REFRAMING AND RECONSTITUTING NORMATIVE VIEWS OF MILITARY TRAUMA: MOVING BEYOND GENDERED PARADIGMS AND CORRECTING POLICIES THAT UNDULY AND UNLAWFULLY SUBJECT NON-COMBAT TRAUMA CLAIMS TO STRICTER SCRUTINY

JOEL MARRERO*

INTRODUCTION

"Trauma" is a troublesome term in military law and culture. The term is inconsistently and incoherently defined in legal, policy, and historical settings. Its conceptualizations can take on feminine or masculine and visible and invisible forms. In a time of war and imminent military drawdown, when many service members are expected to return home injured, it is imperative to use a definition of trauma that comprehends the manifold challenges wounded service members experience as they transition into civil society and encounter the realities of military-related trauma. A focus on the intense interpretative conflicts between combat trauma and other forms of trauma that are conveyed through law and public discourse can contribute to such a project. A richer understanding of what constitutes trauma not only emboldens our collective will to care for those who have sacrificed much to defend us, but can also improve legal and policy interventions.

One program that defines trauma in a troubling way is the Traumatic Injury Protection Servicemember Group Life Insurance ("TSGLI") program, which Congress created in 2005 to address the financial hardships that some severely wounded service members experience.[1] TSGLI provides a service member who sustains certain traumatic injuries some financial assistance while rehabilitating.[2] Yet, not all service members who qualify for compensation under the law's eligibility criteria are approved for compensation.[3] A 2009 report by the

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* Joel Marrero is a fair housing and civil rights attorney with the Southern California Housing Rights Center. When this Article was written, he was a law fellow, attorney, and faculty at the Institute for Military Personnel, Veterans, Human Rights & International Law & AMVETS Legal Clinic at Chapman University. He obtained a Bachelor of Arts in Anthropology at Columbia University and Juris Doctorate with a contraction in Critical Race Studies at the UCLA School of Law. He is grateful to Professor Kyndra Rotunda and the Military Law Institute and AMVETS Legal Clinic for their unconditional support. This Article is dedicated to the brave military women and men who put their lives at risk in service of this country.

1. Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. No. 109-13, 119 Stat. 231 (2005); 38 U.S.C. § 1980A (2013).

2. TSGLI PROCEDURES GUIDE, Traumatic Injury Protection Under Servicemembers' Group Life Insurance (TSGLI) 2.16 (The Dep't of Veterans Affairs 2012) [hereinafter TSGLI GUIDE].

3. *See generally* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-108, TRAUMATIC BRAIN INJURY: BETTER DOD AND VA OVERSIGHT CAN HELP ENSURE MORE ACCURATE, CONSISTENT, AND TIMELY DECISIONS FOR THE TRAUMATIC INJURY INSURANCE PROGRAM (2009) [hereinafter GAO REPORT].

Government Accountability Office found that the Department of Veteran Affairs ("VA") and Department of Defense ("DOD"), through the branches of service, may have wrongfully denied claims in significant numbers.[4] The report partly attributed this finding to ambiguities in the eligibility criteria and confusion among medical service providers.[5]

The source of wrongful denials may lie somewhere between confusion among service providers and claimants, on the one hand, and government-promulgated administrative procedures that contravene and attempt to supplant the statute and regulations, on the other.[6] The administrative guidelines subject certain types of claims, namely claims for trauma sustained outside of combat, to stricter scrutiny than claims for combat-related trauma.[7] Under the VA's standards,[8] those who are injured in combat are likely to qualify, while those who are not injured in combat but are in fact eligible under the law, face a greater likelihood of receiving a denial letter.[9] And yet the law does not distinguish between combat and non-combat wounds. The law, however, does disregard a host of other traumas, such as Post Traumatic Stress Disorder ("PTSD") and traumas caused by assaults within the military, such as Military Sexual Trauma ("MST").[10] While the law recognizes a certain set of traumas as compensable[11] and the administrative procedures recognize a narrower subset of traumas as compensable,[12] neither recognize trauma in a robust and holistic sense. The hierarchy between combat trauma and non-combat trauma trades on a culture that presents the visibly combat-wounded soldier as the chief victim of military service. And herein lays the source of conflicts between policy and law, on the one hand, and reality on the other.

This Article argues that the value system and culture presenting the combat-wounded soldier as the paradigmatic victim of military service are at the root of the interpretive conflicts. A paradigm of thought, centered on a culture, belief system, and set of assumptions, idolizes the soldier as a combat warrior. The wounded combat-warrior is the idyllic representation of heroism, bravery, and sacrifice. The combat-warrior is the chief and only protagonist in a narrative that underwrites support for the TSGLI legislation and its promulgation in the

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4. *Id*. at 4.

5. *Id*. at 25.

6. *See infra* Part III.

7. *See infra* Part III.

8. *SGLI Traumatic Injury Protection Program (TSGLI)*, U.S. DEP'T. OF VETERANS AFFAIRS (Nov. 14, 2013, 8:13 PM), http://benefits.va.gov/insurance/tsgli.asp, *archived at* http://perma.cc/5CZ8-CPSX.

9. *See infra* Part I.A.1.

10. *Traumatic Servicemembers' Group Life Insurance Frequently Asked Questions*, DEP'T OF VETERANS AFFAIRS 2 (2008), *available at* https://www.hrc.army.mil/site/crsc/tsgli/documents/TSGLI_FAQ_w_Benefits_Expansion_12022008.pdf, *archived at* http://perma.cc/E4Y8-HX5R (excluding psychological and mental illnesses and disorders as covered under TSGLI).

11. *See* 38 C.F.R. § 9.20(f) (2013).

12. *See* TSGLI GUIDE, *supra* note 2.

administrative procedures.

The paradigm is far from gender-neutral and, in actuality, is imbued with a long history of exclusionary beliefs, biases, and policies.[13] While it places one aspect of military service at the apex of heroism, it also obfuscates other aspects of military service, sacrifices, and contributions. The paradigm even works to the detriment of the very service member whose prerogative it appears to advance because it does not account for other types of wounds, such as wholly invisible psychological wounds, incurred in all forms of service,[14] and disregards vulnerabilities that service members face outside the battlefield. This dated paradigm fosters conflict on the micro level between the administrative procedures and statute, and on the macro level between narrow perceptions of military trauma and the comprehensive reality of military service.

The Article proceeds in the following manner: Part I discusses the background of the TSGLI legislation, pertinent issues identified by the GAO Report, and an example of a claim for non-combat trauma that was denied under the VA's and DOD's rigorous administrative guidelines. Part I concludes that under the TSGLI disability program, wounds are conceived on a continuum and subject to different levels of scrutiny: visible combat wounds receive the greatest recognition, followed by physical combat wounds that result in invisible injuries, followed by non-combat related wounds recognized under the statute, and wounds that receive no recognition whatsoever. This continuum exists despite the statute and regulations, which make no distinctions between non-combat and combat trauma.

Part II explains the conflict on a macro level, namely attributing the difference in trauma recognition to a normative framework, set of beliefs, and a paradigm of thought that views combat as the authentic and primary source of military trauma. Part III then explains how administrative law principles can arbitrate the interpretative conflict between definitions of trauma found in the administrative procedures or administrative decisions and those found the statute and regulations. The section concludes that when administrative procedures subject a claim to greater scrutiny because the claim fails to adhere to a normative conception of military trauma, principles of administrative law affords the claimant some recourse.

Because principles of administrative law have their limits in assisting a wrongfully denied claimant, Part IV proposes a special set of federal court cases that could tip the scale in favor of the service member. The Article concludes that recognition of trauma grounded in the multiple dimensions of military service and free from gender bias is critical to shaping our collective understanding of the risks inherent with military service, as well as fashioning effective policies and laws aimed to give service members care and relief.

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13. *See infra* note 103 and accompanying text.

14. *Id*.

I. TSGLI BRIEF HISTORY

Before we can improve the lives of wounded service members, it is critical to understand how military benefits operate.

A. TSGLI Background

On May 11, 2005, the U.S. Congress enacted Public Law 109-13, codified in Section 1980A of Title 38 of the United States Code, which created the Traumatic Injury Protection Servicemembers' Group Life Insurance ("TSGLI") program, effective December 1, 2005.[15] TSGLI was designed to offset the financial hardships that traumatically injured service members incur during treatment and rehabilitation periods regardless of where they are injured.[16] According to the VA and congressional records, military service members who are totally and permanently injured commonly incur financial costs directly associated with the long and arduous treatment and rehabilitation period.[17]

Take the example of an injured soldier returning to the United States from deployment. Ordinarily, the soldier is first brought to a field hospital, then to Landstuhl Regional Medical Center in Germany, and finally to Walter Reed National Military Medical Center, located in the Washington, D.C. area.[18] Depending on the severity of the injury and type of treatment required, the soldier can remain in convalescence between hospitals for days if not weeks.[19] The financial burden generally sets in when family members travel from far and wide to be at the bedside of the injured soldier.[20] In many instances, family members relocate to Washington, D.C. indefinitely.[21] The costs brought on by new or additional living expenses, travel, lodging, and sometimes job loss, not to mention loss of future employment opportunities, can be onerous.[22] TSGLI is designed to relieve some of that burden by providing immediate financial relief in the form of lump-sum payments ranging anywhere from $25,000 to $100,000.[23]

The statute requires the VA to define the losses payable under TSGLI, prepare the regulations, and write procedures.[24] In practice, the VA implements the regulations and procedures, while the DOD, through each branch of service, decides TSGLI claims.[25] Of particular importance is a feature of the statute,

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15. Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. No. 109-13, 119 Stat. 231 (2005); 38 U.S.C. § 1980A (2013).

16. *See generally* 38 U.S.C. § 1980A (2013).

17. GAO REPORT, *supra* note 3, at 7.

18. KYNDRA MILLER ROTUNDA, MILITARY AND VETERANS LAW 78-79 (West 1st ed. 2011).

19. *Id*.

20. *Id*.

21. *Id*.

22. *Id.*

23. 38 C.F.R. § 9.20 (2013); *see also* GAO REPORT, *supra* note 3, at 9.

24. 38 U.S.C. § 1980A(b)(1) (2013).

25. GAO REPORT, *supra* note 3, at 10. TSGLI is implemented as an insurance rider to the

which extends coverage to service members who are injured on or after December 5, 2005, for a traumatic injury sustained *anywhere*.[26] To qualify for TSGI, a service member must show a traumatic injury directly resulting from a traumatic event.[27] Under the legislation's granting authority, the VA created an "other traumatic permanent injury category to act as a "catch-all."[28] This "other traumatic injury" category is meant to cover injuries not specifically enumerated in 38 U.S.C. § 1980A, but instead found in 38 C.F.R. § 9.20, injuries that may nevertheless be the product of combat trauma.[29]

Servicemembers' Group Life Insurance ("SGLI") plan and coverage is automatic upon entry into service with premiums at $1 per month for those with full-time SGLI coverage. *Id.* The DOD, through the branches of service, pays any claims in excess of the premiums received. *Id.* at 1. Although the program was broadly modeled after commercial Accidental Death and Dismemberment ("AD&D") insurance coverage, TSGLI differs from AD&D commercial policies to account for the unique needs of military activity. *Id*. For instance, a military service member who is permanently disabled, unable to continue in the military, and qualifies for TSGLI may also qualify for military disability benefits. Once that military service member is medically separated, he or she may also qualify for VA disability benefits. For VA disability benefit requirements, see generally *Disability Compensation*, U.S. Dep't of Veterans Affairs (Nov. 14, 2013, 9:33 PM), http://www.va.gov/explore/disability-compensation.asp?gclid=CJ7ruNLf5boCFcZV4god-HUALA, *archived at* http://perma.cc/MN36-TWY5.

26. 38 U.S.C. § 1980A(a)(1) (2013).

27. Specifically, the claimant must: (1) show a qualifying injury or loss directly caused by a (2) traumatic event which occurs before midnight on the day that the member separates from the uniformed services, (3) show injury or loss that manifests within 730 days (two years) of the traumatic event, and (4) survive for at least seven days from the date of the traumatic injury. 38 C.F.R. § 9.20(d) (2013). The legislation and regulations provide some important eligibility caveats. An injury cannot be caused by a mental disorder, mental or physical illness or disease, unless caused by pyogenic infection, biological, chemical or radiological weapon. *Id.* § 9.20(e)(4). TSGLI also does not cover attempted suicide or injuries sustained while committing or attempting to commit a felony, injuries caused by self-inflicted wounds, medical or surgical treatment of an illness or disease, or willful use of an illegal or controlled substance, unless administered or consumed on the advice of a medical professional. *Id.* § 9.20(e)(3). The regulations also identify the schedule of losses. Some examples include $50,000 for the total and permanent loss of speech, $25,000 for total and permanent loss of hearing in one ear, and $100,000 for paralysis such as quadriplegia, paraplegia, and hemiplegia. *Id.* § 9.20(f).

28. *See* Veterans' Housing Opportunity and Benefits Improvement Act of 2006, Pub. L. 109-233(4)(b), 120 Stat. 397; 38 U.S.C. § 1980A (2013). *See also* Servicemembers' Group Life Insurance Traumatic Injury Protection Program—Genitourinary Losses, FEDERAL REGISTER, https://www.federalregister.gov/articles/2011/12/02/2011-31020/servicemembers-group-life-insurance-traumatic-injury-protection-program-genitourinary-losses (last visited July 9, 2014).

29. (1) Inability to perform certain daily activities ("ADL") for at least 30 consecutive days, (2) hospitalization for at least 15 consecutive days, or (3) hospitalization and inability to perform activities of daily living for specified periods of time. 38 C.F.R. § 9.20(f) (2013). The ADLs are (1) bathing, (2) continence, (3) dressing, (4) eating, (5) toileting, and (6) transferring in and out of bed or a chair. *Id.* § 9.20(e)(5)(vi). If the claimant can show an inability to perform two of these

B. Recognized and Non-Recognized Wounds Exist Along a Continuum

Per 38 U.S.C. § 1980A(a)(2), payment is granted, "if a member suffers more than one such qualifying loss as a result of traumatic injury from the same traumatic event."[30] Section 1980A(b)(1) of 38 U.S.C., the section awarding TSGLI benefits to eligible service members, states, "a member who is insured against traumatic injury under this section is insured against such losses due to traumatic injury (in this section referred to as "qualifying losses") as are prescribed by the Secretary by regulation."[31] The regulation promulgating the statute, 38 C.F.R. § 9.20(b)(1), defines traumatic event as "the application of external force, violence, chemical, biological or radiological weapons, or accidental ingestion of a contaminated substance causing damage to a living being."[32] Section 9.20(c)(1) of 38 C.F.R. defines traumatic injury as "physical damage to a living body that is caused by a traumatic event as defined in paragraph (b) of this section."[33] The regulations continue by defining the exclusions to "traumatic injury" and "traumatic event." Because the term "traumatic event" modifies the term "traumatic injury," a qualifying "traumatic injury" is one that is caused only by a "traumatic event" as defined by the statute or regulation.[34]

While the regulations provide guidance on what constitutes a "traumatic injury" and "traumatic event,"[35] the VA promulgates TSGLI procedures to guide claim adjudicators in determining whether a claim meets the criteria set forth in the statute and regulations.[36] The guide defines "traumatic event" as the "the application of external force, violence, chemical, biological, or radiological weapons, accidental ingestion of a contaminated substance, or exposure to the elements that causes damage to the body."[37] External force is "force or power that causes an individual to meet involuntarily with an object, matter, or entity that causes the individual harm."[38] However, the term "involuntary," which materially modifies "external force," is absent from the legislation[39] or

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six functions for a period of 30 consecutive days, he or she can recover $25,000. *Id.* § 9.20(f). For each additional thirty days the claimant is entitled to an additional $25,000, but no more than $100,000. *Id*. A service member with a traumatic brain injury, an injury also not specifically enumerated, can also recover under TSGLI if they are in a coma or can demonstrate an inability to perform two of the six ADLs after only fifteen consecutive days instead of thirty. *Id*.

30. 38 U.S.C. § 1980A(a)(2) (2013).
31. *Id.* § 1980A(b)(1).
32. 38 C.F.R. § 9.20(b)(1) (2013).
33. *Id.* § 9.20(c)(1).
34. *Id.* § 9.20(c)(1).
35. *See generally id.* § 9.20(b)-(c).
36. *See generally* TSGLI GUIDE, *supra* note 2.
37. *Id*. at 4.
38. *Id*.
39. *See generally* 38 U.S.C. § 1980A (2013).

regulations.[40]

Under the "involuntary external force" criteria set forth by the VA in its procedures guide,[41] service members injured in combat are more likely meet the criteria while service members injured in non-combat situations are likely to be denied. However, under 38 U.S.C. § 1980A and 38 C.F.R. § 9.20, a service member who sustains a traumatic injury anywhere may be eligible for compensation,[42] regardless of whether they are in engaged in combat. For instance, if a full time active duty service member is traumatically injured during a basketball game while on leave, under 38 U.S.C. § 1980A and 38 C.F.R. § 9.20 the service member may be eligible. The application of the "involuntariness" standard in the administrative procedures would likely lead an adjudicator to find that the basketball game was not involuntary. Conversely, an adjudicator would be remiss to deny a claim from a soldier who is accidentally injured during combat, an ultra-hazardous activity that carries a greater risk of "involuntary" trauma. Indeed, it is coincidence that the administrative guide is replete with examples of combat trauma as claims that are likely to be recognized for compensation.[43]

Despite the friction between the standards in the regulations and the standards in the administrative procedures, the law and administrative procedures together illustrate concepts of compensable and non-compensable injuries along on a continuum: claims for visible combat wounds receive the greatest recognition; claims for invisible combat wounds sustained physically, like traumatic brain injury, are legally recognized but in practice are difficult to prove; claims for visible non-combat wounds are in legal-limbo status where they are recognized by law but in practice face a likelihood of denial; and all other wounds, including invisible wounds of combat that have a tenuous physical connection such as PTSD or trauma caused by assault within the military, i.e., MST, are at the bottom of the hierarchy receiving no legal recognition for purposes of TSGLI.[44] The following subsections illustrate this continuum.

1. Combat Wounds Receive Greatest Recognition.—A statement delivered by former Senator Larry Craig of Idaho in support of the TSGLI amendment demonstrates the genesis of the program and the centrality of soldiers visibly injured in the course of combat as the chief benefactors of the program. On April 21, 2005, Craig made remarks before the Senate to discuss TSGLI.[45] Craig stated

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40. The guide further elaborates on external force indicating, "there is a distinct difference between internal and external forces. 'Internal forces' are forces acting between body parts, and 'external forces' are forces acting between the body and the environment, including contact forces and gravitational forces as well as other environmental forces." TSGLI GUIDE, *supra* note 2, at 4. Like the regulations, the procedures guide defines "traumatic injury" as the "physical damage to your body that results from a traumatic event." *Id*.

41. *Id.*

42. 38 U.S.C. § 1980(A) (2013); 38 C.F.R. § 9.20 (2013).

43. TSGLI GUIDE, *supra* note 2, at 8; 12; 13.

44. 38 C.F.R. § 9.20(f) (2013).

45. 151 CONG. REC. S4094-02 (daily ed. Apr. 21, 2005) (statement of Sen. Craig) [hereinafter

he wanted to discuss the "tremendous gap in the coverage that exists in the treatment of the soldiers, sailors, marines, and airmen" fighting in Afghanistan and Iraq at the very moment the remarks were being delivered.[46] According to Craig, "it is widely known that due to the incredible advances in medicine, service members who may not have survived life-threatening injuries in previous wars are now making it back home alive from Iraq and Afghanistan."[47] Unfortunately, these service members, "must live with injuries that may have left them without their limbs, sight, hearing, or speech ability, or even more."[48] These service members generally return home through, and remain at, the Walter Reed National Military Medical Center where they "learn, through physical and occupational therapy, how to reengage back into society."[49]

During this rehabilitation period, these service members incur acute financial hardships. "For many Guard and Reserve members at Walter Reed, they already have foregone higher paying civilian jobs prior to their deployment."[50] The more time spent in recovery the greater the financial stress.[51] In addition, "family members of injured soldiers bear the burdens necessary to travel from great distances to provide the love and emotional support that is absolutely essential for any successful rehabilitation."[52] Hence the genesis and purpose of TSGLI, to provide "immediate payment [which] would be to give injured service members and their families the financial cushion they need to sustain them before their medical discharge from the service, when veteran benefits kick in."[53]

Senator Craig specifically invoked the story of Army Staff Sergeant, Heath Calhoun, who "had both of his legs amputated after being struck during a rocket-propelled grenade attack in Iraq."[54] Craig spoke about the "financial problems [Sgt. Calhoun] had endured after [his wife] quit her job to be with Heath during convalescence."[55] Although the family was able to barely meet their financial needs during the whole year that it took the military to medically discharge him, that period was an "extremely trying period."[56] Craig closed his remarks by reminding his colleagues to "be vigilant in our care for those who are still fighting to regain the normalcy of the lives they enjoyed prior to sustaining catastrophic injuries in the defense of our freedoms."[57]

While Senator Craig's April 21, 2005, statement before Congress may seem

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Craig Statement].

46. *Id*.
47. *Id*.
48. *Id*.
49. *Id*.
50. *Id*.
51. *Id*.
52. *Id*.
53. *Id*.
54. *Id*.
55. *Id*.
56. *Id*.
57. *Id.*

like a one-off, on September 7, 2006, Craig, as the chairman of the United States Senate Committee on Veterans' Affairs, held a hearing entitled "Hearing on Wounded Warrior Insurance: A First Look at a New Benefit for Traumatically Injured Servicemembers."[58] At the hearing, Craig presented testimony from a combat-wounded soldier to tout the benefits that soldiers, who are injured in combat, drive from the program.[59] Interestingly, rather than referring to the program as TSGLI, Craig along with other senators and speakers referred to the insurance program as the "Wounded Warrior Insurance Program."[60]

Based on Craig's statement before Congress, one has the impression that service members injured in combat are chiefly eligible for TSGLI recovery. This is because Craig's statement places the combat-wounded soldier front and center. Soldiers with traumatic and enduring wounds of war indeed deserve accolades for their priceless sacrifices. Craig's statement was perhaps effective in marshalling support for the amendment. But, despite his worthy intentions, Craig spoke of only one dimension of the reality of military trauma and service.

2. Visible Combat Wounds Privileged Over Invisible Combat Wounds.— According to the VA, "TSGLI has been widely acknowledged as a successful program that has met its intended purpose," claiming that, "4,408 veterans and servicemembers have been paid $273,450,000 under the TSGLI program," as of April 30, 2008.[61] The VA's claim of success, however, may be overstated. One report by the GAO, which analyzed the rate of approval for claims filed by service members with traumatic brain injury ("TBI"), found the "actual approval rate may be lower"[62] for claims involving traumatic brain injury.[63]

Although the GAO's report narrowly concerns claims for TBI, the report shows how service members with invisible combat wounds confront greater challenges in obtaining TSGLI compensation as compared to service members with visible combat wounds.[64] While the evidentiary burden for establishing TSGLI eligibility on a claim for TBI on the basis of a coma is relatively uncomplicated, the task of showing a loss of an Activity of Daily Living due to TBI can be relatively complicated.[65] The GAO, in part, predicates this arduous

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58. *Hearing on Wounded Warrior Insurance: A First Look at a New Benefit for Traumatically Injured Service-Members*, 109th Cong. 746 (2006) (statement of Sen. Craig, Chairman, H. Committee on Veterans' Affairs).

59. *Id*.

60. *Id.*

61. U.S. DEP'T. OF VETERANS AFFAIRS, SERVICEMEMBERS' GROUP LIFE INSURANCE TRAUMATIC INJURY PROTECTION: YEAR ONE REVIEW 5 (2008).

62. GAO REPORT, *supra* note 3, at 3.

63. *Id.* The GAO, in part, attributed discrepancy between the VA's claim and the GAO's findings to the DOD's and VA's lack of "assurance that claim decisions are accurate, consistent, and timely within and across the services." *Id*. The rate of actual approval may be lower, or conversely the rate of denial may be higher, because the VA did not capture all denials for traumatic brain injury in its data. *Id*. at 6.

64. *See generally id*. at 1-3.

65. *Id*.

evidentiary task on the obstacles that service members with TBI have in the basic task of gathering evidence.[66]

The GAO also posits that the difficulty lies in the subjective and unclear eligibility criteria.[67] The GAO attributes the subjectivity and lack of clarity in the eligibility criteria to the applicant and recommends that greater educational outreach would improve service members' and medical providers' understanding of TSGLI.[68] However, the GAO appears to have missed the mark in only attributing subjectivity to medical providers and claimants.[69] The report omits any analysis of wrongful denials by the VA and DOD under their administrative procedures.[70] The following is a case in point in which a service member who would otherwise have been eligible for the military disability benefit was denied under the VA's administrative standard because the injury was not the product of "involuntary external force," an outcome that he would have likely dodged had he sustained the same wound in the course of combat.

3. Non-Combat Traumatic Wounds Are Likely to Receive Lower Recognition.—The story of Army Major W.D. Foster demonstrates the greater level of scrutiny that non-combat trauma claims undergo under the administrative procedures. On November 28, 2004, Foster was deployed to Iraq where he remained stationed until November 3, 2005. [71] During a mandatory bi-annual Army physical fitness test, Foster totally and permanently injured himself.[72] It occurred while performing sit-ups. Foster first completed the push-up portion of the physical fitness test, which measured his chest, shoulder, and triceps muscle endurance. After he completed the push-ups, within two minutes, Foster immediately threw himself on his back onto cement ground where there was loose gravel to commence the sit-up portion of the test. On command, Foster assumed the starting position by lying on his back with his knees bent at a forty-five-degree angle. With full speed, Foster lowered his body to the ground until

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66. *Id*.

67. *Id*. at 4.

68. *Id* at 20, 23.

69. *Id*. at 4-5.

70. *See generally id*. (excluding attribution of TSGLI denials for service members based on insufficient administrative procedures).

71. Foster v. United States, 111 Fed. Cl. 658 (2013).

72. *Id.* at 660 (The Army physical fitness test measures three events: push-ups, sit-ups, and a timed two-mile run. *See APFT Standards*, U.S. ARMY BASIC (Nov. 15, 2013, 11:53 PM), http://usarmybasic.com/army-physical-fitness/apft-standards#.Uob5sr4o7IU, *archived at* http://perma.cc/N5YA-WY6M. Each portion of the exam is scored based on the number of repetitions performed or the time run, and the soldier's gender and age category. *Id.* Soldiers who fail any portion of the fitness test must retake the entire fitness test within three month and are "flagged." A flag renders a soldier ineligible for promotion, reenlistment, or enlistment extension. *APFT—Army PT Test*, U.S. ARMY BASIC (Nov. 15, 2013, 11:54 PM), http://usarmybasic.com/army-physical-fitness/apft#.Uob8Lb4o7IU, *archived at* http://perma.cc/D6DD-7WHC. Failure to pass two or more fitness exams can lead to separation from the Army. *Id.* Conversely, a soldier whose score exceeds an exceptional threshold is awarded a physical fitness badge. *Id.*).

the bottom of his shoulder blades touched the ground.

Foster performed a few sit-ups short of thirty-two when sharp pain rushed through his lower back. After the event, Foster attempted to lift himself in preparation for the running portion, but was unable to do so. He experienced numbness in his legs and could not walk. He was rushed to the Army hospital where he underwent an MRI and later learned that he had a spinal stroke. The stroke caused total and permanent paralysis from the waist down. Foster's doctors identified external blunt force trauma against his back while doing countless sit-ups as the most probable cause of his injury. While there was no obvious bleeding or fracture of the spine, Foster's injury more likely than not resulted from a "traumatic event."[73]

Foster applied for TSGLI benefits, but twice the TSGLI adjudicators denied his claim because the injury was not "a direct result of a qualifying traumatic event."[74] Foster then appealed to the Army Board for Correction of Military Records ("ABCMR") in his final administrative appeal.[75] The ABCMR affirmed the denial but on the grounds that the injury was not caused by an "involuntary" traumatic event as defined by the VA's TSGLI procedures guide.[76] Because the Army's appellate system is designed to reverse errabund military disability adjudications, it is also unlikely that Foster's case is an aberration.[77] The Army's affirmance of Foster's denial suggests systemic denial of claims filed by service members for injuries sustained outside of combat, which under the statute and regulations may be compensable.[78] Had Foster sustained the injury in the course of combat by no fault of his own, his injury would likely be considered a product of "involuntary" force.[79] The distinction between a "voluntary" and "involuntary" external force[80] even is thus more than just semantics. Instead it conceives combat-incurred wounds as categorically distinct from those that are incurred outside of combat.

4. Other Service-Related Traumatic Wounds Receive No Recognition.—To reiterate, 38 U.S.C. § 1980A was developed to provide traumatically injured service members financial assistance during the trying treatment and rehabilitation period.[81] Absent from the statute, regulations, and procedures is any mentioning or recognition of other forms of traumatic injuries that leave service members in financial straits during the treatment and rehabilitation period before they are separated from the military. For instance, the statute and regulations disregard enduring invisible wounds such as PTSD or MST, or even visible traumatic wounds incurred by military assault, or even pregnancies that

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73. *Id.*
74. *Id*.
75. *Id*.
76. *Id*.
77. *Id*.
78. *See generally* 38 U.S.C. § 1980A (2013); 38 C.F.R. § 9.20 (2013).
79. *See* TSGLI GUIDE, *supra* note 2.
80. *Id.*
81. *See generally* GAO REPORT, *supra* note 3.

are the product of rape. While unabated stress experienced during deployment to combat duties is the leading cause of PTSD among service members, unlike TBI, it is typically not caused directly by a physical traumatic force to the head.[82] Moreover, unlike TBI, which is recognized as a compensable injury, PTSD generally carries stigma.[83] Thus, the presumption is that those service members injured during combat receive greater recognition than those who are traumatically injured during their course of military service in a non-combat activity.

II. THE ARCHETYPE OF A COMBAT-WOUNDED SOLDIER AND ITS ROOTS IN A CULTURE WHERE PARADIGMS OF IDEALIZED WOUNDED SOLDIERS SHAPE HOW REALITY IS COMPREHENDED

While TSGLI may be thought to benefit only those who are traumatically injured in the course of combat, in actuality, the legislation covers circumstances where service members are injured outside the battlefield.[84] At the micro level is the issue of what remedies are available to a service member wrongfully denied under unduly rigorous administrative criteria. At the macro level is the interpretive conflict between the reality of military trauma, which encompasses combat trauma and military assault trauma, and the centrality of the combat soldier in a military benefit program. This Article argues that the perception of visibly combat-injured soldiers as the paradigmatic victims of military service conforms to the demands of military culture, normative views of military identity, and gendered paradigms. The idealized masculine soldier, one whose primary purpose and duty is to engage in combat, is seen as impervious to non-combat trauma, including PTSD, MST, or visible non-combat wounds.[85] The idealized soldier, however, is saddled with other burdens largely related to physical combat

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82. *How Common Is PTSD?*, U.S. DEP'T. OF VETERANS AFFAIRS (Nov. 6, 2013, 11:02 AM), http://www.ptsd.va.gov/public/pages/how-common-is-ptsd.asp *archived at* http://perma.cc/MW5B-6XGC.

83. Mary Tramontin, *Exit Wounds: Current Issues Pertaining to Combat-Related PTSD of Relevance to the Legal System*, 29 DEV. MENTAL HEALTH L. 23, 24 (2010).

84. 38 C.F.R. § 9.20(d)(1). A full-time active-duty service member who is insured, which occurs automatically, is covered anywhere. *Traumatic Servicemembers' Group Life Insurance Frequently Asked Questions*, *supra* note 10, at 1. This means that if a service member is on vacation and sustains a traumatic injury he or she may be eligible for TSGLI. *Id*. at 1-2. If the service member is injured as a result of a traumatic event, he or she may recover even if the event occurred on a base in Texas or on a ship in the Mediterranean. *Id*.

85. Lara Stemple makes a similar observation on the types of gender biases that inform normative notions of masculinity and manhood in anti-violence law, stating "assumptions that real men are sexual aggressors and never victims promote harmful perceptions about the 'one' way to be a man. They can justify violent behavior as an archetypal manifestation of maleness, promoting a sense of inevitability about its continuation. Such perceptions may influence behavior. . . ." Lara Stemple, *Male Rape and Human Rights*, 60 HASTINGS L.J. 605, 634 (2008).

hazards.[86]

It is not an aberration that Senator Craig deployed the archetype of the combat-wounded soldier when touting the net-positive of the military's disability program. This is a view of soldiering that plays on dichotomies of gender, which reiterate and instantiate military cultural identities, behavior, and value choices.[87] The following discusses gendered paradigms that contribute to perceptions of wounds conveyed through the TSGLI law as well as administrative practices used to evaluate a TSGLI disability claim. The discussion argues that the centrality of combat in Craig's touting of the law, the continuum of wounds under the TSGLI program with combat wounds at the top of the hierarchy, and the disregard of particular wounds maps a gendered paradigm under-gridding military culture, identity, values, and ethos. The section illustrates that non-combat trauma claims are subject to greater scrutiny, in part, because non-combat trauma is perceived less meritorious as compared to combat trauma.

A. The Paradigm of the Combat Warrior

Paradigms are important because they shape perceptions of reality.[88] A paradigm is a lens or framework through which stories are told, experiences reach comprehension, and assumptions linger unstated.[89] It is the "foundation for our values, attitudes, and notions."[90] What shaped Senator Craig's statement before Congress and, maybe even, perceptions of military benefits at large, is the paradigm of the combat warrior. Feminist legal scholars and sociologist have long theorized on the role that paradigms play in shaping law, policy, and human behavior.[91] One such theorist, Karen O Dunivin, discusses the role that

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86. *See* Jill Elaine Hasday, *Fighting Women: The Military, Sex, and Extrajudicial Constitutional Change*, 93 MINN. L. REV. 96, 104-07 (2008) (discussing the risks and burdens of combat soldiering).

87. Karen O. Dunivin, *Military Culture: Change and Continuity*, 20 ARMED FORCES & SOC'Y 531, 532-34 (1994).

88. *Id*.

89. *Id*.

90. For additional writings on the paradigm of the combat masculine warrior, see Karen O. Dunivin, *Military Culture: A Paradigm Shift?*, AIR WAR C., Maxwell Paper No. 10 (2001).

91. Catharine A. MacKinnon, *Difference and Dominance: On Sex Discrimination, in* THE MORAL FOUNDATIONS OF CIVIL RIGHTS 144-58 (Robert K. Fullinwider & Claudia Mills eds., 1986) (discussing the role of paradigms in keeping women in second-class status under equality law); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracists Politics*, 1989 U. CHI. LEGAL F. 139 (arguing that paradigms shape how the experiences of black women are perceived in theoretical, political, and legal discourse); Kim Lane Schepple, *Legal Story Telling*, 87 MICH. L. REV. 2073 (1989) (containing articles by authors including feminist legal theorist, Mari Matsuda, on the use of stories and narratives to disrupt dominant paradigms); *see also* Judith Butler, *Imitation and Gender Insubordination*, THE LESBIAN AND GAY STUDIES READER 307, 308 (Routledge 1993) (explaining how paradigms of thought inform identity categories which can "be instruments of

paradigms in military culture.[92]

In *Military Culture: Change and Continuity*, Dunivin coined the term "combat-masculine warrior paradigm" to describe the relationship between combat and gender in military culture.[93] The concept of the paradigm combat warrior recognizes several important concepts and observations. First, the military is an institution that is by and large comprised of men.[94] Because of this, the military's culture is shaped by and reflects the ideas of men.[95] However, because the military has evolved and diversified as a result of external demands, male-centric norms, experiences, and value-choices permeate military culture, more at some levels than others.[96] Second, "soldiering" is viewed as a masculine role because it is the profession of war, defense, and combat, work that society sees as men's work.[97] This is a view of military service that is identified as hegemonic, pervasive, and historical.[98] Third, there is a symbiosis between perception and reality: men are enticed to join the military's "cult of masculinity," the military swells with men throughout all ranks, and society views the military and its culture as naturally male-centric because of its large male composition.[99] General reviews of the military are shaped by images of the military and its culture and, concomitantly, images of the military and military culture are shaped by general perceptions. Indeed, the popular military advertising slogan, "We're looking for a few good men" depicts the military as largely dominated by and for men.[100] Fourth, the concept of combat defines the military's and, as a consequence, a soldier's core objective.[101]

The concept of the paradigm of the combat masculine warrior is a collection of these views of the military culture and identity. The notion of combat is central feature of the paradigm because:

> military structures and forces are built around combat activities—ground combat divisions, fighter air wings, and naval aircraft battle groups. The Services organize and train themselves around their combat roles,

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regulatory regimes, whether as the normalizing categories of oppressive structures or as the rallying points for a liberatory contestation of that very oppression").

92. *See generally* Dunivin, *supra* note 87.

93. *Id.* at 532-34.

94. *Id*. at 534.

95. *Id*. at 535.

96. Dunivin, *supra* note 90, at 3-4.

97. *See, e.g.*, MARTIN BINKIN & SHIRLEY J. BACH, WOMEN AND THE MILITARY (Brookings Institution, 1977); CYNTHIA ENLOE, DOES KHAKI BECOME YOU? THE MILITARIZATION OF WOMEN'S LIVES 7-15 (1983).

98. *See, e.g.*, Jamie R. Abrams, *The Collateral Consequences of Masculinizing Violence*, 16 WM. & MARY J. WOMEN & L. 703, 711-15 (2010).

99. Dunivin, *supra* note 87, at 534.

100. *Id*. at 2 (citing Michael McCarthy & Darryl Haralson, *The Few. The Proud. The Ad.*, USA TODAY, Mar. 20, 2003, at B3).

101. Dunivin, *supra* note 87, at 534-37.

> distinguishing between combat arms and support activities. Since the primary role of the military is preparation for and conduct of war, the image of the military is synonymous with the image of combat.[102]

Because combat is defined as an extension or exertion of physical power and because the military is largely comprised of men, military culture consequently exalts idealized norms of a soldier as "a man in power, a man with power, and a man of power."[103] The combat warrior paradigm thus reflects the military's cultural belief of what constitutes the ideal soldier.[104]

The following demonstrates the paradigm of the combat warrior pervasively influences military law and policy. While Dunivin argues that the paradigm has shifted towards greater inclusion and gender neutrality as a result of the inclusion of women in combat roles, Dunivin maintains that, notwithstanding the gradual change in gender makeup of the military, the paradigm continues to place male-centric demands on female soldiers.[105]

B. How the Paradigm Gains Prominence Within the Military Culture and Policy

One way to think about the paradigm is that it shapes policies that influence behavior and goads soldiers, including women, toward masculinized ideals. For instance, the military academies honor code, "we will not lie, cheat, or steal," guides "the ethical development of cadets and midshipmen in preparation for their service as 'officers and gentlemen.'"[106] This honor code idealizes an officer as honest, trustworthy, and male. Ideals of what constitute a combat soldier are also found in the Uniform Code of Military Justice ("UCMJ").[107] Under the UCMJ a service member can face punishment for "behavior unbecoming an officer," which includes acts of adultery, financial irresponsibility, and fraternization.[108]

The paradigm of the combat warrior is seen in laws and policies that are exclusionary in nature.[109] For example, military laws have historically segregated "units commanded by white officers, limited the number of service women in uniform, and prohibited women from performing duties aboard combat ships or

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102. *Id*. at 533.

103. *See* Abrams, *supra* note 98 (citing R.W. CONNELL, MASCULINITIES 77 (University of California Press, 1995) (describing hegemonic masculinity theory); *see also* MICHAEL S. KIMMEL, MASCULINITY AS HOMOPHOBIA: FEAR, SHAME, AND SILENCE IN THE CONSTRUCTION OF GENDER IDENTITY, IN SEX, GENDER AND SEXUALITY 58, 61 (Ferber et al. eds., 2009) (discussing hegemonic masculine ideals).

104. For similar discussions on the intersections of masculinity and military culture, see MICHAEL L. RUSTAD, WOMEN IN KHAKI: THE AMERICAN ENLISTED WOMAN (1982); JUDITH H. STIEHM, BRING ME MEN AND WOMEN 65-66 (1981).

105. Dunivin, *supra* note 90, at 5-9.

106. Dunivin, *supra* note 87, at 535.

107. *Id*.

108. *Id*.

109. *Id*.

aircraft."[110] Women remain excluded from combat-related roles such as "flying, infantry, armor, and sea duty."[111] This is because, according to the Congressional testimony of DOD Under Secretary of Defense Edwin Dorn, "the combat exclusion reflects and reinforces widespread attitudes about the place of women in the military. . . . Put bluntly, women may not be regarded as 'real' soldiers until they are able to do what 'real' soldiers do, which is to kill and die in combat."[112] These laws, at one point or another, reflected the ideal archetype of soldier: white, male, and combat-able.[113] The military justified exclusionary laws and policies "on the grounds of preserving combat effectiveness."[114] That is, homogeneity helped achieve unit cohesion, a critical element of combat effectiveness.

The paradigm of the combat warrior reinforces socializing norms and values. For instance, the ability to conform to the combat warrior role demonstrated manhood because "combat arms provided men the opportunity to demonstrate their masculinity."[115] The military operationalizes the paradigm of the combat warrior through training that imparts the ethos of masculinity.[116] This is evident during basic training where "traditional images of independent, competitive, aggressive, and virile males are promoted and rewarded."[117] Those who cannot meet these norms, like women or homosexuals, are systemically excluded as outsiders or deviants and because their presence, especially in war, challenge and undermine the paradigm of the masculine combat warrior.[118] For this reason, they may be especially vulnerable to punishment, disenfranchised from certain military benefits, or viewed as possessing a handicap. It is no surprise that, "the combat exclusion laws and policies that restrict women's assignments lead some members to perceive women as inferiors."[119]

Gendered exclusionary policies have affected the allocation of military benefits. Take the United States Supreme Court case Frontiero v. Richardson.[120] Frontiero concerned a female service member's right to claim her husband as a "dependent" for purposes of certain benefit laws.[121] The Supreme Court found the difference standards for determining "dependency" for women and men

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110. Dunivin, *supra* note 90, at 8.

111. *Id*.

112. Dunivin, *supra* note 87, at 536.

113. *Id.*

114. *Id*.

115. *Id*.

116. *See* HELENA CARREIRAS, GENDER AND THE MILITARY: WOMEN IN THE ARMED FORCES OF WESTERN DEMOCRACIES 41, 43 (2006).

117. Dunivin, *supra* note 90 (citing Joseph H. Pleck, *The Male Sex Role: Definitions, Problems and Sources of Change*, 32 J. SOC. ISSUES 155 (1976)).

118. *Id*.; *see also* William Arkin & Lynne R. Dobrofsky, *Military Socialization and Masculinity*, 34 J. SOC. ISSUES 151, 155 (1978).

119. Dunivin, *supra* note 90, at 536.

120. 411 U.S. 677 (1973).

121. *Id*. at 678.

unconstitutional.[122] In a plurality opinion, Justice Brennan challenged the continued accuracy of the assumption of that female spouses were normally dependent, pointing out the increasing involvement of women in the labor force, and invoking employment and income statutes to support his analysis.[123] The assumption of the law at issue in Frontiero rested on the timeworn conviction that women could not and should not fully participate in military service because their true responsibilities were non-combat related. While there have been modest changes in gender attitudes in the military, the paradigm still maintains some grip on cultural perceptions within the military.

C. How the Paradigm Explains Traumatic Injury Benefit Eligibility Criteria

A military disability benefit program designed to accommodate a variety of combat and non-combat related injury but, that in practice, privileges combat trauma over non-combat trauma is an extension of the combat-warrior paradigm. We saw this in Senator Craig's statement before Congress. His narrative suggests an innocent, deep-rooted belief in a military tradition—a fundamental belief that the identity of the soldier benefiting from the military disability program springs from their role as heroes willing to sacrifice their lives. As a collective of men, the military is perceived as powerful, but alone, the individual male soldier can feel powerless.[124] Consider Craig's narrative on Sgt. Calhoun who was discharged and cannot count on the financial support of the military to meet his financial needs during the rehabilitation and separation period. Sgt. Calhoun's wife too is powerless due to the financial distress resulting from by her husband's disabling injuries. Craig's narrative of Sgt. Calhoun's experience demonstrates that military combat is difficult and hazardous work that leads to significant acts of heroism. For his work and ability to adhere to a combat warrior paradigm, Sgt. Calhoun deserves praise, reward, and sympathy. He sacrificed his limbs as well as the ability to perform the primary combat role of soldier and breadwinner, two traits that animate the ideals of the combat warrior paradigm.

While the narrative helps garner support for a military disability program designed to aid Sgt. Calhoun and similarly-situated service members, it also helps create the perception that members who are injured outside the fog of war are excluded. The combat warrior paradigm and the ideals that Senator Craig espoused do not entirely comprehend the experiences of those injured in non-combat situations.[125] The idyllic picture of Sgt. Calhoun or the soldier injured in combat does not always accurately reflect the reality of soldiers who suffer other types of traumas not covered by TSGLI that also bring about financial hardships

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122. *Id*. at 679.

123. *Id*. at 685-88.

124. Ann McGinley makes a similar observation in the context of firefighters. *See* Ann McGinley, Ricci v. DeStefano*: A Masculinities Theory Analysis*, 33 HARV. J.L. & GENDER 581, 619 (2010) (stating "masculinity theory also recognizes that although men as a group benefit from the 'patriarchal dividend,' individual men often feel powerless in their own lives and jobs").

125. *See supra* Part I.B.4.

during the rehabilitation and convalescence period.[126] Again, these other traumas include sexual trauma, assault by other soldiers, or PTSD.[127] These types of traumas, unlike combat-related traumas, do not promote the construction of masculinity within the military or society's perception of the military as a masculine ideal.[128]

The non-combat-related traumas undermine the image of the masculine soldier because PTSD and sexual trauma fail to demand the type of normative and hegemonic views of heroism enshrined in the combat warrior paradigm.[129] The difference in view between combat-related wounds and other forms of wounds, which are poor representations of the male-centric paradigm, is channeled into perceptions of the law and promulgation of administrative procedures that burden claims for non-combat traumatic injuries.[130] Because combat tests a soldier's manhood or masculinity, serving in combat and demonstrating wounds of combat are ways to illustrate one's manhood.[131] Wounds that are poor illustrations of a soldier's manhood are deemed ill-deserving of recognition or compensation.[132] It is no wonder that female veterans who suffer from military sexual trauma face a relatively arduous evidentiary burden to qualify for VA disability benefits, a notably more difficult burden of proof than their male counterparts.[133] It is also no wonder that service members face tremendous stigma when they are afflicted with PTSD or seek mental health treatment.[134] The stigma attached to PTSD and MST stands in stark contrast to the accolades that visibly combat-wounded

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126. *Id.*

127. *Id.*

128. Abrams, *supra* note 98, at 718 (citing MATHEW J. MORGAN, THE AMERICAN MILITARY AFTER 9/11: SOCIETY, STATE, AND EMPIRE 47 (2008); *see also* CATHERINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 26, 34 (1987) (noting male biases in the definitions of sports, workplace benefits and expectations, scholarship, art, military service, family, history, and sex).

129. Holly Seesel et al., *Consequences of Combat*, 1 VETERANS L. REV. 254, 255 (2009) (reviewing ILONA MEAGHER, MOVING A NATION TO CARE: POST-TRAUMATIC STRESS DISORDER AND AMERICA'S RETURNING TROOPS (2007); DARYL S. PAULSON & STANLEY KRIPPNER, A REVIEW OF HAUNTED BY COMBAT: UNDERSTANDING PTSD IN WAR VETERANS INCLUDING WOMEN, RESERVISTS, AND THOSE COMING BACK FROM IRAQ (2007)).

130. *See* Abrams, *supra* note 98, at 704 (making a similar observation in the context of domestic violence law reforms and resultant consequences of military law).

131. *See, e.g.*, Rosemarie Garland-Thomas, *Integrating Disability, Transforming Feminist Theory*, 14 NWSA J. 1, 6 (2002) (stating that "even the general American public associates femininity with disability").

132. *See* Seesel et al., *supra* note 129, at 255 ("PTSD . . . weakens this heroic vision of soldiers").

133. Jennifer C. Schingle, *A Disparate Impact on Female Veterans: The Unintended Consequences of Veterans Affairs Regulations Governing the Burdens of Proof for Post-Traumatic Stress Disorder Due to Combat and Military Sexual Trauma*, 16 WM. & MARY J. WOMEN & L. 155, 165 (2009).

134. Tramontin, *supra* note 83, at 29.

soldiers often receive.[135]

Defenders of the combat-centric military disability benefit program may contend that soldiers who engage in combat are at greater risks of incurring total and permanent traumatic injuries.[136] Rather than a privileging of combat wounds for ideological or cultural reasons, the disability program reflects the reality that combat situations are inherently riskier.[137] The program aims to provide financial assistance to soldiers who are most likely to sustain the types of injuries that impose severe financial burdens.[138] Because combat soldiers are at a greater risk of literally losing life or limb, they are entitled to greater recognition even at the expense of relegating other forms of military hazards to obscurity.[139]

While these defenses are fair in that they highlight the fact that soldiers, and male soldiers to be precise, are by and large the dominant casualties and injuries of war, the defenses ignore the language of the legislation that allows for compensation regardless of whether an injury is sustained in combat or not.[140] The subjecting of non-combat trauma to greater scrutiny trades on the idea that there are only two forms of wounds sustained because of military service: those which reinforce dominant paradigms of military service and those which do not.[141] Furthermore, the defense in no way explains the omission of coverage of sexual trauma or PSTD and disregards that an invisible war wound, like PTSD, is an incidence of combat just as a visible war wound. This omission conforms to the view that violence can only take two forms: a masculinized or feminized form.[142] Combat is seen as a direct outlet of hyper-masculine exertions of power and control.[143] Combat links strength, success, and control.[144] Wounds that are invisible or the product of sexual assault connote powerlessness and loss of control, which only engender shame, fear, or isolation.[145] Highlighting the risks

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135. *See* GAO REPORT, *supra* note 3, at 1-3 (explaining that service members with visible combat wounds experience fewer challenges in obtaining TSGLI compensation as compared to service members with invisible combat wounds).

136. *See supra* Part I.B.1.

137. *Id.*

138. *See* TSGLI GUIDE, *supra* note 2.

139. *See supra* Part II.C.

140. *See supra* Part I.B.

141. *Id.*

142. Nancy E. Dowd, *Masculinities and Feminist Legal Theory*, 23 WIS. J.L. GENDER & SOC'Y 201, 220 (2008) (noting that violence is often seen as an extension of gender, so much so that violence "is doing gender").

143. *See* Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 501 (1981) (stating that if "[m]asculinity is traditionally defined around the idea of power[, and] the armed forces are the nation's preeminent symbol of power[,]" then one preeminent symbol of masculinity is military might).

144. *See id.* at 500-01 (discussing these traits in the context of masculinity).

145. *See* Dowd, *supra* note 142, at 213 ("masculinity is thus to a large degree about fear and shame and emotional isolation"); *see also* Garland-Thomas, *supra* note 131, at 21 ("Our collective cultural consciousness emphatically denies the knowledge of vulnerability, contingency, and

inherent in war combat dodges the relative normality of male involvement in combat soldiering and the incongruence of masculine qualities such as violence, strength, and aggression with femininity.[146]

Lastly, a defense of the military benefit program that reiterates the risks inherent with combat reinforces the dated notion that soldiering is only synonymous with combat.[147] Today, the military is responsible for a diversity of contingencies. More than ever, the military engages in peacekeeping missions, which are non-combat in nature and support political and economic objectives. Advances in technology, the use of drones, and the outsourcing of ultra-hazardous activities to private military contractors further illustrate the decentralization of combat as the military's preeminent objective.[148]

III. LEGAL REMEDIES FOR WRONGFUL MILITARY BENEFIT DENIALS UNDER PRINCIPLES OF ADMINISTRATIVE LAW

A military service member denied of a disability benefit under unduly arduous adjudicatory procedures has some recourse under principles of administrative law.[149] Congress, through the Administrative Procedures Act ("APA"),[150] established the basic procedural standards for federal agencies.[151] Through statutes, Congress delegates special powers to an agency, board, or commission to oversee and monitor activities in complex areas, such as the securities market, labor force, and, in the present case, military personnel matters.[152] The APA provides two basic types of procedures for agency decision-

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mortality. Disability insists otherwise, contradiction such phallic ideology.").

146. Abrams, *supra* note 98, at 722.

147. *See id.* at 721.

148. *See, e.g.*, David Johnston & John M. Broder, *F.B.I. Says Guards Killed 14 Iraqis Without Cause*, N.Y. TIMES, Nov. 14, 2007, http://www.nytimes.com/2007/11/14/world/middleeast/14blackwater.html?_r=0 (illustrating the risk and use of private military companies in combat); James Risen, *Use of Iraq Contractors Costs Billions, Report Says*, Aug. 11, 2008, http://www.nytimes.com/2008/08/12/washington/12contractors.html?_r (illustrating the cost of private military contractors). *See also* Milena Rodban, On Demand Armies: Private Military Company Involvement in Internal Conflicts (Nov. 18, 2009) (unpublished M.A. thesis, Georgetown University), *available at* https://repository.library.georgetown.edu/bitstream/handle/10822/553572/rodbanMilena.pdf?sequence=1.

149. ROTUNDA, *supra* note 18, at 237.

150. 5 U.S.C. §§ 551-559 (2013).

151. *See* Martin Shapiro, *Administrative Law Unbounded: Reflections on Government and Governance*, 8 IND. J. GLOBAL L. STUD. 369, 370 (2000) (noting that in enacting the APA, Congress recognized that while the executive, legislative, and judicial branches are directly responsible for the performance of their constitutional responsibilities, these bodies of government cannot always decide discrete or complex matters).

152. *See* Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 438 (2003). Stewart discusses the APA's four basic components of U.S. Administrative law: procedural requirements for agency decisionmaking, threshold requirements for the

making: notice and comment rulemaking, and formal adjudication through trial-type hearings. [153] These procedures generate an administrative record that serves as the exclusive basis for agency decision and judicial review.[154] Under the APA, a federal court is authorized to review four basic types agency issues: an agency's compliance's with applicable procedural requirements, the sufficiency of the record evidence to support agency factual determinations, the conformity of an agency action with applicable constitutional and statutory strictures, and a determination of whether an agency's discretionary action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[155]

A TSGLI military disability benefit determination results from application of the Veterans' Benefits statute[156] and regulations promulgated by the DOD and the VA.[157] The statute and regulations apply to all stages of military disability claim, from the initial review to the final administrative appeal to the Board for Correction of Military Records.[158] For these reasons, a TSGLI benefit decision is subject to administrative law principles and judicial review. The DOD and VA must rely on administrative procedures that subject non-combat wounds to greater scrutiny, but this standard is inconsistent with statute and regulations, wherein both combat and non-combat trauma are compensable.[159] When the military denies a benefit to a service member under administrative standards that differ from those in a statute or regulation, the issue is twofold: (1) whether the administrative standards and procedures used to adjudicate the benefit determination conforms to applicable law, and (2) whether the claimant is entitled to relief notwithstanding the administrative standard.[160] Relief may be granted to the claimant if the facts support relief and if the agency abused its discretion.[161]

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availability of judicial review, principles defining the scope of judicial review, and provisions regarding public access to agency information. *Id.*

153. *See* STEPHEN BREYER ET AL., ADMINISTRATIVE LAW AND REGULATION POLICY 652-60, 685-99, 872-86 (5th ed. 2001).

154. *Id*.

155. 5 U.S.C. § 706(2)(A) (2013).

156. 38 U.S.C. § 1980A (2013).

157. 38 C.F.R. § 9.20 (2013).

158. 38 U.S.C. § 1968(a) (2013).

159. *See supra* Part I.B.

160. *See, e.g.*, Richey v. United States, 322 F.3d 1317, 1329 (Fed. Cir. 2003) (finding that the existence of error in military board's decisions does not entitle plaintiff to relief); Murphy v. United States, 993 F.2d 871, 874 (Fed. Cir. 1993) (addressing justiciability of a military administrative decision); Sargisson v. United States, 913 F.2d 918, 921 (Fed. Cir. 1990) (finding that the issue of whether the decision to release the officer from active duty applied with applicable regulations was non-justiciable).

161. Wronke v. March, 787 F.2d 1569, 1576 (Fed. Cir. 1986); *see also* Greig v. United States, 640 F.2d 1261, 1268 (Ct. Cl. 1981) (stating that the agency's decision is final unless arbitrary or capricious, or unsupported by the evidence).

A. Judicial Review of Agency's Factual Determination

First a court determines whether it can exercise jurisdiction over the government.[162] In most cases involving military benefits, either a federal court or the United States Court of Federal Claims can exercise jurisdiction.[163] Then, a court, without hearing the merits of the case, will determine whether a governmental agency's factual determination is entitled to deference.[164] A federal court will hear de novo a military disability determination by a service member if the denial was "arbitrary, capricious, or contrary to law" or unsupported by "substantial evidence."[165] Although both standards are found throughout federal court military disability cases, they are often conflated or misapplied. However, because the "unsupported by substantial evidence" standard is less rigorous than the "arbitrary, capricious, and contrary to law" standard, a litigant is well advised to seek review under both standards.

1. Unsupported by Substantial Evidence.—In *Universal Camera Corp. v. National Labor Relations Board*, the United States Supreme Court stated that "substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[166] To determine whether substantial evidence supports a decision, a court considers the entire record, including that which "fairly detracts from its weight."[167] If a preponderance of the evidence or substantial evidence does not support a military disability decision, a court will set it aside.

In *Peoples v. United States*,[168] the Court of Federal Claims applied the substantial evidence test to hear a Navy employment and separation decision.[169] The Board for Correction of Navy Records ("BCNR"), the Navy's equivalent of the ABCMR, declined to correct a veteran's military records and denied postponement of his mandatory separation for medical reasons because the evidence submitted was insufficient to establish probable material error or

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162. The question of subject matter jurisdiction is a threshold issue that a court determines at the outset of a case. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998).

163. Pursuant to the Tucker Act, the Court of Federal Claims has jurisdiction over "any claim against the United States founded either upon the Constitute, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1). The Tucker Act does not create a substantive cause of action, which means that "a plaintiff must identify a separate source of substantive law that creates the right to money damages." Fisher v. United States, 402 F.3d 1167, 1172 (Fed. Cir. 2005) (en banc in part). "In the parlance of Tucker Act cases, that source must be money-mandating." *Id.*

164. Chambers v. United States, 417 F.3d 1218, 1227 (Fed. Cir. 2005).

165. *Id.*

166. 340 U.S. 474, 477 (1951).

167. Nippon Steel Corp. v. United States, 458 F.3d 1345, 1351 (Fed. Cir. 2006) (quoting *Universal Camera Corp.*, 340 U.S. at 488).

168. 87 Fed. Cl. 553, 570 (2009).

169. *Id.*

injustice.[170] The defendant motioned for judgment on the administrative record, which is a mini-trial in which the court makes "factual findings . . . from the record evidence as if it were conducting a trial on the record."[171]

"Substantial evidence" tested whether the evidence in the records substantially supported the Navy's determination. Although the Navy was not required to explain the reasons for its decision in great detail, it was required to provide the veteran enough detail to permit him to rebut its action, including evidence supporting its finding.[172] First, a Navy Director "misportrayed the record, and by doing so, developed a potentially erroneous presumption about" the veteran's ability to serve.[173] Second, the court found no substantial evidence supporting a link between the medical finding and the veteran's fitness to serve.[174] Third, and most importantly, the Navy failed to provide adequate evidence and guidance in its decision, so as to allow the veteran a fair shot at rebutting the Navy's decision.[175] The court stated that "[w]ithout the guidance of a well-supported decision from the [Navy], and in light of the wholly discretionary nature of the Navy's decision whether to defer plaintiff's mandatory separation, the court cannot determine what record evidence should truly be afforded the most weight in ascertaining whether an injustice has occurred."[176] For these reasons, the court found the Navy's decision lacked substantial evidence.[177]

2. Arbitrary, Capricious, and Contrary to Law.—Courts will also reverse an agency's decision if it is "arbitrary, capricious, or…contrary to law, regulation, or mandatory published procedure."[178] Under this standard, a federal court examines all relevant factors to determine whether there was a clear error of judgment.[179] While courts do not substitute their own judgment regarding sound policy for those of the agency, courts do require the agency to justify its exercise of power and articulate an explanation that rationally connects the facts to the decision.[180] Although an agency is free to modify or reverse a prior decision, the agency must also provide a reason for that change.[181] The decision is arbitrary and capricious if the agency: (1) relied on factors that Congress did not want it to consider; (2) entirely failed to consider an important aspect of the problem; (3) offered an explanation that runs counter to the evidence; or (4) is so implausible that it could not be described as a difference in view or the product of agency

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170. *Id.* at 564.

171. *Id.* at 569 (quoting Bannum, Inc. v. United States, 404 F.3d 1346, 1357 (Fed. Cir. 2005)).

172. *Id.* at 576 (citing Craft v. United States, 544 F.2d 468, 474 (Ct. Cl. 1976)).

173. *Id.* at 579.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. Clayton v. United States, 225 Ct Cl. 593, 595 (1980).

179. Motor Vehicles Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

180. S.E.C. v. Chenery Corp, 332 U.S. 194, 196 (1947).

181. *Id.* at 199.

expertise.[182]

Van Cleave v. United States,[183] a U.S. Court of Federal Claims case, demonstrates the application of the "arbitrary, capricious, or contrary to law" standard in a military disability case.[184] In that case, a pro se veteran suffered debilitating headaches during active duty in the Navy, was rated at 10% disability by the Navy, and was subsequently medically discharged with severance pay.[185] After the discharge, the veteran discovered that the Navy rated him upon an erroneous diagnosis of chronic headaches rather than the correct diagnosis of migraine headaches.[186] He petitioned the BCNR, the Navy's administrative appellate board, for an upward adjustment of his disability rating.[187] A rating based on the veteran's actual disability would have entitled him to a higher rating and therefore higher severance pay.[188]

The BCNR refused to adjust the veteran's disability rating.[189] Under statute, the BCNR is empowered to correct an "error" or "injustice" in a military record.[190] However, the BCNR held that the disability rating on the basis of a headache and not the veteran's actual disability did not constitute an "error" or "injustice" in the military records.[191] First, the board assailed the veteran's credibility by stating that his migraine diagnosis was based on his subjective reports to his physicians.[192] Second, the board stated that having a prescription for migraine medication did not mean that he required medication to treat the migraine.[193] Third, the board stated that he sought a medical discharge, not because he had debilitating migraines, but because he failed to meet the body-fat standards for promotion and continuation on active duty.[194] Lastly, the board used evidence of the veteran's performance to show that he satisfied performance standards while simultaneously accusing the veteran of malingering to show that he did not deserve an increased rating.[195]

The U.S. Court of Federal Claims held that the board "launched an attack on Mr. Van Cleave's credibility and character, criticized [its own personnel] appointed by authority of the Secretary of the Navy, and questioned the integrity of Naval medical personnel and professionalism of the VA's 'general medical

182. *Motor Vehicles Mfrs. Ass'n*, 463 U.S. at 43.
183. 70 Fed. Cl. 674 (2006).
184. *Id.* 684.
185. *Id.* at 675.
186. *Id.* at 676.
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.* at 679.
191. *Id.*
192. *Id.*
193. *Id.* at 680.
194. *Id.* at 678.
195. *Id.* at 685.

officers.'"[196] Moreover, the evidence suggested that the board considered facts that Congress did not want it to consider, such as failing to reassess the veteran at a higher disability rating, entirely failing to consider sound medical opinions supporting the veteran's claim, and offering explanations that ran counter to the evidence, such as its assertion that the evidence of prescription medication meant that the veteran required the medication for treatment of the condition.[197]

B. Judicial Review of Agency Interpretation

At issue is how to interpret "traumatic event" and "traumatic injury."[198] The VA, through its administrative procedures, inserted the term "involuntary" external force to the term "traumatic event."[199] However, the term "involuntary" is found nowhere in the statute and regulations. A court will determine whether the VA's interpretation or application of the word "involuntary" impermissibly reads an express limitation into the statute.

The United States Supreme Court announced the analytical framework for judicial review of an agency's interpretation of a Congressional statutory provision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*.[200] That case involved the Environmental Protection Agency's ("EPA") interpretation of "stationary source" contained in the Clean Air Act.[201] The EPA promulgated regulations that allowed a state to authorize an existing plant to obtain permits for new equipment that did not meet the permit conditions as long as the alteration did not increase the total emissions of the plant.[202] The Natural Resources Defense Council, an environmental defense group, challenged the EPA's interpretation of "stationary source" contained in the regulations.[203] Before the Supreme Court was the question of whether a court can defer to the EPA's interpretation of the statute.[204] The Supreme Court upheld the EPA's

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196. *Id.* at 686.

197. *Id.* at 684-85.

198. *See* 38 U.S.C. § 1980A(a)(2) (stating "[i]f a member suffers more than one such qualifying loss as a result of a traumatic injury from the same traumatic event, payment shall be made . . . ."; *id.* § 1980A(b)(1) (stating "[a] member who is insured against traumatic injury under this section is insured against such losses due to traumatic injury . . . as are prescribed by the Secretary by regulation." Ergo, Congress delegated the power to define "traumatic injury" to the Secretary *but by regulation only*.); *see also* 38 C.F.R. § 9.20(b)-(c) (defining traumatic event as "the application of external force, violence, chemical, biological, or radiological weapons, or accidental ingestion of a contaminated substance causing damage to a living being" and defining traumatic injury as "physical damage to a living body that is caused by a traumatic event as defined in paragraph (b) of this section.").

199. TSGLI GUIDE, *supra* note 2, at 4.

200. 467 U.S. 837, 842-43 (1984).

201. *Id.* at 846-57.

202. *Id.* at 840.

203. *Id.*

204. *Id.* at 843-44.

interpretation and announced a two-part test to determine whether a court will defer to the interpretation of a statute by the agency tasked with its implementation.[205]

In step one of its *Chevron* analysis, a reviewing court must determine whether the statute is ambiguous.[206] The court must ascertain "whether Congress has directly spoken" on the issue.[207] If, by "employing traditional tools of statutory construction," including canons of construction, the reviewing court determines that Congress's intent is clear, then "that is the end of the matter."[208] In step two, after a court finds a statute to be ambiguous, the court must determine whether the construction adopted by the agency is permissible.[209]

A determination of whether an agency interpretation is reasonable depends on where the interpretation is found.[210] In *United States v. Mead Corp.*, the Supreme Court modified Chevron's doctrine of deference finding that a court will defer to an interpretation of a statute by an agency tasked with its promulgation if Congress intended for the agency to act with the "force of law."[211] Agency interpretations of statutes not promulgated as regulations, which undergo the rigors of the "notice and comment" provisions of section 553 of the APA, have the "force of law."[212] In the present case, 38 C.F.R. § 9.20, the TSGLI regulations, have the force of law because they were promulgated after undergoing "notice and comment" pursuant to the APA and Congress's mandate under 38 U.S.C. § 1980A. However, interpretations found only in an agency's administrative procedure guide enjoy less deference, and if they contravene law, they enjoy no deference.[213] The Supreme Court addressed this issue in *Christensen v. Harris County*.[214]

In *Christensen*, employees of the Harris County sheriff's department brought an action against the county for requiring employees to use compensatory before they reached the limit which would require overtime payments.[215] The employees, relying on a U.S. Department of Labor opinion letter stating that an employer may only compel use of "comp time" if agreed to in advance, alleged that this requirement violated of the Fair Labor Standards Act ("FLSA").[216] The U.S. Supreme Court accorded the agency's opinion letter minimal deference and,

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205. *Id.* at 863-64.

206. *Id.* at 842-43.

207. *Id* at 842.

208. Regions Hosp. v. Shalala, 522 U.S. 448, 457 (1998) (quoting *Chevron*, 467 U.S. at 842-43).

209. *Chevron*, 467 U.S. at 843.

210. United States v. Mead Corp., 533 U.S. 218, 230 (2001).

211. *Id.* at 226-27.

212. *Id.* at 226.

213. *Id.*

214. 529 U.S. 576, 587-88 (2000).

215. *Id.* at 581.

216. *Id.*

therefore, was not binding on the court.[217] The Supreme Court reasoned that an agency's opinion letter was not "subject to the rigors of the Administrative Procedur[e] Act, including public notice and comment," and therefore it was entitled "some deference," but not the same deference as an agency's regulations.[218] The Supreme Court drew a bright line between formal agency documents, such as legislative regulations, and less formal ones, including opinion letters, agency manuals, policy statements, and enforcement guides.[219] An agency's interpretation of a statute found only in its administrative procedures is subject to lesser deference under *Skidmore v. Swift & Co.*[220]

In *Skidmore*, seven employees of the Swift & Company packing plant at Fort Worth, Texas brought an action under the Fair Labor Standards Act of 1938 to recover overtime, liquidated damages, and attorneys' fees.[221] At issue was the deference due to the U.S. Department of Labor's interpretation of overtime work.[222] The Supreme Court held that the agency's interpretation was persuasive but not binding.[223] An agency's interpretation will be accorded deference if the interpretation meets a four-factor test: (1) the thoroughness of the agency's investigation; (2) the validity of its reasoning; (3) the consistency of its interpretation over time; and (4) other persuasive powers of the agency.[224]

1. Step One in Chevron Analysis.—The first step in the *Chevron* analysis is to determine whether there is ambiguity in the statute after applying traditional canons of statutory interpretation.[225] Although the C.F.R. does not define or modify the term "external force," as discussed below, courts, in the absence of language that modifies or defines a term, will apply the plain meaning of the language. One Federal Circuit court did just that in *Nielson v. Shinseki*,[226] a case that concerned the meaning of the words "service trauma" in a statute that conferred military benefits.[227]

At issue was whether the veteran's removal of teeth in service by military dentists as a result of a periodontal infection constituted "service trauma."[228] The statute and C.F.R. did not define "service trauma."[229] The court applied the prevailing Webster dictionary definition of trauma at the time the statute was enacted as an "injury or wound to a living body caused by the application of

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217. *Id.* at 587.
218. *Id.* (quoting Reno v. Koray, 515 U.S. 50, 61 (1995)).
219. *Id.*
220. 323 U.S. 134, 140 (1944).
221. *Id.* at 135.
222. *Id.* at 139-40.
223. *Id.* at 140.
224. *Id.*
225. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842-43 (1984).
226. 607 F.3d 802 (Fed. Cir. 2010).
227. *Id.* at 805-08.
228. *Id.* at 803.
229. *Id.* at 805.

external force or violence."[230] The pulling of teeth, according to the court, was an act of force that produced a physical injury.[231] However, the court construed the word "trauma" narrowly because it was preceded by the word "service."[232] The words in the statute, "combat wounds or other service trauma," suggested that Congress intended to include only injuries sustained during the performance of military duties, and not medical treatment. [233] Because a "fundamental canon of statutory construction [requires] that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme," the word juxtaposition of the word "service" to "trauma" narrowed the definition of trauma.[234]

Consistent with the *Nielson* court's application of the principle that terms be given their plain meaning when they are not defined by the statute, Webster's dictionary defines trauma as "an injury (as a wound) to a living tissue caused by an extrinsic agent" or "an agent, force, or mechanism that causes trauma."[235] Webster's dictionary defines "external" as "capable of being perceived outwardly," "of, related to, or connected with the outside or an outer part," and "arising or acting from outside."[236] Webster's dictionary defines "force" as "strength or energy exerted or brought to bear," "cause of motion or change," or "violence, compulsion, or constraint exerted upon or against a person or thing."[237] These definitions contain no requirement of or involve no "voluntary" or "involuntary" action. Because Congress made no express distinction between combat and non-combat wounds, under the plain language of the statute and regulations, any service member who sustains a "traumatic injury" as a result of "external force," in or outside of combat or voluntarily or involuntarily, would qualify for compensation.[238]

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230. *Id.* at 806.

231. *Id.*

232. *Id.* at 807.

233. *Id.*

234. *Id.* (quoting Davis v. Michigan Dep't of Treasury, 489 U.S. 803, 809 (1989)).

235. THE MERRIAM-WEBSTER DICTIONARY 1331 (11th ed. 2003).

236. *Id.* at 443.

237. *Id.* at 489.

238. *See* 38 § U.S.C. 1980A (The regulations also lack language that narrows the term "external force." Instead, the regulations contain language that may expand the term's meaning. Applying the statutory canon that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme" as the *Nielson* court advanced, it is apparent that Congress intended a comprehensive reading of "external force" when it enacted 38 U.S.C. § 1980A. The word "external force" in 38 C.F.R. § 9.20(b) is adjacent to "violence, chemical, biological, or radiological weapons, or accidental ingestion," would suggest an inclusive reading of "external force." A trauma caused by "accidental ingestion," or a working of the internal body, is antithetical to an injury caused by "external force." Likewise, the irrationality of the VA's "involuntary" standard is palpable when applied to circumstances where service members sustain trauma as a result of "accidental ingestion." It is inconceivable that Congress intended this paradox. More importantly, when Congress amended the statute, it extended coverage to traumatic injuries

In analyzing whether there is ambiguity in a statutory term, a federal court is also guided by the basic principle that congressional purpose subordinates an agency's interpretation.[239] A court will rely on legislative history to divine congressional intent only after expressing a belief that the statutory language is not plain, but instead is unclear or ambiguous.[240] Again, according to the congressional record of the Senate dated April 21, 2005, Senator Craig expressed his, and co-sponsoring Senators', reasons for an amendment, which its passage culminated in the creation of the TSGLI program.[241] To reiterate Craig's statement, "[the] amendment addresses the coverage gap through the creation of a new traumatic injury protection insurance program for the benefit of severely disabled service members."[242] The program was created to give "injured service members and their families the financial cushion they need to sustain them before their medical discharge from the service, when veterans benefits kick in."[243] Congress intended to ensure injured troops a "financial cushion" in situations where service members are severely disabled and are unable to secure VA benefits because they are in limbo between active duty and medical discharge. The absence of an "involuntary" requirement in the Congressional records conspicuously demonstrates no Congressional intent underpinning the VA's standard to adjudicate TSGLI claims.

2. Step Two Under the Chevron Analysis.—If a reviewing court finds no ambiguity in the terms "traumatic event," "traumatic injury," or "external force," then the definition controls, and a court will not defer to the agencies' contravening interpretation.[244] However, if a reviewing court finds ambiguity in a term, it will determine whether the agency tasked with promulgating the statute proffered a permissible interpretation.[245] In a circumstance where an agency's administrative procedures modify regulations, the interpretation offered by and applied under the administrative guidelines is analyzed under *Skidmore's* four part test: (1) the thoroughness of the agency's investigation; (2) the validity of its reasoning; (3) the consistency of its interpretation over time; and (4) other

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sustained even in non-military contexts. The words "external force" should therefore be read liberally as Congress intended so as to encompass traumatic events in non-combat situations as well as combat situations.)

239. United States v. Mead Corp., 533 U.S. 218, 230 (2001).

240. *See* Ratzlaf v. United States, 510 U.S. 135, 147-48 (1994) (noting that on the other hand, "we do not resort to legislative history to cloud a statutory text that is clear."); United States v. Great N. Ry. Co., 287 U.S. 144, 154-55 (1932) ("In aid of the process of construction we are at liberty, if the meaning be uncertain, to have recourse to the legislative history of the measure and the statements by those in charge of it during its consideration by the Congress.").

241. Craig Statement, s*upra* note 45, at S4094-95.

242. *Id.*

243. *Id.* at S4095.

244. *See* Regions Hosp. v. Shalala, 522 U.S. 448, 457 (1998) (quoting Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842-43 (1984)) (explaining that if the reviewing court determines that Congress's intent is clear, then "that is the end of the matter.)"

245. United States v. Mead Corp., 533 U.S. 218, 230 (2001).

persuasive powers of the agency.[246]

First, there is no evidence the VA conducted a thorough investigation of what constitutes "involuntary." Second, the "involuntary" standard can lead to paradoxical outcomes, as the guidelines do not define "involuntary." If one is to take the notion of voluntariness to its most extreme, then no service member would ever qualify for the benefit in an all volunteer army. Third, for this same reason, the standard nurtures inconsistency. Lastly, the agency's other persuasive powers, including its authority to promulgate regulations, would offer little basis to accord deference to an administrative guide. As addressed in *Christensen*, under the APA a federal agency may promulgate a substantive rule or regulation, but only if the agency subjects the rule or regulation to the rigors of the notice and comment process.[247] The VA may have exceeded its authority by implementing a substantive standard subjecting it to the APA's notice and comment process. When an agency's interpretation of a regulation or statute contravenes the plain language of the regulation's or statute's text, and thereby exceeding their grant of power, the agency's interpretation is accorded no deference.[248]

IV. WHEN THERE IS AMBIGUITY, PRECEDENT REQUIRES A TIPPING OF THE SCALES IN THE SERVICE MEMBER'S FAVOR

The above section discusses the principles of administrative law as they relate to a military administrative decision reviewed under a standard of scrutiny inconsistent with statute and regulations. Ultimately, *Chevron* and its progeny granted agencies latitude in promulgating regulations and official interpretations of statute and crafted agency-friendly judicial review standards.[249] The Supreme Court's trend after *Chevron* is consistent with cases involving a review of a military disability decision.[250] Deference accorded to military disability cases is also consistent with 10 U.S.C. § 1216(a), which gives broad authority to the military services to administer the disability system.[251] Yet, even when a military decision is contrary to law, a court may be disinclined to second-guess a military administrative decision.[252]

There are several veterans and military service members benefit cases where courts have checked the military's authority without relying on administrative law principles.[253] In these cases, courts have held that the VA or military may not simply select any interpretation of statutory term that conforms to the agency's

246. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

247. Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000).

248. *See* Gonzalez v. Oregon, 546 U.S. 243, 257 (2006).

249. *See supra* Part III.

250. *See infra* Part IV.

251. *See* 10 U.S.C. § 1216(a) (2013) ("The Secretary concerned shall prescribe regulations to carry out this chapter within his department.").

252. *See id.*

253. *See supra* Part III.A.

understanding of the law.[254] Under these cases, courts have found that the military or VA must select any interpretation that favors the veteran or service member when the scales are equal.[255]

A seminal case demonstrating these principles is *Brown v. Gardner*,[256] which concerned a veteran challenging the VA's regulatory interpretation of a statute that accorded the veteran a benefit. The regulation required the veteran to show that the agency was at fault for injuries resulting from medical care provided by the VA for the veteran to be eligible for compensation.[257] The statute itself did not say anything about VA fault. Similar to how the VA presently asserts "involuntary" into its adjudicatory standards, the VA in *Brown* argued that the word "injury" in the statute allowed it to read fault in order to justify its interpretation. [258] The *Brown* court rejected this argument, stating: "[t]he most, then, that the Government could claim on the basis of this term [injury,] is the existence of an ambiguity to be resolved in favor of a fault requirement (assuming that such a resolution would be possible after applying the rule that interpretive doubt is to be resolved in the veteran's favor)." [259]

Thus, the Court in *Brown* recognized that when there is ambiguity in a statute that confers a benefit onto a veteran or service member, the universe of permissible interpretations are restricted to that which favors the veteran or service member.[260] Veteran or military service member-friendly cases need not be read as subverting *Chevron*. Instead, a veteran or military service member-friendly interpretation of a statute can coincide with *Chevron*. Indeed, a joint application of both *Chevron* and a service member-friendly reading is implied in

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254. *Id.*

255. *Id.*

256. 513 U.S. 115 (1994).

257. *Id.* at 553.

258. *Id.*

259. *Id.* at 555.

260. *See* Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 285 (1946) ("This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need."); *see also* Henderson v. Shinseki 131 S. Ct. 1197, 1206 (2011) (quoting King v. St. Vincent's Hosp., 502 U.S. 215, 220-21 (1991)) ("We have long applied 'the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor."); Sears v. Principi, 349 F.3d 1326, 1331-32 (2003) (finding a statute ambiguous and affirming the VA interpretation because it favored veterans in the "vast majority of cases" but not all); Boone v. Lightner, 319 U.S. 561, 575 (1943) ("The Soldiers' and Sailors' Civil Relief Act is always to be liberally construed to protect those who have been [obligated] to drop their own affairs to take up the burdens of the nation."); Boyer v. West, 210 F.3d 1351, 1355-56 (Fed. Cir. 2000) (finding statute providing benefits to veterans unambiguous and rejecting the veteran's proposed interpretation); Smith v. Brown, 35 F.3d 1516, 1526 (Fed. Cir. 1994), *superseded on other grounds by* 38 U.S.C. § 7111 (2005), *as recognized in* Samish Indian Nation v. United States, 419 F.3d 1355, 1367 (2005) (reviewing a VA interpretation of an unambiguous statute not providing benefits to veterans and noting that a veteran may not "rely upon the generous spirit that suffuses the law generally to override the clear meaning of a particular provision").

Brown.[261] The set of cases that advance a favorable reading of benefit-conferring statutes to a veteran or service member filter the field of possible interpretations of "permissible" under *Chevron* to those that favor the veteran or service member. Put another way, these cases are part of the "thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions."[262]

Although several federal courts have tipped the scale in the service member's favor when there is ambiguity in a law that accords the service member benefits,[263] a reliance on these cases is not without risk. First, federal courts have departed from these cases and, as a consequence, have introduced uncertainty into the administration of laws governing benefits for service members. Secondly, and perhaps more importantly, these pro-veteran and pro-service member cases may rely on the same or similar paradigm upon which led the VA to erroneously narrow the applicability of TSGLI. That is, courts have also played a role in propagating the paradigm of the combat-wounded warrior. By elevating the image of the heroic and self-sacrificing combat-wounded warrior to the level of constitutional mantra, a court may also risk obscuring situations where service members who sustain appreciable trauma outside the battlefield or sustain trauma of an invisible form. This is may be of special concern to female service members who are not allowed in combat but may be acutely vulnerable to other forms of trauma that too would place them and their family in financial distress. A court can mitigate these risks by applying a favorable interpretation of statute or regulation to a service member's particular situation. This would help account for realities that law and decision makers disregard or overlook when administering laws that confer benefits to service members.

CONCLUSION

Congress enacted TSGLI to provide traumatically injured service members with financial assistance.[264] Congress intended to give traumatically injured service members some reprieve from the financial hardships that set in during the rehabilitation period.[265] This principle, however, is not always the guiding principle behind every TSGLI claim evaluation. Adjudicators, policy makers, and even lawmakers are guided by stereotypes, paradigms, or beliefs, grounded not in law, but in a longstanding pervasive military culture that places, even innocently or seemingly benignly, gender-biased prerogatives.[266] In an institution that enjoys greater deference than most federal civilian staffed and run agencies, what incentive does the military and those who create military laws have to think critically about its laws and policies? Is there any impulse or motive to challenge,

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261. *Brown*, 513 U.S. at 117.

262. *Henderson*, 131 S. Ct. at 1205 (quoting Shinseki v. Sanders, 556 U.S. 396, 416 (2009) (Souter, J., dissenting)).

263. *See supra* Part III.A.

264. *See supra* Part I.

265. *Id.*

266. *See supra* Part II.

undo, or uproot laws or policies that reflect a combat-warrior centered mindset? What interest is there to administer a benefits program like TSGLI in such a way that service members who are traumatically injured and incur financial hardship as a result are comprehensively cared for regardless of whether the injured occurred in combat?

This Article provides some reasons for an impetus to effect modest change and reform. There are countless male and female service members who have dedicated many years to military service and made priceless sacrifices. Many serve in a variety of combat and non-combat roles, some with a greater proximity to war hazards than others. However, many service members, including women, are vulnerable to workplace violence and assault.[267] The resultant trauma may be as lasting, deep, and disabling as trauma sustained in the war field. But because combat trauma occupies a preeminent role in military disability policy, non-combat trauma is often disregarded and relegated to obscurity.[268] To support the system in its current iteration would give the military license to abdicate its role as a sentinel of justice and inspire faithlessness among service members, especially those who are particularly vulnerable to assault within the military. A paradigm of thought that elevates an ideal at the cost of relegating certain experiences and realities to obscurity too would arouse sentiments of injustice and unfairness among service members. If unit cohesion is of paramount priority, then yes there is ample interest to jettison paradigms of thoughts and allow the reality of military service, in all of its facets, to dictate policies, laws, and the administration of military benefits.

267. *Id.*
268. *Id.*