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“Otherwise Available to the Public”: Using § 102 to Avoid the Supreme Court’s Patent-Eligibility Quagmire

Kurt Fredrickson*

Introduction

To obtain a patent, an applicant must satisfy several statutory requirements, such as 35 U.S.C. § 101, which determines whether an invention is patent-eligible subject matter. Once subject matter has been determined, the patent application is then prosecuted¹ before the United States Patent and Trademark Office (the “PTO”), which ensures the patent application passes several statutory provisions before the patent can issue.² One of the more controversial statutory provisions is § 101, which determines whether the claimed invention’s subject matter is patent eligible.³ Except for a few narrow, statutory exceptions,⁴ a plain reading of § 101 does not exclude any types of subject matter.⁵ However, as courts began hearing challenges to more technically advanced patents, concern grew that patenting certain categories of inventions—including abstract ideas, laws of nature, and physical phenomena

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¹ For a background on patent prosecution, see generally ROBERT PATRICK MERGES & JOHN FITZGERALD DUFFY, *PATENT LAW AND POLICY* 61–65 (8th ed. 2021). *See also Patent Process Overview*, USPTO (Mar. 24, 2022, 2:46 PM EDT), <https://www.uspto.gov/patents/basics/patent-process-overview> [<https://perma.cc/WT9L-96GQ>].

² 35 U.S.C. § 101 (1953); 35 U.S.C. § 102 (2012); 35 U.S.C. § 103 (2011); 35 U.S.C. § 112 (2011); *see also* PETER S. MENELL ET AL., *INTELL. PROP. IN THE NEW TECH. AGE* 162–63 (2020) (describing the statutory requirements for obtaining a patent).

³ *See* MENELL ET AL., *supra* note 2, at 276–318.

⁴ *See, e.g.*, 42 U.S.C. § 2181(a) (1994) (“No patent shall hereafter be granted for any invention or discovery which is useful solely in the utilization of special nuclear material or atomic energy in an atomic weapon.”).

⁵ MENELL ET AL., *supra* note 2, at 282.

(the “judicial exceptions”)—would unfairly bar others from using these fundamental concepts.⁶

As this concern grew, the Court began erecting higher patent-eligibility standards under § 101. The Court has invalidated patents for medical devices⁷ and biochemical applications⁸ by introducing a two-step test to determine whether a claim’s subject matter is patent eligible. The test asks whether the patent claims “something more” than a judicial exception;⁹ if the invention doesn’t, it is patent ineligible.¹⁰ The two-step test has led to a surge in lower court rulings of ineligibility under § 101.¹¹

However, the Court’s two-step test has been widely criticized as making patentability unpredictable and harming innovation.¹² The confused state of law reduces investment in patents and the industries that rely on them.¹³ Some scholars accuse the Court of conflating the requirements of §§ 101 and

⁶ See, e.g., *Gottschalk v. Benson*, 409 U.S. 63 (1972) (invalidating a patent, for an algorithm to convert numbers to binary, as tying up a mathematical formula or algorithm); *Parker v. Flook*, 437 U.S. 584 (1978) (invalidating a patent, for an algorithm to change an alarm limit depending on temperature, as tying up a formula or algorithm in a particular technological environment).

⁷ *Mayo Collaborative Servs. v. Prometheus Lab’ys, Inc.*, 566 U.S. 66 (2012).

⁸ *Ass’n for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576 (2013).

⁹ *Alice Corp. Pty. Ltd. v. CLS Bank Int’l*, 573 U.S. 208, 217 (2014).

¹⁰ *Id.*

¹¹ See MENELL ET AL., *supra* note 2, at 307 (“Between 2014 and the end of 2017, district courts invalidated over 300 patents on § 101 grounds. By contrast, courts invalidated fewer than 30 patents on § 101 grounds over the prior decade.”).

¹² See, e.g., Brief of United States Senator Thom Tillis et al. as Amici Curiae Supporting Petitioner at 2, 5–14, *Am. Axle & Mfg., Inc. v. Neapco Holdings LLC* (*Am. Axle IV*), 142 S. Ct. 2902 (2022) (No. 20-891) (“[The Supreme Court’s test] has created a chaotic state of affairs that, from the standpoint of patent policy, threatens serious negative jurisprudential and real-world consequences to America’s technological leadership.”); Emil Malak, *A Plea for Clarity and a New Approach on Section 101 in 2020*, IPWATCHDOG (Jan. 4, 2020, 12:15 PM), <https://www.ipwatchdog.com/2020/01/04/plea-clarity-new-approach-section-101-2020/id=117537/> [<https://perma.cc/WTC3-NSTJ>] (“Due to the Section 101 problems created by the courts, owning a U.S. patent in the today [sic] is no longer an asset but a liability.”); *Athena Diagnostics, Inc. v. Mayo Collaborative Servs., LLC*, 927 F.3d 1333, 1337 (Fed. Cir. 2019) (Hughes, J., concurring) (“The multiple concurring and dissenting opinions regarding the denial of en banc rehearing in this case are illustrative of how fraught the issue of § 101 eligibility . . . is . . .”); Kennedy Stanley, Note, *The Plot Thickens in the Convoluted Saga of Section 101 Patent Eligibility: Where Do We Go from Here?*, 23 TUL. J. TECH. & INTELL. PROP. 137, 147–49 (2021) (cataloguing various disapproving statements of the Court’s § 101 jurisprudence).

¹³ Brief of Alliance of U.S. Startups & Inventors for Jobs as Amici Curiae Supporting Petitioner at 15–18, *Am. Axle IV*, 142 S. Ct. 2902 (No. 20-891).

112, confusing lower courts.¹⁴ Courts are also wreaking havoc on the patent system, using § 101 to find that digital cameras,¹⁵ garage-door openers,¹⁶ and charging stations¹⁷ are patent ineligible.¹⁸ Since § 101 is decided as a matter of law, judges¹⁹ themselves often determine patents' eligibility at summary judgment.²⁰ Therefore, the task of determining whether a patent is ineligible under § 101 becomes a question of law, which puts judges in the uncomfortable

¹⁴ Brief of Professors Jeffrey A. Lefstin & Peter S. Menell as Amici Curiae Supporting Petitioner at 16–20, *Am. Axle IV*, 142 S. Ct. 2902 (No. 20-891); see also Brief of Ameranth Inc. as Amici Curiae Supporting Petitioner at 9–13, *Am. Axle IV*, 142 S. Ct. 2902 (No. 20-891) [hereinafter Brief for Ameranth] (collecting dissents from judges on the Federal Circuit); *Berkheimer v. HP Inc.*, 890 F.3d 1369, 1375 (Fed. Cir. 2018) (Lourie, C.J., concurring) (“We now are interpreting what began, when it rarely arose, as a simple § 101 analysis, as a complicated multiple-step consideration of inventiveness . . . with the result that an increasing amount of inventive research is no longer subject to patent.”); *Am. Axle & Mfg., Inc. v. Neapco Holdings LLC* (*Am. Axle II*), 967 F.3d 1285, 1319 (Fed. Cir. 2020) (Moore, J., dissenting) (“Our job, our mandate from Congress is to create a clear, uniform body of patent law. Our inability to do so in the § 101 space has not been a mess of our making. But, the unfairness, confusion and uncertainty that will be caused by this opinion is all us.”), *cert. denied*, *Am. Axle IV*, 142 S. Ct. 2902 (2022).

¹⁵ *Yu v. Apple Inc.*, 1 F.4th 1040 (Fed. Cir. 2021), *cert. denied*, 142 S. Ct. 1113 (2022). The dissent criticized the majority opinion, stating: “[t]his camera is a mechanical and electronic device of defined structure and mechanism; it is not an ‘abstract idea.’” *Id.* at 1046 (Newman, J.).

¹⁶ See *Chamberlain Grp. v. Techtronic Indus. Co.*, 935 F.3d 1341 (Fed. Cir. 2019), *cert. denied*, 141 S. Ct. 241 (2020).

¹⁷ See *ChargePoint, Inc. v. Sema Connect, Inc.*, 920 F.3d 759 (Fed. Cir. 2019), *cert. denied*, 140 S. Ct. 983 (2020).

¹⁸ Some have argued that the telephone, the light bulb, and the airplane would have been found ineligible under the Court's § 101 jurisprudence. See Brief of the Chicago Patent Attorneys as Amici Curiae Supporting Petitioner at 9–18, *Am. Axle IV*, 142 S. Ct. 2902 (No. 20-891); Brief of the Houston Intellectual Property Law Ass'n as Amici Curiae Supporting Petitioner at 8–9, *Am. Axle IV*, 142 S. Ct. 2902 (No. 20-891).

¹⁹ Not only federal judges are causing issues with patent eligibility; the International Trade Commission recently found that diamond bits are ineligible under § 101. See *Certain Polycrystalline Diamond Compacts & Articles Containing Same*, Inv. No. 337-TA-1236, USITC (Oct. 26, 2022) (Final), <https://edis.usitc.gov/external/attachment/783166-1908508.pdf> [<https://perma.cc/V8J9-F5ZZ>], *appeal docketed sub nom.* *US Synthetic Corp. v. Int'l Trade Comm'n*, No. 23-1217 (Fed. Cir. 2022). One Commission member decried the decision, stating that “finding claims reciting a specific, definable composition of matter as ineligible . . . suggests that the ID and Majority have strayed from the preemption concerns that motivate the judicial exception to patent eligibility.” *Id.* at 19–20 (Schmidtlin, Comm'r, dissenting).

²⁰ See, e.g., *Am. Axle & Mfg. v. Neapco Holdings LLC* (*Am. Axle I*), 309 F. Supp. 3d 218 (D. Del. 2018), *aff'd*, *Am. Axle II*, 939 F.3d 1355 (Fed. Cir. 2019).

role of ruling on scientific concepts. For example, one Federal Circuit judge has stated that “judges, not experts, will determine as a matter of law, when claims are directed to a natural law . . . [Judges] are the scientific experts now.”²¹

Despite the criticism, the Supreme Court is unwilling to reexamine its § 101 jurisprudence, and other solutions are needed. In 2022, *American Axle & Manufacturing, Inc. v. Neapco Holdings LLC* (*Am. Axle IV*),²² which was considered “the best vehicle for this court to decide the vital questions of patent eligibility in the broadest context with the greatest impact,”²³ was denied certiorari. Although Congress has introduced legislation to fix § 101, no bills have been enacted into law.²⁴ Therefore, parties and courts must approach patent eligibility at a new angle. In doing so, the Court’s messy § 101 jurisprudence is avoided by first proceeding with a patentability analysis under other statutory requirements, namely §§ 102 and 103, which require a patent to be novel and nonobvious.²⁵

This Article discusses a framework that bypasses the Court’s § 101 jurisprudence by instead allowing laws of nature and physical phenomena to be admitted as prior art under § 102.²⁶ Although § 102 typically admits printed publications, offers for sale, and products as prior art, the little-used phrase “otherwise available to the public” allows for a wider variety of admissible prior art. This Article proposes that data and expert reports can be submitted

²¹ *Am. Axle II*, 967 F.3d at 1311 (Moore, J., dissenting); cf. *Ass’n for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576, 596 (2013) (Scalia, J., concurring) (refusing to join the majority opinion on “fine details of molecular biology” because “I am unable to affirm those details on my own knowledge or even my own belief.”)

²² 142 S. Ct. 2902 (2022).

²³ Brief for Ameranth, *supra* note 14, at 14. In part, this was because the Federal Circuit’s denial of rehearing en banc was joined by five concurrences and dissents. See *Am. Axle & Mfg. v. Neapco Holdings LLC* (*Am. Axle III*), 966 F.3d 1347 (2020).

²⁴ See, e.g., Patent Eligibility Restoration Act of 2022, S. 4734, 117th Cong. (2022) (limiting unpatentable material to discrete categories, including “unmodified natural material”); Patent Eligibility Restoration Act of 2024, H.R. 9474, 118th Cong. (2024) (same). See generally David O. Taylor, *Amending Patent Eligibility*, 50 U.C. DAVIS L. REV. 2149, 2153–71 (2017) (discussing the basis for a legislative solution for § 101 issues).

²⁵ See 35 U.S.C. § 102 (2012); 35 U.S.C. § 103 (2011). This Article is not the first to suggest that the current § 101 inquiry can be adequately handled by §§ 102 and 103. See, e.g., *Berkheimer v. HP Inc.*, 890 F.3d 1369, 1375–76 (Fed. Cir. 2018) (Lourie, J., concurring) (“[I]f a claim recites ‘something more,’ an ‘inventive’ physical or technological step, it is not an abstract idea, and can be examined under established patentability provisions such as §§ 102 and 103.”). Rather, the crux of the framework is admitting scientific data and expert-witness testimony as § 102 prior art. See *infra* Section III.B.

²⁶ Abstract ideas will not be discussed.

under § 102 as prior art, which can anticipate any laws of nature or physical phenomena claimed by a patent.

Part I of the Article provides the historical background of § 101 and the Supreme Court's related jurisprudence. Part II describes the framework and procedure of entering laws of nature and physical phenomena as § 102 prior art. Part III then applies the framework to past cases of interest.

I. Historical Background

The Court applies § 101 to exclude certain inventions as unpatentable. Section 101 of the Patent Act states “[w]hoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of [U.S.C. 35].”²⁷ In general, the Court has held that § 101 deserves a “broad construction.”²⁸ However, the Court has also developed three judicial exceptions to patentability: (1) laws of nature; (2) physical phenomena; and (3) abstract ideas.²⁹

The Court has described two basic tenets of policy underpinning the judicial exceptions: utilitarianism and fairness.³⁰ First, under a utilitarian perspective, preventing others from using laws of nature and physical phenomena stifles innovation. The judicial exceptions are “part of the storehouse of knowledge of all men He who discovers a hitherto unknown phenomenon of nature has no claim to a monopoly of it which the law recognizes. [An invention] must come from the *application* of the law of nature to a new and useful end.”³¹ Thus, allowing these judicial exceptions to be patentable would

²⁷ “Invention” is defined as an “invention or discovery,” and a process as a “process, art or method,” including “a new use of known process, machine, manufacture, composition of matter, or material.” 35 U.S.C. § 100 (2012).

²⁸ *Diamond v. Chakrabarty*, 447 U.S. 303, 308–09 (1980) (citations omitted); *see also id.* at 309 (“Congress intended statutory subject matter to include anything under the sun that is made by man.” (citation omitted)).

²⁹ *Id.*

³⁰ *See generally* ROBERT P. MERGES, *JUSTIFYING INTELLECTUAL PROPERTY* (2011) (contrasting utilitarian and fairness foundations for patent law).

³¹ *See Funk Bros. Seed Co. v. Kalo Inoculant Co.*, 333 U.S. 127, 130 (1948) (emphasis added); *see also Mayo Collaborative Servs. v. Prometheus Lab’y, Inc.*, 566 U.S. 66, 71–72 (2012) (“While a scientific truth, or the mathematical expression of it, is not a patentable invention, a novel and useful structure created with the aid of knowledge of scientific truth may be.” (citation omitted)); *Parker v. Flook*, 437 U.S. 584, 590 (1978) (“[A] process is not unpatentable simply because it contains a law of nature or a mathematical algorithm.”); *Alice Corp. Pty. Ltd. v. CLS Bank Int’l*, 573 U.S. 208, 216 (2014) (“Monopolization of those tools through the grant of a patent might tend to impede innovation more than it would tend to promote it, thereby thwarting the primary object of the patent laws.” (citation omitted)).

“inhibit further discovery by improperly tying up the future use of laws of nature.”³² Second, because “[s]uch discoveries are ‘manifestations of . . . nature, free to all men and reserved exclusively to none’” it would be unfair to exclude others from using the judicial exceptions.³³

These policy concerns are important, but issues arose when the Court found that patenting a law of nature required an “inventive application” or “inventive concept.”³⁴ However, for many years, the Court did not consider § 101, and the Federal Circuit vastly expanded the scope of patent-eligible subject matter.³⁵ However, after lawsuits by patent-assertion entities caused a flood of outrage from policymakers,³⁶ the Federal Circuit reined in the surge of patentable subject-matter.³⁷

Subsequently, the Court took a more active role in ruling patents ineligible under § 101. The Court began tightening subject-matter eligibility regarding laws of nature and physical phenomena. In invalidating a medical-diagnostic patent in *Mayo Collaborative Services v. Prometheus Laboratories, Inc. (Mayo)*,³⁸

³² *Mayo*, 566 U.S. at 85. One member of the Court decried the terms “the works of nature” and “the laws of nature” as “infected with too much ambiguity and equivocation.” *Funk Bros.*, 333 U.S. at 134–35 (Frankfurter, J., concurring). Because “everything that happens may be deemed ‘the work of nature,’ and any patentable composite exemplifies in its properties ‘the laws of nature,’” these terms could “could fairly be employed to challenge almost every patent.” *Id.* at 135. This passage foresaw § 101 “swallow[ing] all of patent law.” *See Alice*, 573 U.S. at 217.

³³ *See* *Diamond v. Chakrabarty*, 447 U.S. 303, 309 (1980) (quoting *Funk Bros. Seed Co. v. Kalo Inoculant Co.*, 333 U.S. 127, 130 (1948)); *c.f. id.* at 314–16 (noting the tension between proceeding “cautiously when . . . asked to extend patent rights into areas wholly unforeseen by Congress” and allowing “inventions most benefiting mankind . . . [that] are often unforeseeable.”).

³⁴ *See Flook*, 437 U.S. at 594; *see also* *United States v. Dubilier Condenser Corp.*, 289 U.S. 178, 188 (1933) (“[T]he peculiar nature of the act of invention, which consists neither in finding out the *laws of nature*, nor in fruitful research as to the operation of natural laws, but in discovering how *those laws may be utilized or applied for some beneficial purpose*, by a process, a device or a machine.” (emphasis added)).

³⁵ *MENELL ET AL.*, *supra* note 2, at 283; *see, e.g.*, *Amgen, Inc. v. Chugai Pharm. Co.*, 927 F.2d 1200 (Fed. Cir. 1991) (holding that isolated, DNA molecules are eligible under § 101), *abrogated by* *Ass’n for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576, 580 (2013); *In re Alappat*, 33 F.3d 1526 (Fed. Cir. 1994) (holding that displaying data on a computer screen was eligible under § 101).

³⁶ *MENELL ET AL.*, *supra* note 2, at 284.

³⁷ *See, e.g., In re Nuijten*, 500 F.3d 1346 (Fed. Cir. 2007) (holding that a watermarked, electromagnetic signal was ineligible under § 101).

³⁸ 566 U.S. 66, 72 (2012). The Court based its decision, in part, on a prior case that allowed an “inventive application” of a mathematical formula to be patentable. *Id.* at 81 (citing *Diamond v. Diehr*, 450 U.S. 175, 187–88 (1981)). For an argument that the “inventive

the Court stated that “to transform an unpatentable law of nature into a patent-eligible application of such a law, one must do more than simply state the law of nature while adding the words ‘apply it.’”³⁹ Instead, the claim must add something beyond “conventional or *obvious* pre-solution activity.”⁴⁰ And although the Government argued that the claimed invention would be anticipated or obvious under §§ 102 or 103, the Court rejected this idea as making the “‘law of nature’ exception to § 101 patentability a dead letter” and inconsistent with prior law.⁴¹ The Court then cemented its new approach in *Alice Corp. v. CLS Bank International (Alice)*⁴² by requiring a two-step inquiry for patent eligibility: First, “determine whether the claims at issue are directed to one of” the judicial exceptions.⁴³ Second, ask, “what else is there in the claims before us?”⁴⁴

Although the Court’s *Alice/Mayo* test was not well-received by judges, attorneys, or academics,⁴⁵ the criticism grew louder when lower courts restricted the realm of unpatentable subject-matter more narrowly. Recently, the Federal

application test” predates *Diehr*, see generally Jeffrey A. Lefstin, *Inventive Application: A History*, 67 FLA. L. REV. 656 (2016).

³⁹ *Mayo*, 566 U.S. at 72.

⁴⁰ *Id.* at 79 (citation omitted) (emphasis added).

⁴¹ *Id.* at 89; see also *id.* at 90 (“[S]tudiously ignoring all laws of nature when evaluating a patent application under §§ 102 and 103 would make all inventions unpatentable because all inventions can be reduced to underlying principles of nature which, once known, make their implementation obvious.” (citation omitted)).

⁴² 573 U.S. 208 (2014).

⁴³ *Id.* at 217.

⁴⁴ *Id.* The second step is sometimes described as “a search for an ‘inventive concept’” See, e.g., *id.* (quoting *Mayo Collaborative Servs. v. Prometheus Lab’ys, Inc.*, 566 U.S. 66, 72 (2012)).

⁴⁵ See, e.g., *PPS Data, LLC v. Jack Henry & Assocs.*, 404 F. Supp. 3d 1021, 1039 n.8 (E.D. Tex. 2019) (“The only thing clear about the appropriate test for patent-eligible subject matter is that it is unclear.”); Umber Aggarwal & Karthik Kumar, *Overcoming Section 101 Challenges Against AR and VR Inventions*, FINNEGAN: PROSECUTION FIRST BLOG (Aug. 24, 2020), <https://www.finnegan.com/en/insights/blogs/prosecution-first/overcoming-section-101-challenges-against-ar-and-vr-inventions.html> [<https://perma.cc/32EB-7JCP>] (“Because of the unpredictability and genuine threat of one’s invention being deemed patent ineligible, the mere association of an invention to software or data processing may scare away potential investors, weaken leverage with potential licensees, and fail to intimidate competitors from infringing.”); Rob Merges, *Go Ask Alice—What Can You Patent after Alice v. CLS Bank?*, SCOTUSBLOG (Jun. 20, 2014, 12:04 PM) <https://www.scotusblog.com/2014/06/symposium-go-ask-alice-what-can-you-patent-after-alice-v-cls-bank/> [<https://perma.cc/PQ3P-XG53>] (“[T]he Supreme Court has gone and assimilated the *Benson* holding into its new *Bilski-Mayo-Alice* framework, in a way that will surely bring future headaches.”).

Circuit held that manufacturing a drive shaft for a car was patent ineligible.⁴⁶ Because “[i]n all but name” the claim recited a law of nature, the claim was ineligible under § 101,⁴⁷ a remarkable result given that the law of nature was not even mentioned in the patent.⁴⁸ Patent professionals decried the Court’s denial of certiorari⁴⁹ and the uncertain state of § 101 moving forward.⁵⁰

II. Analysis

A. Description of the New Framework

This Article’s goal is to prevent laws of nature and physical phenomena from being patented, while still acknowledging the Supreme Court’s policy concerns. In short, this Article proposes resolving the patentability of laws of nature and physical phenomena in a § 102 inquiry. This allows courts to bypass the unclear *Alice/Mayo* test while still safeguarding public interest.

First, this Article discusses how the “otherwise available to the public” language of § 102 allows a wide variety of prior-art references that were not previously available. Second, this Article explains how laws of nature and physical phenomena can be admitted as § 102 prior art. Third, this Article discusses how laws-of-nature and physical-phenomena references can be used in a traditional § 103 inquiry to invalidate a patent for obviousness. Finally, this Article discusses the order courts perform patent-validity analyses and how it would be wiser to start with § 102 instead of § 101.

B. § 102 and “Otherwise Available to the Public”

The Leahy-Smith America Invents Act (the “AIA”)⁵¹ was signed into law in 2011 and significantly changed patent law in the United States, such

⁴⁶ See *Am. Axle II*, 967 F.3d 1285, 1304 (Fed. Cir. 2020).

⁴⁷ *Id.* at 1301.

⁴⁸ See *generally* Method for Attenuating Driveline Vibrations, U.S. Patent No. 7,774,911 (filed Feb. 27, 2006) (issued Aug. 17, 2010).

⁴⁹ *Am. Axle IV*, 142 S. Ct. 2902 (2022).

⁵⁰ See, e.g., Eileen McDermott, American Axle *Denied: Patent Stakeholders Sound Off on SOCTUS’s Refusal to Deal with Eligibility*, IPWATCHDOG (Jul. 4, 2022, 01:15 PM), <https://www.ipwatchdog.com/2022/07/04/american-axle-denied-patent-stakeholders-sound-off-scotus-refusal-deal-eligibility/id=149955/> [<https://perma.cc/LV3V-V55S>] (“In denying certiorari . . . the Supreme Court has in essence told the patent community to ‘deal with it.’” (quoting Michael Borella)); *id.* (“If this is not a case for the Supreme Court, then it may instead have to become a subject of legislation.” (quoting Charles R. Macedo)); *id.* (“Everyone knows patent eligibility in America is a train wreck. . . . To call patent eligibility law in America asinine is an understatement.” (quoting Gene Quinn)).

⁵¹ Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011) (codified as amended in scattered sections of 35 U.S.C.).

as changing the previous “first to invent system” to a “first inventor to file system,” harmonizing with the rest of the world.⁵² In addition, the AIA altered § 102’s wording. Section 102 bars a patent when a prior-art reference⁵³ “anticipates” the patent; that is, if the claimed invention was already in the public domain.⁵⁴ The AIA added the phrase “otherwise available to the public” to § 102. There was uncertainty about the new phrase’s purpose, which had no analogue in pre-AIA § 102.⁵⁵

There are many rationales for adding “otherwise available to the public,” but not all rationales agree on the phrase’s meaning and purpose. The legislative history states that the three rationales to add the new phrase were: (1) to modify the previously listed types of prior art (printed publication, in public use, or on sale);⁵⁶ (2) to “modernize and harmonize our patent system with our international trading partners”;⁵⁷ and (3) to clarify that, when the “invention has entered the public domain, by any means” the reference is available as prior art.⁵⁸ The second rationale exists harmoniously with the others, but the first and third rationales are not completely congruent. If the prior-art reference is a printed publication, both the first and third rationales would cover it. However, if the prior-art reference is available to the public, but *not*

⁵² See generally Mark Schafer, Note, *How the Leahy-Smith America Invents Act Sought to Harmonize United States Patent Priority with the World, A Comparison with the European Patent Convention*, 12 WASH. U. GLOB. STUD. L. REV. 807 (2013) (describing the AIA’s stated goal of harmonizing patent law with the rest of the world).

⁵³ In general, if a prior-art reference is available under § 102, it is available under § 103. *But see In re Clay*, 966 F.2d 656, 660 (Fed. Cir. 1992) (holding that the prior-art reference’s field of art must be “analogous” with the claimed invention’s field of art). This Article will treat the availability of a prior-art reference under §§ 102 and 103 interchangeably.

⁵⁴ See generally MERGES & DUFFY, *supra* note 1, at 79–268 (discussing the history of § 102 and anticipation doctrine, both pre- and post-AIA).

⁵⁵ See generally Caroline A. Schneider, *The New Novelty: Defining the Content of “Otherwise Available to the Public”*, 41 J. LEGIS. 151 (2015).

⁵⁶ 157 CONG. REC. S1360, S1370 (daily ed. Mar. 9, 2011) (statement of Sen. Jon Kyl). This interpretation is favored by prior-construction, surplusage, associated-words, and *ejusdem* canons. See Schneider, *supra* note 55, at 171.

⁵⁷ 157 CONG. REC. E1219, E1219 (daily ed. June 28, 2011) (statement of Rep. Lamar Smith). This interpretation best serves the AIA’s purpose. See Schneider, *supra* note 55, at 171.

⁵⁸ 157 CONG. REC. S5402, S5431 (daily ed. Sept. 8, 2011) (statement of Sen. Jon Kyl). This interpretation is supported by the associated-words canon, the legislative history, and the PTO’s guidelines. See Schneider, *supra* note 55, at 171; see also MPEP § 2152 (9th ed. Rev. 10.2019, June 2020) (“Finally, a catch-all ‘otherwise available to the public’ category of prior art is added.”). However, this interpretation also violates the prior-construction canon. See Schneider, *supra* note 55, at 171–72.

an enumerated kind of prior art—that is, not a printed publication, in public use, or on sale—the reference is covered by the third rationale but not the first.

That being said, the third rationale likely leads to the correct reading, given the Court’s decision in *Helsinn Healthcare S.A. v. Teva Pharmaceuticals*.⁵⁹ In *Helsinn*, the Court held that “otherwise available to the public” was not meant to change the scope of the pre-sale bar from pre-AIA § 102, and thus prior case law reading on the “on-sale” bar still held.⁶⁰ In doing so, the Court stated that the new phrase “‘otherwise available to the public’ captures material that does not fit neatly into the statute’s enumerated categories but is nevertheless meant to be covered.”⁶¹ For the remainder of the Article, the third rationale is assumed correct.

C. Laws of Nature and Physical Phenomena as “Otherwise Available to the Public”

Laws of nature and physical phenomena are *always* “otherwise available to the public.” Because the scientific method requires experimental data as a foundation for any successful theory,⁶² any sufficiently detailed description⁶³ of a fundamental law of nature is “self-anticipating.” Scientists develop laws of nature to explain the world around us; the act of formulating the law requires a link to the natural world. Thus, a law of nature or physical phenomena self-anticipates through data or experiments already known to others.

An example of a self-anticipating law of nature is the “Law of Gravitation,” which describes how massive objects attract each other.⁶⁴ The Law of Gravitation describes why things fall when you drop them and how planets rotate around the sun.⁶⁵ The Law of Gravitation was first formulated by Isaac Newton,⁶⁶ but his famous equation built on the efforts of others.⁶⁷ Decades

⁵⁹ 139 S. Ct. 628 (2019).

⁶⁰ *Id.* at 633, 634.

⁶¹ *Id.* at 634.

⁶² See generally NAT’L ACADS. SCIS., ENG’G, & MED., REPRODUCIBILITY AND REPLICABILITY IN SCIENCE 27–38 (2019) (ebook).

⁶³ For example, to satisfy § 112 (definiteness, credibility, enablement).

⁶⁴ EDS. ENCYC. BRITANNICA, *Newton’s Law of Gravitation*, ENCYC. BRITANNICA, <https://www.britannica.com/science/Newtons-law-of-gravitation> [<https://perma.cc/V8X3-EEAK>] (last accessed Nov. 9, 2022).

⁶⁵ See *The Apple, the Moon, and the Inverse Square Law*, PHYSICS CLASSROOM, <https://www.physicsclassroom.com/class/circles/Lesson-3/The-Apple,-the-Moon,-and-the-Inverse-Square-Law> [<https://perma.cc/N4QM-KKK6>] (last accessed Nov. 9, 2022).

⁶⁶ EDS. ENCYCLOPAEDIA BRITANNICA, *supra* note 64.

⁶⁷ See Jamie L. Vernon, *On the Shoulders of Giants*, AM. SCIENTIST, <https://www.americanscientist.org/article/on-the-shoulders-of-giants> [<https://perma.cc/2Z3G-4223>] (last accessed Nov. 11, 2022) (“[Newton] went on to say, ‘If I have seen further it is by standing

earlier, Johannes Kepler derived equations that described how planets moved around the Sun, and Newton used Kepler's calculations to derive the Law of Gravitation.⁶⁸ Kepler could describe *how* the planets moved, but Newton told us *why*.⁶⁹ Thus, to prove the Law of Gravitation correct—that it explained and predicted nature—Newton invariably referred to natural phenomena or data that *already existed*. By example, the Law of Gravitation is like an unpatentable, new species of tree found in an unexplored ecosystem. Although an intrepid explorer expends blood, sweat, and tears to find the tree, the tree always existed.⁷⁰ Likewise, gravity caused apples to fall from trees long before Newton explained why.

For these reasons, the Law of Gravitation is a fundamental law of nature and is readily self-anticipated. The more fundamental the law of nature is, the more it must credibly describe; the more revolutionary the law, the more data is needed to verify it. Thus, the framework provides ample data, introducible as prior art under § 102, to show that the law of nature is anticipated. The Law of Gravitation explains a planet's motion around the Sun and why apples fall on scientists' heads. But because a law of nature's scope is so expansive, it is easy to show the law's effects. It takes a genius like Newton to formulate the Law of Gravitation, but anyone can anticipate it by showing a dropped object falls to the floor.

Thus, Newton formulated the Law of Gravitation from preexisting observed data, and the law could then be used for useful ends. But this conception of formulation is not necessarily the same as an invention. Inventions are typically defined as a useful device or process derived from experimentation.⁷¹ In contrast, a law of nature simply describes *how things are*. For example, the Law of Gravitation describes how massive particles interact. In an inventive sense, the law is useful only abstractly as a starting point. In contrast, an invention

on the shoulders of Giants,' providing one of our most cherished metaphors for scientific advancement.”).

⁶⁸ See Alok Jha, *Newton's Universal Law of Gravitation*, GUARDIAN (Oct. 13, 2013, 3:00), <https://www.theguardian.com/science/2013/oct/13/newtons-universal-law-of-gravitation> [<https://perma.cc/7CJQ-3QRW>].

⁶⁹ See *id.*

⁷⁰ See *Diamond v. Chakrabarty*, 447 U.S. 303, 309 (1980) (“[A] new mineral discovered in the earth or a new plant found in the wild is not patentable subject matter.”).

⁷¹ See *Invention*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/invention> [<https://perma.cc/LLM9-KBC3>] (last visited Sept. 14, 2022) (defining “invention” as “a device, contrivance, or process originated after study and experiment.”); *Invention*, BLACK'S LAW DICTIONARY (11th ed. 2019) (“A useful and patentable process, machine, manufacture, or composition of matter, or any improvement to one of those, created through independent effort and characterized by an extraordinary degree of skill or ingenuity; a newly discovered art or operation.”).

applying a law of nature is useful: a satellite, a cannon, or a spaceship.⁷² These inventions use the Law of Gravitation to function: in an abstract sense (a satellite stays in orbit around the Earth through the gravitational force between the two objects) and an inventive sense (inventors use the Law of Gravitation to calculate a satellite's proper distance from the Earth to maintain the satellite's orbit).⁷³ The inventor adds their own ingenuity to make an invention beyond the law of nature.

Now imagine that Newton is a shrewd inventor and understands how valuable his new law is. Rather than publish in a scientific journal, he instead files a patent application claiming the Law of Gravitation. However, to satisfy § 112, and specifically credible utility,⁷⁴ Newton must provide proof that the Law of Gravitation accurately represents the world. Since the Law of Gravitation is so universal—that is, it purports to describe the interaction between any objects with mass—the bar for credible utility is high.⁷⁵ So the counterintuitive result is that the more fundamental the underlying law is, the more evidence is needed to prove it.⁷⁶

⁷² For most of the United States' legal history, not only were inventions patentable, but so were "discoveries." See generally Jeffrey L. Lefstin, Peter S. Menell & David O. Taylor, *Final Report of the Berkeley Center for Law & Technology Section 101 Workshop: Addressing Patent Eligibility Challenges*, 33 BERKELEY TECH. L.J. 551, 568–75 (2022). The authors argue *Mayo* has inappropriately required an *inventive* application of a discovery to be patentable. See *id.* at 570–72. In the framework, a § 102 reference does not anticipate the *application* of a law of nature or physical phenomena, although the application still may be obvious under § 103.

⁷³ See Jamie Condliffe, *Every Satellite Got into Space Thanks to Newton's Law of Gravitation*, GIZMODO (June 10, 2015), <https://gizmodo.com/every-satellite-got-into-space-thanks-to-newtons-law-of-1706907868> [<https://perma.cc/VC3X-FHBV>].

⁷⁴ See MERGES & DUFFY, *supra* note 1, at 271 ("An applicant for a patent cannot satisfy the utility requirement merely by advancing wonderful allegations.")

⁷⁵ Typically, the PTO "has the initial burden of challenging a patent applicant's presumptively correct assertion of utility." *In re Swartz*, 232 F.3d 862, 864 (Fed. Cir. 2000). But the PTO "may question the applicant's asserted utility where the application 'suggests an inherently unbelievable undertaking or involves implausible scientific concepts.'" MERGES & DUFFY, *supra* note 1, at 272 (quoting *In re Brana*, 51 F.3d 1560, 1566 (Fed. Cir. 1995)). So the PTO would use a high degree of scrutiny when examining an application claiming a broad law of nature, such as the Law of Gravitation.

⁷⁶ Albert Einstein said something similar when formulating his famous mass-energy equivalence, popularly known as $E = mc^2$. "An assumption of such unusual generality," wrote Einstein of the mass-energy equivalence, "inevitably invites challenge for proving its necessity or correctness in the most general matter." Arthur I. Miller, *Albert Einstein's 1907 Jahrbuch Paper: The First Step from SRT to GRT*, in STUDIES IN THE HISTORY OF GENERAL RELATIVITY 319, 320 (Jean Eisenstaedt & A.J. Kox eds., 1992) (quoting Albert Einstein, *On the Principle of Relativity and the Consequences Derived from It*, 4 Jahrbuch der Radioaktivität & Elektronik [Y.B. RADIOACTIVITY & ELECS.] 411 (1907)).

In any case, anticipated laws of nature need a way to enter a courthouse under the Federal Rules of Evidence. There are three possible routes for a party to submit a prior-art reference that anticipates⁷⁷ the law of nature or physical phenomena. First, basic facts—for example, when I drop an object, it falls to the ground—could be admitted under judicial notice.⁷⁸ However, this route is available only for the most obvious examples (e.g., “things fall when you drop them”) and more complicated scientific information likely cannot be admitted this way. A second route is as a document. However, a document must bypass the typical barriers of hearsay by being admitted as a hearsay exception.⁷⁹ The third, and likely most common route, is via testimony of expert witnesses. A scientific or technical expert witness could testify that the physical concepts explained by the law of nature are anticipated by data that the law purports to claim.⁸⁰ Likewise, an expert witness could opine that a physical phenomenon already existed or must have existed. In these cases, the expert’s testimony is the § 102 reference.⁸¹

In summary, if the claim encompasses only a law of nature or physical phenomena, the framework provides previous data or expert testimony as a § 102 reference. Thus, § 102 replaces part one of the Supreme Court’s *Alice/Mayo* test for § 101: determining whether the claim is directed to a judicial exception.⁸²

In addition, admitting laws of nature or physical phenomena under § 102 satisfies both of the Court’s patent-eligibility concerns.⁸³ First, the framework prevents “improperly tying up the future use of laws of nature” by allowing claims directed to laws of nature or physical phenomena as § 102 references.⁸⁴ Second, admitting laws of nature or physical phenomena under § 102 prevents applicants from unfairly excluding others from laws of nature and physical phenomena “free to all men and reserved exclusively to none.”⁸⁵

⁷⁷ Or renders the patent obvious. See *infra* Section III.C.1.

⁷⁸ See FED. R. EVID. 201(b)(1) (“The court may judicially notice a fact that is not subject to reasonable dispute because it: . . . is generally known within the trial court’s territorial jurisdiction”). A statement that “when I drop an object, it falls to the ground” is “generally known” by everyone. See *id.*

⁷⁹ See *id.* 801–805. Because a law of nature must explain data that is quite old, the ancient-documents exception—for documents prepared before 1998—is a natural route to overcome a hearsay objection. See *id.* 803(16).

⁸⁰ See *id.* 702.

⁸¹ *Id.* 703.

⁸² See *Alice Corp. Pty. Ltd. v. CLS Bank Int’l*, 573 U.S. 208, 217 (2014); *Mayo Collaborative Servs. v. Prometheus Lab’ys, Inc.*, 566 U.S. 66, 76–78 (2012).

⁸³ See *supra* Section I.

⁸⁴ See *Mayo*, 566 U.S. at 85.

⁸⁵ See *Diamond v. Chakrabarty*, 447 U.S. 303, 309 (1980).

1. Moving on to § 103: The Obviousness Inquiry

This Article's focus is availability of prior art under § 102, but a brief discussion of § 103 is warranted. The Court's § 101 jurisprudence contains a second step—that is, whether the claim is directed to “something more” than the patent-ineligible judicial exception.⁸⁶ This step is really an inquiry under § 103, which is whether a claim is “obvious” over the prior art.

Under § 103, an invention is “nonobvious” if the invention's “development is a significant enough technical advance to merit the award of a patent,”⁸⁷ which has several economic justifications. First, “if an idea is so obvious that people in the field would develop it without much effort,” then the patent system's incentives “may be unnecessary to generate the idea.”⁸⁸ In other words, it doesn't make economic sense to award a patent monopoly if another inventor was likely to develop the invention anyway. Second, the nonobvious inquiry measures technical competence; meaning, “whether a development is a significant enough technical advance to merit the award of a patent.”⁸⁹ In essence, the law should not grant a twenty-year monopoly for a minor advancement in science and technology.

The obviousness inquiry has several parts. First, to test whether a patent is obvious over the prior art, numerous prior art references are combined to add up to the claimed invention.⁹⁰ Then, a factfinder determines the difference between the invention and the combined prior-art, and “[i]f this difference is such that the subject matter as a whole would have been *obvious* at the time to a person skilled in the art, then the subject matter cannot be patented.”⁹¹ In doing so, a court must also consider “the level of ordinary skill in the pertinent art” and “secondary considerations,” including: (1) the patented invention's commercial success; (2) fulfillment of long felt but unsolved needs; (3) failure of others; (4) disbelief of experts that the invention would function; (5) and the invention's unexpected success.⁹² On balance, if the invention is deemed nonobvious, the patent application survives the § 103 inquiry.

Our framework doesn't change the focus of the § 103 inquiry, but the framework does allow for a wider variety of prior art. Thus, § 103 replaces

⁸⁶ See *Alice*, 573 U.S. at 217.

⁸⁷ MERGES & DUFFY, *supra* note 1, at 327.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ See 35 U.S.C. § 103.

⁹¹ *Graham v. John Deere Co.*, 383 U.S. 1, 15 (1966) (emphasis added) (citations omitted).

⁹² *Id.* at 17; see also *United States v. Adams*, 383 U.S. 39, 51–52 (1966) (applying the *Graham* factors when evaluating a wet battery patent to hold that the battery was nonobvious because the operating characteristics were unexpected, “far surpassed then-existing wet batteries,” and experts expressed disbelief at the time of invention).

part two of the Supreme Court's *Alice/Mayo* test: determining whether the claim "contains an 'inventive concept' sufficient to 'transform'" the judicial exception into a patent-eligible invention.⁹³

2. *The Order of Applying the Statutory Requirements*

Although courts typically perform a § 101 analysis first, this is not required.⁹⁴ Patent eligibility under § 101 "presents issues to the courts that are complex, difficult, and saturated by fundamental policy considerations."⁹⁵ Analogizing avoidance doctrine,⁹⁶ some authors argue that "the same logic that leads the Supreme Court to avoid its most delicate subject matter ought to apply in the case of patents and § 101."⁹⁷ Thus, it makes sense for courts to analyze patentability under §§ 102, 103, and 112 before moving on to § 101.⁹⁸

Statistical evidence shows that patent examiners and the Board of Patent Appeals and Interferences (BPAI)⁹⁹ already do exactly that. 84% of patent applications rejected by patent examiners for lacking subject-matter eligibility under § 101 were also rejected as either anticipated or obvious under

⁹³ *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. 208, 221 (2014) (quoting *Mayo Collaborative Svcs. v. Prometheus Labs, Inc.*, 566 U.S. 66, 72, 80 (2012)).

⁹⁴ See Dennis Crouch & Robert P. Merges, *Operating Efficiently Post-Bilski by Ordering Patent Doctrine Decision-Making*, 25 BERKELEY TECH. L.J. 1673, 1685–86 (2010); *Datamize, LLC v. Plumtree Software, Inc.*, 417 F.3d 1342, 1348 (Fed. Cir. 2005) (deciding case based on indefiniteness under § 112, without reaching patent-eligible subject matter under § 101); *In re Hyatt*, 708 F.2d 712, 715 (Fed. Cir. 1983) (same). *Contra* *Parker v. Flook*, 437 U.S. 584, 593 (1978) ("The obligation to determine what type of discovery is sought to be patented must precede the determination of whether that discovery is, in fact, new or obvious.") (dictum).

⁹⁵ Crouch & Merges, *supra* note 94, at 1683.

⁹⁶ Avoidance doctrine guides the Supreme Court to follow a "policy of strict necessity in disposing of constitutional issues." *Rescue Army v. Mun. Ct. of City of Los Angeles*, 331 U.S. 549, 568 (1947) ("[E]very application [of avoidance doctrine] has been an instance of reluctance, indeed of refusal, to undertake the most important and the most delicate of the Court's functions, notwithstanding conceded jurisdiction, until necessity compels it in the performance of constitutional duty."); see also *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.").

⁹⁷ Crouch & Merges, *supra* note 94, at 1683.

⁹⁸ See *id.* at 1683–91 (discussing that patent law is a poor subject for a "rigid approach": requiring each eligibility requirement to be applied discretely and in a uniform order).

⁹⁹ The BPAI is the precursor to the modern Patent Trial and Appeal Board. See Federal Courts Improvement Act, 28 U.S.C. § 1295(a)(4)(A), (B) (1982) (discussing the appeal process involving the Board of Appeals or the Board of Patent Inferences of the Patent and Trademark Office).

§§ 102 or 103.¹⁰⁰ Likewise, 94% of patent applications that the BPAI rejected for lacking subject-matter eligibility under § 101 were also rejected under another ground.¹⁰¹

Of course, if a court found the patent novel and nonobvious, the court would still have to analyze the patent's subject-matter eligibility under § 101. However, the more rigorous tests under §§ 102 and 103, which require a close examination of the supplied prior art, would likely lead to similar results under § 101. Put another way, a judge who decided that a patent is both novel and nonobvious is unlikely to determine that a patent adds only conventional steps under the *Alice/Mayo* test. Therefore, in practice, it's unlikely that a claim will survive §§ 102 and 103 but *not* § 101.

* * *

This Section showed how § 102's "otherwise available to the public" allows a wide variety of prior-art references. This Section also explained how laws of nature and physical phenomena can be admitted as prior art and used in both § 102 anticipation and § 103 obviousness inquiries. Finally, this Section showed that courts should analyze patents under §§ 102 and 103 before turning to § 101 eligibility. The next Section shows how the framework applies to some seminal cases.

III. Application

A. The Framework as Retroactively Applied to Law-of-Nature and Physical-Phenomena Cases

The above framework is now applied to some notable cases where a law of nature or physical phenomena was a § 101 issue. First, this Section discusses *Seaborg* where, in contrast to the Circuit Court of Patent Appeals ("CCPA"), the framework would have not allowed a patent under § 102. Second, this Section discusses *Mayo*, where we concur with the Supreme Court, but maintain that the correct analysis was invalidation under § 103. Third, this Section covers *Myriad*, where the framework agrees with the Supreme Court that the patent was eligible, but under a § 102 analysis. Finally, this Section discusses *Am. Axle II*, where the framework disagrees with the Federal Circuit and argues that the patent should have been allowed.

¹⁰⁰ See Crouch & Merges, *supra* note 94, at 1686 (citing Christopher A. Cotropia, Mark Lemley & Bhaven Sampat, *Do Applicant Patent Citations Matter? Implications for the Presumption of Validity*, 42 RSCH. POL'Y 844 (2013)).

¹⁰¹ See *id.*

B. Seaborg

In *In re Seaborg*,¹⁰² the CCPA¹⁰³ found that the chemical element americium was patentable, but the framework would find that a chemical element is never patentable.

The CCPA allowed Glenn T. Seaborg to patent a chemical element by claiming “Element 95,” which is now identified as americium.¹⁰⁴ In rejecting the patent application, the patent examiner referred to United States Patent Application No. 568,904,¹⁰⁵ which described a nuclear reactor. The Examiner rejected the claim because the ’904 Patent Application stated that a small amount of americium could be created after running the reactor for one hundred days.¹⁰⁶ On appeal, Seaborg argued that the reactor could produce no more than “one one-hundred millionth” of a gram of americium, and “if present, would have been undetectable.”¹⁰⁷ Both the Solicitor General and the PTO maintained that the americium would be produced by the reactor in use and thus inherently anticipated the application.¹⁰⁸ The CCPA disagreed, because any americium “was produced in such miniscule amounts and under such conditions that its presence was undetectable.”¹⁰⁹ The CCPA reversed the BPAI and allowed the patent.¹¹⁰ Section 101 was not mentioned.

Under the framework, however, any chemical element is unpatentable. One of the fundamental postulates of chemistry is that an element’s chemical properties are entirely determined by the number of protons present in its nucleus.¹¹¹ All atoms that have the same number of protons are of the same

¹⁰² 328 F.2d 996 (1964).

¹⁰³ The CCPA is the precursor to the modern Federal Circuit. *See generally* Federal Courts Improvement Act, 28 U.S.C. § 1295 (transferring the CCPA’s jurisdiction, docket, and judges to the United States Court of Appeals for the Federal Circuit). The Federal Circuit treats all prior CCPA cases as binding precedent. *See S. Corp. v. United States*, 690 F.2d 1368, 1369 (Fed. Cir. 1982).

¹⁰⁴ *See Seaborg*, 328 F.2d at 996 (citing U.S. Patent Application No. 692,730, which eventually issued as U.S. Patent No. 3,156,523).

¹⁰⁵ This patent application eventually issued as United States Patent No. 2,708,656.

¹⁰⁶ *See Seaborg*, 328 F.2d at 996, 999.

¹⁰⁷ *Id.* at 997 & n.3.

¹⁰⁸ *See id.* at 997. Inherent anticipation is when “each and every element as set forth in the claim is found . . . inherently described, in a single prior art reference.” *Verdegaal Bros., Inc. v. Union Oil Co.*, 814 F.2d 628, 631 (Fed. Cir. 1987).

¹⁰⁹ *Seaborg*, 328 F.2d at 998–99.

¹¹⁰ *Id.*

¹¹¹ OPENSTAX COLLEGE, *PRINCIPLES OF CHEMISTRY* 77–78 (2015), <https://web.ung.edu/media/chemistry/Chapter2/Chapter2-AtomsMoleculesAndIons.pdf> [<https://perma.cc/5VHD-G9KW>].

element and behave chemically identically.¹¹² Thus, elements are uniquely defined by their atomic number—that is, the number of protons they contain.¹¹³ This physical phenomenon was first discovered by Dmitrii Mendeleev, who published his paper¹¹⁴ correlating an element’s chemical properties and its atomic weight.¹¹⁵ Because protons only come in integers—that is, only “full numbers” like one, two, or three—there are only a finite number of possible elements. From this deduction, Mendeleev arranged each element by its atomic weight and listed its chemical properties, creating the periodic table.¹¹⁶ From the periodic table, Mendeleev predicted multiple elements that were later discovered by others.¹¹⁷

For these reasons, no one can claim any chemical elements in any patent, because the periodic table anticipated them. Mendeleev’s genius was identifying that all atoms of the same element have one thing in common: their atomic number.¹¹⁸ Therefore, Mendeleev correctly identified that undiscovered elements *must* exist.¹¹⁹ This concept is the law of nature or the physical phenomena. Therefore, because any element with an integer number of protons *must* exist, all elements are unpatentable, regardless of the scientist’s ingenuity in creating them.¹²⁰ The CCPA’s reasoning was flawed because it didn’t matter whether the ’904 Patent Application inherently anticipated the claim. The laws of chemistry anticipated it.

¹¹² See *id.*

¹¹³ For example, a hydrogen atom always has one proton, a carbon atom always has six protons, and so on.

¹¹⁴ See Masanori Kaji, *D.I. Mendeleev’s Concept of Chemical Elements and The Principles of Chemistry*, 27 BULL. FOR HIST. CHEMISTRY 4, 9 (2002).

¹¹⁵ The “atomic mass” is the mass of the atom’s nucleus, which consists of protons and neutrons. OPENSTAX COLLEGE, *supra* note 111, at 79. Neutrons add mass to the atom, but they do not contribute to the atom’s chemical properties. See *id.* at 77. Thus the atomic number, given by only the number of protons, is what contributes to an atom’s chemical properties. See *id.*

¹¹⁶ See *Development of the Periodic Table*, ROYAL SOC’Y CHEMISTRY, <https://www.rsc.org/periodic-table/history/about> [<https://perma.cc/5UDA-SZCM>] (last visited Oct. 31, 2022) (“[Mendeleev] realised that, by putting [the elements] in order of increasing atomic weight, certain types of element regularly occurred.”).

¹¹⁷ For example, the periodic table predicted the existence of gallium, which was later discovered to have remarkably similar properties to what Mendeleev predicted. See *id.*

¹¹⁸ See OPENSTAX COLLEGE, *supra* note 111, at 77–79.

¹¹⁹ See ROYAL SOC’Y CHEMISTRY, *supra* note 116.

¹²⁰ Methods of *creating* such an atom would still be patentable. See, e.g., *In re Mancy*, 499 F.2d 1289, 1292–94 (C.C.P.A. 1974) (holding that a new method of creating a known antibiotic was nonobvious); cf. *TorPharm, Inc. v. Ranbaxy Pharms., Inc.*, 336 F.3d 1322, 1327 (Fed. Cir. 2003) (“[A] process yielding a well-known product may yet be nonobvious.”).

C. *Mayo*

In *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, the Supreme Court held that a method of administering a drug was unpatentable under § 101,¹²¹ but the framework would find the claim novel under § 102.

At issue was claim 1, which described, in relevant part:

A method . . . comprising: [1] administering a drug providing 6-thioguanine to a subject . . . and [2] determining the level of 6-thioguanine in said subject . . . [3] wherein the level of 6-thioguanine less than [a first number] *indicates a need to increase* the amount of said drug . . . and wherein the level of 6-thioguanine greater than [a second number] *indicates a need to decrease* the amount of said drug¹²²

First, the Court noted that the “administering step” was already known: “[D]octors used thiopurine drugs to treat patients suffering from autoimmune disorders long before anyone asserted these claims.”¹²³ Second, the Court noted that the “determining step” instructs “the doctor to determine the level of the relevant metabolites in the blood” without any additional level of specificity, which was too general to be patented.¹²⁴ Third, the Court stated the “wherein clauses simply tell a doctor about the relevant *natural laws*, at most adding a suggestion that he should take those laws into account when treating his patient.”¹²⁵ And finally, the combination of the elements was not patentable, because the three steps “simply tell doctors to gather data from which they may draw an inference in light of the correlations.”¹²⁶

Under the framework, both the (1) administering step and the (2) determining step would be available as § 102 prior art. Although the Court did not cite a source for its claim that the administering step was well-known, one of the ‘623 Patent’s cited references—which provides treatment by administering 6-thioguanine—discloses both steps.¹²⁷

The (3) “wherein clause” step would also be available as § 102 prior art. The Court described the law of nature, contained in the “wherein clause,” as the relation between an administered dose and production of a toxic side-effect, “a consequence of the ways in which thiopurine compounds are metabolized by the body.”¹²⁸ Blood toxicity, from having too high of a drug concentra-

¹²¹ See *Mayo Collaborative Servs. v. Prometheus Lab’s, Inc.*, 566 U.S. 66, 67 (2012).

¹²² Method of Treating IBD/Crohn’s Disease & Related Conditions, U.S. Patent No. 6,355,623 col. 20 ll. 9–25 (filed Apr. 8, 1999) (issued Mar. 12, 2002) (emphasis added).

¹²³ *Mayo*, 566 U.S. 66, 78 (2012).

¹²⁴ *Id.* at 79.

¹²⁵ *Id.* at 78 (emphasis added).

¹²⁶ *Id.* at 79.

¹²⁷ See ‘623 Patent col. 8, ll. 37–46, 52–56.

¹²⁸ *Mayo*, 566 U.S. at 77.

tion in a patient's blood, is a well-settled principle of medicine¹²⁹ and is thus available as a § 102 reference under the proposed framework.

But even if the “wherein clause” step was *not* available as a “traditional” § 102 reference, the clause could still be anticipated. Say the *Mayo* inventors had discovered, for the first time, that a patient could be at risk for toxicity if there was too much of a certain drug in their bloodstream. To meet the bar for credible utility, the inventors must show that this general law of nature applied to many other types of medicines and patients.¹³⁰ The inventors would refer to older data, where patients—who had medicine administered at too high doses—would get sicker without explanation. The inventors could not credibly explain their claims otherwise.¹³¹ And these previous studies are available as § 102 references.

Regardless, the “wherein clause” is much more specific than the Court claimed. The inventors tried only to patent the effect of *specific* levels of 6-thioguanine in a patient's blood and the body's response to the drug.¹³² The key is the specificity of the levels, transforming the anticipated law of nature—having too much or too little drugs in a patient's blood—into a possibly novel and nonobvious idea. Whether or not these *specific* drug levels were known to others in the art,¹³³ and if prior-art references were applicable, is a matter for the factfinder and outside this Article's scope. If these claims were novel and nonobvious, the law of nature—patients getting sick if they receive too much medicine—would not be preempted; only the claim—for specific 6-thioguanine levels in a patient's blood and the body's response to the drugs—would be.¹³⁴

It is true that a court would then need to analyze the claim under § 101, which under *Mayo* was found to be unpatentable. But as discussed previously, a judge who decides that an invention is both novel and nonobvious is unlikely to determine that a patent adds only conventional steps to the

¹²⁹ See, e.g., Manjitha Dasgupta, *Neurotoxicity, Immunotoxicity, and Drug Toxicity*, 3(S1) ADVANCES IN CLINICAL TOXICOLOGY 000S1-001, 00S1-001 to -002 (2018).

¹³⁰ For example, through expert testimony or scientific articles.

¹³¹ The inventors would need to refer to previous data and experiments to pass the bar of credible utility. See *supra* Section III.C.

¹³² ‘623 Patent col. 20 ll. 9–25.

¹³³ In fact, the ‘623 Patent listed a prior-art reference that disclosed 6-thioguanine. See *id.* col. 8, ll. 37–39 (“Previous studies suggested that measurement of 6-MP metabolite levels can be used to predict clinical efficacy and tolerance to azathioprine or 6-MP.”).

¹³⁴ Indeed, the ‘623 Patent is a § 102 reference anticipating a future patent claiming to preempt the law of nature—a patient getting sick if receiving too much medicine. See *In re Slayter*, 276 F.2d 408, 411 (C.C.P.A. 1960) (“[A] generic claim cannot be allowed to an applicant if the prior art discloses a species falling within the claimed genus; in other words, whatever would infringe if subsequent will anticipate if prior.”).

judicial exception.¹³⁵ Thus, the case should move on to trial and a factfinder would then determine whether the patent survived §§ 101, 102, and 103.

D. *Myriad*

In *Association for Molecular Pathology v. Myriad Genetics*,¹³⁶ the Supreme Court determined that isolated DNA was not patentable, where complementary DNA (“cDNA”) molecules were.¹³⁷ The framework agrees.

A living organism's genes are encoded in DNA, naturally existing in every organism's body,¹³⁸ whereas cDNA is created from DNA in a laboratory, consisting of the same sequence of nucleotides as the DNA but with certain portions (exons) removed.¹³⁹ In contrast to DNA, cDNA does not exist naturally in a human's body.¹⁴⁰ Claim 1 of United States Patent No. 5,747,282 claimed “the DNA code that tells a cell to produce the string of BRCA1 amino acids.”¹⁴¹ Claim 2 of the '282 Patent, instead, claimed “the cDNA exons in the BRCA1 gene,” which does not naturally occur in the human body.¹⁴²

First, the Court found claim 1 ineligible under § 101. The patentee stressed that “isolating DNA from the human genome severs chemical bonds and thereby creates a nonnaturally occurring molecule.”¹⁴³ But, as the Court noted, claim 1 was “not expressed in terms of chemical composition, nor [did it] rely in any way on the chemical changes that result from the isolation of a particular section of DNA.”¹⁴⁴ Rather, the claim's focus was “the genetic information encoded” in the BRCA1 gene, which exists naturally in the human body.¹⁴⁵ Because the claim was directed to a natural phenomenon—a specific sequence of DNA naturally occurring in the human body—the claim was ineligible subject-matter under § 101.¹⁴⁶

Second, the Court found claim 2 eligible under § 101. Here, the Court noted that “cDNA does not present the same obstacles to patentability as naturally occurring, isolated DNA segments.”¹⁴⁷ Because cDNA “is distinct

¹³⁵ See *supra* Section III.C.2.

¹³⁶ 569 U.S. 576 (2013).

¹³⁷ *Id.* at 589–90.

¹³⁸ See *id.* at 580.

¹³⁹ See *id.*

¹⁴⁰ See *id.* at 582.

¹⁴¹ *Id.* at 584 (citing the '282 Patent). Mutations in the BRCA1 gene “can dramatically increase an individual's risk of developing breast and ovarian cancer.” *Id.* at 582–83.

¹⁴² *Id.* at 584 (citing the '282 Patent).

¹⁴³ *Id.* at 593.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ See *id.* at 580.

¹⁴⁷ *Id.* at 594.

from the DNA from which it was derived . . . cDNA is not a ‘product of nature’ and is patent eligible under § 101.”¹⁴⁸

Under the framework, claim 1 is anticipated under § 102 because the BRCA1 gene was already known. The patentee “found the location and sequence of the BRCA1 [gene]” present in the human genome.¹⁴⁹ However, the BRCA1 gene was already known to exist before the patent application’s filing,¹⁵⁰ meaning that the ’282 Patent’s own text anticipated claim 1.

In addition, the BRCA1 gene naturally occurs in the human body and thus claim 1 self-anticipates. The entire point of the ’282 Patent’s claims was to identify the BRCA1 gene, which enabled the patentee “to develop medical tests that are useful for detecting mutations in a patient’s BRCA1 [gene] . . . [detecting] whether the patient has an increased risk of cancer.”¹⁵¹ If the BRCA1 gene did not naturally occur in patients’ bodies, the diagnostic test would be useless. Thus, the patentee’s assertion of the BRCA1 gene’s *existence* is the § 102 reference.

Finally, claim 2’s cDNA is not anticipated in the framework, as the cDNA molecule is “synthetic”; that is, it does not naturally exist in the human body.¹⁵² As the Court notes, whether the cDNA is patentable under §§ 102, 103, and 112 is a separate question,¹⁵³ and is beyond this Article’s scope.

E. *Am. Axle II*

In *American Axle and Mfg., Inc. v. Neapco Holdings (Am. Axle II)*,¹⁵⁴ the Federal Circuit considered a patent claiming a “method for manufacturing driveline propeller shafts . . . with liners that are designed to attenuate vibrations transmitted through a shaft assembly.”¹⁵⁵ The court found claim 22 unpatentable under § 101 but was indeterminate on claim 1.

First, the court determined that claim 22 was directed to a law of nature under *Alice/Mayo* step 1. Claim 22 cited, in relevant part,

A method for manufacturing a shaft assembly of a driveline system . . . [the method comprising:] . . . [1] tuning a mass and a stiffness of at least one liner . . . [2] [wherein the] at least one liner is a tuned resistive absorber for attenuating shell mode vibrations

¹⁴⁸ *Id.* at 595.

¹⁴⁹ *Id.* at 583.

¹⁵⁰ See 17Q-Linked Breast & Ovarian Cancer Susceptibility Gene, U.S. Patent No. 5,747,282 col. 2, ll. 62–63 (filed Jun. 7, 1995) (issued May 5, 1998) (“Intense efforts to isolate the BRCA1 gene have proceeded since it was first mapped in 1990.”).

¹⁵¹ *Myriad*, 569 U.S. at 583.

¹⁵² See *id.* at 582.

¹⁵³ See *id.* at 595 n.9.

¹⁵⁴ 939 F.3d 1355 (Fed. Cir. 2019), *aff’d in part, vacated in part*, 967 F.3d 1285 (Fed. Cir. 2019).

¹⁵⁵ *Id.* at 1289 (citing U.S. Patent No. 7,774,911 col. 1 ll. 6–7).

[and wherein the at least one *liner*] is a tuned reactive absorber for attenuating bending mode vibrations.¹⁵⁶

The court decided that the first part of claim 22 was “directed to the use of a natural law: Hooke’s law.”¹⁵⁷ Hooke’s law was not mentioned in the claims, patent specification, or prosecution history.¹⁵⁸ However, both parties’ expert witnesses agreed “that Hooke’s law undergirds the design of a liner so that it exhibits a desired damping frequency pursuant to the claimed invention.”¹⁵⁹ And claim 22 “expressly requires varying frequency attenuation (tuning) based on mass and stiffness.”¹⁶⁰ Thus, since what “Hooke’s law does is precisely . . . relate frequency to mass and stiffness,” claim 22 recited Hooke’s law “in all but name.”¹⁶¹

Second, the Court determined that claim 22 was ineligible under § 101 because the claim was directed to “nothing more” than Hooke’s law.¹⁶² The second portion of claim 22 recited wherein “[t]he at least one *liner is a tuned resistive absorber for attenuating shell mode vibrations* and [wherein the at least one *liner*] is a tuned reactive absorber for attenuating bending mode vibrations.”¹⁶³ The court noted that this language is not directed to a law of nature, but rather to a “goal.”¹⁶⁴ Because the “goal”—that the liner is tuned to attenuate both “shell mode vibrations” and “bending mode vibrations”—could be “achieved by one skilled in the art using any method, including any method implemented by computer modeling and trial and error,” this claim language merely “describe[d] a desired result.”¹⁶⁵ As claim 22 did not go “beyond stating a functional result,” it failed to “identify ‘how’ that

¹⁵⁶ Method for Attenuating Driveline Vibrations, U.S. Patent No. 7,744,911 (filed Feb. 27, 2006) (issued Aug. 17, 2010) (emphasis added). “Shell mode vibrations” and “bending mode vibrations” occur when the liner rattles at certain frequencies; these vibrations cause undesirable noise and are desired to be mitigated. *Id.* col. 1, ll. 44–54.

¹⁵⁷ *Am. Axle II*, 967 F.3d at 1298. The court uses the phrases “natural law” and “law of nature” synonymously. *Id.* at 1297 (“[T]he same principle necessarily applies in *natural law* cases. In *Mayo*, the Court concluded that ‘to transform an unpatentable *law of nature* into a patent-eligible application of such a law’” (emphasis added) (quoting *Mayo Collaborative Servs. v. Prometheus Lab’s, Inc.*, 566 U.S. 66, 72 (2012))).

¹⁵⁸ *See id.* at 1307 (Moore, J., dissenting).

¹⁵⁹ *Id.* at 1294 (majority opinion).

¹⁶⁰ *Id.* at 1301.

¹⁶¹ *Id.* at 1301 (citations omitted); *see also* Method for Attenuating Driveline Vibrations, U.S. Patent No. 7,774,911 col. 11 ll. 29, 31 (filed Feb. 27, 2006) (issued Aug. 17, 2010) (stating that “the method comprising: . . . tuning a mass and a stiffness of at least one liner.”).

¹⁶² *Am. Axle II*, 967 F.3d at 1289.

¹⁶³ ‘911 Patent col. 3, ll. 16–19 (emphasis added).

¹⁶⁴ *Am. Axle II*, 967 F.3d at 1293.

¹⁶⁵ *Id.* at 1293–94.

functional result is achieved by limiting the claim scope . . . to concrete action.”¹⁶⁶ Likewise, there is “no such inventive work recited in Claim 22” and it is thus ineligible because the steps “amount to more than conventional pre- and post-solution activity.”¹⁶⁷

Finally, the court briefly turned to claim 1 and found the § 101 analysis inconclusive. Claim 1, in relevant part, recites “[a] *method . . . comprising: . . . tuning at least one liner to attenuate at least two types of vibration transmitted through the shaft member.*”¹⁶⁸ The court described claim 1 as “more general” than claim 22, because the specification indicated that claim 1 could be tuned by “variables other than mass or stiffness.”¹⁶⁹ The court then remanded the case for more analysis on claim 1’s patent eligibility.¹⁷⁰

Under the framework, however, neither claim would be anticipated, regardless of whether the claims explicitly mentioned Hooke’s law. What makes this case different from the usual concerns—an inventor unduly tying up laws of nature—is that Hooke’s law is not a law of nature in the same way as the Law of Gravitation.¹⁷¹ Rather, Hooke’s law describes a simple, idealized scientific model of one-dimensional motion of a spring attached to an object, and where friction is ignored.¹⁷² Hooke’s law is a pedagogical tool,¹⁷³ included in any elementary mechanical-engineering textbook.¹⁷⁴ So the Court’s concern of the “storehouse of nature” or preemption is unfounded, because the system described by Hooke’s law cannot exist.¹⁷⁵

But claim 22 includes more than just a sentence spelling out Hooke’s law in words. Claim 22 also includes two important wherein-clauses: “wherein

¹⁶⁶ *Id.* at 1302. The court distinguished the first “how” requirement from a second “how” requirement: enablement under § 112. *See id.* (explaining that the enabling requirement applies to the specification because “once the required concrete physical structures or actions are set out in the claim, the specification must set forth enough information for a relevant skilled artisan to be able to make and use the claimed structures or perform the claimed actions.”).

¹⁶⁷ *Id.* at 1299.

¹⁶⁸ ‘911 Patent col. 10 ll. 17–18 (emphasis added).

¹⁶⁹ *Am. Axle II*, 967 F.3d at 1300.

¹⁷⁰ *Id.* at 1301.

¹⁷¹ That is, a law of nature that describes how things *are*. *See supra* Section II.B.

¹⁷² *See* EDWARD BELTRAMI, *MATHEMATICS FOR DYNAMIC MODELING* 3–4 (2d ed. 1998). Indeed, the model assumes the *spring itself* has no mass, which is impossible. *See id.* at 4.

¹⁷³ *See generally* Leila Kääntä, Gabriele Kasper & Arja Piirainen-Marsh, *Explaining Hooke’s Law: Definitional Practices in a CLIL Physics Classroom*, 2016 *APPLIED LINGUISTICS* 1, 1–25 (2016) (describing how Hooke’s law can be used by teachers within a “larger pedagogical context”).

¹⁷⁴ *See, e.g.*, BELTRAMI, *supra* note 172, at 3–4.

¹⁷⁵ *Funk Bros. Seed Co. v. Kalo Inoculant Co.*, 333 U.S. 127, 130 (1948).

the at least one liner is a tuned resistive absorber for attenuating shell mode vibrations and wherein the at least one liner is a tuned reactive absorber for attenuating bending mode vibrations.”¹⁷⁶ To “tune” a liner to a given vibration, the vibration itself must be determined, which depends not only on the liner’s geometry and material, but the liner’s interactions with the rest of the mechanical system.¹⁷⁷ And crucially, Hooke’s law describes a model system: an object attached to a spring.¹⁷⁸ This simple system cannot even have shell-mode vibrations or bending-mode vibrations; these vibrations exist only in more complicated systems.¹⁷⁹ For these reasons, claim 22 necessarily includes more than using Hooke’s law, because Hooke’s law cannot describe the vibrations of a more complicated system. Thus, Hooke’s law, as embodied by *any* reference, would not anticipate claim 22.

However, whether claim 22 would survive a § 103 obviousness analysis is a different matter. The ’911 Patent states that previous techniques “have been employed to attenuate vibrations in prop shafts including the use of weights and liners.”¹⁸⁰ And the ’911 Patent also states that liners already existed to attenuate vibration modes.¹⁸¹ But the plaintiff contended that the ’911 Patent’s inventors “conceived of the novel and unconventional concept of ‘tuning’ a liner to damp specific prop shaft vibration modes.”¹⁸² Whether the combination of these references was obvious is a question of mixed law and fact and beyond this Article’s scope.¹⁸³

* * *

¹⁷⁶ Method for Attenuating Driveline Vibrations, U.S. Patent No. 7,774,911 col. 11 ll. 33–37 (filed Feb. 27, 2006) (issued Aug. 17, 2010).

¹⁷⁷ See *id.* col. 11 ll. 33–37, col. 6 ll. 36–40 (“[T]hose of ordinary skill in the art will appreciate that the natural torsion frequency is a function of not only the propshaft assembly 20’, but also of the first and second driveline components (*e.g.*, the transmission 18 and the rear axle 22) to which the propshaft assembly is coupled.”). The frequency is determined by “extensive computer modelling” or “experimental modal analysis.” *Am. Axle & Mfg., Inc. v. Neapco Holdings LLC* (*Am. Axle II*), 967 F.3d 1285, 1294 (Fed. Cir. 2020) (citation omitted).

¹⁷⁸ See Kääntä, Kasper & Piirainen-Marsh, *supra* note 173, at 13.

¹⁷⁹ See ’911 Patent fig.6 (illustrating a shell-mode vibration in a two-dimensional cross-section of a shaft structure); see *id.* fig.5 (illustrating a bending-mode vibration in a two-dimensional cross-section of a shaft structure). Hooke’s law cannot model these types of vibrations because the law describes a system with only *one* dimension. See BELTRAMI, *supra* note 172, at 3–4.

¹⁸⁰ ’911 Patent col. 1 ll. 53–54. The ’911 Patent cites numerous prior-art references that disclose these techniques. See *id.* col. 1 ll. 55–67, col. 2 ll. 1–38.

¹⁸¹ ’911 Patent col. 1 ll. 53–67, col. 2 ll. 11–38.

¹⁸² *Am. Axle II*, 967 F.3d at 1303 (footnote omitted) (quoting Opp. Br. 13).

¹⁸³ *Kinetic Concepts, Inc. v. Smith & Nephew, Inc.*, 688 F.3d 1342, 1356–57 (Fed. Cir. 2012) (citation omitted). Whether the nonobviousness inquiry is one of law

This Section showed how the framework will sometimes invalidate a patent under § 102 and sometimes allow it. This Section also showed how the framework leads to a more streamlined procedure that does not require a court to legally determine scientific principles as they must under § 101. Instead, courts can use new sources as prior art and conduct traditional §§ 102 and 103 analyses.

Conclusion

This Article discusses the Court's current § 101 jurisprudence and how laws of nature and physical phenomena can be introduced as § 102 prior art. It elucidates how the framework would find prior patents eligible, or ineligible based on these § 102 references. The proposed framework respects the policy concerns of tying up fundamental building blocks while shedding itself of the Court's confusing jurisprudence.

Balling on a Budget: Closing the Hatch Act's Treasury Reimbursement Enforcement Loophole and Saving Taxpayer Money

Andrew Allen*

Introduction

The U.S. Office of Special Counsel (“OSC”) is an investigative and prosecutorial independent agency that oversees the enforcement of the Hatch Act, a federal statute enacted in 1939 to restrict the political activities of executive branch employees.¹ Under the Hatch Act, a civil-service federal employee within the executive branch may not “use his [or her] official authority . . . for the purpose of interfering with or affecting the result of an election.”² This statutory prohibition applies to Presidentially Appointed, Senate-Confirmed (“PAS”) federal employees within the President’s cabinet who engage in a mix of political and official travel due to the nature of their job, which requires them to constantly be on duty.³ Unlike most federal executive branch employees, a PAS may engage in political activity on duty as long as the PAS cabinet secretary⁴ and their respective cabinet-level

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¹ See 5 U.S.C. §§ 7321–7326; see also 5 C.F.R. § 734.101 (defining political activity as “an activity directed towards the success or failure of a political party, candidate for partisan political office, or partisan political group”).

² 5 U.S.C. § 7323(a)(1).

³ See 5 U.S.C. § 7324(b)(1); see also 5 C.F.R. § 734.502(a)(1)–(2).

⁴ A cabinet secretary is a senior official appointed by the President and confirmed by the Senate that serves as head of one of 15 executive departments within the President’s Cabinet and advises the President on a particular subject matter area, ranging from transportation to healthcare. See generally *The Cabinet*, THE WHITE HOUSE, <https://www.whitehouse.gov/administration/cabinet/> [<https://perma.cc/GQ5M-UBQD>] (last accessed Jan. 21, 2025) (listing current Trump Administration cabinet officials).

agency reimburse the U.S. Department of the Treasury (“Treasury”).⁵ A tricky enforcement issue arises, however, when a PAS actively campaigns for a partisan political candidate in their official capacity but then refuses to rectify or cure the Hatch Act violation by paying back the Treasury as requested by OSC.⁶ Without an enforcement mechanism to compel reimbursement, OSC has no compulsory avenue to effect compliance with the Hatch Act and must instead rely on the current administration’s good faith cooperation to order discipline.⁷ For example, in 2020, the U.S. Department of Agriculture (“Agriculture”) outright refused to reimburse the Treasury for the costs associated with Cabinet Secretary George Ervin “Sonny” Perdue’s (“Secretary Perdue”) delivery of a partisan speech supporting President Trump’s campaign at an official Agriculture event.⁸ This incident illustrates how easily taxpayer-funded political travel can occur unimpeded by the Hatch Act’s explicit statutory and regulatory reimbursement framework.⁹ This concern was recently brought to the forefront during the Trump Administration with Secretary Perdue but has been a recurring problem for OSC across three recent presidential administrations.¹⁰

This Note evaluates the inherent weaknesses and loopholes of the current Hatch Act provisions and regulations that have allowed past PAS cabinet secretaries and their respective agencies to evade its official authority prohibitions and Treasury reimbursement regulations without ever facing accountability. This Note utilizes Secretary Perdue’s refusal to reimburse the Treasury as a case

⁵ See 5 U.S.C. § 7324(b)(1); see also 5 C.F.R. § 734.502(a)(1)–(2).

⁶ See U.S. OFF. OF SPECIAL COUNS., INVESTIGATION OF POLITICAL ACTIVITIES BY SENIOR TRUMP ADMINISTRATION OFFICIALS DURING THE 2020 PRESIDENTIAL ELECTION, 5, 56–57 (Nov. 9, 2021) [hereinafter TRUMP REPORT].

⁷ See *id.* at 56–57.

⁸ See *id.*

⁹ See *id.* at 56–58; see also Letter from Ana Galindo-Marrone, Chief, Hatch Act Unit, to Donald K. Sherman, Deputy Director, Citizens for Responsibility and Ethics in Washington (Oct. 8, 2020), <https://www.citizensforethics.org/wp-content/uploads/2020/10/HA-20-000394-Closure-Letter-to-CREW.pdf> [<https://perma.cc/ZQN4-UJR4>] [hereinafter Perdue Investigation Letter].

¹⁰ See U.S. OFF. OF SPECIAL COUNS., INVESTIGATION OF POLITICAL ACTIVITIES BY WHITE HOUSE AND FEDERAL AGENCY OFFICIALS DURING THE 2006 MIDTERM ELECTIONS 77–118 (Jan. 2011), <https://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2019/06/24214702/OSC-REPORT.pdf> [<https://perma.cc/S9FE-5ZFC>] [hereinafter BUSH REPORT]; see U.S. OFF. OF SPECIAL COUNS., OSC REPORT TO THE PRESIDENT, SECRETARY SEBELIUS, OSC File No. HA-12-1989, at 1 (Sep. 12, 2012), [https://osc.gov/Documents/Hatch%20Act/Reports/Report%20of%20Prohibited%20Political%20Activity,%20Kathleen%20Sebelius%20\(HA-12-1989\).pdf](https://osc.gov/Documents/Hatch%20Act/Reports/Report%20of%20Prohibited%20Political%20Activity,%20Kathleen%20Sebelius%20(HA-12-1989).pdf) [<https://perma.cc/Y8AT-JMQB>] [hereinafter SEBELIUS REPORT]; see TRUMP REPORT, *supra* note 6, at 56–57.

study for a problem that has been largely ignored for two decades. Specifically, this Note draws on existing Hatch Act provisions, criminal statutes, and prior OSC reports that collectively assist in establishing a multifaceted statutory solution to this enforcement problem—a solution that is enforceable by the United States Court of Appeals for the Federal Circuit (“Federal Circuit”), which has exclusive jurisdiction over Hatch Act appeals.¹¹ Pursuant to OSC’s amended Hatch Act regulations, the Federal Circuit should enforce a statutorily imposed monetary remedy to hold PAS cabinet secretaries accountable for engaging in taxpayer-funded political travel and redress clear financial injury to the Treasury and the American taxpayer. This Note argues that a clear, judicially enforced statutory enforcement mechanism should exist to fill the political travel enforcement gap and prevent a PAS from using their public office for private gain.

Part I of this Note explains the Hatch Act’s purpose and legislative history, prohibited and permitted political activities for federal employees, and OSC’s role in enforcing the Hatch Act. Next, this Part explains the Hatch Act’s statutory and regulatory framework for Treasury reimbursement for PAS official travel, the successful application of that framework to a Hatch Act incident involving then Department of Health and Human Services (“HHS”) Secretary Kathleen Sebelius, and a failed application of that framework to the Agriculture Secretary Perdue incident. Part II of this Note examines how the Agriculture Secretary Perdue incident—and prior incidents of cabinet secretary taxpayer-funded political travel—exposed a loophole in the Hatch Act, leading to easy exploitation. Part III of this Note explores statutory and judicial solutions to this problem, considering existing barriers that complicate solving it, including separation of powers concerns, jurisdictional issues, and OSC’s inability to revise its regulations.

I. Background

The Hatch Act’s legislative history, the prohibited and permitted political activities it sets for certain federal employees, and OSC’s enforcement role provide necessary legal and factual context for the Treasury reimbursement issue. The framework for Treasury reimbursement for PAS official travel and an example of its application illustrates how it is intended to function in practice. Finally, the Hatch Act incident involving Agriculture Secretary Perdue highlights the Treasury reimbursement framework’s shortcomings and the need for a robust enforcement mechanism.

¹¹ See generally 5 U.S.C. §§ 7323–7324; 18 U.S.C. § 595; TRUMP REPORT, *supra* note 6; SEBELIUS REPORT, *supra* note 10; BUSH REPORT, *supra* note 10.

A. Hatch Act Purpose and Legislative History

The Hatch Act originates from the Pendleton Civil Service Reform Act of 1883, which established a “merit-based civil service system” of federal employment and a Civil Service Commission tasked with limiting the partisan political influence of the existing patronage system.¹² President Teddy Roosevelt, a former Civil Service Commissioner,¹³ enacted Civil Service Rule I by executive order, restricting a small portion of the federal workforce—the “Executive civil service”—from using their official authority to influence or interfere with an election.¹⁴ The 1938 election highlighted the inadequacy of these efforts when federal supervisory employees of the Works Progress Administration used their official authority to learn subordinate employees’ political affiliations.¹⁵ The supervisors subsequently fired the subordinates who did not support their preferred partisan political candidate,¹⁶ illustrating the persisting politicization of federal employment.

Due to the continued growth of this patronage system—where the winning political party rewards its political supporters with federal employment positions—federal employees were torn between their duties to the American public and their allegiance to the partisan political party that employed them.¹⁷ Consequently, rather than impartially executing the laws and administering government programs that serve the general public, executive branch employees acted in the best interest of the political party in power, severely undermining a central purpose of representative democracy.¹⁸

In recognizing the continued political polarization of the federal workforce, Congress enacted the Hatch Act of 1939.¹⁹ The original statute prohibited all federal executive branch employees from using their “official authority or influence for the purpose of interfering with an election or affecting [its]

¹² See TRUMP REPORT, *supra* note 6, at 7.

¹³ See *Theodore Roosevelt*, U.S. OFF. OF PERS. MGMT., <https://www.opm.gov/about-us/our-mission-role-history/theodore-roosevelt/> [<https://perma.cc/WR3V-EFMG>] (last visited Oct. 14, 2024).

¹⁴ Exec. Order No. 209 (Mar. 20, 1903) (identical language adopted in the Hatch Act of 1939), available online at https://en.wikisource.org/wiki/Executive_Order_209#cite_note-13 [<https://perma.cc/74K9-PNJP>].

¹⁵ See TRUMP REPORT, *supra* note 6, at 8.

¹⁶ *Id.*

¹⁷ See *id.* at 7; see also U.S. DEP’T OF JUST., FEDERAL PROSECUTION OF ELECTION OFFENSES 99–100 (Richard C. Pilger ed., 8th ed. 2017) [hereinafter DEP’T OF JUST.].

¹⁸ See TRUMP REPORT, *supra* note 6, at 7; H.R. REP. NO. 103-16, at 5–7.

¹⁹ See *U.S. Civ. Serv. Comm’n v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548, 560 (1973). See generally *The Hatch Act of 1939, An Act to Prevent Pernicious Political Activities*, Pub. L. No. 76-252, 53 Stat. 1147, 1147–49 (1939).

result.”²⁰ The statute also barred promising federal employment in exchange for political support of or opposition to a political party, soliciting or receiving political contributions, and actively participating in political management and campaigns.²¹ The Hatch Act’s prohibition against using one’s official authority to influence an election’s outcome was central to accomplishing its core purpose of maintaining a nonpartisan federal civilian workforce.²² This prohibition aimed to preserve public trust in the federal government by ensuring that federal employees not only avoid engaging in political activity in the first place but also “appear to the *public* to be avoiding it” to prevent “confidence in the system of representative Government . . . [being] eroded to a disastrous extent.”²³

In 1993, Congress extensively amended the Hatch Act to relax the scope and extent of its prohibitions to restore and preserve federal employees’ First Amendment rights to participate in the political process.²⁴ The Hatch Act Reform Amendments of 1993 aimed to (1) allow federal employees to “engage in political activity on their own time . . . while off the job and away from the workplace,” (2) eliminate confusion as to what conduct the Act prohibited, and (3) amend the Act to better function “as an effective deterrent” against employees who “abuse their official position.”²⁵ While these amendments preserved all other preexisting Hatch Act prohibitions, they also created a statutory exemption for PAS and Executive Office of the President (“EOP”) employees to engage in political activity on duty, thereby limiting their potential Hatch Act liability.²⁶

²⁰ Letter Carriers, 413 U.S. at 560 (quoting § 9 of the original Act). *See also* The Hatch Act of 1939, 53 Stat. at 1147–49.

²¹ *Id.*

²² *See Hatch Act Overview*, U.S. OFF. OF SPECIAL COUNS., <https://osc.gov/Services/Pages/HatchAct.aspx> [<https://perma.cc/CKD6-AGA5>] (last visited Jan. 27, 2024) (articulating the Hatch Act’s purposes of ensuring the nonpartisan administration of federal programs, “[protecting] federal employees from political coercion in the workplace, and . . . [ensuring] that federal employees are advanced based on merit and not political affiliation”); Letter Carriers, 413 U.S. at 558–60.

²³ Letter Carriers, 413 U.S. at 565 (emphasis added).

²⁴ *See* Hatch Act Reform Amendments of 1993, Pub. L. No. 103-94, 107 Stat. 1001, 1001 (allowing federal employees to participate politically in their personal, private capacities in the electoral “processes of the Nation”); *see also* H.R. REP. NO. 103-16, 4–5.

²⁵ H.R. REP. NO. 103-16, 15–16 (the 1993 Amendments only prohibited further restricted employees from engaging in partisan political management and campaigns); *see* 5 U.S.C. § 7323(b)(2)(A)–(B).

²⁶ *See* Hatch Act Reform Amendments of 1993, Pub. L. No. 103-94, § 7324(b)(1)–(2), 107 Stat. 1001, 1003–04.

Further, the Hatch Act was amended once again in 2012 to allow state and local employees—including District of Columbia employees—to run as candidates in partisan political elections as long as their positions were not completely federally funded and to enact certain modifications to penalties for violations.²⁷ The 2012 Amendments were enacted after criticism that the Hatch Act’s prohibition of individuals whose employment is “trivially . . . tied to a source of federal funds” disqualified and disincentivized many candidates from running in state and local elections.²⁸ These amendments rectified this issue by providing that the Act’s candidacy prohibition covered only state and local employees in fully federally funded positions.²⁹

Congress passed several companion criminal statutes to combat patronage crimes, which the Department of Justice’s Public Integrity Section enforced.³⁰ For example, 18 U.S.C. § 595 criminalizes “any public officer or employee . . . from using his or her official authority to interfere with or affect the nomination or election of a candidate for federal office.”³¹ Enacted as part of the original Hatch Act of 1939, this statute broadly covers “all public officials, whether elected or appointed, federal or non-federal” and is proven by establishing a “nexus between the official action and intent to influence.”³²

B. The Hatch Act Prohibitions and Permitted Political Activities for Federal Employees

The Hatch Act applies to all federal employees within the executive branch except the President and Vice President.³³ Under the Hatch Act, federal executive branch employees are prohibited from (1) engaging in political activity on duty, (2) running for partisan political office, and (3) soliciting, accepting, or receiving campaign contributions.³⁴ The Hatch Act divides federal

²⁷ See Hatch Act Modernization Act of 2012, Pub L. No. 112-230, 126 Stat. 1616.

²⁸ Carolyn N. Lerner, *A Law Misused for Political Ends*, N.Y. TIMES (Oct. 30, 2011), <https://www.nytimes.com/2011/10/31/opinion/the-hatch-act-a-law-misused.html> [<https://perma.cc/4BAG-JCQT>].

²⁹ See Hatch Act Modernization Act of 2012, Pub L. No. 112-230, 126 Stat. 1616.

³⁰ DEP’T OF JUST., *supra* note 17, at 99–111.

³¹ *Id.* at 111; see also 18 U.S.C. § 595 (any person “employed in any administrative position by the United States, or by any [U.S.] department or agency” who “uses his official authority for the purpose of interfering with, or affecting, the nomination or election of any candidate” for President, Vice President, Congress, D.C. delegate, and others “shall be fined under this title or imprisoned not more than one year, or both”).

³² DEP’T OF JUSTICE, *supra* note 17, at 111.

³³ See 5 U.S.C. § 7322(1) (defining employee as “any individual, other than the President and Vice President, employed in . . . an Executive agency other than the Government Accountability Office”).

³⁴ See 5 U.S.C. §§ 7323–7324.

employees into two major categories: less restricted and further restricted.³⁵ Stricter prohibitions exist for further restricted employees who may not “take an active part in political management or campaigns.”³⁶ Most Hatch Act prohibitions apply equally to PAS cabinet secretaries,³⁷ including the Act’s use of official authority prohibition.³⁸ For example, a PAS may not use “his or her official title while participating in political activity”—a prohibition frequently implicated when a PAS cabinet secretary engages in political activity on official travel.³⁹

C. The U.S. Office of Special Counsel and Hatch Act Enforcement

While the Hatch Act originated in 1939, its chief enforcer was not formed until 1978. The Civil Service Reform Act of 1978 created OSC, an investigatory body that acted as an extension of the Merit Systems Protection Board (“MSPB”) in investigating Hatch Act allegations and offering them to the MSPB.⁴⁰ The Whistleblower Protection Act of 1989 reformulated OSC as an independent executive branch agency separate and distinct from the MSPB

³⁵ See 5 U.S.C. § 7323.

³⁶ 5 U.S.C. § 7323(b)(2)(A); see also 5 U.S.C. § 7323(b)(2)(B) (enumerating a list of further restricted employees including individuals employed in intelligence agencies, the Federal Election Commission, and OSC itself). PAS employees “may take an active part in political management or . . . campaigns” and are therefore classified as less restricted. 5 U.S.C. § 7323(b)(2)(A).

³⁷ See 5 U.S.C. § 7323(a); see also *Hatch Act FAQs, Presidential Appointees with Senate Confirmation*, U.S. OFFICE OF SPECIAL COUNS., <https://osc.gov/Services/Pages/HatchAct-FAQ.aspx#tabGroup27> [<https://perma.cc/V8LK-2GTV>] (last accessed Oct. 14, 2024) (noting a PAS may not use their official authority or influence to affect an election’s results, “knowingly solicit, accept, or receive a political contribution from any person; be a candidate for public office in a partisan election; or knowingly solicit or discourage the political activity of any person who has business before the employee’s employing office.”).

³⁸ See 5 U.S.C. § 7323(a)(1).

³⁹ 5 C.F.R. § 734.302. In past reports detailing Hatch Act violations by PAS cabinet secretaries, OSC has analyzed campaign speeches on mixed official and political travel as concurrent violations of the Hatch Act’s official authority and ‘political activity on duty’ prohibitions. See, e.g., SEBELIUS REPORT, *supra* note 10, at 2 (noting HHS Secretary’s conduct would have constituted both a violation of § 7323(a)(1) and § 7324 had HHS not obtained reimbursement from a partisan political campaign).

⁴⁰ See Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978); see also *Am. Fed’n of Gov’t Emps. v. O’Connor*, 747 F.2d 748, 753 (D.C. Cir. 1984) (noting in dicta that the Civil Service Reform Act gave the MSPB the authority to “[adjudicate] Hatch Act cases” and OSC the responsibility to “investigate Hatch Act allegations and to present [those allegations] to the MSPB”).

that continued investigating complaints and prosecuting violations before the MSPB.⁴¹

OSC exercises sole investigative authority over all Hatch Act complaints.⁴² After thoroughly investigating a Hatch Act complaint, OSC may either close the matter without further action through a closure letter if the investigation uncovers no violations, issue a cure letter to a subject ordering them to comply with the law if there is an ongoing violation, deliver a warning letter informing the subject of their violation with no penalty, or facilitate a three-way settlement agreement with OSC, the Hatch Act subject, and the employee's federal agency.⁴³ OSC may also issue advisory opinions that guide federal employees on how to comply with the Hatch Act and place federal employees on notice of OSC's interpretations of the Act and its corresponding regulations.⁴⁴ While non-binding, these advisory opinions often indicate OSC's enforcement priorities.⁴⁵

Upon finding a Hatch Act violation, OSC may file a complaint for disciplinary action against the federal employee before the MSPB.⁴⁶ OSC must prove a federal employee violated the Hatch Act by a preponderance of the evidence in a hearing overseen by an Administrative Law Judge ("ALJ").⁴⁷ If the ALJ concludes OSC has met this burden, it will issue a non-precedential decision—appealable to the MSPB's Board Members—and choose from a

⁴¹ See Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (1989).

⁴² See 5 U.S.C. § 1212(a)(5); see also 5 U.S.C. § 1216(a)(1)–(2).

⁴³ See *Fact Sheet: How Complaints are Investigated and Prosecuted*, U.S. OFFICE OF SPECIAL COUNSEL, (Sept. 2018), <https://osc.gov/Documents/PPP/Processing%20Complaints%20of%20PPPs/How%20Complaints%20are%20Investigated%20and%20Prosecuted.pdf> [<https://perma.cc/9EVN-7CVF>]; 5 U.S.C. § 1215(a). OSC often engages in a combination of these procedures to settle a case. *Id.*; see also HENRY J. KERNER, U.S. OFFICE OF SPECIAL COUNSEL ANNUAL REPORT TO CONGRESS FOR FISCAL YEAR 2022, 32 (June 26, 2023), <https://osc.gov/Documents/Resources/Congressional%20Matters/Annual%20Reports%20to%20Congress/FY%202022%20Annual%20Report%20to%20Congress.pdf> [<https://perma.cc/YR82-UB9V>] (acknowledging most OSC investigations culminate in closure of a case, the issuance of a cure letter, or the issuance of a warning letter to a Hatch Act investigative subject).

⁴⁴ See 5 U.S.C. § 1212(f).

⁴⁵ See generally *Hatch Act Advisory Opinions*, U.S. OFFICE OF SPECIAL COUNS., <https://osc.gov/Services/Pages/HatchAct-AdvisoryOpinion.aspx#tabGroup110> [<https://perma.cc/7VHU-HAT8>] (last visited Oct. 14, 2024).

⁴⁶ See 5 U.S.C. § 1215(a).

⁴⁷ See *Special Couns. v. Purnell*, 37 M.S.P.R. 184, 188 (1988) (holding the preponderance of the evidence standard should be applied by the MSPB in Hatch Act proceedings in accordance with the Administrative Procedure Act because no other statute or regulation required a higher burden of proof).

variety of penalties, including a maximum civil penalty of \$1,000 to “debarment from Federal employment.”⁴⁸

If the MSPB affirms the ALJ’s findings on appeal, the federal employee can appeal the ALJ’s non-precedential decision to the Federal Circuit.⁴⁹ The Federal Circuit has adjudicated a myriad of Hatch Act matters, primarily candidacy cases where a federal employee illegally runs as a candidate for partisan political office,⁵⁰ political fundraising cases where an employee raises funds for partisan political campaigns by “knowingly [soliciting], [accepting], or [receiving] a political contribution from any person,”⁵¹ and cases where an employee engages in political activity on duty.⁵² The Federal Circuit has also issued decisions reviewing Hatch Act violations by certain covered state and local employees.⁵³

⁴⁸ 5 U.S.C. § 7326 (having been in effect since the Act’s amendment in 2012, these penalties may apply to an employee who violates the Act, with debarment reserved for particularly flagrant or willful violations of the Act).

⁴⁹ See 5 U.S.C. § 7703(b)(1)(A) (“a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit . . . within 60 days after the Board issues notice of the final order or decision of the Board”); 28 U.S.C. § 1295(a)(9) (defining Federal Circuit’s exclusive jurisdiction over MSPB’s final decisions).

⁵⁰ *Arnold v. Merit Sys. Prot. Bd.*, No. 2023-1649, 2023 U.S. App. LEXIS 32870, at *7–8 (Fed. Cir. 2023) (finding the MSPB did not err in deciding a National Oceanic and Atmospheric Administration employee violated the Hatch Act’s candidacy prohibition because the primary election in which the employee unsuccessfully ran—a U.S. House of Representatives seat in Washington State’s Eighth District—was a partisan one); see also *McEntee v. Merit Sys. Prot. Bd.*, 404 F.3d 1320, 1334–35 (Fed. Cir. 2005) (FAA employee’s solicitation of donations from members of the Republican Party based on partisan party affiliation, touting of Republican party members’ endorsements, and appearances at party “press conferences with his endorsers” all demonstrated the employee was acting in concert with the Republican party and rebutted the presumption that the mayoral election was nonpartisan); *Briggs v. Merit Sys. Prot. Bd.*, 322 Fed. Appx. 983, 985 (Fed. Cir. 2009); 5 U.S.C. § 7323(a)(3).

⁵¹ 5 U.S.C. § 7323(a)(2); see, e.g., *Lewis v. Merit Sys. Prot. Bd.*, 594 Fed. Appx. 974, 976–80 (Fed. Cir. 2014) (affirming MSPB’s decision to remove a United States Postal Service (USPS) employee for running a partisan political campaign and knowingly engaging in political fundraising for his campaign, as the MSPB’s finding was supported by substantial evidence).

⁵² See *Eisinger v. Merit Sys. Prot. Bd.*, 236 Fed. Appx. 628, 629–30 (Fed. Cir. 2007) (upholding MSPB’s decision to remove a Small Business Administration staff attorney for utilizing his government e-mail account and computer as well as phone conversations to advocate for the political success of a California state political party); see also 5 U.S.C. § 7324(a).

⁵³ See, e.g., *Perkins v. Off. of Special Couns.*, 522 F.3d 1373, 1380–81 (Fed. Cir. 2008) (affirming MSPB’s denial of attorney fees to a police officer who was found not to have violated

The disciplinary process for PASs materially differs, however, in that OSC must submit a written complaint directly to the current President “for appropriate action” through a public report of the established Hatch Act violations.⁵⁴ OSC is not statutorily allowed to discipline a PAS apart from condemning their actions and proposing recommended corrective steps to the President.⁵⁵ Consequently, OSC relies entirely on the current President in office to review OSC’s conclusions and discipline cabinet-level officials accordingly.⁵⁶

D. Hatch Act’s Statutory and Regulatory Framework Regarding PAS Official Travel

The Hatch Act’s 1993 Amendments allow PAS and EOP federal employees to engage in political activity on duty “if the costs associated with that political activity are not paid for by money derived from the Treasury of the United States.”⁵⁷ A PAS or EOP employee who, in the course of travel, “attends both political and official events” must ensure that “the relevant political or candidate” covers all political activity costs and Treasury funds only finance official activity.⁵⁸ To qualify for this exemption, the federal employee

the state and local provision prohibiting state and local employees in fully federally funded positions from being a “candidate for elective office”); *see also* 5 U.S.C. § 1502(a)(1)–(3).

⁵⁴ 5 U.S.C. § 1215(b) (defining a PAS employee as an “employee in a confidential, policy-making, policy-determining, or policy-advocating position appointed by the President, by and with the advice and consent of the Senate” excluding those in the “Foreign Service”).

⁵⁵ TRUMP REPORT, *supra* note 6, at 46 (noting deterrence of a PAS from repeatedly violating the Hatch Act is only accomplished through the PAS’s “inherent desire to avoid illegal activity, . . . the prospect of a public OSC report and the attendant press attention, and . . . an administration’s willingness to impose meaningful consequences of established violations of the law”).

⁵⁶ TRUMP REPORT, *supra* note 6, at 46 (noting deterrence of a PAS from repeatedly violating the Hatch Act is only accomplished through the PAS’s “inherent desire to avoid illegal activity, . . . the prospect of a public OSC report and the attendant press attention, and . . . an administration’s willingness to impose meaningful consequences for established violations of the law”).

⁵⁷ 5 U.S.C. § 7324(b)(1). The Hatch Act prevents most executive branch federal employees from engaging in political activity on duty in the workplace. *See* 5 U.S.C. § 7324(a). While the Hatch Act was revised in 2012, the 1993 Amendments mark the most recent and applicable version of the Hatch Act when applied to PAS cabinet secretaries. *See* H.R. REP. NO. 103-16.

⁵⁸ *See* U.S. OFF. OF SPECIAL COUNS., OSC ADVISORY REGARDING MIXED TRAVEL BY PRESIDENTIALLY-APPOINTED / SENATE-CONFIRMED (PAS) EMPLOYEES 1 (Oct. 6, 2011) [https://osc.gov/Documents/Hatch%20Act/Advisory%20Opinions/Federal/Mixed%20Travel%20by%20Presidential%20Appointees%20with%20Senate%20Confirmation%20\(PAS\).pdf](https://osc.gov/Documents/Hatch%20Act/Advisory%20Opinions/Federal/Mixed%20Travel%20by%20Presidential%20Appointees%20with%20Senate%20Confirmation%20(PAS).pdf) [<https://perma.cc/UP2H-2F64>] [hereinafter MIXED TRAVEL ADVISORY].

must be a directly commissioned White House appointee within the EOP or a PAS employee with a position that makes U.S. policy decisions regarding “relations with foreign powers” or “the nationwide administration of Federal laws.”⁵⁹ Congress specifically intended for this statutory exemption to the ‘on duty’ prohibition to apply to “high level political officials” because PAS “officials are considered to be continuously on duty” and are therefore often unable to separate official and political, often personal, responsibilities during the workday.⁶⁰ Congress further operated under the expectation that a PAS would conduct most of their political activity “off Government property” and outside “regular duty hours.”⁶¹

This exemption often applies when a PAS cabinet secretary on official travel engages in a mix of official and political activity—typically by attending a political event⁶² or delivering a political speech advocating for a political candidate in their official capacity.⁶³ When doing so, its respective agency must reimburse the Treasury or be found violating the Hatch Act for engaging in partisan political activity funded by the American taxpayer.⁶⁴ However, no subsequent enforcement mechanism exists when a PAS cabinet secretary refuses to reimburse the Treasury and cure the violation.⁶⁵

The Hatch Act regulations provide that a PAS can cure a violation and avoid these costs being covered by the Treasury so long as “[t]he Treasury is reimbursed for the costs *within a reasonable period of time*.”⁶⁶ These regulations

⁵⁹ 5 C.F.R. § 734.502(a)(1)–(2) (defining a PAS as an “employee appointed by the President by and with the advice and consent of the Senate whose position is located within the United States”).

⁶⁰ H.R. REP. NO. 103-16, at 22 (1993).

⁶¹ *Id.*; see 5 C.F.R. § 734.502(c) (specifying that OPM regulations clarify a PAS may engage in political activity on duty, which includes engagement in political activity in a federal room or building, wearing an official “uniform, badge, or insignia,” or using a “Government-owned or leased vehicle”).

⁶² See MIXED TRAVEL ADVISORY, *supra* note 58, at 1. OSC outlines a myriad of illustrative, non-exhaustive factors including the type of event, presence of partisan political candidates, the relationship “between the event and official agency business,” the PAS’s motivation for attendance, and the “PAS’s prepared remarks” that an agency can use to determine whether the event is political. *Id.* at 2–3. OSC states the definition of a political event closely parallels the regulatory definition of political activity. See 5 C.F.R. § 734.101.

⁶³ See SEBELIUS REPORT, *supra* note 10, at 4.

⁶⁴ See 5 U.S.C. § 7324(b)(1).

⁶⁵ TRUMP REPORT, *supra* note 6, at 57.

⁶⁶ 5 C.F.R. § 734.503(a) (emphasis added); see also PERDUE INVESTIGATION LETTER, *supra* note 9, at 5 (acknowledging in a footnote that without a clear regulatory definition of what amount of time is reasonable, OSC has “previously proposed a 30-day reimbursement window”).

provide a formula for allocating costs between a PAS's official and political activities.⁶⁷ The first step involves computing the "total activity time," or the total "amount of time actually spent by the employee in meeting, receptions, rallies, and similar activities" during mixed travel, by adding together the respective amount of time expended on official activities and time expended on political activities.⁶⁸ Then, the PAS and the applicable agency determine the "[p]ercentage of [the] trip that is political" by dividing the time expended on political activities by the total activity time.⁶⁹ Finally, the agency multiplies the percentage of time expended on political activity by the cost of the entire mixed travel trip to yield the "amount to be paid by the political entity or organization"—the costs associated with the political activity—for the particular candidate.⁷⁰ By applying this formula, the PAS cabinet secretary should reimburse the Treasury for the costs associated with the political activity "within a reasonable period of time."⁷¹

In developing this statutory exemption, Congress articulated that one of the statute's primary purposes was fairness to the American taxpayer.⁷² Congress explained that "when a cabinet secretary makes a trip to give a political speech, the candidate benefiting from the speech should pay all the costs of the trip."⁷³ The unequivocal congressional purpose of the reimbursement requirement was that when a cabinet official delivers a political speech—on a trip involving a mix of "official Governmental business" and apparent political activity—on behalf of a partisan political candidate, that candidate is financially responsible for reimbursing the Treasury for the cost of that political activity.⁷⁴

⁶⁷ 5 C.F.R. § 734.503(c)(1). The formula notes this "[a]llocation method" applies to every mixed travel cost incurred during the trip that is considered "relevant." 5 C.F.R. § 734.503(c)(2).

⁶⁸ 5 C.F.R. § 734.503(c)(1) (internal quotation marks omitted) (listing examples of PAS official activities such as "official meetings" and "receptions" and examples of PAS political activities as "political meetings, receptions, [and] rallies"). This 'total activity time' calculation excludes the PAS's "time spent in actual travel, private study, or rest and recreation." *Id.*

⁶⁹ 5 C.F.R. § 734.503(c)(1).

⁷⁰ *Id.*

⁷¹ 5 C.F.R. § 734.503(a).

⁷² H.R. REP. NO. 103-16, at 22 (1993) (stating the policy justification for Treasury reimbursement "is that the taxpayers should not pay for these political activities").

⁷³ *Id.*

⁷⁴ *Id.* Of course, the cabinet secretary and their respective agency are responsible for collaborating with the partisan political candidate to facilitate payment to the Treasury. Congress interestingly noted a PAS need not reimburse the Treasury for the "pro rata portion" or proportional allocation of their salary—that is, a PAS is not obligated to pay out a portion of their salary to the Treasury based on the time they spent engaging in political activity. *Id.*

E. Successful Application of the Hatch Act's Statutory and Regulatory Framework Regarding PAS Official Travel: HHS Secretary Kathleen Sebelius

In 2012, OSC received a Hatch Act complaint that then-HHS Secretary Kathleen Sebelius engaged in “extemporaneous remarks” in her official capacity as the keynote speaker at a Human Rights Campaign Gala.⁷⁵ Secretary Sebelius prepared remarks on prior policy accomplishments of the Obama Administration and how its policy initiatives, milestones, and goals had benefitted the event’s LGBT audience members—permissible speech on duty under the Hatch Act.⁷⁶ However, Secretary Sebelius subsequently went off script and made several partisan remarks in favor of President Obama’s reelection, stating the Administration’s work “could be wiped out in a heartbeat.”⁷⁷ She urged gala audience members to “come together here in Charlotte to present the nomination to the President” and “make sure that in November [Obama] continues to be the President for another four years because this effort has just begun.”⁷⁸ She also emphasized the importance of the 2012 election for governor of North Carolina and expressly endorsed North Carolina Lieutenant Governor Walter Dalton—the Democratic candidate in the governor’s race.⁷⁹ OSC concluded Secretary Sebelius violated the Hatch Act by using her official authority to interfere with an election in two instances: endorsing the North Carolina Lieutenant Governor’s “gubernatorial campaign” for governor and expressly advocating for President Obama’s reelection campaign through a “series of extemporaneous [partisan] remarks” designed to spur Democratic voter turnout in North Carolina, a critical battleground state for the 2012 Presidential election.⁸⁰

After Secretary Sebelius’s remarks garnered media attention,⁸¹ HHS acted to “retroactively [reclassify] the event as political.”⁸² HHS then contacted the

⁷⁵ SEBELIUS REPORT, *supra* note 10, at 6. OSC noted HHS’s internal resources, including Secretary Sebelius’s “calendar and a briefing memo prepared by her staff,” confirmed the agency’s perception of this event as a political one. *Id.* at 3.

⁷⁶ *See id.* at 1, 3.

⁷⁷ *Id.* at 4.

⁷⁸ *See id.*

⁷⁹ *See id.* (noting Secretary Sebelius stated that “it’s hugely important to make sure that we reelect the President and elect a Democratic governor here in North Carolina”).

⁸⁰ *Id.* at 6.

⁸¹ *See* Joanne Spataro, *Human Rights Campaign gala gets down — and gets political*, CREATIVE LOAFING CHARLOTTE (Feb. 26, 2012, 10:25 AM), <https://clclt.com/theclog/archives/2012/02/26/human-rights-campaign-gala-gets-down-and-gets-political> [<https://perma.cc/LQF5-7T7U>].

⁸² *See* SEBELIUS REPORT, *supra* note 10, at 4.

Obama for America Campaign and the Democratic National Committee (“DNC”) and asked both political action committees to reimburse all political expenses the Treasury incurred for the Secretary’s North Carolina trip.⁸³ The DNC promptly complied with the HHS’s request for reimbursement.⁸⁴ By reclassifying the gala event as political and acknowledging the political nature of the event by issuing a public statement, the HHS’s “appropriate and timely” efforts to properly implement the regulatory reimbursement formula “to ensure that the government received reimbursement for all travel-related costs and expenses,” collectively cured Secretary Sebelius’ Treasury violation under § 7324(b).⁸⁵ OSC noted that Secretary Sebelius’s rescission of her endorsement of the North Carolina candidate for governor, coupled with the gala being the only instance where she made “political comments in an official setting,” reinforced its decision to close the case.⁸⁶

F. Failed Application of the Hatch Act’s Statutory and Regulatory Framework Regarding PAS Official Travel: Agriculture Secretary Perdue

However, the current Treasury reimbursement framework does not always result in reimbursement in practice.⁸⁷ On August 24, 2020, Agriculture Secretary Perdue traveled to North Carolina to deliver a speech in his official capacity at an Agriculture Department-sponsored event dedicated to promoting the Department’s “Farmers to Families Food Box Program” established to provide agricultural aid in the height of the COVID-19 pandemic.⁸⁸ While addressing a crowd of onlookers, Secretary Perdue campaigned for then-President Donald Trump’s reelection by addressing the event’s crowd as “those forgotten people that voted for [Trump] in 2016” and noted that the Agriculture program beneficiaries present remained a key demographic that would vote for Trump a second time in 2020.⁸⁹ Perdue continued to

⁸³ *See id.*

⁸⁴ *See id.*

⁸⁵ *See id.* at 7.

⁸⁶ *See id.*

⁸⁷ TRUMP REPORT, *supra* note 6, at 57 (noting “even if OSC concludes that a PAS grossly misused U.S. Treasury funds for campaign activities in violation of the Hatch Act, OSC is unable to recover those funds for taxpayers *unless* the PAS agrees to *voluntarily reimburse* the government”) (emphasis added).

⁸⁸ Perdue Investigation Letter, *supra* note 9, at 1; *see also* USDA Farmers to Families Food Box, U.S. DEP’T OF AGRICULTURE, AGRICULTURE MARKETING SERVICE, <https://www.ams.usda.gov/selling-food-to-usda/farmers-to-families-food-box> [<https://perma.cc/T8H8-D69X>] (last accessed Oct. 14, 2023).

⁸⁹ Perdue Investigation Letter, *supra* note 9, at 1.

give this campaign pitch in his official capacity as Agriculture Secretary by praising Trump's electability.⁹⁰ Perdue then engaged in a mix of official and political speech, praising the success of the agricultural program as "an outpouring of compassion . . . for people who matter," American farmers, and subsequently issuing a call to action to the rural voters present in the crowd to show up at the polls for the incumbent President.⁹¹

After thoroughly investigating and analyzing these remarks, OSC concluded Secretary Perdue's speech constituted political activity on duty because he unapologetically and openly campaigned for an incumbent President.⁹² Given his violation, OSC sent Agriculture and Perdue a cure letter requesting Perdue comply with the Hatch Act.⁹³ In response to OSC's letter, Agriculture deflected any connotation that Secretary Perdue has used his official authority in violation of the Hatch Act and, instead, likened Perdue's comments to mere speculation about audience members, discussions of the Trump Administration's policy, and predictions of prospective voters.⁹⁴ Agriculture not only categorically denied Secretary Perdue's Hatch Act violation but also repeatedly contended the Secretary's speech primarily consisted of "factual, predictive, and/or policy-based" statements.⁹⁵ In turn, OSC replied, stating that Agriculture's arguments lacked any legal justification or authority, and provided precedent that factual statements by a federal employee may constitute partisan political activity.⁹⁶ OSC also noted the dispositive inquiry was

⁹⁰ See *id.* at 2.

⁹¹ *Id.* (noting Secretary Perdue pronounced during his speech that similar successful USDA agricultural programs would "continue to happen—four more years—if America gets out and votes for this man, Donald J. Trump.").

⁹² See *id.* at 1, 4–5. OSC based its decision on the net impression of Secretary Perdue's speech, which consisted of a discussion of a Presidential incumbent's prior and upcoming candidacies, emphasis on the success of the USDA's agricultural program, and how "the program would continue if President Trump were reelected." *Id.* at 4.

⁹³ See *id.* at 1.

⁹⁴ See *id.* at 2.

⁹⁵ See *id.* at 3 ("at no point did the Secretary encourage or direct the crowd to vote for the President") (quoting Letter from Richard Goeken, Principal Deputy General Counsel, to Erica S. Hamrick, Deputy Chief, Hatch Act Unit, U.S. Office of Special Counsel, at 2–3 (Sept. 4, 2020)).

⁹⁶ See *id.*; see also *Burrus v. Vegliante*, 336 F.3d 82, 84 (2d Cir. 2003) (holding a union's poster contrasting Presidential political candidates constitutes political activity despite it "[purporting] to present only factual information" because the union acknowledged the poster "was intended to generate support for Vice President Gore"); *Special Couns. v. Malone*, 84 M.S.P.R. 342, 363–64, ¶35 (M.S.P.B. Nov. 10, 1999) (holding a federal employee used his official authority to interfere with an election because the mere act of "[informing] persons

whether the cabinet secretary's speech constituted political activity under the Hatch Act.⁹⁷

Despite OSC's second legally supported request to reimburse the U.S. Treasury, the contentious interagency exchange reached a stalemate on January 8, 2021, when Agriculture again refused to concede from their original position, stating unequivocally that "no reimbursement will occur."⁹⁸ Following the end of President Trump's term, Perdue left his cabinet-level position without ever reimbursing the Treasury.⁹⁹

G. Further Failed Application of the Hatch Act's Statutory and Regulatory Framework Regarding PAS Official Travel: Bush Administration Cabinet Secretaries During the 2006 Midterm Elections

Secretary Perdue's failure to reimburse the Treasury provides a contemporary example of how a lack of an enforcement mechanism has resulted in misuse of taxpayer funds. However, according to an OSC report that investigated President Bush's White House officials, political activity on official travel without Treasury reimbursement was rampant and widespread within the Bush Administration's cabinet, who exploited the enforcement loophole repeatedly during the 2006 Midterm elections.¹⁰⁰ The 2011 report details extensive Hatch Act violations of Bush Administration cabinet secretaries, who campaigned for numerous Republican congressional candidates nationally and failed to reimburse the Treasury for the political costs expended on a litany of various trips to the candidates' congressional districts.¹⁰¹ OSC's

doing business with his agency of the fundraising event for the purpose of promoting attendance at the [mayoral fundraising] event").

⁹⁷ See Perdue Investigation Letter, *supra* note 9, at 5 ("there is no exception in the law for [factual] [or] [predictive] statements").

⁹⁸ TRUMP REPORT, *supra* note 6, at 57 (internal quotations omitted).

⁹⁹ See *id.*

¹⁰⁰ See BUSH REPORT, *supra* note 10, at 77–93.

¹⁰¹ See *id.* (listing Department of Veterans Affairs Secretary Nicholson, Department Transportation Acting Secretary Cino, Department of Interior Secretary Kempthorne, Department of Housing and Urban Development Secretary Jackson, Department of Education Secretary Spellings, Agriculture Secretary Johanns, HHS Secretary Leavitt, and Department of Energy Secretary Bodman, *inter alia*, as Bush cabinet officials who campaigned for Republican congressional candidates and failed to ever seek reimbursement of the Treasury). The Cabinet Secretaries' respective agencies either classified purely political trips as "official" to circumvent reimbursement or outright declined to reimburse the U.S. Treasury for trips that the agency accurately designated as political in order to campaign for Republican congressional candidates. See *id.* at 77. The Treasury, and in turn the taxpayer, was not reimbursed in either instance. See *id.*

Bush Report underscores the pervasiveness and longevity of this enforcement issue, which has vexed OSC for decades.¹⁰²

II. Analysis

A. The Current Treasury Reimbursement Enforcement Scheme is Unworkable and Inadequate

As illustrated by Agriculture Secretary Perdue's outright refusal to reimburse the Treasury, it is evident that this regulatory scheme is unworkable, inadequate, and in desperate need of statutory and judicial reform.¹⁰³ HHS Secretary Sebelius and Secretary Perdue's Hatch Act violations involved similar conduct—making partisan remarks in support of an incumbent President and imploring audience members to choose that President as their candidate—but only Secretary Sebelius complied with the law in an act of good faith, underscoring the flaws within the Hatch Act's regulations.¹⁰⁴ The current enforcement mechanism cannot prevent—or deter—a PAS Hatch Act investigative subject that intentionally refuses to cooperate and comply with the law in good faith.¹⁰⁵

Despite advancing his private and personal interests by openly campaigning for then-President Trump's reelection, Secretary Perdue escaped all accountability or repercussions even though OSC repeatedly implored the Agriculture Department to cure his violation.¹⁰⁶ Under the current framework, any PAS may follow Secretary Perdue's example by ignoring OSC's requests to reimburse the taxpayer through the Treasury.¹⁰⁷ To succeed in reimbursement, the current enforcement scheme relies on the PAS violator, respective agency, and the President to readily collaborate with OSC in good faith to cure any § 7324(b) violation.¹⁰⁸ This statute lacks any teeth because it enables a PAS violator to misuse their own office at an official agency event, ignore OSC advice until their term as cabinet secretary ends following an election, and blatantly avoid reimbursement.¹⁰⁹ Moreover, OSC cannot enforce these statu-

¹⁰² See *id.* at 77–93. A particularly egregious instance, documented by OSC, occurred when Department of Energy Secretary Bodman “used Department of Defense and Federal Aviation Administration aircraft to travel to six events with Republican incumbents” who the Bush Administration regarded as “priorities,” totaling “approximately \$30,795.” *Id.* at 93.

¹⁰³ See TRUMP REPORT, *supra* note 6, at 57.

¹⁰⁴ Compare PERDUE INVESTIGATION LETTER, *supra* note 9, at 2, with SEBELIUS REPORT, *supra* note 10.

¹⁰⁵ See TRUMP REPORT, *supra* note 6, at 57.

¹⁰⁶ See *id.*

¹⁰⁷ See *id.*

¹⁰⁸ See *id.* at 4, 46.

¹⁰⁹ See *id.* at 57.

tory and regulatory reimbursement provisions beyond investigating a PAS's conduct and submitting a letter to the President with the hope that either a PAS willingly complies or a President disciplines the PAS.¹¹⁰ This enforcement authority mistakenly assumes the President would take disciplinary action against a cabinet secretary who publicly supports and openly campaigns for that same President in power during an official departmental agency event.¹¹¹ The current framework presumes complete Presidential adherence with the Hatch Act and does not anticipate situations where a President's administration adamantly refuses to cooperate with OSC.¹¹²

Most importantly, Congress's failure to enforce this Treasury reimbursement prohibition and PAS employees' use of taxpayer funds for political purposes undermines the core legislative purposes of the Hatch Act—preventing federal employees from abusing their official authority for private gain and acting in their own self-interest at the public's expense.¹¹³ Enabling a PAS to engage in unequivocally political activity on taxpayer-funded travel sets a dangerous precedent for continued, unchecked mismanagement of taxpayer funds in that funds are expended outside the budget established by Congress.¹¹⁴ This perverse result—use of taxpayer funds for political purposes—is not only contrary to the Hatch Act's mandate, but also fundamentally unfair to the American taxpayer as it contradicts the public's expectation that taxes go towards impartial administration of government programs, ultimately eroding public trust in government institutions.¹¹⁵ By allowing the most egregious PAS violators of the Hatch Act, such as Secretary Perdue, to expend taxpayer funds for political gain without being held accountable to the people, the Hatch Act fails to ensure “impartial execution of the laws.”¹¹⁶

¹¹⁰ See *id.* (noting “OSC is unable to recover those costs for taxpayers unless the PAS agrees to voluntarily reimburse the government”); see also 5 U.S.C. § 1215(a)–(b) (2018).

¹¹¹ See TRUMP REPORT, *supra* note 6, at 11; see also BUSH REPORT, *supra* note 10, at 102 (“Government business must not be manipulated and used as a resource for the electoral benefit of the governing administration's political party”).

¹¹² See TRUMP REPORT, *supra* note 6, at 46.

¹¹³ See H.R. REP. NO. 103-16, at 21–22.

¹¹⁴ See TRUMP REPORT, *supra* note 6, at 57 (noting the potential for a PAS to “grossly [misuse] U.S. Treasury funds for campaign activities” without repercussion); see also BUSH REPORT, *supra* note 10 at 77, 103 (accentuating that Treasury funds expended by Bush Administration cabinet-level secretaries and agencies for “political trips” improperly “classified as official” was “likely . . . much greater than what is reflected in [their] report” and condemning “systematic misuse of federal resources.”).

¹¹⁵ See U.S. Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 560–61 (1973).

¹¹⁶ *Id.* at 565.

B. Existing Barriers to OSC Enforcement Inform a Solution to the Political Travel Enforcement Gap

The following section examines the three main barriers that have prevented OSC from successfully closing the political travel enforcement gap, as well as OSC's recommendations on how to remedy these barriers in its reports. First, imbuing OSC with the authority to seek the removal of a PAS would interfere with the President's power to discipline his senior officials and effectively execute the laws. Second, OSC lacks rulemaking authority to amend—and add teeth to—the Treasury Reimbursement regulatory framework. Third, OSC and MSPB's jurisdiction is severely limited in that neither entity may discipline or seek reimbursement against a PAS Cabinet-level official who leaves federal service following an election. The final subsection explores OSC's proposed statutory solutions to this enforcement gap, including amendments allowing OSC to pursue and obtain monetary penalties from a PAS, possess rulemaking authority, and seek disciplinary action against a PAS who has violated that Hatch Act but left federal service.

1. OSC's Discipline of Cabinet Officials Poses Separation of Powers Concerns

OSC has repeatedly emphasized that the agency is hesitant to discipline senior presidential administration officials due to its bifurcated statutory enforcement scheme and the separation of powers concerns implicated by disciplining officials close to the President.¹¹⁷ The MSPB's efforts to discipline a PAS cabinet-level secretary in the Treasury reimbursement context would implicate constitutionality concerns, interfering with the Chief Executive's Article II power.¹¹⁸ OSC maintains it lacks "any role in the disciplinary process for PAS or commissioned officers beyond issuing a report" to the President of an official's Hatch Act violation.¹¹⁹ OSC exercises its prosecutorial discretion to decline to order disciplinary action against a PAS under the assumption that the President "would take action, disciplinary or otherwise, sufficient to impress upon senior administration officials that they must comply with the Hatch Act."¹²⁰ OSC has hesitated to discipline senior officials to circumvent

¹¹⁷ See TRUMP REPORT, *supra* note 6, at 45–46; see also 5 U.S.C. § 1215(a)–(b) (2018).

¹¹⁸ See generally Ian Hargreaves, *Hatching a Plan: Filling the Enforcement Gap in the Hatch Act and the Extraordinary Case of Kellyanne Conway*, 21 U.C. DAVIS BUS. L.J. 225, 225, 247 (2021); U.S. CONST. art. II, § 3.

¹¹⁹ TRUMP REPORT, *supra* note 6 at 46.

¹²⁰ *Id.* at 45.

implicating separation of powers concerns and “raising difficult constitutional questions,” relying on the President’s Article II removal power as a justification.¹²¹

OSC’s stance is primarily based on a policy opinion issued by the Office of Legal Counsel (“OLC”) that concluded the MSPB lacked authority to discipline senior Presidential employees, even if Congress granted the MSPB authority to adjudicate a complaint filed by OSC for disciplinary action.¹²² OLC acknowledged that Congress possessed “some authority to prescribe sanctions against executive branch officials who act in violation of existing law.”¹²³ However, OLC ultimately recognized that the MSPB constituted a “body over which the President has limited control” and that any MSPB-imposed removal restrictions could result in the MSPB aggrandizing executive authority from the President.¹²⁴ OLC further found that enabling the MSPB to impose harsher punishments on non-PAS federal employees—including demotion, suspension, debarment, and removal from federal service—could create significant issues.¹²⁵ This authority would interfere with the President’s implied, unrestricted, and exclusive power to remove purely executive officers of the United States and, in turn, unconstitutionally obstruct the President’s duty, as outlined in Article II of the U.S. Constitution, to faithfully execute the laws.¹²⁶

The Supreme Court will likely view any increase in OSC disciplinary authority with skepticism, as the President may only remove OSC’s Special Counsel for good cause.¹²⁷ If OSC were to pursue disciplinary action against a PAS cabinet secretary that a sitting President disagrees with, the President would be unable to remove its agency head, and their ability to execute a certain cabinet-level department’s laws would be significantly diminished.¹²⁸

¹²¹ *Id.*

¹²² *See* 2 U.S. Op. O.L.C. 107, 107–09 (1978).

¹²³ *Id.* at 109.

¹²⁴ *See id.*

¹²⁵ *See id.*

¹²⁶ *See id.*; *see also* U.S. CONST. art. II, § 3; *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2200 (2020); *Myers v. United States*, 272 U.S. 52, 125–28 (1926).

¹²⁷ *See* 5 U.S.C. § 1211(b) (good cause includes “inefficiency, neglect of duty, or malfeasance in office”). In the Supreme Court’s recent line of cases removing congressionally imposed for-cause restrictions on independent agencies, OSC’s single-agency-head structure with for cause removal protections has been twice upheld. *See Seila L. LLC*, 140 S. Ct. at 2201–02 (distinguishing OSC from CFPB in that OSC “exercises only limited jurisdiction to enforce certain rules governing Federal . . . Employees”); *Collins v. Yellen*, 141 S. Ct. 1761, 1787 (2021) (declaring the FHFA’s single-director structure violated separation of powers; declining in a footnote to “comment on the constitutionality of any of [OSC]’s officers”).

¹²⁸ *See* U.S. CONST. art. II, § 3.

A statutory amendment to the Hatch Act that creates an intra-executive separation of powers confrontation between OSC and the President and effectively expands OSC's jurisdiction could encourage the Supreme Court to reevaluate OSC's singular agency-head constitutional structure.¹²⁹ The Supreme Court's invalidation of the Special Counsel's for-cause protection would render OSC enforcement superfluous, as the President could remove any Special Counsel at will if their agency was pursuing a Hatch Act violation against a PAS cabinet secretary.¹³⁰

2. OSC's Inability to Revise its Own Hatch Act Regulations Makes It Practically Impossible for OSC to Exercise Rulemaking Authority and Tackle the Treasury Reimbursement Issue

OSC lacks the ability to amend its own Hatch Act regulations; the U.S. Office of Personnel Management ("OPM") is instead charged with promulgating Hatch Act regulations.¹³¹ OLC has concluded both the plain language of the relevant statutes defining OPM's authority¹³² and the legislative history of the 1993 Hatch Act Amendments establish a "tripartite system of Hatch Act implementation" between OSC, MSPB, and OPM that gives OPM "plenary authority to issue Hatch Act regulations."¹³³ The United States Court of Appeals for the District of Columbia's ("D.C. Circuit") analysis of the statutory scheme also informed OLC's conclusion.¹³⁴ The D.C. Circuit stated that "the MSPB is charged with adjudicating Hatch Act cases, the [OPM] . . . is responsible for promulgating Hatch Act regulations, and the Office of the Special Counsel is empowered to investigate allegations of Hatch Act violations and to present them to the MSPB."¹³⁵

¹²⁹ See *Seila L. LLC*, 140 S. Ct. at 2201–02.

¹³⁰ See *id.* at 2211 (holding the for-cause removal protection for the CFPB Director was "severable from the other provisions of Dodd-Frank that establish the CFPB").

¹³¹ See 5 U.S.C. § 1212(e) (OSC only has the authority to "prescribe such regulations as may be necessary to perform the functions of the Special Counsel"); see also 5 U.S.C. § 1103(b)(1); 5 U.S.C. § 1104(a)(1); 5 C.F.R. § 734.102(c); Hatch Act Reform Amendments of 1993, Pub. L. No. 103-94, 107 Stat. 1001, 1001; 139 Cong. Rec., 15340, 15372 (July 13, 1993).

¹³² See 5 U.S.C. § 1103(b)(1) (authorizing the OPM director to publish a notice of proposed rulemaking for "any rule or regulation" that "does not apply solely to [OPM] or [OPM's] employees"); 5 U.S.C. § 1104(a)(1), (2) (bestowing the OPM director with "authority for personnel management functions"; prohibiting delegation of OPM's authority "to prescribe regulations and to ensure compliance with the civil service laws, rules, and regulations").

¹³³ 18 U.S. Op. O.L.C. 1, 5 (1994).

¹³⁴ See *Am. Fed'n of Gov't Emps. v. O'Connor*, 747 F.2d 748, 753 (D.C. Cir. 1984).

¹³⁵ *Id.*

OSC's inability to exercise rulemaking authority consequently results in the enforcement agency being unable to respond to rapidly changing developments in the dissemination of political activity and campaigning, as OPM has not revised Hatch Act regulations in decades.¹³⁶ As a result, OSC must resort to non-binding, persuasive advisory opinions to set its enforcement priorities in a social media-driven political world.¹³⁷ Therefore, it is inherently disadvantaged when tackling "changing factual and legal circumstances."¹³⁸ Without exercising this crucial rulemaking authority, OSC cannot promulgate and revise the Treasury regulatory reimbursement framework to combat the recurring problem of PAS resistance to reimbursement.¹³⁹

3. OSC and the MSPB's Statutorily Limited Jurisdiction Prevents Discipline of a PAS Cabinet-level Official No Longer in Federal Service Following an Election

OSC only has jurisdictional authority to discipline an individual who is actively considered a federal *employee*.¹⁴⁰ Consequently, if OSC files a complaint after a federal employee has left federal service, the MSPB must dismiss the action, and the former employee incurs no formal penalty.¹⁴¹ This jurisdictional restriction on OSC's authority makes its ability to thoroughly investigate and prosecute an egregious Hatch Act violation by a PAS practically impossible, given that a cabinet secretary's tenure is inherently limited by turnover in presidential administrations.¹⁴² Amending the statute to give OSC the authority to seek monetary penalties from a PAS even after they leave federal service, as proposed in OSC's Trump Administration Report, is one of the agency's potential solutions to this problem.¹⁴³

¹³⁶ See TRUMP REPORT, *supra* note 6, at 53 (acknowledging that OPM's failure to consider OSC's proposed rulemakings since 1996 has culminated in the Act's regulations "[having] not kept pace with . . . technological developments").

¹³⁷ See *id.* at 54. See generally *Hatch Act Advisory Opinions*, U.S. OFF. OF SPECIAL COUNS., <https://osc.gov/Services/Pages/HatchAct-AdvisoryOpinion.aspx#tabGroup110> [<https://perma.cc/7VHU-HAT8>] (last accessed Oct. 14, 2023).

¹³⁸ TRUMP REPORT, *supra* note 6, at 54.

¹³⁹ *Id.* at 54–57; see also BUSH REPORT, *supra* note 10, at 77–79, 81–82.

¹⁴⁰ 5 U.S.C. § 7322 (emphasis added). See also 5 C.F.R. § 734.101.

¹⁴¹ Special Couns. v. Owens, 11 M.S.P.R. 110, 110–11 (1982) (affirming administrative law judge's conclusions that an OSC complaint against a federal employee "should be dismissed" because the MSPB lacks "jurisdiction . . . over an employee who left the Federal service before the Special Counsel's complaint was filed and served").

¹⁴² TRUMP REPORT, *supra* note 6, at 57.

¹⁴³ See *id.* at 4, 46. See also discussion *infra* Section III.B.

4. OSC Proposes Several Statutory Solutions to the Political Travel Enforcement Gap in its Reports

In its Report of Investigation on Hatch Act violations of Trump Administration Officials, OSC contemplates several statutory reform recommendations allowing OSC to pursue disciplinary action against a PAS in their personal, individualized capacity, even after the PAS is no longer in federal service.¹⁴⁴ OSC's proposed solution is a statutory amendment enabling OSC to "pursue *substantial monetary penalties* against PAS and commissioned officers before the MSPB—rather than the full range of more constitutionally suspect disciplinary actions under existing law."¹⁴⁵ OSC concurrently recommends a complementary statutory amendment that would enable the agency to promulgate revisions to its regulations and enforce Hatch Act prohibitions, including Treasury reimbursement, in response to rapidly evolving real-world events.¹⁴⁶ OSC further recommends that Congress provide "statutory clarification" of the MSPB's jurisdiction over federal employees who leave federal service after violating the Hatch Act to circumvent disciplinary action "prior to OSC initiating discipline proceedings."¹⁴⁷

III. Solution

While several statutory solutions have been proposed, this Note states the most effective multi-faceted statutory and judicial solution to close the PAS political travel gap. Amending the Hatch Act to allow OSC to pursue disciplinary action against cabinet secretaries in either their official or personal capacity would ensure their reimbursement of the Treasury for taxpayer-funded political travel.¹⁴⁸ OSC's proposed statutory reforms are all necessary to solve this issue.¹⁴⁹ However, they are insufficient by themselves, as the MSPB and Federal Circuit possess the requisite expertise to evaluate and, when necessary, require the PAS to coordinate reimbursement of the Treasury for political activity. First, Congress must give OSC enforcement authority to seek a civil monetary penalty for Treasury reimbursement before the MSPB.¹⁵⁰ The Federal Circuit, the sole Court of Appeals with jurisdiction over MSPB Hatch Act appeals, must employ a judicially created test to determine whether the MSPB's findings are supported by substantial evidence and, when appropriate, affirm an MSPB judgment against a PAS for the amount of Treasury

¹⁴⁴ See TRUMP REPORT, *supra* note 6, at 46.

¹⁴⁵ *Id.* (emphasis added).

¹⁴⁶ See *id.* at 55, 57.

¹⁴⁷ *Id.* at 46.

¹⁴⁸ See discussion *infra* Section III.A.

¹⁴⁹ See *id.*; see also *supra* Section II.B.4.

¹⁵⁰ See discussion *infra* Section III.B.

proceeds expended on political activity.¹⁵¹ Second, Congress must provide legislative direction to OPM to amend the Hatch Act regulations to quantify a specific timeline for reimbursement.¹⁵² Third, Congress must expand OSC's jurisdiction to enable OSC to seek disciplinary action against a PAS in their personal capacity following their departure from federal service before the MSPB and the Federal Circuit.¹⁵³

A. Congress Must Amend the Hatch Act to Allow OSC to Pursue Disciplinary Action Against a PAS in their Official and Personal Capacity to Seek Reimbursement for Taxpayer-Funded Political Travel

Congress should give OSC enforcement authority to bring a judicial claim before the MSPB, and subsequently the Federal Circuit, against a PAS in their official and personal capacities—even after they leave office.¹⁵⁴ The Federal Circuit would then review OSC's investigative findings and determine the existence of a Treasury reimbursement violation through a judicially created test.¹⁵⁵ The Federal Circuit could employ the following two-pronged test—whether OSC has proven before the MSPB that (1) the PAS engaged in political activity while on official travel and (2) the PAS failed to reimburse the Treasury within the 30-day reimbursement window—to determine whether the MSPB's decision was supported by substantial evidence.¹⁵⁶ In the case of the Secretary Perdue incident, the Federal Circuit could have evaluated the MSPB's determinations and the evidence presented by OSC that (1) Secretary Perdue engaged in political activity while on official travel and (2) failed to reimburse the Treasury within a 30-day window.¹⁵⁷ If the

¹⁵¹ See 28 U.S.C. § 1295(a)(9); *see also* 5 U.S.C. § 7703(b)(1)(A).

¹⁵² See discussion *infra* Section III.C.

¹⁵³ See discussion *infra* Section III.D.

¹⁵⁴ This civil remedy could function similar to that contemplated in civil rights statutes. See 42 U.S.C. §§ 1983, 1988. *But see* *Kentucky v. Graham*, 473 U.S. 159, 167–68 (1985) (holding “a suit against a government official in his or her personal capacity cannot lead to imposition of fee liability upon the governmental entity” in a § 1982 action brought by a plaintiff against a state officer because “[a] victory in a personal-capacity action is a victory against the individual defendant, rather than against the entity that employs him” and “the entity is not even a party to a personal-capacity lawsuit and has no opportunity to present a defense”).

¹⁵⁵ See 28 U.S.C. § 1295(a)(9); 5 U.S.C. § 7703(b)(1)(A).

¹⁵⁶ See 5 U.S.C. § 7703(c); *see also* *McEntee v. Merit Sys. Prot. Bd.*, 404 F.3d 1320, 1334–35 (Fed. Cir. 2005) (affirming MSPB's determination of Hatch Act violations under substantial evidence standard).

¹⁵⁷ 5 U.S.C. § 7703(c); *see also* Perdue Investigation Letter, *supra* note 9, at 4–5. The Federal Circuit could have evaluated MSPB's determinations as to the egregious Hatch Act

Federal Circuit decided to affirm the MSPB's finding, it could issue a judicial opinion and court order compelling reimbursement of taxpayer proceeds back to the Treasury.¹⁵⁸ Considering the current Hatch Act statutory shortcomings, criminal statutes, and prior OSC reports, this combined statutory and judicial solution would allow OSC and the Federal Circuit to enforce Treasury Reimbursement for mixed political and official travel by a PAS cabinet secretary.¹⁵⁹

B. Congress Must Codify a Civil Monetary Penalty for Treasury Reimbursement Before the MSPB and Federal Circuit

The clearest, most effective enforcement solution is a congressional amendment vesting OSC with the authority to seek a monetary penalty before the MSPB—and the Federal Circuit on appeal—against the PAS.¹⁶⁰ The monetary remedy should be based on the amount of money needed to fully reimburse the Treasury for the entire cost of political travel, with the political costs incurred ultimately being given back to the Treasury.¹⁶¹ This limited remedy would strike the proper balance between effective, full taxpayer reimbursement and respecting separation of power concerns.¹⁶² Adopting stronger statutory language, such as articulating criminal fines in the Hatch Act's companion criminal statutes, would empower OSC to seek reimbursement before the MSPB and ultimately enforce substantive sanctions against a PAS and its respective agency on appeal before the Federal Circuit.¹⁶³ The language of 18 U.S.C. § 595 ("§ 595") illustrates that Congress contemplated severe punishments to high-level federal officials who used their official authority for election interference.¹⁶⁴ § 595's broader scope and coverage compared to

violations committed by Bush Administration PAS cabinet secretaries under the same test. See BUSH REPORT, *supra* note 10, at 77, 82–93.

¹⁵⁸ See 5 U.S.C. § 7703(b)(1)(A).

¹⁵⁹ See 5 U.S.C. § 7324(b); 5 C.F.R. § 734.503; TRUMP REPORT, *supra* note 6, at 46–49, 53–55, 56–57; DEP'T OF JUST., *supra* note 17, at 99–111.

¹⁶⁰ See TRUMP REPORT, *supra* note 6, at 46.

¹⁶¹ See *id.* at 57. This reimbursement could function as a restitution-based remedy. See U.S. DEP'T OF JUST., Restitution Process, (Oct. 10. 2023), <https://www.justice.gov/criminal/criminal-vns/restitution-process> [<https://perma.cc/VE5K-SW7C>]; 18 U.S.C. § 3663A; *Plante v. Seanor*, No. 5:17-CV-150-REW-EBA, 2018 WL 5730160, at *12 (E.D. Ky. Nov. 2, 2018) (exploring unjust enrichment, the civil side of restitution, as an equitable alternative to contractual damages claim).

¹⁶² See 2 U.S. Op. O.L.C. 107, 107–09 (1978). Ordering a PAS to pay punitive damages on top of Treasury reimbursement is more likely to unconstitutionally impede the President's ability to faithfully execute the laws. See *id.*; U.S. CONST. art. II, § 3.

¹⁶³ DEP'T OF JUSTICE, *supra* note 17, at 99–111; see also 18 U.S.C. § 595.

¹⁶⁴ 18 U.S.C. § 595.

the Hatch Act should guide how to extend the statute to encompass more individuals and seek significant monetary penalties, achieving a deterrent effect.¹⁶⁵

C. Congress Must Provide Legislative Direction to OPM to Amend the Hatch Act Regulations to Quantify a Specific Timeline for Reimbursement

Congress should further direct OPM to amend the Hatch Act's Treasury Regulation to reflect a concrete time period of thirty days for reimbursement in lieu of "a reasonable period of time."¹⁶⁶ Once an OSC investigation uncovers that political activity occurred during official travel, OSC must be able to establish a timeline by which the PAS and the respective agency of the individual in question may cure the violation before litigation is required.¹⁶⁷ Otherwise, a contentious legal back-and-forth between OSC and an agency would result in never-ending disagreement and no reimbursement.¹⁶⁸ Currently, the regulation's failure to answer what constitutes a reasonable amount of time further hampers OSC's ability to induce a PAS unwilling to comply with the Hatch Act to reimburse the Treasury in a timely manner.¹⁶⁹ Establishing a tangible timeline would enable OSC to effectively seek corrective action before the MSPB and, ultimately, the Federal Circuit without burdening either adjudicatory body's time and resources.¹⁷⁰

Additionally, Congress must amend the statutory allocation of OSC authority to provide OSC concurrent rulemaking authority with OPM.¹⁷¹ OSC's inability to actively revise and bolster its regulations render the agency unable to respond to new enforcement issues that arise in real-time, enabling bad actors to completely circumvent any punishment for their prohibited conduct under the law.¹⁷²

D. Congress Must Expand OSC's Jurisdiction to Enable OSC to Seek Disciplinary Action Against a PAS in Their Personal Capacity

Congress must expand OSC's jurisdiction to enable OSC to seek disciplinary action against a PAS in their personal capacity following their departure

¹⁶⁵ See *id.*

¹⁶⁶ 5 C.F.R. § 734.503(a).

¹⁶⁷ Perdue Investigation Letter, *supra* note 9, at 5, n. 11.

¹⁶⁸ See *id.* at 2–5.

¹⁶⁹ See 5 C.F.R. § 734.503(a).

¹⁷⁰ See TRUMP REPORT, *supra* note 6, at 57.

¹⁷¹ See *id.* at 53–55.

¹⁷² See *id.* at 54–55.

from federal service before the MSPB and Federal Circuit. A statutory exception to OSC's limited jurisdiction over federal employees would allow OSC to seek reimbursement from a PAS employee and their respective parent agency before the MSPB and Federal Circuit even after the PAS is no longer in federal service.¹⁷³ This narrow exception would recognize PAS employees should be scrutinized both in and outside of office—unlike all other covered federal employees—since a PAS cabinet position is far more temporary and transient than most federal executive civil service positions.¹⁷⁴ This exception would serve the sole purpose of recouping any loss of Treasury funds for the American taxpayer and would circumvent any separation of powers concerns posed by OSC pursuing disciplinary action before the MSPB and Federal Circuit against a PAS who remains in office.¹⁷⁵

Conclusion

The Hatch Act needs an additional enforcement mechanism that allows OSC to seek reimbursement from a cabinet-level agency official who engages in political activity on mixed travel.¹⁷⁶ Congress must carefully draft statutory provisions that significantly bolster OSC's enforcement authority and comport with limiting constitutional separation of powers principles.¹⁷⁷ Even modest revisions of the statute to expand OSC's enforcement and rulemaking authority may draw Supreme Court scrutiny.¹⁷⁸ This Note proposes a multilayered, feasible framework—imposing monetary remedies, structural protections, and judicial review by the Federal Circuit—that fully reimburses the Treasury and decisively closes the political travel enforcement gap.¹⁷⁹ Congress's continued failure to amend the Hatch Act and rectify this gap will embolden future presidential administration appointees to misuse American taxpayer funds to further their political self-interests.

¹⁷³ See *id.* at 57, n. 198.

¹⁷⁴ See *id.* at 48 (explaining how senior members of a presidential administration exploit the “window in the final months of an election cycle” by violating the Hatch Act with impunity).

¹⁷⁵ 2 U.S. Op. O.L.C. 107, 107–09 (1978).

¹⁷⁶ See 5 U.S.C. § 7324(b); 5 C.F.R. § 734.503; see also TRUMP REPORT, *supra* note 6, at 57.

¹⁷⁷ 2 U.S. Op. O.L.C. 107, 109 (1978). See also *Myers v. United States*, 272 U.S. 52, 125–27 (1926); *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2200 (2020); U.S. CONST. art. II, § 3.

¹⁷⁸ See *Seila L. LLC*, 140 S. Ct. at 2201–02 (leaving OSC's status as an independent agency undisturbed because the agency “exercises only limited jurisdiction to enforce certain rules” and lacks “regulatory authority”).

¹⁷⁹ See discussion *supra* Section III; see also TRUMP REPORT, *supra* note 6, at 46–49, 53–55, 56–57.

Believing Survivors of Military Sexual Trauma: The Imperativeness of Altering the Claim Interpretation and Adjudication Process for Veterans Seeking Disability Compensation and Benefits

Emma Wardour*

Introduction

Rape victims must yell, cry, fight—says the Army that has trained us for years to be silent, to be strong, to be obedient. It's as if there is a list somewhere about how we, the raped, are supposed to act, how to play our parts for those who will judge us. We're failing a set of standards that we have no idea even exist.

—Ryan Leigh Dostie¹

The prevalence of sexual assault within the military is jarring, with an estimated 29,061 individuals experiencing sexual violence during their time in service in 2023.² Military Sexual Assault (“MST”) refers to in-service sexual activity constituting “threatening sexual harassment” or sexual assault, occurring when the victim could not negate sexual advances or when the acts were performed against the individual’s will.³ MST experiences may include, but are not limited to, sex resulting from physical force, pressure, or coercion; sexual advances or contact that made the individual feel uncomfortable or

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¹ Renée Burbank, *Stigmatizing Narratives in Military Sexual Trauma Cases*, 31 KAN. J.L. & PUB. POL’Y 185, 208 (2022).

² See *Department of Defense Annual Report on Sexual Assault in the Military Fiscal Year 2023*, DEP’T OF DEF. 1, 4, 9 (2024), https://www.sapr.mil/sites/default/files/public/docs/reports/AR/FY23/FY23_Annual_Report.pdf [<https://perma.cc/GM7M-XUCD>] (last visited Jan. 31, 2024).

³ *Military Sexual Trauma*, U.S. DEP’T OF VETERANS AFFS., <https://www.mentalhealth.va.gov/msthome/index.asp> [<https://perma.cc/A8E6-SYHL>] (Oct. 9, 2024).

threatened; sexual acts where the individual was unable to consent due to intoxication or unconsciousness; and threatening sexual commentary.⁴

For MST-related disability claims, the court must consider all pertinent evidence; however, the lack of certain documentation is prohibited from being given weight.⁵ When the United States Court of Appeals for the Federal Circuit (“Federal Circuit”) decided *AZ v. Shinseki*⁶ in 2013, adjudicators were no longer permitted to find a claimant unreliable based on the absence of in-service documentation of sexual assault or harassment.⁷ Instead, where a veteran lacked such records, decision-makers were supposed to regard the absence of documentation as irrelevant, sourcing credibility from other proffered information and evidence.⁸ The *Shinseki* holding was intended to provide relief for victims by making it easier for veterans to receive disability compensation and benefits using alternative forms of evidence where their experience of MST exacerbated or created a health condition.⁹

However, neither the Board of Veterans’ Appeals (“Board”) nor Veterans Affairs (“VA”) abide by this holding in practice.¹⁰ Subsequent Board rulings have resulted in excessive litigation and impeded survivor justice, and VA resources—including the M21-1 (the procedural manual for VA adjudicators that guides the claims process) and the VA website—do not contain

⁴ See *id.*

⁵ See *AZ v. Shinseki*, 731 F.3d 1303, 1306, 1311 (Fed. Cir. 2013).

⁶ 731 F.3d 1303 (Fed. Cir. 2013).

⁷ See *id.* at 1306.

⁸ See *id.* at 1306, 1310.

⁹ See *id.* at 1310, 1312–14. See generally *Military Sexual Trauma and Disability Compensation*, U.S. DEP’T OF VETERANS AFFS., <https://www.va.gov/resources/military-sexual-trauma-and-disability-compensation/> [https://perma.cc/K9D4-HL7D] (Sept. 26, 2023).

¹⁰ See, e.g., *Wood v. McDonald*, No. 14-4345, 2016 U.S. App. Vet. Claims LEXIS 596 (Vet. App. Apr. 27, 2016); *Kim v. McDonough*, No. 21-7412, 2023 U.S. App. Vet. Claims LEXIS 582 (Vet. App. Apr. 6, 2023). See generally *Military Sexual Trauma and Disability Compensation*, U.S. DEP’T OF VETERANS AFFS., <https://www.va.gov/resources/military-sexual-trauma-and-disability-compensation/> [https://perma.cc/K9D4-HL7D] (Sept. 26, 2023) (only referencing in-service records as sufficient evidence of MST); Brian Reese, *VA M21-1 Manual Explained: Learn How VA Raters Review and Rate your Claim!*, VA CLAIMS INSIDER (Feb. 21, 2023), <https://vaclaimsinsider.com/va-m21-1-manual/> [https://perma.cc/2WDV-GGQ7]; *M21-1 Adjudication Procedures Manual*, U.S. DEP’T OF VETERANS AFFS., https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/55440000001018/topic/554400000004049/M21-1-Adjudication-Procedures-Manual [https://perma.cc/WN75-5FY9] (Jan. 8, 2024) (lacking guidance on the adjudication of generalized MST claims).

sufficient information on generalized MST claim adjudication.¹¹ Ultimately, for veterans seeking disability compensation and benefits for a generalized MST claim,¹² the aforementioned practices by the Board and VA serve as a major impediment to such procurement.

This Note argues that the current adjudication and interpretation of the evidentiary standard for generalized MST are practically and facially inconsistent with the Federal Circuit's holding in *Shinseki*,¹³ resulting in an unintelligible legal standard. To promote legal clarity and justice, the Board and the VA must uniformly apply *Shinseki*'s standard. This includes limiting the Board's discretion during appellate review and ensuring the *Shinseki* standard is preserved in public VA resources pertinent to claim adjudication. Part II discusses the importance of disability compensation for survivors, additionally exploring the public portrayal and differences in evidentiary standards for generalized PTSD claims, PTSD claims related to MST, and generalized MST claims. Part II further evaluates the issues MST claimants face in obtaining disability benefits due to difficulties gathering sufficient evidence. It also details the landmark *Shinseki* case, the legal standards applied during Board appeals, and how subsequent case law has disregarded its binding effect. Part III analyzes the inconsistency between the current interpretation and adjudication of the MST standard with *Shinseki*'s holding. It argues that the Board has subsequently ignored this ruling, leading to a plethora of issues: the reviewing standard utilized by the Court of Appeals for Veterans Claims ("CAVC") is incorrect and affords the Board too much discretion, and VA resources misguide potential claimants and adjudicators by omitting critical claim information. Part IV of this Note concludes by suggesting the adoption of three interconnected solutions to aid in accomplishing *Shinseki*'s goal, easing the evidentiary burdens generalized MST claimants face.

I. Background

Disability compensation and benefits are crucial from both a monetary and medical standpoint, but the process of bringing a successful claim can be lengthy, leading to claimants' mistrust in the VA system.¹⁴ There are significant differences in the evidentiary standard between generalized PTSD

¹¹ See *Wood*, No. 14-4345, 2016 U.S. App. Vet. Claims LEXIS 596; *Kim*, No. 21-7412, 2023 U.S. App. Vet. Claims LEXIS 582. See generally *Military Sexual Trauma and Disability Compensation*, *supra* note 9; *M21-1 Adjudication Procedures Manual*, *supra* note 10.

¹² The references to "generalized" claimants throughout this Note concerning either PTSD or MST are not official terminology but are utilized in order to simplify these concepts and to diminish confusion for readers.

¹³ 731 F.3d 1303 (Fed. Cir. 2013).

¹⁴ See discussion *infra* Section II.A.

claims, PTSD claims tied to MST, and generalized MST claims, with MST claimants facing the most stringent requirements to prevail.¹⁵ The Federal Circuit's 2013 decision in *Shinseki* aimed to mitigate these disparities, but subsequent decisions by the Board and the VA illustrate the residual effects of this ruling.¹⁶

A. Disability Compensation and Benefits

For a veteran to satisfy eligibility requirements and secure disability compensation or benefits, three conditions must be met:¹⁷ an individual must (1) be a veteran who (2) has a present illness or injury that is (3) connected to their time in the military.¹⁸ When these elements are fulfilled, determining which VA benefits a claimant can obtain, in addition to their monthly monetary compensation, such as VA health care,¹⁹ is the next step in the process.

Compensation and benefits can be imperative to affording healthcare and addressing health issues.²⁰ Survivors of MST may experience a variety of health concerns, including but not limited to hypothyroidism, substance abuse, fluctuations in weight,²¹ eating disorders, mental health issues, suicidal

¹⁵ See discussion *infra* Section II.B.

¹⁶ See discussion *infra* Section II.D–E.

¹⁷ See *Eligibility for VA Disability Benefits*, U.S. DEP'T OF VETERANS AFFS., <https://www.va.gov/disability/eligibility/> [<https://perma.cc/W7G5-QRP6>] (Aug. 15, 2023).

¹⁸ See *id.* (expanding on the above simplified textual definition, the claimant must have been active duty or served on either active or inactive duty training and have a disability arising from post-service (where the veteran's service is related to a disability arising after active duty ended), pre-service (where the veteran's service exacerbated an existing condition), or in-service (where such service created the disability the veteran currently suffers from)).

¹⁹ See *About VA Disability Ratings*, U.S. DEP'T OF VETERANS AFFS., <https://www.va.gov/disability/about-disability-ratings/> [<https://perma.cc/3AXM-C4ZL>] (Nov. 5, 2024) (both monetary compensation and benefits are based on the disability rating assigned by the VA, where disability severity is labeled as a percentage between 10 and 100, reflecting the level that the disability serves as a detriment to the veteran's functioning and well-being. Determining this percentage may be based on VA claim exam results, information derived from federal agencies or elsewhere, and the evidence given to the VA); see also *Current Veterans Disability Compensation Rates*, U.S. DEP'T OF VETERANS AFFS., <https://www.va.gov/disability/compensation-rates/veteran-rates/> [<https://perma.cc/X4WP-4AXX>] (Dec. 2, 2024) (Depending on whether a claimant has dependents, the monthly compensation rate may vary. For example, for a veteran with no dependents and a ten percent disability rating, the claimant will receive \$175.51 monthly and where the veteran has a 100% disability rating with no dependents, \$3,831.30 a month).

²⁰ See generally *About VA Disability Ratings*, *supra* note 19.

²¹ See Kelly H. Koo & Shira Maguen, *Military Sexual Trauma and Mental Health Diagnoses in Female Veterans Returning from Afghanistan and Iraq: Barriers and Facilitators*

ideations,²² relationship issues, emotional numbness, troubles with sleeping, and attention issues.²³ Obtaining both compensation and benefits for disabilities resulting from MST can aid tremendously in mitigating, treating, or eradicating these physical and mental manifestations by elevating one's ability to obtain and afford appropriate medical care.²⁴

However, the process of bringing a disability claim and succeeding can be long and arduous, where a veteran must navigate a fifteen-page application to file a claim with the Department of Veterans Affairs.²⁵ As of January 2025, nearly 260,000 claims have been "backlogged," which references claims that have been awaiting a decision for over 125 days since they were first received.²⁶ Currently, it takes the VA approximately 140 days to decide a disability claim, which is almost a five-month-long wait time that will inevitably be extended if a veteran seeks an appeal.²⁷ Where an appeal is sought, the claim may progress sequentially from the Board to the CAVC, to the Federal Circuit, and finally to the United States Supreme Court.²⁸

In part due to the lengthy claims process that many victims face, veterans have become skeptical of the adjudication process and question whether

to Veterans Affairs Care, 25 HASTINGS WOMEN'S L.J. 27, 31 (2014). Hypothyroidism, also known as underactive thyroid, may cause a variety of symptoms, including weight gain, memory issues, and muscle weakness, which in turn can lead to a plethora of additional health problems if untreated, including heart issues. *See Hypothyroidism*, MAYO CLINIC (Dec. 10, 2022), <https://www.mayoclinic.org/diseases-conditions/hypothyroidism/symptoms-causes/syc-20350284> [<https://perma.cc/PDS6-V4EZ>].

²² See Burbank, *supra* note 1, at 196.

²³ See Alexandra Besso, *Veterans as Victims of Military Sexual Assault: Unequal Access to PTSD Disability Benefits and Judicial Remedies*, 23 BUFF. J. GENDER L. & SOC. POL'Y 73, 76 (2014).

²⁴ See Amy Street et. al., *Providing Mental Health Care for Those Who Experienced Military Sexual Trauma*, U.S. DEPT OF VETERANS AFFS., https://www.ptsd.va.gov/professional/treat/type/providing_care_mst.asp#three [<https://perma.cc/7FZN-A5SR>] (Dec. 7, 2023) (demonstrating that access to cognitive-behavioral treatments and psychoeducation may be remedial for some veterans depending on their residual symptoms).

²⁵ See *About VA Form 21-526EZ*, U.S. DEPT OF VETERANS AFFS., <https://www.va.gov/find-forms/about-form-21-526ez/> [<https://perma.cc/W8ME-8HHR>] (Oct. 7, 2024).

²⁶ See *Veterans Benefits Administration Reports*, U.S. DEPT OF VETERANS AFFS., https://www.benefits.va.gov/reports/detailed_claims_data.asp [<https://perma.cc/J5KU-BQQN>] (Jan. 27, 2025).

²⁷ See *How to File a VA Disability Claim*, U.S. DEPT OF VETERANS AFFS., <https://www.va.gov/disability/how-to-file-claim/#:~:text=How%20long%20does%20it%20take%20VA%20to%20make%20a%20decision%3F> [<https://perma.cc/8Q75-3Y2R>] (Jan. 14, 2025).

²⁸ See Henry J. Loyer, *Military Sexual Trauma: Policy Analysis on Veterans' Benefits Access in the Past, Present, and Future*, 24 FED. CIR. B.J. 493, 501 (2015).

its decisions are equitable and efficient.²⁹ This distrust may also derive from the public view that the VA mistrusts claimants, and aims to ensure false claims are not awarded.³⁰ As a result of such distrust, even true MST claimants may be perceived as ineligible for disability compensation and benefits solely because of the claim they bring and the evidence they possess or lack.³¹

B. The Evidentiary Differences Between Generalized PTSD, PTSD Related to MST, and Generalized MST Claims

For a veteran to receive disability compensation and benefits for in-service instances resulting in trauma, the evidentiary standards vary markedly from claim to claim.³² These standards and their practical applications can be accessed via the VA website and the M21-1, both available to the public.³³ Claimants attempting to recover for generalized PTSD claims benefit from the most relaxed standard, with claimants seeking recovery for PTSD resulting from MST confronting a slightly heightened standard.³⁴ Generalized MST claimants face the most stringent evidentiary standard, and because of this, there have been attempts to lower this standard to provide victims with better odds of obtaining disability compensation and benefits.³⁵

²⁹ See Kaylee R. Gum, *Military Sexual Trauma and Department of Veterans Affairs Disability Compensation for PTSD: Barriers, Evidentiary Burdens and Potential Remedies*, 22 WM. & MARY J. OF WOMEN & L. 689, 704 (2016); see also Jennifer Hickey, *VA Secretary: Trust Remains Barrier to Vets Claiming Benefits*, NGAUS (Apr. 11, 2023), <https://www.ngaus.org/newsroom/va-secretary-trust-remains-barrier-vets-claiming-benefits> [<https://perma.cc/7FEM-2CMC>].

³⁰ See Burbank, *supra* note 1, at 205–06 (the VA has previously proclaimed that it was “strongly oppose[d]” to allowing generalized MST claimants to prevail where they only proffered lay evidence of trauma as PTSD claimants are allowed because doing so would open up the claims process to virtually any allegation of MST, including claims that were false). See also *Ensuring Access to Disability Benefits for Veteran Survivors of Military Sexual Trauma: Hearing Before the Subcomm. on Disability Assistance & Mem’l Affs. of the H. Comm. on Veterans’ Affs.*, 116th Cong. 45 (2019) (statement of Willie C. Clark Sr., Deputy Under Secretary for Field Operations, Veterans Benefits Administration) (the VA has stated that such opposition arises from the opinion that the occurrence of in-service MST is not “similar enough” to PTSD claims because “the [PTSD] provision is based on acknowledgement of the disruptive circumstances occurring on a battlefield and the resulting incomplete record keeping. . . . Unlike in-service events related to combat, MST . . . can happen anywhere and at any time during service.”).

³¹ See Burbank, *supra* note 1, at 206.

³² See discussion *infra* Section II.B.2–4.

³³ See discussion *infra* Section II.B.1.

³⁴ See discussion *infra* Section II.B.2–3.

³⁵ See discussion *infra* Section II.B.4.

1. The Portrayal of Current Evidentiary Standards Within Publicly Accessible VA Resources

When a government entity publishes information accessible to the public, such information is generally perceived “as highly trustworthy.”³⁶ Yet, the reliability of government-endorsed resources is not always as adjudged, as misinformation is prevalent and can and does harm consumers.³⁷ An exemplar of such harm is reflected via an unreviewed clinical trial published by the National Institutes of Health (“NIH”), a government entity that regularly aids individuals in finding novel medical treatments by posting pertinent trials.³⁸ Before publishing these trials, the NIH does not screen all treatments, and several individuals who believed that an unapproved stem-cell treatment was government-endorsed due to its appearance on the NIH website were subsequently blinded.³⁹

The VA, a government entity,⁴⁰ communicates legal standards and adjudicatory practices with both the public and employees through various publicly accessible resources, including the M21-1 and the VA website.⁴¹ The M21-1—the gold-standard procedural manual binding VA adjudicators to its guidance—“outlines the rules, regulations, and procedures for evaluating and deciding claims for VA benefits” and is an important resource for VA employees.⁴² The VA website, which states its mission is to provide “exceptional health care that improves [veteran] health and well-being,”⁴³ is a

³⁶ Janet Freilich, *Government Misinformation Platforms*, 172 U. PENN. L. REV., 1537, 1537 (2024); see also *Veteran Trust in VA*, U.S. DEP’T OF VETERANS AFFS., <https://www.va.gov/initiatives/veteran-trust-in-va/> [<https://perma.cc/UF7A-BPJ5>] (Aug. 13, 2024) (demonstrating that, as of Fiscal Year 2024, nearly 80% of veterans who utilize VA services trust this entity).

³⁷ See Janet Freilich, *Government websites are loaded with misinformation, and that’s a big problem for AI*, GOV’T EXEC. (Aug. 28, 2023), <https://www.govexec.com/technology/2023/08/government-websites-are-loaded-misinformation-and-s-big-problem-ai/389759/> [<https://perma.cc/92B3-7EGU>].

³⁸ See *id.*

³⁹ See *id.*

⁴⁰ See *U.S. Department of Veterans Affairs Structure*, U.S. DEP’T OF VETERANS AFFS., <https://www.ruralhealth.va.gov/aboutus/structure.asp#:~:text=The%20United%20States%20Department%20of,and%20consent%20of%20the%20Senate> [<https://perma.cc/L23K-2FDD>] (May 14, 2024).

⁴¹ See generally *Military Sexual Trauma and Disability Compensation*, *supra* note 9; *M21-1 Adjudication Procedures Manual*, *supra* note 10.

⁴² See Reese, *supra* note 10.

⁴³ *Veterans Health Administration*, U.S. DEP’T OF VETERANS AFFS., <https://www.va.gov/health/aboutvha.asp#:~:text=VHA%20Mission,their%20health%20and%20well%2Dbeing> [<https://perma.cc/77HV-HL2S>] (May 14, 2024).

resource targeted at service members and veterans that provides similar details, including acceptable evidence for certain claims.⁴⁴

2. Generalized PTSD

For a general PTSD-related claim, a veteran may be able to demonstrate that an in-service stressor occurred simply by providing testimony unless it is clearly contradicted by other existing evidence.⁴⁵ Congress enacted this standard in 2010 in response to backlash surrounding the previously heightened regulation, which required corroborating evidence for PTSD claims involving stressors unrelated to their combat experience.⁴⁶ These stressors include concepts like the fear of terrorist or hostile military activity and often required the individual to proffer names, dates, and places—something that many individuals could not do despite the validity of their claims.⁴⁷ Now, however, without the need to prove trauma through corroborating evidence, demonstrating the existence of disability can be a simple process.⁴⁸

3. PTSD Related to MST

A PTSD claim stemming from MST cannot be established solely through a veteran's lay testimony, making it harder for veterans with these claims to obtain compensation since other evidence is required.⁴⁹ Per the VA website, a veteran pursuing disability compensation for PTSD resulting from MST may submit evidence from their time in service, such as in-service investigative reports, sexual assault or harassment reporting forms from the U.S. Department of Defense ("Defense Department"), Military Personnel Records, or Service Treatment Records recording MST.⁵⁰ When a veteran does not possess these records, the VA accepts other evidence in both direct⁵¹ and indirect

⁴⁴ See DEP'T OF VETERANS AFFS., VA DIRECTIVE 6102: INTERNET AND INTRANET SERVICES 3 (2019), https://www.va.gov/vapubs/viewPublication.asp?Pub_ID=1056&FType=2 [<https://perma.cc/73JQ-YK95>].

⁴⁵ See 38 C.F.R. § 3.304(f)(1) (2023).

⁴⁶ See Alexandra Yacyshyn, "[Secretary Shulkin], Tear Down This Wall!" *Tearing Down the Wall Between Veterans Suffering From PTSD Due to Military Sexual Trauma and Compensation Benefits*, 32 J. CIV. RTS. & ECON. DEV. 275, 289 (2019).

⁴⁷ See *id.*

⁴⁸ See 38 C.F.R. § 3.304(f)(1) (2023).

⁴⁹ See *id.*; see also Yacyshyn, *supra* note 46, at 288–89 (noting that PTSD resulting from MST was not included in Congress's 2010 amendment to the PTSD standard, despite the categorization of such PTSD as a disability resulting from a non-combat stressor).

⁵⁰ See *Military Sexual Trauma and Disability Compensation*, *supra* note 10.

⁵¹ See *id.* (some direct evidence that the VA allows includes records or statements derived from "chaplains or clergy members;" and "rape crisis centers or centers for domestic violence assistance." The VA will also accept direct reports such as "personal diaries or journals;"

forms.⁵² This may include records or statements from “counseling, health, or military training facilities,” “family members, roommates, or fellow service members,” reports from “civilian police,”⁵³ evidence exhibiting life changes, such as “changes in work performance” and “problems with sexual function,” along with evidence of behavioral changes such as anxiety and depression, as well as other miscellaneous evidence, such as “pregnancy test results.”⁵⁴ Indirect evidence that does not demonstrate clear causation is also permitted if it displays behavioral or lifestyle alterations following the in-service MST.⁵⁵ Ultimately, a veteran has a higher evidentiary burden to meet for MST-related PTSD in comparison to generalized PTSD since lay testimony is insufficient proof of in-service trauma.⁵⁶

4. *Generalized MST*

For veterans seeking disability compensation solely for experiencing MST that created or exacerbated a health condition, a victim may submit the same in-service records accepted for claims of PTSD resulting from MST.⁵⁷ While not explicitly outlined on the VA website, the VA may also assess evidence derived from individuals such as the veteran’s friends, family, or the veteran themselves, as well as any pertinent medical evidence.⁵⁸ However, the VA

and “medical reports from civilian providers or caregivers” who treated the veteran following the MST).

⁵² See *id.* (this information appears on the same page and may include indirect evidence exhibiting life changes such as “changes in eating or weight;” “relationship issues, like divorce;” “substance use problems;” and “unexplained social or financial decisions or problems.” Evidence can also be proffered demonstrating behavioral changes, such as “feeling disconnected from others;” “panic attacks;” “suicidal thoughts;” and “uncontrollable worries.” Lastly, a veteran may submit evidence of “requests for transfer to another military duty assignment;” “tests for sexually transmitted infections;” “appointments at a health or counseling facility without a specific diagnosis or health condition;” and “treatment for physical injuries around the time of the MST, regardless of whether they were reported as a result of the MST”).

⁵³ See *supra* note 51 and accompanying text.

⁵⁴ See *supra* note 52 and accompanying text.

⁵⁵ See *Military Sexual Trauma and Disability Compensation*, *supra* note 10.

⁵⁶ See discussion *supra* Section II.B.2; see also *id.*

⁵⁷ See *Military Sexual Trauma and Disability Compensation*, *supra* note 10.

⁵⁸ See Burbank, *Stigmatizing Narratives in Military Sexual Trauma Cases*, 31 KAN. J.L. & PUB. POL’Y 185, *supra* note 1, at 197; see also *AZ v. Shinseki*, 731 F.3d 1303, 1323 (Fed. Cir. 2013) (Moore, J., dissenting) (quoting Fed. R. Evid. 401(a) and 38 C.F.R. § 3.303(a)) (Judge Moore notes that this standard requires the consideration of any relevant evidence, which according to the Federal Rules of Evidence, is anything that “has *any tendency* to make a fact more or less probable than it would be without the evidence.” However, that interpretation was not utilized by the majority in this opinion and does not appear to be the governing

may only do so where the testimony “is consistent with the places, types, and circumstances of his or her military service” and where the veteran proffers a credible statement regarding the in-service connection of their disability.⁵⁹ The M21-1 exemplifies how the aforementioned “consistency” standard can be met with two situations that lack direct in-service records: one sufficiently demonstrates an in-service injury, and the other does not.⁶⁰ Notably, neither of these examples pertains to a claim for MST, and the manual does not offer any guidance for adjudicating the credibility and consistency of MST claims unrelated to PTSD.⁶¹

Ultimately, a narrower array of evidence is accepted for MST-related claims in comparison to generalized PTSD claims, as lay testimony is not enough to demonstrate the occurrence of sexual trauma.⁶² The same is true for such claims in comparison to MST claims resulting in PTSD, as despite some of the same evidence being satisfactory to prove in-service trauma, the VA seemingly accepts much less from generalized MST claimants—as seen in Appendix A.⁶³ Recognizing veterans’ difficulty in seeking recovery for gener-

analysis of such claims, seemingly tasking the adjudicator with deciding what constitutes “pertinent” evidence); see also *Military Sexual Trauma and Disability Compensation*, *supra* note 10.

⁵⁹ Burbank, *supra* note 1, at 198; see also *M21-1, Part IV, Subpart I, Chapter 1, Section B – Evidentiary Standards for Finding an Examination or Opinion Necessary*, U.S. DEP’T OF VETERANS AFFS., https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/enUS/portal/55440000001018/content/554400000180495/M21-1-Part-IV-Subpart-i-Chapter-1-Section-B-Evidentiary-Standards-for-Finding-an-Examination-or-Opinion-Necessary [<https://perma.cc/U5DS-K4MY>] (Sept. 9, 2024) (these requirements may also be applicable to PTSD and PTSD related to MST where establishing a service connection hinges on lay evidence, but are notated in this section to demonstrate that generalized MST claimants are presented with fewer avenues to obtain disability compensation and benefits, and that the consistency standard only heightens the evidentiary gap).

⁶⁰ See also Burbank, *supra* note 1, at 198. See generally *M21-1 Adjudication Procedures Manual*, *supra* note 10.

⁶¹ See Burbank, *supra* note 1, at 199.

⁶² See discussion *supra* Section II.B.2, 4; see also *Military Sexual Trauma and Disability Compensation*, *supra* note 10; see also Burbank, *supra* note 1, at 197; see also 38 C.F.R. § 3.303(a) (2023).

⁶³ See discussion *supra* Section II.B.3–4; see also *Military Sexual Trauma and Disability Compensation*, *supra* note 10; see also 38 C.F.R. § 3.303(a) (2023). While the VA is allowed to consider other evidence for MST claimants, claimants for PTSD related to MST are explicitly afforded a laundry list of acceptable evidence, ultimately distinguishing the two types of claims via the notion that the consideration of other evidence for MST claimants hinges on adjudicatory discretion. See Burbank, *supra* note 1, at 197 and accompanying text. The result is a heightened evidentiary standard for MST claimants because other evidence is not automatically accepted, as is the case for claimants of PTSD related to MST who proffer evidence listed on the VA website. See Appendix A.

alized MST claims, there have been attempts to lower the burden of proof by altering the MST standard to mirror the generalized PTSD standard, however, none have passed VA or legislative scrutiny.⁶⁴

C. The Difficulty of Obtaining Evidence for MST Claims

Per the Defense Department's Annual Report on Sexual Assault in the Military, active duty members filed 7,266 sexual assault reports, and approximately 6.8% of female and 1.3% of male service members reported experiences of uninvited sexual contact in 2023.⁶⁵ Acknowledging the notion of underreporting, the Defense Department estimated the true prevalence of sexual assault amongst active duty members to be 29,061—with 15,201 women and 13,860 men having experienced some form of sexual violence.⁶⁶ Converting these numbers to a percentage, it is estimated that approximately 75% of active duty victims do not report their victimization.⁶⁷

There are a multitude of reasons that victims do not report MST, such as the desire to repress their assault,⁶⁸ the hope that family members and friends do not find out,⁶⁹ embarrassment, shame, disorientation, stigma,⁷⁰ and victim blaming.⁷¹ The experience of sexual assault within the military adds to this multidimensionality in a complicated manner. Victims often identify their perpetrators as fellow service members, and it is not uncommon for the perpetrator to be a superior, leading to frequent, if not daily, interactions between

⁶⁴ See Yacyshyn, *supra* note 46, at 296, 298–299 (a bill known as the Ruth Moore Act passed the House but ultimately died in the Senate. A secondary attempt to lower the evidentiary burden was specifically directed at the VA Secretary by the Service Women's Action Network ("SWAN"), which also failed); Ruth Moore Act, S.865, 114th Cong. (as passed by House, July 27, 2015); *Serv. Women's Action Network v. Sec'y of Veterans Affairs*, 815 F.3d 1369, 1375–1376 (Fed. Cir. 2016) (explaining that SWAN's petition was denied by the VA because the Secretary claimed that current law addressed concerns regarding difficulties in gathering evidence to prove one's claim and that present training programs allowed for fair and accurate adjudication of claims).

⁶⁵ See *Department of Defense Annual Report on Sexual Assault in the Military Fiscal Year 2023*, *supra* note 2, at 3–4, 9.

⁶⁶ *Id.* at 4, 9.

⁶⁷ See *id.*

⁶⁸ See *id.*

⁶⁹ See Ann M. Vallandingham, Department of Defense's Sexual Assault Policy: Recommendations for a More Comprehensive and Uniform Policy, 54 NAVAL L. REV. 205, 213 (2007).

⁷⁰ Nikki Levy, *Easing the Burden: Military Sexual Trauma, Retaliation, and Veterans Benefits*, 27 FED. CIR. B.J. 377, 382 (2018).

⁷¹ See Vallandingham, *supra* note 69, at 213.

them.⁷² Due to the close living quarters required in service, these interactions may extend beyond a professional setting, additionally depriving victims of their personal space.⁷³ Thus, the possibility of continued assault is substantial, and the fear of impeding unit cohesion or being labeled as a “troublemaker” may materialize and dissuade victims from reporting abuse.⁷⁴

The fear of collateral misconduct may also deter reporting.⁷⁵ Service members engaging in adultery, underage drinking, or fraternization may be subject to discipline, despite their victimization.⁷⁶ Additionally, fear of professional retaliation may play a role in choosing not to report, especially if the perpetrator is a superior.⁷⁷ For those brave enough to speak out, reporting may result in professional backlash, such as demotion, reassignment, or discharge from the military, along with social seclusion and abuse both verbally and physically.⁷⁸ Lastly, military cultural norms convolute the nature of reporting due to the notion that service members are expected to be strong, active, combat-trained individuals who should never challenge a superior.⁷⁹ This directly contradicts the stereotypical image of the physically weak, helpless victim that many service members resonate with in experiencing MST or in deciding not to report, with both circumstances in defiance of military expectations.⁸⁰

D. *AZ v. Shinseki*

In September of 2013, the Federal Circuit decided a landmark case, *AZ v. Shinseki*, for veterans’ MST disability compensation and benefits claims.⁸¹ This case involved two veterans who sought disability compensation for in-service MST that resulted in PTSD, neither of whom had any in-service documentation to bolster their claims.⁸² The claimants’ allegations of assault were rejected on three different occasions, with each decision founded

⁷² See Reid C. Schweitzer, *Veterans Affairs Benefits for Sexually Assaulted Male Veterans*, 19 WM. & MARY J. WOMEN & L. 637, 640 (2013); see also Edward Ward, “Indisputable” and “Particular”: Why VA’s Denial of a New Evidentiary Standard for MST-Related PTSD is Arbitrary and Capricious, 26 FED. CIR. B.J. 203, 219 (2016).

⁷³ See Ward, *supra* note 72, at 220.

⁷⁴ See Department of Defense Annual Report on Sexual Assault in the Military Fiscal Year 2023, *supra* note 2, at 12; Schweitzer, *supra* note 72, at 640.

⁷⁵ See Levy, *supra* note 70, at 385.

⁷⁶ See *id.*; Department of Defense Annual Report on Sexual Assault in the Military Fiscal Year 2023, *supra* note 2, at 23.

⁷⁷ See Levy, *supra* note 70, at 383.

⁷⁸ See *id.* at 382–83.

⁷⁹ See Burbank, *supra* note 1, at 208.

⁸⁰ See *id.* at 208–09.

⁸¹ See *AZ v. Shinseki*, 731 F.3d 1303, 1303–04 (Fed. Cir. 2013).

⁸² See *id.* at 1305.

on the failure to report to military authorities and the lack of in-service documentation to conclude that MST did not occur.⁸³ The Federal Circuit vacated these prior decisions, holding the lack of a service record documenting sexual assault cannot be utilized as evidence that such misconduct did not happen.⁸⁴ Despite *Shinseki's* holding that the lack of in-service reports or documentation cannot weigh against the validity of a claim, veterans must still prove that “it is as likely as not that an in-service stressor occurred” through proffering other evidence.⁸⁵

E. The Legal Landscape Following *AZ v. Shinseki*

The Board is required to adhere to Federal Circuit precedent.⁸⁶ This notion is known as “stare decisis . . . [which is] the idea that today’s Court should stand by yesterday’s decisions [and] is ‘a foundation stone of the rule of law.’”⁸⁷ Adherence to this doctrine “‘promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, [] contributes to the actual and perceived integrity of the judicial process’ . . . [and] sav[es] parties and courts the expense of endless relitigation.”⁸⁸

When a decision is appealed from the Board, the CAVC—the immediate reviewing court—applies the “clearly erroneous” standard for findings of fact.⁸⁹ This standard includes factual instances where the CAVC evaluates the VA’s duty to assist claimants, the existence of a service connection, or the credibility of lay witness testimony.⁹⁰ Yet, these notions are only considered findings of fact where “it involves applying established law to the facts at issue without creating legal precedent.”⁹¹ To clarify, where the Board interprets case law or statutes in an unprecedented manner, this is ultimately a

⁸³ See *id.* at 1305–08 (the veterans faced rejection of their claim from the VA Regional Office, the Board, and the CAVC before their appeal reached the Federal Circuit).

⁸⁴ See *id.* at 1306.

⁸⁵ Gum, *supra* note 29, at 705; see also discussion *supra* Section II.B.4 (describing which other evidence is considered acceptable).

⁸⁶ See *Gunter v. McDonough*, No. 22-5945, 2023 U.S. App. Vet. Claims LEXIS 1761, at *7–8 (Vet. App. Nov. 15, 2023).

⁸⁷ *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455 (2015) (quoting *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014)).

⁸⁸ *Id.* (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)).

⁸⁹ See *Schoon v. McDonough*, No. 18-3106, 2022 U.S. App. Vet. Claims LEXIS 804, at *5 (Vet. App. May 27, 2022); see also *Kim v. McDonough*, No. 21-7412, 2023 U.S. App. Vet. Claims LEXIS 582, at *12-13 (Vet. App. Apr. 6, 2023).

⁹⁰ See *Schoon*, No. 18-3106, 2022 U.S. App. Vet. Claims LEXIS 804, at *5; see also *Kim*, No. 21-7412, 2023 U.S. App. Vet. Claims LEXIS 582, at *12–13.

⁹¹ *Lennox v. Principi*, 353 F.3d 941, 945 (Fed. Cir. 2003).

dispute over the legal standard that should govern the factual issue, which is a finding of law.⁹² On the other hand, the CAVC reviews the Board's legal rulings *de novo*, allowing the appellate court to review determinations of law without deference to the lower court's decision-making process, as opposed to with minimal deference under the "clearly erroneous" standard.⁹³ The creation and application of the standard of review is judicially decided,⁹⁴ and research demonstrates that the difference between the deferential "clearly erroneous" and less deferential *de novo* standards substantially influences legal outcomes, as "standards of review that grant less deference to the lower court's decision regularly yield lower affirmance rates."⁹⁵ These findings may, in part, be explained by the fear of reversal, which may stem from a judge's disfavor surrounding relitigating a case when they have a crowded docket, the fear that professional opportunities will be diminished, the belief that reversal undermines judicial power, or the worry that their legal decisions will be disrespected.⁹⁶

While the precedent set by *Shinseki* requires adjudicators of veterans' claims to abide by the notion that a claimant's lack of in-service documentation is insufficient to disprove MST, the Board has not always complied with this ruling.⁹⁷ Cases where the Board has improperly considered the lack of in-service records as evidence that MST did not occur are not uncommon and have been recognized by the CAVC in many instances.⁹⁸ In fact, the CAVC has noted that "the Board's speculation [that MST did not occur] represents

⁹² See *id.*

⁹³ See *id.*; see also Tomich v. McDonough, 2023 U.S. App. Vet. Claims LEXIS 1515, at *11 (Vet. App. Sept. 27, 2023); see also *Identifying and Understanding Standards of Review*, WRITING CTR. GULC 2–3 (2019), <https://www.law.georgetown.edu/wp-content/uploads/2019/09/Identifying-and-Understanding-Standards-of-Review.pdf> [<https://perma.cc/5N4K-U4WX>].

⁹⁴ See *Identifying and Understanding Standards of Review*, *supra* note 93, at 2.

⁹⁵ Timothy Storm, *The Standard of Review Does Matter: Evidence of Judicial Self-Restraint in the Illinois Appellate Court*, 34 S. ILL. U. L. J. 73, 103 (2009); see also *Ironshore Specialty Ins. Co. v. Eidos Partners, LLC*, No. 13 CV 8434 (KBF), 2014 U.S. Dist. Ct. Briefs LEXIS 4999, at *9 (S.D.N.Y. June 25, 2014) (citing Corey Rayburn Yung, *Judged By the Company You Keep: An Empirical Study of the Ideologies of Federal Judges*, 51 B.C. L. REV. 1133, 1161 (2010)) (demonstrating similar results in an analysis of criminal and civil opinions for eleven circuit courts of appeals).

⁹⁶ David Klein & Neal Devins, *Dicta, Schmicta: Theory Versus Practice in Lower Court Decision Making*, 54 WM. & MARY L. REV. 2044–45 (2013) (though this resource concerns mainly dicta, the research on the fear of reversal also applies to binding precedent).

⁹⁷ See *AZ v. Shinseki*, 731 F.3d 1303, 1306 (Fed. Cir. 2013).

⁹⁸ See generally *Wood v. McDonald*, No. 14-4345, 2016 U.S. App. Vet. Claims LEXIS 596 (Vet. App. Apr. 27, 2016); *Lynch v. McDonald*, No. 15-3004, 2016

its own unsubstantiated opinion as to the expected behavior of a victim of military sexual trauma . . . and the probable onset of . . . symptoms.”⁹⁹ In *Wood v. McDonald*,¹⁰⁰ which reached the CAVC in 2016 after the Board denied the claimant disability compensation and benefits, the case of Mr. Wood is discussed, a veteran claiming that in-service MST resulted in depression.¹⁰¹ In reviewing the previous court’s decision for “clear error,” the CAVC assessed whether there was a service connection and whether the VA complied with its duty to assist.¹⁰² The CAVC noted the Board’s 2014 decision primarily relied on the medical opinion of one VA psychiatrist.¹⁰³ The psychiatrist concluded that Mr. Wood’s depression was not linked to his time in service, further detailing that there was insufficient evidence corroborating Mr. Wood’s MST claim, and additionally noting Mr. Wood’s failure to complain for years after the alleged incident.¹⁰⁴ In issuing its opinion, the CAVC cited *Shinseki*, admonishing the Board’s heavy reliance on Mr. Wood’s lack of in-service MST documentation as part of its credibility determination.¹⁰⁵ In 2018, after the case was remanded, the Board made a final determination denying Mr. Wood’s relief.¹⁰⁶

To this day, the CAVC still relies on similar reasoning to remand decisions of the Board.¹⁰⁷ In *Kim v. McDonough*,¹⁰⁸ the CAVC remanded the Board’s 2021 decision denying Ms. Kim disability compensation and benefits for her claim of MST, which resulted in a variety of psychological manifestations.¹⁰⁹ Reviewing whether there was a service connection and the sufficiency of Ms. Kim’s opinion under the “clearly erroneous” standard, the Board found the claimant’s reports of sexual assault unreliable in part because they were not

U.S. App. Vet. Claims LEXIS 1895 (Vet. App. Dec. 8, 2016); *Kim v. McDonough*, No. 21-7412, 2023 U.S. App. Vet. Claims LEXIS 582 (Vet. App. Apr. 6, 2023).

⁹⁹ *Lynch*, No. 15-3004, 2016 U.S. App. Vet. Claims LEXIS 1895, at *5, *7, *8.

¹⁰⁰ No. 14-4345, 2016 U.S. App. Vet. Claims LEXIS 596 (Vet. App. Apr. 27, 2016).

¹⁰¹ *See generally id.*

¹⁰² *See Wood v. McDonald*, No. 14-4345, 2016 U.S. App. Vet. Claims LEXIS 596, at *12–17 (Vet. App. Apr. 27, 2016).

¹⁰³ *See id.* at *1, *9–11.

¹⁰⁴ *See id.* at *9–10.

¹⁰⁵ *See id.* at *11, *16.

¹⁰⁶ *See Names Redacted By Agency*, Docket No. 09-45 488, 2018 BVA LEXIS 33283, at *16 (BVA Apr. 2, 2018).

¹⁰⁷ *See generally Kim v. McDonough*, No. 21-7412, 2023 U.S. App. Vet. Claims LEXIS 582 (Vet. App. Apr. 6, 2023).

¹⁰⁸ No. 21-7412, 2023 U.S. App. Vet. Claims LEXIS 582 (Vet. App. Apr. 6, 2023).

¹⁰⁹ *See id.* at *1, *25.

reflected in her service record.¹¹⁰ However, the CAVC pointed to *Shinseki* to negate this reasoning on appeal.¹¹¹ As of January 2025, Ms. Kim still awaits a final decision.¹¹²

II. Analysis

Despite the holding in *Shinseki* that binds claim adjudicators within the Federal Circuit to the notion that the lack of in-service documentation of MST is not dispositive of its non-occurrence, veterans seeking disability compensation and benefits cannot always reap the advantages of this ruling.¹¹³ The current adjudication and interpretation of MST claims by the VA and the Board are both practically and facially inconsistent with *Shinseki*.¹¹⁴ This inconsistency is a result of the discretionary power afforded to the Board in the CAVC's limited ability to reverse Board decisions, ultimately creating legal uncertainty and the heightened prospect of yielding judicial outcomes adverse to justice.¹¹⁵

A. Practical Inconsistency

Personal biases often penetrate the adjudicatory process, creating the impression that *Shinseki* was never heard. Many VA employees disagree with *Shinseki*'s holding, believing that where records are lacking, other evidence is insufficient to prove in-service sexual assault.¹¹⁶ On appeal, the CAVC has been attuned to the Board's subjectivity in rendering indirect evidence unconvincing and has stated that "the Board's speculation [that MST did not occur] represents its own unsubstantiated opinion as to the expected behavior of a victim of military sexual trauma . . . and the probable onset of [] symptoms."¹¹⁷ Whether these beliefs are derived from the fear of false claims, strong adherence to the cultural norms within the military, or for another reason, they connect directly to adjudicatory practices.¹¹⁸ By rejecting *Shinseki* and enforcing personal opinions, the resulting implicit or explicit biases essentially punish claimants for not experiencing sexual assault in the

¹¹⁰ See *Kim v. McDonough*, No. 21-7412, 2023 U.S. App. Vet. Claims LEXIS 582, at *10–11, *12–13 (Vet. App. Apr. 6, 2023).

¹¹¹ See *id.* at *18–19.

¹¹² See *id.*

¹¹³ See discussion *infra* Section III.A–B.

¹¹⁴ See discussion *infra* Section III.A–B.

¹¹⁵ See discussion *infra* Section III.A.

¹¹⁶ See Burbank, *supra* note 1, at 199.

¹¹⁷ *Lynch v. McDonald*, No. 15-3004, 2016 U.S. App. Vet. Claims LEXIS 1895, at *5, *7–8 (Vet. App. Dec. 8, 2016).

¹¹⁸ See *supra* notes 30, 72–80 and accompanying text.

manner that VA leaders demand.¹¹⁹ This demonstrated partiality and failure to abide by governing law ultimately results in legal uncertainty, wasteful litigation, a steepening of the MST evidentiary standard, and the incorrect legal standard applied on appeal.¹²⁰

By not adhering to precedent, the Board creates legal uncertainty as to the proper applicable legal standard for generalized MST claims where no in-service documentation is available.¹²¹ Per *stare decisis*, which is foundational to the law, the Board must follow the Federal Circuit's precedent to "promote[] the evenhanded, predictable, and consistent development of legal principles, foster[] reliance on judicial decisions, and contribute[] to the actual and perceived integrity of the judicial process."¹²² In both *Wood v. McDonald* and *Kim v. McDonough*, the CAVC reversed and remanded the Board's prior decisions.¹²³ The CAVC's decision in *Wood v. McDonald* noted that the Board's denial of disability compensation and benefits for MST related depression was improperly hinged on the claimant's lack of service records notating such victimization.¹²⁴ In *Kim v. McDonough*, the CAVC discredited the Board's reasoning for denying Ms. Kim's request for benefits stemming from MST, which was in part credited to her lack of in-service documentation of the assault.¹²⁵ While the Board may assert that its decision to deny compensation and benefits for these claimants was unrelated to the lack of direct evidence of MST to negate the contention that it did not intentionally ignore *Shinseki*, the lack of such evidence played a role in decision-making nonetheless.¹²⁶ Regardless of the size of that role, the Board failed to adhere to *stare decisis* by utilizing the lack of information to influence its decision-making process.¹²⁷ Where binding precedent such as *Shinseki* is not followed, as exemplified in *Wood v. McDonald* and *Kim v. McDonough*, the Board effectively promotes the unfair, unpredictable, and inconsistent evolution of the law that negates trust in the judiciary and adjudicatory process. Ultimately, the contradictory nature of these decisions with *Shinseki* creates confusion about the current state of the

¹¹⁹ See Burbank, *supra* note 1, at 212.

¹²⁰ See discussion *infra* Section III.A.

¹²¹ See *infra* notes 116–120 and accompanying text.

¹²² *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

¹²³ See *Wood v. McDonald*, No. 14-4345, 2016 U.S. App. Vet. Claims LEXIS 596, at *24 (Vet. App. Apr. 27, 2016); *Kim v. McDonough*, No. 21-7412, 2023 U.S. App. Vet. Claims LEXIS 582, at *25 (Vet. App. Apr. 6, 2023)

¹²⁴ See *Wood*, No. 14-4345, 2016 U.S. App. Vet. Claims LEXIS 596, at *11, *16.

¹²⁵ See *Kim*, No. 21-7412, 2023 U.S. App. Vet. Claims LEXIS 582, at *5–6, *10–11, *14–15, *17–20.

¹²⁶ See *supra* notes 105, 110 and accompanying text.

¹²⁷ See *supra* notes 86, 105, 112 and accompanying text.

law and how claimants of generalized MST seeking disability compensation and benefits should be treated within a court of law.

Since the *Shinseki* decision, the Board's disregard for legal precedent has contributed to lengthy, wasteful litigation.¹²⁸ Adherence to *stare decisis* is imperative in part because following prior decisions "sav[es] parties and courts the expense of endless relitigation."¹²⁹ Shortly after *Shinseki*, the Board decided *Wood v. McDonald* in 2014, which was remanded by CAVC in 2016.¹³⁰ Remanding the case back to the Board prolonged a final decision for Mr. Wood for an additional four years, ultimately depriving him of justice and disability compensation and benefits.¹³¹ Over a decade since the decision, *Kim v. McDonough*, which reached the CAVC in 2023 after a 2021 Board decision, illuminates the Board's continued failure to adhere to the law.¹³² The CAVC remanded the case, and Ms. Kim still awaits a final decision regarding the viability of her claim,¹³³ but as of 2025 she has spent almost four years fighting for justice. For veterans like Ms. Kim and Mr. Wood, the monetary and temporal costs of relitigating are often directly connected to the ability to obtain medical care, potentially worsening their MST-related health issues if prevailing on their claims is imperative to receiving medical treatment.¹³⁴ Since acting in accordance with binding precedent is imperative to saving claimants time, money, and access to care, the Board's failure to do so leaves generalized MST claimants to face lengthy, wasteful litigation and the possibility of being unable to access necessary medical care, compensation, or benefits connected to their disability.¹³⁵ The Board's failure to act in accordance with *Shinseki* is effectively an obstruction to justice and leaves claimants to tirelessly pursue legal redress for prolonged periods solely due to the inability of adjudicators to abide by their legal duties.

In addition to wasteful litigation, the failure to abide by *Shinseki* also results in a heightened evidentiary standard for generalized MST claimants.¹³⁶ In comparison to claims for generalized PTSD and PTSD related to MST,

¹²⁸ See *infra* notes 129–135 and accompanying text.

¹²⁹ See *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455 (2015).

¹³⁰ See *Wood v. McDonald*, No. 14-4345, 2016 U.S. App. Vet. Claims LEXIS 596, at *24 (Vet. App. Apr. 27, 2016).

¹³¹ See *generally Names Redacted By Agency*, Docket No. 09-45-488, 2018 BVA LEXIS 33283 (BVA Apr. 2, 2018).

¹³² See *Kim v. McDonough*, No. 21-7412, 2023 U.S. App. Vet. Claims LEXIS 582, at *24–25 (Vet. App. Apr. 6, 2023).

¹³³ See *supra* note 112 and accompanying text.

¹³⁴ See *supra* notes 20–24 and accompanying text.

¹³⁵ See *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455 (2015); *Kim v. McDonough*, No. 21-7412, 2023 U.S. App. Vet. Claims LEXIS 582, at *25.

¹³⁶ See *infra* notes 137–141 and accompanying text.

generalized MST claimants are already subjected to the most stringent evidentiary standard.¹³⁷ *Shinseki* aims to mitigate this evidentiary gap by barring the absence of a service record documenting MST as a weight against the claimant.¹³⁸ By denying veterans like Ms. Kim and Mr. Wood benefits in part due to the lack of direct evidence proving their assault,¹³⁹ the Board further steepens the already high evidentiary standard for MST claimants by failing to follow *Shinseki* precedent.¹⁴⁰ While *Shinseki* does not afford generalized MST victims equal opportunity to obtain disability compensation and benefits as claimants of generalized PTSD and PTSD related to MST, it nonetheless increases the opportunity for victims to obtain legal redress by prohibiting an avenue of denial.¹⁴¹ It is thus imperative that the Board adheres to *Shinseki* to provide all victimized veterans with a uniform chance of obtaining redress.

The CAVC's review of the Board's generalized MST decisions under the "clearly erroneous" standard is incorrect where the Board fails to adhere to *Shinseki*.¹⁴² When a case is appealed from the Board, the CAVC reviews findings of fact, which includes the VA's duty to assist, whether there is a service connection, and the credibility of lay witness testimony, *inter alia*, under the "clearly erroneous" standard.¹⁴³ However, where the Board creates precedent through interpreting case law in an unprecedented manner, the governing standard is *de novo*, as the issue morphs from factual to legal, and the "clearly erroneous" standard is no longer applicable.¹⁴⁴ *Wood v. McDonald* and *Kim v. McDonough* were both reviewed under the "clearly erroneous standard," as the issues on appeal pertained to the VA's duty to assist, the existence of a service connection, or the credibility of lay witness testimony.¹⁴⁵ In each case, the CAVC reversed in part due to the Board's failure to comply with *Shinseki*.¹⁴⁶ Though "clearly erroneous" would typically be the governing standard since the issues on appeal are facially factual, it was incorrectly implemented in each of these cases.¹⁴⁷ Since the Board failed to apply *Shinseki*, despite its obligation to adhere to *stare decisis* for Federal Circuit decisions, it created

¹³⁷ See discussion *supra* Section II.B.3–4.

¹³⁸ See *AZ v. Shinseki*, 731 F.3d 1303, 1306 (Fed. Cir. 2013).

¹³⁹ See *supra* notes 105, 112 and accompanying text.

¹⁴⁰ See discussion *supra* Section II.B.2, II.D.

¹⁴¹ See generally *AZ v. Shinseki*, 731 F.3d 1303 (Fed. Cir. 2013).

¹⁴² See *infra* notes 143–152 and accompanying text.

¹⁴³ See *Schoon v. McDonough*, No. 18-3106, 2022 U.S. App. Vet. Claims LEXIS 804, at *5 (Vet. App. May 27, 2022); see also *Kim v. McDonough*, No. 21-7412, 2023 U.S. App. Vet. Claims LEXIS 582, at *12–13 (Vet. App. Apr. 6, 2023).

¹⁴⁴ See *supra* notes 91–93 and accompanying text.

¹⁴⁵ See *supra* notes 102–103, 105, 110 and accompanying text.

¹⁴⁶ See *supra* notes 102–103, 105, 110 and accompanying text.

¹⁴⁷ See *supra* notes 89–90 and accompanying text.

its own precedent by falsely promoting the notion that it is acceptable to deny an MST claim based on the lack of in-service documentation.¹⁴⁸ By usurping the Federal Circuit's role to overrule precedent its court creates, the Board's decisions in *Wood v. McDonald* and *Kim v. McDonough* should have been reviewed *de novo*—without deference to the Board—as the question of *Shinseki*'s applicability is a dispute over the governing legal standard as opposed to a factual inquiry.¹⁴⁹ With such a public rejection of the law, the Board's ignorance risks increasing the number of in-service assaults while simultaneously risking a decrease in the number of veterans reporting their experience of MST and attempting to claim benefits, which in turn, may lead to the proliferation of health issues and warped expectations for military members.¹⁵⁰ Considering the CAVC recognizes the unbridled subjectivity permeating the Board's decision-making,¹⁵¹ it is evident that the Board's bravado in blatantly circumventing legal precedent needs to be reined in.¹⁵²

B. Facial Inconsistency

Both the M21-1 and the VA website are facially inconsistent with the holding of *Shinseki*, misguiding potential claimants and adjudicators.¹⁵³ The VA is a government entity that communicates information pertaining to generalized MST claims via the VA website and the M21-1.¹⁵⁴ While the public generally trusts government-published information, misinformation is common, which can lead to consumer harm, such as when individuals participated in a clinical trial endorsed by the NIH website, only to end up blinded and discover that the treatment was unreviewed.¹⁵⁵

1. M21-1

The M21-1—the primary procedural manual for VA adjudicators that guides claims in many aspects—lacks sufficient direction for generalized MST claims,¹⁵⁶ and serves as a foundational tool for misinformation and consumer harm. While the holding of *Shinseki* is mentioned throughout the manual with respect to PTSD related to MST, the M21-1 fails to comment on how this ruling extends to generalized MST in both an explanatory and exemplary

¹⁴⁸ See *Gunter v. McDonough*, No. 22-5945, 2023 U.S. App. Vet. Claims LEXIS 1761, at *7–8 (Vet. App. Nov. 15, 2023).

¹⁴⁹ See *supra* notes 92–93 and accompanying text.

¹⁵⁰ See *supra* notes 20–24, 79–80 and accompanying text.

¹⁵¹ See *supra* notes 99, 105, 111 and accompanying text.

¹⁵² See discussion *supra* Section II.E.

¹⁵³ See discussion *supra* Section III.B.

¹⁵⁴ See *supra* notes 40–41 and accompanying text.

¹⁵⁵ See *supra* notes 36–39 and accompanying text.

¹⁵⁶ See *supra* notes 43, 61–62 and accompanying text.

manner.¹⁵⁷ Since the information government entities make available to the public is deemed reliable and misinformation can lead to consumer harm,¹⁵⁸ the omission of adjudicatory direction within the M21-1 risks harm to claimants, as consumers of this information are likely to be VA employees.¹⁵⁹ The vagueness of the M21-1's guidance and omissions of adjudicatory instructions allow for great judicial discretion that permits bias and greatly differential rulings, depending on which VA employee is assigned to the case.¹⁶⁰ Essentially, when a veteran does not react to sexual harm in the manner the VA seeks by reporting their victimization during their time in the military or confiding in a credible individual to testify on their behalf, the veteran is unlikely to be believed where personal biases permeate the decision-making process despite the incredible variety in individual reactions to victimization.¹⁶¹ Ultimately, the failure to include pertinent information damages both the public and adjudicators and can easily prevent victims from obtaining the legal redress they seek and are often entitled to.

2. VA Website

The VA website also serves as a foundational tool for misinformation and consumer harm. The VA's page, dedicated explicitly to MST and disability compensation and benefits for victimized veterans, incorrectly references in-service records as the only sufficient evidence for generalized MST.¹⁶² As

¹⁵⁷ See *supra* notes 61–62 and accompanying text; see also Burbank, *supra* note 1, at 198–99. See generally *M21-1, Part VIII, Subpart iv, Chapter 1, Section E – Evidence Evaluation and Decisions for Posttraumatic Stress Disorder (PTSD) Claims Related to Personal Trauma*, U.S. DEPT OF VETERANS AFFS., https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/55440000001018/content/554400000177715/M21-1-Part-VIII-Subpart-iv-Chapter-1-Section-E-Evidence-Evaluation-and-Decisions-for-Posttraumatic-Stress-Disorder-PTSD-Claims-Related-to-Personal-Trauma?query=AZ%20v.%20Shinseki [<https://perma.cc/LZS2-RKV>] (Jan. 8, 2024); *M21-1, Part VIII, Subpart iv, Chapter 1, Section B – Development for Posttraumatic Stress Disorder (PTSD) Claims Related to Personal Trauma*, U.S. DEPT OF VETERANS AFFS., https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/55440000001018/content/554400000177469/M21-1-Part-VIII-Subpart-iv-Chapter-1-Section-B-Development-for-Posttraumatic-Stress-Disorder-PTSD-Claims-Related-to-Personal-Trauma?query=az%20v.%20shinseki [<https://perma.cc/8GZ3-M5AA>] (Jan. 8, 2024).

¹⁵⁸ See *supra* notes 36–39 and accompanying text.

¹⁵⁹ See *supra* notes 43, 61–62 and accompanying text; see also Burbank, *supra* note 1, at 198–99. See generally *M21-1 Adjudication Procedures Manual*, *supra* note 10.

¹⁶⁰ See *supra* notes 43, 61–62 and accompanying text; see also Burbank, *supra* note 1, at 198–99. See generally *M21-1 Adjudication Procedures Manual*, *supra* note 10.

¹⁶¹ See Burbank, *supra* note 1, at 207.

¹⁶² See *Military Sexual Trauma and Disability Compensation*, *supra* note 10.

of 2025, the VA website makes no mention of *Shinseki*'s holding to internet users.¹⁶³ Directly underneath the description of acceptable evidence for generalized MST claims, the VA website references other direct and indirect evidence that can be proffered for a PTSD claim related to MST where the claimant lacks in-service documentation.¹⁶⁴ Since government-published information is unlikely to be questioned despite the commonality of misinformation and subsequent harm, the omission of other acceptable evidence for generalized MST claims within the VA website risks harm to potential claimants.¹⁶⁵ The VA's omission of pertinent claim information is unlikely to be detected by potential claimants, especially when considering that the evidentiary requirements for MST related to PTSD, which appear on the same page, list a plethora of other acceptable evidence.¹⁶⁶ For veterans and lay individuals unfamiliar with the legal standards required to recover for a generalized MST claim, the likelihood of recognizing that other evidence can be offered is slim and can lead to the potential loss of a ripe claim. The VA website serves as a primary resource for veterans seeking disability compensation and benefits, but without thorough legal research or knowledge, it can become a barrier to justice for victims who falsely believe they cannot file a claim.¹⁶⁷

III. Recommendations

To promulgate *Shinseki* on both a practical and facial level and to promote survivor-centered notions of justice, three interconnected solutions should be implemented.¹⁶⁸ The "clearly erroneous" standard utilized by appellate courts to review the Board's determination of eligibility for disability compensation and benefits for generalized MST claims should be discarded by

¹⁶³ See *supra* note 58 and accompanying text.

¹⁶⁴ See *Military Sexual Trauma and Disability Compensation*, *supra* note 10.

¹⁶⁵ See *supra* notes 36–37 and accompanying text.

¹⁶⁶ See *Military Sexual Trauma and Disability Compensation*, *supra* note 10.

¹⁶⁷ See *generally Compensation*, U.S. DEP'T OF VETERANS AFFS., <https://www.benefits.va.gov/compensation/> [<https://perma.cc/75DP-PUBU>] (Jan. 17, 2024); *supra* note 36–37 and accompanying text.

¹⁶⁸ While the ideal solution is to have Congress promulgate legislation to lower the heightened evidentiary standard generalized MST claimants face to the standard required of generalized PTSD claimants, this Note acknowledges the prior failed attempt to do so and instead proposes a potentially more practicable solution. See sources cited *supra* note 49. However, bringing the issues addressed in this Note to the attention of Congress may prove to be fruitful considering the proposition of a new legal lens and demonstrated circumvention of precedent. Relevant Congressional Committees include the Committee on Veterans' Affairs, particularly the Subcommittee on Disability Assistance and Memorial Affairs, and the Committee on Armed Services, notably the Subcommittee on Military Personnel.

the Federal Circuit, and the M21-1 and the VA website should be updated.¹⁶⁹ Implementing these remedies will allow victimized veterans suffering from a subsequent disability to understand their avenues for legal redress while serving as a foundation for fair adjudicatory practices.¹⁷⁰

A. Standard of Review

Reducing the deference given to the Board's decisions on appeal is imperative to creating an intelligible legal standard. The Board's inability to comply with governing precedent results in legal uncertainty, unnecessary litigation, a heightened MST evidentiary standard, and the incorrect legal standard applied on appeal—all of which can be solved by the Federal Circuit changing the applicable legal standard of review for generalized MST claims.¹⁷¹

In scenarios where the CAVC reviews the Board's decisions to determine whether the VA has met its duty to assist, whether a service connection exists, and whether lay witness testimony is credible in cases of generalized MST, "clearly erroneous" is the standard often applied.¹⁷² However, when the Board ignores *stare decisis*, as it did in both *Wood v. McDonald* and *Kim v. McDonough*, the issue switches from factual to legal and requires an application of the *de novo* standard, which grants no deference to the decision-making process of the lower court, whereas "clearly erroneous" grants only a small amount of deference.¹⁷³ The differences between these two standards are significant, as reviewing standards that grant less deference on appeal are more likely to be reversed, which may partly be attributed to the judicial body's fear of reversal.¹⁷⁴ Considering that the Board has refused to abide by precedent since 2013, and because failing to apply *Shinseki* is a question of law, it is imperative to implement the *de novo* standard in cases where a veteran claims in-service MST resulted in disability but lacks corroborating in-service documentation.¹⁷⁵

Since standards of review are judicially created,¹⁷⁶ it is appropriate for the Federal Circuit to implement such a change, something of which can be directed through case law regarding a generalized MST claim that reaches

¹⁶⁹ See discussion *infra* Section IV.A–B.

¹⁷⁰ See discussion *infra* Section IV.A–B.

¹⁷¹ See discussion *supra* Section III.A.

¹⁷² See *supra* notes 89–90 and accompanying text.

¹⁷³ See *supra* note 147–150 and accompanying text.

¹⁷⁴ See *supra* notes 95–96 and accompanying text.

¹⁷⁵ See discussions *supra* Section II.E, Section III.A.

¹⁷⁶ See *Identifying and Understanding Standards of Review*, *supra* note 94 and accompanying text.

the court on appeal.¹⁷⁷ As in *Shinseki*, where the Federal Circuit altered the evidentiary standard for generalized MST claimants, the court has the power to modify the legal landscape once again by changing the applicable legal standard.¹⁷⁸ By doing so, *stare decisis* would apply, binding the CAVC to the *de novo* standard and effectuating the intended relief of *Shinseki*.¹⁷⁹ Since the *de novo* standard subjects lower courts to higher reversal rates and because fear of reversal may contribute to legal compliance, revoking all deference is an appropriate response to ensure that *Shinseki* is consistently abided by and that less apparent cases of legal circumvention are attended to.¹⁸⁰ Reducing the decision-making power currently held by the Board would provide a clear legal standard, decrease wasteful litigation, and increase the number of victimized veterans who seek and are afforded legal redress.

B. VA Resources

Amending the M21-1 and the VA website to reflect *Shinseki* is imperative to creating legal clarity and preventing consumers from harm related to misinformation. Currently, both the M21-1 and the VA website lack the information needed to adjudicate generalized MST claims.¹⁸¹ These resources are essential to the public, chiefly VA adjudicators and victims of MST.¹⁸² The absence of such information perpetuates the circumvention of *Shinseki's* holding, as without it, adjudicator subjectivity is permitted, and potential claimants are prevented from understanding the viability of their claims, which unfairly denies these individuals the opportunity to obtain legal redress.¹⁸³

1. M21-1

Updating the M21-1 to include information on how generalized MST claims can and should be adjudicated for claimants seeking disability compensation and benefits would aid in reducing claimant harm. The lack of guidance within the M21-1 as to how to properly adjudicate a generalized MST claim allows for unchecked bias and subjectivity in deciding whether a victim has a viable claim.¹⁸⁴ Since the M21-1 acts as the gold standard for

¹⁷⁷ See *Lighting Ballast Control, LLC v. Philips Elecs. N. Am. Corp.*, 744 F.3d, 1272, 1276–77 (Fed. Cir. 2014), *vacated*, 574 U.S. 1133 (2015) (the Federal Circuit considered, and denied, changing the standard of review from *de novo*, but had the authority to do so).

¹⁷⁸ See *AZ v. Shinseki*, 731 F.3d 1303, 1306 (Fed. Cir. 2013).

¹⁷⁹ See *Bethea v. Derwinski*, 2 Vet. App. 252, 254 (1992) (stating that Federal Circuit decisions are binding on the CAVC).

¹⁸⁰ See *supra* notes 95–96 and accompanying text.

¹⁸¹ See *Burbank*, *supra* note 1, at 197, 199.

¹⁸² See *supra* notes 42–44 and accompanying text.

¹⁸³ See *supra* notes 116–120, 159–162, 164–169 and accompanying text.

¹⁸⁴ See *supra* notes 116–120 and accompanying text.

those determining veteran claims,¹⁸⁵ and since the lack of guidance allows for great adjudicatory discretion,¹⁸⁶ updating the M21-1 to more accurately exemplify the idealized practical effects of *Shinseki* by providing examples and explanations would contribute to more just legal outcomes. The Board would have a firmer grasp of the adjudication process for MST claims and how to avoid appeal, while appellate courts could better parse out biased adjudicators and reverse where Board decisions are outwardly averse to the manual. Ultimately, updating the manual will further legal clarity and uniformity in the litigation process while decreasing appeals where adjudicators adhere to the manual's instructions.

2. VA Website

Updating the VA website to reflect that the VA will consider other evidence besides in-service documentation provides potential claimants with the necessary transparency to decide if filing a claim is an option.¹⁸⁷ The lack of relevant claim information on the website furthers claimant harm by obscuring an avenue of legal redress. Considering the VA website is where veterans obtain the form necessary to file a claim and that the lack of pertinent information misguides claimants,¹⁸⁸ there is no better way to put victims on notice of the evidentiary qualifications for a generalized MST claim than to update the page that these individuals are likely to come across in deciding whether to apply for disability compensation and benefits.¹⁸⁹ Updating the website is a quick and elementary solution that would increase justice for victims seeking a legal path to recovery by clarifying what evidence can be proffered for a generalized MST claim.

IV. Conclusion

For the foregoing reasons, the Board and the VA must adhere to *Shinseki*'s holding to promote an intelligible legal standard for generalized MST claims. The failure to abide by *stare decisis* has further warped military cultural expectations while resulting in legal uncertainty, circular litigation, prolonged or worsened health issues, a heightened evidentiary standard, the incorrect

¹⁸⁵ See Reese, *supra* note 10 and accompanying text.

¹⁸⁶ See generally *M21-1 Adjudication Procedures Manual*, *supra* note 10; Burbank, *supra* note 1, at 198–99 (discussing the lack of guidance for generalized MST claims and the resulting potential for discretion); *supra* notes 149–151 and accompanying text.

¹⁸⁷ See *supra* notes 58–59 and accompanying text; see also Burbank, *supra* note 1, at 198; *M21-1, Part IV, Subpart I, Chapter 1, Section B – Evidentiary Standards for Finding an Examination or Opinion Necessary*, *supra* note 59.

¹⁸⁸ See *About VA Form 21-526EZ*, *supra* note 25 and accompanying text.

¹⁸⁹ See *Military Sexual Trauma and Disability Compensation*, *supra* note 10.

appellate legal standard, and the failure to provide victimized veterans with legal justice. By attending to this issue on both a practical and facial level in amending the M21-1 and VA website and adopting the *de novo* standard of review for generalized MST claimants seeking disability compensation and benefits, increased numbers of MST victims will prevail within a court of law.

APPENDIX A

*Evidentiary Differences Between PTSD Related to MST and Generalized MST.*¹⁹⁰

	PTSD RELATED TO MST	MST
"SERVICE TREATMENT RECORDS (STR)"	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
"MILITARY PERSONNEL RECORDS (MPR)"	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
"DEFENSE DEPARTMENT (DOD) REPORTING FORMS"	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
"INVESTIGATIVE REPORTS"	<input checked="" type="checkbox"/>	<input type="checkbox"/>
RECORDS/STATEMENTS FROM: "CHAPLAINS OR CLERGY MEMBERS"	<input checked="" type="checkbox"/>	<input type="checkbox"/>
RECORDS/STATEMENTS FROM: "COUNSELING, HEALTH, OR MILITARY TRAINING FACILITIES"	<input checked="" type="checkbox"/>	<input type="checkbox"/>
RECORDS/STATEMENTS FROM: "FAMILY MEMBERS, ROOMMATES, OR FELLOW SERVICE MEMBERS"	<input checked="" type="checkbox"/>	<input type="checkbox"/>
RECORDS/STATEMENTS FROM: "RAPE CRISIS CENTERS OR CENTERS FOR DOMESTIC VIOLENCE ASSISTANCE"	<input checked="" type="checkbox"/>	<input type="checkbox"/>
"CIVILIAN POLICE REPORTS"	<input checked="" type="checkbox"/>	<input type="checkbox"/>
"MEDICAL REPORTS FROM CIVILIAN PROVIDERS OR CAREGIVERS WHO TREATED YOU AT ANY TIME AFTER THE MST"	<input checked="" type="checkbox"/>	<input type="checkbox"/>
"PERSONAL DIARIES OR JOURNALS"	<input checked="" type="checkbox"/>	<input type="checkbox"/>
"CHANGES IN WORK PERFORMANCE"	<input checked="" type="checkbox"/>	<input type="checkbox"/>
"CHANGES IN EATING OR WEIGHT"	<input checked="" type="checkbox"/>	<input type="checkbox"/>
"RELATIONSHIP ISSUES, LIKE DIVORCE"	<input checked="" type="checkbox"/>	<input type="checkbox"/>
"PROBLEMS WITH SEXUAL FUNCTION"	<input checked="" type="checkbox"/>	<input type="checkbox"/>
"SUBSTANCE USE PROBLEMS"	<input checked="" type="checkbox"/>	<input type="checkbox"/>
"UNEXPLAINED SOCIAL OR FINANCIAL DECISIONS OR PROBLEMS"	<input checked="" type="checkbox"/>	<input type="checkbox"/>
"FEELING ANXIOUS"	<input checked="" type="checkbox"/>	<input type="checkbox"/>
"FEELING DEPRESSED"	<input checked="" type="checkbox"/>	<input type="checkbox"/>
"FEELING DISCONNECTED FROM OTHERS"	<input checked="" type="checkbox"/>	<input type="checkbox"/>
"PANIC ATTACKS"	<input checked="" type="checkbox"/>	<input type="checkbox"/>
"SUICIDAL THOUGHTS"	<input checked="" type="checkbox"/>	<input type="checkbox"/>
"UNCONTROLLABLE WORRIES"	<input checked="" type="checkbox"/>	<input type="checkbox"/>
"PREGNANCY TEST RESULTS"	<input checked="" type="checkbox"/>	<input type="checkbox"/>
"REQUEST FOR TRANSFER TO ANOTHER MILITARY DUTY ASSIGNMENT"	<input checked="" type="checkbox"/>	<input type="checkbox"/>
"TESTS FOR SEXUALLY TRANSMITTED INFECTIONS"	<input checked="" type="checkbox"/>	<input type="checkbox"/>
"APPOINTMENTS AT A HEALTH OR COUNSELING FACILITY WITHOUT A SPECIFIC DIAGNOSIS OR HEALTH CONDITION"	<input checked="" type="checkbox"/>	<input type="checkbox"/>
"TREATMENT FOR PHYSICAL INJURIES AROUND THE TIME OF THE MST, REGARDLESS OF WHETHER THEY WERE REPORTED AS A RESULT OF THE MST"	<input checked="" type="checkbox"/>	<input type="checkbox"/>

¹⁹⁰ *Id.* (this chart is a visual representation of what a veteran may proffer via the VA website as it currently stands. Items with a check are what a veteran may proffer as explicitly stated via the website, whereas unchecked items represent evidence that in theory should be able to be proffered but may or may not be admitted due to judicial discretion. *See id.*; Burbank, *supra* note 1, at 197–98. The table does not include a direct comparison to PTSD, as a PTSD claimant is able to proffer lay testimony, which negates the necessity of other direct and indirect evidence, ultimately rendering a direct comparison to PTSD related to MST and generalized MST unnecessary).

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