



WRITTEN STATEMENT OF
THE AMERICAN CIVIL LIBERTIES UNION

For a Hearing on

“The Ruth Moore Act of 2013 (S. 294)”

**Submitted to the
U.S. Senate Committee on Veterans’ Affairs**

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On behalf of the American Civil Liberties Union (ACLU) and its more than a half million members, countless additional supporters and activists, and 53 affiliates nationwide, we commend the Senate Veterans' Affairs Committee for bringing attention to the problems survivors of military sexual trauma face when applying for disability benefits from the Department of Veterans Affairs (VA).

For decades, the ACLU has worked not only to end discriminatory treatment within our military,¹ but also to prevent and respond to gender-based violence and harassment in the workplace and to ensure women's full equality. The ACLU also works to hold governments, employers and other institutional actors accountable so as to ensure that women and men can lead lives free from violence.

Over the last several years, Congress, the Department of Defense and the VA have grappled with the scourge of sexual harassment, sexual assault and rape within the military. Although a variety of proposals have been implemented and some progress has been made to prevent and respond to sexual assault, sexual harassment and rape in the military, the problem is deeply-rooted and persists. More than 3,300 reports of sexual assault were made in FY 2012,² but we know that the incidence of sexual assault is significantly underreported. The Pentagon estimated that 26,000 incidents of sexual assault occurred in 2012 alone,³ and that one in three women serving in the military has been sexually assaulted.⁴ While such statistics alone are alarming, the problem of military sexual assault is compounded by the fact that service members who leave the service find that the trauma they experienced as a result of sexual assault is not adequately recognized by the VA.

The ACLU supports the Ruth Moore Act of 2013 (S. 294), which would remove current barriers that far too often prove insurmountable for sexual assault survivors who apply for disability compensation for post-traumatic stress disorder (PTSD) and other mental health conditions. Congress should act quickly to enact this legislation.

I. Congressional action is needed to ease the evidentiary burden of proof survivors of sexual assault must meet when seeking disability benefits.

Veterans who were sexually assaulted during their service in our armed forces, and who now seek disability benefits, for conditions such as PTSD and depression, face enormous barriers. Data obtained through a FOIA lawsuit, filed in 2010 by the ACLU and the Service Women's Action Network (SWAN) against the VA and the Department of Defense, shows that only 32 percent of PTSD disability claims based on military sexual trauma were approved by the Veterans Benefits Administration (VBA), compared to an approval rate of 54 percent of all other PTSD claims from 2008-2010. Moreover, of those sexual assault survivors who were approved for benefits, women were more likely to receive a lower disability rating than men, therefore qualifying for less compensation.

¹ Most recently, In November 2012, the ACLU initiated a lawsuit, on behalf of the Service Women Action Network and other plaintiffs, against the Department of Defense challenging the ground combat exclusion. Over the years, we have also successfully challenged military recruitment standards and military academy admissions policies that discriminated against women; fought for servicewomen to receive the same military benefits as their male counterparts; and defended the rights of pregnant servicewomen; and advocated for servicewomen's access to reproductive health care.

² DEPARTMENT OF DEFENSE, ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2012, VOLUME I, 3 (2013), available at http://www.sapr.mil/media/pdf/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_ONE.pdf.

³ *Id.* at 25.

⁴ James Risen, *Military Has Not Solved Problem of Sexual Assault, Women Say*, N.Y. TIMES, Nov. 2, 2012 at A15, available at <http://www.nytimes.com/2012/11/02/us/women-in-air-force-say-sexual-misconduct-still-rampant.html?pagewanted=all&r=0>.

Despite the disparity in approved claims uncovered by the FOIA lawsuit, the VA has indicated that it is unwilling to amend 38 C.F.R. § 3.304(f), the current regulation governing the claims process for PTSD.⁵ In 2011, the VA issued a “fast letter” to all VA Regional Offices (VAROs) reiterating the current policy while also emphasizing that the regulation should be interpreted liberally to give a veteran’s claim the benefit of the doubt.⁶ The letter provided further guidance for what secondary markers—evidentiary signs, events or circumstances—a claims officer should seek out and review in determining the validity of a disability claim. While we commend the VA for providing such guidance, it fails to address the problem. Although the VA specifically “developed regulations and procedures that provide for a liberal approach to evidentiary development and adjudication of [] claims,”⁷ the subjective nature of the current policy actually works against survivors of sexual assault.

The VA’s regulations explicitly treat veterans who suffer from PTSD based on sexual trauma differently from all other PTSD claims, including those related to combat and hostile military activity. Even when a veteran can establish a diagnosis of PTSD and his or her mental health provider connects PTSD to sexual assault during service, the VA “is not required to accept doctors’ opinions that the alleged PTSD had its origins”⁸ in the claimant’s military service. The VA reasoned that while such a diagnosis may constitute credible evidence, it is not always probative.⁹ As a result, the VA requires additional evidence, such as records from law enforcement authorities, hospitals, or mental health facilities, that generally does not exist. As the Department of Defense itself acknowledges, the vast majority of service members who are assaulted do not report that assault because of the retaliation they are likely to face.

Another problem faced by veterans is that until recently, the Department of Defense retained restricted reports of sexual assault for only 5 years; after that time the records were destroyed.¹⁰ On average, a veteran who was assaulted waits 15 years after leaving the service to file a disability claim with the VA.¹¹ Because of this delay and the Pentagon’s former record retention policy, veterans who were sexually assaulted are effectively cut off from accessing critical evidence substantiating their disability claim to the VA. Likewise, as more time passes before a veteran seeks disability benefits, the harder it becomes for that individual to later prove a claim of sexual assault through secondary markers, such as statements from fellow service members or deterioration in work performance. People move away, while documents are lost or discarded.

Even when a veteran is able to present evidence to a claims examiner, whether the claim is approved is ultimately determined by a subjective standard that differs from examiner to examiner leading to inconsistent outcomes.¹² Moreover, VAROs have seen high workforce turnover and the time period over which new

⁵ See *Invisible Wounds: Examining the Disability Compensation Benefits Process for Victims of Military Sexual Trauma: Hearing Before the Subcomm. on Disability Assistance & Mem’l Affairs of the H. Comm. on Veterans’ Affairs*, 112th Cong. (2012) (statement of Anu Bhagwati, Executive Director, Service Women’s Action Network).

⁶ See Training Letter 11-05 from Thomas J. Murphy, Director, Compensation & Pension Services, to all VA Regional Offices (Dec. 2, 2011).

⁷ *Id.*

⁸ *Godfrey v. Brown*, 8 Vet. App. 113, 121 (1995).

⁹ Post-Traumatic Stress Disorder Claims Based on Personal Attacks, 67 Fed. Reg. 10330 (Mar. 7, 2002) (codified in 38 C.F.R. pt. 3)

¹⁰ The National Defense Authorization Act for FY13 changed this policy so that now DoD must retain these documents for 50 years, but only at the request of the service member. Pub. L. No. 112-239, § 577, 126 Stat. 1632, 1762.

¹¹ DEP’T OF VETERANS AFFAIRS, VETERANS HEALTH INITIATIVE: MILITARY SEXUAL TRAUMA 58 (2004), available at http://www.publichealth.va.gov/docs/vhi/military_sexual_trauma.pdf.

¹² A study commissioned by the VA reported that “rating decisions often call for subjective judgments.” INST. FOR DEF. ANALYSES, ANALYSIS OF DIFFERENCES IN DISABILITY COMPENSATION IN THE DEPARTMENT OF VETERANS AFFAIRS, VOLUME 1: FINAL REPORT, S-3 (2006), available at http://www.va.gov/VETDATA/docs/SurveysAndStudies/State_Variance_Study-Volumes_1_2.pdf. See also *Title Redacted by Agency*, Bd. Vet. App. 0318972 (2003) (veteran’s claim was denied despite presenting substantial evidence corroborating his sexual assault, including documentation of erratic behavior, sworn statements attesting to military performance issues, and records of mental counseling and treatment for sexual transmitted diseases.).

employees receive training on adjudicating claims has been significantly reduced from one year to just eight weeks.¹³ As the VA grapples with the overwhelming number of outstanding benefits claims, which now total almost 900,000,¹⁴ unprepared and overburdened employees may not have the time or the skill set needed to properly investigate and adjudicate complex sexual assault disability claims.

While the VA stands by its current policy, it is clear that the Department is not achieving its mission to “treat all veterans and their families with the utmost dignity and compassion.”¹⁵ Instead the VA has created an unfair standard that sets sexual assault survivors up to fail in claiming the disability benefits they deserve.

The Ruth Moore Act would rectify the current policy and bring fairness to the claims process. Under S. 294, the VA would be required to treat PTSD claims related to sexual assault the same way it treats all other PTSD claims: by accepting the veteran’s lay testimony as sufficient proof that the trauma occurred “in the absence of clear and convincing evidence to the contrary.”¹⁶ This standard will help reduce the number of inconsistent and arbitrary adjudication decisions that result from applying a subjective standard and will decrease the risk of veterans experiencing further trauma as they navigate the claims process.

II. S. 294’s reporting requirement helps ensure government accountability.

The ACLU works to hold our government accountable for responding to and taking proactive measures to end the cycle of violence in our country. For this reason, in 2010 we filed a federal lawsuit against the Department of Defense and the VA for their failure to respond to our FOIA requests seeking records documenting incidents of sexual assault, sexual harassment, and domestic violence in the military and how the government addresses this violence. The goal of the lawsuit was to “obtain the release of records on a matter of public concern, namely, the prevalence of [military sexual trauma] (MST) within the armed services, the policies of DoD and the VA regarding MST and other related disabilities, and the nature of each agency’s response to MST.”¹⁷

Given our past work in advancing government accountability, we strongly support the provision in the bill that requires the VA to submit an annual report to Congress that includes statistics, such as the number sexual assault-related claims that were approved or denied, and the average time it took the VA to adjudicate a claim.

Should you have any questions, please don’t hesitate to contact Senior Legislative Counsel Vania Leveille at 202-715-0806 or vleveille@dcacclu.org.

¹³ *Focusing on People: A Review of VA’s Plans for Employee Training, Accountability, and Workload Management to Improve Disability Claims Processing: Hearing Before H. Comm. on Veterans’ Affairs*, 113th Cong. (2013) (submission for the record of The American Federation of Government Employees).

¹⁴ Rick Maze, *VFW defends VA official, despite continued backlog*, FED. TIMES (Mar. 20, 2013, 4:19 PM), <http://www.federaltimes.com/article/20130320/DEPARTMENTS04/303200003/VFW-defends-VA-official-despite-continued-backlog>.

¹⁵ U.S. DEP’T OF VETERANS AFFAIRS, ABOUT VA: MISSION, CORE VALUES & GOALS, available at http://www.va.gov/about_va/mission.asp (last visited Apr. 15, 2013).

¹⁶ Ruth Moore Act of 2013, S. 294, 113th Cong. § 2(a) (2013).

¹⁷ Complaint at 2, *Serv. Women’s Action Network v. U.S. Dep’t of Def.*, No. 3:2010cv01953 (D. Conn. Feb. 23, 2011).