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Believing Survivors: In Veterans Affairs Benefits Claims, No In-Service Report is Required to Prove an Instance of Military Sexual Trauma

Allysen Adrian

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**BELIEVING SURVIVORS: IN VETERANS AFFAIRS
BENEFITS CLAIMS, NO IN-SERVICE REPORT IS
REQUIRED TO PROVE AN INSTANCE OF MILITARY
SEXUAL TRAUMA**

Allysen Adrian*

AZ v. Shinseki held that the Department of Veterans Affairs could not treat the absence of military documentation of an in-service sexual assault as proof that the assault never occurred. Nor can the Department of Veterans Affairs assert that a veteran's decision not to report an instance of sexual trauma to military authorities is proof that the assault did not occur. A veteran's submission of testimonial lay evidence can supplant the lack of report. This holding aligns with the Department of Veterans Affairs' duty to consider all evidence in the file and to maximize benefits for the veteran.

* J.D. Candidate 2020, the University of Missouri. 2017 B.A. in Classics from the University of Missouri. The author would like to thank Professors Mary Beck and Angela Drake for their inspiration and guidance. The author dedicates this article to her family, especially her father, for their unwavering support.

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I. INTRODUCTION

In *AZ v. Shinseki*, the United States Court of Appeals for the Federal Circuit held that a compensation claim for post-traumatic stress disorder (“PTSD”) could be supported by an allegation of Military Sexual Trauma (“MST”) in the absence of either a military record of the incident or an incident report by the veteran victim.¹ Veterans AZ and AY each filed compensation claims with the Department of Veterans Affairs (“VA”) for post-traumatic stress disorder.² Both veterans rested their post-traumatic stress disorder claims on instances of sexual trauma they experienced while serving on active duty.³ AZ’s and AY’s claims for compensation were repeatedly denied at multiple levels of the Department of Veterans Affairs claims process due to lack of military records of the alleged sexual trauma.⁴

Both claims bounced around the VA appeals process from 2004 until the United States Court of Appeals for the Federal Circuit took up their consolidated case in 2013.⁵ The Federal Circuit ruled that the Department of Veterans Affairs improperly relied on the lack of military sexual trauma evidence in the veterans’ military records to deny their claims for compensation.⁶ The Department of Veterans Affairs must consider military sexual trauma related post-traumatic stress disorder compensation claims despite the lack of a documented, in-service incident report.⁷ This note will explain how this holding aligns with the duty of the Department of Veterans Affairs to maximize benefits for disabled veterans. This note will discuss the importance of this decision in light of the chronic underreporting of sexual trauma in the military.

II. FACTS AND HOLDING

Both veterans submitted their own claims for compensation under similar facts. This section outlines their individual cases,

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

2. *Id.* at 1305.

3. *Id.* at 1306, 1308.

4. *Id.* at 1305-06.

5. *Id.* at 1303, 1306.

6. *Id.* at 1306.

7. *Id.*

and the next section discusses the instant decision in their consolidated case before the United States Court of Appeals for the Federal Circuit.

A. AZ's Case

AZ served in the United States Army for sixteen months.⁸ During her service, she was sexually and physically abused more than once by a superior ranking officer.⁹ She ultimately became pregnant with the child of her abuser.¹⁰ After conception, the abuser beat her multiple times per week.¹¹ In 2004, AZ received a diagnosis of post-traumatic stress disorder and subsequently filed a claim for disability compensation.¹² She alleged the sexual and physical assaults at the hands of the officer were the in-service stressor which caused her post-traumatic stress disorder.¹³ The claim was denied by the regional Decision Review Officer¹⁴ because AZ's service record contained no evidence of in-service sexual trauma.¹⁵

She later reopened her claim and submitted lay evidence¹⁶ from her siblings, who attested to what she told them about the assaults and described her personality changes since the assaults.¹⁷ On appeal, the Board of Veterans' Claims rejected her claim due to lack of evidence in her military record supporting

8. *Id.*

9. *Id.*

10. *Id.*

11. *AZ v. Shinseki*, No. 10-2393, 2011 U.S. App. Vet. Claims LEXIS 2730, at *2 (Nov. 28, 2011), *vacated*, 731 F.3d 1303 (Fed. Cir. 2013).

12. *AZ*, 731 F.3d at 1306.

13. *Id.*

14. Decision Review Officers are the first adjudicators in a veteran's compensation claim after an initial claim to the Department of Veterans Affairs has been denied. Their decisions are appealable to the Board of Veterans' Appeals. *See, e.g.*, U.S. DEP'T OF VET. AFFAIRS, *Decision Review Officer (DRO) Review Process* (Aug. 21, 2017), [https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/55440000001018/content/55440000014083/M21-1,-Part-I,-Chapter-5,-Section-C---Decision-Review-Officer-\(DRO\)-Review-Process](https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/55440000001018/content/55440000014083/M21-1,-Part-I,-Chapter-5,-Section-C---Decision-Review-Officer-(DRO)-Review-Process).

15. *AZ*, 731 F.3d at 1306.

16. Lay evidence is evidence offered by an individual who does not claim to have any sort of expertise in the matter to which they are testifying. *See* FED. R. EVID. 701. Common examples of lay evidence in VA adjudication are "buddy statements" (usually attesting to things that happened while in-service) and statements from veteran's family members (usually attesting to the veteran's behavior after service). *See* Chisolm, Chisolm & Kilpatrick, *How to Use Law Evidence for VA Disability Claims* (Dec. 17, 2018), <https://eck-law.com/news-lay-evidence-va-disability-claim>.

17. *AZ*, 731 F.3d at 1306.

the sexual abuse.¹⁸ Evidence of her in-service conception was not persuasive evidence of the assault because there was no specific indication of sexual assault in medical records relating to her pregnancy.¹⁹ The Board acknowledged the lay evidence but found such evidence to be unpersuasive.²⁰ Because the siblings did not witness the assault, their testimony was not enough to overcome the lack of contemporaneous evidence in the file.²¹ She appealed to the Court of Appeals for Veterans Claims.²² The Court of Appeals for Veterans Claims affirmed the Board's rejection of service-connection.²³

B. AY's Case

AY served on active duty for three years.²⁴ AY was sexually assaulted by a fellow soldier during training.²⁵ She did not report the assault or any residual consequences of the assault.²⁶ Nothing in AY's military service record corroborates her assault.²⁷

In 2002, AY was diagnosed with post-traumatic stress disorder.²⁸ Two years later, she filed for disability benefits from the Department of Veterans Affairs.²⁹ She included in her claim file a statement from her ex-husband, asserting that AY told him of the assault during her term of service.³⁰ The claim was denied by the Decision Review Officer.³¹

In 2005, AY reopened her claim with new evidence.³² This time she included three additional lay statements.³³ Two statements were from fellow soldiers who served with AY at the

18. *Id.* at 1305.

19. *Id.* at 1306.

20. *Id.* at 1307.

21. *Id.*

22. *AZ v. Shinseki*, No. 10-2393, 2011 U.S. App. Vet. Claims LEXIS 2730, at *1 (Nov. 28, 2011), *vacated*, 731 F.3d 1303 (Fed. Cir. 2013).

23. *Id.*

24. *AZ*, 731 F.3d at 1308.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

time of the assault and the third statement was from AY's sister.³⁴ The Decision Review Officer again denied the claim, citing a lack of corroborating evidence in AY's Service Medical Records and Personnel Records.³⁵ AY appealed to the Board of Veterans' Claims.³⁶ The Board also denied her claim.³⁷ AY then appealed to the United States Court of Appeals for Veterans Claims, which affirmed the Board's decision.³⁸

III. INSTANT DECISION

AY and AZ each timely appealed to the Court of Appeals for the Federal Circuit.³⁹ The Court consolidated their cases to decide whether an absence of military records or failure to report sexual assault during service could serve as evidence that the assault did not occur.⁴⁰ The Court held that a lack of contemporaneous documentation of the alleged sexual assault is not evidence that the assault did not occur.⁴¹ The Court also held that a veteran's decision not to report an assault to military officials could not be used as evidence that the assault did not occur.⁴²

IV. LEGAL BACKGROUND

The Department of Veterans Affairs' benefits program operates under its own administrative law umbrella. Some background in this area is helpful to the discussion in this casenote.

A. The Department of Veterans Affairs' Claims Requirements for Service-Connection of a Disability

Any veteran seeking service-connected disability compensation from the Department of Veterans Affairs must

34. *Id.*

35. *Id.*

36. *Id.* at 1309.

37. *Id.*

38. *AY v. Shinseki*, No. 10-2390, 2011 U.S. App. Vet. Claims LEXIS 2702, at *1 (Aug. 17, 2011), *vacated*, 731 F.3d 1303 (Fed. Cir. 2013).

39. *AZ*, 731 F.3d at 1308-09.

40. *Id.* at 1309-10.

41. *Id.* at 1306.

42. *Id.*

satisfy three fundamental requirements.⁴³ The veteran must first show that he or she currently suffers from a disability.⁴⁴ The veteran then must present evidence of in-service onset or in-service aggravation of that disability.⁴⁵ The veteran must be on active duty or on active duty training at the time the injury occurred in order for the injury to be compensable.⁴⁶ Finally, the veteran's evidence must establish a nexus between the current disability and the in-service incident.⁴⁷ The disability must be granted service-connection to be compensable.⁴⁸

In a post-traumatic stress disorder compensation claim based on an in-service personal assault, such as an instance of sexual trauma, service connection is further governed by Title 38 section 3.304(f) of the United States Code of Federal Regulations.⁴⁹ The regulation requires medical evidence to show the veteran's diagnosis of post-traumatic stress disorder as a current disability.⁵⁰ Medical evidence is also required to show a connection between the current symptoms and an in-service stressor event.⁵¹ The regulation also requires "credible supporting evidence" to show that the in-service stressor actually occurred.⁵² Thus, a veteran's in-service stressor need not be proved with medical or military evidence.⁵³

The current version of this regulation explicitly allows the use of lay evidence to corroborate the veteran's alleged in-service stressor.⁵⁴ *AZ v. Shinseki* reinforces this regulation by holding that a lack of evidence in the military service file does not bar a claim for post-traumatic stress disorder based on a military sexual trauma.⁵⁵

AZ and *AY* each submitted explicitly permissible forms of evidence to corroborate their in-service abuse. The applicable regulation provides that "statements from *family members*, *roommates*, *fellow service members*, or *clergy*" (emphasis added)

43. See 38 U.S.C. §§1110, 1131 (2013).

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. See 38 C.F.R. § 3.304(f) (2013).

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at (f)(1).

54. 38 C.F.R. § 3.304(f)(5).

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

can corroborate the veteran's alleged in-service trauma.⁵⁶ The regulation further explicitly allows the use of lay evidence to prove behavior changes after an assault.⁵⁷ AZ's evidence included testimony from her siblings that she had changed since the in-service stressor occurred.⁵⁸ This regulation also allows a veteran to produce evidence of a pregnancy, such as a pregnancy test, to support a post-traumatic stress disorder claim based on a military sexual trauma.⁵⁹ AZ submitted statements from two fellow soldiers and a family member supporting the occurrence of sexual trauma.⁶⁰ AZ also submitted evidence of her in-service pregnancy, which resulted from her in-service assaults.⁶¹

The regulation is clear. All of AZ's and AY's proffered evidence was entirely proper. The *AZ v. Shinseki* holding that a lack of evidence of sexual assault in the veteran's military file is not evidence that the assault did not occur underscores the importance of this regulation and reinforces the liberal construction of the Department of Veterans Affairs' evidence rules.

This regulation, like all Department of Veterans Affairs compensation benefits law, is designed to reduce a veteran's bar to compensation. The requirement of only "credible supporting evidence"⁶² lowers the evidentiary requirement for veterans like AZ and AY who did not report or officially document their in-service trauma.

B. How Military Law Accords with the #MeToo Movement

Military sexual trauma and its adjudication is getting more attention in recent decades. The *Department of Defense Annual Report on Sexual Assault in the Military* estimated that in 2012 26,000 active duty servicemembers were sexually victimized by a fellow servicemember.⁶³ Shortly after the release of this report,

56. 38 C.F.R. § 3.304(f)(5) (emphasis added).

57. *Id.*

58. *AZ*, 731 F.3d at 1306.

59. 38 C.F.R. § 3.304(f)(5).

60. *AZ*, 731 F.3d at 1308.

61. *Id.*

62. 38 C.F.R. §3.304(f).

63. U.S. DEP'T OF DEF., FISCAL YEAR 2012 DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, Exec. Summary, at 3 (Apr. 15, 2013); *see also* Julie Dickerson, *A Compensation System for Military Victims of Sexual Assault and*

then-President Obama called attention to the issue of sexual assault in the military.⁶⁴

On October 15, 2017, actress Alyssa Milano prompted her Twitter followers who had been victims of sexual misconduct to reply to her tweet using “me too.”⁶⁵ This tweet sparked a trend where people used #MeToo to share both stories and words of encouragement.⁶⁶ #MeToo has since become a rallying cry for giving a voice to victims of sexual assault.⁶⁷ Though the phrase “me too” and its accompanying movement originated in 2007 with activist Tarana Burke,⁶⁸ it is Milano’s tweet that sparked the current #MeToo movement.⁶⁹

On January 7, 2018, when Oprah Winfrey mentioned the #MeToo movement in her Golden Globes acceptance speech, she specifically mentioned members of the military.⁷⁰ Winfrey’s public comments emboldened the #MeTooMilitary movement, which began trending on social media platforms after the speech.⁷¹

As societal focus turns to issues of sexual assault, both in and out of the military, the law must adapt and improve. Title 38 section 1720D of the United States Code went into effect in 1992.⁷² This statute requires the Secretary of Veterans Affairs to provide “counseling and appropriate care and services” to victims of sexual trauma in the military.⁷³

Title 38 section 3.304 of the Code of Federal Regulations was revised in 2002.⁷⁴ This revision allowed use of lay evidence

Harassment, 222 MIL. L. REV. 211, 211 (2014).

64. Dickerson, *supra* note 63.

65. Elizabeth Chuck, *#MeToo: Hashtag Becomes Anti-Sexual Harassment and Assault Rallying Cry*, NBC NEWS (October 16, 2017), <https://www.nbcnews.com/storyline/sexual-misconduct/metoo-hashtag-becomes-anti-sexual-harassment-assault-rallying-cry-n810986>.

66. *Id.*

67. *See id.*

68. Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (October 20, 2017), <https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html>.

69. Chuck, *supra* note 65.

70. Traci Tong, *Women Veterans Want Their Voices Heard in the #MeToo Movement*, PRI (January 18, 2018), <https://www.pri.org/stories/2018-01-18/women-veterans-want-their-voices-heard-metoo-movement>.

71. *Id.*

72. Veterans Health Care Act of 1992 §102(a)(1), 38 U.S.C. §1720D(a)(1) (1992).

73. 38 U.S.C. §1720D(a)(1) (2019).

74. Post-Traumatic Stress Disorder Claims Based on Personal Assault, 67 Fed. Reg. 10,330 (Mar. 7, 2002).

to support an instance of military sexual trauma when it was the alleged in-service stressor for a veteran's post-traumatic stress disorder claim.⁷⁵ The revision explicitly added tests for pregnancy and sexually transmitted diseases as forms of evidence that can support this type of claim.⁷⁶ To implement the changes, the revision included a notice requirement—the Department of Veterans Affairs cannot deny this type of claim without notifying veterans of their right to submit these newly acceptable forms of evidence.⁷⁷

The change in this evidentiary rule prompted the Department of Veterans Affairs to assign military sexual assault-related post-traumatic stress disorder claims to adjudicators who had special training in this area.⁷⁸ However, this was not implemented until 2011, almost a decade after the revision.⁷⁹ In 2013, the Department of Veterans Affairs solicited 2,667 veterans to reapply for post-traumatic stress disorder compensation, noting that many of these claims were denied due to lack of adjudicator training.⁸⁰

In light of the #MeToo and #MeTooMilitary movements, the Department of Veterans Affairs must continue to adapt their system so that veteran victims of sexual assault receive appropriate compensation for their service-related conditions. The Court's decision in *AZ v. Shinseki* comes not a moment too soon. This decision serves to bolster the compensation claims of veterans who suffer from post-traumatic stress disorder due to an in-service sexual assault.

C. The Department of Veterans Affairs' Disability Compensation Program is Designed to Favor the Veteran

The Department of Veterans Affairs benefits program is

75. *See id.*, at 10,331.

76. *Id.* at 10,332.

77. *Id.* at 10,330.

78. U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-477, *MILITARY SEXUAL TRAUMA: IMPROVEMENTS MADE, BUT VA CAN DO MORE TO TRACK AND IMPROVE CONSISTENCY OF DISABILITY CLAIM DECISIONS 10* (2014), <https://www.gao.gov/assets/670/663964.pdf>.

79. *See id.*; *see also supra* note 74

80. U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-477, *MILITARY SEXUAL TRAUMA: IMPROVEMENTS MADE, BUT VA CAN DO MORE TO TRACK AND IMPROVE CONSISTENCY OF DISABILITY CLAIM DECISIONS 12* (2014), <https://www.gao.gov/assets/670/663964.pdf>.

non-adversarial in nature.⁸¹ The veteran does not have any opposition to proving their claim unless the case reaches the Court of Appeals for Veterans Claims – the first level of adversarial adjudication for veterans' benefits claims.⁸² This means that a veteran need only meet the statutory requirements to receive disability compensation.⁸³ The Department of Veterans Affairs system is required to consider all evidence in the file before them, including lay evidence, and any doubt or ambiguity should be resolved in favor of the veteran.⁸⁴ The duty to maximize benefits is associated with the duty to assist the veteran in obtaining relevant records for corroboration of their claim.⁸⁵ The Department of Veterans Affairs has a duty to maximize benefits for veterans.⁸⁶ When a claim is denied, the adjudicator is required to give a list of the evidence considered and all reasons for the denial.⁸⁷

In a system designed to be so veteran-friendly,⁸⁸ it is difficult to imagine how AZ's and AY's claims for diagnosed post-traumatic stress disorder supported by lay evidence of military sexual trauma were denied service-connection.

V. COMMENT

A. AZ v. Shinseki Accords with the Department of Veterans Affairs' Claimant-Friendly Compensation Scheme

The duty to maximize benefits is an essential pillar of the Department of Veterans Affairs compensation system. The Department of Veterans Affairs' duty to maximize benefits extends to all disability claims,⁸⁹ including military sexual trauma-related post-traumatic stress disorder claims.⁹⁰ A duty

81. *Comer v. Peake*, 552 F.3d 1362, 1368 (Fed. Cir. 2009).

82. *See* CT. VET. APP., *About the Court*, <http://m.uscourts.cavc.gov/About.php> (last visited May 8, 2019).

83. *How VA Assigns Disability Ratings*, U.S. DEP'T OF VET. AFFAIRS (last visited Feb. 19, 2019), <https://www.va.gov/disability/about-disability-ratings>.

84. 38 U.S.C. § 5107(b) (2013).

85. 38 U.S.C. § 5103A(a)(1) (2013); *Stowers v. Shinseki*, 26 Vet. App. 550, 555 (2014).

86. *Bradley v. Peake*, 22 Vet. App. 280, 294 (2008).

87. 38 U.S.C. § 5104(b) (2013).

88. *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998).

89. 38 U.S.C. § 5103A(a)(1); *Stowers*, 26 Vet. App. at 555.

90. *Id.* The schedule for rating service-connected mental disorders is in title 38

to maximize benefits includes an examination of all evidence in the veteran's file.⁹¹

As discussed, AZ and AY each submitted ample evidentiary support for the sexual trauma they each experienced while serving in the military. The adjudicators' failure to properly consider the evidence in the file was an erroneous breach of the Department of Veterans Affairs' duty to examine all of the evidence in the file. It was also a breach of the Department of Veterans Affairs' duty to resolve any doubt or ambiguity in favor of the veteran and maximize their benefits.⁹² AZ and AY submitted statutorily acceptable evidence that should have been enough to grant service connection. The fact that a contemporaneous report would be more conclusive does not mean the evidence these veterans included is not enough to support an instance of military sexual trauma. In line with the claimant-friendly system set up by the Department of Veterans Affairs, *AZ v. Shinseki* illustrates that this breach of duty must be reversed and corrected in favor of the veteran.

B. AZ v. Shinseki Will Ease the Evidentiary Burden on Survivors of Military Sexual Trauma Who Choose Not to Report Their Abuse

Military sexual trauma is both common and underreported. In 2012, the *Department of Defense Annual Report on Sexual Assault in the Military: Fiscal Year 2012* projected that only 11 percent of the yearly servicemember sexual assaults that occur get reported to the Department of Defense.⁹³ The Department of Defense's 2017 report on sexual assault in the military illustrates a positive trend in sexual assault reporting.⁹⁴ This report states that the 5,350 reported sexual assaults in 2016 constituted 32% of the estimated sexual assaults.⁹⁵ These

section 4.130 of the United States Code of Federal Regulations. See 38 C.F.R. §4.130 (2013).

91. 38 U.S.C. § 5107(b) (2013).

92. *Id.*; see also *Bradley v. Peake*, 22 Vet. App. 280, 294 (2008).

93. U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2012 18 (2013).

94. U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2017 8 (2018).

95. U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2016 19 (2017),

http://sapr.mil/public/docs/reports/FY16_Annual/FY16_SAPRO_Annual_Report.pdf;
In contrast, a report released at the close of 2017 by The National Crime

reports show a nearly threefold increase in military sexual assault reporting between 2012 and 2016.⁹⁶

Though military sexual trauma report statistics are improving, many active duty servicemembers still do not report instances of sexual assault. On January 8, 2018, a protest organized by a veterans group called the Service Women's Action Network occurred outside the Pentagon.⁹⁷ Among the protesters was Army veteran Nichole Bowen-Crawford, who was sexually assaulted by a superior officer while deployed in Iraq in 2003.⁹⁸ Bowen-Crawford's story is similar to that of many sexual assault victims in the military. When she told a supervisor about the assault, she was told to let it go, or else risk jeopardizing her career.⁹⁹

The protesters at the Pentagon called for changes in the way the military handles sexual assault prosecutions within its ranks.¹⁰⁰ The current prosecutorial system functions at the discretion of commanding officers who often know and work with the accused servicemember.¹⁰¹ This policy of military self-policing naturally gives rise to bias and conflicts of interest not normally permitted in civilian courts. The same commanding officers who submit a case for prosecution also get to select the jury of military officials who will decide the case.¹⁰² These same officers also have the power to withdraw cases without any

Victimization Survey shows that the reporting rate for sexual assault victims nationwide was 23%. Kathryn Casteel et al., *What We Know About Victims of Sexual Assault in America*, FIVETHIRTYEIGHT (Sept. 21, 2018), <https://projects.fivethirtyeight.com/sexual-assault-victims/>.

96. Compare U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2012 18 (2013), with U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2016 19 (2017), http://sapr.mil/public/docs/reports/FY16_Annual/FY16_SAPRO_Annual_Report.pdf.

97. AFP, *US Troops Stage #MeTooMilitary Protest Outside Pentagon*, DAILY MAIL (Jan. 8, 2018), <https://www.dailymail.co.uk/wires/afp/article-5247333/US-troops-gather-outside-Pentagon-MeTooMilitary-protest.html>.

98. Alexa Liautaud, *#MeToo is Coming for the U.S. Military* (Feb. 8, 2018), VICE NEWS, https://news.vice.com/en_us/article/43qkmm/metoo-is-coming-for-the-us-military.

99. *Id.*

100. Richard Sisk, *Vets Groups Bring '#Me Too' Movement to Pentagon*, MILITARY.COM (Jan. 8, 2018), <https://www.military.com/daily-news/2018/01/08/vets-groups-bring-me-too-movement-pentagon.html>.

101. See Robert Draper, *The Military's Rough Justice on Sexual Assault*, N.Y. TIMES MAGAZINE (Nov. 26, 2014), <https://www.nytimes.com/2014/11/30/magazine/the-militarys-rough-justice-on-sexual-assault.html>.

102. *Id.*

justification for doing so.¹⁰³ It is not unheard of for commanding officers to testify on behalf of the accused to prevent their unit from losing a “valuable” soldier.¹⁰⁴ This makes it incredibly difficult for a soldier who was sexually assaulted, especially by a superior officer, to come forward. If the victim does come forward, there is likely to be little success if the accused knows the commanding officer or officers in charge of these judicial matters.

Another negative sequela of the self-policing system is a lack of faith in the prosecutorial outcome. When a victim files a complaint, the accused servicemember is not automatically slated for court martial.¹⁰⁵ Instead, a higher up officer will decide whether to submit the case for a court martial.¹⁰⁶ Only 30% of complaints filed in 2016 ended up in the court martial stage.¹⁰⁷ Of those cases, only 9% resulted in a conviction of the accused.¹⁰⁸ Of the complainants surveyed in 2016, only 20% were satisfied with the action taken against their abuser.¹⁰⁹ The staggering ineffectiveness of this system naturally deters victims of sexual violence from bringing complaints.

The bias and ineffectiveness associated with the system is only one reason why a victim may not report sexual misconduct. Victims who choose to come forward are also at risk for retaliation. In 2016, 60% of the victims who reported their abuse also reported some form of retaliation for filing the complaint.¹¹⁰ Victims who report risk losing the respect they originally held from their military family.¹¹¹ The few victims who do report risk

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. Kirsten Gillibrand, *Military Justice Improvement Act*, <https://www.gillibrand.senate.gov/mjia> (last visited May 8, 2019); see generally DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2016 Appendix B (2017), https://sapr.mil/public/docs/reports/FY17_Annual/FY16_Annual_Report_on_Sexual_Assault_in_the_Military_Full_Report3_Volume1.pdf [hereinafter DOD 2016 REPORT WITH APPENDIX].

108. Gillibrand, *supra* note 107; see also DOD 2016 REPORT WITH APPENDIX, *supra* note 107.

109. Gillibrand, *supra* note 107; see also DOD 2016 REPORT WITH APPENDIX, *supra* note 107.

110. Gillibrand, *supra* note 107; see also DOD 2016 REPORT WITH APPENDIX, *supra* note 107.

111. For an anecdote regarding retaliation, read about Airwoman Kris' experience in this article. Draper, *supra* note 101.

terrible retaliation for a very small chance at justice.

In 2014, Senator Kirsten Gillibrand of New York wrote the Military Justice Improvement Act.¹¹² This act would wrest the prosecutorial discretion in cases of sexual assault from local military control and give it to “independent, trained, professional military prosecutors.”¹¹³ Senator Gillibrand’s website notes that six of America’s allies have made similar reforms to their prosecutorial structures with success.¹¹⁴ The Military Justice Improvement Act came within five votes of passing the Senate in March of 2014.¹¹⁵

While Senator Gillibrand’s legislation failed, a more conservative military prosecutorial reform bill sponsored by Senator Claire McCaskill of Missouri passed the following week.¹¹⁶ The Victims Protection Act gives sexual assault victims the choice between a military or civilian court proceeding and prevents defense counsel from launching a defense strategy based on the accused’s good record.¹¹⁷ This act passed unanimously in the senate.¹¹⁸

Legislative reform is an essential component in improving report statistics. However, the Victims Protection Act cannot do anything for a veteran who is seeking disability compensation rather than justice within the military’s prosecutorial regime. The Court’s decision in *AZ v. Shinseki* will ensure that, even when a veteran does not report a sexual assault while in the military, the veteran will be able to receive disability compensation for the sequelae of the assault. Veterans have many reasons not to report a sexual assault, and the Department of Veterans Affairs should not allow the decision not to report to prejudice a claim for compensation.

VI. CONCLUSION

The United States Court of Appeals for the Federal Circuit was correct in reversing these cases. The Department of

112. Draper, *supra* note 101.

113. Gillibrand, *supra* note 107.

114. Gillibrand, *supra* note 107.

115. Draper, *supra* note 101.

116. Ramsey Cox & Jeremy Herb, *Senate Approves McCaskill Sexual Assault Bill in 97-0 Vote*, THE HILL (Mar. 10, 2014), <https://thehill.com/blogs/floor-action/senate/200393-senate-votes-97-0-for-military-sexual-assault-bill>.

117. *Id.*

118. *Id.*

Veterans Affairs has a duty to maximize the benefits owed to a disabled veteran and to give the veteran the benefit of any doubt regarding appropriate evidence in the claim file. The cases ought to have been adjudicated in favor of the veteran by looking at all the proffered evidence and resolving any ambiguity in favor of the veteran.

Sexually violent crimes are underreported in the public at large, but members of the military have even more reasons not to report their sexual abuse to a military authority. The Department of Veterans Affairs should not consider a lack of contemporaneous military evidence of assault as proof that the assault did not actually occur. The *AZ v. Shinseki* decision removes a method of denying service connection for a post-traumatic stress disorder claim that rests on the ground of proving an instance of military sexual trauma. Victims of military sexual trauma do not regularly report their abuse to military authorities, and *AZ v. Shinseki* ensures that claimant veterans who do not report sexual trauma that occurred while in-service will not be prejudiced by their decision not to report.