

WHEN IS A COMBAT VETERAN A COMBAT VETERAN?: The Evidentiary Stumbling Block for Veterans Seeking PTSD Disability Benefits

Alison Atwater[†]

I. INTRODUCTION

Deep in the jungle of Vietnam, a combat unit battled the enemy under heavy fire; one soldier, specially trained in communications and armed only with a pistol, manned the radio.¹ With the battle raging around him, the soldier transmitted and received vital information while those in the unit he was trained to serve fought and died.²

Nearly a generation earlier, a medic in Korea scrambled to tend wounded soldiers during a fierce fight with the Chinese on a hill that changed hands five times in a single day.³ Sometime during the night the medic fell, tumbling down the hill and landing with both knees broken.⁴ In the darkness he managed to inject morphine into each knee.⁵ Then he lay there.⁶ Chinese voices drifted to him through the night.⁷ When daylight came, the medic dragged himself back up the hill.⁸

Fast-forward to decades later. Diagnosed with post-traumatic stress disorder (“PTSD”), both veterans apply for PTSD disability benefits through the Department of Veterans Affairs (“VA”). Both veterans are

[†] Candidate for J.D. 2010, Sandra Day O’Connor College of Law at Arizona State University. Special thanks to Ted Jarvi for his patient explanation of VA law and to Prof. Andy Hessick for his valuable input.

1. E-mail from Theodore C. Jarvi, Past President, Nat’l Org. of Veterans Advocates, to Alison Atwater, Author (Oct. 22, 2008) (on file with author) [hereinafter Jarvi e-mail].

2. *Id.*

3. Interview with Theodore C. Jarvi, Past President, Nat’l Org. of Veterans Advocates, in Tempe, Ariz. (Oct. 3, 2008).

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

denied.⁹ The problem? Insufficient evidence that their military service exposed them to a “stressor” leading to PTSD.¹⁰

A double-take might be the natural reaction. But of the 20,000 new claims for PTSD disability compensation reviewed by the VA each year, half are denied—mainly for lack of evidence that the stressor was service-connected.¹¹

Behind this denial rate lies a two-track procedure the VA uses to determine whether a veteran had a verifiable stressor and may be eligible for PTSD disability benefits.¹² One track is for veterans whose records contain evidence that they “engaged in combat with the enemy”¹³—a narrow classification that, for practical purposes, applies mainly to veterans who received medals or badges related to combat service.¹⁴ When these veterans describe the traumatic events underlying their PTSD, a rebuttable presumption arises that those events actually occurred, even if official records contain no reference to the events.¹⁵ Thus, their stressor is considered “verified” by their words alone.

The other track is for veterans whose records do not make it immediately clear that they participated in combat.¹⁶ Their descriptions of personal combat experience, taken alone, are insufficient to verify a stressor.¹⁷ A veteran on this track does not get the benefit of the presumption,¹⁸ and so he must become an evidentiary Indiana Jones, embarking on a quest to dig up evidence—often forty years or more after the fact—showing that the stressors he experienced actually occurred. This often necessitates an exhaustive study of official records, supplemented by a hunt for other documents such as contemporaneous news stories or military histories, or out-of-the-blue phone calls asking old wartime buddies (if they can be

9. *Id.*

10. *Id.* A “stressor” is a traumatic event that can result in PTSD. *See* discussion *infra* Part II.A.

11. CONG. BUDGET OFFICE, 110TH CONG., COST ESTIMATE FOR H.R. 5892: VETERANS DISABILITY BENEFITS CLAIMS MODERNIZATION ACT OF 2008 2–3 (2008), available at <http://www.cbo.gov/ftpdocs/96xx/doc9626/hr5892.pdf> [hereinafter CBO REPORT].

12. 38 U.S.C. § 1154(b) (2008).

13. *Id.*; 38 C.F.R. § 3.304(f) (2008).

14. *See* NAT’L VETERANS LEGAL SERVS. PROJECT, VETERANS BENEFITS MANUAL § 3.6.4.1, at 158 (Barton F. Stichman & Ronald B. Abrams eds., 2007) [hereinafter BENEFITS MANUAL]. In military language, this is the veteran’s “military occupational specialty,” or “MOS.” *Id.* For ease of reading, this Comment will avoid military jargon as much as possible.

15. 38 U.S.C. § 1154(b).

16. 38 C.F.R. § 3.304(f).

17. *Id.*

18. *Id.*

found) to relive the experience once again and write a statement for the VA.¹⁹

Both the radioman and the medic ended up on the second track.²⁰ Neither received medals nor badges related to service in combat, nor did their military records clearly indicate personal combat exposure.²¹ Further, their military specializations—along with many others, such as truck driver, clerk, or cook—were not considered combat-related by the VA.²² These veterans, like thousands of others in a similar position, must engage in an evidentiary quest to prove that they experienced combat.

Because of the “engaged in combat with the enemy” standard and the way the VA implements it, veterans with combat-related PTSD who seek disability compensation benefits face greater or lesser evidentiary hurdles depending on their medals, military job classification, and the often unreliable state of their military records rather than on the unpredictable realities of life in a combat zone. This Comment argues that Congress should pass legislation that would clarify the definition of “engaged in combat with the enemy” to include active service in a combat zone,²³ thus overturning the current controlling definition that leads to this disparate treatment of veterans.²⁴ Such legislation would ease the burden on veterans who lived through combat but cannot meet the strict requirements the VA has established to prove it, and who face extraordinary evidentiary hurdles when their military records contain insufficient or no documentation of the traumatic events they experienced. This change makes particular sense in light of the nature of modern warfare, where every service member in a combat area is on what was formerly considered the “front line.”²⁵

While a clarification of this nature would also benefit certain veterans with non-PTSD disabilities, it would have its largest impact on veterans

19. See discussion *infra* Part III.B.

20. Jarvi e-mail, *supra* note 1.

21. *Id.*

22. *Id.*

23. Pending legislation includes bills in both the House and Senate that would make this clarification. See discussion *infra* Part IV.B.

24. See Vet. Aff. Op. Gen. Couns. Prec. 12-99 ¶ 4 (1999); discussion *infra* Part III.A; see also Press Release, Senate Comm. on Veterans’ Affairs, Akaka Introduces Compensation for Combat Veterans Act (Nov. 9, 2007) (quoting Chairman Akaka’s floor statement of November 6, 2007, in which he describes pending legislation as intended to overturn the GC opinion).

25. *Veterans Disability Benefits Claims Modernization Act of 2008: Hearing Before the Subcomm. on Disability Assistance and Memorial Affairs*, 110th Cong. (2008) (statements of Raymond C. Kelley, Nat’l Legislative Dir., Am. Veterans, and Kerry Baker, Assoc. Nat’l Legislative Dir., Disabled Am. Veterans), available at <http://veterans.house.gov/hearings/hearing.aspx?newsid=223> [hereinafter *April 10th Hearing*].

with PTSD.²⁶ The scope of this Comment encompasses only combat-related PTSD and does not discuss PTSD related to personal assault or other non-combat stressors, issues specific to prisoners of war, or non-PTSD disabilities for which proof of service connection may be difficult. Part II of this Comment provides background on PTSD and statistics relating to different veteran populations. Part III describes the process of building a case for PTSD disability benefits and evidentiary hurdles veterans encounter. Finally, Part IV argues in favor of clarifying the definition of “engaged in combat with the enemy” by showing that the new definition is consistent with both legislative intent and the principles underlying presumptions.

II. POST-TRAUMATIC STRESS DISORDER AND THE COMBAT VETERAN

A. *What is Post-Traumatic Stress Disorder?*

Flashbacks, nightmares, exaggerated startle responses—all of these unpleasant experiences are part of the common lore about PTSD, and all play some part in a PTSD medical diagnosis.²⁷ PTSD is an anxiety disorder that a person may develop after living through a traumatic experience.²⁸ The disorder is characterized by six diagnostic criteria defined by the American Psychiatric Association, most recently in the fourth edition of its *Diagnostic and Statistical Manual of Mental Disorders* (“DSM-IV-TR”).²⁹

According to the DSM-IV-TR criteria, a diagnosis of PTSD first requires the experience of a traumatic event known as the “stressor.”³⁰ During this event, the person must have 1) “experienced, witnessed, or been confronted with an event or events that involve actual or threatened death or serious injury, or a threat to the physical integrity of oneself or others,” and 2) responded with “intense fear, helplessness, or horror.”³¹ This must be followed by “intrusive recollection” of the event, such that “the traumatic

26. See CBO REPORT, *supra* note 11, at 2.

27. Dep’t of Veterans Affairs, Nat’l Ctr. for PTSD FactSheet: DSM-IV-TR Criteria for PTSD, http://www.ncptsd.va.gov/ncmain/ncdocs/fact_shts/fs_dsm_iv_tr.html (last visited Feb. 28, 2009) [hereinafter DSM-IV Criteria].

28. Dep’t of Veterans Affairs, Nat’l Ctr. for PTSD FactSheet: What Is Posttraumatic Stress Disorder (PTSD)?, http://www.ncptsd.va.gov/ncmain/ncdocs/fact_shts/fs_what_is_ptsd.html (last visited Feb. 28, 2009).

29. DSM-IV Criteria, *supra* note 27.

30. *Id.*

31. *Id.*

event is persistently re-experienced in at least one” of several ways, including recollections, dreams, hallucinations, flashbacks, or distress after being exposed to a situation similar to the original event.³² The person must also experience at least three symptoms of “avoidance” and “numbing,” including avoidance of thoughts or conversations about the event, avoidance of situations that cause memories of the event, detachment from other people, or inability to remember something important about the event.³³ At least two symptoms of “hyper-arousal”—such as difficulty sleeping or concentrating, angry outbursts, or an “[e]xaggerated startle response”—must also be present.³⁴ These symptoms must last for more than a month, and the experience of these symptoms must cause “clinically significant distress” in important aspects of the person’s life, such as social interaction or work life.³⁵ PTSD can be acute or chronic, depending on whether it lasts more or less than three months, and is considered to be “delay[ed]-onset” if symptoms begin six months or more after the stressor.³⁶

Evidence shows that a veteran who develops PTSD related to military service often will experience a lifetime of chronic PTSD symptoms that resist treatment.³⁷ There are veterans from every military conflict since World War II who currently receive disability compensation for PTSD.³⁸

B. PTSD in Combat Veterans—Past, Present, and Future

Audie Murphy kept a pistol under his pillow while he slept—a sleep disrupted by nightmares of combat in Southern Europe, where he killed 240 Germans and became the most decorated American hero of World War II.³⁹

John Corns, a Civil War veteran, was by all accounts a mentally sound individual when he joined the Army and marched off to war.⁴⁰ When he

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. Brett T. Litz, Dep’t of Veterans Affairs, *Nat’l Ctr. for PTSD FactSheet: A Brief Primer on the Mental Health Impact of the Wars in Afghanistan and Iraq*, http://www.ncptsd.va.gov/ncmain/researchers/fact_sheets/fs_war.jsp (follow article hyperlink under “War” heading) (last visited Jan. 3, 2009).

38. *Systemic Indifference to Invisible Wounds: Hearing Before the S. Comm. on Veterans Affairs*, 110th Cong. (2008) (statement of Rear Admiral Patrick W. Dunne, USN (Ret.), Acting Undersecretary for Benefits, Veterans Benefits Admin., Dep’t of Veterans Affairs), available at http://www.senate.gov/~veterans/public/index.cfm?pageid=16&release_id=11687&sub_release_id=11727&view=all [hereinafter *Dunne Systemic Indifference Statement*].

39. Herbert Hendin & Ann Pollinger Haas, *Posttraumatic Stress Disorders in Veterans of Early American Wars*, 12 PSYCHOHISTORY REV. No. 4, 25, 25 (1984).

returned, however, everything changed. Friends and neighbors described Mr. Corns as experiencing “great mental commotion.”⁴¹ They watched him cover his face and make loud sounds or imagine he was drilling his troops.⁴² “There is some one [sic] after me,” Mr. Corns would tell them.⁴³ “[D]o you see them coming over the hill[?] [W]e will all be lost and destroyed.”⁴⁴

In World War II, they called it “combat fatigue.”⁴⁵ During World War I, “shell shock.”⁴⁶ Before that, doctors hypothesized that what we now recognize as PTSD was a “disease of the heart.”⁴⁷ British doctors in the late nineteenth century were so convinced of this that they recommended soldiers’ equipment be redesigned to allow for greater circulation; however, the number of “irritable heart” cases through various British military campaigns remained unchanged.⁴⁸

“The number of cases of insanity in our army is astonishing,” remarked a Union doctor during the American Civil War,⁴⁹ perhaps presaging the psychological nature of PTSD at a time when PTSD symptoms were given such names as “trotting heart,” “effort syndrome,” and “soldier’s heart.”⁵⁰ The syndrome was widely-enough recognized that “Exposure in the Army” became a category of disability that, along with the hardships of military service at the time, took into account the effects of combat exposure.⁵¹ Even so, physicians did not begin to recognize such effects of battle exposure as psychological until the First World War.⁵²

Today, PTSD ranks number six among the most common service-connected conditions.⁵³ As of May 2008, nearly 329,000 veterans were receiving disability compensation for service-connected PTSD—a figure almost triple the 120,000 who received such compensation in 1999.⁵⁴

40. Eric T. Dean, Jr., “*We Will All Be Lost and Destroyed*”: *Post-Traumatic Stress Disorder and the Civil War*, 37 CIV. WAR HIST. No. 2, 138, 151 (1991).

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. COMM. ON VETERANS COMP. FOR POSTTRAUMATIC STRESS DISORDER, BD. ON MILITARY AND VETERANS HEALTH, BD. ON BEHAVIORAL, COGNITIVE, AND SENSORY SCI., INST. OF MED. & NAT’L RESEARCH COUNCIL, PTSD COMPENSATION AND MILITARY SERVICE 43 (Nat’l Acad. Press 2007) [hereinafter PTSD COMPENSATION].

46. *Id.* at 36–37.

47. See Dean, *supra* note 40, at 141–42; PTSD COMPENSATION, *supra* note 45, at 35.

48. PTSD COMPENSATION, *supra* note 45, at 35–36.

49. Dean, *supra* note 40, at 145.

50. *Id.* at 141; PTSD COMPENSATION, *supra* note 45, at 35 (“soldier’s heart”).

51. Dean, *supra* note 40, at 142.

52. PTSD COMPENSATION, *supra* note 45, at 36.

53. H.R. REP. NO. 110-789, at 14 (2008).

54. *Dunne Systemic Indifference Statement*, *supra* note 38.

Vietnam veterans represent the vast majority of the increase, with 222,191 receiving PTSD benefits in May 2008. Gulf War Era veterans, which includes veterans of the ongoing Operation Iraqi Freedom and Operation Enduring Freedom (“OIF/OEF”) campaigns, make up the next largest portion, with 59,196 receiving PTSD benefits.⁵⁵

While there is no way to predict exactly how many veterans of the ongoing OIF/OEF campaigns will ultimately suffer from PTSD, a recent study found that 18.5% of military returnees from Iraq and Afghanistan have PTSD.⁵⁶ This number approaches the upper end of the range of current estimates that project rates anywhere from twelve to twenty percent.⁵⁷ Many comparisons have been drawn between the combat experiences of soldiers in the OIF/OEF campaigns and soldiers who served in Vietnam,⁵⁸ thirty percent of whom have had PTSD at some point in their lives.⁵⁹ Looking to the future, it may be significant that within a year of their return, one in three Iraq veterans visited the VA for mental health reasons.⁶⁰

III. PTSD DISABILITY BENEFITS AND THE EVIDENTIARY STUMBLING BLOCK

*Looking for anyone that was in [Q]uy Nhon/Phu Tai area inbetween [sic] Sept68–Oct69. . . . that was a perimeter guard the night our #1 Tank Farm was attacked. Any info on that attack would help me with my PTSD claim.*⁶¹

*Need help to verify stressors for VA claim. Searching for . . . anyone else who served in B. Co., 39th Arty., 1969–70.*⁶²

55. *Id.* The remainder includes veterans of World War II (24,087), Korea (12,229), and Peacetime (11,220). *Id.*

56. *Veterans for Common Sense v. Peake*, 563 F. Supp. 2d 1049, 1062 (N.D. Cal. 2008) (citing RAND study).

57. Dep’t of Veterans Affairs, *Nat’l Ctr. for PTSD FactSheet: How Common is PTSD?*, <http://www.ncptsd.va.gov/ncmain/veterans/> (follow hyperlink in “Vets Dealing with War Trauma” box) (last visited Jan. 3, 2009) [hereinafter *How Common is PTSD*].

58. See, e.g., Alan Fontana & Robert Rosenheck, *Treatment-Seeking Veterans of Iraq and Afghanistan: Comparison with Veterans of Previous Wars*, 196 J. OF NERVOUS & MENTAL DISEASE 513 (2008).

59. *How Common is PTSD*, *supra* note 57. Studies disagree about how many Vietnam veterans currently exhibit symptoms of PTSD.

60. Transcript of Record at 220, *Veterans for Common Sense*, 563 F. Supp. 2d 1049 (No. C-07-3758 SC).

61. VietNow, <http://www.vietnow.com> (follow “locator & messages” link) (last visited Mar. 17, 2009).

62. Donald Franklin, Classified Ad, THE VVA VETERAN, Sept.–Oct. 2008, at 41.

The VA provides monthly disability compensation for veterans suffering from PTSD,⁶³ but these benefits are not distributed with an even hand. The laws and regulations allow some veterans to be taken at their word, while others who experienced equally traumatic events must prove their claim by searching for evidence that even an experienced researcher—let alone a mentally impaired veteran—may find difficult or impossible to locate.

A. *Requirements for a PTSD Claim*

In order to receive disability compensation for PTSD, a veteran's claim must meet three evidentiary requirements. First, there must be a current medical diagnosis of PTSD that conforms to the DSM-IV criteria.⁶⁴

Second, there must be “nexus” medical evidence showing a link between the PTSD symptoms and an in-service stressor.⁶⁵ This nexus medical evidence must be supplied by someone who is qualified to give medical “diagnoses, statements, or opinions,”⁶⁶ and it must demonstrate that the stressor at least contributed to the current PTSD symptoms.⁶⁷ If all evidence for and against a link is in approximate balance, the benefit of the doubt goes to the veteran.⁶⁸ Generally, a veteran will not have trouble meeting this second requirement if there is a PTSD diagnosis.⁶⁹

The third requirement mandates “credible supporting evidence that the claimed in-service stressor occurred.”⁷⁰ Here the veteran faces one of two possible evidentiary standards: If the veteran “engaged in combat with the enemy,” then the veteran's own testimony is enough to establish that the in-service stressor occurred unless there is evidence to the contrary.⁷¹ If the veteran did not engage in combat or cannot prove engagement in combat, then the veteran must provide other evidence that he experienced a stressor during military service.⁷² This fork in the road is found in both statutory and regulatory language. The statute, 38 U.S.C. section 1154(b), provides:

63. BENEFITS MANUAL, *supra* note 14, at 58, 148.

64. 38 C.F.R. §§ 3.304(f), 4.125(a) (2008).

65. BENEFITS MANUAL, *supra* note 14, § 3.6.5, at 167 (citing *Cohen v. Brown*, 10 Vet. App. 128, 138 (1997)); 38 C.F.R. § 3.304(f).

66. 38 C.F.R. § 3.159(a)(1) (2008).

67. BENEFITS MANUAL, *supra* note 14, § 3.6.5, at 167 (citing *Cohen*, 10 Vet. App. at 138).

68. *Id.* (citing 38 U.S.C.S. § 5107(b)); 38 C.F.R. § 3.102 (2007).

69. BENEFITS MANUAL, *supra* note 14, § 3.6.5, at 167.

70. 38 C.F.R. § 3.304(f).

71. *Id.*

72. *See id.*

In the case of any veteran who engaged in combat with the enemy in active service . . . during a period of war . . . , the Secretary [of Veterans Affairs] shall accept as sufficient proof of service-connection of any . . . injury alleged to have been incurred in . . . such service satisfactory lay or other evidence . . . , if consistent with the circumstances, conditions, or hardships of such service, notwithstanding the fact that there is no official record of such incurrence . . . and, to that end, shall resolve every reasonable doubt in favor of the veteran. Service-connection of such injury or disease may be rebutted by clear and convincing evidence to the contrary.⁷³

The regulation implements this statutory standard. It provides that “[i]f the evidence establishes that the veteran engaged in combat with the enemy and the claimed stressor is related to that combat . . . , the veteran’s lay testimony alone may establish the occurrence of the claimed in-service stressor” unless there is “clear and convincing evidence to the contrary.”⁷⁴

The VA’s controlling definition of “combat with the enemy” comes from a 1999 VA General Counsel (“GC”) precedent opinion⁷⁵ that defines the statutory phrase “engaged in combat with the enemy” as a veteran who “personally participated in events constituting an actual fight or encounter with a military foe or hostile unit or instrumentality.”⁷⁶ “Personal participation” and “actual fight or encounter,” however, requires evidence.⁷⁷ A veteran with a medal has all the evidence he needs, because the VA accepts certain decorations such as a Combat Action Ribbon or a Purple Heart as prima facie evidence of combat participation.⁷⁸ In that case, combat service is presumed and his word is accepted.⁷⁹ Other veterans, however, who may have equally compelling personal combat experience but no decorations, receive no such presumption.⁸⁰ Instead, they are left holding the evidentiary bag—one they must attempt to fill at least half way with

73. 38 U.S.C. § 1154(b) (2000).

74. 38 C.F.R. § 3.304(f).

75. BENEFITS MANUAL, *supra* note 14, § 3.3.2.1, at 89 (citing Vet. Aff. Op. Gen. Couns. Prec. 12-99 (1999)).

76. Vet. Aff. Op. Gen. Couns. Prec. 12-99 (1999), *available at* <http://www.va.gov/ogc/docs/1999/prc12-99.doc>.

77. DEP’T VETERANS AFFAIRS, VBA M21-1MR, pt. 4ii, ch. 1, § D(13)(b) (2005), *available at* http://www.warms.vba.va.gov/admin21/m21_1/mr/part4/subptii/ch01/ch01_secd.doc [hereinafter M21-1MR].

78. *Id.* § D(13)(d)-(e).

79. *Id.*

80. *See id.*

corroborating evidence in order to meet the ostensibly veteran-friendly “equipoise” standard of evidence that allows the claim to be resolved in their favor.⁸¹ Even with this standard, these veterans struggle to obtain evidence that they personally participated in combat.

B. *The Evidentiary Stumbling Block*

For a minority of veterans, the struggle to obtain evidence may be relatively short because even though they lack combat decorations, their official military records contain clear evidence of combat service. This evidence may include a combat-related military specialization such as “infantryman,” actual documentation of the veteran’s participation in a specific encounter, or a combination of references to the veteran’s presence during a particular event.⁸² This evidence, once found, triggers the presumption.

Combat veterans who cannot establish combat with the enemy so easily must offer additional proof that they experienced a service-related stressor. The process of gathering such evidence can be time-consuming and difficult, if not impossible—often because records are missing or the stressor incident was never documented in the first place. This can be particularly true where a service member is on temporary reassignment to a different unit,⁸³ and is especially significant in light of the fluid modern battlefield that lacks any defined “front line,”⁸⁴ where a cook, truck driver, or combat engineer may be subjected to combat stressors.⁸⁵ Adding to the difficulty is the military’s lack of documentation and poor recordkeeping.⁸⁶ Chairman of the Senate Committee on Veterans Affairs (“Senate Committee”) Daniel Akaka has affirmed that “record keeping and

81. *Id.* § D(13)(i)–(k); BENEFITS MANUAL, *supra* note 14, § 3.6.4.1, at 161.

82. BENEFITS MANUAL, *supra* note 14, § 3.6.4.1, at 158; *see also* M21-1MR, *supra* note 77, at pt. 4ii, ch. 1 § D(13)(e)–(g).

83. *April 10th Hearing*, *supra* note 25.

84. *Id.* (statement of Steve Smithson, Deputy Dir., Veterans Affairs and Rehab. Comm’n, Am. Legion).

85. *See, e.g.*, *Moran v. Principi*, 17 Vet. App. 149, 153 (2003) (veteran who served as a cook in Vietnam and whose unit took fire initially denied benefits); *April 10th Hearing*, *supra* note 25 (statement of Eric A. Hilleman, Deputy Dir., Nat’l Legislative Serv., Veterans of Foreign Wars, noting physical danger to members of truck convoy in combat zone); Press Release, Senate Comm. on Veterans’ Affairs, *supra* note 24 (quoting Chairman Akaka’s floor statement of November 6, 2007, in which he references a combat engineer exposed to IEDs in Iraq).

86. *April 10th Hearing*, *supra* note 25 (statements of Raymond C. Kelley, Nat’l Legislative Dir., Am. Veterans, and Kerry Baker, Assoc. Nat’l Legislative Dir., Disabled Am. Veterans).

transmittal of records in combat areas remains problematic.”⁸⁷ In its report on H.R. 5892, which sought to clarify the definition of “combat with the enemy” to include active service “in a theater of combat operations . . . during a period of war,”⁸⁸ the House Veterans Committee found that “documentation, due to the unpredictable enemy fire lines and nature of battle, as well as frequent separation from units, may not exist” and that veterans affected by this situation “are not the outliers.”⁸⁹ These problems also extend to medical records, as noted by Senator Akaka: “During oversight visits to regional offices, [Senate] Committee staff has identified a number of cases where service medical records of veterans serving in combat areas are missing . . . [and d]iscussions with physicians who have served in those areas confirm that records are not always made or maintained.”⁹⁰

The VA has a “duty to assist” a disability claimant,⁹¹ and as part of this duty the VA is charged with helping obtain records relevant to the claimant’s military service.⁹² However, it is a duty that has been called “too good to be true.”⁹³ While the VA rating officials that make the initial adjudications of veterans’ disability claims must request a claimant’s service records from the National Personnel Records Center and, in some cases, the U.S. Army and Joint Services Records Research Center,⁹⁴ in practical experience the effort is often not enough to make the claimant’s case.⁹⁵ The VA generally requests only military medical records and the veteran’s DD 214,⁹⁶ a separation document listing information such as the veteran’s military specialty, foreign service, assignments, and decorations.⁹⁷

87. Press Release, Senate Comm. on Veterans’ Affairs, *supra* note 24.

88. H.R. 5892, 110th Cong. § 101(a)(2) (2008) (introduced in House).

89. H.R. REP. NO. 110-789, at 13 (2008), *available at* <http://thomas.loc.gov/cgi-bin/cpquery/T?&report=hr789&dbname=110&>.

90. *Pending Benefits Legislation: Hearing Before the S. Comm. on Veterans Affairs*, 110th Cong. (2008) (statement of Chairman Daniel K. Akaka regarding S. 2309), *available at* http://veterans.senate.gov/public/index.cfm?pageid=16&release_id=11612&sub_release_id=11682&view=all.

91. 38 U.S.C. § 5103A(a), (d) (2006).

92. *Id.* § 5103A(c).

93. Theodore C. Jarvi, Past President, Nat’l Org. of Veterans Advocates, *Getting Stronger Evidence When the Evidence that the VA Gets Is Too Weak 1* (Sept. 26, 2008) (unpublished manuscript of presentation at Nat’l Org. of Veterans Advocates New Practitioner Seminar, on file with the author).

94. BENEFITS MANUAL, *supra* note 14, § 3.6.4.1, at 157–59.

95. *See* Jarvi, *supra* note 93, at 3–4.

96. *Id.*, at 8.

97. National Archives, DD Form 214, Discharge Papers and Separation Documents, <http://www.archives.gov/veterans/military-service-records/dd-214.html> (last visited Feb. 3, 2009).

Military personnel records may contain valuable additional information, but usually the VA will not request personnel records unless someone specifically asks to do so.⁹⁸ When the VA does seek records, the request for information to the records center may be too sketchy to produce records that are specific enough to be helpful.⁹⁹ Moreover, those searching records at the archives or reviewing records for the VA often do not have the time or resources to make a diligent effort to locate information crucial to the veteran's claim.¹⁰⁰ For these reasons, advocates who regularly work on behalf of veterans advise submitting a separate request for records and conducting a thorough review of records from many sources.¹⁰¹

Some types of evidence that can tip the scales for a veteran trying to prove a stressor occurred, such as "buddy statements," newspaper clippings, contemporaneous letters, or articles published in regimental newsletters, will never be sought by the VA.¹⁰² Veterans must locate these items on their own.¹⁰³ For example, the medic who broke his knees in Korea made a successful claim only after his attorney on appeal stumbled across a vanity press book offered online and authored by another Korean War veteran that detailed the activities of the medic's unit on that embattled hill.¹⁰⁴

Just launching this kind of search requires a veteran to recall information he may have "spent the past [thirty-five] years [or more] trying to forget."¹⁰⁵ The pleas for help quoted at the beginning of Part III from veterans' locator services illustrate veterans' attempts to find their own evidence, and both excerpts indicate an inability to recall comrades' names or exact dates. Even when a veteran successfully locates an old buddy, however, new issues may arise. The radioman who served alongside those infantrymen in Vietnam made one contact, only to learn that his buddy had his own mental problems, and had spent the last decades in and out of mental health treatment facilities.¹⁰⁶ After talking with the radioman, the buddy's issues flared up and he again checked himself into a facility, leaving the radioman with "significant guilt" for having brought the matter up in the first place.¹⁰⁷

98. Jarvi, *supra* note 93, at 8 (emphasis omitted).

99. *Id.*

100. Interview with Theodore C. Jarvi, *supra* note 3.

101. See generally Jarvi, *supra* note 93; BENEFITS MANUAL, *supra* note 14, § 3.6.4.1, at 158, 161. In an interview, Mr. Jarvi said that anyone who relies on the VA's duty to assist is "making a sad mistake." Interview with Theodore C. Jarvi, Past President, Nat'l Org. of Veterans Advocate, in Tempe, Ariz. (Aug. 27, 2008).

102. BENEFITS MANUAL, *supra* note 14, § 3.6.4.1, at 160–62.

103. See *id.*

104. Interview with Theodore C. Jarvi, *supra* note 3.

105. Jarvi e-mail, *supra* note 1.

106. *Id.*

107. *Id.*

The radioman's claim is still pending as he awaits a decision based on the statements of two other buddies.¹⁰⁸

In addition to these difficulties, a trio of other factors—the veteran claimant's level of education and mental health, a statute barring veterans from obtaining paid representation before an initial adjudication is made,¹⁰⁹ and the backlog of claims handled by organizations who represent veterans for free—may converge to operate against a veteran's successful search for evidence. Of troops currently deployed, 82% of Army personnel and 89% of Marines have a high school diploma or less.¹¹⁰ These figures led a recent court to speculate that “many of these soldiers, once they separate and become veterans, may have difficulty navigating complex benefit application procedures unless they are provided with substantial assistance.”¹¹¹ The court noted that this application procedure involves filling out a twenty-three page benefits application, and pointed out that “[v]eterans often make mistakes when completing this application and veterans suffering from PTSD have a particularly hard time with this.”¹¹² To the extent that this is true for the application process, there is a reasonable basis to infer that these same veterans may find it difficult to determine whether requesting records on their own is appropriate, to identify the wide variety of possible agencies to contact for records, to draft effective letters to each agency requesting information, to educate themselves about the wide variety of unofficial evidence that may be acceptable, and to launch an effort to search out such evidence.

Veterans who need help or advice with the initial claims process have few options, because they are highly unlikely to have an attorney until after their claim has been denied.¹¹³ According to statute, “a fee may not be charged, allowed, or paid for services of agents and attorneys with respect to services provided before the date on which a notice of disagreement is filed with respect to the case.”¹¹⁴ A “notice of disagreement” is the first step a veteran must take to appeal an unfavorable decision made by the claims adjudicator at the VA regional office where the veteran applied for

108. *Id.*

109. 38 U.S.C. § 5904(c)(1) (2006).

110. *Veterans for Common Sense v. Peake*, 563 F. Supp. 2d 1049, 1070 (N.D. Cal. 2008).

111. *Id.*

112. *Id.* at 1071.

113. *See id.*; 38 U.S.C. § 5904(c)(1).

114. *Id.* Congress enacted the Veterans Benefits, Health Care, and Information Technology Act of 2006 on December 22, 2006, amending § 5904 to allow paid representation beginning at the notice of disagreement stage. Veterans Benefits, Health Care, and Information Act of 2006, Pub. L. No. 109-461, 120 Stat. 3403, 3407–08. Prior to this, a veteran could not hire an attorney before the Board of Veterans Appeals had issued a final decision on the case. *See id.*

benefits.¹¹⁵ During the initial development of the veteran's claim, an attorney may represent a veteran only on a pro bono basis.¹¹⁶ The veteran may find help from a Veterans Services Organization ("VSO") such as the American Legion or the Disabled Veterans of America, that often have service officers at the VA regional offices to assist veterans with claims.¹¹⁷ The VSO personnel are rarely attorneys, and the VA does not train VSO personnel about the claims process or about how to assist veterans.¹¹⁸ Some VSOs, such as Vietnam Veterans of America, conduct their own training programs.¹¹⁹ However, because "all the Veterans Service Organizations together can't meet the volume of the crying need for adequate representation to help people properly develop claims,"¹²⁰ even these helpful VSO services are not enough.

Ultimately, the VA denies fifty percent of PTSD claims, mainly for lack of evidence.¹²¹

IV. AMENDING THE DEFINITION OF "ENGAGED IN COMBAT WITH THE ENEMY"

The GC's 1999 precedent opinion defining "engaged in combat with the enemy" is an evidentiary stumbling block that results in disparate treatment of veterans. The playing field could be leveled if, as has been proposed,¹²² Congress overturned the GC opinion by clarifying the definition of "engaged in combat with the enemy" to include active service in a combat zone, or if the VA acted to amend the definition itself. The GC opinion specifically rejects such a definition, instead requiring that a veteran must have "personally participated" in the fight and that "whether a veteran 'engaged in combat with the enemy' necessarily must be made on a case-by-case basis."¹²³ This analysis ignores the realities of modern warfare in

115. BD. OF VETERANS APPEALS, DEP'T OF VETERANS AFFAIRS, HOW DO I APPEAL?, VA PAMPHLET 01-02-02A, at 2 (April 2002), available at <http://www.va.gov/vbs/bva/010202A.pdf> [hereinafter BVA, HOW DO I APPEAL].

116. *Veterans for Common Sense*, 563 F. Supp. 2d at 1072; BVA, HOW DO I APPEAL, *supra* note 115, at 3.

117. BVA, HOW DO I APPEAL, *supra* note 115, at 3.

118. *Veterans for Common Sense*, 563 F.Supp.2d at 1072.

119. Transcript of Record at 512:12-18, *Veterans for Common Sense*, 563 F. Supp. 2d 1049 (2008) (No. C-07-3758 SC) (testimony of Richard Weidman, Exec. Dir. for Policy and Gov't Affairs, Vietnam Veterans of Am.).

120. *Id.* at 514:23-515:1.

121. CBO REPORT, *supra* note 11, at 2.

122. See H.R. 6732, 110th Cong. § 1 (2008); H.R. 5985, 110th Cong. § 2 (2008); S. 2309, 110th Cong. § 2 (2007); discussion *infra* pp. 21-22.

123. Vet. Aff. Op. Gen. Couns. Prec. 12-99 ¶¶ 4, 6 (1999).

which many veterans who took part in combat cannot prove their participation and mistakes Congress's intent that combat veterans should not be required to prove the events they experienced.

A. *The General Counsel's Precedent Opinion Relies on a Flawed Interpretation of Congressional Intent*

In his 1999 interpretation of "engaged in combat with the enemy," the GC stated that his goal was to implement congressional intent. To that end, he relied on the dictionary and on legislative history.¹²⁴ Seeking out the "ordinary meaning" of the words, the GC looked to Webster's dictionary and pieced together a conclusion that "the ordinary meaning of the phrase 'engaged in combat with the enemy' requires that the veteran have taken part in a fight or encounter with a military foe or hostile unit or instrumentality."¹²⁵ While at first blush this definition may seem reasonable, it would leave out, for example, a soldier who had to drive repeatedly along roads known to be littered with roadside bombs.

The sources consulted by the GC do not demand such a strict definition of combat. In refusing to include service in a combat zone in the definition, the GC opinion relies on a flawed interpretation of era-specific Congressional intent. First, the GC opinion uses certain bill provisions to support its congressional intent argument, but misstates the content of those bill provisions. Second, in relying on parts of those bills out of the World War I-era context in which they were proposed, the GC transposes Congress's intent to avoid a legal presumption of service-connected disability onto the issue of whether a veteran engaged in combat at all. Consequently, the GC made it more difficult for veterans to demonstrate that they engaged in combat, despite evidence that Congress never considered determination of a veteran's engagement in combat to be a problematic issue.

The rebuttable presumption of fact that favors combat veterans was first enacted in 1941.¹²⁶ At the time, the House Committee on World War Veterans' Legislation ("the Committee") had its hands full as it tried to address the myriad issues facing World War I veterans.¹²⁷ Then, as now, veterans' groups such as the Disabled American Veterans and the Veterans of Foreign Wars actively promoted the interests of veterans and testified in

124. *Id.* ¶¶ 2–3.

125. *Id.* ¶ 2.

126. H.R. 4905, 77th Cong. (1941).

127. See generally *Hearings Before the Comm. on World War Veterans' Legis.*, 77th Cong. (1941) [hereinafter *World War Hearings*].

Congress on veterans' behalf.¹²⁸ And then, as now, disabled veterans' inability to prove service-connection was a major issue.¹²⁹ Following World War I, the Committee considered a variety of bills that would to eliminate the need for disabled combat veterans to produce evidence of service-connection for their disabilities.¹³⁰

In many ways, the World War I veterans presented a very different set of circumstances from that seen in modern warfare. Testimony from that period illustrates a clear distinction between inside and outside a combat area, between the "front" and the "rear" areas. Men serving on the front lines "were at a station where the records, if there were any, were very loosely kept. In many cases they were not kept at all."¹³¹ While a soldier stationed in a camp "outside the combat areas" could easily obtain documentation of medical issues, "such formalities were discarded upon the battlefield."¹³² Men fought at the front, but whatever records they had "were at the rear."¹³³ Any records kept near the front were subject to destruction under enemy fire.¹³⁴

At the same time, however, the World War I veterans faced evidentiary hurdles very similar to those faced by today's veterans. As noted above, medical and service records were incomplete or missing. Lacking such evidence, World War veterans attempted to locate "buddies" who could corroborate their injuries. In fact, "most of [the] veteran-organization divisional papers [of the World War Combat Veterans Association were] taken up mainly by people asking for information as to 'buddies' and things like that,"¹³⁵ although obtaining affidavits from those buddies was often not enough to prove disability service-connection.¹³⁶ More than twenty years after the war ended, memories had faded¹³⁷ and "it is really a very hard thing for any combat man . . . to try to prove disability."¹³⁸

128. *See id.* at 103–05, 179–83 (statement of Millard W. Rice); *see also April 10th Hearing, supra* note 25 (statements of Kerry Baker and Eric A. Hilleman).

129. *See generally id.*

130. *See* DEP'T OF VETERANS AFFAIRS, ANALYSIS OF PRESUMPTIONS OF SERVICE CONNECTION 6–21 (1993).

131. *World War Hearings, supra* note 127, at 247 (statement of Ben F. Gurnett on behalf of World War Combat Veterans Ass'n, May 15, 1941).

132. *Id.* at 246 (remarks of Nat'l Sec'y-Treasurer K. A. Sutherland on the occasion of annual Combat Veterans' Night, U.S. Veterans' Hosp. and Nat'l Soldiers' Home, Sawtelle, Cal., Feb. 26, 1941, read during statement of Ben F. Gurnett).

133. *Id.* at 247 (statement of Ben F. Gurnett on behalf of World War Combat Veterans Ass'n, May 15, 1941).

134. *See id.* at 248.

135. *Id.* at 250.

136. *See id.*

137. H.R. REP. NO. 76-2982, at 3 (1940).

138. *World War Hearings, supra* note 127, at 247 (statement of Ben F. Gurnett).

It was under these circumstances that the desire to create a different evidentiary standard for combat veterans arose, taking form in the text of several House bills¹³⁹ that led, ultimately, to Congress adopting H.R. 4905, which contained the language found today in 38 U.S.C. 1154(b).¹⁴⁰ The first proposed legislation, H.R. 156,¹⁴¹ provided for veterans who “engaged in combat with an enemy of the United States” or were “subjected to other arduous conditions of military . . . service” during war. Another provided for veterans who served “in a combat area.”¹⁴²

In making its case that the “engaged in combat with the enemy” language found in 1154(b) should not include service in a combat zone, the GC opinion cites these two predecessor bills as examples of bills “containing varying criteria for invoking the special evidentiary requirements now provided by section 1154(b).”¹⁴³ While these bills do contain varying criteria, neither contains the same “special evidentiary requirements” found in 1154(b) that allow a veteran’s lay testimony to serve as sufficient proof of service-connection as long as the testimony is consistent with the conditions of the veteran’s service. Instead, these predecessor bills contain a sweeping presumption of law that would have presumed service-connection of any disability suffered by a combat veteran, as long as the disability could “reasonably be considered to have been due to or aggravated by the conditions of all of [the veteran’s] active military . . . service.”¹⁴⁴ Not surprisingly, the VA objected to this language.¹⁴⁵ During

139. One major issue confronting the Committee was empirical evidence that a far higher percentage of non-combat veterans were receiving disability compensation than combat veterans, an inequity that, in the minds of the Committee members, demonstrated the need for combat veterans to be treated differently. H.R. REP. NO. 76-2982, at 3.

140. See H.R. REP. NO. 77-1157, at 2 (1941); Letter from Frank T. Hines, Adm’r, Veterans Affairs Admin., to Hon. John E. Rankin, Chairman, H.R. Comm. on World War Veterans’ Legislation, at 317–19 (July 11, 1941) (Comm. Print 1941) [hereinafter July Hines Letter].

141. H.R. 156, 77th Cong. (1941). This bill’s predecessor in the 76th Congress, H.R. 6450, 76th Cong. (1940), passed the House with only one “no” vote but died in the Senate finance committee. *World War Hearings*, *supra* note 127, at 181 (statement of Millard W. Rice, Nat’l Serv. Dir., Disabled Am. Veterans).

142. H.R. 2652, 77th Cong. (1941). See Appendix for the text and a comparison of the three bills.

143. Vet. Aff. Op. Gen. Couns. Prec. 12-99 ¶ 3 (1999). The GC also cites a third bill, H.R. 1587, but this Author could not locate the text of that bill. It is cited by the Veterans’ Administrator as “under consideration” during the May 1941 testimony, July Hines Letter, *supra* note 140, at 317, but it does not appear to have been the subject of discussion, *see generally*, *World War Hearings*, *supra* note 127, at 247.

144. H.R. 156, 77th Cong. (1941); H.R. 2652, 77th Cong. (1941).

145. Letter from Frank T. Hines, Adm’r, Veterans Affairs Admin., to Hon. John E. Rankin, Chairman, H.R. Comm. on World War Veterans’ Legislation, at 1–2 (Feb. 4, 1941) (Comm. Print 1941) [hereinafter February Hines Letter]; *World War Hearings*, *supra* note 127, at 247 (statement of Brig. Gen. Frank T. Hines, May 16, 1941).

the 1941 Committee hearings that addressed these bills, the focus remained squarely on the appropriateness of that presumption—not on the distinction between “engaged in combat with an enemy,” “arduous conditions of military service,” or “combat area.”¹⁴⁶ In fact, this issue arose only twice.

The idea behind changing the criteria to “combat area” in H.R. 2652¹⁴⁷ was actually to make sure that only veterans who had experienced combat would be covered by the presumption they were considering.¹⁴⁸ Language in the previous bill, applying the presumption to veterans who had been “subjected to . . . arduous conditions of military . . . service,”¹⁴⁹ had been criticized as too broad in that it could have included “home-area” or “rear-area” veterans.¹⁵⁰ By limiting the criteria to veterans who had served in a “combat area,” the intent was “to controvert the question of [the Veterans Administrator] . . . that [the] bill would apply to each and all veterans, irrespective of what service they did” and to reward combat veterans, who were “particularly deserving” of a special evidentiary standard.¹⁵¹

By ignoring the substance of these discussions, which centered on whether to enact a legal presumption that would service-connect veterans’ disabilities, the GC opinion credits the Committee members with deliberating over an issue that probably never crossed their minds. The criteria used in the bills under discussion can only be viewed within the

146. See Appendix.

147. *Id.*

148. *World War Hearings, supra* note 127, at 248–49 (statement of Ben F. Gurnett).

149. H.R. 156, 77th Cong. (1941).

150. *World War Hearings, supra* note 127, at 248–49 (statement of Ben F. Gurnett).

151. *Id.* at 248. This is not to say the VA Administrator, General Hines, was pleased with the change. In questioning how “combat area” would be defined, the General remarked that “General Pershing handling the forces overseas would probably indicate the zone at the front, the first line, and the reserve line and certain supply lines,” but that veterans “would consider the combat zone the entire [American Expeditionary Force].” *World War Hearings, supra* note 127, at 291 (statement of Brig. Gen. Frank T. Hines, Administrator of Veterans Affairs). Gen. Hines did not suggest an alternative, and it is notable that previously, in his objection to H.R. 156, he did not mention the “subjected to other arduous conditions” language included as an alternative to “engaged in combat with an enemy.” See generally February Hines Letter, *supra* note 145. No Committee member remarked on the General’s comment about combat areas, and he immediately launched into his main objections, which related to the broad legal presumption contained in the bill. *World War Hearings, supra* note 127, at 291 (statement of Frank T. Hines). In 1917, John Joseph Pershing was appointed as commander in chief of the American Expeditionary Force. THE COLUMBIA ENCYCLOPEDIA 1520–21 (William Bridgwater & Elizabeth J. Sherwood eds., 1956). Thanks to his organizational skills, “hastily trained American troops [were molded] into well-integrated combat units.” *Id.* General Pershing was also legally trained, having earned his law degree at the University of Nebraska in 1893. *Id.* The American Expeditionary Forces were the United States troops serving overseas during World War I. NOAH WEBSTER, WEBSTER’S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE 54 (Thomas H. Russel, A. C. Bean, & L. B. Vaughan, eds., 1942).

context of World War I front/rear warfare and the Committee's obvious concern for those who had served at the front. To the Committee, the General's reasoning about "combat areas" would likely have seemed both sound yet irrelevant—sound, because those who served at the rear already seemed to be getting preferential treatment compared to those at the front,¹⁵² yet irrelevant, because in the minds of Committee members and testifiers who were themselves combat veterans,¹⁵³ there was little distinction between "combat area," "combat zone," or "engaging in combat with the enemy." There was the front, where combat took place, and there was the rear, where it did not.¹⁵⁴ That the Committee members had little concept of a distinction between "engaged in combat with the enemy" and any variation of that language is evidenced by both the hearings and the report accompanying the legislation that is now 1154(b), in which these variations appear to be used interchangeably.¹⁵⁵ Even in the discussion following General Hines's stated concern about the words "combat area," one Committee member phrased the criteria as "in a zone of combat" to no objection from the General.¹⁵⁶

The interchangeable use continues into the House Report recommending passage of what is now 1154(b), describing it as a bill that would address "determination of service connection of injuries or diseases claimed to have been incurred in or aggravated by *active service* in a war, campaign, or expedition."¹⁵⁷ The report later references "the conditions surrounding the service of combat veterans" and compares the recordkeeping for veterans "in other than combat areas" with that of veterans "who served in combat."¹⁵⁸ While the use of "engaged in combat with the enemy" in this legislation was no doubt "purposeful," as the GC opinion asserts, it arguably could not have had the significance the GC gave it.¹⁵⁹

152. *World War Hearings*, *supra* note 127, at 105, 249 (statements of Millard W. Rice and Ben F. Gurnett); H.R. REP. NO. 76-2982, at 3 (1940).

153. *See World War Hearings*, *supra* note 127, at 182–83, 248 (statements of Millard W. Rice and Ben F. Gurnett).

154. *See id.* at 247 (statement of Ben F. Gurnett).

155. *See, e.g., id.* at 249–51, 293–94 (statements of Ben F. Gurnett and Frank T. Hines); H.R. REP. NO. 2982, at 2–3 (1940).

156. *World War Hearings*, *supra* note 127, at 292 (statement of Frank T. Hines).

157. H.R. REP. NO. 77-1157, at 1 (1941) (emphasis added).

158. *Id.* at 3.

159. In fact, the Committee makes a point of saying the language of H.R. 4905 was "carefully selected to make clear that a statutory presumption in connection with determination of service connection is not intended" but, instead, "to overcome the adverse effect of a lack of official record." H.R. REP. NO. 77-1157, at 2 (1941). The Committee is silent about its selection of "engaged in combat with the enemy." *See generally id.*

The Committee hearings demonstrate the members' deep concern for the plight of combat veterans with incomplete and missing records.¹⁶⁰ There is no indication that, by proposing the "engaged in combat with the enemy" language, the Committee intended for any veteran who was disabled as a result of combat experience to be excluded from the provisions of the bill for lack of evidence. To the contrary, the testimony indicates that Congress intended only to facilitate service-connection of disability claims for veterans who served in combat areas.¹⁶¹

Had there been a concern that proving "engaged in combat with the enemy" would be a hurdle for combat veterans, it is doubtful the Committee would have agreed to that language. Nothing in the hearings preceding H.R. 4905 indicates the Committee foresaw a type of warfare in which using official records to determine who was a combat veteran would be problematic. Working within the framework of war as they knew it, the Committee members were not proposing legislation that would address the as-yet-unknown circumstances of future wars; they were addressing the

160. See *World War Hearings*, *supra* note 127, at 104, 182, 292 (statements of Millard W. Rice and Frank T. Hines).

161. That Congress in fact had the opposite intent, and that the GC opinion thwarts this intent, was argued recently by Sen. Daniel Akaka, Chairman of the Senate Committee on Veterans Affairs when he stated that "the requirement in that opinion is inconsistent with the original intent of Congress in liberalizing the requirements for proof of service-connection in cases involving veterans who served in combat areas." Press Release, Senate Comm. on Veterans' Affairs, *supra* note 24 (quoting Chairman Akaka's floor statement of November 6, 2007, citing S. REP. NO. 77-902, at 2 (1941) (identical to H.R. REP. NO. 77-1157, at 2-3 (1941))). The House Committee on Veterans Affairs echoed this view when it criticized the "additional and unauthorized requirements" for determining eligibility for the 1154(b) presumption found in the VA internal ratings manual, saying the application of these requirements "frustrates Congress' intent." H.R. REP. NO. 110-789, at 14 (2008) (referring to the VA M21-1MR manual). That manual refers users directly to the GC opinion for guidance on "evidence that may be used to support a determination that a veteran engaged in combat with the enemy." M21-1MR, *supra* note 77, at pt. 4, subpt. ii, ch. 1 § D(13)(b). In the end, the "engaged in combat with the enemy" language of H.R. 4905 was almost certainly settled on during negotiations with the VA that focused on the presumption portion of the bill. During the hearings and in his objection to H.R. 156, General Hines repeatedly argued that what the Committee was trying to accomplish for veterans was already part of the VA's policy. *World War Hearings*, *supra* note 127, at 290-91 (statement of Frank T. Hines); February Hines Letter, *supra* note 145, at 3. During the hearings, the Chairman asked the General and his legal staff to confer with the bill's sponsor. *World War Hearings*, *supra* note 127, at 292-293 (statement of Frank T. Hines). The General's July 11 report to the Chairman states that "the Veterans' Administration collaborated with [the] committee in the preparation of the draft of the bill which has become H.R. 4905." July Hines Letter, *supra* note 140, at 318. It is reasonable to assume that, during the course of that collaboration, the General again raised his concerns about the possible interpretation of "combat area" and that, given that their pressing concern was combat veterans, the Committee members agreed to return to part of the language used in H.R. 156.

pressing needs of aging WWI front-line veterans like themselves, many of whom still could not prove service connection twenty-three years after the Great War ended.

B. Amending the Definition Is Consistent with the Principles Underlying Presumptions

While the VA could choose to revisit its definition of “engaged in combat with the enemy,” it has not. The other option, then, is for Congress to statutorily overturn the GC opinion. Two versions of legislation pending in Congress would amend 38 U.S.C. § 1154(b) to include active service in a combat zone.¹⁶² One version provides that “[a] veteran who during active service . . . served in” an area that the President designates as a combat zone “shall be treated as having engaged in combat with the enemy in active service.”¹⁶³ The other version provides that “‘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.”¹⁶⁴ Both versions would expand the presumption to all veterans who served in a combat area.

Giving all combat veterans access to the rebuttable presumption of fact contained in 1154(b) makes sense when refracted through the prism of presumption rationale. Presumptions “assume the truth of certain matters for the purpose of some given inquiry,” and courts adopt them for a variety

162. H.R. 6732, 110th Cong. § 1 (2008); H.R. 5985, 110th Cong. § 2 (2008); S. 2309, 110th Cong. § 2 (2007).

163. S. 2309, 110th Cong. § 2 (2007); H.R. 5985, 110th Cong. § 2 (2008). Both have been referred to the Committees on Veterans’ Affairs of the respective houses but no other action has been taken.

164. H.R. 6732, 110th Cong. § 1 (2008) (introduced July 31, 2008). The exact language of the latter version was included in the Veterans Disability Benefits Claims Modernization Act of 2008 as introduced in the House of Representatives in April 2008 and reported on July 29, 2008. H.R. 5892, 110th Cong. § 101 (2008) (as introduced). By the time the bill was passed on July 30, the language had been removed. *Id.* (as referred to Senate). A desire not to hold up the rest of the bill for lack of funding for this provision motivated the elimination. Telephone Interview with Staff, House Comm. on Veterans Affairs, (Oct. 20, 2008). According to the Congressional Budget Office report for H.R. 5892, the amended definition would lead to a \$4.8 billion increase in direct spending between 2009–2018, as new beneficiaries are approved and veterans currently on the rolls for disabilities other than PTSD have their PTSD disability claims approved. CBO REPORT, *supra* note 11, at 3. The language that was removed from H.R. 5892 was reintroduced in a separate House bill the following day and awaits Committee review. H.R. 6732, 110th Cong. § 1 (2008).

of reasons.¹⁶⁵ In an overarching sense, a presumption simply operates as a tool of fairness.¹⁶⁶ It may be efficient in situations where there has been experience with a recurring situation that must be repeatedly dealt with.¹⁶⁷ Presumptions also help with “managing circumstances in which direct proof, for one reason or another, is rendered difficult.”¹⁶⁸ Presumptions may be a matter of convenience,¹⁶⁹ judicial economy,¹⁷⁰ or probability.¹⁷¹ Often, presumptions are rooted in policy considerations.¹⁷² This same rainbow of justifications exists for presumptions within the context of VA disability benefits,¹⁷³ and the issue at hand brings the entire spectrum into play.

At the most general level, defining “engaged in combat with the enemy” to include active service in a combat zone is fair to veterans. For VA disability cases, this may be thought of as “promot[ing] accuracy and consistency in adjudications by requiring similar treatment in similar cases.”¹⁷⁴ Imagine two hypothetical veterans who both come under fire and witness death inside a combat zone. One veteran happens to be a member of an infantry unit that documents the firefight, and one is a truck driver on undocumented temporary duty with another unit. If each is later diagnosed with PTSD, and medical evidence links the diagnosis with the experience of coming under fire and witnessing death, then absent an evidentiary requirement the difference between these veterans is clear: There is no difference. Both experienced combat, both suffer debilitating effects. And yet, under the current system the first veteran will obtain benefits with little difficulty, while the second may spend years trying to prove his case or may never prove it at all.

The recurring experience of combat as a circumstance “in which direct proof, for one reason or another, is rendered difficult”¹⁷⁵ also supports the presumption. Even in our modern age, “record keeping and transmittal of

165. Edward W. Tuttle, *Presumptions*, in THE ENCYCLOPAEDIA OF EVIDENCE 876, 877 n.2 (Edgar W. Camp & John F. Crowe, eds., 1906) (quoting Professor Thayer’s Preliminary Treatise on Evidence, chapter on Presumptions, p. 314) [hereinafter Tuttle, *Presumptions*].

166. *Basic Inc. v. Levinson*, 485 U.S. 224, 245 (1988).

167. See Tuttle, *Presumptions*, *supra* note 165, at 879.

168. *Basic*, 485 U.S. at 245.

169. Tuttle, *Presumptions*, *supra* note 165, at 879.

170. *Basic*, 485 U.S. at 245.

171. *Id.*

172. Tuttle, *Presumptions*, *supra* note 165, at 879.

173. See Donald E. Zeglin, Presumptions of Service Connection 2–3, available at https://www.1888932-2946.ws/vetscommission/e-documentmanager/gallery/Documents/Reference_Materials/Presumption-Paper_3-7-06.pdf (background paper prepared for the Veterans’ Disability Benefits Comm., March 2006).

174. *Id.* at 3.

175. See *World War Hearings*, *supra* note 127, at 247–48; discussion *supra* Part III.B.

records in combat areas remains problematic.”¹⁷⁶ As a result, locating evidence of service-connection may be “impractical or unduly burdensome,” and a presumption may be appropriate to relieve both the VA and the veteran of the need to track down such evidence.¹⁷⁷ The current practice of allowing combat veterans to substitute medals or awards for actual evidence of personal combat experience is a way of managing this reality.¹⁷⁸ It is meant to bring those who served in conditions adverse to recordkeeping under a presumptive umbrella, but it draws an artificial line. Some who served under those conditions receive the presumption; others do not. When is a combat veteran a combat veteran?

Unlike earlier days where a battlefield’s “front line” could be drawn on a map and was commonly distinguished from the “rear” areas, modern warfare has no clearly distinguishable front or rear areas.¹⁷⁹ A soldier’s military occupation is not dispositive of whether he or she could have seen battle.¹⁸⁰ Everyone in the combat zone faces danger. The military’s recent establishment of a “Combat Action Badge,” whose purpose is to award a soldier who personally engaged in combat with the enemy regardless of military job description or what type of unit the soldier may be assigned to,¹⁸¹ recognizes this truth. Especially in the case of PTSD, where the wound is invisible and there may be no reason for immediate medical treatment that would generate records, without official documentation of the veteran’s presence when the enemy struck, there may be no way of proving he was there—particularly years later, after memories have faded though the effects have not.

The concern, of course, is increased cost resulting from veterans who may take advantage of an expanded definition of “engaged in combat with the enemy” and claim service-connected disability based on their service in a combat zone when, in fact, the disability is unrelated to that service. It is important to note that under the proposed legislation, the only change would be a clarified definition. This would *not* create an automatic presumption of service-connection for any disabled veteran who served in a combat zone. All three requirements for receiving PTSD disability benefits—a medical

176. Press Release, Senate Comm. on Veterans’ Affairs, *supra* note 24; *see* discussion *supra* Part III.B.

177. Zeglin, *supra* note 173, at 3.

178. *See generally* Press Release, Senate Comm. on Veterans’ Affairs, *supra* note 24.

179. *April 10th Hearing*, *supra* note 25 (statement of Steve Smithson, Deputy Director, Veterans Affairs and Rehabilitation Commission, American Legion).

180. *See, e.g.*, Moran v. Principi, 17 Vet. App. 149, 153 (Vet. App. 2003).

181. U.S. Army, Combat Action Badge, http://www.army.mil/symbols/combatbadges/Action.html?story_id_key=7285 (last visited Jan. 17, 2009) (badge authorized in 2005).

diagnosis, credible evidence that the in-service stressor occurred, and medical evidence showing a link between the diagnosis and the in-service stressor—would remain in place. The VA has already decided to give benefits to veterans with service-connected PTSD; the way the VA implements the presumption is intended to make sure that the right people get those benefits, even though that is not the effect. The clarified definition would allow more intended beneficiaries to receive benefits. A veteran who served in a combat zone would be considered to have “engaged in combat with the enemy.” As long as his own testimony is consistent with the conditions of his service and not contradicted by clear and convincing evidence, the veteran could use that testimony as credible evidence that a stressor occurred. Continuing to require a medical diagnosis of PTSD, testimony about a stressor that is consistent with the veteran’s service, medical evidence showing a link between the PTSD diagnosis and the claimed stressor, and the absence of clear and convincing evidence contradicting the testimony creates a barrier to those with false claims.

Debate rages in the scientific community regarding what level of combat exposure can lead to PTSD, whether service in a war zone exposes a service member to sufficient stressors to cause PTSD, and even whether veterans are telling the truth about their combat service when they seek treatment for PTSD.¹⁸² One study found that out of 100 Vietnam veterans seeking PTSD treatment, only 41% had verifiable combat service; however, this study limited its verification process to official military records.¹⁸³ Even by that standard, 93% of the veterans had documented service in Vietnam,¹⁸⁴ and it is doubtful that the few without such documented service would make it past the “not contradicted by clear and convincing evidence” requirement for service–connection.

Another group of researchers looking at the same issue supplemented the use of military records with additional indicators such as whether members of the veteran’s company had been killed during the veteran’s service, whether the veteran served in a division that took high casualties, and by doing the legwork of comparing veterans’ stories with accounts in military histories and contemporaneous newspapers.¹⁸⁵ With these criteria, the researchers confirmed “as plausible the exposure to traumatic stressors of

182. See Letters, *PTSD and Vietnam Veterans*, 315 *SCIENCE* 184–87, Jan. 12, 2007 [hereinafter Letters].

183. *Id.*

184. *Id.* at 184.

185. See Bruce P. Dohrenwend et al., *The Psychological Risks of Vietnam for U.S. Veterans: A Revisit with New Data and Methods*, 313 *SCI.* 979, 981 (2006).

[91%] of the subsample veterans with war-related onsets of PTSD.”¹⁸⁶ These researchers also designed a complex standard to measure “probable severity of exposure to war-zone stressors” for these PTSD treatment-seeking veterans.¹⁸⁷ Measuring the veterans’ self-reports of combat exposure against this standard of probability showed that while 15.6% of those who reported high exposure and rated a high probability of exposure sought disability benefits, only 3% of those who reported high exposure but rated low probability sought benefits.¹⁸⁸

Taken together, the findings from these widely-discussed studies cast serious doubt on the notion that veterans falsify accounts of combat exposure when filing for PTSD benefits claims. Only those who were actually exposed to events tend to seek benefits, and the false positive rate is very low.

The VA has reached the same conclusion. After a 2005 report by the VA’s Inspector General suggested that the VA benefits system is vulnerable to fraudulent claims especially from veterans claiming PTSD,¹⁸⁹ the VA itself refused to find evidence of fraud, saying instead that “the problems . . . appear to be administrative in nature, such as missing documents, and not fraud.”¹⁹⁰

Presumptions also exist within the VA disability benefits system to “streamline the adjudication process by eliminating the need to obtain evidence and decide complex issues.”¹⁹¹ Defining “engaged in combat with the enemy” to include service in a combat zone would serve judicial economy both literally, in the arena of disability claims appeals, and figuratively, in the arena of resources expended by the VA in its efforts to assist veterans in locating records. First, statistics show that of the disability claims appealed to the Board of Veterans Appeals, only 40% are affirmed.¹⁹² Of the rest, 20% are granted and 40% are remanded.¹⁹³ This indicates a high error rate at the initial claims determination level, leading to wasted resources as claims are recycled through the system. Second, 20,000

186. *Id.*

187. *Id.* at 979.

188. *Id.* at 980–81.

189. OFFICE OF INSPECTOR GEN., DEP’T OF VETERANS AFFAIRS, REVIEW OF STATE VARIANCES IN VA DISABILITY COMPENSATION PAYMENTS 70–74 (2005).

190. Press Release, Dept. of Veterans Affairs, No Across the Board Review of PTSD Cases—Secretary Nicholson (Nov. 10, 2005), <http://www1.va.gov/opa/pressrel/pressrelease.cfm?id=1042>.

191. Zeglin, *supra* note 173, at 3.

192. *Veterans for Common Sense v. Peake*, 563 F. Supp. 2d 1049, 1075 (N.D. Cal. 2008).

193. *Id.*

new PTSD claims per year,¹⁹⁴ combined with the VA's duty to assist,¹⁹⁵ adds up to a large expenditure of resources applied toward veterans' search for evidence. As noted in Part III.B, the VA's efforts to obtain records are often crafted in vague terms and are not targeted for efficient success, which leads to wasted efforts. While individual rating specialists may take their jobs very seriously, in strictly economic terms the VA at large arguably has little incentive to assist veterans efficiently in proving combat experience or stressors, because the result of a successful effort is likely to be an award of benefits. An amended definition of "engaged in combat with the enemy" would shift the VA's focus toward locating clear and convincing evidence that a veteran's combat experience or stressor did not occur. In that case, the "reward" of success would be withholding disability compensation, giving the VA an incentive to find more efficient, targeted ways to research military records.

Rounding out this spectrum of presumption rationales are policy and probability. In the context of veterans' disability benefits, these two factors have historically intertwined. Perhaps the bedrock of all veterans' disability policy is the idea that "[veterans] ought not to be deprived of the benefit of the fact that they have served their country, and therefore are entitled to this relief."¹⁹⁶ In 1921, when Senator Pomerene declared this credo during a Senate debate, Congress enacted presumptions of service connection for tuberculosis and neuropsychiatric disease in order to ease veterans' burden of proving these disabilities originated during their military service.¹⁹⁷ This, despite the "large percentage" of the general population that had tuberculosis and the "impossibility" of knowing exactly when a person's tuberculosis had become active.¹⁹⁸ Policy competition between science, medicine, and evidence on the one hand and "ensuring that our veterans receive the honor and dedicated care that their courage and bravery demand"¹⁹⁹ on the other took shape in the practice of resolving doubt in favor of the veteran—a policy that existed in 1941 in VA claims adjudication²⁰⁰ and continues today. Arguably, and whether articulated or not, this was the policy underlying the 1921 presumptions and every

194. CBO REPORT, *supra* note 11, at 2–3.

195. 38 U.S.C. § 5103A(a), (d) (2006).

196. DEP'T OF VETERANS AFFAIRS, ANALYSIS OF PRESUMPTIONS OF SERVICE CONNECTION 8 (1993) (citing 61 CONG. REC. 4105 (daily ed. July 20, 1921) (remarks of Sen. Pomerene)).

197. *Id.* at i.

198. *Id.* at 8 (citing 61 CONG. REC. 4106 (daily ed. July 20, 1921) (remarks of Sen. Pomerene)).

199. Rep. Bob Filner, Chairman's Welcome Message, <http://veterans.house.gov> (last visited Feb. 10, 2009).

200. February Hines Letter, *supra* note 145, at 3.

presumption of service connection that Congress or the VA has enacted since,²⁰¹ because medical science is far from absolute. Even now, while scientists argue about the causes and validity of PTSD in veterans,²⁰² the VA marches ahead with its efforts to provide resources for soldiers with PTSD.²⁰³ That a rebuttable presumption replaces evidence of a PTSD stressor for some veterans is an example of veteran-friendly policy trumping the shifting sands of science. Given the many reasons why meeting the evidentiary requirement is difficult, giving all combat zone veterans with PTSD access to this rebuttable presumption is one more area where the policy of resolving doubt in favor of the veteran should apply.

Without a doubt, clarifying the definition of “engaged in combat with the enemy” will cost more than keeping it artificially restrictive.²⁰⁴ However, 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. In that hypothetical, all veterans who do in fact meet the requirements would receive the benefits they are entitled to—as opposed to the current situation, where only some veterans who in fact meet the requirements receive what they are entitled to.²⁰⁵ This illustrates that the intent of the government’s policy is not to save money; it is to ensure that only those entitled to benefits actually receive benefits. Artificially increasing evidentiary burdens in a way that excludes bona fide claimants does not further that goal. By contrast, amending the definition of “engaged in combat with the enemy” would more accurately reflect the realities of modern warfare. The number of veterans receiving benefits will approximate the number of veterans who would currently be eligible if they could locate evidence of their combat experience or stressor.

Ultimately, all of these rationales blend back into the underlying concept of fairness. Examining the combat veteran presumption through the lens of presumption principles is like playing with light and a prism: The prism makes the different arguments distinguishable, but remove it and they all merge into one thing—justice for veterans.

201. For example, in 1994, “notwithstanding the scientific and medical uncertainty surrounding [certain] illnesses associated with Persian Gulf service, Congress enacted [a] presumption of service connection applicable to [these] illnesses.” Zeglin, *supra* note 173, at 12.

202. *See generally* Letters, *supra* note 182.

203. *See generally* Nat’l Ctr. for PTSD Home Page, Dep’t of Veterans Affairs, <http://www.ncptsd.va.gov> (last visited Feb. 10, 2009).

204. CBO REPORT, *supra* note 11, at 3 (estimating a \$4.8 billion dollar increase in direct spending over the 2009–18 period).

205. *See id.*

V. CONCLUSION

Congress should pass pending legislation to amend 38 U.S.C. 1154(b) to clarify the definition of “engaged in combat with the enemy” to include active service in a combat zone. Modern veterans with legitimate combat experience struggle, often in vain, to meet a definition caught in a time warp. By relying on World War I era problem-solving, the General Counsel precedent opinion defining “engaged in combat with the enemy” creates an evidentiary hurdle that was never meant to be. Those who drafted that language could not have envisioned a “war without fronts”²⁰⁶ that would force veterans to prove combat service. Today, the realities of modern warfare, the persistent problems with recordkeeping, the longstanding policy recognizing a duty to those who made sacrifices on the battlefield, and a general aversion to inequity all demand that every combat veteran stand on an equal footing. For veterans who served in a combat zone, coming up with evidence of combat experience should not be about pointing to a medal, wading into the unreliable morass of official records, or hoping to find a long-lost buddy who remembers what happened. By defining “engaged in combat with the enemy” to include active service in a combat zone, Congress has the opportunity to free itself from the solutions of the past and create a one that will be relevant for present and future disabled veterans.

206. See generally THOMAS C. THAYER, WAR WITHOUT FRONTS: THE AMERICAN EXPERIENCE IN VIETNAM (Westview Press 1986).

APPENDIX

The bills in the table below have been broken apart so that provisions that are identical and those with a similar purpose appear across from each other horizontally.

H.R. 6450 (1940) ²⁰⁷ ; H.R. 156 (1941) ²⁰⁸	H.R. 2652 (1941) ²⁰⁹	H.R. 4905 (1941) ²¹⁰ , now 38 USC 1154(b)
Where the veteran is shown to have been engaged in combat with an enemy of the United States, or during some service in some war, campaign or expedition, to have been subjected to other arduous conditions of military or naval service,	Where any part of the veteran's service is shown to have been in a combat area during a war, campaign, or expedition, he shall be considered to have been subjected to arduous conditions of military or naval service and	In the case of any veteran who engaged in combat with the enemy in active service with a military or naval organization of the United States during some war, campaign, or expedition, the Administrator of Veterans' Affairs is authorized and directed to accept as sufficient proof of service connection of any disease or injury alleged to have been incurred in or aggravated by service in such war, campaign, or expedition, 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

207 .H.R. REP. NO. 76-2982, at 1 (1940).

208. Text of this bill is inferred from the February Hines Letter, *supra* note 145, at 1.

209. Text of this bill is found in *World War Hearings*, *supra* note 127, at 179 (statement of Millard W. Rice).

210. Text of this bill is found in the July Hines Letter, *supra* note 140, at 317.

<p>such disability as can reasonably be considered to have been due to or aggravated by the conditions of all of his active military or naval service, shall be determined to be directly due to or aggravated by such service in line of duty, . . .</p> <p>unless it shall have been clearly established by clear and unmistakable evidence that any such disability was not originated in or aggravated by his military or naval service.</p>	<p>such disability as can reasonably be considered to have been due to or aggravated by the conditions of his active military or naval service shall be determined to be directly due to or aggravated by such service in line of duty, . . .</p> <p>unless it shall have been clearly established by clear and unmistakable evidence that any such disability was not originated in or aggravated by his military or naval service.</p>	<p>incurrence or aggravation in such service, and, to that end, shall resolve every reasonable doubt in favor of the veteran:</p> <p><i>Provided,</i> That service connection of such injury or disease may be rebutted by clear and convincing evidence to the contrary.</p>
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