

7-1-2015

Justice Delayed; Justice Denied? Causes and Proposed Solutions Concerning Delays in the Award of Veterans' Benefits

Michael P. Allen

Follow this and additional works at: <http://repository.law.miami.edu/umnsac>



Part of the [Military, War and Peace Commons](#), and the [National Security Commons](#)

Recommended Citation

Michael P. Allen, *Justice Delayed; Justice Denied? Causes and Proposed Solutions Concerning Delays in the Award of Veterans' Benefits*, 5 U. Miami Nat'l Security & Armed Conflict L. Rev. 1 (2015)
Available at: <http://repository.law.miami.edu/umnsac/vol5/iss1/4>

This Contribution is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami National Security & Armed Conflict Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.

Justice Delayed; Justice Denied? Causes and Proposed Solutions Concerning Delays in the Award of Veterans' Benefits

Michael P. Allen*

ABSTRACT

As he turned his eyes toward leading the country into life after the Civil War, President Abraham Lincoln famously called on the nation to “care for him who shall have borne the battle and for his widow and his orphan.”¹ Sadly, President Lincoln would not live to see how much Americans have heeded his call to support our veterans. In many respects, this symposium is a contemporary example of a continuing commitment to Lincoln’s charge. From a variety of perspectives, the participants have addressed the myriad ways in which our returning combat veterans face legal, medical, political and social challenges as they reintegrate into society. This important discussion underscores that a conscious focus on the men – and today, women – who serve in the military is as significant today as it was in 1865.

My contribution to the symposium focuses on the difficulties veterans face in obtaining benefits administered by the United States Department of Veterans Affairs (the VA). These benefits are an important part of Lincoln’s legacy. Indeed, the quotation from President Lincoln’s second inaugural address adorns the

* Associate Dean for Academic Affairs, Professor of Law, and Director, Veterans Law Institute, Stetson University College of Law. B.A., 1989 University of Rochester; J.D., 1992 Columbia University School of Law. I would like to thank the staff of the University of Miami National Security and Armed Conflict Law Review for the invitation to take part in this important symposium as well as for the professional and helpful manner in which they have interacted with all of the participants.

¹ President Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865).

entryway at the VA's main headquarters in Washington.² My principal goal in this essay is to provide an overview of the difficulties veterans face under the current system as well as to consider what could be done to address these problems.³ Simply put, American veterans are waiting far too long to obtain the benefits to which they are entitled.

This essay proceeds in four parts. Part I sets forth a description of the current system under which veterans apply for benefits and appeal adverse decisions. As will become clear, the current system is complex and overburdened with quite literally millions of claims. Part I also provides statistics concerning the rampant delays many veterans face as they pursue their claims for benefits. Part II turns to the causes for the complexity of and delays associated with the current veterans' benefits system. As Part II explains, the problems veterans face can, ironically enough, be explained in significant measure by how much we as a nation have heeded President Lincoln's call. Part III discusses approaches that could be taken to address the problems veterans face in obtaining their benefits. There is no silver bullet, but Part III lays out steps that could be taken to alleviate some of the issues confronting veterans as we work towards a more global solution. Finally, Part IV sets out a conclusion and call to action.

Table of Contents

| | |
|---|---|
| ABSTRACT | 1 |
| I. THE VETERANS' BENEFITS SYSTEM: STRUCTURE AND WORKLOAD | 3 |
| A. <i>The VA and the Benefits it Administers</i> | 3 |
| B. <i>The Benefits' Process</i> | 5 |

² Ken McKinnon, *To Care for Him Who Shall Have Borne the Battle*, U.S. DEP'T OF VETERANS AFFAIRS (Mar. 4, 2015, 8:30 AM), <http://www.blogs.va.gov/VAntage/17573/care-shall-borne-battle/>.

³ Throughout this essay I use the term "veteran" to refer to those people seeking VA benefits. The category of potential claimants is actually larger, including certain spouses and children. *See, e.g.*, 38 U.S.C. § 1316 (providing benefits to certain spouses and child of veterans); 38 U.S.C. §§ 1801-1834 (concerning benefits available to certain children of Vietnam veterans). The comments about the system, its problems, and potential solutions are as applicable to the other claimants as to veterans themselves.

| | |
|---|----|
| 1. The Administrative Process | 5 |
| 2. The Judicial Process..... | 7 |
| 3. A Comparison of the Administrative and Judicial Systems | 8 |
| 4. The Workload in the System, Delays and the “Hamster Wheel” | 10 |
| II. CAUSES OF DELAY: A SURPRISING DOWNSIDE OF A COMMITMENT TO VETERANS | 13 |
| <i>A. The Substantive Generosity of Congress</i> | 14 |
| <i>B. The Ad Hoc Development of the Veterans’ Benefits System</i> | 14 |
| <i>C. Procedural Protections Provided Claimants</i> | 17 |
| <i>D. Legal Complexity</i> | 18 |
| III. WHAT CAN BE DONE? SOME THOUGHTS ABOUT POTENTIAL SOLUTIONS..... | 19 |
| <i>A. Initial Submission of Claims</i> | 21 |
| 1. Greater Use of Presumptions | 21 |
| 2. Greater Involvement of Lawyers | 23 |
| 3. Greater Use of Devices to Obtain Information | 25 |
| <i>B. Administrative Appeals</i> | 28 |
| 1. Elimination of the SOC..... | 29 |
| 2. Factual Development at the Board..... | 29 |
| <i>C. Judicial Review</i> | 30 |
| 1. Greater Reversal at the CAVC..... | 31 |
| 2. The Role of the Federal Circuit..... | 32 |
| 3. Aggregate Issue Resolution..... | 33 |
| IV. CONCLUSION AND CALL TO ACTION | 33 |

I. THE VETERANS’ BENEFITS SYSTEM: STRUCTURE AND WORKLOAD

A. The VA and the Benefits it Administers

It is not an exaggeration to state that a veteran seeking benefits through the VA faces a daunting task. The VA is perhaps the definition of a byzantine bureaucracy. It is the second largest federal cabinet department with over 300,000 employees as of 2014.⁴ Indeed, the VA’s own attempt to describe itself resulted in a document over 350 pages

⁴ U.S. Dep’t of Veterans Affairs 2014 Functional Organization Manual – v.2.0a at 11, http://www.va.gov/ofcadmin/docs/VA_Functional_Organization_Manual_Version_2.0a.pdf.

long.⁵ According to the VA, it provides services at “151 medical centers, 8209 community-based outpatient clinics, 300 vet centers, 56 regional offices, and 131 national and 90 state or tribal cemeteries.”⁶ Veterans can certainly be forgiven by being intimidated by what could accurately be described as a giant maze.

On a gross level, one can think of the VA as being focused on three major missions represented by three “administrations” within the department: medical care; cemeteries/burial; and general benefits unrelated to medical care or burial.⁷ This essay focuses on those parts of the VA dealing with benefits, principally through the Veterans Benefits Administration or “VBA.”

Title 38 of the United States Code provides a wide array of benefits to which veterans are entitled.⁸ The most common form of veterans’ benefit, and the one on which this essay will principally focus, is service-connected disability compensation.⁹ Essentially, this benefit provides monthly monetary payments to veterans for injuries or illnesses connected to the veterans’ military service.¹⁰ A veteran will be entitled to such benefit if she establishes that she qualifies as a “veteran,”¹¹ suffers

⁵ See generally *id.*

⁶ *Id.* at 11.

⁷ *Id.* at 13. The three entities within the VA focusing on these areas are the Veterans Health Administration, the National Cemetery Administration, and the Veterans Benefits Administration.

⁸ The range of benefits available to veterans is truly staggering. See, e.g., 38 U.S.C. §§ 1101-1163 (“Compensation for Service-Connected Disability or Death”); §§ 1301-1323 (“Dependency and Indemnity Compensation for Service-Connected Deaths”); §§ 1501-1562 (“Pension for Non-Service Connected Disability or Death for Service”); §§ 1701-1787 (“Hospital, Nursing Home, Domiciliary, and Medical Care”); §§ 1801-1834 (“Benefits for Children of Vietnam Veterans and Other Veterans”); §§ 1901-1988 (“Insurance”); §§ 2001-2066 (“Benefits for Homeless Veterans”); §§ 2301-2308 (“Burial Benefits”); §§ 3001-3035 (“All-Volunteer Force Educational Assistance Program”); §§ 3100-3122 (“Training and Rehabilitation for Veterans with Service-Connected Disabilities”); §§ 3201-3243 (“Post-Vietnam Era Veterans’ Educational Assistance”); §§ 3301-3325 (“Post-9/11 Educational Assistance”); §§ 3701-3765 (“Housing and Small Business Loans”); §§ 4100-4114 (“Job Counseling, Training, and Placement Service for Veterans”); and §§ 4211-4215 (“Employment and Training of Veterans”).

⁹ For example, in its most recent statement concerning the benefits it administers, the VA noted that it provided disability compensation to over 4 million people. This compared to about a half million people receiving pensions and about 1.1 million people receiving education benefits. See *2014 Performance and Accountability Report*, U.S. DEPT. OF VETERANS AFFAIRS, pt. I-9 (Nov. 2014), <http://www.va.gov/budget/docs/report/2014-VAParFullWeb.pdf>.

¹⁰ See *Veterans Benefits Manual* §3.1.1 at 57 (Barton F. Stichman, Ronald B. Abrams & Louis J. George, eds., 2014).

¹¹ 38 U.S.C. § 101(2) (defining a veteran as “a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable.”).

from a current disability (not the result of drug or alcohol abuse), and that disability is connected to an injury, event or illness occurring during the veteran's time in the military.¹² This latter concept – the connection between a current condition and an in-service event, is often referred to as “nexus.”¹³ Thus, a veteran who injured her left knee when jumping out of an aircraft during service would be able to receive compensation for the knee injury if she had medical evidence of her knee condition, factual evidence of the parachute jump, and medical evidence linking these two things. And the person who saw horrific events while in-service could establish an entitlement to benefits for post-traumatic stress disorder (PTSD).¹⁴ The latter situation is certainly more complex than the former, but the concept is the same.

There are far more complexities in the process than are apparent by this brief description of how a veteran establishes an entitlement to service-connected disability compensation.¹⁵ However, the information is sufficient for one to now consider the process by which a veteran attempts to obtain such a benefit within the VA system.

B. The Benefits' Process

1. The Administrative Process

A veteran wishing to receive benefits begins her journey at one of the VA's Regional Offices (“RO,” also called the “agency of original jurisdiction”) either by filing the claim physically at such location or submitting a claim through a VA online system.¹⁶ If a veteran obtains the

¹² See 38 U.S.C. §§ 1110, 1131; see also *Washington v. Nicholson*, 19 Vet. App. 362, 367 (2005), citing *Caluza v. Brown*, 7 Vet. App. 498, 506 (1995), *aff'd* 78 F.3d 604 (Fed. Cir. 1996).

¹³ See e.g., *Veterans Benefits Manual*, *supra* note 10 at § 3.4 (discussing nexus requirement).

¹⁴ See generally *Veterans Benefits Manual*, *supra* note 10 at § 3.6 (discussing special regime in place for PTSD claims).

¹⁵ For example, a veteran can establish service connection for certain conditions based on “secondary service-connection.” See 38 C.F.R. § 3.310 (providing in relevant part: “disability which is proximately due to or the result of a service-connected disease or injury shall be service connected. When service connection is thus established for a secondary condition, the secondary condition shall be considered a part of the original condition.”). So, the veteran in the example in the text who injured her left knee in service could also be secondarily service-connected for a right hip condition if there was medical evidence sufficient to establish that the left knee injury caused the veteran to walk with a gait that, thereafter, caused a right hip problem.

¹⁶ See *U.S. Dep't of Veterans Affairs*, www.benefits.va.gov/COMPENSATION/apply.asp (last visited May 1, 2015) (providing claimants with instructions about filing an initial claim for benefits); see also *Veterans Benefits Manual*, *supra* note 10 at § 12.1 (providing overview of initial filing of claims).

benefits she seeks, the process comes to an end. But a veteran might be denied benefits or otherwise be dissatisfied with the RO's decision.¹⁷ In such a situation, the veteran is statutorily entitled to an appeal within the agency.¹⁸

The administrative appeal process is a multi-step one.¹⁹ It begins with a veteran indicating her intent to appeal by filing a "Notice of Disagreement" (NOD) with the RO.²⁰ The veteran has one-year from the date of mailing of the decision with which the claimant disagrees.²¹ The NOD does not perfect a veteran's appeal. Instead, the filing of that document triggers an obligation of the RO either to alter its decision or to prepare a "Statement of the Case" (SOC).²² An SOC is designed to provide the veterans with additional information about the basis for the decision, including a summary of the evidence, a statement of the relevant law, and why given those items the decision at issue was made.²³

After all of this one would assume that the matter is set for administrative appeal. But the veteran has still not perfected her appeal. To do so, within sixty days of when the SOC is mailed to her, she must submit a formal appeal.²⁴ This formal appeal is done by completing VA-Form 9.²⁵

The veteran's appeal is determined by an entity within the VA independent of the Veterans Benefits Administration, the Board of Veterans' Appeals (Board).²⁶ The Board is comprised of a Chairperson

¹⁷ In addition to being denied a benefit outright, a veteran could be dissatisfied with a variety of other decisions. For example, the veteran might believe she is entitled to an "effective date" for benefits earlier than the RO assigned. See 38 U.S.C. § 5110. Alternatively, the veteran might disagree with the amount of monthly compensation the RO awarded, a concept known as a "rating" decision. See 38 U.S.C. § 1155.

¹⁸ See 38 U.S.C. § 7104(a) (providing that veterans are entitled to "one appeal to the secretary [of the Department of Veterans Affairs]" when denied benefits).

¹⁹ The VA provides a basic description of the multistage appeals process in a booklet available on the internet. See *How Do I Appeal?* (Apr. 2002), www.bva.va.gov/docs/Pamphlets/010202A.pdf.

²⁰ 38 U.S.C. § 7105(a)(b). The veteran may also seek review by a more senior RO employee at this stage, a Decision Review Officer (DRO). See 38 C.F.R. § 3.2600. Use of the DRO procedure is optional and does not affect the discussion in the text. Accordingly, I will generally refer to the RO in this essay without specifying whether a DRO is involved. For more information concerning the DRO process, see *Veterans Benefits Manual*, *supra* note 10, at § 12.8.1.

²¹ 38 U.S.C. § 7105(b)(1).

²² 38 U.S.C. § 7105(d)(1).

²³ 38 U.S.C. § 7105(d)(1)(A)-(C).

²⁴ 38 U.S.C. § 7105(d)(3).

²⁵ See *How Do I Appeal?*, *supra* note 19 at 6. The form itself can be found online. See www.va.gov/vaforms/va/pdf/va9.pdf.

²⁶ 38 U.S.C. § 7104(a).

appointed by the President of the United States, a Vice-chairperson, and a sufficient number of Board Members (or Veterans Law Judges) to consider appeals.²⁷ The Board bases its decision “on the entire record of the proceeding and upon consideration of all evidence and material of record and applicable law and regulation.”²⁸ Unlike most appellate processes, a veteran may submit additional evidence to the Board in connection with her appeal.²⁹ A final Board decision concludes the administrative process.

2. The Judicial Process

Until 1988, the Board’s decision was the end of the matter; veterans were prohibited from obtaining judicial review of a VA decision concerning benefits.³⁰ That changed with the passage of the Veterans Judicial Review Act (VJRA).³¹ The VJRA created a federal court today known as the United States Court of Appeals for Veterans Claims (CAVC).³² Thus, today a veteran may seek further review of a decision denying benefits outside the administrative process by appealing to the CAVC.³³ The veteran must file her notice of appeal with the CAVC

²⁷ 38 U.S.C. § 7101; *see generally* U.S. Dep’t of Veterans Affairs, *Board of Veterans’ Appeals Annual Report*, 3-4 (2013) (describing structure of Board), www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2013AR.pdf (hereinafter “2013 BVA Report”). The 2013 Report is the most recent one available from the Board.

²⁸ *See* 38 U.S.C. § 7104(a).

²⁹ *See* Statement of Ms. Laura H. Eskenazi, Executive in Charge and Vice Chairman, Board of Veterans’ Appeals, *Veterans’ Dilemma: Navigating the Appeals System for Veterans Claims*, House Comm. on Veterans Affairs (Jan. 22, 2015), <http://veterans.house.gov/witness-testimony/laura-h-eskenazi-esquire> (hereinafter “Eskenazi Statement”).

³⁰ *See* 38 U.S.C. § 211(a) (1988 ed.) (current version at 38 U.S.C. § 511). There was a narrow exception to this bar for constitutional claims. *See also Johnson v. Robison*, 415 U.S. 361, 366-74 (1974).

³¹ Veterans’ Judicial Review Act, Pub. L. No. 100-687; 102 Stat. 4105 (1988). For a general discussion of the VJRA and the advent of judicial review in this context, *see* Michael P. Allen, *Significant Developments in Veterans Law (2004-2006) and What They Reveal About the U.S. Court of Appeals for Veterans Claims and the U.S. Court of Appeals for the Federal Circuit*, 40 U. MICH. J. OF LAW REFORM 483, 486-491 (2007).

³² The CAVC was originally named the United States Court of Appeals for Veterans Appeals. *Id.* at § 4051, 102 Stat. 4105, 4113 (1988). The court’s name was changed in 1998. Veterans Programs Enhancement Act of 1988, Pub. L. No. 105-368 § 511(b), 112 Stat. 3315, 3341 (1998). Congress created the CAVC under its Article I powers. *See* 38 U.S.C. § 7251. The CAVC is comprised of judges appointed by the President of the United States with the advice and consent of the Senate to serve fifteen-year terms. *See* 38 U.S.C. § 7251(a)-(c). The CAVC’s website contains additional information concerning the court’s history. *See* www.uscourts.cavc.gov/history.php.

³³ *See* 38 U.S.C. § 7252(a) (setting forth the jurisdiction of the CAVC to hear appeals to review decisions of the Board), § 7266 (setting forth procedures for filing a notice of appeal). The Secretary may not appeal from a Board decision. 38 U.S.C. § 7252(a)

within 120 days of the Board's decision.³⁴ The CAVC is purely an appellate court, precluded by statute from making factual determinations.³⁵ It has the "power to affirm, modify or reverse a decision of the Board or to remand the matter, as appropriate."³⁶

Any aggrieved party at the CAVC may appeal to the United States Court of Appeals for the Federal Circuit (Federal Circuit).³⁷ Review in the Federal Circuit is limited by statute. Specifically, in the absence of a constitutional issue, the Federal Circuit may review only legal questions; it specifically is precluded from ruling on a factual determination or on the application of law to the facts in a particular case.³⁸ Review of Federal Circuit decisions is available by writ of certiorari in the Supreme Court.³⁹

3. A Comparison of the Administrative and Judicial Systems

The current system for awarding and reviewing veterans' benefits is truly unique. The system was not one designed from beginning to end at the same time. Rather, it is the product of the addition of judicial review on top of the pre-existing administrative system through the VJRA. As I discuss below in Part II, this oddity of historical evolution most certainly affects how a veteran experiences the process. And in Part III I discuss how one can approach solutions to a problem that is, in part, tied to the manner in which the system evolved.

At this point, however, there is still additional descriptive work to be done to understand the problems with the system and the possible solutions to those problems. The administrative portion of the process from the filing of an application for benefits through consideration of an appeal by the Board is meant to be one that is non-adversarial and pro-claimant.⁴⁰ The Supreme Court recently reiterated that Congress has made clear its intention that the administrative process is meant to be something radically different from a traditional adversarial process of

³⁴ 38 U.S.C. § 7266(a).

³⁵ 38 U.S.C. § 7261(c).

³⁶ 38 U.S.C. § 7252(a).

³⁷ 38 U.S.C. § 7292.

³⁸ 38 U.S.C. § 7292(d)(2).

³⁹ See 28 U.S.C. § 1254 (providing for Supreme Court appellate jurisdiction concerning decisions of the courts of appeals).

⁴⁰ For a more comprehensive discussion of the non-adversarial features of the administrative process discussed in the text, see Michael P. Allen, *Due Process and the American Veteran: What the Constitution Can Tell Us About the Veterans' Benefits System*, 80 U. CIN. L. REV. 501, 507-511 (2011); Rory R. Riley, *The Importance of Preserving the Pro-Claimant Policy Underlying the Veterans' Benefits Scheme: A Comparative Analysis of the Administrative Structure of the Department of Veterans Affairs Disability Benefits System*, 2 VET. L. REV. 77, 83-92 (2010).

litigation.⁴¹ The non-adversarial (and pro-claimant) features of the veterans' benefits system include:

- The VA is required to provide certain notices to claimants concerning what must be done to establish an entitlement to benefits. Such notice includes “any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim.”⁴²
- Significantly, the VA has a statutory duty to assist claimants in developing evidence to establish their claims.⁴³
- There is no statute of limitations to file an application seeking benefits based on a service-connected disability.⁴⁴
- Principles of *res judicata* have far less purchase in the administrative system than they do in general civil litigation because veterans seeking to revisit rejected claims have the ability to reopen claims based on the submission of “new and material evidence”⁴⁵ or to attack the earlier decision by alleging that it was the product of “clear and unmistakable error.”⁴⁶
- Whenever positive and negative evidence on a material issue is roughly equal, the VA is required to give to the veteran the “benefit of the doubt” with respect to proof of that issue.⁴⁷
- The VA is required to “sympathetically read” a veteran’s claim documents.⁴⁸
- In terms of statutory interpretation, the Supreme Court has adopted a “rule that interpretative doubt is to be resolved in the veteran’s favor.”⁴⁹

⁴¹ *Henderson v. Shinseki*, 131 S. Ct. 1197, 1200-07 (2011).

⁴² 38 U.S.C. § 5103(a); *see also* 38 U.S.C. § 3.159(b) (adopting regulations implementing the statutory duty to assist).

⁴³ 38 U.S.C. § 5103A.

⁴⁴ *See generally Henderson*, 131 S. Ct. 1197 (2011).

⁴⁵ 38 U.S.C. § 5108.

⁴⁶ 38 U.S.C. §§ 5109A, 7111. To establish clear and unmistakable error in a decision, which can be done after the time to appeal has passed, the veteran must show that (1) the decision was incorrect because either the facts known at the time were not before the adjudicator or the law then in effect was applied incorrectly, and (2) the outcome would have been manifestly different if that error had not been made. *Russell v. Principi*, 3 Vet. App. 310, 313 (1992) (en banc).

⁴⁷ 38 U.S.C. § 5107(b). The classic CAVC case on the benefit of the doubt doctrine is *Gilbert v. Derwinski*, 1 Vet. App. 49 (1990).

⁴⁸ *See e.g., Robinson v. Shinseki*, 557 F.3d 1355, 1359-60 (Fed. Cir. 2009); *Comer v. Peake*, 552 F.3d 1362, 1369-70 (Fed. Cir. 2009); *Szemraj v. Principi*, 357 F.3d 1370, 1373 (Fed. Cir. 2004).

⁴⁹ *Brown v. Gardner*, 513 U.S. 115, 118 (1994).

The upshot of these statutory factors is that the administrative process is quite different from what one is used to in the more traditional adversary process. However, a more traditional adversary process is precisely what one finds when one appeals from an administrative determination to the judiciary process. When one reaches the CAVC and thereafter the Federal Circuit, the landscape is one that would be familiar to any lawyer – a traditional American adversarial process.

A final important consideration concerning the current structure of the veterans' benefits system is the role of lawyers in terms of representing veterans. For much of the history of the United States, there was a limited role for lawyers in the veterans' benefits process. To begin with, and as mentioned above, it was not until the enactment of the VJRA in 1988 that there was judicial review (and judges are lawyers after all) of benefits determinations.⁵⁰ And it took until 2006 for Congress to allow lawyers charging a fee to represent claimants prior to a final Board decision.⁵¹ Thus, while the nation's commitment to providing benefits to its veterans is not new, the integration of lawyers in a meaningful way into that system is still in its infancy. There is no question that the integration of lawyers into a non-adversarial process has been a challenge and that challenge has caused some delay in the process of administrative appellate adjudication. And I will return to that point below.⁵²

4. The Workload in the System, Delays and the “Hamster Wheel”

To say that the veterans' benefits system is operating at an exceedingly high volume is an understatement. From fiscal year 2010 through fiscal year 2014, the ROs in the Veterans Benefits Administration dealt with over one million claims filed per year.⁵³ In fiscal year 2014, VA set a record when it processed 1.3 million disability claims.⁵⁴ It is difficult to obtain statistics concerning the average time it takes to process a claim for benefits. The VA's stated goal is to “process all compensation and pension ratings claims within 125 days of receipt” and for the purpose of this essay I will assume the VA does so in the

⁵⁰ Pub. L. No. 100-687, 102 Stat. 4105 (codified as amended in scattered sections of 38 U.S.C.).

⁵¹ See 38 U.S.C. § 5904(c)(1), enacted as part of the Veterans Benefits Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, tit. I, § 101(h), 120 Stat. 3403, 3408.

⁵² See Part II.B, *infra*.

⁵³ See Eskenazi Statement, *supra* note 29, at 5.

⁵⁴ U.S. Dept. of Veterans Affairs, *2014 Performance and Accountability Report* at II-21, available at <http://www.va.gov/budget/docs/report/2014-VAparFullWeb.pdf>.

average case.⁵⁵ Of course, however, as of the VA's most recent report on the subject, nearly a quarter-million claims remained adjudicated after the 125-day goal.⁵⁶

The historical rate of appeal of initial decision has stayed relatively constant at approximately 10%.⁵⁷ Recall that the first step in the appellate process is when a veteran files an NOD.⁵⁸ In fiscal year 2014, veterans filed 137,766 NODs.⁵⁹ At that point, the RO is required to prepare an SOC.⁶⁰ In the last year for which statistics are available, the average time between the submission of an NOD and completion of the SOC was 295 days.⁶¹ Thus, if one assumes that the VA completes the claim within the 125-day goal, a veteran dissatisfied with an RO decision will already have been waiting for benefit for a total of 420 days on average (125 days initial processing and 295 days waiting for the SOC). And the veteran's appeal will not yet even have been perfected.

After receiving the SOC, the veteran has 60 days within which to perfect her appeal by submitting a Form-9 to the RO.⁶² At this point the veteran is at the mercy of the RO because she must wait for the RO to certify the appeal to the board. For the most recent year in which statistics are available, the average time for such a certification was 725 days.⁶³ Our veteran has now waited 1,145 days (125 initial processing, 295 days waiting for the SOC, and 725 days waiting to have the appeal certified) and her appeal has only just arrived before the Board. The journey has lasted over three years at this point.⁶⁴

Once at the Board, the Board reports that the average time until it reaches a decision is 235 days.⁶⁵ At this point, then, our veteran has had

⁵⁵ *Id.*

⁵⁶ *Id.* (reporting 241,991 claims pending beyond 125 days).

⁵⁷ See *Eskenazi Statement*, *supra* note 29 at 7.

⁵⁸ 38 U.S.C. § 7105(a)(b).

⁵⁹ See *Eskenazi Statement*, *supra* note 29 at 5.

⁶⁰ 38 U.S.C. § 7105(d)(1).

⁶¹ Board of Veterans' Appeals, *2013 Annual Report* at 21, available at http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2013AR.pdf (2013 Board Annual Report).

⁶² 38 U.S.C. § 7105(d)(3).

⁶³ See *2013 Board Annual Report*, *supra* note 61 at 21.

⁶⁴ If one were to use all data from fiscal year 2013, the time is even longer, amounting to 1,255 days. See Statement of Baron F. Stichman, Joint Executive Director, National Veterans Legal Services Program, at 2, *Veterans' Dilemma: Navigating the Appeals System for Veterans Claims*, Hearing before U.S. House of Rep. Committee on Veterans Affairs (Jan. 22, 2015), available at <http://veterans.house.gov/witness-testimony/barton-f-stichman-4> (hereinafter "Stichman Statement").

⁶⁵ *Id.* One can quibble with this statistic because it excludes the time when an appeal is pending at the Board but a Veterans Service Organization is preparing a written statement. However, I will use the Board's reported statistic for purposes of this essay.

her claim pending for 1,380 days, or almost four years. One might believe that at this point a veteran who remained dissatisfied would continue her journey by moving into the judicial system. That could certainly happen, but the more likely outcome at the Board for such a veteran is that her claim will be remanded to an RO for further development.⁶⁶ The average time on remand is 348 days.⁶⁷ Our veteran would now be 1,493 days since she filed her claim, or over four years.⁶⁸

Perhaps the veteran has now been awarded the benefits she seeks. However, it is more likely that our veteran is now firmly on the so-called hamster wheel.⁶⁹ Veterans and those representing them refer to the system as a hamster wheel because of the multiple remands veterans experience as they move between the various parts of the system. The metaphor is truly a powerful one because one can get the sense that there is much movement without really going anywhere.

In any event, at some point in time the administrative process will come to an end. If a veteran remains dissatisfied with the result, she may appeal to the CAVC.⁷⁰ In fiscal year 2014, 3,745 appeals were filed at the CAVC.⁷¹ The CAVC reported that the “median time” from filing an appeal to disposition in 2014 was 286 days. So, if we assume that our veteran did not step on the hamster wheel, in other words did not have a remand at the Board level, her claim would not have been in the adjudication process for 1,666 days, over four and half years. One reaches this figures by adding the initial processing time (125 days) to the time preparing the SOC (295 days) to the time waiting for certification of the appeal (725 days) to the time for a Board decision (235 days) to the median time for disposition of an appeal at the CAVC (286 days). I have not included the time that could be associated with an appeal from the CAVC to the Federal Circuit. In fiscal year 2014 just

⁶⁶ For the most recent fiscal year in which statistics are available, 45.8% of Board decisions concerning disability compensation resulted in a remand, the highest category of resolution by far. See *2013 Board Annual Report*, *supra* note 61 at 24.

⁶⁷ *Id.* at 21.

⁶⁸ The Board’s current leadership recognizes the role that remands play in the resolution of veterans’ claims. See *Eskenazi Statement*, *supra* note 29 at 1, 5.

⁶⁹ The hamster wheel metaphor is standard fare in the veterans law world. See, e.g., *Stichman Statement*, *supra* note 64 at 6 (noting that “[f]or nearly a decade now, those who regularly represent disabled veterans before the VA and CAVC have been using an unflattering phrase to describe the system of justice that veterans face once they appeal a VA regional office decision denying a claim for service-connected disability benefits: ‘the hamster wheel.’”).

⁷⁰ 38 U.S.C. §§ 7252, 7266.

⁷¹ United States Court of Appeals for Veterans Claims, *2014 Annual Report* at 1, available at http://www.uscourts.cavc.gov/documents/FY2014_AnnualReport06MAR15_FINAL.pdf (hereinafter “2014 CAVC Annual Report”).

under 150 appeals were filed in the Federal Circuit in veterans law cases.⁷²

Even this rather staggering statistic concerning the time it takes to resolve a veteran's claim for benefits is deceptive. The hamster wheel continues at the CAVC. In fiscal year 2014 there were 3,686 dispositions of appeals at the court.⁷³ Over 71% of those dispositions involved at least a partial remand, with 26% of the dispositions being a remand in full.⁷⁴ The end result of this saga is that the four and half year journey described above is actually the best-case scenario for a veteran who does not prevail at the agency. The reality can often be far worse. Part II considers why it is that veterans face these delays given our strong commitment to honoring those who served.

II. CAUSES OF DELAY: A SURPRISING DOWNSIDE OF A COMMITMENT TO VETERANS

The previous Part described the current structure of the system by which veterans' benefits are awarded and reviewed. What should be clear from that discussion is that the veterans' benefits system is unique and that veterans face serious challenges – and associated delays – in obtaining the benefits to which they are entitled. This Part turns to a consideration of the causes of those delays in particular. One is tempted to place the “blame” for the delays (and other difficulties) associated with obtaining veterans' benefits on factors such as administrative inefficiency or, perhaps inappropriately, a desire by VA officials to deny benefits as a policy matter. As to the latter point, I simply do not believe VA officials actually wish to harm deserving veterans. If one were to take that view of the situation, there is a far more fundamental problem at play. As to the former point, there is no question that there is inefficiency

⁷² See United States Court of Appeals for the Federal Circuit, *Appeals Filed in Major Origins*, available at http://www.cafc.uscourts.gov/images/stories/the-court/statistics/caseload_by_major_origin_2005-2014.pdf. The median time for the disposition of an appeal from the CAVC at the Federal Circuit in fiscal year 2014 was 10 months. See United States Court of Appeals for the Federal Circuit, *Median Time to Disposition in Cases Terminated After Hearing or Submission*, available at http://www.cafc.uscourts.gov/images/stories/Statistics/med%20disp%20time%20merits_table.pdf.

⁷³ See *2014 CAVC Annual Report*, *supra* note 71, at 1.

⁷⁴ *Id.* 957 matters were remanded as the only remedy. 979 matters involved a partial affirmance of the Board as well as a remand. Finally, 693 matters involved a partial reversal of the Board along with a remand. For further discussion of remands at the CAVC, see James D. Ridgway, *Why So Many Remands?: A Comparative Analysis of Appellate Review by the United States Court of Appeals for Veterans Claims*, 1 VETERANS L. REV. 113 (2009).

in the process. No system this large can be entirely efficient. But there are far more interesting causes for the delays veterans are facing.

This Part highlights four systemic causes of delay beyond those mentioned above, causes that in my view are often overlooked in the discussion. Those four areas are: (1) Congress' amazing substantive generosity to veterans and their families; (2) the ad hoc development of the veterans' benefits system that led to its current structure; (3) the wide array of procedural protections provided to veterans; and (4) the complex nature of the law underling the provision of veterans' benefits.

A. *The Substantive Generosity of Congress*

There is nearly universal agreement that the nation owes an incredible debt of gratitude to the men and women who choose (or who were selected) to serve in the armed forces. They make it possible for the entire country to live the extraordinary lives we get to live. And Congress has recognized the service these men and women have provided by providing an extraordinarily broad range of benefits to which they are entitled.⁷⁵ In my estimation, Congress' decision to make the broad range of benefits to veterans and their families is the right thing to do as a matter of policy. But that correct and honorable decision comes with a cost. That cost is the necessity to have a system by which those benefits are administered. This truly fundamental point – fidelity to President Lincoln's call – is often overlooked.

Correspondingly, the management of the wide array benefits Congress has made available to veterans and their families requires by its very nature a large bureaucracy. No matter how one feels about so-called "big government," it requires a great many people to review millions of claims for benefits submitted each year and many more to provide the review of those initial decisions. There is no doubt that there are inefficiencies in the VA. However, for now the point is that a cause of some of the problems with veterans' benefits determinations is related to the incredibly expansive list of benefits veterans can access. The balance of this Part discusses those issues.

B. *The Ad Hoc Development of the Veterans' Benefits System*

Another significant cause of the delays in resolution of veterans' initial applications and appeals of benefits denials can be traced to the ad hoc development of the benefits' system itself and the various consequences that flow from that development. As one will recall from

⁷⁵ See e.g., 2014 Performance and Accountability Report, *supra* note 9.

the summary of the system set out above,⁷⁶ the system we have today is the result of additions over a long period of time. It is as if one had built a house with many additions over the years but there was no conscious planning of what the residence should ultimately look like. The structure works as a house but not in the way in which it would have had it been planned at a single time. And VA has recognized the reality that the development of the current system has led to delays at all levels of the system.⁷⁷ In this sub-section, I briefly highlight some of the ways in which the ad hoc development of the benefits' system contributes to current delays.

To begin, the system includes two dramatically different segments: a non-adversarial administrative structure onto which a traditional judicial system has been grafted.⁷⁸ Moreover, the engrafting of that judicial superstructure came only after many years in which the administrative structure existed in isolation. This part of the system's development causes delay in several respects.

First, there is a disconnect between the two parts of the system for veterans as they move from the non-adversarial process to the traditionally adversarial judicial process. This transition can be a difficult one for unrepresented veterans who have grown accustomed to being assisted in the development of their claims. None of the pro-claimant features of the system discussed above apply when the veteran reaches the CAVC.

Second, even after over a quarter-century of the presence of courts in the process, it does not appear that all of the actors in the administrative system have fully accepted judicial review.⁷⁹ Some of this resistance may be conscious. But leaving that aside, it also seems that even after more than twenty-five years there is not a sufficiently well-developed means by which legal ruling are communicated to front line adjudicators in a timely and understandable manner. The result of this state of affairs is that errors occur that could be avoided and those errors will also lead to likely needless remands to apply the correct legal rule.⁸⁰ These remands in turn add to the length of time it takes for an appeal of an

⁷⁶ See *supra* Part I.

⁷⁷ See *Eskenazi Statement*, *supra* note 29 at 3 (“Judicial review has significantly complicated VA’s administration of its benefits programs, resulting in significant delays in adjudicating the initial claim and the appeal processes. The processes that were developed in the decades after World War I were not designed to be compatible with judicial review. As a result, interpretation of statutes and regulations that often date to World War I or World War II has led to many unexpected results that have been difficult to integrate into the decades of procedures that have accumulated.”).

⁷⁸ See *supra* Part I.B.

⁷⁹ See *Eskenazi Statement*, *supra* note 29 at 3-4.

⁸⁰ See *supra* Part I.B.4.

administrative decision to be fully resolved based on the correct legal principles.

Third, even if there were not resistance (conscious or unconscious) to the imposition of judicial review, the complex body of law imposed on the administrative process is being implemented in the first instance by non-lawyers. This reality means that errors in adjudications are most certainly likely to occur, requiring correction on appeal.

Fourth, some delay in the current system can be tied to requirements Congress has imposed on various actors in the process. For example, Congress made the decision to create the CAVC as an appellate body and specifically precluded that body from making factual determinations.⁸¹ The decision to have judicial review of veterans' benefits decisions vested in an *appellate* tribunal and the corresponding restriction on making factual determinations have an important consequence. The CAVC will often find an error the Board has committed but conclude that the proper remedy is to remand the matter so that the Board may conduct the appropriate fact-related exercise. In other words, this structural feature of the system is a critical component of the so-called hamster wheel on which so many veterans find themselves.⁸²

Related to the point concerning the appellate nature of the CAVC, Congress has required that the Board's decisions contain: "a written statement of the Board's findings and conclusions, and the reasons and bases for those findings and conclusions, on all material issues of fact or law presented on the record. . ."⁸³ The rationale for doing this is two-fold. We want the veteran to understand why the Board has reached its conclusions. We also want to make sure that a court can meaningfully review the Board's actions. However, this requirement is also a component of the hamster wheel because so-called "reasons and bases" errors are extraordinarily common.⁸⁴ When the CAVC determines that there is a lack of reasons or bases (or as is also common, the parties on appeal agree that the Board's decision lacks a sufficient statement of reasons and bases), the only recourse is a remand. At that point it seems quite likely that the Board will issue another decision reaching the same result but with more explanation. That, in turn, will lead to another appeal to the CAVC. The wheel continues to turn.

In addition, Congress made a determination to include two-levels of as-of-right judicial review of administrative decisions. As described above, a dissatisfied claimant has a right to appeal a final Board decision

⁸¹ See, e.g., 38 U.S.C. § 7261(c).

⁸² See *supra* Part I.C (discussing delays in the system and the hamster wheel effect).

⁸³ 38 U.S.C. § 7104(d)(1).

⁸⁴ See, e.g., Ridgway, *Why So Many Remands?*, *supra* note 74 at 136-138.

to the CAVC. Either party then has a right of appeal to the Federal Circuit.⁸⁵ As far as I am aware, this is the only example in federal practice of two levels of as-of-right appellate review. There is no question that the inclusion of the Federal Circuit in the chain of review adds to delays in the appellate process. Most obviously, in cases appealed to that court the appellate process is lengthened by definition as the court considers the appeal. However, more systemically the presence of an additional layer of review contributes to delay by making the law less stable. Of course, this recognition does not mean that having the Federal Circuit as a part of the process is necessarily a bad thing. If there is some goal that the court's inclusion supports – for example a strong concern for error correction plain and simple – having two levels of review might be appropriate. But with that extra layer of review necessarily comes delay.

Finally, yet another aspect of the ad hoc development of the current system that contributes to delay concerns the presence of lawyers in the administrative system. As described above, Congress has provided that a claimant may retain a lawyer for a fee as soon as he or she receives an initial RO decision on a claim.⁸⁶ This was a significant change in the system that had historically disfavored the assistance of counsel. The greater use of lawyers in the administrative system has the potential to reduce delays in the appellate process because lawyers will be better positioned to assemble evidence that complies with the complex law at issue. However, that potential is being undercut by a resistance (or at least a perceived resistance) to counsel by administrative adjudicators at all levels of the system. The result of such resistance means not only that the reductions in delays that could accompany the greater introduction of lawyers in the system are not being realized, but ironically greater delays are being introduced as administrative adjudicators and counsel engage in peripheral battles over the presence of lawyers themselves.

C. *Procedural Protections Provided Claimants*

As I have mentioned above, Congress has been quite generous to veterans in terms of the benefits they are entitled to receive.⁸⁷ I've explained how that generosity itself is, ironically, a part of the delays in receipt of benefits. A related concept is that in addition to being generous in the types of benefits available, Congress has also been generous in

⁸⁵ 38 U.S.C. § 7292.

⁸⁶ See 38 U.S.C. § 5904(c)(1).

⁸⁷ See *supra* Part II.A.

providing procedural protections to claimants in the system.⁸⁸ I have outlined above a non-exhaustive list of the procedural protections veterans have in the system.⁸⁹

These procedural protections are important to veterans. However, with any additional layer of procedure comes a corresponding period of delay. For example, with each additional hearing comes time to prepare, have the hearing, and eventually render a decision. And with the duties of notice and assistance, a finding that such a duty has not been complied with will almost always lead to a remand. Indeed, allowing a veteran to submit additional evidence throughout the appeal process is a benefit to a veteran but also adds delay as the new evidence needs to be processed.⁹⁰ None of this is to say that the procedural protections provided to veterans are a bad thing. It is simply to note that the more procedure one affords, the longer a process will take from start to finish all other things being equal.

D. *Legal Complexity*

A final cause of delays in the administrative system concerns the complexity of the law in the area of veterans' benefits. As Judge Lance of the CAVC has written, "[t]here is an unfortunate – and not entirely unfounded – belief that veterans law is becoming too complex for the thousands of regional office adjudicators that must apply the rules on the front lines in over a million cases per year."⁹¹ If Judge Lance is correct – and I believe he is – delays are going to inevitably result. And it is worth noting that if the law in this area is becoming too complex for RO adjudicators to apply, how much more of a problem is that for claimants who may not have the benefit of legal counsel.

Delays flow from legal complexity in at least two respects. First, it simply takes time for a legal ruling issued by the Federal Circuit or the CAVC to be communicated to adjudicators in a manner that allows it to be applied. Second, even when communicated, the complexity of legal doctrine is such that errors are inevitably a part of the process. Those

⁸⁸ The Federal Circuit has also held that applicants for veterans' benefits have a property interest in those benefits from the moment they apply such that the Constitution's Due Process Clause applies. *Cushman v. Shinseki*, 576 F.3d 1290 (Fed. Cir. 2009). I have discussed the constitutional issues more directly in Allen, *Due Process*, *supra* note 40.

⁸⁹ See *supra* Part I.B.3.

⁹⁰ See, e.g., *Eskenazi Statement*, *supra* note 29 at 9 ("Appellants, at no cost and without limitation, may submit additional evidence at any time during the pending appeal, regardless of whether the appeal is at the VBA or the Board, and the VBA must generally reevaluate the claim based upon the new evidence.).

⁹¹ *Delisio v. Shinseki*, 25 Vet. App. 45, 63 (2011) (Lance, J., concurring in the judgment).

errors need to be corrected on appeal at some point and these corrections often lead to remands.⁹² Those remands, in turn, can lead to further appeals lengthening the time to resolution of claims. This point has been recognized by the current leadership of the Board who has told Congress that the “legal complexity” of the system has made timely resolution of veterans’ claims more difficult.⁹³

As with many of the causes of delay I have discussed, there is a positive attribute behind the scenes. The introduction of judicial review has unquestionably led to the legal complexity that is a part of the increased delay in resolving claims. But judicial review has also brought great benefits to the system of veterans’ benefits. I have discussed these benefits in other venues and will not repeat them here.⁹⁴ My point at this juncture is that one has to recognize that while extensive delays in resolving claims is unquestionably not a good thing, some level of delay is part and parcel of alterations to the system that have been a good thing.

III. WHAT CAN BE DONE? SOME THOUGHTS ABOUT POTENTIAL SOLUTIONS

It should be clear by this point that veterans face significant obstacles in connection with obtaining the benefits to which they are entitled. The veterans’ benefits system is complex, overburdened, and in many respects structured in an accidental manner. The system has developed over decades with different parts being grafted onto structures established years before.⁹⁵

I have written elsewhere about what I consider to be the best way in which to address the systemic problems veterans face in connection with obtaining their benefits: there should be a commission (or similar group) whose charge it is to consider the system from stem to stern with fresh eyes.⁹⁶ Such a commission would bring together representatives of all the relevant constituencies, including veterans, VA employees, and

⁹² See generally *supra* Part I.B.4.

⁹³ See *Eskenazi Statement*, *supra* note 29 at 3-4 (“Specifically, the applicable law as developed primarily by precedential CVAC and Federal Circuit decisions is constantly increasing in complexity. As a result of this legal complexity and the open record, it has become increasingly challenging to ‘complete’ an appeal or to reach a final decision in an appeal.”).

⁹⁴ See Michael P. Allen, *The United States Court of Appeals for Veterans Claims at Twenty: A Proposal for a Legislative Commission to Consider its Future*, 58 CATHOLIC U. L. REV. 361, 372-77 (2009) (discussing benefits of judicial review of veterans’ benefits determinations) (hereinafter “Legislative Commission”).

⁹⁵ See generally *supra* Part I.

⁹⁶ See generally Allen, *Legislative Commission*, *supra* note 94.

congressional and judicial representatives.⁹⁷ In many respects, the commission would start with a blank page on which it could design a veterans' benefits system that makes sense globally and takes into account the various values the constituencies deem to be important.⁹⁸

I continue to believe the commission is the best way to systemically address the issues veterans face with the timely adjudication of their benefits claims. However, it may be the case that political realities make such a comprehensive review impossible. There are many powerful stakeholders who care deeply about veterans. Yet this fact may mean that we are stuck with status quo writ large because so many different factions have their own views about the best way in which to proceed.

Working under the assumption that the political landscape will not allow a comprehensive systemic reimagining of the veterans' benefits system – or at least not soon – we need to consider a second best solution. The secondary approach is one that approaches the situation in a targeted manner. As described above, veterans face significant delays in the resolution of their claims.⁹⁹ These delays are the result of a complex mix of factors, not the least of which is the procedural and substantive generosity Congress has shown to veterans as a group.¹⁰⁰ If the entire system can't be redesigned, we should focus on small parts of the system that can (or likely would) reduce delays. Such a focused approach is most certainly not as advantageous as the comprehensive review, but it is perhaps the best that can be done under the present circumstances.

The balance of this Part provides illustrations of targeted changes in the system that could help address the problems veterans face in terms of delay. These suggestions are by no means an exhaustive listing of the changes that could be made. They are merely examples. This part proceeds by discussing changes at several levels of the current system: the initial submission of claims; the administrative appeal process; and at the stage of judicial review. Changes in each segment are discussed in turn.¹⁰¹

⁹⁷ *Id.* at 388-90 (discussing the constituencies that should be included and the importance of having a comprehensive group of representatives).

⁹⁸ *Id.* at 390-92 (discussing values the commission should consider as part of its work).

⁹⁹ *See supra* Part I.B.4.

¹⁰⁰ *See supra* Part II.

¹⁰¹ Not every suggestion discussed above can be neatly placed into one portion of the system. There is overlap. This Part separates the various suggestions largely for administrative convenience. Moreover, I do not discuss two rather obvious means to address delays in adjudication. The first is providing additional resources in terms of either budget and/or personnel. More resources would certainly help, but it is by no means a panacea. Money does not address the underlying issues. Second, enhanced training, particularly at the RO level, is critically important. If the law is complex, the

A. *Initial Submission of Claims*

Not to be pedantic, but an excellent place to start to address the delays veterans face is at the beginning. If one can reduce delays at the ROs stage of the process, the length of time it takes to adjudicate a claim, whether it is initially granted or denied, will be reduced. This sub-part discusses three changes at the initial claims adjudication process that should be considered as part of a targeted strategy to reduce delays: greater use of presumptions to establish service-connection; greater involvement of lawyers in the initial claims process; and establishing techniques to allow greater means of obtaining information concerning particularly relevant matters.

1. Greater Use of Presumptions

When a process has inputs exceeding one million claims per year,¹⁰² anything that can be done to streamline the resolution of such claims is likely to have a positive impact on the overall claims processing timeline. As discussed above, one of the significant causes of delay in the current system is the complexity of the law, especially after the institution of judicial review.¹⁰³ For each claim, and the associated multiple issues in those claims, an RO adjudicator must make factual findings and apply the law to the facts. If one were able to streamline this process at the frontend it would allow both for quicker adjudication as well as potentially lead to a reduction in error rates because the law to be applied would be less complex.

An example of how one could accomplish this feat already exists. The standard means of establishing service-connection whether on a direct or secondary basis is for a veteran to affirmatively establish a current condition, an in-service event or occurrence, and a nexus between those two things.¹⁰⁴ However, for certain types of claims Congress has determined that a veteran may establish certain of these elements base on statutory presumptions. An example of this approach concerns exposure to the defoliant Agent Orange and the myriad conditions medical science indicates are correlated with such exposure. Under current law, a veteran will be presumed to have been exposed to Agent Orange if she established she was in Vietnam during a specified period of time in the

more education RO-level adjudicators have the better. Again, however, this potential solution – at least standing alone – does not address the root causes of the delay.

¹⁰² See *supra* Part I.B.4 (providing statistics concerning initial filing of claims).

¹⁰³ See *supra* Part II.D.

¹⁰⁴ See 38 U.S.C. §§ 1110, 1131 (2011); see also *Washington v. Nicholson*, 19 Vet. App. 362, 367 (2005), citing *Caluza v. Brown*, 7 Vet. App. 498, 506 (1995), *aff'd* 78 F.3d 604 (Fed. Cir. 1996).

1960s and 1970s.¹⁰⁵ This presumption allows a veteran to establish an in-service event – exposure – without the need to actually prove the exposure. Thereafter, a second level of presumptions come into play. Congress has provided that once a veteran has shown (either directly or by presumption) an exposure to Agent Orange, certain conditions are presumed to have been the result of such exposure.¹⁰⁶ In other words, there is a presumption of “nexus.”

The combined effect of these “Agent Orange presumptions” is veteran-friendly and also conducive to easier adjudication of a claim. An RO adjudicator need not delve into factual question concerning exposure or medical evidence dealing with causation. The result of these presumptions is a more efficient and less complex adjudicatory process and one that should increase the speed of initial adjudications.

It would be possible to extend the use of presumptions beyond the very complex situation of Agent Orange. Indeed, my suggestion is to use presumptions in exactly the opposite types of situations: common, garden-variety high volume claims. Take one example: A common claims for service-connected disability is hearing loss. At present, one adjudicates a claim for hearing loss in the tradition way: the veteran has to establish she has hearing loss; that there was some in-service event; and that the in-service event caused the current hearing loss. Making these determinations take time. But that time is really not well-spent. Many people working in the military are around loud noises all the time and often in conditions that do not allow the use of hearing protection: the artillery specialist; a person working in the engine room of a submarine; the aircraft mechanic. The list goes on and on. Why should we require the time and effort for RO adjudicators to spend time to address these situations?

Hearing loss presents a classic example of a claim for which a presumption would streamline the RO process. Why not have a rule in which certain military occupations¹⁰⁷ will presumptively establish service-connection for hearing loss? Under such a regime, all a veteran would have to establish is that she has a current diagnosis of hearing loss. If she had a certain MOS that was listed as presumptively correlated with hearing loss, the veteran would be deemed to be presumptively service-connected just as the Agent Orange veteran is. Imagine how much time that would save for these claims by RO adjudicators. And of these claims

¹⁰⁵ 38 U.S.C. § 1116(a) (1991); 38 C.F.R. § 3.307(a)(6) (1992).

¹⁰⁶ 38 C.F.R. § 3.307(a)(6)(ii) (1992).

¹⁰⁷ The term often used to designate a military occupation is “MOS” – Military Occupation Specialty.

take less time, the adjudicators would have more time to deal with other veterans' claims.

I believe this suggestion can have a dramatic impact on how RO adjudicators deal with their workload. There are two issues that make this suggestion problematic. First, in order to implement this suggestion concerning the greater use of presumptions, Congress must act. Presumptions are established by Congress. Second, one must decide which conditions are appropriate for a presumption. That exercise takes time and judgment. Nevertheless, there is a great opportunity for Congress to address the systemic problem of the adjudication of veterans' claims by using its power to develop means of presumptive service-connection.

2. Greater Involvement of Lawyers

One of the true anomalies in the current veterans' benefits system is that the administrative process is one Congress designed to be non-adversarial but in which Congress has also now provided for greater involvement by lawyers.¹⁰⁸ There is no question that the introduction of lawyers into this non-adversarial system has been a challenge. Indeed, as I mentioned above, it may be one of the causes of some of the delays.¹⁰⁹ Ironically, however, I also believe that greater use of lawyers can reduce delays if all the relevant constituencies work together.

First, Congress should remove the current bar preventing a veteran from hiring a lawyer for a fee prior to an initial decision by the RO.¹¹⁰ With that current bar in place, a veteran will only get the assistance of a lawyer after she has already had her claim denied (or otherwise not fully granted). Thus, if we assume that the denial was erroneous, an attorney will only be able to bring his or her legal training to bear on an issue after a veteran has lost. Take for an example a situation in which a veteran's claim is lacking probative evidence of the "nexus" between a current disability and an in-service event. A lawyer trained in evidence and understanding the complexity of veterans law will be much better positioned than the veteran to see such a deficiency in proof. Of course, the lawyer can correct the problem by obtaining the relevant evidence. However, if the lawyer had been involved from the beginning, he or she would have been able to ensure that the evidence was there for the initial

¹⁰⁸ See Part I.B.3 (discussing both the non-adversarial nature of the administrative system as well the introduction of lawyers into that system).

¹⁰⁹ See *supra* Part II.B.

¹¹⁰ See 38 U.S.C. § 5904(c)(1), enacted as part of the Veterans Benefits Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, tit. I, § 101(h), 120 Stat. 3403, 3408.

adjudication instead of only after the veteran had waited for the erroneous denial.

But merely providing veterans with the ability to hire a lawyer from the beginning of the claims journey is not enough. The VA, Veterans Service Organizations (VSO),¹¹¹ and the private bar need to work together to develop means by which lawyers can be fully integrated into the non-adversarial administrative system. Lawyers have skills that are useful in veterans law. Lawyers are trained to understand complex legal doctrines and to assemble evidence to meet the elements of a given claim. Those skills do not require that a particular process be adversarial. It does require, however, that all involved be receptive to lawyers being involved in a non-adversarial process.

To begin with, the VSOs and the private bar need to learn to work together far more effectively. With over a million claims filed each year, there is no shortage of veterans needing assistance. The skills lawyers possess are going to be important for certain claims. For example, claims concerning PTSD or military sexual trauma are complex and often require significant evidence to establish certain elements of service-connection.¹¹² This is precisely the type of claim for which a lawyer's special skills are ideally suited. At the same time, other claims are not as complex (either factually or legally). For these claims, VSOs may be a veteran's best option. So long as these two groups representing veterans treat each other with suspicion, veterans will not be served.

Second, members of the private bar need to approach their role in the system with some creativity. As I have mentioned, lawyers have skills that are well-suited to the type of questions often at issue in veterans' benefits claims. But lawyers will not be effective in advancing the interest of their clients if they approach using their skills as if they were in a traditional litigation system. Instead, lawyers have to think about their role in the administrative system as if they were working in tandem with the VA employees who are adjudicating the claim.

Of course, if lawyers are going to work in tandem with the VA, they will need a partner. This means that the VA should embrace the role of lawyers in the system. Congress has made clear that veterans have the

¹¹¹ VSOs are various organizations that provide services and support to veterans. Such organizations include the Vietnam Veterans of America, Disabled American Veterans, and the American Legion to name just a few. See 2013/2014 Directory of Veterans and Military Services Organizations, available at http://www.va.gov/vso/VSO-Directory_2013-2014.pdf (listing VA approved VSOs). VSO also represent claimants in the benefits process through non-attorney representatives.

¹¹² See *Veterans Benefits Manual*, *supra* note 10, at § 3.6 (discussing PTSD claims including those related to military sexual trauma).

ability to have a lawyer involved at a certain point in the process.¹¹³ The agency should exercise its rule-making authority make it easier for lawyers to assist veterans using their special skillset.¹¹⁴ The next sub-part discusses one of the most important areas in which such rules would be useful. At the very minimum, however, the VA must not be an antagonist to lawyers. Doing so ignores Congress' direction and ultimately disservices veterans.

3. Greater Use of Devices to Obtain Information

There is no question that evidence matters in the veterans' benefits system. A veteran seeking service-connected compensation must establish a current disability, an in-service event, and a connection or "nexus" between the two.¹¹⁵ Thus, the coin of the realm in many veterans' benefits matters is medical evidence. Whether it is establishing a current disability or (more likely) the nexus between an in-service event and a current disability, medical evidence and opinions are often what matters. The problem for veterans is that, rather ironically some might say, because the benefits' system is non-adversarial and pro-claimant, there are few means by which a veteran can test the medical evidence upon which the RO or the Board relies.

Either Congress by statute or the VA by regulation could adopt a system by which veterans could test the evidence they VA has developed concerning the claim. One can see the importance of such information-gathering devices by considering a recent case the Federal Circuit considered. *Parks v. Shinseki* concerned a claim related to exposure to chemicals as part of a secret mission in the military.¹¹⁶ Not surprisingly, a key issue was whether the veteran's current disabilities were related to his exposure to chemicals while in service. The RO sought a medical examination to address this issue and ultimately obtained an opinion from a nurse practitioner.¹¹⁷ The nurse-examiner concluded that it was "less likely than not" that the exposure caused the conditions.¹¹⁸ The RO ruled against the veteran, a determination that was ultimately affirmed by both the Board and the CAVC.¹¹⁹

¹¹³ See 38 U.S.C. § 5904(c)(1), enacted as part of the Veterans Benefits Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, tit. I, § 101(h), 120 Stat. 3403, 3408.

¹¹⁴ See 38 U.S.C. § 501 (2011) (providing rulemaking authority to VA).

¹¹⁵ See 38 U.S.C. §§ 1110, 1131; *supra* note 104.

¹¹⁶ *Parks v. Shinseki*, 716 F.3d 581, 582 (Fed. Cir. 2013).

¹¹⁷ *Id.* at 583.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 583-84.

On appeal to the Federal Circuit, the central issue was whether the nurse-examiner was sufficiently qualified to have rendered the opinion she gave. More specifically in this case, it was whether the evidence was “competent medical evidence.”¹²⁰ The Federal Circuit first held that a rebuttal presumption of regularity applied in this area in that a court would assume that the RO (or Board) followed a regular process when selecting the examiner.¹²¹ But this presumption is rebuttable; the veteran has to submit information that the examiner is not qualified or at least information sufficient to raise the issue.¹²²

The Federal Circuit never reached the question of whether the nurse in *Parks* was competent to render the opinion at issue. Instead, the court noted that the veteran never raised any issue about the nurse-examiner’s qualifications.¹²³ Thus, the decision was one based on waiver.

Parks is important in its own right. However, for purposes of this essay the key point is what it can mean for being an advocate for a veteran. The Federal Circuit has made clear that if a veteran wants to preserve a challenge to the qualifications of a medical examiner, he or she must raise that issue at the RO (or Board). But how does one have a basis to do so if no one has to provide information about the examiner in the first place?

My answer to this question is that the veteran is entitled to access to the sort of information that would provide a good faith basis on which to raise a competency challenge. Whether we call it “discovery,” “disclosure,” or “transparency,” the fact is that there is no way in which *Parks* makes sense without a veteran having the means to obtain the information that is necessary to prevent the waiver the Federal Circuit found in that case. And either Congress or the VA can make this a reality. Either way, a procedure to test the sufficiency of the evidence is critical.

This point is reinforced by the Federal Circuit’s holding that applicants for veterans’ benefits have a constitutionally protected property interest under the Due Process Clause in their claim for benefits from the moment of application.¹²⁴ As such, veterans are entitled to certain procedural protections in respect to their claims.¹²⁵ In my estimation, *Parks* allows veterans advocates – as well as the VA -- a

¹²⁰ *Id.* at 584.

¹²¹ *Id.* at 585.

¹²² *Id.*

¹²³ *Parks*, 716 F.3d at 586.

¹²⁴ *Cushman v. Shinseki*, 576 F.3d 1290 (Fed. Cir. 2009).

¹²⁵ See generally Allen, *Due Process*, *supra* note 40 (for a more detailed discussion of *Cushman*).

means to bring life to *Cushman* as well as to explore the more general issues concerning access to information in the veterans' benefits process.

The reality is that *Parks* shows how the adoption of information gathering devices can make the process more efficient. Take this as an example:

Step 1: We know from *Parks* that while there is a presumption that the RO or the Board used a correct process to select a competent medical examiner, that presumption is rebuttable.

Step 2: One cannot rebut the presumption (or really even have an ethical basis to challenge the qualifications of the examiner) without at least basic information about his or her qualifications.

Step 3: If access to such basic information is not provided in the pro-claimant, non-adversarial veterans' system that would raise serious concerns under *Cushman*.

Step 4: Therefore, there must be some means to obtain the information.

This line of argument has the advantage of being both incredibly simple and also essentially self-evident. And if that is the case, the key issue then becomes how one seeks this information in a manner that preserves a claim of error later in the process. There are a number of devices that could be used by advocates to either obtain information or preserve error. The simplest is to use what in civil practice would be termed interrogatories, or questions posed to another party in a formal litigation.¹²⁶

That would leave the question of what to request in such interrogatories. Again, the Federal Rules of Civil Procedure provide at least some guidance. Rule 26(a)(2)(B) provides a list of information concerning testifying expert witnesses that must be provided to the opposing party automatically. Much of that information is almost axiomatically required in the veterans' context if (a) the veteran must affirmatively challenge the examiner's qualifications and (b) the Constitution's Due Process Clause applies. To list just some examples, Rule 26 calls for disclosure of the following:

- "a complete statement of all opinions the witness will express and the basis and reasons for them;"¹²⁷
- "the facts or data considered by the witness in forming [the opinions]";¹²⁸

¹²⁶ See Fed. R. Civ. P. 33.

¹²⁷ Fed. R. Civ. P. 26(a)(2)(B)(i).

¹²⁸ Fed. R. Civ. P. 26(a)(2)(B)(ii).

- “the witness’s qualifications, including a list of all publications authored in the previous 10 years.”¹²⁹

My point here is not to draft a sample set of interrogatories or even to propose a more general means of obtaining information in the benefits’ process. Rather, my suggestion is that Congress or the VA could use their lawmaking or regulatory power in a way to change procedures to affect delays.¹³⁰

B. *Administrative Appeals*

There are also targeted steps that can be taken in connection with the administrative appeal process to reduce the delays in the adjudication of claims. There is perhaps nowhere else in the process in which the tension between procedural protections for veterans and the reduction of delays in adjudication is more apparent. As I have described above, Congress has created an administrative process that is riddled with procedural protections for veterans.¹³¹ It may be that changes in the administrative review process is where one truly has to confront the divide between a desire for procedural protections and speed of adjudication

In this sub-part, I discuss several procedural changes at the Board level that could help reduce the delays veterans are experiencing. To be sure, it is possible to view any one of these changes as reducing procedural protections afforded to veterans. If one’s primary goal is to maintain as much procedure as possible, adopting these changes will not be attractive. But if one is interested in reducing delays in adjudication while maintaining the appropriate procedural safeguards, these suggestions should be considered. This sub-part considers two steps that could be taken at the administrative appeal level: elimination of the SOC; and allowing the Board to engage in factual development.

¹²⁹ Fed. R. Civ. P. 26(a)(2)(B)(iv).

¹³⁰ The CAVC recently had the opportunity to explore how much information gathering a veteran (or her advocate) should be entitled to as a matter of Due Process. *See Nohr v. McDonald*, 27 Vet. App. 124 (2014). In that case, the veteran had propounded a number of “interrogatories” to the VA concerning the qualifications of a doctor who had submitted a medical opinion. *Id.* at 127-28. The CAVC ultimately avoided ruling on the constitutional question by holding that the veteran’s interrogatories essentially called into play the examiner’s qualifications such that the VA’s duties to the veteran required further investigation. *Id.* at 131-34. Accordingly, the CAVC remanded the matter for further adjudication, leaving the more general information-gathering question unresolved. *Id.* at 134-35.

¹³¹ *See supra* Part I.B.3 (summarizing certain of the pro-claimant procedural protections for veterans).

1. Elimination of the SOC

As I have described above, the process by which a veteran perfects her appeal is a multi-stage one.¹³² The veteran must submit an NOD.¹³³ As a result, the RO prepares the SOC.¹³⁴ Then, the veteran must file a form to formally initiate the appeal.¹³⁵ If all that was involved here was filing forms, there would not be a cost-savings in terms of time. But there is much more at stake here. On average, it takes the RO approximately 295 days to prepare the SOC.¹³⁶ If one were able to eliminate that time from the process, veterans would be able to have their administrative appeal considered much more quickly.

The material contained in the SOC is certainly relevant to the initial decision.¹³⁷ In other words, the RO adjudicator at the initial phase should certainly be considering why the applicable law dictates the result based on the facts presented. If that is the case, why then should the function the SOC performs be combined with the information conveyed in the initial decision? How much more is this the case if doing so would eliminate almost 300 days from the appeal process? This is a simple, almost cost-free, means to reduce delay.¹³⁸

2. Factual Development at the Board

As has been discussed at several points, one of the major problems in the current system is the prevalence of remands.¹³⁹ One part of this remand cycle is when the Board determines that the RO has failed to obtain adequate evidence concerning an issue. When that situation occurs, the Board remands the matter to the RO to develop the evidence, often a medical opinion.¹⁴⁰ Delays could likely be reduced if the Board were able to conduct such further development itself.

¹³² See *supra* Part I.B.1.

¹³³ 38 U.S.C. § 7105(a), (b)(1)-(2) (2012).

¹³⁴ 38 U.S.C. § 7105(d)(1) (2012).

¹³⁵ 38 U.S.C. § 7105(d)(3) (2012).

¹³⁶ 2013 *Board Annual Report*, *supra* note 61 at 21.

¹³⁷ See 38 U.S.C. § 7105(d)(1)(A)-(C) (2012) (setting forth requirement for SOC).

¹³⁸ The National Organization of Veterans' Advocates has also proposed eliminating the SOC requirement. See *Veterans' Dilemma: Navigating the Appeals System for Veterans Claims: Hearing before U.S. House of Rep. Committee on Veterans Affairs*, at 9-11 (Jan. 22, 2015) (statement of Kenneth M. Carpenter, Esquire, Founding Member, National Organization of Veterans' Advocates), available at <http://veterans.house.gov/witness-testimony/kenneth-m-carpenter>.

¹³⁹ See *supra* Part II.C.

¹⁴⁰ See *Eskenazi Statement*, *supra* note 29 at 5 (discussing delays caused by Board remands to the RO to develop evidence). In reality, the Board will often remand the matter to a centralized organization within the Veterans Benefits Administration known as the "Appeals Management Center." See, e.g., *Stichman Statement*, *supra* note 64 at 10.

The general idea would be that resources could be shifted from segments of the Veterans Benefits Administration to the Board. Thus, such realignment, while certainly not without cost, would likely not be cost-prohibitive. When a Board Member determines, for example, that a medical examination was inadequate, she would be able to have a supplemental examination conducted without the administrative process of remanding the matter to another entity within the VA.

This suggestion is a part of a current bill pending in the United States House of Representatives, the Express Appeals Act.¹⁴¹ It is part of a larger pilot project that would create a special class of appeals into which a veteran could opt. These “express appeals” would be resolved without a veteran being able to submit new evidence.¹⁴² The concept of an “express appeal” process is one that is controversial. Some see it as a positive thing because it provides additional options to veterans.¹⁴³ Others view the proposal with skepticism because they see it as undermining important procedural protections afforded to veterans.¹⁴⁴ I do not take a position on the larger bill in this essay. Its present importance is that the shifting of development from the RO to Board dovetails with one of the targeted changes to the system that would be beneficial.¹⁴⁵ And in doing so, there appears to be some political will to make this change.

C. *Judicial Review*

The final stage of the veterans’ benefits is the process of judicial review inaugurated by the VJRA. As outlined above, a veteran who has been denied the benefits she seeks by a Board decision may appeal to the

For present purposes, that technical distinction makes no meaningful difference. For additional information concerning the Appeals Management Center, see *Veterans Benefits Manual*, *supra* note 10 at § 13.10.

¹⁴¹ H.R. 800, 114th Cong. § 2(c)(4) (2015).

¹⁴² *Id.* at § 2.

¹⁴³ See, e.g., *Veterans’ Dilemma: Navigating the Appeals System for Veterans Claims: Hearing before U.S. House of Rep. Committee on Veterans Affairs*, at 15-17 (Jan. 22, 2015) (statement of Gerald T. Manar, Deputy Director, National Veterans Service, Veterans of Foreign Wars), available at <http://veterans.house.gov/witness-testimony/mr-gerald-t-manar-1>; *Veterans’ Dilemma: Navigating the Appeals System for Veterans Claims: Hearing before U.S. House of Rep. Committee on Veterans Affairs*, at 12-15 (Jan. 22, 2015) (statement of Mr. Paul R. Varela, Assistant National Legislative Director, Disabled American Veterans), available at <http://veterans.house.gov/witness-testimony/mr-paul-r-varela-1>.

¹⁴⁴ See, e.g., *Stichman Statement*, *supra* note 64, at 9-10.

¹⁴⁵ Others have also supported this change in the locus of the development of evidence on appeal. See, e.g., *Stichman Statement*, *supra* note 64 at 10-11.

CAVC.¹⁴⁶ Thereafter, either party who loses before the CAVC may appeal as of right to the Federal Circuit, subject to that court's limited scope of review.¹⁴⁷ There are steps that can be taken at the stage of judicial review that can affect the overall time within which veterans' claims are resolved. This sub-part discusses three possible changes to the system: greater use of the CAVC to reverse decision of the Board as opposed to merely remanding such matters; reconsidering the role of the Federal Circuit in the process; and adopting a form of aggregate issue resolution technique.

1. Greater Reversal at the CAVC

There is no question that one of the significant features of the "hamster wheel" of veterans' benefits adjudication is the rate at which cases are remanded.¹⁴⁸ One significant reason for such remands is the CAVC's reluctance to engage in statutorily prohibited fact-finding. So, for example, the CAVC will conclude that the Board made a certain error (often because of the provision of insufficient reasons and bases).¹⁴⁹ Having found such an error, the CAVC will almost always remand the case to the Board to adjudicate the appeal in the first instance.¹⁵⁰ No doubt, this course of action will often be correct so long as the CAVC is prohibited from making factual determinations in the first instance. However, I believe the CAVC (either on its own initiative or at the direction of Congress) could be more aggressive in using its power to reverse the Board as opposed to remanding a matter.

Specifically, I have suggested elsewhere that the CAVC should adopt a form of hypothetical clearly erroneous review.¹⁵¹ Under this approach, the court would ask whether on the state of the evidence in the record *if* the Board had made a factual finding against the claimant, *would* the court have been left with the "definite and firm conviction that

¹⁴⁶ See 38 U.S.C. § 7252(a) (2011) (setting forth the jurisdiction of the CAVC to hear appeals to review decisions of the Board); see also 38 U.S.C. § 7266 (2012) (setting forth procedures for filing a notice of appeal).

¹⁴⁷ 38 U.S.C. § 7292 (2012).

¹⁴⁸ See *supra* Part I.B.4 (discussing remands at all levels of the system including the CAVC).

¹⁴⁹ See, e.g., Ridgway, *Why So Many Remands?*, *supra* note 74, at 136-38.

¹⁵⁰ See, e.g., *Deloach v. Shinseki*, 704 F.3d 1370 (Fed. Cir. 2013) (affirming CAVC decision to remand instead of reverse); *Byron v. Shinseki*, 670 F.3d 1202 (Fed. Cir. 2012) (affirming CAVC decision to remand instead of reverse).

¹⁵¹ See Michael P. Allen, *Commentary on Three Cases from the Federal Circuit and the Court of Appeals for Veterans Claims as We Approach Twenty-Five Years of Judicial Review of Veterans' Benefits*, 5 VETERANS L. REV. 136, 150-55 (2013).

a mistake has been committed.”¹⁵² The CAVC uses such a standard to assess actual findings of fact the Board has made.¹⁵³ It is true that the proposal would be for a hypothetical review of a finding of fact not actually made. My point, however, is that if the court were to conclude that on the face of the record existing before the court a finding of fact adverse to the veteran would be clearly erroneous, it seems that there is no need for a remand.¹⁵⁴ I have not attempted to assess empirically how much of an effect such hypothetical clearly erroneous review would have, but I suspect it could have a not insignificant impact over the run of appeals. At the very least, this change in appellate review would likely have a positive effect on the overall time veterans face in the appellate process.

2. The Role of the Federal Circuit

When Congress established judicial review in connection with veterans' benefits determinations, it created a system that is unique in the federal judiciary. Judicial review in the veterans' benefits context is the only situation in the federal judicial system in which there are two levels of appellate court review as of right. At the time Congress enacted the VJRA it may have made sense to include the Federal Circuit in the process. After all, Congress created the CAVC under its Article I powers and there was at the time no “law” of veterans benefits due to the pre-existing prohibition on judicial review of veterans' benefits determination.¹⁵⁵

Regardless of whether the initial constitution of system made sense, times have changed. We now have over 25 years of the development of veterans' benefits law. Perhaps it is now time to consider whether the Federal Circuit continues to play a meaningful place in the system. Congress could streamline the current system by removing the Federal Circuit from the process of judicial review. Such a change would mean that an Article I court, the CAVC, would have its decisions reviewable only by a writ of certiorari. This is not an issue. The United States Court

¹⁵² See *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948) (setting forth federal standard for clearly erroneous review of factual findings actually made).

¹⁵³ See, e.g., *Byron v. Shinseki*, No. 09-4634, 2011 WL 2441683, at *4 (U.S. App. Vet. Claims June 20, 2011) (non-precedential single-judge memorandum opinion).

¹⁵⁴ I note here that engaging in such a hypothetical exercise is not unknown to the CAVC. It does something similar when it “takes due account of the rule of prejudicial error” in assessing whether an administrative error would have affected the ultimate outcome in the matter at hand. See 38 U.S.C. § 7261(b)(2) (2012).

¹⁵⁵ See *supra* Part I.B.2 (discussing advent of judicial review under the VJRA).

of Appeals for the Armed Forces is in the same position.¹⁵⁶ Congress could remove the Federal Circuit from the process and, thereby, reduce the time for appeal.

3. Aggregate Issue Resolution

A third issue that could affect delays in the system concerns the lack of a procedural mechanism by which the CAVC can address multiple claims in a single setting. There should be a means of utilizing aggregate resolution of issues on appeal either by means of a CAVC adopted rule of procedure or congressional direction. The general concept would be to have a procedural device similar to the class action device in general civil litigation.¹⁵⁷

The CAVC has ruled in a number of decisions that it lacks the authority to resolve issues using a procedure akin to a class action in general civil litigation.¹⁵⁸ Whatever the merits of those decisions, I believe that adopting such a procedural approach could reduce delays in adjudication on a systemic basis. If the court were able to formally adjudicate an issue that had binding legal effect on hundreds or thousands of cases, I firmly believe that the process of adjudication would be streamlined.¹⁵⁹ For example, if a claimant sought an order concerning a delay in adjudicating her claim for benefits, she could proceed as a representative on behalf of all others similarly situated. And in any event, it seems inconceivable that such a procedure would add to delays in adjudication.

IV. CONCLUSION AND CALL TO ACTION

I began this essay by recounting Abraham Lincoln's call to action concerning America's veterans. Nothing I had said should be seen as critical of this country's commitment to President Lincoln's vision. Indeed, it may be that we have collectively been so committed to veterans that the men and women who have served in the armed forces are facing some of the problems I have discussed.

¹⁵⁶ The history and jurisdiction of the United States Court of Appeals for the Armed Forces is set forth on that court's website. See About the Court, United States Court of Appeals for the Armed Forces, <http://www.armfor.uscourts.gov/newcaaf/about.htm>.

¹⁵⁷ See FED. R. CIV. P. 23.

¹⁵⁸ See, e.g., *American Legion v. Nicholson*, 21 Vet. App. 1 (2007) (en banc) (holding that court lacked jurisdiction to adjudicate claims brought by an organization as opposed to an individual veteran); *Lefkowitz v. Derwinski*, 1 Vet. App. 439 (1991) (rejecting contention that court had the authority to adjudicate class actions).

¹⁵⁹ Others have also made this suggestion. See, e.g., *Stichman Statement*, *supra* note 64, at 12-14.

What is clear today is that we need to take a new look at how we honor those who have protected our freedoms, something at very great cost to them. I have outlined some possible solutions that can alleviate the unacceptable delays veterans face in obtaining the benefits available to them. Those in power or who have the ability to consider these steps should do so. But more importantly, we need to be engaged in a comprehensive national discussion about how we can make President Lincoln's vision a reality in our modern world.

