

NOTE

The Battle for Recognition: Granting Hmong Special Guerilla Unit Veterans Access to VA Benefits

*Emily Jenkins**

ABSTRACT

Between 1961 and 1973, the U.S. Central Intelligence Agency secretly directed and operated a paramilitary force of Hmong guerilla fighters in Laos. This paramilitary force, standing in the place of American servicemembers, contained the communist forces in Laos and secured the attention of some 70,000 North Vietnamese soldiers who otherwise would have fought against the Americans and its South Vietnamese allies. Yet members of the Hmong paramilitary force do not meet the Department of Veterans Affairs's current definition of "veteran" because the group was directly operated by the Central Intelligence Agency rather than the U.S. Armed Forces. As such, the veterans themselves and their families do not have access to the numerous benefits offered by the VA. In order for the United States to reconcile its failure to recognize and support the Hmong Special Guerilla Unit for the past four decades, the service by the Hmong must be considered "active service," entitling the soldiers of the Hmong Special Guerilla Unit to veteran status. In order to do so, this Note argues that the Department of Defense must amend its requirement that a group must have served under the direction of the U.S. Armed Forces to include service under the Central Intelligence Agency, which would bring the Hmong Special Guerilla Unit within the scope of the criteria.

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TABLE OF CONTENTS

| | |
|--|----|
| INTRODUCTION..... | 29 |
| I. BACKGROUND..... | 31 |
| A. <i>The Hmong SGU and Its Role in the Vietnam War</i> | 31 |
| B. <i>Basic Eligibility at the VA and Active Service for Civilian and Contractual Groups</i> | 37 |
| C. <i>A Closer Look at the WASPs</i> | 42 |
| II. ANALYSIS..... | 43 |
| A. <i>Denial of the SGU and Inadequacies in the Department of Defense Criteria</i> | 44 |
| B. <i>SGU Access to VA Benefits: Narrow and Broad Solutions</i> | 49 |
| CONCLUSION..... | 54 |

INTRODUCTION

The year is 1964. A young man, committed to the United States military efforts in Southeast Asia in the 1960s and 1970s, joins the military campaign in Laos.¹ Only a few short months later, the young man loses his leg to a land mine during the ravages of combat.² Rather than return to his home to heal and reconcile with his injury, this young man was fitted with a prosthetic leg and continued to support the war effort for an additional nine years by folding parachutes and providing food and supplies to military families.³ Fast-forward to 2010, the young man—not so young anymore—applies to the Department of Veterans Affairs (“VA”) seeking entitlement to VA disability benefits for his lost limb.⁴ He is denied.⁵

This veteran’s problem? His service is not considered “active service” under the current VA regulations.⁶ The young man, a member of the Hmong ethnic minority in Laos, joined the Hmong Special Guerilla Unit (“SGU”) to support the fight against the communist forces in Southeast Asia.⁷ When the American intervention in Southeast Asia failed and the Communist Party in Laos rose to power in 1975, the young man fled his home country.⁸ He

¹ See No. 12-06 797, 1444534, at *1–2 (BVA Oct. 7, 2014), <https://www.va.gov/vetapp14/files6/1444534.txt> [<https://perma.cc/3U4H-D6XC>].

² See *id.* at *2.

³ See *id.*

⁴ See *id.* at *1.

⁵ See *id.*

⁶ 38 C.F.R. § 3.7 (2019) (specifying the “individuals and groups [who] are considered to have performed active military, naval, or air service”).

⁷ See No. 12-06 797, 1444534, at *1–2.

⁸ See *id.* at *2.

became a citizen of the United States 13 years later.⁹ Despite his sacrifice, he will never be able to obtain federal VA benefits because, without qualifying service, he is not recognized as a veteran.¹⁰ This is the reality for the remaining estimated 3,500 Hmong veterans in the United States today.¹¹

The GI Bill Improvement Act of 1977 extended the availability of active service status to certain civilian and contractual groups that qualify under the statute.¹² The SGU has yet to qualify as one of these groups.¹³ In order for groups like the SGU to be considered to have rendered active service in the Armed Forces of the United States, the group must submit an application to the Department of Defense Civilian/Military Service Review Board (“CMSRB”).¹⁴ CMSRB will weigh a number of factors, including to what extent the group was “under the control of the U.S. Armed Forces in support of a military operation or mission during an armed conflict,” to determine whether the applicant group rendered active service.¹⁵ CMSRB then makes a recommendation to the Secretary of the Air Force, who has the final say on the status of the group.¹⁶ If the Secretary of the Air Force issues a favorable decision, the relevant regulations are amended to recognize the group.¹⁷ A member of a recognized group will then be entitled to basic eligibility for VA benefits, so long as the member was discharged under conditions other than dishonorable.¹⁸ Currently, CMSRB has only recognized groups who served with the Armed Forces in World War I and World War II, leaving countless groups who supported the Armed Forces in conflicts since the end of World War II, like the Hmong SGU, without access to VA benefits.¹⁹

The impediment to active service recognition for the SGU—along with similar paramilitary forces relied upon by the United States in many of its military operations—is tied to the U.S. Central Intelligence Agency’s (“CIA”) recruitment, training, and supervision of the group, which fails to satisfy the requirement of being under the direction and control of the Armed

⁹ *See id.*

¹⁰ *See id.*; 38 C.F.R. §§ 3.1, 3.7.

¹¹ *See* Mark Brunswick, *One Last Fight for Secret Soldiers: Hmong Seek Recognition as Vets*, SEATTLE TIMES (Mar. 17, 2012, 8:01 AM), <https://www.seattletimes.com/nation-world/one-last-fight-for-secret-soldiers-hmong-see-recognition-as-vets/> [<https://perma.cc/5CT5-3FKC>].

¹² Pub. L. No. 95-202, § 401, 91 Stat. 1443, 1449 (1977) (codified at 38 U.S.C. § 106).

¹³ *See* 38 C.F.R. § 3.7.

¹⁴ 32 C.F.R. § 47.6(a), App’x A (2019).

¹⁵ § 47.4(b).

¹⁶ § 47.6(4)–(5), App’x A.

¹⁷ *See id.*; 38 C.F.R. § 3.7(x) (listing groups recognized as having performed active service pursuant to a favorable decision by the Secretary of the Air Force).

¹⁸ *See* 38 U.S.C. §§ 101(2), 106; 38 C.F.R. §§ 3.1(d), (p), 3.7(x) (2019).

¹⁹ *See* 38 C.F.R. § 3.7(x).

Forces.²⁰ This Note argues that the mere fact that service was rendered under CIA control is an inadequate basis for denial of veterans benefits by CMSRB. The indirect control of the Armed Forces over CIA-controlled groups, the blurred line between CIA-specific and military-specific operations, and the direct benefits received by the Armed Forces from these paramilitary forces should compel CMSRB to grant the Hmong SGU veterans benefits.

By failing to include the SGU as having contributed active service for purposes of veteran status, the United States has ignored the sacrifice of the Lao and Hmong veterans of the SGU. It must take the necessary measures to remedy this injustice by providing these veterans with the opportunity to obtain benefits through the VA. Under the current criteria promulgated by CMSRB, CMSRB can and should recognize the SGU as having rendered active service.²¹ Further, the Department of Defense should amend the criteria for active service to include groups similar to the SGU that operated under the direction of the CIA in order to prevent their contributions to U.S. military efforts from being overlooked in the future.

Part I of this Note provides the history of the CIA's development of the Hmong SGU in Laos and its role in the Vietnam War, details the law governing the processes and criteria considered when a group seeks to obtain active service status, and outlines the history of a group previously determined by CMSRB as having rendered active service for comparison with the Hmong SGU. Part II.A then articulates why the Hmong SGU were preliminarily denied veteran status and why that denial was erroneous. Finally, Part II.B proposes both narrow and broad solutions, including granting SGU active service under the current CMSRB criteria, Congressional intervention, and the amendment of CMSRB's criteria by the Department of Defense to explicitly include groups that operated under the direct control of the CIA.

I. BACKGROUND

A. *The Hmong SGU and Its Role in the Vietnam War*

In early 1961, during the transition from the Eisenhower administration to the Kennedy administration, President Eisenhower made clear to President-elect Kennedy that Laos—a small, landlocked country located

²⁰ See Letter from Bruce T. Brown, Exec. Sec'y, U.S. Dep't of Def. Civilian/Military Rev. Bd., to Khao Insiengmay, Exec. Dir., United Royal Lao Armed Forces and Special Guerilla Unit Veterans of the Vietnam War (May 29, 2014) (on file with author) (citing GI Bill Improvement Act § 401).

²¹ See generally 32 C.F.R. § 47.4(b) (2019) (providing the criteria for active service).

between Thailand and Vietnam—was of the utmost importance in the fight against communism.²² President Eisenhower stated that “[Laos] was the cork in the bottle. If Laos fell, then Thailand, the Philippines, and of course [the leader of the Republic of China] would go.”²³ Years before this encounter, President Eisenhower began building a massive CIA presence in Laos such that, by the end of his administration, the number of CIA operatives and administrative support in Laos was greater than the United States’ own foreign service presence at the American Embassy.²⁴ The buildup of the CIA presence in Laos foreshadowed the extensive and lengthy American involvement for the next decade.

As tensions in neighboring Vietnam began to heighten and the possibility of full-blown war against the North Vietnamese became a reality, Laos’ relevance remained steady, but the idea of open U.S. military involvement in Laos became less realistic.²⁵ As a result, the U.S. government refrained from outright military intervention and opted, instead, for a secret war in Laos. The first of its kind, the prospect of a secret war came to fruition in January 1961 when James William “Bill” Lair, a World War II veteran and CIA operative, met Major (then soon-to-be General) Vang Pao, a member of the Hmong ethnic minority in Laos and prominent military leader amongst the Hmong people.²⁶ After his interactions with Vang Pao and the Hmong people, Lair advocated for the training and deployment of the Hmong, and the United States accepted his proposal.²⁷ Thus began Operation Momentum.

Operation Momentum grew into the most expansive mission the fledgling CIA, established fourteen years earlier in 1947, had yet to embark upon.²⁸ The Hmong paramilitary forces experienced early success in Laos, holding off communist incursions by both the Pathet Lao and the North

²² See 7. *Notes of Conversation Between President-Elect Kennedy and President Eisenhower*, in FOREIGN RELATIONS OF THE UNITED STATES, 1961-1963, VOL. XXIV, LAOS CRISIS, <https://history.state.gov/historicaldocuments/frus1961-63v24/d7> [<https://perma.cc/9KWN-RM6Q>].

²³ *Id.*

²⁴ JOSHUA KURLANTZICK, A GREAT PLACE TO HAVE A WAR: AMERICA IN LAOS AND THE BIRTH OF A MILITARY CIA 11–13 (2016).

²⁵ See *id.* at 12.

²⁶ See Interview by Stephen Maxner with Bill Lair, CIA, in Meridian, Tex. (Dec. 12, 2001), <https://www.vietnam.ttu.edu/virtualarchive/items.php?item=OH0200> [<https://perma.cc/FS33-YZL9>]; KURLANTZICK, *supra* note 24, at 80–82.

²⁷ KURLANTZICK, *supra* note 24, at 81–82.

²⁸ See *id.* at 14; *History of the CIA*, CENT. INTEL. AGENCY (Oct. 06, 2020, 1:39 PM), <https://web.archive.org/web/20201226213953/https://www.cia.gov/about-cia/history-of-the-cia> (last visited Mar. 18, 2021).

Vietnamese.²⁹ Meanwhile, the CIA's involvement stayed out of the public eye, which in turn helped the United States' overall goal of keeping American ground troops (officially) out of Laos.³⁰ In the early years, the Hmong utilized traditional guerilla tactics, often attacking enemy strongholds and supply lines by deploying explosives in enemy supply depots or vehicles.³¹ But between 1963 and 1966, the CIA helped turn Vang Pao's original promise of 10,000 men into an organized force of 20,000, and the purpose of the Hmong army shifted from a defensive, guerilla-style war to an offensive, conventional war.³² U.S. officials believed this shift would draw the attention of the North Vietnamese away from joint U.S. and South Vietnamese military operations, lifting pressure on American forces in Vietnam.³³ Further, officials believed that engaging the North Vietnamese on two separate fronts would force Northern Vietnam's use of critical manpower and resources, essentially using the Hmong forces to "bleed Hanoi."³⁴

Throughout the Johnson administration and most of the Nixon administration, the Hmong SGU contributed heavily to American war efforts in Southeast Asia. For example, Hmong soldiers, coupled with a CIA case

²⁹ See KURLANTZICK, *supra* note 24, at 94–100.

³⁰ See *id.* Members of the Studies and Observation Group (SOG), a joint group of American special forces teams, regularly ran so-called "Prairie Fire" missions across the Vietnamese-Laotian border, which were covert missions operated and commanded by the U.S. military. See generally JOHN S. MEYER, *ACROSS THE FENCE: THE SECRET WAR IN VIETNAM* (2013); JOHN STRYKER MEYER & JOHN E. PETERS, *ON THE GROUND: THE SECRET WAR IN VIETNAM* (2007); JOHN L. PLASTER, *SOG: THE SECRET WARS OF AMERICA'S COMMANDOS IN VIETNAM* (1997). "Prairie Fire" was "a strip of the eastern Lao panhandle 20 kilometers deep from the 17th Parallel down to the Cambodian border." KENNETH CONBOY, *SHADOW WAR: THE CIA'S SECRET WAR IN LAOS 173* (1995). The Prairie Fire missions were discrete reconnaissance missions, coupled occasionally with "Search, Locate, Annihilate, and Monitor," or "SLAM," missions. *Id.*

³¹ See SPECIAL GUERRILLA UNITS VETERANS AND FAMS. OF USA, INC., *THE SPECIAL GUERRILLA UNITS (SGU) SERVICE HISTORY 9* (2010), https://graphics.jsonline.com/jsi_news/documents/sgu_final_2.pdf [<https://perma.cc/T9TG-FA4V>] [hereinafter *SGU SERVICE HISTORY*].

³² See KURLANTZICK, *supra* note 24, at 124; William M. Leary, *CIA Air Operations in Laos, 1955-1974: Supporting the "Secret War,"* CENT. INTEL. AGENCY (June 27, 2008, 7:37 AM), <https://web.archive.org/web/20201116105808/https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/winter99-00/art7.html> (last visited Mar. 18, 2021).

³³ See Interview by Stephen Maxner with Norm Gardner, Case Officer, CIA, in Vienna, Va. (Mar. 14, 2001), <https://www.vietnam.ttu.edu/reports/images.php?img=/OH/OH0028/OH0028.pdf> [<https://perma.cc/W4YF-QNUQ>] (explaining that the purpose of the CIA's activities in Laos was to "take the pressure off South Vietnam; to take pressure off of American troops in South Vietnam").

³⁴ KURLANTZICK, *supra* note 24, at 124–26.

officer, created the “Rascal Program,” where Hmong soldiers would dress as civilians and travel throughout Northern Laos in search of concentrations of North Vietnamese soldiers.³⁵ Once discovered, the Hmong would pass through the camp or supply depot, discretely dropping beacon devices behind them.³⁶ These beacon devices sent signals to American Air Force pilots, who would hone in on the location of the signal and target those areas for bombing.³⁷ The Rascal Program successfully ran about 30 operations, all of which resulted in some sort of “secondary explosions,” indicating a “direct hit on an ammo or fuel depot.”³⁸ In addition, Hmong soldiers were tasked with braving the jungle and run-ins with the enemy in order to rescue, or recover the bodies of, American pilots whose planes were shot down over Laos.³⁹ Further, the SGU produced bomber pilots who provided air support to ground forces in partnership with the U.S. Air Force.⁴⁰ The Hmong SGU ground forces, sometimes placed in ill-prepared positions by American strategists, suffered great losses.⁴¹

In early 1973, President Nixon signed the Paris Peace Accords, ending any hope for a U.S. victory in Vietnam and all American aid to the SGU.⁴² American CIA agents left the SGU behind after the Vientiane Peace Agreement was signed by the competing factions in Laos.⁴³ Soon after, both the South Vietnamese and the anticommunists in Laos succumbed to the might of the communist victors in 1975.⁴⁴ The United States managed to airlift some 3,500 high ranking Hmong SGU members and their families to safety, but hundreds of thousands remained.⁴⁵ During the war, an estimated 30,000–40,000 Hmong were killed in action while serving the United States, and an estimated 2,500–3,000 were missing in action.⁴⁶ After the Pathet Lao

³⁵ Peter Alan Lloyd, *CIA Operations in Laos—a Case Officer Remembers: Part 1—The Rascal Program*, MODERN FORCES, http://modernforces.com/peter_lloyd_interview_1.htm [<https://perma.cc/WXU2-59WN>].

³⁶ *See id.*

³⁷ *See id.*

³⁸ *Id.*

³⁹ *See* SGU SERVICE HISTORY, *supra* note 31, at 9.

⁴⁰ *Id.* at 10.

⁴¹ KURLANTZICK, *supra* note 24, at 134–46 (detailing the Massacre at Nam Bac Town, the slaughter of the reinforcements sent to relieve the town, and the response of the American strategists who were in command).

⁴² SGU SERVICE HISTORY, *supra* note 31, at 11; *Hmong Timeline*, MINN. HIST. SOC’Y, <https://www.mnhs.org/hmong/hmong-timeline> [<https://perma.cc/JGX3-LUV2>].

⁴³ SGU SERVICE HISTORY, *supra* note 31, at 11.

⁴⁴ *See id.* at 11–12.

⁴⁵ *See id.*

⁴⁶ *See Hmong Timeline*, *supra* note 42. For perspective, the estimated number of American military deaths in the Vietnam War is 58,220. *See Vietnam War U.S. Military Fatal*

took control of the Laotian government in 1975, many Hmong were persecuted or sent to communist reeducation camps across the country.⁴⁷ Fearing for their safety, Hmong and other ethnic Lao people fled their home country to Thailand, some making the treacherous journey across the Mekong Delta.⁴⁸ After spending years as refugees in Thailand, many Hmong resettled in the United States.⁴⁹

Now, approximately 260,000 Hmong live in the United States, many of whom are veterans of the SGU.⁵⁰ For the Hmong, resettlement has certainly been an uphill battle. When the Hmong arrived in the United States, they encountered barriers to their hopes for a new life, as many migrants do, in the forms of lack of education, inability to speak English, and cultural disassociation.⁵¹ Despite severe feelings of betrayal, the SGU veterans took up the fight for recognition of the sacrifices they made for a country that kept their existence a secret.

In 2000, the Hmong people achieved their first milestone toward acceptance and recognition by the United States when Congress, after lobbying efforts by the Lao Veterans of America, Inc., enacted the Hmong Veterans Naturalization Act.⁵² The Act served as an attempt to heal the wounds of the secret war by easing the process by which Hmong and other ethnic Lao could attain citizenship.⁵³ Specifically, the Act waived the English language requirement of the naturalization test and required special consideration by the Attorney General regarding the civics portion.⁵⁴ The Act aided tens of thousands of Hmong and Lao and offered a clearer path for their families to be reunited in the United States.⁵⁵

Since the Act's passage, organizations like the Lao Veterans of America and other regional Hmong veterans' groups in the U.S. have continued to advocate for greater recognition of their military service to the United States.

Casualty Statistics, NAT'L ARCHIVES, <https://www.archives.gov/research/military/vietnam-war/casualty-statistics> [<https://perma.cc/UB2Y-RHU9>].

⁴⁷ See SGU SERVICE HISTORY, *supra* note 31, at 11–12; *Hmong Timeline*, *supra* note 42.

⁴⁸ See SGU SERVICE HISTORY, *supra* note 31, at 12.

⁴⁹ See *id.*

⁵⁰ See *Hmong Timeline*, *supra* note 42; Brunswick, *supra* note 11.

⁵¹ See Angela McCaffrey, *Hmong Veterans' Naturalization Act: Precedent for Waiving the English Language Requirement for the Elderly*, 19 GEO. IMMIGR. L.J. 495, 496, 503–09 (2005).

⁵² Pub. L. No. 106-207, 114 Stat. 316 (2000); see McCaffrey, *supra* note 51, at 496 n.5.

⁵³ McCaffrey, *supra* note 51, at 496.

⁵⁴ See *id.*; Hmong Veterans' Nationalization Act §§ 2–3.

⁵⁵ McCaffrey, *supra* note 51, at 496 (discussing one of the purposes of assisting in naturalization as “allow[ing] for more expeditious immigration processing of spouses and children and the opportunity to sponsor siblings and parents”).

Recently, such recognition has produced results, prompting some states with large Hmong populations to consider legislation that extends state veteran status to SGU veterans.⁵⁶ Most notably, members of the Wisconsin state legislature introduced a bill that would extend state veterans benefits to Hmong veterans.⁵⁷ Additionally, Wisconsin is considering a bill that would designate May fourteenth as “Hmong-Lao Veterans Day.”⁵⁸ At the federal level, in 2018, President Trump signed into law the Consolidated Appropriations Act,⁵⁹ which extended eligibility for burial in national cemeteries to those veterans that were naturalized via the Hmong Veterans’ Naturalization Act; however this burial eligibility does not include Arlington National Cemetery.⁶⁰

Even with the recent surge in attempts to pay respect to Hmong SGU veterans, one of the most important barriers to repayment for the SGU’s sacrifices is its exclusion from federal VA benefits. In response to the federal

⁵⁶ See, e.g., Cassandra Day, *Connecticut 1st State to Give Burial Rights to Hmong and Laotian Special Guerilla Unit*, MIDDLETOWN PRESS (June 27, 2019, 5:21 PM), <https://www.middletownpress.com/middletown/article/Connecticut-1st-state-to-give-burial-rights-to-14056877.php> [<https://perma.cc/C46L-SNBC>]; Alaska Law Now Honors Hmong Veterans, REPRESENTATIVE GERAN TARR (July 30, 2018), akhouse.org/rep_tarr/2018/07/30/alaska-law-now-honors-hmong-veterans/ (discussing the Alaska law that allows Hmong and Laotian veterans to receive veteran designation on state IDs, which “will allow them to enjoy the numerous voluntary discounts and other benefits many private establishments use to honor veterans”).

⁵⁷ *Hmong Veteran Bill Would Give State Benefits to Refugees*, WQOW (Oct. 16, 2019, 9:04 AM), <https://wqow.com/news/top-stories/2019/10/16/hmong-veteran-bill-would-give-state-benefits-to-refugees/> [<https://perma.cc/XWB7-R6X8>]; Hope Kirwan, ‘We Owe Them This Debt:’ New Bill Would Make Hmong Veterans Eligible for State Benefits, WIS. PUB. RADIO (Oct. 15, 2019, 5:00 PM), <https://www.wpr.org/we-owe-them-debt-new-bill-would-make-hmong-veterans-eligible-state-benefits> [<https://perma.cc/86XL-RH5N>]. Such benefits include access to the “[Wisconsin] GI Bill, Veterans Educations Grant, Professional/Occupational Licensure Fee Waiver, Veterans Employment Assistance, Assistance to Needy Veterans Grant, Veteran Identifier on State Driver’s License or State ID through WI DOT, [and] Military Funeral Aid Honors.” *Hmong Veteran Bill Would Give State Benefits to Refugees*, *supra*.

⁵⁸ Rob Mentzer, *Bill Would Create Hmong-Lao Veterans Day In Wisconsin*, WIS. PUB. RADIO (Jan. 21, 2020, 6:10 AM), <https://www.wpr.org/bill-would-create-hmong-lao-veterans-day-wisconsin> [<https://perma.cc/XC85-MGF4>].

⁵⁹ Pub. L. No.115-141, 132 Stat. 348 (2018).

⁶⁰ See *id.* § 251; see also NAT’L CEMETERY ADMIN., U.S. DEP’T OF VETERANS AFFS., HMONG BURIAL AND MEMORIAL BENEFITS, https://www.cem.va.gov/cem/docs/factsheets/Hmong_Burial_Memorial_Benefits_Factsheet.pdf [<https://perma.cc/V2RU-MAHL>] (explaining the newly enacted burial and memorial benefits for Hmong individuals); Agnes Constantine, *Congress Passes Law Allowing National Cemetery Burials For ‘Secret War’ Veterans*, NBC NEWS (April 3, 2018, 12:14 PM), <https://www.nbcnews.com/news/asian-america/congress-passes-law-allowing-national-cemetery-burials-secret-war-veterans-n862346> [<https://perma.cc/J3JN-GK4A>] (noting the exclusion from Arlington National Cemetery).

government's extension of burial rights to the SGU, a Vietnam veteran remarked:

This is step one . . . We need the federal VA to recognize the Hmong and the Lao as Vietnam veterans, and give them the medical care that's needed . . . They have the same medical issues: Agent Orange issues, post traumatic stress [disorder] and a myriad of other health issues.⁶¹

Despite these calls for recognition by the VA, Hmong SGU veterans do not meet the VA's current definition of "veteran," and are thus unable to access federal veterans' benefits.

B. Basic Eligibility at the VA and Active Service for Civilian and Contractual Groups

The VA offers many types of benefits, such as disability benefits, health care, education benefits, and housing benefits.⁶² For families of a deceased veteran, the VA can provide a survivors pension to that veteran's spouse or dependents.⁶³ In order for a person to succeed on a claim for benefits from the VA, they⁶⁴ must (1) establish basic eligibility for VA benefits and (2) establish entitlement to the benefit sought.⁶⁵ To establish basic eligibility, a person must demonstrate that they are a veteran under VA's definition.⁶⁶ Under 38 C.F.R. § 3.1(d), a "veteran" is "a person who served in the active military, naval, or air service and who was discharged or released therefrom under conditions other than dishonorable." The most straightforward way for

⁶¹ Day, *supra* note 56 (quoting Brigadier General Daniel J. McHale, who served in Vietnam from 1970 to 1971). Before their deaths, General Vang Pao and Bill Lair prepared a history of the SGU, in which they emphasized the need for SGU access to VA benefits for post-traumatic stress disorder and "a host of other challenges that complicate their ways of living in the United States." SGU SERVICE HISTORY, *supra* note 31, at 14–15.

⁶² See SCOTT D. SZYMENDERA, CONG. RSCH. SERV., R42324, WHO IS A "VETERAN"?—BASIC ELIGIBILITY FOR VETERANS' BENEFITS 1 (2016).

⁶³ VA *Survivors Pension*, U.S. DEP'T OF VETERANS AFFS., <https://www.va.gov/pension/survivors-pension/> [<https://perma.cc/YP5T-28CH>].

⁶⁴ This Note uses the gender-neutral "they/them/theirs" pronouns.

⁶⁵ See BARTON F. STICHMAN, RONALD B. ABRAMS, AMY F. ODOM, & RICHARD V. SPATARO, VETERANS BENEFITS MANUAL 21 (2018–2019 ed.). For example, entitlement to disability compensation requires demonstration of (1) a current disability, (2) an in-service event regarding that injury, and (3) a nexus between the two. See VA ADJUDICATION PROCEDURES MANUAL M21-1, PART IV, SUBPART II, CHAPTER 2, SECTION B—DETERMINING SERVICE CONNECTION (SC), [https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/55440000001018/content/554400000014553/M21-1,-Part-IV,-Subpart-ii,-Chapter-2,-Section-B---Determining-Service-Connection-\(SC\)](https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/55440000001018/content/554400000014553/M21-1,-Part-IV,-Subpart-ii,-Chapter-2,-Section-B---Determining-Service-Connection-(SC)) [<https://perma.cc/FT63-CACV>]; see also 38 C.F.R. § 3.303 (2019) (explaining factors related to the nexus between the disability and service).

⁶⁶ STICHMAN ET AL., *supra* note 65, at 21.

a person to demonstrate veteran status is to provide proof of “full time duty” in one of the five branches of the U.S. Armed Forces and nondishonorable discharge.⁶⁷ Many other people meet the definition of veteran, including reservists and members of the National Guard, though the VA imposes additional requirements for basic eligibility on those persons.⁶⁸

However, oftentimes during periods of war or prolonged conflict, people who do not fall within the traditional criteria for active military service sacrifice their time, resources, and even their lives to support the United States military effort. It was these people Congress had in mind when it enacted § 401 of the GI Bill Improvement Act of 1977.⁶⁹ Specifically, Congress sought to recognize the service of the Women’s Air Forces Service Pilots (“WASPs”) during World War II.⁷⁰ WASPs were civilian volunteers trained to fly military aircraft for the Army Air Force across the United States and Canada, but the program was discontinued in 1944 as the war came to an end.⁷¹ The Act made it possible for service in WASPs or “any other similarly situated group” to count as active service for purposes of the laws and regulations administered by the VA.⁷² Further, the Act instructed the Secretary of Defense to issue honorable discharges to a member of WASPs or a similarly situated group where “the nature and duration of the service of such member so warrants.”⁷³ As a consequence, a member of WASPs or a similarly situated group that has been issued an honorable discharge by the Secretary of Defense will meet the VA’s basic eligibility criteria, and can thus attempt to show entitlement to the myriad of benefits offered by the VA.

Congress delegated to the Secretary of Defense the authority to determine which groups are “similarly situated” to the WASPs.⁷⁴ Congress

⁶⁷ 38 C.F.R. §§ 3.1(d), 3.6(a), (b)(1). The five branches of the U.S. Armed Forces include the Army, the Navy, the Marine Corps, the Air Force, and the Coast Guard. 38 C.F.R. § 3.1(a). Additionally, it is important to note that the language used by the military on a person’s discharge documents is not indicative of a person’s discharge conditions for basic eligibility purposes. See STICHMAN ET AL., *supra* note 65, at 27.

⁶⁸ See, e.g., 38 C.F.R. § 3.6(c) (explaining the definition of “active duty” for reservists).

⁶⁹ See *Recognition for Purposes of VA Benefits: Hearing on S. 247, S. 1414, S. 129, and Related Bills Before the S. Comm. on Veterans’ Affs.*, 95th Cong. 1–2 (1977) (statement of Sen. Alan Cranston, Chairman, S. Comm. on Veterans’ Affs.).

⁷⁰ See *id.*; GI Bill Improvement Act of 1977, Pub. L. No. 95–202, § 401, 91 Stat. 1449.

⁷¹ Susan Stamberg, *Female WWII Pilots: The Original Fly Girls*, NPR (Mar. 9, 2010, 12:00 AM), <https://www.npr.org/2010/03/09/123773525/female-wwii-pilots-the-original-fly-girls> [<https://perma.cc/6V9W-5TNP>].

⁷² § 401(a)(1), 91 Stat. at 1449.

⁷³ § 401(a)(1)(B).

⁷⁴ § 401(a)(1).

laid out criteria the Secretary could consider in making the determination, which included the extent to which:

- (A) such group received military training and acquired a military capability or the service performed by such group was critical to the success of a military mission,
- (B) the members of such group were subject to military justice, discipline, and control,
- (C) the members of such group were permitted to resign,
- (D) the members of such group were susceptible to assignment for duty in a combat zone, and
- (E) the members of such group had reasonable expectations that their service would be considered to be active military service.⁷⁵

Pursuant to the authority granted in the Act, the Department of Defense promulgated regulations implementing § 401(a)(1), which adopted the same criteria Congress discussed in the Act.⁷⁶ The regulations also delegated the power to determine which groups are “similarly situated” to the WASPs to the Secretary of the Air Force and established the Civilian/Military Service Review Board.⁷⁷ CMSRB was tasked with reviewing applications from groups seeking active service recognition and making recommendations to the Secretary of the Air Force after considering whether the applicant group met the Act’s criteria.⁷⁸ However, the Secretary of the Air Force retained the ultimate authority to grant active service status, though CMSRB’s recommendations were nearly uniformly implemented.⁷⁹

By 1987, ten years after the passage of the Act, sixty-four groups had applied to CMSRB, but only fourteen were granted active service recognition.⁸⁰ In granting and denying applications, CMSRB issued conclusory decisions (typically one to two pages) that failed to uniformly utilize the criteria laid out in the Act and subsequent regulations, or included additional considerations not within the Act’s criteria.⁸¹ When CMSRB denied two subgroups of the Merchant Marine—the Oceangoing Group and the Invasion Group—members of those groups brought suit against Secretary of the Air Force Edward Aldridge, alleging that the denials were

⁷⁵ § 401(a)(2).

⁷⁶ See *Determination of Active Military Service and Discharge*, 44 Fed. Reg. 11,223 (Feb. 28, 1979) (to be codified at 32 C.F.R. pt. 47); 32 C.F.R. § 47.3(b) (1980).

⁷⁷ §§ 47.1 n.1, 47.5(a)(1).

⁷⁸ § 47.7(a)–(b).

⁷⁹ See § 47.7(e); *Schumacher v. Aldridge*, 665 F. Supp. 41, 44, 51–52 (D.D.C. 1987).

⁸⁰ See *id.* at 44.

⁸¹ See *id.* at 44 n.2, 54–55.

arbitrary and capricious.⁸² In *Schumacher v. Aldridge*,⁸³ the District Court of the District of Columbia found that the five criteria adopted after the Act's passage were "poorly defined," and the Secretary had failed to "articulate clear and intelligible criteria" for his decision pursuant to § 401(a).⁸⁴ Further, in applying criteria not codified in the Act or its implementing regulations, the court held that CMSRB and the Secretary abused their discretion, as Congress surely did not intend for the Secretary to "publish one set of criteria and to apply another."⁸⁵ As a result, the Department of Defense vastly overhauled its standards and criteria for determining when a group should be granted active service recognition.

In 1989 the Secretary of Defense adopted new regulations which listed the criteria CMSRB would consider when determining whether a group rendered active service to the Armed Forces of the United States.⁸⁶ Much more detailed than the original five criteria, 32 C.F.R. § 47.4(a) lays out the preliminary requirements for a group to be eligible for recognition under the GI Bill Improvement Act.⁸⁷ First, a group must have been similarly situated to the WASPs.⁸⁸ For a group to be similar situated to the WASPs, it must be "an identifiable group at the time the service was being rendered to the U.S. Armed Forces during a period of armed conflict."⁸⁹ Second, the group must have rendered service in what was considered civilian employment, either through a formal hiring process or a less formal process if it was during wartime.⁹⁰ Third, the group must have served during a period of armed conflict.⁹¹ For a period to constitute "armed conflict," it must involve prolonged conflict against a "foreign belligerent", and must be "more than a military engagement of limited duration or for limited objectives, [that] involves a significant use of military and civilian forces."⁹² The regulation offers a few examples of armed conflict, including World War I and II, and the Korean and Vietnam conflicts.⁹³ Fourth, the group must consist of living

⁸² See *id.* at 42.

⁸³ 665 F. Supp. 41 (D.D.C. 1987).

⁸⁴ *Id.* at 52 (discussing 32 C.F.R. pt. 47 (1986)).

⁸⁵ *Id.* at 53.

⁸⁶ Active Duty Service Determination for Civilian or Contractual Groups, 54 Fed. Reg. 39,991 (Sept. 29, 1989) (to be codified at 32 C.F.R. pt. 47); 32 C.F.R. § 47.4 (1990).

⁸⁷ See 32 C.F.R. § 47.4(a) (2019).

⁸⁸ § 47.4(a)(1).

⁸⁹ § 47.3.

⁹⁰ § 47.4(a)(2).

⁹¹ § 47.4(a)(3).

⁹² § 47.3.

⁹³ § 47.3(a). The regulation formally refers to the Korean and Vietnam "Conflicts" because Congress did not officially declare war, but this Note refers to the conflict in Vietnam colloquially as the Vietnam War. See *Official Declarations of War by Congress*, U.S. SENATE,

persons.⁹⁴ Thus, the law does not include groups like those that served in the Spanish American War of 1898 and is not intended to serve a commemorative purpose.⁹⁵ Lastly, the group must “[n]ot have already received benefits from the Federal Government for the service in question.”⁹⁶

Once a group meets the basic requirements for consideration, CMSRB will determine whether a group’s service is equivalent to active military service on the basis of “the extent to which the group was under control of the U.S. Armed Forces in support of a military operation or mission during an armed conflict.”⁹⁷ CMSRB will look at a wide range of criteria to determine the extent of control exerted over the group. First, the regulations state that in order for the service to be recognized, the applicant group must have been “created or organized by the U.S. Government to fill a wartime need,” and, if the group’s application is based on service in a combat zone, “the mission of the group in a combat zone must have been substantially different from the mission of similar groups not in a combat zone.”⁹⁸ Additionally, the criteria include the level of authority the military exercised over the group; the level of “[i]ntegration into the military organization;” whether the group was subject to military discipline or military justice; whether, at the time the service was rendered, there was a prohibition on the group’s members against joining the armed forces; and whether the group received military training or achieved military capability.⁹⁹

Further, the regulations also list criteria that *do not* favor equivalency to active military service, which include whether the group submitted to military control for protection or its own well-being, regardless of whether the group was “[a]rmed by the U.S. military for defensive purposes,” “[r]outed by the U.S. military to avoid the enemy,” or “[i]nstructed by the U.S. military for the defense of the group when attacked by, or in danger of attack by, the enemy.”¹⁰⁰ An additional factor disfavoring equivalency is

https://www.senate.gov/pagelayout/history/h_multi_sections_and_teasers/WarDeclarationsbyCongress.htm [<https://perma.cc/GBA7-ZDJ8>].

⁹⁴ § 47.4(a)(4).

⁹⁵ See Active Duty Service Determination for Civilian or Contractual Groups, 54 Fed. Reg. 39,991, 39,992 (Sept. 29, 1989) (to be codified at 32 C.F.R. pt. 47); see generally *Spanish-American War*, HIST. (Feb. 21, 2020), <https://www.history.com/topics/early-20th-century-us/spanish-american-war> [<https://perma.cc/RH89-CHVB>].

⁹⁶ § 47.4(a)(5).

⁹⁷ § 47.4(b).

⁹⁸ § 47.4(b)(1)(i)(A)–(B).

⁹⁹ See § 47.4(b)(1)(ii)–(vii). Military discipline includes implementation of a curfew, restricting travel, and other restrictions on the rights or liberties of the group’s members. See § 47.4(b)(1)(iv)(A). Military justice, on the other hand, is subjection to the military criminal justice system and court-martial jurisdiction. See § 47.4(b)(1)(v).

¹⁰⁰ § 47.4(b)(2)(i).

whether the members of a group were permitted to resign at will.¹⁰¹ Lastly, the regulations state that prior recognition of the group by any state or local government does not impact CMSRB's decision to grant recognition.¹⁰²

After considering the above criteria, if CMSRB issues a favorable decision and the Secretary of the Air Force implements it, the VA will amend the relevant regulation, 38 C.F.R. § 3.7(x), to include the approved group. To date, § 3.7(x) includes thirty-three groups that qualify for active service recognition. However, § 3.7(x) has not been amended to recognize a new group since 2006 and has yet to include a civilian or contractual group that served after World War II.¹⁰³ All currently recognized groups served in either World War I or World War II.¹⁰⁴

C. *A Closer Look at the WASPs*

Because all active service decisions relate back to the original grant of veteran status to the WASPs, an understanding of their contribution to the United States and their military efforts during World War II is necessary to accurately determine what constitutes a similarly situated group. The WASP program was established in 1942 in response to the attack at Pearl Harbor.¹⁰⁵ Due to the manpower needs of World War II, women were needed to fill noncombat roles that were traditionally occupied by men, which included training women to “replace men in every noncombatant flying duty in which it is feasible to employ women.”¹⁰⁶

In total, over 1,000 women participated in the WASP program in its brief, two-year tenure.¹⁰⁷ One of the most interesting aspects of the group was the expectation that it would be militarized “from the start.”¹⁰⁸ From the group's inception, the Army Air Forces planned to incorporate women pilots into either the Women's Army Corps or directly into the Army Corps itself.¹⁰⁹ This expectation translated into the type of training the WASPs were

¹⁰¹ See § 47.4(b)(2)(ii).

¹⁰² See § 47.4(b)(2)(iii).

¹⁰³ See *Individuals and Groups Considered to Have Performed Active Military, Naval, or Air Service*, 71 Fed. Reg. 29,080, 29,081 (May 19, 2006) (to be codified at 38 C.F.R. pt. 3).

¹⁰⁴ See 38 C.F.R. § 3.7(x) (2019).

¹⁰⁵ See *A History of the Women Airforce Service Pilots*, NAT'L WASP WWII MUSEUM, <https://waspmuseum.org/history.html> [https://perma.cc/Y9XR-QEQX].

¹⁰⁶ See *Recognition for Purposes of VA Benefits*, *supra* note 69 at 32 (statement of Sen. Barry M. Goldwater) (quoting a memorandum from General Henry H. “Hap” Arnold, Chief of the Air Corps).

¹⁰⁷ See *A History of the Women Airforce Service Pilots*, *supra* note 105.

¹⁰⁸ *Recognition for Purposes of VA Benefits*, *supra* note 69, at 35 (statement of Sen. Barry M. Goldwater).

¹⁰⁹ See *id.* at 35–36.

given, which was military in nature.¹¹⁰ Despite this expectation, Congress rejected bills aimed at militarizing the WASP program, even though the program's incorporation had support from the War Department.¹¹¹

Without official classification as part of the military, the WASPs remained civilians and were denied access to VA benefits for over thirty years after their service.¹¹² However, the federal government's recognition of their sacrifice eventually came to fruition with the passage of the GI Bill Improvement Act of 1977.¹¹³ Congress passed the Act out of gratitude for these women and an understanding that without their efforts, the United States' war effort would have been significantly weakened.¹¹⁴ Because of the WASP program, military officials were able to direct their attention, resources, and manpower away from domestic noncombative duties, like the transport of aircraft and equipment, and instead focus on the conflict abroad.¹¹⁵

Much like the WASP program, the Hmong SGU allowed the U.S. military to focus on the war in Vietnam, arguably contributing more than the WASPs by serving in combat roles and ensuring fewer American soldiers were in harm's way.¹¹⁶ Yet over forty years since the Hmong's service, and over thirty since the enactment of the GI Bill Improvement Act, the SGU have yet to gain the same access to VA benefits and overall recognition as the WASPs.

II. ANALYSIS

Part A of this section will address the error in denying the SGU active service recognition under the current criteria, as well as the inadequacies of the current criteria. Part B of this section provides three possible solutions to ensure recognition of the SGU and like paramilitary groups' service as active service, the most viable of which would require amending the criteria that CMSRB uses to make active service determinations.

¹¹⁰ *See id.* at 36.

¹¹¹ *See id.* at 35–36.

¹¹² *See id.* at 37–38.

¹¹³ Pub. L. No. 95-202, § 401, 91 Stat. 1443, 1449 (1977) (extending the availability of active service status to civilian and contractual groups).

¹¹⁴ *See Recognition for Purposes of VA Benefits*, *supra* note 69, at 37–38 (statement of Sen. Barry M. Goldwater).

¹¹⁵ *See id.* at 32–33.

¹¹⁶ SGU SERVICE HISTORY, *supra* note 31, at 5, 9–11; *Recognition for Purposes of VA Benefits*, *supra* note 69, at 45 (statement of Dorothy Starbuck, Chief Benefits Dir., VA) (noting that the WASP members flew 60 million miles for the Army Air Forces, although they did perform any combat operations).

A. *Denial of the SGU and Inadequacies in the Department of Defense Criteria*

When Mr. Khao Insixiengmay, the Executive Director of the United Royal Lao Armed Forces and Special Guerilla Unit Veterans of the Vietnam War, reached out to the VA to gauge the possibility of recognition for the veterans his organization represents, he received a letter in response from CMSRB.¹¹⁷ In that letter, CMSRB stated that “[w]ithout prejudging any application you might submit to the C/MSRB,” it appeared that the Hmong and Lao veterans were ineligible for recognition.¹¹⁸ The letter explained that “the service rendered by your group was not service provided to the U.S. Armed Forces as civilian employees or contractors, but as members of the Laotian Armed Forces,” and that “it appears the service your group rendered was at the direction and control of the Central Intelligence Agency and American Ambassador to Laos, and not under the direction and control of the U.S. Armed Forces.”¹¹⁹ With this initial rejection, CMSRB advised Mr. Insixiengmay to submit a formal application.¹²⁰

In short, CMSRB based its guidance on two observations: (1) that it “appear[ed] the service rendered by [the SGU and the Royal Lao Armed Forces] was not service provided to the U.S. Armed Forces as civilian employees or contractors, but *as members of the Laotian Armed Forces*,” and (2) the SGU was “at the direction and control of the Central Intelligence Agency . . . and not under the direction and control of the U.S. Armed Forces.”¹²¹ This guidance is flawed for multiple reasons, the first being the mistaken view that the Royal Lao Armed Forces and the Hmong SGU both served the Laotian Armed Forces. The Royal Lao Armed Forces (“FAR”—deriving from the French translation Forces Armées Royales) was the national standing army of the Kingdom of Laos, established after Laos gained its independence from France in the early 1950s.¹²² The FAR and its various divisions remained the national military of Laos until the Kingdom

¹¹⁷ Letter from Bruce T. Brown to Khao Insixiengmay, *supra* note 20.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* (emphasis added).

¹²² See *Royal Lao Armed Forces (FAR)*, GLOBALSECURITY.ORG, <https://www.globalsecurity.org/military/world/laos/army-far.htm> [https://perma.cc/7LT8-B6LV].

was replaced by the Lao People's Democratic Republic in 1975.¹²³ The FAR received regular assistance from the United States, including provision of weapons and munitions, training, and other forms of direct military assistance.¹²⁴ While the FAR was a valuable asset to the U.S. military effort in Southeast Asia, it is understandable why CMSRB would be hesitant to award active service recognition to a foreign power's military. The U.S. regularly allies itself with governments and states during periods of war, and opening up the possibility for any member of a previous or current allies' military to have access to VA benefits would be impractical and controversial.

The SGU was not part of the Royal Lao Armed Forces, however, and its members' service should not be confused with that of the FAR. The Hmong were not under the direction of the FAR, as they were independently fighting for their people's own survival.¹²⁵ The Hmong utilized guerilla tactics during the outbreak of civil war in Laos, with individual clans conducting disorganized, discrete attacks.¹²⁶ Under the direction of Vang Pao and the CIA, the clans were organized together to form the SGU fighting force, which often fought alongside the FAR but remained a distinct entity.¹²⁷ Thus, for CMSRB to conflate the service of the two groups as "members of the Laotian Armed Forces" is inaccurate and serves as an unnecessary barrier to recognizing the Hmong SGU.¹²⁸

Second, CMSRB's concern that the Hmong operated under the direction of the CIA, rather than the U.S. Armed Forces, should not impede the SGU's recognition. The coordination between the CIA and the U.S. military in Laos, coupled with an understanding of the nature of joint efforts by the CIA and the military in modern warfare, suggest that recognition of the Hmong SGU under 32 C.F.R. Part 47 would effectuate the *purpose* of the original

¹²³ See *id.*; *The Lao People's Democratic Republic*, ENCYC. BRITANNICA, <https://www.britannica.com/place/Laos/The-Lao-Peoples-Democratic-Republic> [<https://perma.cc/M5QG-R3LB>].

¹²⁴ See *Royal Lao Armed Forces (FAR)*, *supra* note 122.

¹²⁵ See SGU SERVICE HISTORY, *supra* note 31, at 4–5, 9.

¹²⁶ See KURLANTZICK, *supra* note 24, at 67–68, 78–82 (discussing the clan structure of the Hmong in Laos, and the need of Vang Pao to unite rival clans conducting guerilla warfare against the Pathet Lao for the success of Operation Momentum).

¹²⁷ See Interview by Stephen Maxner with Bill Lair, *supra* note 26, at 118. Bill Lair refers to the Lao Army and the Hmong army as two distinct groups. For example, in discussing the Massacre at Nam Bac, he states that U.S. officials in Laos contacted him to "go talk to Vang Pao to see if he couldn't move a force to help relieve pressure on [the FAR]." *Id.* Further, when asked if the forces at Nam Bac were General Phoumi Novasan's forces, Lair responded "[y]eah, they were the regular Lao Army." *Id.*

¹²⁸ Letter from Bruce T. Brown to Khao Insixiangmay, *supra* note 20.

provision included in the GI Bill Improvement Act of 1977.¹²⁹ The Act revolved around the desire to pay respect to the WASPs, a group that *volunteered* to serve the United States during a period of immense conflict and uncertainty.¹³⁰ Congress did not stop with the recognition of a single group, however. Instead, an amendment made by Congressman Olin Teague extended the legislation to groups that are “similarly situated” to the WASPs, demonstrating Congress’s understanding that military efforts often require groups of people to go above and beyond the duties of average civilians.¹³¹ The WASPs certainly was not the first, nor would they be the last group to do so.¹³² Notably, Congress did not limit § 401 to American citizens or members of the American public as the only groups that could be “similarly situated” to the WASPs, despite Congress’s awareness of the use of civilian and ethnic minority forces by both the CIA and the U.S. military in Southeast Asia during the Vietnam War.¹³³ Further, without such a limitation, CMSRB has recognized groups like the Wake Island Defenders from Guam, the Guam Combat Patrol, and “[t]he approximately 50 Chamorro and Carolinian former native policemen who received military training in the Donnal area of Central Saipan.”¹³⁴

When subsequent groups were granted active service status, CMSRB discussed the groups in terms of their overall contribution, refraining from focusing on the minute details of the group’s service. For example, in its approval of the Signal Corps Female Telephone Operators Unit, CMSRB

¹²⁹ SGU SERVICE HISTORY, *supra* note 31, at 5–7 (detailing the history of the formation of the SGU, which has its roots in President Eisenhower’s objective of “stabiliz[ing] the situation in Laos without having to send American troops there”).

¹³⁰ “I think all of us here today are in accord that [the WASPs] served bravely and willingly during times of great national need, and that many individual women among these groups performed heroically. They are representative of American women, whose great contribution to our Nation—as productive workers, as volunteers, and as homemakers—is still afforded too little recognition.” *Recognition for Purposes of VA Benefits*, *supra* note 69 at 2 (statement of Sen. Alan Cranston, Chairman, S. Comm. on Veterans’ Affairs).

¹³¹ See 123 Cong. Rec. H36,941 (daily ed. Nov. 3, 1977) (statement of Rep. Olin Teague).

¹³² See *id.* at H36,952 (statement of Sen. Barry M. Goldwater) (noting that in 1976 Congress extended veteran benefits to any citizen of Poland or Czechoslovakia who fought on the allied side of WWII and had been a citizen of the United States for the preceding ten years, and stating it would be “a sad, sad commentary on this body if we fail to treat our women, American Patriots of World War II, in the same way.”).

¹³³ GI Bill Improvement Act of 1977, Pub. L. No. 95-202, § 401(a)(1), 91 Stat. 1443, 1449 (1977). After the CIA kept its paramilitary efforts in Laos under Congress’s radar for a decade, the publishing of the Pentagon Papers in 1971 unveiled the true extent of the CIA’s and the U.S. Armed Forces’ operations in Southeast Asia. See generally Walt Haney, *The Pentagon Papers and the United States Involvement in Laos*, in THE PENTAGON PAPERS, VOL. 5: CRITICAL ESSAYS 248 (1972).

¹³⁴ 38 C.F.R. §§ 3.7(x)(9), (11), (31) (2019).

stated that “[a]vailability of the female operators theoretically released soldiers for combat or telephone operators for service at more dangerous locations.”¹³⁵ Addressing the World War I Quartermaster Corps Female Clerical Employees Serving with the American Expeditionary Forces, CMSRB stated that they “contribute[d] to the success of the military mission [by relieving enlisted men for duty at the front].”¹³⁶ Finally, in its discussion of the failure by CMSRB to recognize the Merchant Marines, the court in *Schumacher* quoted General Douglas MacArthur’s support of the Merchant Marines’ contribution to the war effort in World War II: “[the Merchant Marines] have contributed tremendously to our success. I hold no branch in higher esteem than the merchant marine service.”¹³⁷

U.S. officials speak of the Hmong in very similar terms. For example, the former head of the CIA’s Far East Division, William Colby, praised the Hmong: “For [ten] years, Vang Pao’s soldiers held the growing North Vietnamese forces to approximately the same battlelines they held in 1962. And significantly for Americans, the 70,000 North Vietnamese engaged in Laos were not available to add to the forces fighting Americans and South Vietnamese in South Vietnam.”¹³⁸ Amongst the Hmong themselves, it was understood that “[o]ne Hmong that died in Laos meant one American going home.”¹³⁹ These quotes embody the incredible contribution the Hmong made to the United States’ war effort in Southeast Asia. Like the WASPs and other recognized groups, the Hmong SGU allowed American servicemembers to remain focused on the war front in Vietnam. Even more drastically than the WASPs, the SGU’s efforts kept more troops from being deployed and kept American forces from fighting a war on two fronts by engaging in combat and directly fighting the United States’ enemy.¹⁴⁰ Recognition of such efforts is clearly within the purpose of the GI Bill Improvement Act, regardless of who directed the SGU.

Additionally, during the Vietnam War, the U.S. military was aware and supportive of the efforts of the Hmong paramilitary program. While the Commander of the U.S. Military Assistance Command in Vietnam, William Westmoreland, and the Ambassador to Laos, Bill Sullivan, held differing opinions on the amount of American military intervention necessary in Laos, the two were well-acquainted with the need for “collaboration” between the

¹³⁵ *Schumacher*, 665 F. Supp at 45.

¹³⁶ *Id.* (alteration in original).

¹³⁷ *Id.* at 48.

¹³⁸ SGU SERVICE HISTORY, *supra* note 31, at 13 (quoting William Colby).

¹³⁹ *Hmong Soldiers Not Considered US Veterans* (Twin Cities PBS television broadcast Oct. 3, 2017), <https://www.mnvietnam.org/story/hmong-soldiers-not-considered-us-veterans/> [<https://perma.cc/H4JT-CQ5B>].

¹⁴⁰ SGU SERVICE HISTORY, *supra* note 31, at 5–7.

Hmong and U.S. Special Forces running missions along the border of Laos and Vietnam.¹⁴¹ Their joint efforts and regular communication demonstrate that the military was not completely unengaged with the activities of the SGU. To the contrary, the nature of the effort to reduce North Vietnamese access to Laos required the CIA to direct the SGU with the military's overall strategy in mind, and also required the military to take account of the SGU's operations in its own planning and strategy.¹⁴² Thus, though the Hmong did not operate under day-to-day control of the U.S. Armed Forces, their movements and operations were inextricably intertwined with the Armed Forces' operations and overall control. One could not act without notifying the other so as to avoid friendly fire between the two forces.¹⁴³

Finally, realism requires us to reject a distinction between the deployment and usage of a militarized unit under the control of CIA versus one under the control of the U.S. Armed Forces. Though the CIA and the military operate under different statutory authority—Title 10 and Title 50 of the United States Code, respectively—the line between the Title 10 and Title 50 missions has become increasingly blurred since the militarization of the CIA during its activities in Laos.¹⁴⁴ Since then, the CIA has been the near-

¹⁴¹ 306. *Telegram From the Ambassador to Laos (Sullivan) to the Commander, Military Assistance Command, Vietnam (Westmoreland)* (Aug. 10, 1967), in FOREIGN RELATIONS OF THE UNITED STATES, 1964–1968, VOL. XXVII, LAOS, <https://history.state.gov/historicaldocuments/frus1964-68v28/d306> [<https://perma.cc/4MT4-ACY8>] (“Your message on Prairie Fire touches on the question of the collaborative effort required to deal with the problem of enemy operations on Lao territory. I fully endorse this principle of collaboration and assure you that I also subscribe to the principle of flexibility”); 251. *Telegram From the Commander, Military Assistance Command, Vietnam (Westmoreland) to the Commander in Chief, Pacific (Sharp)* (Sept. 16, 1966), in Foreign Relations of the United States, 1964–1968 Vol. XXVII, Laos, <https://history.state.gov/historicaldocuments/frus1964-68v28/d251> [<https://perma.cc/68FP-L5MT>] (“A particular issue emerging from ensuing discussion was the positioning of ground elements by [the Hmong] without prior coordination with [military command], thereby imposing restrictions on US air operations, e.g., road-watch positions located at selected interdiction points (SIPs). Amb[assador] Sullivan agreed that mutual coordination was necessary.”).

¹⁴² See 251. *Telegram From the Commander, Military Assistance Command, Vietnam (Westmoreland) to the Commander in Chief, Pacific (Sharp)*, *supra* note 141.

¹⁴³ See 306. *Telegram From the Ambassador to Laos (Sullivan) to the Commander, Military Assistance Command, Vietnam (Westmoreland)*, *supra* note 141 (“A [Hmong] special guerrilla unit is in the area of an enemy force which is well west of the Prairie Fire zone. For Prairie Fire teams to attack in this area would have required their introduction into the vicinity of our [Hmong] unit, from which they would then have mounted their action. This would have brought the Prairie Fire team into potential conflict with the [Hmong] unit. For this reason it was decided that the [Hmong] unit would undertake the mission and it is currently moving to engage the enemy.”).

¹⁴⁴ See RICHARD A. BEST JR. & ANDREW FEICKERT, CONG. RSCH. SERV., RS22017, SPECIAL OPERATIONS FORCES (SOF) AND CIA PARAMILITARY OPERATIONS: ISSUES FOR CONGRESS 3 (2006).

sole developer of paramilitary forces around the globe organized and trained to serve the United States' interests. Just a few of the CIA's declassified operations include training the Thai Police Aerial Reinforcement Unit ("PARU") forces (also developed during the Vietnam War), rebel forces in Nicaragua, and paramilitary operations in Somalia.¹⁴⁵ The paramilitary groups created and supplied by the CIA have regularly supported and interacted with American ground forces or military intelligence. Perhaps the most well-known example of such interaction between the CIA and the military is the Omega Program, a joint operation between the CIA and the military to assassinate Osama Bin Laden.¹⁴⁶ The Omega Program utilized the paramilitary forces under the control of the CIA (the Afghan Pashtuns) to "run spying missions into the Pakistani tribal areas," and used that information to inform missions conducted by SEAL Team Six.¹⁴⁷ SEALs even ran missions with the paramilitary forces.¹⁴⁸ The program was actually modeled off the Phoenix Program utilized in Vietnam where CIA "officers and Special Operations troops conducted interrogations and assassinations to try to dismantle the Vietcong's guerilla networks in South Vietnam."¹⁴⁹ Given the necessity for collaboration between the CIA's intelligence operatives, its paramilitary groups, and the U.S. Special Forces, the ability to distinguish when a mission is exclusively "Title 10" or "Title 50" has become much more challenging.

Because the line between a CIA and military operation is becoming increasingly blurred, CMSRB's criteria for recognition of active service operate on antiquated notions of warfare and should be amended.

B. *SGU Access to VA Benefits: Narrow and Broad Solutions*

There are multiple solutions the U.S. government could employ to offer the Hmong SGU long-awaited access to benefits they earned in their service to the United States and its military efforts in Laos. Applying CMSRB's

¹⁴⁵ See Leary, *supra* note 32; Mark Mazzetti, *U.S. Signals Backing for Ethiopian Incursion Into Somalia*, N.Y. TIMES (Dec. 27, 2006), <https://www.nytimes.com/2006/12/27/world/africa/27africa.html> [<https://perma.cc/N86S-FMMF>]; Timothy Alexander Guzman, *The CIA's Dirty War in Nicaragua*, GLOBAL RSCH. (Apr. 24, 2018), <https://www.globalresearch.ca/the-cias-dirty-war-in-nicaragua/5629008> [<https://perma.cc/LPW8-3V3S>].

¹⁴⁶ Mark Mazzetti, Nicholas Kulish, Christopher Drew, Serge F. Kovalski, Sean D. Naylor, & John Ismay, *SEAL Team 6: A Secret History of Quiet Killings and Blurred Lines*, N.Y. TIMES (June 6, 2015), <https://www.nytimes.com/2015/06/07/world/asia/the-secret-history-of-seal-team-6.html> [<https://perma.cc/5UAJ-4JPZ>].

¹⁴⁷ *Id.* SEALs are the U.S. Navy's "Sea, Air, and Land Forces." *Navy Seal Careers*, NAVY, <https://www.navy.com/seals> [<https://perma.cc/8D4L-MR7M>].

¹⁴⁸ See Mazzetti et al., *supra* note 146.

¹⁴⁹ *Id.*

criteria, the Hmong SGU clearly satisfies the preliminary hurdle of eligibility for recognition under the GI Bill Improvement Act. First, the Hmong SGU is a similarly situated group to the WASPs because it was a clearly identified group during the Vietnam War that rendered services to the United States during a period of armed conflict.¹⁵⁰ Second, the SGU were employed by the United States as they received a monthly payment for their efforts and, because the SGU was formed during the exigencies of war, no formal hiring process was necessary.¹⁵¹ Third, the SGU rendered its service during the Vietnam War, which is specifically identified by CMSRB as something that would qualify as “armed conflict.”¹⁵² Fourth, the SGU consists of living persons today, with at least 3,500 veterans living in the United States as citizens.¹⁵³ Finally, the SGU members have not received benefits from the federal government for their service, outside the access to federal military burial sites.¹⁵⁴ However, an extension of burial rights is not preclusive of meeting the initial criteria, as the WASPs themselves were extended access to military burial sites in 2016, *including* Arlington National Cemetery.¹⁵⁵

After meeting the initial hurdle, a look at the promulgated criteria that favor equivalency between active service and active military service demonstrates that even under the current regulations, the SGU should be recognized as having rendered active service. At the outset, it is important to note these criteria are simply that: criteria. CMSRB’s analysis does not include required elements, nor is any one factor dispositive. For example, the WASPs were not subject to military justice and could resign at will, even though these factors would weigh against recognition of another group’s service.¹⁵⁶ With regard to the SGU, the group served under exigent circumstances and provided unique service that was not expected from any

¹⁵⁰ See 32 C.F.R. §§ 47.3, 47.4(a)(1) (2019).

¹⁵¹ See § 47.4(a)(2); *Hmong Timeline*, *supra* note 42 (“Each soldier was paid an equivalent of three dollars a month.”).

¹⁵² See §§ 47.3(a), 47.4(a)(3).

¹⁵³ See § 47.4(a)(4); Brunswick, *supra* note 11. Compare this with the veterans during the Spanish-American War period, for whom recognition would only be for commemorative purposes, which falls outside the scope of the law. See Active Duty Service Determination for Civilian or Contractual Groups, 54 Fed. Reg. 39,991 (Sept. 29, 1989) (to be codified at 32 C.F.R. pt. 47).

¹⁵⁴ See Consolidated Appropriations Act 2018, Pub. L. 115-141, § 251, 132 Stat. 348, 824–25 (2018).

¹⁵⁵ See Laura Wagner, *Congress Approves Arlington Cemetery Burials For Female WWII Pilots*, NPR (May 11, 2016, 8:13 PM), <https://www.npr.org/sections/thetwo-way/2016/05/11/477716378/congress-approves-arlington-cemetery-burials-for-female-wwii-pilots> [<https://perma.cc/29WY-9DYB>].

¹⁵⁶ 32 C.F.R. §§ 47.4(b)(1)(iv), (2)(ii); *Recognition for Purposes of VA Benefits*, *supra* note 69 at 45 (statement of Dorothy Starbuck, Chief Benefits Director, VA).

traditional civilian group.¹⁵⁷ The SGU was clearly “organized by *U.S. Government authorities* to fill a wartime need” when it was established and developed as a coherent and cohesive fighting force by the CIA to fill the “need” of containing the enemy—both in the abstract and physical sense—in a neutral country.¹⁵⁸ Further, the SGU performed its service in combat zones across Laos, actively engaging with the enemy, taking and returning fire, and suffering casualties for over a decade, all of which point toward service that is “beyond that generally performed by civilian employees”¹⁵⁹ Moreover, SGU members received military training and the group achieved military capability.¹⁶⁰ Tens of thousands of Hmong underwent aircraft, commando, and infantry training to perform missions as a conventional military force.¹⁶¹ The SGU’s capacity as a military force is unquestioned, and figures estimate that 70,000 North Vietnamese were kept out of the war in Vietnam because of the fight in Laos.¹⁶²

Additionally, recognizing the SGU’s service as active service is not impeded by any of the factors the Department of Defense promulgated as “[i]ncidents not favoring equivalency.”¹⁶³ First, there is no indication that the Hmong submitted themselves to the United States for protection or for their own well-being.¹⁶⁴ The United States and the Hmong created the SGU as a joint venture, as both recognized the need to work together to increase their chances of success against communist forces.¹⁶⁵ The Hmong were fighting in the Laotian civil war before the CIA’s involvement, and likely would have continued their own fight against the communist forces absent the CIA.¹⁶⁶ The CIA, however, needed a covert force that kept the United States’ involvement in Laos under wraps, meaning the United States needed the Hmong for *its* own well-being.¹⁶⁷ Further, the SGU suffered from defections and deserters, indicating that once a Hmong person committed to the SGU, they could not simply resign.¹⁶⁸ Thus, with more factors weighing in favor of recognition of the SGU’s service as active service than factors weighing against such recognition, the narrowest and simplest solution to the SGU’s

¹⁵⁷ See § 47.4(a)(2); SGU SERVICE HISTORY, *supra* note 31, at 4–5.

¹⁵⁸ § 47.4(b)(1)(i)(A) (emphasis added); SGU SERVICE HISTORY, *supra* note 31, at 5–10.

¹⁵⁹ § 47.4(b)(1)(i); see *supra* text accompanying notes 28–33.

¹⁶⁰ See § 47.4(b)(1)(vii); SGU SERVICE HISTORY, *supra* note 31, at 9–10.

¹⁶¹ See SGU SERVICE HISTORY, *supra* note 31, at 5–10.

¹⁶² See *id.* at 13.

¹⁶³ § 47.4(b)(2); see *supra* text accompanying notes 100–101.

¹⁶⁴ See § 47.4(b)(2)(i).

¹⁶⁵ See SGU SERVICE HISTORY, *supra* note 31, at 4–7.

¹⁶⁶ See *id.* at 4–5; KURLANTZICK, *supra* note 24, at 6.

¹⁶⁷ See *supra* Part II.A.

¹⁶⁸ See KURLANTZICK, *supra* note 24, at 161–62; § 47.4(b)(2)(ii).

ineligibility for VA benefits is for CMSRB to recommend that the SGU be granted active service recognition by the Secretary of the Air Force.

This solution is contingent on CMSRB's acceptance of the argument that (1) the U.S. Armed Forces exercised control over the SGU's mission through its coordination with the CIA and (2) that the Armed Forces and CIA pursued the same goal in Southeast Asia.¹⁶⁹ CMSRB could choose not to interpret the current regulations in this way, even though doing so would help accomplish the fair treatment members of the SGU seek. Thus, another possible solution would be for the Department of Defense to amend its criteria for determining active service to *explicitly* include civilian groups that operated under the direct control of the CIA. This would entail amending 32 C.F.R. § 47.4(b) to read:

A determination of [active duty] service that is considered to be equivalent to active military service is made on the extent to which the group was under the control of the U.S. Armed Forces *and/or* the Central Intelligence Agency in a military operation or mission during an armed conflict.

This revision would mirror the changes and developments in modern warfare, where a militarized CIA maintains a presence in military operations across the world, including through operations it conducts on its own. Further, since its activities in Laos, the CIA has maintained great control over paramilitary operations, requiring less use of civilian groups by the U.S. Armed Forces directly.¹⁷⁰ The CIA was created *after* World War II, and the fact that no groups outside of those that participated in World War I and World War II have been recognized by CMSRB only supports the contention that the military's role in the direction of civilian groups has increasingly diminished.¹⁷¹ Additionally, expanding the criteria for recognition would provide justice to not only the Hmong SGU, but other paramilitary forces whose sacrifices were made at the direction of the United States to save American lives and resources. However, this is not to say that the Department of Defense should open up access to VA benefits to every group the CIA has controlled or directed across the world. Currently, the criteria contain sound limiting factors—such as submission to the United States for protection, even if the United States armed a group for defensive purposes—that would prevent open access to VA benefits by foreign groups unlike the Hmong.¹⁷²

¹⁶⁹ § 47.4(b).

¹⁷⁰ BEST & FEICKERT, *supra* note 144, at 3.

¹⁷¹ 38 C.F.R. § 3.7(x) (2019); *History of the CIA*, *supra* note 28.

¹⁷² 32 C.F.R. § 47.4(b)(1)(i).

Additionally, the Department of Defense could further limit access, and reduce “floodgate” concerns, by using the Hmong SGU as an example of a group whose participation was “a vital element of the war-fighting capability of the Armed Forces,” meaning the group acted as a surrogate for U.S. forces.¹⁷³ The Department of Defense could adopt a limiting requirement that the CIA’s control over a group must be in pursuance of a common purpose with the U.S. Armed Forces in a conflict in which American servicemembers are involved. This would exclude those groups that the CIA supports through provision of arms and funds, but who are not supported by the United States—typically rebel forces. Additionally, the Department of Defense could limit recognition of service to groups who consist of a large proportion of naturalized U.S. citizens—like the Hmong—which would strengthen the connection between the U.S. and the group applying for recognition.

Finally, Congressional intervention is another viable solution. In order to recognize the service of the Hmong, Congress could pass legislation designating the SGU’s service as “active service,” as it has with twenty-four groups in the past.¹⁷⁴ For example, Congress legislated that Filipino veterans enlisted during World War II rendered “active service,” including veterans who served with the Philippine Scouts or the Philippine Commonwealth Army and Filipino guerillas.¹⁷⁵ Recognizing the Hmong SGU as veterans through legislation would respond to the recent surge of support for such recognition while simultaneously limiting the potential “floodgate” concerns that arise with the expansion of the Department of Defense criteria for determining active service. Yet, the legislative process is lengthy and often encounters political gridlock, which poses a particular challenge when the potential benefit recipients are elderly and face numerous physical and mental health ailments incurred from their service. Further, a statutory grant of recognition would only benefit the Hmong, whereas amending the Department of Defense criteria would benefit the Hmong *and* provide a path to recognition for similar groups.

Among the three proposed solutions, an amendment to the Department of Defense criteria seems to be the most efficient method of ensuring recognition for the Hmong SGU and future paramilitary groups seeking active service status. Specifically, because agencies are often afforded *Chevron* deference when interpreting their authorizing statutes, the

¹⁷³ § 47.4(b)(1)(i).

¹⁷⁴ See, e.g., First Supplemental Surplus Appropriation Rescission Acts of 1946, Pub. L. No. 79-301, 60 Stat. 6, 14 (codified as amended at 38 U.S.C. § 107). A complete list of groups made eligible through Congressional statute can be found at 38 C.F.R. § 3.7.

¹⁷⁵ See 60 Stat. at 14; 38 C.F.R. § 3.40.

amendment would likely be upheld should it be challenged in courts.¹⁷⁶ An amendment by the Department of Defense to its active service criteria will provide a past, present, and future-oriented solution to the SGU's access to VA benefits.

CONCLUSION

Had that young man who lost his leg in a land mine explosion been considered a veteran, he could have further pursued his claim for disability benefits at the Board of Veterans' Appeals. Were he to succeed on that claim, he would have received anywhere between a 60% and 90% disability rating, depending on exactly where his leg was amputated.¹⁷⁷ Such high ratings would have secured him monthly disability compensation between \$1,131.68 and \$2,216.96.¹⁷⁸ For SGU veterans, who have struggled with language and educational barriers when seeking employment, an extra \$1,100 to \$2,200 a month could make an extreme impact on their financial stability.

Beyond the monetary gain, the United States must grant SGU veterans access to VA benefits to recognize the undeniable sacrifice of the Hmong SGU, who stood in place of the American lives that otherwise would have been on the front lines in Laos. The Hmong people sacrificed 30,000 to 40,000 lives for the United States' war effort and ensured that some 70,000 North Vietnamese troops were unable to fight against U.S. servicemembers in Vietnam.¹⁷⁹ Forty-five years later, it is time for the United States to recognize the debt it owes to the Hmong Special Guerilla Unit.

¹⁷⁶ In *Chevron USA v. Nat'l Resources Defense Council, Inc.*, 47 U.S. 837 (1984), the U.S. Supreme Court developed a two-step test that accords an agency's interpretation of a governing statute substantial deference. *See id.* at 842–43. The test requires a court to first determine whether Congress directly spoke to the precise question at issue in the relevant statute and, if not, the court must then determine whether the agency's interpretation of the relevant provision is a reasonable one. *See id.* The proposed amendment to the Department of Defense's criteria would be an interpretation of 38 U.S.C. § 106 (note), which codifies the GI Bill Improvement Act of 1977, Pub. L. No. 95–202, § 401, 91 Stat. 1449. The regulation would therefore be subject to *Chevron* deference, making this solution particularly viable.

¹⁷⁷ *See* 38 C.F.R. § 4.71a, Diagnostic Codes 5160–73.

¹⁷⁸ *See* 2021 *Veterans Disability Compensation Rates*, U.S. DEP'T OF VETERANS AFFS., <https://www.va.gov/disability/compensation-rates/veteran-rates/> [https://perma.cc/ZV62-SPFM].

¹⁷⁹ *See Hmong Timeline*, *supra* note 42; SGU SERVICE HISTORY, *supra* note 31, at 13 (quoting William Colby, head of the CIA's Far East Division).