

**AN ANALYSIS OF CIA AND MILITARY TESTING OF LSD
ON NON-CONSENTING U.S. SERVICE MEMBERS AND
RECOVERY THROUGH THE VA DISABILITY SYSTEM**

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“This is the happy warrior, This is he...”

—Sir Herbert Read¹

I. INTRODUCTION

Discovering that the United States government has experimented on unwitting and un-consenting American citizens is a difficult pill to swallow, especially when some of those American citizens are United States Armed Forces service members. This scenario begs the question: what happens now? Now that the U.S. government has finished its classified experimentation, where does this leave the soldier who wanted to defend and serve his country, but

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¹ Sir Herbert Read, *The Happy Warrior*, in THE WAR POETS 138 (Robert Giddings ed., 1988).

is now a victim of his government? Where does this leave “the happy warrior”?²

This paper will explore the top-secret Central Intelligence Agency (CIA) human medical experiment, MKULTRA, and the possible avenues of relief for service members involved in the project. First, the veteran may bring suit against the U.S. government for constitutional violations, or in a civil tort action. However, due to the evolution of the doctrine and cases such as *Chappell v. Wallace*, *United States v. Stanley*, and *Feres v. United States*, veterans will likely be unable to recover a remedy in court.³

Second, a veteran may recover under the Department of Veterans’ Affairs (VA) disability compensation system.⁴ Service-connected disability compensation is a monthly, monetary benefit paid to a veteran upon a showing to the VA that the veteran was disabled due to an injury arising out of, or aggravated by, their active-duty military service.⁵ However, a veteran used as an unwitting test subject in MKULTRA would have a difficult time surmounting the burden of proof the VA system requires. But given recent court decisions, namely *AZ v. Shinseki*, it may be possible to alleviate some of the veteran’s burden of proof involving MKULTRA claims.⁶

This article will take a brief look into the history of human medical trials, followed by a history of the CIA program MKULTRA, and other related programs. Next, it will explore case law that bars veterans from constitutional remedies as well as tort remedies against the U.S. government. Finally, the article will discuss challenges for veterans in the VA disability compensation system to determine if MKULTRA victims could successfully seek service-connection. Ultimately, a veteran attempting to recover damages from MKULTRA testing will likely be unable to prevail under a constitutional analysis, but an MKULTRA victim may be able to seek service-connection under the VA.

² See Read, *supra* note 1.

³ See *United States v. Stanley*, 483 U.S. 669 (1987); *Chappell v. Wallace*, 462 U.S. 296 (1983); *Feres v. United States*, 340 U.S. 135 (1950).

⁴ See 38 C.F.R. § 3.4 (2013).

⁵ See *id.*; see also *Veterans with Service-Connected Disabilities*, FEDERAL BENEFITS FOR VETERANS, DEPENDENTS AND SURVIVORS, DEP’T OF VETERANS AFF. 34 (2014), available at

http://www.va.gov/opa/publications/benefits_book/2014_Federal_Benefits_for_Veterans_English.pdf.

⁶ See *AZ v. Shinseki*, 731 F.3d 1303 (Fed. Cir. 2013).

II. THE EVOLUTION OF MEDICAL ETHICS

Throughout the course of American history, science has demanded discovery. However, when answering the call of duty, scientists, whether privately-funded or government-sponsored, have frequently tested drug technologies on humans.⁷ During the 1960s, the United States began scrutinizing how scientists were acquiring their information, and a new change in physician ethics emerged.⁸ The evolution called for new ideals regarding informed consent.⁹ To comply, the National Institute of Health (NIH) issued a new clinical manual requiring informed consent.¹⁰ Unfortunately, the manual did not provide a precise definition of the term.¹¹ However, it did require a volunteer to sign a statement prior to participating in the medical trial, asserting the volunteer “understand[s] the project and agree[s] to participate in it,” and, if the volunteer “find[s] [his/her] assigned project to be intolerable, [the volunteer] may withdraw from it.”¹²

The Food and Drug Administration (FDA) followed suit, although it defined informed consent as “the person [having] the ability to exercise choice.”¹³ It further required the person “receive a ‘fair explanation’ of the procedure, including an understanding of the experiment’s purpose and duration, ‘all inconveniences and hazards reasonably to be expected,’ the nature of a controlled trial (and the possibility of going on a placebo), and any existing alternative forms of therapy available.”¹⁴

The spark of this “most remarkable—and thoroughly controversial—transformation” was media coverage of various private medical trials.¹⁵ In 1962, one example caught the attention of Congress and the media when a drug, not yet evaluated by the FDA, was given “on an experimental basis” to women at risk for complications such as “spontaneous abortion” and “premature

⁷ See DAVID J. ROTHMAN, *STRANGERS AT THE BEDSIDE: A HISTORY OF HOW LAW AND BIOETHICS TRANSFORMED MEDICAL DECISION MAKING* 1 (1991).

⁸ *Id.* at 88-89.

⁹ *Id.* at 89.

¹⁰ *Id.* at 91.

¹¹ *Id.*

¹² *Id.* at 92.

¹³ *Id.* at 93.

¹⁴ *Id.*

¹⁵ *Id.* at 1; see also *id.* at 74. One study, for example, occurred in an institution for mentally ill children where a mild form of hepatitis was endemic. *Id.* The existing presence of the virus was used as grounds for artificially introducing the hepatitis virus to other children in the home. *Id.* When the study was publicized, it was described as “risk[ing]... injury... for the benefit of others.” *Id.*

delivery.”¹⁶ The drug was taken by 20,000 American women, which included 3,750 women of childbearing age and 624 pregnant women.¹⁷ However, these women did not know they were part of an experimental drug testing program and, as such, had not given informed consent.¹⁸

Thereafter, a Senator from New York, Jacob Javits, proposed an amendment to the Kefauver Bill, which enabled pharmaceutical medication testing for safety and efficacy, to compel:

the secretary of Health, Education and Welfare (HEW) to issue regulations that no such [experimental] drug may be administered to any human being in any clinical investigation unless . . . that human being has been appropriately advised that such drug has not been determined to be safe in use for human beings.¹⁹

However, Senator Javits’ amendment to the bill was not successful.²⁰

Almost a decade later, Congress again discovered a grave miscarriage of ethical considerations. In 1972, the Tuskegee syphilis experiments became known to the public.²¹ Initiated by the U.S. Public Health Service, the Tuskegee syphilis program began in 1932, and it focused on African-American men from the South who were believed to be “particularly susceptible to venereal diseases.”²² Over 600 men were recruited, two-thirds of which were given the live syphilis virus.²³ Although the participants were told they were being treated for “bad blood,” they received “painful diagnostic procedures” that would implant and grow syphilis, rather than treat it.²⁴ The men involved also received mercury treatments that eased the symptoms of syphilis.²⁵

¹⁶ *Id.* at 63-64.

¹⁷ *Id.* at 64.

¹⁸ *Id.*

¹⁹ *Id.* (citation omitted) (internal quotation marks omitted).

²⁰ *Id.* at 64, 66-67 (explaining that the Javits amendment, once it merged from the legislature, required consent “except where [investigators] deem it not feasible or, in their best professional judgment, contrary to the best interests of such human beings,” essentially leaving consent up to the discretion of researchers).

²¹ KELLY BARTH, *HUMAN MEDICAL TRIALS* 25 (2005).

²² *Id.* at 11-12.

²³ *Id.* at 26, 40.

²⁴ *Id.* at 12 (citation omitted). Also note that, beginning in the 1940s, penicillin could have been used to treat syphilis, but none of the participants were given penicillin for treatment. *See id.*

²⁵ *Id.*

The Tuskegee study lasted for forty years.²⁶ While the men received only \$25.00 for participating in the program, the Tuskegee victims received a collective settlement of ten million dollars in 1974.²⁷ Then, in 1997, President Bill Clinton formally apologized to the victims and their families for the “clearly racist” study that was “orchestrated” by the federal government.²⁸

Despite these events, the medical community is still debating the topic of informed consent today. For example, in 2009, the Gardasil vaccine received serious backlash regarding its efficacy and safety.²⁹ One of the top researchers of Gardasil and HPV vaccinations, Dr. Diane Harper, came out against the drug, stating that “the benefit to public health is nothing, there is no reduction in cervical cancers.”³⁰ While Merck, the drug’s manufacturer, and the Centers for Disease Control and Prevention (CDC) have stated that adequate warnings, such as “soreness at the injection site and risk of fainting after vaccination” are provided, questions remain whether more might be necessary.³¹ Further, while no link is established, girls that received the vaccination have had episodes of blood clots, developed Lou Gehrig’s Disease (ALS), and even died.³²

Before this came to light, in 2008, in the United Kingdom, 2,000 girls were given the vaccine and developed side-effects that included “nausea, dizziness, blurred vision, convulsions, seizures, and hyperventilation [with] 4,602 suspected side-effects recorded in total [and] the most tragic case involv[ing] a 14-year-old girl who dropped dead in the corridor of her school an hour after receiving the vaccination.”³³ However, the complete range of reported symptoms experienced from the vaccine was not included in the CDC’s warning.³⁴ Dr. Harper stated that “[p]arents and women must know that deaths occurred.”³⁵

Further, Dr. Harper advised that the warning should be more complete and include “that protection from the vaccination might not

²⁶ *Id.* at 25.

²⁷ *Id.* at 37, 25.

²⁸ *Id.* at 53.

²⁹ See, e.g., Sharyl Attkisson, *Gardasil Researcher Speaks Out*, CBS NEWS (Aug. 19, 2009), <http://www.cbsnews.com/news/gardasil-researcher-speaks-out/> (discussing the potential dangers and controversy regarding the vaccination).

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ Vera Shirav, *Gardasil Vaccine Researcher Drops Bombshell*, ALLIANCE FOR HUM. RES. PROTECTION (Oct. 26, 2009), <http://www.ahrp.org/cms/content/view/642/103/>.

³⁴ Attkisson, *supra* note 29.

³⁵ *Id.*

last long enough to provide a cancer protection benefit, and that its risks—‘small but real’—could occur more often than the cervical cancer itself would.”³⁶ Therefore, while Gardasil is still available on the market and encouraged for young girls and women, there are important details not widely known about this vaccine. Clearly the notion of informed consent has made significant advancements since World War II, but whether informed consent has evolved far enough within the medical community is unclear.

III. THE HISTORY OF MKULTRA

Beginning in the late 1940s and continuing through the next three decades, the U.S. military and the CIA initiated programs to study human behavior.³⁷ Many of the programs, specifically MKULTRA, were initiated as a retaliatory effort because of fears that the Soviet Union was “engaged in intensive efforts to produce LSD.”³⁸ The research conducted and sponsored by the CIA would give the agency an understanding of “the mechanisms by which these substance[s] worked and how their effects could be defeated.”³⁹

The U.S. Navy initiated Project Chatter in 1947.⁴⁰ The program tested the use of drugs for their utility in interrogation and recruitment.⁴¹ Drugs such as anabasis uphylla, scopolamine, and mescaline were used on humans to “determine their speech-inducing qualities.”⁴² Project Chatter was engaged throughout the Korean War, and it was terminated in 1953.⁴³

In 1950, Project Bluebird was approved and initiated by the CIA.⁴⁴ Bluebird had several objectives, among them “conditioning personnel to prevent unauthorized extraction of information,” controlling persons in interrogations, “memory enhancement,” and “preventing hostile control of Agency personnel.”⁴⁵ After initiating

³⁶ *Id.*

³⁷ *Project MKULTRA, The CIA’s Program of Research in Behavior Modification: Joint Hearing Before the S. Comm. on Intelligence Activities & the Subcomm. on Health & Sci. Research, 95th Cong. 385-86 (1977), available at http://www.nytimes.com/packages/pdf/national/13inmate_ProjectMKULTRA.pdf.*

³⁸ *Id.* at 72.

³⁹ *Id.*

⁴⁰ *Id.* at 67.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

the Project Bluebird, another program directive, Project Artichoke, was engaged to evaluate the “offensive use of unconventional interrogation techniques, including hypnosis and drugs.”⁴⁶ Project Artichoke included “in-house experiments on interrogation techniques, conducted ‘under medical and security controls, which would ensure that no damage was done to individuals who volunteer[ed] for the experiments.’”⁴⁷

Under Project MKNAOMI, the U.S. Army, in 1952, agreed to assist the CIA in “developing, testing, and maintaining biological agents and delivery systems.”⁴⁸ The Army provided the CIA with darts containing “biological agents” and pills that contained “several different biological agents” the CIA could use to develop biological weapons.⁴⁹ This project continued until 1970, when President Nixon ordered that biological weapons capable of killing or incapacitating could not be kept.⁵⁰

Finally, MKULTRA was approved in 1953 to develop chemical and biological weapons that would be used in the future to “control human behavior” in “clandestine operations.”⁵¹ MKULTRA was classified in 1963, after the Inspector General’s survey produced several reasons why the project should be considered “sensitive,” including:

- (a) Research in the manipulation of human behavior is considered by many authorities in medicine and related fields to be professionally unethical, therefore the reputation of the professional participants in MKULTRA program are on occasion in jeopardy.
- (b) Some MKULTRA activities raise questions of legality implicit in the original charter.
- (c) A final phase of the testing of MKULTRA products places the rights and interests of U.S. citizens in jeopardy.
- (d) Public disclosures of some aspects of MKULTRA activity could induce serious adverse reaction in U.S. public opinion, as well as stimulate offensive

⁴⁶ *Id.*

⁴⁷ *Id.* at 67-68.

⁴⁸ *Id.* at 68-69.

⁴⁹ *Id.* at 69.

⁵⁰ *Id.*

⁵¹ *Id.*

and defensive action in this field on the part of foreign intelligence services.⁵²

MKULTRA ran from 1953 to 1964, and experimented with “radiation, electroshock, . . . harassment substances, and [the use of] paramilitary devices and materials.”⁵³ Then CIA Director, Admiral Stansfield Turner, testified to Congress in 1977 that this was solely a CIA project; there was “no evidence within the Agency of any involvement at higher echelons, the White House, for instance, or specific approval.”⁵⁴ Although the Admiral was careful to avoid stating that the program was purposely shielded from the President of the United States, he commented that the President knew nothing about the testing conducted on U.S. citizens and military personnel.⁵⁵

MKULTRA had three different phases of research: “first, the search for materials suitable for study; second, laboratory testing on voluntary human subjects in various types of institutions; third, the application of MKULTRA materials in normal life settings.”⁵⁶ While substances to experiment with were not difficult to discover, how and where did the CIA find “voluntary” subjects to test the use of mind-altering drugs? The answer to that question, obviously, is where numerous people were stripped of their resolve and autonomy—namely, hospitals and prisons.⁵⁷

The first study was initiated in the National Institute of Mental Health, and tested drugs and hallucinogens on patients (usually prisoners) at the Addiction Research Center.⁵⁸ This center essentially became “a prison for drug addicts serving sentences for drug violations,” in that the CIA then subjected the drug offenders to drug use in order to monitor hallucinogenic effects.⁵⁹ Although the Congressional Report states that these “test subjects were volunteer prisoners,” it also says that only a physical test and a general consent form were required before administering these mind altering drugs.⁶⁰ Were there any psychological evaluations? Was history of prior substance abuse taken into account? Did it matter how long a prisoner

⁵² *Id.* at 70.

⁵³ *Id.* at 4, 70.

⁵⁴ *Id.* at 13.

⁵⁵ *Id.* at 13-14.

⁵⁶ *Id.* at 70.

⁵⁷ *Id.* at 71.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

had been drug-free before asking them to “volunteer” to be fed government drugs?

The CIA did not seem particularly troubled with these questions, and eventually admitted to using LSD in “surreptitious administration of unwitting nonvolunteer subjects in normal life settings.”⁶¹ The CIA began this program to research the “full pattern of reaction” on various test subjects, including “individuals at all social levels, high and low, Native American and foreign.”⁶² The information gathered from MKULTRA was used for “harassment, discrediting, or disabling persons” in interrogation settings.⁶³

However, not only did the CIA discover an interest in the effects of LSD, the U.S. Army began its own experimentations.⁶⁴ The Army tested LSD on three different groups of soldiers:

In the first [group], LSD was administered to more than 1,000 American soldiers who volunteered to be subjects in chemical warfare experiments. In the second phase . . . 95 volunteers received LSD in clinical experiments designed to evaluate potential intelligence uses of the drug. In the third phase, . . . 16 unwitting nonvolunteer subjects were interrogated after receiving LSD as part of operational field tests.⁶⁵

It appeared MKULTRA’s experimentation knew no bounds, and in the 1977 Congressional Hearing, Admiral Turner testified on the known extent of the program.⁶⁶ Despite widespread document destruction after the program ended, Admiral Turner claimed he was working closely with the Attorney General to identify the individuals used as unwitting test subjects, since names were not recorded.⁶⁷ However, when asked whether he could provide a list of all individuals involved and whether they were voluntary or involuntarily subjects, Admiral Turner responded that he could.⁶⁸ He does not, however, explain how he could provide such a list without knowledge of their identity.⁶⁹ Senator Kennedy posed the next question to the Admiral:

⁶¹ *Id.*

⁶² *Id.* (citation omitted).

⁶³ *Id.*

⁶⁴ *Id.* at 11, 72.

⁶⁵ *Id.* at 72.

⁶⁶ *Id.* at 4-5.

⁶⁷ *Id.* at 86.

⁶⁸ *Id.* at 36.

⁶⁹ *Id.*

“It is your intention to notify the individuals who have been the subjects of the research . . . ?”⁷⁰ The Admiral simply answered yes, so Senator Kennedy pushed further stating, “If you can identify them, you intend to notify them.”⁷¹ The Admiral agreed.⁷²

Senator Kennedy then asked whether the Admiral could identify all universities and research centers that were involved; again, the Admiral answered in the affirmative.⁷³ While Senator Kennedy wanted these institutions named, the Admiral stated policy reasons for non-disclosure, including the facilities’ reputations.⁷⁴ However, the Admiral stated that he “already notified one institution because the involvement was so extensive that I thought they really needed to protect themselves”⁷⁵

Although the Admiral provided no additional information on the identity of the university, it came to light that the University of Maryland President, Wilson H. Elkins, received a letter from the Department of the Army, dated October 14, 1975, two years prior to the Congressional Hearing.⁷⁶ The letter sought information regarding any follow-up studies that the university had conducted on its own, and whether it could provide information on individual test subjects and members of the university involved.⁷⁷ President Elkin’s response stated that “the contract with the Army Medical Research and Development Command and the University of Maryland stipulated that the studies were Secret, so that all records were either turned over the Army or destroyed.”⁷⁸ However, Elkins provided three names of personnel at the University of Maryland who were involved.⁷⁹ Indeed, one such faculty member, Walter Weintraub, the Director of Graduate Education for the Department of Psychiatry at the University of Maryland School of Medicine, wrote numerous articles regarding drug

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 37.

⁷⁶ Letter from Dr. Kenneth R. Dirks, Brigadier Gen., U.S. Army Med. Research & Dev. Command, to Wilson H. Elkins, President, Univ. of Md. (Oct. 14, 1975) (on file with author).

⁷⁷ *Id.*

⁷⁸ Letter from Wilson H. Elkins, President, Univ. of Md., to Dr. Kenneth R. Dirks, Brigadier Gen., U.S. Army Med. Research & Dev. Command (Dec. 23, 1975) (on file with author).

⁷⁹ *Id.*

use and testing.⁸⁰ Regarding follow-up studies, Elkins commented: “The institution, of course has no authority to conduct follow-up studies on military personnel, and there is no record of civilian studies so that we are not considering conducting such a follow-up.”⁸¹

Strangely enough, around the same time as this Congressional Hearing, the University of Maryland received another communication, this time from the CIA itself.⁸² In a Board of Regents meeting, President Elkins noted that the CIA accused the university of providing money to conduct MKULTRA research.⁸³ However, Elkins stated that, although the CIA may have record of a \$3,750 grant in 1956 for “study of the effect of blood vessels of certain camphoric acid derivatives,” the university received the grant from “a private organization.”⁸⁴ Elkins stated that the “University had no indication [the] CIA was the source of the funds,” and that the “University had no other direct or indirect involvement with Project MKULTRA.”⁸⁵ However, the University of Maryland has yet to find this 1977 letter about MKULTRA funding from the CIA.⁸⁶ Indeed, the only record of the letter is Elkin’s reference to it in the Board of Regents meeting.⁸⁷

Other documents relating to MKULTRA have been slowly released by the CIA, one page at a time. In 1998, the CIA’s Office of General Counsel released a letter (with names redacted), dated October 3, 1977, which was addressed to the California Medical Facility.⁸⁸ The letter included documents to address the extent of the facility’s involvement and stated:

⁸⁰ *Id.* See generally Walter Weintraub, *The Clinical Use and Misuse of Tranquilizers*, 3 MD. ST. MED. J. (1962); Walter Weintraub & H. Aronson, *Clinical Judgment in Psychopharmacological Research*, 5 J. NEUROPSYCHIATRY 65-70 (1963); Walter Weintraub et al., *The Influence of Varying Dosage on the Effects of Lysergic Acid Diethylamide (LSD-25) in Humans*, 132 J. NERVOUS & MENTAL DISEASE 404 (1961). As evidenced above, Weintraub’s articles indicate his involvement in the LSD study.

⁸¹ See Letter from Elkins, *supra* note 78.

⁸² Wilson H. Elkins, President, Univ. of Md., Remarks at the Board of Regents Special Meeting (Aug. 19, 1977) (on file with author).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Email from Archivist, Univ. of Md., to Brandy Disbennett (Nov. 6, 2013) (on file with author).

⁸⁷ *Id.*

⁸⁸ Letter from Cent. Intelligence Agency, Office of Gen. Counsel, to Dr. T.L. Clanon, Cal. Med. Facility (Oct. 3, 1977), available at http://www.foia.cia.gov/sites/default/files/document_conversions/89801/DOC_0000196947.pdf.

These materials are in the same form in which they have been made available to the public except that, in order to allow you to judge the nature and extent of the Facility's involvement, the name of the Facility and SIMPR have been reinserted wherever they appear in the original documents.⁸⁹

Then, in 2002, the CIA released an account of funds to institutions regarding the projects and budgets.⁹⁰ The latest release, from 2006, is an office memorandum labeled "Notes for DDCI" (Deputy Director of Central Intelligence), dated August 3, 1964.⁹¹ The drafting party has been redacted and includes three points, but only the last is pertinent:

We are holding the papers for your session with the Director, et. al, today on MKSEARCH, the program for testing exotic drugs on unwitting Americans. A pre-session with Helms, Gottlieb, and Earman is tentatively scheduled for 2:00 today for a meeting with the DCI at 2:30. Since the DCI has a 1:00 lunch appointment with the President, this may all slip, but I will keep track of it today.⁹²

Beside the typed text, a handwritten note reads "extremely, frightfully, and frantically sensitive."⁹³ This note is most compelling because Admiral Turner testified that he had no reason to believe the President had knowledge of the programs, though this memorandum suggests the Commander-in-Chief may have known exactly what was occurring.⁹⁴

⁸⁹ *Id.* The letter subsequently states: "The information which remains deleted includes the names of all other institutions and organizations, all individuals, and CIA employees, except those who have been publicly acknowledged by the Agency at some prior time."

⁹⁰ Memorandum from Cent. Intelligence Agency on Project MKULTRA (Dec. 5, 1956), *available at* http://www.foia.cia.gov/sites/default/files/document_conversions/89801/DOC_0000707674.pdf.

⁹¹ Memorandum for Deputy Dir. of Cent. Intelligence (Aug. 3, 1964), *available at* http://www.foia.cia.gov/sites/default/files/document_conversions/5829/CIA-RDP80B01676R001300100015-3.pdf.

⁹² *Id.*

⁹³ *Id.* Though difficult to read in the original, the last word appears to be "sensitive."

⁹⁴ *Project MKULTRA*, *supra* note 37, at 13-14. Here, again, the Admiral states that he has been assured "there is no evidence within the Agency of any involvement at

IV. A CONSTITUTIONAL CLAIM

Knowing that MKULTRA existed and was used as an experimental drug program on unwitting Americans, the question becomes, what can that soldier do now? While a well-established rule would grant a lay citizen relief for a violation of the United States Constitution, such as an unreasonable search and seizure, this rule does not apply to service members with a claim against their superior officers during active duty.⁹⁵ For reasons discussed in the following cases, the Supreme Court has not found it appropriate to extend a remedy to veterans whose constitutionally protected rights were violated while in the service.

First, in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, the Court held that a violation of the Constitution by a government actor gives rise to damages for an individual.⁹⁶ The Court relied heavily on *Bell v. Hood*, and stated that “where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.”⁹⁷

Articulating the “special factors” test, the Court found there were “no special factors counselling hesitation in the absence of affirmative action by Congress.”⁹⁸ The Court implied that, without congressional intent to create a remedy, a court should not create a remedy on its own.⁹⁹ For example, the Court referenced *United States v. Standard Oil*, where the Court found that the case involved “federal fiscal policy,” and, therefore, Congress should create the remedy, not the courts.¹⁰⁰

higher echelons, the White House, for instance, or specific approval.” Also note that MKSEARCH was a follow-up program to MKULTRA.

⁹⁵ See *Bivens v. Several Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 389, 396 (1971) (holding that the violation of a constitutional right by a federal agent acting under his authority gives rise to an action for damages from the constitutional violation, but that the doctrine may not be extended when “special factors” apply). *But see* *United States v. Stanley*, 483 U.S. 669, 671 (1987) (finding that a *Bivens* claim is not permitted when a service member’s injury stems from an action that is “incident to service”); *Chappell v. Wallace*, 462 U.S. 296, 298, 304 (1983) (holding that “special factors” prevent service members from seeking damages for a *Bivens* claim).

⁹⁶ See *Bivens*, 403 U.S. at 389.

⁹⁷ *Id.* at 392 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

⁹⁸ *Id.* at 396.

⁹⁹ *Id.* at 396-97.

¹⁰⁰ *Id.* at 396 (quoting *United States v. Standard Oil Co.*, 332 U.S. 301, 311 (1947)).

Twelve years after *Bivens*, the Court in *Chappell v. Wallace* held that service members may not recover damages for constitutional violations arising while in-service, a *Bivens*-type claim.¹⁰¹ Due to the “peculiar and special relationship of the soldier to his superiors” and “inescapable demands” in the military that call for “immediate compliance with military procedures and orders [that] must be virtually reflex,” the Court found it appropriate to deny the petitioner’s claim.¹⁰²

Further, in analyzing the *Bivens* special factors test, the Court found that a congressionally created remedy existed and should be utilized.¹⁰³ Congress created the Uniform Code of Military Justice (UCMJ) for service members to “avail themselves of the procedures and remedies created by Congress.”¹⁰⁴ The Court indicated the petitioners should have sought redress in the UCMJ instead of within the court system, and this conclusion would also support the Court’s finding that “special factors” prohibited this claim.¹⁰⁵ Due to the creation of the UCMJ, the Court decided there can be no remedy for a service member bringing claims of constitutional violations against their superior officers.¹⁰⁶

The doctrines of *Bivens* and *Chappell* intersected once again when U.S. Army Master Sergeant James B. Stanley filed a complaint alleging unwitting exposure to lysergic acid diethylamide (LSD) while in the service.¹⁰⁷ In February of 1958, Master Sergeant Stanley participated in a program that was “designed to test the effectiveness of protective clothing and equipment as defenses against chemical warfare.”¹⁰⁸ However, during this program, Stanley was given, unbeknownst to him, doses of LSD.¹⁰⁹ The Army’s purpose in secretly dosing volunteers was “to study the effects of the drug on human subjects.”¹¹⁰

Stanley was not aware of the LSD testing until December 10, 1975, when the Army sent him a letter, inquiring about the long-term effects of LSD on the “volunteers” in the 1958 study.¹¹¹ Stanley

¹⁰¹ *Chappell v. Wallace*, 462 U.S. 296, 305 (1983).

¹⁰² *Id.* at 300 (quoting *United States v. Brown*, 348 U.S. 110, 112 (1954)).

¹⁰³ *Id.* at 299. Note that the Court here applied a *Feres* analysis due to pertinent policy concerns. *Id.* at 299-304.

¹⁰⁴ *Id.* at 302.

¹⁰⁵ *See id.* at 303.

¹⁰⁶ *Id.* at 304.

¹⁰⁷ *United States v. Stanley*, 483 U.S. 669, 671 (1987).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

brought suit under the Federal Tort Claims Act, “alleging negligence in the administration, supervision, and subsequent monitoring of the drug testing program.”¹¹²

Stanley contended that the LSD caused him to experience “hallucinations,” “incoherence,” “memory loss,” and “impaired . . . military performance,” along with periods of violence towards his family.¹¹³ He reported that, on occasion, he would “awake from sleep at night and, without reason, violently beat his wife and children, later being unable to recall the entire incident.”¹¹⁴ After Stanley was discharged in 1969, he and his wife divorced, due to “personality changes wrought by the LSD.”¹¹⁵

Chappell was issued during the time Stanley was still fighting to appear in district court.¹¹⁶ The Supreme Court granted certiorari in *Stanley* because the Circuits Courts had inconsistently applied *Chappell* against *Bivens*-type claims, and there was no clear guidance for courts on whether *Chappell* served as a direct bar to *Bivens* actions.¹¹⁷

Stanley attempted to distinguish his case from *Chappell* through two distinct arguments.¹¹⁸ First, Stanley argued that his injury was in no way “incident to service.”¹¹⁹ Justice Scalia, writing for the majority, stated that “[i]f that argument is sound, then even if *Feres* principles apply fully to *Bivens* actions, further proceedings are necessary to determine whether they apply to this case.”¹²⁰ Stanley also argued that the individuals who gave him LSD were not his superior officers and “may well have been civilian personnel.”¹²¹ Because of this, the Court admitted *Chappell* is “not strictly controlling.”¹²² Unlike the civilian military scientists in *Stanley*, *Chappell*’s case involved superior officers, and policy concerns supported denying the claim against superior officers because they should be able to make decisions quickly.¹²³ Here, however, the

¹¹² *Id.* at 672; *see also* Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 (2014).

Note that the effect of the *Feres* doctrine barred the claim because Stanley was on active duty at the time of the alleged negligence. *Stanley*, 483 U.S. at 672.

¹¹³ *Stanley*, 483 U.S. at 671.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 674.

¹¹⁷ *Id.* at 676.

¹¹⁸ *Id.* at 679-80.

¹¹⁹ *Id.* at 680.

¹²⁰ *Id.*

¹²¹ *Id.* at 679.

¹²² *Id.* at 680.

¹²³ *Id.*

policy concerns of *Chappell* do not support Stanley's claim because the conduct may not have been performed by military personnel.¹²⁴

Nevertheless, the Court did not find that Stanley's assertions distinguished the case from *Chappell's* other policy concerns.¹²⁵ The Constitution imbued Congress with such articulated powers, and where military concerns are involved, the Court will not extend a remedy in a situation absent Congressional action.¹²⁶ Further, Justice Scalia stated that the creation of a remedy by the court system, in spite of Congress, would be "inappropriate."¹²⁷ Ultimately, the Court reaffirmed *Chappell* and the use of the special factors test.¹²⁸

Justice Sandra Day O'Connor concurred in part and dissented in part to the majority decision.¹²⁹ She asserted that the holdings in *Chappell* and *Feres* should be "read together" as "both cases unmistakably stand for the proposition that the special circumstances of the military mandate that civilian courts avoid entertaining a suit involving harm caused as a result of military service."¹³⁰ In reading the cases together, a claim brought by a service member, having arisen out of even "negligence, recklessness, [or] deliberate indifference" by the military would not survive a *Bivens*-type analysis.¹³¹ However, Justice O'Connor continued, stating that *Chappell* is applicable only to harms that "arise out of or are in the course of activity incident to service."¹³² In Stanley's case, however, Justice O'Connor believed that this harm was not incident to service, stating, "In my view, conduct of the type alleged in this case is so far beyond the bounds of human decency that as a matter of law it simply cannot be considered a part of the military mission."¹³³ She would, therefore, have granted Stanley's claim the ability to be heard in court under a *Bivens* analysis, stating that "[n]o judicially crafted rule should insulate from liability the involuntary and unknowing human experimentation alleged."¹³⁴ Nonetheless, Stanley's day in court remained denied.

¹²⁴ *Id.*

¹²⁵ *Id.* at 705.

¹²⁶ *Id.* at 682.

¹²⁷ *Id.* at 683.

¹²⁸ *Id.*

¹²⁹ *Id.* at 708.

¹³⁰ *Id.* at 709.

¹³¹ *Id.*

¹³² *Id.* (quoting *Feres v. United States*, 340 U.S. 135, 146 (1950)).

¹³³ *Id.*

¹³⁴ *Id.* at 709-10.

A. MKULTRA in Court Today

If another MKULTRA victim brought a claim in court today, the resolution undoubtedly would be similar to *Stanley*. Thus, Stanley and other similarly situated veterans cannot bring a claim against the federal government for constitutional violations. Even when Stanley attempted to distinguish himself in pivotal ways from *Chappell*, including that the conduct alleged was not by his superior officers, the Court nonetheless found that unwittingly dosing service members with LSD was incident to service and, therefore, *Chappell* and *Feres* barred Stanley's claim.

Despite grave violations of constitutionally protected rights, the United States Supreme Court decided that veterans may not receive a judicial remedy because it would be contrary to congressional intent. But the ultimate effect of the Supreme Court's decision is the same as stating that Congress would deny due process of the law to veterans. Even further, Congress expected that veterans who were *unknowingly* dosed with LSD in service should avail themselves of congressionally created remedies, such as the UCMJ.

How far must the factual scenario go to demonstrate that human experimentation is not part of the military mission and, therefore, not incident to service? Would it have been enough if Stanley knew, without a doubt, that civilians had given him LSD without his knowledge? Does it matter that Stanley did not learn of his harm until after he was discharged from the Army? What can an individual do without proof?

V. THE *FERES* DOCTRINE

Feres v. United States is a landmark decision in the history of the Supreme Court. It created the *Feres* Doctrine, which is the main hurdle for service members and veterans recovering in a tort action against the armed forces and their superior officers. The Court in *Feres* looked at three different factual scenarios: the "*Feres* case," the "*Jefferson* case," and the "*Griggs* case."¹³⁵

In the *Feres* case, a soldier was in his barracks when it caught fire and killed him.¹³⁶ His estate alleged that the military was negligent in quartering the service member there when it knew, or should have known, that the barracks were "unsafe because of a

¹³⁵ *Feres*, 340 U.S. at 136-37.

¹³⁶ *Id.* at 137.

defective heating plant.”¹³⁷ The *Jefferson* case involved a service member who underwent an abdominal surgery and, eight months later, “a towel 30 inches long by 18 inches wide, marked ‘Medical Department U.S. Army’” was extracted from his stomach.¹³⁸ Finally, the *Griggs* case dealt with issues of negligence and “unskillful medical treatment” that caused the service member’s death.¹³⁹ The Court articulated the common underlying theme in all three cases: the plaintiffs were on active duty and “sustained injury due to negligence of others in the armed forces.”¹⁴⁰

The Court examined whether the Federal Tort Claims Act (FTCA)¹⁴¹ provided legal recourse to a service member who sustained a harm due to negligence on behalf of the armed forces when the harm was acquired “incident to the service.”¹⁴² First, the FTCA excludes recovery from “[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.”¹⁴³ The Court then discussed several arguments as to why the FTCA must also bar service members’ negligence claims.¹⁴⁴

The Court in *Feres* determined that there were a number of inequalities that would arise, should a service member be able to sue the armed forces.¹⁴⁵ Notably, noting the fact that a soldier is not able to choose his station, the Court paints a picture that a veteran could be a victim of tort law because he is forced to reside in a particular state or territory, and this is inherently unfair.¹⁴⁶

The Court also relied on the special connection between a soldier and his command, as a distinct federal relationship between service members and the government that is “derived from federal sources and governed by federal authority.”¹⁴⁷ The Court commented that the FTCA is a congressional exercise of power and it is intended to fit into the scope of other remedies, such as “systems of simple,

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 138.

¹⁴¹ Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-80 (2014). The FTCA authorizes civil tort suits to be brought against the United States. *See* H.R. 2249, 110th Cong. (2007).

¹⁴² *Feres*, 340 U.S. at 138.

¹⁴³ *Id.* (citing 28 U.S.C. § 2680(j)).

¹⁴⁴ *Id.* at 139.

¹⁴⁵ *Id.* at 142-43.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 144.

certain, and uniform compensation for injuries or death of those in armed services.”¹⁴⁸

The Court looked to the Department of Veterans Affairs and its disability compensation system as the appropriate remedy, stating the VA system “normally requires no litigation [and] is not negligible or niggardly”¹⁴⁹ The Court also articulated that “a soldier is at peculiar disadvantage in litigation,” in that the “[l]ack of time and money” and “difficulty if not impossibility of procuring witnesses” would severely affect the soldier’s ability to defend himself in tort litigation.¹⁵⁰

The important question then is whether *Feres* is still modern in its policy concerns. The VA system that is intended to provide a veteran with a fair and equitable remedy is no longer an efficient system.¹⁵¹ Further, the information gathering for a disability compensation claim is similar to that which a veteran would have to show in a court environment.¹⁵²

Feres should not bar claims brought by veterans concerning involuntary ingestion of LSD due to the nature of CIA-initiated human experimentation programs. In a 1994 report prepared for the Committee on Veterans’ Affairs, contributors expressed why *Feres* should not apply to MKULTRA victims, stating, “[W]hen inappropriate experimentation has resulted in suffering for military personnel, [the *Feres* doctrine] stands in violation of established ethical standards”¹⁵³ The report further asserted that “Congress should not apply the *Feres* Doctrine for military personnel who are harmed by inappropriate experimentation when informed consent has not been given.”¹⁵⁴ It cited Justice O’Connor’s dissent in *Stanley* to support its assertion.¹⁵⁵ Justice O’Connor postured that a MKULTRA victim should not be denied a remedy due to the government’s “deliberate and calculated exposure of otherwise healthy military

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 145.

¹⁵⁰ *Id.*

¹⁵¹ See generally JACQUELINE MAFFUCCI, THE BATTLE TO END THE VA BACKLOG (2014), available at http://media.iava.org/2014BattleToEndtheVABacklog_PRINT.pdf (discussing the VA backlog that inhibits access to benefits for veterans).

¹⁵² *Id.* at 12-13 (describing the difficulties in collecting evidence for a claim).

¹⁵³ STAFF OF S. COMM. ON VETERANS AFFAIRS, 103D CONG., IS MILITARY RESEARCH HAZARDOUS TO VETERANS’ HEALTH? LESSONS SPANNING HALF A CENTURY 45 (Comm. Print 1994).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

personnel to medical experimentation without their consent, outside of any combat, combat training, or military exigency”¹⁵⁶

The *Feres* decision relied on the fact that soldiers suffered their harm “in the course of activity incident to service.”¹⁵⁷ However, the activities of MKULTRA did not involve service members performing in the course of duty, and, therefore, their harm could not have occurred incident to service, especially where the participants did not give informed consent. Further, as Justice O’Connor wrote in her *Stanley* dissent, MKULTRA was never in line with a military mission.¹⁵⁸ Even during the course of the program, its validity and legality were continuously questioned,¹⁵⁹ and the leaders of the programs ordered frequent document destruction.¹⁶⁰ These actions should not be understood to be in the line of duty, in line with the military mission, or in any other formulation that would excuse a claim because of the *Feres* Doctrine’s attention to the “federal sources . . . governed by federal authority.”¹⁶¹

VI. DISABILITY COMPENSATION SYSTEM

While the disability compensation system may have been efficient in the 1950s, it has been severely criticized recently for its inability to adapt and change its technological deficiencies, its

¹⁵⁶ *Id.* (citing *United States v. Stanley*, 483 U.S. 669, 709 (1987) (O’Connor, J., dissenting)).

¹⁵⁷ *Feres v. United States*, 340 U.S. 135, 146 (1950).

¹⁵⁸ *See Stanley*, 483 U.S. at 708-10 (O’Connor, J., dissenting).

¹⁵⁹ *Project MKULTRA*, *supra* note 37, at 398. The General Counsel wrote to the Inspector General after the suicide of an unwitting victim of LSD: “I’m not happy with what seems to be a very casual attitude on the part of . . . representatives to the way this experiment was conducted I do believe, especially when human health or life is at stake, that at least the prudent, reasonable measures which can be taken to minimize the risk must be taken and failure to do so was culpable negligence.”

¹⁶⁰ *See id.* at 403-04. Dr. Sidney Gottlieb spoke with the Director of Central Intelligence, Richard Helms upon his retirement, and Gottlieb believed that “it would be a good idea if these files were destroyed.” *Id.* at 403. Helms further remarked that “we thought we would just get rid of the files as well, so that anybody who assisted us in the past would not be subject to follow-up or questions, embarrassment, if you will.” *Id.* at 403-04. Further, the Select Committee found that even prior to this document destruction by Helms and Gottlieb, “MKULTRA records were far from complete” and the Inspector General stated in 1963 that “MKULTRA record[s] appear . . . to rest in the memories of the principal officers and is therefore almost certain to be lost with their departures.” *Id.* at 404 n.7.

¹⁶¹ *Feres*, 340 U.S. at 144; *see also* Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 (2014). Since even an intentional tort claim would be barred by the FTCA, it is a moot point whether the actions by the CIA and U.S. Army were negligence or battery. 28 U.S.C. § 2680(j) (2013).

inaccuracy in claims processing, and its huge backlog and delay in addressing claims.¹⁶² Currently, there are nearly 250,000 claims more than 125 days old pending at regional Veterans Affairs offices.¹⁶³ This number includes claims for original entitlement and for increased rating evaluation.¹⁶⁴ Although the backlog has decreased since 2013, the overall number of claims has increased and the VA system is still overburdened by the sheer volume.¹⁶⁵ Further, the majority of claims that are processed require adjudication, and because of the VA's effort to reduce backlog, the number of claims in the appeals process has increased.¹⁶⁶ Indeed, appeals have grown by nearly 17%.¹⁶⁷ As of September 2014, over 260,000 claims were currently in the first stages of the appeals process, and the Court of Appeals for Veteran's Claims heard and decided more than 3,800 appeals in 2013.¹⁶⁸

In order to be successful in a claim for service-connected disability, a veteran must show: (1) medical evidence of a current diagnosed physical or mental disability; (2) evidence of an event, injury, or disease in service; and (3) a link between his current disability and the event, injury or disease in service, usually supported by medical evidence.¹⁶⁹

While the VA does have a statutory duty to assist veterans in obtaining necessary evidence,¹⁷⁰ the burden initially falls on the veteran to collect and identify the following: (1) information from his service record as to an in service injury; (2) current medical

¹⁶² See MAFFUCCI, *supra* note 151, at 3-4.

¹⁶³ 2014 Performance and Accountability Report Part I, DEP'T. OF VETERAN AFF., Nov. 17, 2014, at 2, available at <http://www.va.gov/budget/docs/report/2014-VAparPartI.pdf>.

¹⁶⁴ 2014 Performance and Accountability Report Part II, DEP'T. OF VETERAN AFF., Nov. 17, 2014, at 3, available at <http://www.va.gov/budget/docs/report/2014-VAparPartII.pdf>.

¹⁶⁵ *Id.* (discussing the various challenges faced by the VA, including the increased complexity of claims).

¹⁶⁶ *Id.* at 97.

¹⁶⁷ *Id.* at 3.

¹⁶⁸ *Id.* at 98; Performance and Accountability Report, U.S. CT. OF APPEALS FOR VETERANS CLAIMS (2013), at 3, available at <http://www.uscourts.cavc.gov/documents/FY2013PerformanceAccountabilityReport.pdf>.

¹⁶⁹ See *Claims and Evidence: FDC Checklist for Disability Compensation*, DEP'T OF VETERANS AFF., <http://www.benefits.va.gov/fdc/checklist.asp> (last visited Feb. 16, 2014); see also 38 C.F.R. § 3.303(a) (2013) ("Service connection connotes many factors but basically it means that the facts, shown by evidence, establish that a particular injury or disease resulting in disability was incurred coincident with service in the armed forces, or if preexisting such service, was aggravated therein.").

¹⁷⁰ See 38 U.S.C. § 5103A (2013) (stating that the VA has a duty to assist claimants in obtaining evidence); 38 C.F.R. § 21.1032 (2013).

documentation that denotes an injury in-service; and (3) current documents that correlate the two conditions (for example, a letter from a doctor reconciling the veteran's in-service injury and the current condition).¹⁷¹ In proving their claims, combat veterans frequently resort to buddy statements to prove the occurrence of events or verify an in-service stressor.¹⁷²

An MKULTRA victim will likely meet only one of the necessary burdens. For example, he or she may have proof of their participation in the program, such as a letter similar to the one *Stanley* received. Or, he or she may have a current diagnosed condition, such as chronic paranoia or anxiety. However, they would need both, simultaneously, to proceed. Moreover, he or she would need a doctor willing to write a statement verifying that their condition was caused by LSD exposure sometime during the 1950s and 1960s.

But assume a particular victim can meet all of the burdens—that they have a current diagnosed condition, that their doctor has reviewed their military records and treatment history and is willing to write a letter stating their belief that the veteran's condition is likely related to LSD exposure in the service. Then, how will this particular veteran also prove that they were, in fact, given LSD unwittingly?

The United States Court of Appeals for the Federal Circuit recently decided a case from the Court of Appeals for Veterans' Claims that related to the burden of proof in VA claims.¹⁷³ *AZ v. Shinseki* involved a service-connection claim for Post-Traumatic Stress Disorder (PTSD) as a result of sexual assault that occurred in-service.¹⁷⁴ However, prior adjudication denied the appellant's claim because her military service records did not contain treatment records of a sexual assault.¹⁷⁵ According to 38 U.S.C. § 5107:

¹⁷¹ See *Shedden v. Principi*, 381 F.3d 1163, 1166-67 (Fed. Cir. 2004). A veteran must show: "(1) the existence of a present disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship between the present disability and the disease or injury incurred or aggravated during service." *Id.* (citing *Hansen v. Principi*, 16 Vet. App. 110, 111 (Vet. App. 2002)).

¹⁷² See *Special Rules for Combat Veterans Proving "In Service Occurrence or Aggravation of a Disease or Injury,"* AMERICAN BAR ASSOCIATION, at 2, available at

http://www.americanbar.org/content/dam/aba/administrative/young_lawyers/project_salute/cb_d2_f26_special_rules_for_combat_veterans_proving_in_service_occurrence_or_aggravation_of_a_disease_or_injury.authcheckdam.pdf.

¹⁷³ See *AZ v. Shinseki*, 731 F.3d 1303 (Fed. Cir. 2013).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 1305-06.

The Secretary shall consider all information and lay and medical evidence of record in a case before the Secretary with respect to benefits under laws administered by the Secretary. When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant.¹⁷⁶

However, *AZ* is not about the appellant having documented evidence weighed against her; rather, it is about having the lack of evidence weighed against her.¹⁷⁷ While the statute addresses the weight of positive and negative evidence, it does not address the weight of an absence of evidence.¹⁷⁸ The court explained that “[t]he absence of certain evidence may be pertinent if it tends to disprove (or prove) a material fact.”¹⁷⁹ However, in exploring the facts before it, the court found that “servicemen and servicewomen who experience in-service sexual assaults face ‘unique’ disincentives to report.”¹⁸⁰ For example, servicewomen failed to report sexual assault because of “fear of retaliation or reprisals,” fear of the stigma associated with reporting, or fear they would “appear weak or incapable of performing their mission.”¹⁸¹ The court also cited to a 2010 report from the Sexual Assault Prevention and Response Office (SAPRO) that reviewed the last six years of reporting and found that less than 15% of service members who were victims of sexual assault reported the event to the military.¹⁸²

Thus, the question before the court in *AZ* was whether the VA could recognize a service connection for the other 85% of service members who did not report their sexual assault due to fear.¹⁸³ The Federal Circuit reviewed, in depth, the common law rules of evidence

¹⁷⁶ *Id.* at 1310 (citing 38 U.S.C. § 5107(b) (2013)).

¹⁷⁷ *Id.* at 1311.

¹⁷⁸ *Id.*; see also 38 U.S.C. § 5107(b) (2013).

¹⁷⁹ *AZ*, 731 F.3d at 1311.

¹⁸⁰ *Id.* at 1313.

¹⁸¹ *Id.* (citing *Sexual Assault Prevention & Response Report*, U.S. DEP’T. OF DEF. (2010), at 20, available at

http://www.sapr.mil/public/docs/reports/DoD_Fiscal_Year_2010_Annual_Report_on_Sexual_Assault_in_the_Military.pdf).

¹⁸² *Id.* at 1314 (citing *Sexual Assault Prevention & Response Report*, U.S. DEP’T. OF DEF. (2010), at 53, available at

http://www.sapr.mil/public/docs/reports/DoD_Fiscal_Year_2010_Annual_Report_on_Sexual_Assault_in_the_Military.pdf).

¹⁸³ See *id.* at 1311, 1315.

and the Federal Rules of Evidence, and answered the question in the affirmative.¹⁸⁴ The court held that the VA can grant service connection for those victims that did not report.¹⁸⁵

Where no such record would have existed, the common law rules of evidence would admit the absence thereof as evidence that the transaction did not occur, if the record is one that “naturally would have been made if the transaction had occurred.”¹⁸⁶ This common law rule of evidence has been widely adopted by lower courts.¹⁸⁷ It then became an exception to the Federal Rules of Evidence’s hearsay rules, specifically Rule 803(7) and Rule 803(10).¹⁸⁸ The court stated that “both rules require for admissibility that ‘a record was regularly kept’ for the type of event in question.”¹⁸⁹ Also, “[e]vidence that an entry is missing from a deficient record is inadmissible” under the Federal Rules of Evidence.¹⁹⁰

However, referring to *Buczynski v. Shinseki*, the Federal Circuit found that “the Board [of Veterans Appeals] may not consider the absence of [administrative record] evidence as substantive negative evidence” against a claim.¹⁹¹ Further, consistent with its holding in *Fagan v. Shinseki*, the Federal Circuit concluded evidence that does not lend positive or negative support to a veteran’s claim for service-connection is not “pertinent evidence” as to the veteran’s claim.¹⁹² In *AZ*, the court found that not reporting a sexual assault, due to the nature of the crime, cannot be regarded as evidence that the assault did not occur.¹⁹³

Policy concerns also support the holding in *AZ*. For example, the court discussed that the veteran’s benefits system should be based on “solicitude for the claimant.”¹⁹⁴ Congress “relaxed evidentiary requirements” for veterans in the VA system, so to “penalize” a victim of sexual assault for not reporting to their superior officer “would

¹⁸⁴ *See id.* at 1315-17.

¹⁸⁵ *Id.* at 1322.

¹⁸⁶ *Id.* at 1315 (citing 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1531, at 463).

¹⁸⁷ *See id.* at 1315-16.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 1317.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 1317 (quoting *Buczynski v. Shinseki*, 24 Vet. App. 221, 224 (Vet. App. 2011)).

¹⁹² *Id.* at 1318 (citing *Fagan v. Shinseki*, 573 F.3d 1282, 1289 (Fed. Cir. 2009)).

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 1322 (citing *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 311 (1985)).

hardly comport with a system in which ‘the importance of systemic fairness and the appearance of fairness carries great weight.’”¹⁹⁵

A. *The Expansive Effect of AZ v. Shinseki*

The Court of Appeals for Veterans Claims (CAVC) has embraced the Federal Circuit’s decision in *AZ* and has given the holding effect in cases beyond sexual assault. In *Helm v. Shinseki*, the veteran, Helm, was seeking service-connection for hearing loss as a result of noise trauma during service.¹⁹⁶ The VA denied the claim due to lack of records documenting the hearing loss.¹⁹⁷ Specifically, Helm’s statements of complaints of hearing loss were “not credible based on the lack of objective medical evidence of hearing loss or tinnitus until many years after service.”¹⁹⁸

The court relied on two cases to reverse the Board of Veterans Appeal’s denial. First, citing *Horn v. Shinseki*, the CAVC held that the “absence of evidence cannot be substantive negative evidence,” unless a veteran first shows a proper foundation that would show that the lack of record “has a tendency to prove or disprove a relevant fact.”¹⁹⁹ Next, referring to *AZ*, the court noted that “absence of documentation of a claimed sexual assault in service cannot be considered as evidence that the assault did not occur”²⁰⁰ Therefore, the court in *Helm*, relying on these two cases, found that the Board improperly held that the lack of evidence in his medical records weighed negatively against his claim.²⁰¹ The CAVC remanded Helm’s claim for reconsideration by the Board.²⁰²

¹⁹⁵ *Id.* (citing *Hodge v. West*, 155 F.3d 1356, 1363 (Fed. Cir. 1998)).

¹⁹⁶ *Helm v. Shinseki*, No. 12-2177, 2013 WL 5874707, at *1-2 (Vet. App. Oct. 31, 2013).

¹⁹⁷ *Id.* at *8.

¹⁹⁸ *Id.* at *8-9.

¹⁹⁹ *Id.* at *9 (citing *Horn v. Shinseki*, 25 Vet. App. 231, 239 (Vet. App. 2012)).

²⁰⁰ *Id.* (discussing *AZ*, 731 F.3d at 1318).

²⁰¹ *Id.* at *10.

²⁰² *Id.* at *12; *see also* *Lee v. Shinseki*, No. 12-3273, 2013 WL 6816705, at *20 (Vet. App. Dec. 26, 2013) (holding that the Board may not make an adverse credibility determination on a veteran’s claim if he failed to file for an existing disability when that veteran had previously filed for a separate disability). Also note that this was a service-connection claim for hypertension, and that the court relied on *AZ*, *Fagan*, *Horn* and *Buczynski* in determining that the veteran’s failure to file for hypertension in his claim was “too ambiguous to have probative value” and required an explanation of reasons and basis by the Board prior to making a credibility determination. *Id.* at *17-18.

B. *AZ v. Shinseki and MKULTRA Victims*

An MKULTRA victim should be permitted by the VA to avail themselves of *AZ*, its authorities, and subsequent cases because they are analogous scenarios: a veteran with an injury due to LSD experimentation, but without proof, is much like a veteran who lacks evidence of his or her sexual assault.

The first hurdle for MKULTRA victims is proving when, where, and how they were unwittingly dosed with LSD. Unfortunately, whether documents exist that could illuminate a particular veteran's claim, such as the list of names alluded to in the Congressional Hearing with Admiral Turner, is unclear.²⁰³

There is no exact precedent to show what the Court has done, or would do, in this situation, but there are some analogies we can draw based on other factual scenarios. In *Boggs v. West*, the veteran alleged harm not from his time in-service, but rather as a result of VA treatment.²⁰⁴ In 1966, he was admitted to a VA hospital due to "reactive depression with severe anxiety, mild hysterical features, and excessive use of denial."²⁰⁵ One year later, the veteran "consented to participation in an investigational study of the use of the drug LSD."²⁰⁶ Two years later, the veteran was given a follow-up examination and was diagnosed with "chronic severe anxiety reaction."²⁰⁷ While the veteran stated he did not want to continue the program after one dose, he alleged that VA physicians continued to administer doses of LSD without his consent.²⁰⁸ His doctors supported the conclusion that his later diagnosis of organic brain syndrome in 1981 was indicative of "post-LSD syndrome," but the VA nonetheless denied the claim.²⁰⁹ The CAVC asserted that pre-existing conditions and alcoholism contributed to his condition, not LSD.²¹⁰ The CAVC also found it "highly probative" that there was no evidence after the administration of LSD that the veteran suffered any ill effects in terms of employability, or effects to his central nervous system.²¹¹ The CAVC affirmed the Board's decision based on the idea that the veteran consented to LSD experimentation, that he had a pre-existing

²⁰³ See *Project MKULTRA*, *supra* note 37, at 36.

²⁰⁴ *Boggs v. West*, 11 Vet. App. 334, 336 (Vet. App. 1998).

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 337.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.* at 341.

condition when entering the VA system, and that the “preponderance of the evidence shows that the veteran did not incur a superimposed disability as the result of VA medical treatment in 1967.”²¹²

A second relevant case is *Arista v. Shinseki*, decided in 2011.²¹³ The veteran was a munitions systems specialist on active duty from 1987 to 1992.²¹⁴ The veteran had filed a claim for service-connection for PTSD, but was not able to substantiate his stressor because his mission was classified.²¹⁵ The Board decided that he had not submitted “specific enough information” of his stressors.²¹⁶ While the veteran was able to submit a document that was stamped “4-SECRET,” he was not able to provide enough evidence to convince the VA of his claimed stressors.²¹⁷ The VA continued to request records, but the veteran was not able to provide any and, in October 2006, stated, “I can’t give you buddy letters because the guys I worked with can’t say anything either.”²¹⁸ The CAVC affirmed the Board’s denial of the veteran’s claim for PTSD.²¹⁹

These two cases demonstrate that an MKULTRA victim today would have a difficult time surmounting the VA’s burden of proof. First, because the program aimed to recruit prisoners and hospitalized patients with prior drug addictions, later disabilities may be assumed to be a result of pre-existing conditions, not a result of LSD dosing.²²⁰ Second, any condition that was diagnosed after being given LSD will

²¹² See *id.* at 336. It should also be noted that when the veteran entered the VA system with psychological disabilities, it was a year before the VA recruited him into an LSD experimentation program. *Id.* Was the veteran capable of giving informed consent to this program? Is this a program that one could even give informed consent to participate in? We know nothing from the case concerning Boggs’ treatment from the time he walked through the doors seeking treatment for depression to when the VA recruited him into an LSD program. See *id.* This case was appealed to the Federal Circuit, but was dismissed for lack of jurisdiction. *Boggs v. Shinseki*, 404 F. App’x 472, 474-75 (Fed. Cir. 2010); see also 38 U.S.C. § 7292(d)(2) (2013) (“Except to the extent that an appeal under this chapter presents a constitutional issue, the Court of Appeals may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case.”).

²¹³ *Arista v. Shinseki*, No. 10-1338, 2011 WL 6004121, at *1 (Vet. App. Dec. 2, 2011). This case may not be cited as binding precedent. See U.S. Vet. App. R. 30(a). This case should be persuasive only to illustrate what a court may do if presented with a similar situation.

²¹⁴ *Id.* at *1.

²¹⁵ *Id.* at *5-6.

²¹⁶ *Id.* at *6.

²¹⁷ *Id.* at *4.

²¹⁸ *Id.* at *2-3.

²¹⁹ *Id.* at *6.

²²⁰ See *Project MKULTRA*, *supra* note 37, at 391.

be difficult to prove in a medical document, such as a letter connecting the illness to the LSD, especially if a veteran is only aware that he or she was given LSD once.

Lastly, as the *Arista* case demonstrates, the veteran must be able to access classified records in order to substantiate his claim.²²¹ In *Arista*, the veteran was not able to obtain the records that he required and was denied his benefits, even though it is not clear if records about his injury and actions *would have been kept*.²²² However, in the case of MKULTRA, records were kept, but often ordered to be destroyed by program directors.²²³ Moreover, there are probably documents related to MKULTRA that are still classified.²²⁴ Due to the potential impossibility of an MKULTRA victim obtaining records, the question becomes is *AZ* expansive enough to allow a veteran who was subjected to MKULTRA to recover benefits without vital documents?

If a veteran wanted to obtain service-connection benefits for receiving unwitting dosages of LSD during service under MKULTRA, the veteran will not be able to obtain sufficient records to prove that he/she was a test subject. In light of the absence of records, a veteran should be able to use *AZ* to demonstrate that the lack of records is not probative evidence that the veteran was *not* used as a test subject in MKULTRA.²²⁵ However, it is important to note that the holding in *AZ* was specific to instances of sexual assault, so courts may be unwilling to extend the holding to LSD exposure under MKULTRA.²²⁶ Unreleased documents, or documents destroyed by the government, are analogous to records that would not have been kept or recorded in the first place. Both of these scenarios create situations where the veteran is not able to substantiate his claim because he is not able to prove his in-service injury or harm. *AZ* bridged the gap for records that would not have existed, and it should also bridge the gap for records that the government destroyed or refuses to release.

²²¹ See *Arista*, 2011 WL 6004121, at *6-7.

²²² *Id.* at *2-4.

²²³ See *Project MKULTRA*, *supra* note 37, at 403-04.

²²⁴ See also *CIA v. Sims*, 471 U.S. 159, 181 (1985) (holding that the Freedom of Information Act allowed the Director of the CIA to withhold information regarding the research institutions involved in MKULTRA). *Sims* is yet another obstacle that a veteran must overcome if he seeks documents regarding testing at institutions where the veteran may have been stationed during the time of the program. In the event that *Sims* bars a veteran from obtaining documents, *AZ* should alleviate the burden of absent records. See *AZ v. Shinseki*, 731 F.3d 1303, 1318 (Fed. Cir. 2013).

²²⁵ See *AZ*, 731 F.3d at 1318.

²²⁶ *Id.*

VII. CONCLUSION

Based on the policy considerations enumerated in *AZ*, regarding Congress's legislative intent in creating the VA disability system, the "relaxed evidentiary requirements" are supposed to promote a veteran-friendly and non-adversarial system.²²⁷ Moreover, *AZ* also stated that, to deny a claim based on evidence that would not have been kept, would not "comport with a system in which 'the importance of systemic fairness and the appearance of fairness carries great weight.'"²²⁸ Therefore, in reliance on a system based on fairness to the veteran, military destruction of documents that would support a veteran's claim for a service-connection injury should not be held against that veteran or his claim. Even given the negative treatment of comparable scenarios in *Boggs* and *Arista*, *AZ* and *Helm* should overcome the evidentiary gaps. Therefore, MKULTRA victims should have at least a colorable argument against the VA as to why they deserve service-connection for currently suffered disabilities as a result of unwitting exposure to LSD by the government.

²²⁷ *Id.* at 1322.

²²⁸ *Id.* (citing *Hodge v. West*, 155 F.3d 1356, 1363 (Fed. Cir. 1998)).

