

Thirty Years of Veterans Law: Welcome to the Wild West

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“Sometimes it isn’t being fast that counts, or even accurate; but willing.”¹
John Wayne

I. INTRODUCTION

The rise of veterans issues in our local communities since the Global War on Terrorism began in 2001 has seen the phrase “veterans law” grow and surge in a number of different aspects. The term “veterans law” is a relatively recent term in jurisprudence and, over the past decade, has evolved into many different meanings. Among other things, the term could refer to the law issued from the federal appellate court deciding veterans’ claims for benefits from the Department of Veterans Affairs (VA).² “Veterans law” could also be used to discuss the litigation and legislation regarding the types of discharges veterans face and the implications of these discharges when seeking benefits.

In 1988, when Congress created a new federal appellate court whose sole purpose was to provide oversight to decisions made by the VA, it was the first time that judicial oversight was specifically applied to veterans’ claims. As Chief Judge Frank Q. Nebeker, the first Chief Judge of the new court phrased the issue, “For the first time, the court

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1. John Wayne Enterprises, LLC, *John Wayne Legacy Quotes*, <https://johnwayne.com/quotes> [<https://perma.cc/TX2S-PUKL>] (last visited Nov. 18, 2018).

2. Stacey-Rae Simcox & John Paul Cimino, § 6.03 *Sources of Veterans Law*, in *SERVICEMEMBER AND VETERANS RIGHTS* (Brian Clauss & Stacey-Rae Simcox eds., 2017); *id.* § 6.04(2) *Basic Eligibility Issues*.

brought the principle of stare decisis to the veterans' community."³ As this court, the United States Court of Appeals for Veterans Claims (CAVC), turned thirty in 2018, it seems an appropriate time to consider the landscape of veterans law since the last articles considering this broad issue were published a decade ago for the twentieth anniversary of the court.

In this past decade, veterans law issues have seen huge growth and public awareness with infusions of new practitioners, new issues of law being decided by the courts, new major Congressional legislation for the first time in decades, and veterans law issues in the news and mainstream culture. Many experienced practitioners in this area are astounded by the movement in this area of law in the past few years, yet they would also note that this movement has been a long time coming. To compare the practice of veterans law to a train gathering momentum as it moves along the tracks would be appropriate. However, another apt comparison is to the undeveloped legal system of old movies in which John Wayne implements justice in a wild and untamed land. The analogy of the Wild West is sometimes used amongst veterans law practitioners and professors who teach in this area to describe its fresh expanse, often devoid of legal precedent, built on shifting ground, and offering a landscape where a true pioneer can both make an impact and see measurable success.

This Article is intended as an overview of three major advancements in veterans law in the past decade: major changes in federal court case law regarding veterans benefits through the prism of the thirtieth anniversary of the CAVC, the most sweeping legislative changes to appeals of veterans benefits decisions in the past thirty years, and the new push to force the Department of Defense to equitably administer the discharges of veterans with post-traumatic stress disorder and traumatic brain injuries. To accomplish this review, Part II will look at the CAVC and its evolution, particularly in the past decade. By examining the roots of the court's creation, the impact it has had and will continue to have on veterans law becomes a richer discussion, particularly as one recognizes that the CAVC is on the burgeoning frontier of veterans benefits jurisprudence. Part III will consider the impact of new legislation shaped during President Obama's administration and signed into law by President Trump in 2017, marking the first major overhaul in the way the VA processes claims since the creation of the CAVC thirty years ago.

3. Frank Q. Nebeker, *Jurisdiction of the United States Court of Veterans Appeals: Searching Out the Limits*, 46 ME. L. REV. 5, 5 (1994).

Part IV will discuss the growing investigation, litigation, and legislative pushes on behalf of veterans whose discharges from military service are characterized in a way that prevents them from re-entering civilian life successfully and seeking medical treatment or benefits related to their service. Part V will offer some thoughts on the future of veterans law in the next decade and things to watch for as it continues to expand and evolve.

Although any one of these topics could serve as an article in itself, the purpose of this Article is to give a broader overview of efforts to work within the law to make changes for our nation's veterans in the past decade. The reason for writing this Article is to give veterans, attorneys, judges, and law students reason to be excited about the real opportunities available to make a difference on a large scale—opportunities that become rarer and rarer in other areas of law where jurisprudence has been established for decades. The examples discussed in this article are just that—examples. So much more can and will be done by those who are motivated. With that, welcome to the Wild West where you can be a true pioneer!

II. THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS (CAVC) TURNS THIRTY AND SAILS INTO “UNCHARTED WATERS.”

On November 18, 1988, President Ronald Reagan signed the Veterans' Judicial Review Act (VJRA or “the Act”) into law.⁴ Title III of this Act created the CAVC.⁵ Prior to the establishment of the CAVC, the VA operated as a two-tiered administrative system for adjudicating veterans'⁶ claims for the various benefits offered to them by the agency. These benefits include pensions, education funds, disability compensation, guaranteed home loans, and more.⁷ As before the Act's passage, the first level of adjudication of a claim occurs at the agency of original jurisdiction, referred to as the VA Regional Office (VARO).⁸ The VARO issues a decision on the veteran's claim and if the veteran

4. See Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988).

5. §§ 301–303, 102 Stat. at 4113–22.

6. The term veteran is used in this article to describe the type of claimant seeking benefits from the VA. While other claimants are permitted, for instance dependent children and widowed spouses, veterans are the overwhelming majority of applicants for benefits and thus that term is used throughout.

7. *Veterans Benefits Administration, About VBA*, U.S. DEP'T OF VETERANS AFFAIRS, <http://www.benefits.va.gov/benefits/about.asp> [<https://perma.cc/U5J5-ZL42>] (last visited Nov. 18, 2018).

8. See 38 U.S.C. §§ 5107, 5110(a) (2012); 38 C.F.R. § 19.24 (2016).

does not agree with the decision, the veteran can file an appeal to the agency termed a Notice of Disagreement.⁹ In response to the Notice of Disagreement, the VARO issues a Statement of the Case, which is a more in-depth explanation of the VARO's decision.¹⁰ Veterans dissatisfied with the ultimate decision of the VARO after receiving a Statement of the Case can appeal to the Board of Veterans' Appeals (BVA or "the Board") by filing what is referred to as a VA Form 9.¹¹ The Board is part of the VA and ultimately answers to the Secretary of the VA.¹² Before 1988, veterans could file a request for reconsideration with the Board if they were unhappy with the Board's decision, but further appellate review by another body was precluded.¹³

Noticeably absent in the appeals process for veterans prior to the Act's passage was any independent judiciary review.¹⁴ Before the VJRA specifically created judicial review of the VA, the Federal Circuit noted that "the VA stood 'in "splendid isolation as the single federal administrative agency whose major functions were explicitly insulated from judicial review."'"¹⁵ Conversations about creating judicial review of the VA began in Congress in 1952.¹⁶ From then until 1988, there was dispute about whether there should be any judicial review of the VA decision-making process.¹⁷ Before being appointed as a judge on the CAVC's bench in 2003, Lawrence B. Hagel was the Deputy General

9. See 38 U.S.C. § 7105(b)(1). It is important to remember that this system has been radically altered by Congress with the passage of the Appeals Modernization Act discussed in Section III of this article. This original system of appealing VA decisions, referred to as the "legacy system," was the system in place at the time of the VJRA's passage and will continue to exist alongside the new Appeals Modernization Act until all appeals in the legacy system are complete. Right now there are several hundred thousand of these legacy appeals.

10. 38 C.F.R. §§ 19.26(d), 19.29 (2016).

11. 38 U.S.C. § 7105(d)(3).

12. 38 U.S.C. § 7101(a).

13. 38 U.S.C. § 211(a) (1988) (current version at 38 U.S.C. § 511(a) (2012)).

14. *Id.*

15. *Gardner v. Brown*, 5 F.3d 1456, 1463 (1993) (citing H.R. REP. NO. 100-963, at 10 (1988), as reprinted in 1988 U.S.C.C.A.N. 5782, 5791). The provisions of 38 U.S.C. § 211(a) (1970) read as follows:

On and after October 17, 1940, except as provided in sections 775, 784, and as to matters arising under chapter 37 of this title, the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

Act of Aug. 12, 1970, Pub. L. No. 91-376, § 8(a), 84 Stat. 790.

16. Lawrence B. Hagel & Michael P. Horan, *Five Years Under the Veterans' Judicial Review Act: The VA is Brought Kicking and Screaming Into the World of Meaningful Due Process*, 46 ME. L. REV. 43, 44 (1994).

17. *Id.* at 45.

Counsel for the Paralyzed Veterans of America.¹⁸ In 1994, five years after the passage of the VJRA, then-Deputy General Counsel Hagel co-authored an article that observed “[t]here is complete unanimity of opinion on few issues affecting the veterans community. Judicial review is an example.”¹⁹ Reviewing some of the arguments for and against judicial review helps to give context for issues only now being seriously addressed in the courts and via legislation.

There were several considerations that weighed against implementing judicial review. First, Congress believed that the VA was and should remain a non-adversarial system where veterans were assisted along the way by VA employees. The VA’s benefits system was specifically crafted by Congress “to function . . . with a high degree of . . . solicitude for the claimant.”²⁰ The VA’s resulting veteran-friendly system reflects the “congressional intent to create an Agency environment in which VA is actually engaged in a continuing dialogue with claimants in a paternalistic, collaborative effort to provide every benefit to which the claimant is entitled.”²¹ The VA was also charged with giving veterans the benefit of the doubt in adjudicating their claims.²² In upholding its duty to help veterans, the VA was tasked with many other duties, including but not limited to assisting veterans in obtaining medical evaluations and evidence, reviewing veterans’ claims sympathetically, and gathering evidence to support a veterans’ claims.²³ Adding judicial oversight to the VA seemed unnecessary as the VA was not intended to be an adversary of the veteran, but instead was supposed to be a partner and benevolent provider.²⁴ Adding judicial review to this system also seemed dangerous because the VA would automatically be put on the defensive with regard to its decisions on a veteran’s claim,

18. *Judge Lawrence B. Hagel*, U.S. COURT OF APPEALS FOR VETERANS CLAIMS, <http://www.uscourts.cavc.gov/hagel.php> [<https://perma.cc/5ZDQ-CPSC>] (last visited Jan. 24, 2019).

19. See Hagel & Horan, *supra* note 16, at 43–44.

20. *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 311 (1985).

21. *Evans v. Shinseki*, 25 Vet. App. 7, 16 (2011).

22. 38 U.S.C. § 5107(b) (2012) (“When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant.”). Congress intended the benefit of the doubt standard to be a valuable tool to continually enforce the VA’s non-adversarial and veteran-friendly adjudication of claims. *Hodge v. West*, 155 F.3d 1356, 1362–63, (1998) (citing H.R. REP. NO. 100-963, at 13 (1988), *as* reprinted in 1988 U.S.C.C.A.N. 5782, 5794–95).

23. These duties to veterans were formalized through the Veterans Claims Assistance Act of 2000, Pub. L. 106-475, 114 Stat. 2096, 38 U.S.C. § 5103A and § 5107 (2012). See also 38 U.S.C. § 5109.

24. S.11, *The Proposed Veterans’ Administration Adjudication Procedure and Judicial Review Act*, and S. 2292, *Veterans’ Judicial Review Act: Hearing Before the S. Comm. on Veterans’ Affairs*, 100th Cong. 481 (1988) [hereinafter *Hearings*] (statement of the Veterans Administration (VA)).

therefore negating the ostensibly benevolent and non-adversarial system created.²⁵

Second, there was concern that adding judicial review would increase the number of attorneys practicing in this area of law at every level.²⁶ Veterans service organizations (VSOs), such as the American Legion and the Disabled American Veterans, represent their veterans in the VA's system at no cost.²⁷ The VSOs, who had strong lobbyists in Congress, were opposed to changes to the system that would introduce more lawyers. The VSOs had, and continue to exert, great power within the system as they were certainly the primary providers of assistance to veterans in navigating the VA's complicated benefits system.²⁸ They had no desire to forfeit their preeminence to attorneys.²⁹ Additionally, Congress had long seen attorneys as unscrupulous in the representation of veterans. As far back as the Civil War, Congress had labored under the assumption that most attorneys swindle veterans out of money while doing very little work on behalf of the veteran.³⁰ For this reason, in 1862, Congress set a limit of \$5 as the amount of money an attorney could be paid for helping a veteran.³¹ In 1864, this fee limit was raised to

25. *Id.* at 393 (statement of National Vietnam Veterans Coalition); *id.* at 481 (statement of the Veterans Administration (VA)).

26. *Id.* at 392–93 (statement of National Vietnam Veterans Coalition); *id.* at 500 (statement of Donald L. Ivers, General Counsel, Veterans Administration).

27. *Id.* at 393 (statement of National Vietnam Veterans Coalition); Laurence R. Helfer, *The Politics of Judicial Structure: Creating the United States Court of Veterans Appeals*, 25 CONN. L. REV. 155, 159–60 (1992).

28. Helfer, *supra* note 27, at 160. It may seem paradoxical that a system designed to be veteran-friendly is rife with complexity. One commenter explained the situation this way:

In the case of the veterans benefits system, decades of procedural rulings have increased the complexity of adjudication. It has thus become increasingly difficult for non-attorney claimants and adjudicators to understand the system, and it now takes dramatically longer for VA to issue initial decisions and process appeals. Rarely will procedural rulings be abrogated. Rather, the layers accumulate with predictable, negative consequences for timeliness and flexibility. This buildup of complex procedures has created a paradox inherent in the modern veterans law system: the proliferation of procedures intended to make the system more “veteran friendly” has, in fact, made the system forbidding to claimants and caused increasingly painful delays.

James Ridgway, *Area Summary: Fresh Eyes on Persistent Issues: Veterans Law at the Federal Circuit in 2012*, 62 AM. U. L. REV. 1037, 1044–1045 (2013) (footnotes omitted). The CAVC has also commented on this problem. *DeLisio v. Shinseki*, 25 Vet. App. 45, 63 (2011) (Lance, J., concurring) (“There 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.”).

29. Helfer, *supra* note 27; *Hearings, supra* note 24, at 421 (statement of Veterans Due Process).

30. *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 360 (1985).

31. Dennis Whelan, *William Henry Glasson and the First Hundred Years of Federal Compensation for Service Connected Disability in America* 46 (2013) (Villanova Univ., Working

\$10.³² These limited fees were intended to stop what Congress believed to be predatory behavior.³³

In 1985, the Supreme Court heard a constitutional challenge to the \$10 limit brought under the Fifth Amendment's procedural Due Process Clause. In holding the limit constitutional, the Court made very clear that in this matter "[a] necessary concomitant of Congress' desire that a veteran not need a representative to assist him in making his claim was that the system should be as informal and nonadversarial as possible."³⁴ As the years wore on, this limit stayed in place and continued to dissuade attorneys from participating in the system because a \$10 fee for legal work in 1980 was not worth any attorney's time, either to become competent in the area of veterans benefits or to create a practice out of it.³⁵ It was not until the passage of the VJRA in 1988 that the limitations on attorneys' fees were altered, primarily by permitting attorneys to charge fees when representing veterans on disability claim appeals.³⁶

Third, there was widespread concern that introducing judicial review would cause delay in veterans receiving their benefits. The VA was concerned that attorneys would cause delays by advancing the client's cause, as opposed to looking for truth.³⁷ Others were less generous, asserting that attorneys would purposefully cause delay to increase their fees.³⁸ Another apprehension regarding delay was that matters would become more complicated and more formalized, requiring the VA to spend more time on each claim.³⁹ Finally, unease that the federal court system was already overwhelmed led to concern that these claims would contribute to an already-taxed judicial system.⁴⁰

Paper, Aug. 31, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2344337 [<https://perma.cc/9WR4-J2T2>].

32. *See id.* at 48, 50.

33. For example, see the comments on the Senate floor of Senator Edward Bragg in 1886: "Mr. Speaker, these [attorneys] that pretend to be 'friends of soldiers' are the friends of soldiers as vultures are the friends of dead bodies—because they feed and fatten on them. . . . They have the voice of Jacob, but their hand has the clutch of Esau." WILLIAM H. GLASSON, FEDERAL MILITARY PENSIONS IN THE UNITED STATES 214–15 (David Kinley ed. 1918).

34. *Walters*, 473 U.S. at 323.

35. *Hearings*, *supra* note 24, at 56–7 (statement of J. Thomas Burch, Jr., Chairman, National Vietnam Veterans Coalition), 385 (statement of Frank E.G. Weil, American Veterans Committee).

36. *See* 38 U.S.C. § 7263(c)–(d) (2012).

37. *Hearings*, *supra* note 24, at 500 (statement of Donald L. Ivers, General Counsel, Veterans Administration).

38. *Id.* at 603 (statement of Disabled American Veterans), 568 (statement of Jerry L. Mashaw, Professor of Law at Yale Law School).

39. *Id.* at 493 (statement of Donald L. Ivers, General Counsel, Veterans Administration).

40. *Id.* at 333–34 (statement of Hon. Morris S. Arnold & Hon. Stephen G. Breyer, on behalf of the Judicial Conference of the United States).

In contrast to the aforementioned arguments, there were many reasons articulated that compelled the implementation of judicial review. One major reason for the Court's creation was a belief that the VA's system (as it was in the 1980s) was malfunctioning. The Chairman of the Senate Committee on Veterans' Affairs at the time, Senator Alan Cranston, commented at the opening of testimony regarding judicial review that: "I have said that the need for judicial review does not depend on whether or not the present system of claims adjudication is broken. . . . In the past year or two, however, it has become increasingly clear that the entire claims adjudication process, including the Board, has some serious problems."⁴¹

The extent of the problems varied. There were contentions that the Board, the highest level of appeal within the VA for decisions regarding benefits, was failing to consistently uphold its charge to maintain a non-adversarial system. One veterans' group accused the VA of "using deception to deny hearings at crucial and sensitive stages of the adjudication process[,] . . . denying claims for failure of veterans to respond to correspondence never sent[,] . . . [and] (f)raudulently enhancing productivity performance records to achieve merit bonuses and to promote empire building schemes."⁴² Another proponent of judicial review testified that:

[T]he VA system is highly adversarial. It is loaded with lawyers on one side, and it is filled with pitfalls for the unrepresented claimant on the other side. We have, for example, had several clients who were unrepresented at the local level and whose claims have been dismissed by the Board of Veterans' Appeals for the clients' failures to use particular forms or certain magic words or forms of pleading. These dismissals have cost our clients many months of time and potentially many thousands of dollars in lost compensation.⁴³

An observer who advocated for judicial review offered one explanation for this observed variance between the required non-adversarial environment and the apparent adversarial behavior—it is unrealistic to believe VA employees can act in the best interests of the government and the veteran at the same time.⁴⁴

41. *Hearings, supra* note 24, at 2 (statement of Sen. Alan Cranston, Chairman, S. Comm. on Veterans' Affairs).

42. *Id.* at 409 (statement of Veterans Due Process).

43. *Id.* at 6 (statement of Susan D. Bennett, Esq., Assistant Professor of Law and Director, Public Interest Law Clinic, Washington College of Law, American University, Washington, D.C.).

44. *Id.* at 385 (statement of Frank E.G. Weil, American Veterans Committee); *see* 38 U.S.C. § 5107(b) (2012). This dichotomy has been pointed out as a unique aspect of the VA's procedural

Other complaints regarding the problems in the system revolved around arbitrary decision-making at the agency. One veterans' advocate observed that "(t)he reasonable doubt doctrine . . . is only applied it seems when the overwhelming weight of evidence, in fact, supports the veteran's claim" despite the requirement that when evidence is in equipoise, the decision should go to the veteran.⁴⁵ Other groups advocating for judicial review were less aggressive in the necessity for review, but nonetheless advanced the value of court intervention. For example, the Veterans of Foreign Wars remarked upon the fact that the pressure on the Board to move faster coupled with increasingly complicated claims created a system where "human nature being what it is, errors in judgment may occur."⁴⁶

There were also concerns that by prohibiting judicial review of veterans benefits claims, veterans were not being given the same rights to fairness, equity, or due process that other citizens receive. One Senator noted that while felons, the mentally ill, and illegal aliens are afforded judicial review of determinations affecting them, veterans are not.⁴⁷ Another commented, "[w]hat an irony that the veterans who have fought to see that we all have these legal rights, are the very ones who are being denied those rights now."⁴⁸ One veterans' advocate remarked "if veterans are a special class—I think for some purposes they are and should be viewed as such—it would seem to be that they deserve more rather than less by way of procedural protection."⁴⁹

Finally, scholars and others hoped that creation of judicial review of the VA adjudication process would allow for mass reform of the VA system, as opposed to making decisions in individual cases that would fail to have widespread effect. Many believed that class action suits would be the best vehicle for this type of reform and have advocated for it since debate began.⁵⁰

adjudication system. 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, 126–27 (2009).

45. *Hearings*, *supra* note 24, at 6 (statement of Susan D. Bennett, Esq., Assistant Professor of Law and Director, Public Interest Law Clinic, Washington College of Law, American University, Washington, D.C.).

46. *Id.* at 313 (statement of The Veterans of Foreign Wars).

47. *Id.* at 17 (statement of Sen. John Kerry).

48. *Id.* at 47 (statement of Sen. Thomas A. Daschle).

49. *Id.* at 11 (statement of Eugene R. Fidell, Esq., Partner, Klores, Feldesman, & Tucker, Washington, D.C.).

50. See, e.g., 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 CATH. U. L. REV. 361, 404 (2009); Hagel & Horan, *supra* note 16, at 65.

A. “A Ruby in the Dung”

As the debate drew to a close during the Senate Veterans’ Affairs Committee hearing on judicial review in 1988, the following exchange occurred:

Senator SIMPSON. I will be very interested to see what you and the chairman put together after these hearings. I think very possibly it will be very close to where you want to be.

Senator MURKOWSKI. There won’t be too much sausage.

[Laughter.]

Senator SIMPSON. Well, there will be, without question, sausage that is the way our work is; but occasionally, we find a ruby in the dung, and that is what keeps us going. [Laughter.]⁵¹

The dung in this metaphor could be any multitude of issues. However, the ruby created from decades of wrestling and debate about the issue of judicial review is unquestionably the CAVC. The VJRA created the CAVC as an Article I court.⁵² Its judges are appointed to the bench for a term of fifteen years.⁵³ In the original legislation, the CAVC was authorized one chief judge and at least two but no more than six associate judges.⁵⁴ Effective on December 31, 2009, Congress temporarily authorized two more judges to be added to the court, making the total judges on the court nine.⁵⁵

The court has exclusive jurisdiction over final decisions of the Board, and the enacting statute prohibits the Secretary from seeking review of the Board’s decisions.⁵⁶ Its jurisdiction was constructed from the competing pieces of legislation proposed by the House and Senate, with heavy input from VSOs and other stakeholders.⁵⁷ As a result,

51. *Hearings, supra* note 24, at 10.

52. *See* Veterans’ Judicial Review Act, Pub. L. No. 100-687, § 4051, 102 Stat. 4105, 4113 (1988) (codified as amended at 38 U.S.C. § 7251 (2012)).

53. 38 U.S.C. § 7253(c) (2012).

54. § 4053, 102 Stat. at 4114.

55. 38 U.S.C. § 7253(h)(5)(i)(1) (2012 & Supp. 2017).

56. 38 U.S.C. § 7252(a) (2012).

57. *See generally* Helfer, *supra* note 27 (explaining the different constituent groups involved in the process of advocating for specific aspects of the VCAA); Barton F. Stichman, *The Veterans’ Judicial Review Act of 1988: Congress Introduces Courts and Attorneys to Veterans’ Benefits Proceedings*, 41 ADMIN. L. REV. 365 (1989) (describing the history and importance of judicial review in the veterans benefits process).

Congress granted the CAVC the authority to: (1) decide all relevant questions of law; (2) interpret constitutional, statutory, and regulatory provisions; (3) determine the meaning or applicability of the terms of an action of the Secretary; (4) compel action of the Secretary unlawfully withheld or unreasonably delayed; (5) hold unlawful and set aside decisions, findings, conclusions, rules and regulations adopted by the Secretary or Board that are arbitrary and capricious, an abuse of discretion, contrary to constitutional right, or in excess of statutory authority, among other things; and (6) hold unlawful and set aside or reverse findings of material fact made by the VA that are clearly erroneous.⁵⁸

Proceedings at the court are adversarial, which is a sharp departure from the VA system below.⁵⁹ At the CAVC, the interests of the Secretary of the VA are represented by attorneys from VA's Office of General Counsel.⁶⁰ The veterans themselves may be *pro se* or represented by agents or attorneys authorized to practice before the court.⁶¹ Veterans or the Secretary may appeal decisions of the CAVC to the United States Court of Appeals for the Federal Circuit.⁶² The Federal Circuit's jurisdiction over decisions of the CAVC is limited to appeals involving "the validity of any statute or regulation or any interpretation thereof" or "interpret[ing] constitutional and statutory provisions."⁶³ After the Federal Circuit, a veteran or the VA may apply for review from the Supreme Court of the United States.⁶⁴

B. An Assessment of the Hopes and Fears

In 2009, a widely recognized and preeminent scholar of the CAVC, then-Professor Michael P. Allen of Stetson University College of Law,

58. 38 U.S.C. § 7261(a). The "clearly erroneous" standard differs slightly from the Administrative Procedure Act's "arbitrary and capricious" standard applied to questions of fact. *See Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 378 (1989) (citing 5 U.S.C. § 706(2)(A)).

59. *See* 38 U.S.C. § 7263(a) (marking the first mention of attorney representation to protect the interests of the Secretary of the VA); *Forshey v. Principi*, 284 F.3d 1335, 1355 (Fed. Cir. 2002) (en banc), *superseded on other grounds* by Veterans Benefits Act of 2002, Pub. L. No. 107-330, § 402(a), 116 Stat. 2820, 2832.

60. 38 U.S.C. § 7263(a); *see Forshey*, 284 F.3d at 1355.

61. 38 U.S.C. § 5904(c); 38 C.F.R. §§ 14.628, 14.629(b)(1)(iii)–(iv) (2018); *see generally The Role of National, State, and County Veterans Service Officers in Claims Development: Hearing Before the H. Subcomm. on Disability Assistance and Memorial Affairs*, 109th Cong. (2006) (discussing the work of VSOs in the claims process and their interaction with and advocacy on behalf of veterans).

62. 38 U.S.C. § 7292(c).

63. *Id.*

64. *Id.*; *see* 28 U.S.C. § 1254(1) (2012).

wrote an article assessing the first twenty years of the CAVC's successes and tribulations.⁶⁵ For a number of years, Judge Allen was the only academician analyzing and advising on the operation of the CAVC. In his 2009 Article, Judge Allen commented on some of the concerns of those advocating for and against the judiciary taking a role in veterans-benefits adjudications.⁶⁶ Overall, Judge Allen's assessment of the CAVC's role in the process and the Court's decisions shaping veterans law was a positive one.

It seems appropriate to take a fresh look at the concerns of stakeholders in 1988 and Judge Allen's article of ten years ago to measure at least some of the clarity and quagmire that judicial review has contributed to the adjudication of veterans' benefits over the last ten years. To do so, this Article will look briefly at three separate hopes and fears expressed in 1988 and, in part, commented on by Judge Allen and others: the effect of judicial review on the quality of decision-making at the VA and the non-adversarial process, the fear that judicial review will cause delay in the system, and the hope that judicial review will bring more due process and equity to the VA's adjudication system.

1. The Effect of Judicial Review on the VA's Decision-Making and the Non-Adversarial Process

One of the major concerns of proponents of judicial review were accusations that the VAROs and the Board were making arbitrary decisions, with no outside and objective body holding them accountable.⁶⁷ The concern about the Board's cavalier handling of veterans' claims seems to have been a grounded one. As Senator Cranston remarked in the 1988 hearings, "[t]he Chairman of the BVA commented during a recent House hearing that even the specter of judicial review has made some of the people reviewing BVA claims more careful to see that the board [sic] does everything that it can."⁶⁸

The other major consideration that goes hand-in-hand with arbitrary

65. See Allen, *supra* note 50. In 2017, Professor Allen was appointed and confirmed to the bench of the Court of Appeals for Veterans Claims by President Trump. Therefore, he will be referred to as Judge Allen throughout the rest of this article. See Judge Michael P. Allen, U.S. COURT OF APPEALS FOR VETERAN CLAIMS, <https://www.uscourts.cavc.gov/allen.php> [https://perma.cc/R3T3-LY99] (last visited Jan. 24, 2019).

66. Allen, *supra* note 50.

67. Hearings, *supra* note 24, at 6 (statement of Susan D. Bennett, Esq., Assistant Professor of Law and Director, Public Interest Law Clinic, Washington College of Law, American University, Washington, D.C.).

68. *Id.* at 2 (statement of Sen. Alan Cranston, Chairman, S. Comm. on Veterans' Affairs).

decision-making involves the non-adversarial nature of the VA system. Opponents of judicial review were afraid that adding legal review to the VA's adjudication system would inherently create adversity.⁶⁹ Proponents of review maintained that the system was already adversarial in certain instances. They argued that the VA needed reminding of its role in the system as facilitator, and not bouncer, of claims that may be meritorious if the VA applied the appropriate veteran-friendly legal standards in the adjudication process.⁷⁰

In light of these concerns, it is widely recognized that with the advent of court review the nature of the veterans benefits adjudication has changed. The Federal Circuit remarked ten years after the creation of the CAVC that the non-adversarial nature of the entire benefits process was altered significantly: “[I]t appears the system has changed from ‘a nonadversarial, ex parte, paternalistic system for adjudicating veterans’ claims,’ to one in which veterans . . . must satisfy formal legal requirements, often without the benefit of legal counsel, before they are entitled to administrative and judicial review.”⁷¹

In 1996, a Congressionally-convened commission charged with evaluating the VA adjudication process including the effect of the still fairly new judicial review, reported that the creation of judicial review created an “adversarial paternalism.”⁷² While acknowledging the contradiction in those terms, the commission noted that:

When an adversarial review is imposed on a paternalistic adjudication and there are no definitive rules that describe the limits of adjudicative paternalism, for all practical purposes the judicial review standard becomes, “Was VA paternalistic enough?” As each case presents different circumstances, the boundaries of paternalism can be and are continually extended.⁷³

69. See, e.g., *id.* at 7 (statement of Sen. Simpson), *id.* at 13 (testimony of Eugene R. Fidell, Esq., Partner, Klores, Feldesman, & Tucker, Washington, D.C.), *id.* at 15 (testimony of Keith A. Rosenberg, Esq., Whiteford, Taylor & Preston), *id.* at 481 (statement of the Veterans Administration (VA)), and *id.* at 393 (statement of National Vietnam Veterans Coalition).

70. See, e.g., *id.* at 409 (statement of Veterans Due Process); *id.* at 6 (statement of Susan D. Bennett, Esq., Assistant Professor of Law and Director, Public Interest Law Clinic, Washington College of Law, American University, Washington, D.C.).

71. *Bailey v. West*, 160 F.3d 1360, 1365 (Fed. Cir. 1998) (quoting *Collaro v. Dep't of Veterans Affairs*, 136 F.3d 1304, 1309–10 (Fed. Cir. 1998)).

72. THE VETERAN. VA'S CUSTOMER: WHO CLAIMS BENEFITS AND WHY?, VETERANS' CLAIMS ADJUDICATION COMM'N 160 (1996) [hereinafter THE VETERAN] http://www.veteranslawlibrary.com/files/Commission_Reports/Melidosian_Commission_Report_Dec_1996.pdf [https://perma.cc/Q5LB-5DWZ].

73. *Id.*

The commission noted that before judicial review, the VA was only accountable to itself, allowing for cursory decision-making with little or no explanation to veterans concerning the reasons for the outcome.⁷⁴ However, to comply with broad legal requirements decided at the court, the VA has had to make more complex and intricate decisions about benefit claims, which take more time to create.⁷⁵

Judge Allen noted that in 2009, the generalized perception of Congress, the CAVC, and other observers was that the decision-making process of the VA had been “improved” overall as a result of judicial review.⁷⁶ While the issue of the length of time the VA takes to work on a veteran’s claims will be discussed further in this article, it is appropriate to first consider whether over the past decade the overall quality of VA decision-making has been improved and whether the effects of judicial review on the non-adversarial process have created change in the system.

In terms of measuring the effects of judicial review on the quality of VA decisions, it is difficult to agree on a standard of measurement. While the decisions of the VAROs and Board are more complex since the creation of the CAVC, are they actually deciding issues correctly? In 2009, Judge Allen appropriately noted that if one were to measure the quality of administrative opinions in terms of result, there was no baseline before 1988.⁷⁷ He also observed that in the second decade of judicial review, the rates of the CAVC’s reversal of Board decisions from 1999 to 2009 remained relatively stable.⁷⁸ For instance, in 2008 the CAVC made decisions on the merits of approximately 3,480 cases concerning veterans’ benefits claims.⁷⁹ Approximately 80% of the decisions of the Board were remanded in whole or in part for some failure on the Board’s part.⁸⁰ Additionally, the court granted 2,433 applications for Equal Access to Justice Act fees (EAJA) in 2008.⁸¹ EAJA is the federal law regarding lawsuits against the United States government that permits a prevailing party’s legal counsel to collect fees

74. *Id.* at 193.

75. *Id.* at 114.

76. *See* Allen, *supra* note 50, at 376.

77. *Id.*

78. *Id.*

79. U.S. COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORT 1 (2000-2008) https://www.uscourts.cavc.gov/documents/Annual_Report_FY_2009_October_1_2008_to_September_30_2009.pdf [<https://perma.cc/8DXD-PUWE>]. This number excludes those decisions made on petitions for extraordinary relief.

80. *Id.*

81. *Id.*

from the federal government.⁸² To collect these fees, the court must find that the government's position in the case was not "substantially justified."⁸³ The phrase "substantially justified" implies "justified to a degree that could satisfy a reasonable person."⁸⁴ This means that in 2008, the Board was unreasonable in its decision-making towards veterans in 70% of the cases the court decided.⁸⁵ As a comparison, the CAVC in 1998 decided 1,352 cases on the merits.⁸⁶ Of these cases, 60% were remanded in whole or in part.⁸⁷ At that time, because attorney representation had been discouraged for so long by the low fee rate previously discussed, almost half of the veterans in the court were unrepresented.⁸⁸ Even so, 380 EAJA applications were granted.⁸⁹ Again, while these numbers indicate stability in the court's decisions, they are alarming in their own right that the VA is consistently failing to implement the veteran-friendly system in the manner envisioned by Congress.

In 2010, the Supreme Court also expressed concern about this inconsistency, remarking on the number of veterans' cases heard at the CAVC that were awarded EAJA fees. This exchange occurred during an oral argument regarding EAJA fees at the Social Security Administration:

CHIEF JUSTICE ROBERTS:—70 percent of the time the government's position is substantially unjustified?

MR. YANG: In cases—in the VA context, the number is not quite that large, but there's a substantial number of cases at the court of appeals –

CHIEF JUSTICE ROBERTS: What number would you accept?

MR. YANG: It was, I believe, in the order of either 50 or maybe slightly more than 50 percent. It might be 60. But the number is substantial that you get a reversal, and in almost all of those cases, EAJA –

82. See 28 U.S.C. § 2412(d)(1), (d)(2)(F) (2012).

83. *Id.* § 2412(d)(1)(A)–(B), (d)(3).

84. *Pierce v. Underwood*, 487 U.S. 552, 565 (1988).

85. This number reflects the number of granted EAJA applications granted in 2008 divided by the total merits decisions in 2008 excluding extraordinary relief claims: 2433/3480 = 69.9%.

86. U.S. COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORT 1 (1997-2007) https://www.uscourts.cavc.gov/documents/Annual_Reports_2007.pdf [https://perma.cc/D82B-7AYL]. This number excludes those decisions made on petitions for extraordinary relief.

87. *Id.* This number excludes those decisions made on petitions for extraordinary relief.

88. *Id.*

89. *Id.*

CHIEF JUSTICE ROBERTS: Well, that's really startling, isn't it? In litigating with veterans, the government more often than not takes a position that is substantially unjustified?

MR. YANG: It is an unfortunate number, Your Honor. And it is—it's accurate.⁹⁰

In 2017, the most recent year numbers are available, the situation is worse. Of the 3,619 appeals that were decided on the merits at the court, 86% of these decisions remanded in whole or in part the decisions of the Board.⁹¹ In addition, a whopping 80% of the cases decided were awarded EAJA fees.⁹² Overall, the decisions being made at the Regional Office level are no more encouraging if one reviews them for compliance with the law. In 2017, the Board remanded or reversed 73% of the appeals of Regional Office decisions.⁹³

If the quality of Board decisions is measured in terms of content, then these numbers⁹⁴ represent a concerning trend that the author has addressed in detail in prior articles.⁹⁵ While the number of reversals in 2017 (3,112) is a small fraction of the decisions the Board makes denying a veteran benefits (11,371), the 86% reversal rate of all appeals decided in one year is no less alarming.⁹⁶ As one attorney who has been practicing in the veterans law arena for decades noted, “the VA’s appeal process . . . has been unable to ‘fully and sympathetically develop the veteran’s claim to its optimum before deciding it on the merits’ in 4 out

90. Transcript of Oral Argument at 52, *Astrue v. Ratliff*, 560 U.S. 586 (2010) (No. 08-1322), 2010 WL 603696.

91. U.S. COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORT 2 (2017) <https://www.uscourts.cavc.gov/documents/FY2017AnnualReport.pdf> [https://perma.cc/HXX8-5NWV]. This number is the total number of appeals excluding appeals dismissed voluntarily, for lack of jurisdiction or timeliness, or for default.

92. *Id.* This number reflects the total number of EAJA appeals divided by the total number of merits appeals excluding voluntary dismissals and dismissals for lack of jurisdiction or timeliness, or for default: $2882/3619 = 79.6\%$.

93. U.S. DEP'T OF VETERANS AFFAIRS, BD. OF VETERANS' APPEALS, ANNUAL REPORT FISCAL YEAR (FY) 2017 30 (2017) https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA_2017AR.pdf [https://perma.cc/DY8S-F5K7]. The Board reports making 52,661 decisions in 2017 of which 73.4% approved the veteran's appeal of the VARO's decision or remanded the decision for further development.

94. *See id.* For instance, in 2017 the Board decided approximately 52,261 cases and ultimately denied only 11,371 of these. It is this smaller number of cases that represent appealable decisions of the Board.

95. *See, e.g.,* Stacey-Rae Simcox, *Thirty Years After Walters the Mission is Clear, the Execution is Muddled: A Fresh Look at the Supreme Court's Decision to Deny Veterans the Due Process Right to Hire Attorneys in the VA Benefits Process*, 84 U. CIN. L. REV. 671 (2016).

96. *See* U.S. DEP'T OF VETERANS AFFAIRS, BD. OF VETERANS' APPEALS, ANNUAL REPORT FISCAL YEAR, *supra* note 93 at 29 and text accompanying note 94.

of every 10 cases appealed to the [Board] since 1992 through 2013.”⁹⁷ Discouragingly, this reversal rate has remained relatively unchanged in the thirty years of judicial review of the VA’s adjudication process.

As Judge Allen noted, it is true that the rate of remands is not the only way to examine the impact of judicial review, but it does provide one of the only objective standards available.⁹⁸ Taking into consideration the quality of the rationale given for the VA’s decisions also raises concerns. One veterans’ advocate remarked that the fact that the lack of clear guidance in a number of areas of veterans law has led to the inability of the VA to make consistent and accurate decisions.⁹⁹ The Disabled American Veterans expressed concern in 2015 that the rating decisions emanating from the Regional Offices still lack “substantive information for claimants to understand how VA arrived at its decision on a claim for benefits.”¹⁰⁰ While these comments are not representative of every decision made at the VARO and Board, they are indicative of the continuing perception among veterans that the VA engages in arbitrary decision-making without explanation, despite judicial review.

In the content of the court’s opinions, one can find evidence that the struggle to maintain a non-adversarial system, and yet acknowledge that attorneys are now a larger part of that system, is real. For example, in 2014, the CAVC played referee between the Board and attorneys representing Mr. Nohr, a veteran.¹⁰¹ The attorneys wanted to ask questions of the medical examiner the VA procured and relied upon when deciding Mr. Nohr’s claims.¹⁰² In asking questions, the attorneys referred to the questions as “interrogatories.” The Board refused to require the examiner, Dr. Feng, to answer the request. The CAVC suggested in its dicta that:

the Board’s refusal to send Mr. Nohr’s questions and request for documents to Dr. Feng and its corresponding statement stressing the nonadversarial nature of the VA benefits system looks like a knee-jerk reaction based upon Mr. Nohr’s characterization of his questions as

97. *Veterans’ Dilemma: Navigating the Appeals System for Veterans Claims: Hearing Before the Subcomm. on Disability Assistance and Memorial Affairs of the H. Comm. on Veterans’ Affairs*, 114th Cong. 114 (2015) [hereinafter *Veterans’ Dilemma*] (statement of Kenneth M. Carpenter, Esq., Founding Member, National Organization of Veterans Advocates).

98. See Allen, *supra* note 50, at 376.

99. *Veterans’ Dilemma*, *supra* note 97, at 107 (statement of Barton F. Stichman, Esq., Joint Executive Director, National Veterans Legal Services Program).

100. *Id.* at 87 (statement of Paul R. Varela, Assistant National Legislative Director, Disabled American Veterans).

101. See *Nohr v. McDonald*, 27 Vet. App. 124 (2014).

102. *Id.* at 125, 127–28.

“interrogatories.” With the increasing involvement of attorneys at the administrative level and the corresponding complexity that attorney involvement can generate, the veterans bar and VA must proceed with caution so as not to unravel Congress’s desire to preserve and maintain the unique character and structure of the paternalistic, nonadversarial veterans’ benefits system.¹⁰³

The CAVC then ordered the Board to have the examiner answer the questions asked as part of the VA’s duty to assist a veteran.¹⁰⁴

In decision after decision, the CAVC has systematically reminded the Board and VARO of its non-adversarial nature and its duty to assist the veteran. Official statistics on the number of remands of Board decisions due to a failure to adhere to these standards are difficult to obtain. This is partially due to the fact that the court itself decides relatively few of the appeals to the court on the merits due to large numbers of settlements. The CAVC Rules of Court mandate that veterans’ counsel and attorneys representing the Secretary from the Office of General Counsel enter into settlement conferences.¹⁰⁵ Large numbers of cases “decided” by the CAVC are actually the result of these settlement conferences. Determining why the cases were settled by joint agreement of the parties to remand is difficult without completely exhuming each and every one of the motions for joint remand on the CAVC docket, which in 2017 alone would equate to approximately 1,940 veterans’ cases.¹⁰⁶

However, while the CAVC does not provide official statistics regarding how many cases are voluntarily remanded by the Office of General Counsel, it is possible to extrapolate approximate numbers from the number of CAVC decisions made on the merits of each case and finding that the VA failed in its duty to assist the veteran. In FY 2017, the CAVC had five full-time judges deciding cases and issuing orders.¹⁰⁷ Those five judges decided approximately 1,180 cases and petitions on

103. *Id.* at 131.

104. *Id.* at 134–35.

105. U.S. COURT OF APPEALS FOR VETERANS CLAIMS, COURT RULES, RULE 33(c).

106. U.S. COURT OF APPEALS FOR VETERANS CLAIMS, *supra* note 91, at 2. The CAVC received 4,095 total appeals in 2017. Of those 4,095 appeals, 499 were affirmed on the merits, 160 were dismissed for lack of jurisdiction or timeliness, 101 were dismissed for default, and 215 were voluntarily dismissed—leaving 3,120 total cases remanded by the CAVC in FY 2017. Of these, 1,180 were the result of a judge’s decisions on the merits leaving 1,940 cases the result of some type of motion for remand.

107. U.S. COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORT 5 (2016) <https://www.uscourts.cavc.gov/documents/FY2016AnnualReport.pdf> [<https://perma.cc/UBB3-BYAA4>]; see U.S. COURT OF APPEALS FOR VETERANS CLAIMS, *supra* note 91, at 5 (reporting 4,296 total cases filed in 2017 and 859 filings per active judge).

the merits.¹⁰⁸ Of those 1,180 cases, approximately 430 of them vacated the decision of the Board and remanded in whole or in part veterans' claims based on a violation of the VA's duty to assist.¹⁰⁹ That equates to approximately 36% of the cases remanded by the CAVC specifically because the Board failed to adhere to the non-adversarial system created by Congress. While admittedly this is an unscientific manner in which to gather statistics, practitioners at the CAVC would argue that in their experience, the number of cases in which the Board failed in its duty to assist is actually much higher. One would have hoped that after three decades of reminders to adhere to the non-adversarial system, the number of times the VA failed to do so would be much lower.¹¹⁰

2. The Fear of Delay in the System

The length of time it takes the VA to make decisions on veterans' claims has been a constant source of irritation for veterans and the VA alike. Even before the judicial review of the Board was established, there were complaints that the system just took too long in deciding veteran's claims.¹¹¹ By 1993, the VA was able to begin pointing the finger at the CAVC for delays. While testifying before Congress, a VA official warned that an "activist court" had caused their processing times on initial claims to balloon from 120 days in 1990 to 175 days three years later.¹¹² Congress, the VA, and those who help veterans were already referring to the delays as a backlog.¹¹³ Some pointed to the difficulty the VA was having translating court decisions to lay persons working at the Regional Office level making initial decisions on veterans claims.¹¹⁴ However, the VA General Counsel office declared that by 1993 the VA had an effective system in place to communicate changes in

108. *Id.*

109. This number was arrived at by searching for all merit opinions of the CAVC that vacated or remanded the decision of the Board for violations of the Duty to Assist from 10/1/2016 to 9/30/2017.

110. See generally Ridgway, *supra* note 44 (providing an interesting view of the reason for high remands from the VA's perspective).

111. See *Hearings, supra* note 24, at 225 (statement of Richard O'Dell, Chairman of the Committee on Advocacy, Vietnam Veterans of America).

112. *S. 616, Veterans' Compensation COLA Act of 1993, and Oversight of VA Claims Processing and Adjudication: Hearing Before the S. Comm. on Veterans' Affairs*, 103d Cong. 20 (1993) (statement of R. John Vogel, Deputy Undersecretary for Benefits, Department of Veterans Affairs).

113. See generally *id.* at 33–35 (discussing the increasing number of claims awaiting decision for an increasing amount of time).

114. *Id.* at 2 (statement of Sen. John D. Rockefeller, Chairman, S. Comm. on Veterans' Affairs).

the law to its employees.¹¹⁵ Independently, the Veterans Claims Adjudication Commission's 1996 report found that with the creation of the CAVC, the average time it took for the VARO and Board to process claims doubled.¹¹⁶ By 2012, the average time it took to receive an initial decision from the VA was reported as 260 days.¹¹⁷ The 2012 numbers showed that there were "856,092 pending compensation rating claims, of which 568,043 (66 percent) were considered backlogged [pending over 125 days]."¹¹⁸ A push in 2013 to focus on making decisions on initial claims within 125 days to reduce the almost 600,000 waiting claims required mandatory overtime of rank and file VA employees.¹¹⁹

This focus on completing initial claims faster forced the backlog on decisions into the appellate side of adjudication at the VA. From 2009–2011, the time it took for the VA to initiate its first response to a veteran's appeal of a decision increased 57% from 293 days to 460 days.¹²⁰ In 2015, the average veteran would wait 1,380 days to have their appeal decided by the Board.¹²¹ A 2018 VA Inspector General report found that the average time a veteran now waits to have an appeal favorably decided at the Board and implemented is 2,213 days—a little over six years!¹²² If a remand to the VARO is required—which happens in 43% of the cases the Board decides¹²³—another 943 days could be added to the process, making the total time a veteran is kept waiting 3,156 days—over eight and a half years.¹²⁴

Were the fears of veterans' advocates that the court would delay benefits to veterans founded? Frankly, it is difficult to say exactly how much impact the CAVC has had on the delays in the system. The issue of delay at the VA is not a new phenomenon. In 1988, before the CAVC

115. *Id.* at 25 (statement of Mr. Thompson, Assistant General Counsel, Department of Veterans Affairs).

116. THE VETERAN, *supra* note 72, at 168.

117. U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-89, VETERANS' DISABILITY BENEFITS: TIMELY PROCESSING REMAINS A DAUNTING CHALLENGE 1 (2012).

118. *Id.* at 9.

119. David Wood, *VA Backlog Reform is Difficult But on Track, Secretary Eric Shinseki Says*, HUFFINGTON POST (May 22, 2013, 12:07 PM), https://www.huffingtonpost.com/2013/05/22/va-backlog_n_3312744.html [<https://perma.cc/EEW5-XW9J>].

120. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 117, at 10.

121. Michael P. Allen, *Justice Delayed; Justice Denied? Causes and Proposed Solutions Concerning Delays in the Award of Veterans' Benefits*, 5 U. MIAMI NAT'L SEC. & ARMED CONF. L. REV. 1, 11–12 (2015).

122. OFF. OF INSPECTOR GEN., OFF. OF AUDITS & EVALUATIONS, U.S. DEP'T OF VETERANS AFF., REVIEW OF TIMELINESS OF THE APPEALS PROCESS 4 (2018), <https://www.va.gov/oig/pubs/VAOIG-16-01750-79.pdf> [<https://perma.cc/LN3G-GHCQ>].

123. U.S. DEP'T OF VETERANS AFFAIRS, *supra* note 93.

124. OFF. OF INSPECTOR GEN., *supra* note 122.

was created by passage of the VJRA, the Chief Benefits Director of the VA attempted to explain the problems VA was having with timely processing veterans claims to a frustrated Congress: “There are twenty-eight standards in our timeliness measurement system. As of January 31, 1988, we were meeting an acceptable level in only five of them.”¹²⁵

The reasons for the current delay and backlog seem to be varied. In 2018, judicial review is no longer viewed as the primary reason for delay in the system. Observers point to the fact that the sheer number of claims the VA has had to process over the past two decades has been on the rise, sparked primarily by Vietnam-era veterans retiring and Iraq, Afghanistan, and Global War on Terrorism veterans leaving the service in large numbers.¹²⁶ For instance, in 2008 the VA processed nearly 900,000 claims for disability compensation.¹²⁷ In 2011, the VA completed over 1 million claims.¹²⁸ At the end of Fiscal Year 2017, the last year for which official numbers are available in VA reports, the VA processed 1.4 million claims.¹²⁹ There is no doubt that the workload has increased, but former VA Secretary Eric Shinseki indicated that more VA employees were not necessarily the answer to processing the growing numbers.¹³⁰ Despite this admission, Congress increased the VA’s budget in 2015 to hire more employees to handle these claims.¹³¹ And while that worked for a brief time, pending claims numbers were

125. See S. REP. NO. 100-342, at 30–31 (1988).

126. See generally Allen, *supra* note 121, at 10 (Discussing the impact of large numbers of veterans applying for benefits and its impact on the VA’s processing of benefits.)

127. U.S. DEP’T. OF VETERANS AFFAIRS, VETERANS BENEFITS ADMINISTRATION, FY 2008 PERFORMANCE AND ACCOUNTABILITY REPORT 2 (2008), <https://www.va.gov/finance/aftr/index.asp> [<https://perma.cc/Q8VP-HQ6R>] (click “Archive” link under the “Fiscal Year 2008” bullet point in the “Prior Years Published Reports” section).

128. U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 117, at 9.

129. U.S. DEP’T. OF VETERANS AFFAIRS, FY 2019 / FY 2017 ANNUAL PERFORMANCE PLAN AND REPORT 33 (2018), <https://www.va.gov/oei/docs/VA2019appr.pdf> [<https://perma.cc/93T5-FUMT>].

130. Secretary Shinseki had this exchange with interviewer Candy Crowley on CNN in 2013:

CROWLEY: But is there something he can do for you? Does it need more people? Do you need more processors? Do you need more accountability for the processors? What do you need? SHINSEKI: In the past four years, if you look at our budget for V.A., a 40 percent increase our budgets at a time when other departments have gone through belt tightening. Someone once told me that show me your budget and I’ll show you what you value. I think very clearly from this president the growth in our budgets reflect where he places his value.

State of the Union with Candy Crowley (CNN television broadcast Mar. 24, 2013), <http://transcripts.cnn.com/TRANSCRIPTS/130324/sotu.02.html> [<https://perma.cc/3GD3-MPYX>].

131. *VA Enters Stretch on Goals for Homelessness, Claims Backlog*, NBC NEWS (Nov. 11, 2015, 10:43 AM), <https://www.nbcnews.com/storyline/va-hospital-scandal/va-enters-stretch-goals-homelessness-claims-backlog-n461511> [<https://perma.cc/25PG-JK3Q>].

steadily increasing again into another backlog by 2017.¹³²

Other reasons offered for delay have included changes in the presumptions that allow the VA to provide compensation for veterans suffering from certain health conditions without requiring the veterans to definitively prove the conditions' connection to their service. The Secretary of the VA granted three such presumptions for Vietnam veterans exposed to Agent Orange between 2010 and 2012, which the VA pointed to as a contributing factor in increasing claims-processing times.¹³³ The complexity of conditions claimed, such as traumatic brain injuries, and large numbers of untrained and inexperienced claims processors hired to reduce the backlog have also been identified as contributing to the problem.¹³⁴ However, it has been argued that the issues seen in the VA are no more complex than those seen in the Social Security Administration where initial decisions also are made by laypersons employed at the agency.¹³⁵

However, in the past decade, the VA's most oft-cited reason for the delays in the system is the non-adversarial nature of the VA itself. The VA has pointed to the codification of this paternalistic system under the Veterans Claims Assistance Act of 2000,¹³⁶ which mandates the assistance the VA owes to veterans who file a claim, as the primary "problem" it faces in delivering timely claims decisions in both the original decision and appellate processes. Some statutory duties the VA has to help a veteran through the claims process include requesting federally-held records pertaining to a veteran's claim, requesting privately held medical records on behalf of the veteran, providing the veteran with a medical examination, and imposing the duty to read a veteran's claim sympathetically.¹³⁷ Generally, these duties are referred to as the VA's "duty to assist" a veteran.

To be certain, fulfilling the duty to assist takes time. As Judge Allen noted

132. Leo Shane III, *Once a Fixed Issue, the VA Disability Claims Backlog is on the Rise Again*, MILITARY TIMES (Mar. 24, 2017), <https://www.militarytimes.com/news/pentagon-congress/2017/03/24/once-a-fixed-issue-the-va-disability-claims-backlog-is-on-the-rise-again/> [<https://perma.cc/XF2V-SGJ2>].

133. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 117, at 13.

134. *Id.* at 11.

135. Michael J. Wishnie, "A Boy Gets Into Trouble": *Service Members, Civil Rights, and Veterans' Law Exceptionalism*, 97 B.U. L. REV. 1709, 1736 (2017).

136. Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, 114 Stat. 2096 (Nov. 9, 2000).

137. 38 U.S.C. §§ 5103A (2012 & Supp. 2017), 5107 (2012), 5109 (2012 & Supp. 2017); *See McGee v. Peake*, 511 F.3d 1352, 1357 (Fed. Cir. 2008); *Cook v. Principi*, 318 F.3d 1334, 1337-38 n.4 (Fed. Cir. 2002).

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.¹³⁸

In 2007, an administrator at the VA testified before Congress that the backlog in claims was partially due to the requirements of the VCAA that the VA schedule medical examinations and notify the veteran of the evidence required to prove their claims.¹³⁹ The VA has also claimed that it takes 157 days of processing time (in 2011) to request records for veterans when processing initial claims.¹⁴⁰

The delay issue is front and center not only at Congress, but in jurisprudence as well. Recently, a spate of lawsuits concerning the delays at the VA have come before both the CAVC and the Federal Circuit.¹⁴¹ These cases have argued that the delays at the VA are a violation of due process, and that the CAVC has a duty to order the Secretary of the VA to act when decisions on claims are “unlawfully withheld or unreasonably delayed.”¹⁴² While the due process considerations will be addressed in the following Section, a discussion of the CAVC’s willingness to order the Secretary to move more quickly and cut wait times is well placed here.

In an interesting crossroads of the tensions between providing a veteran-friendly, paternalistic system and acknowledging the VA’s assertions that delay in such a system is quite impossible to avoid, the CAVC had created its own standard for determining the requirements for when a writ of mandamus should be issued by the court to order the Secretary to more quickly adjudicate a veteran’s claims.¹⁴³ The writ of mandamus would require the Secretary to take actions on a veteran’s

138. Allen, *supra* note 121, at 18.

139. *Personal Costs of the US Department of Veterans Affairs Claims Backlog: Hearing Before the Subcomm. on Disability Assistance and Memorial Affairs of the H. Comm on Veterans’ Affairs*, 110th Cong. 1st Sess. 41–42 (2007) (statement of Michael Wolcuff, Associate Deputy Under Secretary for Field Operations, Veterans Benefits Administration, Department of Veterans Affairs).

140. U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 117, at 2.

141. *Rose v. O’Rourke*, 891 F.3d 1366, 1367 (Fed. Cir. 2018); *Martin v. O’Rourke*, 891 F.3d 1338 (Fed. Cir. 2018); *Monk v. Shulkin*, 855 F.3d 1312, 1314 (Fed. Cir. 2017).

142. 38 U.S.C. § 7261(a)(2) (2012); *see, e.g., Martin*, 891 F.3d 1338.

143. *Costanza v. West*, 12 Vet. App. 133, 134 (1999) (per curiam), *abrogated by Martin*, 891 F.3d at 1348.

claim when that action is unreasonably delayed.¹⁴⁴ The CAVC referred to the test it used to determine unreasonable delay as the *Costanza* standard and required the veteran to demonstrate that “the delay he complains of is so extraordinary, given the demands and resources of the Secretary, that the delay amounts to an arbitrary refusal to act, and not the product of a burdened system.”¹⁴⁵ As the Federal Circuit noted, “[t]here is little to be said about this standard’s origin.”¹⁴⁶

The CAVC’s choice to apply an arbitrary-refusal-to-act standard was an interesting one in light of the nature of the pro-veteran system. The CAVC was in the minority of courts choosing to use this standard.¹⁴⁷ Additionally, using the *Costanza* standard “inevitably favor(s) the Secretary because the standard considers the ‘demands and resources of the Secretary.’”¹⁴⁸ After twenty years of using the *Costanza* standard, a challenge was inevitable.

In 2018, the Federal Circuit heard the consolidated claims of nine individual veterans concerning delay at the VA. The Appellants argued that the CAVC should use the standard that many other federal courts use to determine unreasonable delay, referred to as the *TRAC* standard, as opposed to the less favorable and narrower *Costanza* standard.¹⁴⁹ Under *TRAC*, a claim of unreasonable delay is analyzed to determine “whether the agency’s delay is so egregious as to warrant mandamus”¹⁵⁰ using six factors:

- (1) the time agencies take to make decisions must be governed by a “rule of reason”;
- (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason;
- (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake;
- (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority;
- (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and
- (6) the court need not find “any impropriety lurking behind agency lassitude” in order to hold that

144. *Martin*, 891 F.3d at 1344.

145. *Costanza*, 12 Vet. App. at 134.

146. *Martin*, 891 F.3d at 1344.

147. Brief of Amicus Curiae Nat’l Law Sch. Veterans Clinic Consortium at 5–6, *Monk v. Wilkie*, (No. 15-1280), Vet. App. (2017).

148. *Id.* at 6 (citing *Costanza*, 12 Vet. App. at 134).

149. *Telecomms. Research & Action Ctr. v. FCC (TRAC)*, 750 F.2d 70, 76 (D.C. Cir. 1984).

150. *Id.* at 79.

agency action is unreasonably delayed.¹⁵¹

The Federal Circuit agreed with Appellants that the *TRAC* standards are “a more balanced approach” because it encompasses a review of both the veterans’ interests and the burdens on the VA.¹⁵² The Federal Circuit spent the majority of its discussion on the first elements of the *TRAC* standard, the “rule of reason” analysis. The Federal Circuit explained that while it is reasonable to expect complex decision-making, such as preparation of a Statement of the Case, to take time, the delay is unexplainable when considering periods of decision-making that are “due to the agency’s failure to perform certain ministerial tasks.”¹⁵³ For instance, the Federal Circuit noted that during several steps of the process of an appeal, the VA could not explain why delay exists:

Once the veteran files a Form 9 (appeal to the Board), the VA completes a Certification of Appeal. . . it is unclear to us why this two-and-a-half-hour certification process takes an average of 773 days to complete—and the government has not provided an explanation. And the average 321-day delay that occurs when the VA transfers the certified appeal to the BVA is even more mysterious. The government, again, has not explained the cause of this delay, even though the transfer process appears to consist of simply transferring appellate records.¹⁵⁴

The Federal Circuit also noted that *TRAC* factors three and five allow the CAVC to consider the specific effects of delay on individual veterans, while the fourth factor allows a balancing of the VA’s burden under large numbers of claims.¹⁵⁵ The Federal Circuit believed that following the *TRAC* standards will allow the CAVC to evaluate these claims of unreasonable delay in a more balanced manner on a case-by-case basis without setting arbitrary deadlines on the VA to complete actions.¹⁵⁶

While veterans celebrate the victory in *Martin*, the outcome is yet another demonstration of the Wild West mentality of veterans law. *Martin* shows that well-timed advocacy can overturn law that has been observed by the CAVC for decades. This topic is important and will be discussed further below. Due to the recency of the Federal Circuit’s

151. *Martin*, 891 F.3d at 1344–45 (quoting *TRAC*, 750 F.2d at 80).

152. *Id.* at 1345.

153. *Id.* at 1346.

154. *Id.* at 1341.

155. *Id.* at 1346–47.

156. *Id.* at 1345.

decision that the *TRAC* elements should be used by the CAVC, there are very few decisions implementing the *TRAC* factors in a case of delay at the VA yet, so it is something for observers to carefully watch for in the coming years. Hopefully, the use of this new standard of review regarding delay in VA decision-making will allow the CAVC to make more meaningful decisions on a case-by-case basis to stop the long periods of unexplainable delay in VA decision-making.

Finally, before leaving the topic of delay in the VA adjudication system, it would be wise to remind the reader that the discussion of delay is not merely an academic one. Circuit Judge Moore discussed the importance of delay in his concurring opinion in *Martin*:

The men and women in these cases protected this country and the freedoms we hold dear; they were disabled in the service of their country; the least we can do is properly resolve their disability claims so that they have the food and shelter necessary for survival. It takes on average six and a half years for a veteran to challenge a VBA determination and get a decision on remand. God help this nation if it took that long for these brave men and women to answer the call to serve and protect. We owe them more.¹⁵⁷

3. Increased Due Process and “Uncharted Waters”

Veterans’ advocates and supporters hoped that with the advent of judicial review, veterans would be afforded more due process in the VA adjudication system and that they would be treated more equitably.¹⁵⁸ In a review of the past decade of veterans law and due process, the most impactful court decision has to be the Federal Circuit’s decision in *Cushman v. Shinseki*, which held that a veteran’s entitlement to disability benefits is a property interest protected by the Due Process Clause of the Fifth Amendment.¹⁵⁹ However, since *Cushman* was decided in 2009, the Federal Circuit and the CAVC have avoided the application of a due process analysis to what are arguably the biggest issues in veterans’ benefits in the last decade: the backlog of claims and delay in the system. Perhaps the use of the word “avoid” is too harsh of an assessment on the courts’ willingness to intervene. It may be more accurate to say that the courts have been “prevented” from deciding such issues. As CAVC Judges Lance and Hagel noted in 2012:

157. *Id.* at 1352 (Moore, J., concurring).

158. *See, e.g., Hearings, supra* note 24, at 17 (statement of Sen. John Kerry).

159. 576 F.3d 1290, 1298 (Fed. Cir. 2009).

It is true that the Court rarely grants a petition for extraordinary relief. However, it should not be assumed from this fact that petitions are an ineffective tool for obtaining relief. The reality is that the Court regularly orders the Secretary to respond to a petition that sets forth a well-pleaded complaint that the processing of a claim has been improperly delayed. When the Court issues such an order, the great majority of the time the Secretary responds by correcting the problem within the short time allotted for a response, and the petition is dismissed as moot because the relief sought has been obtained.¹⁶⁰

Recently however, a new wave of litigation at the CAVC and Federal Circuit has positioned the issue front and center for the CAVC and offered it another chance to consider the issue decisively. One prime example of this litigation is the case of Mr. Conley Monk. Mr. Monk is a Vietnam veteran who was denied service connection for his Post Traumatic Stress Disorder and filed his Notice of Disagreement with the VARO in July 2013.¹⁶¹ After twenty months of waiting, Mr. Monk filed a petition with the CAVC for a writ of mandamus ordering the VARO to issue a Statement of the Case and claiming that the VARO's failure to do so was a constructive denial of Mr. Monk's benefits.¹⁶² The CAVC denied his petition in a 2015 decision because Mr. Monk was unable to meet the *Costanza* standard showing that the Secretary's delay was equivalent to an arbitrary refusal to act.¹⁶³ Additionally, Mr. Monk asked that the CAVC "compel the Secretary promptly to decide his claim and that of thousands of similarly situated veterans who confront significant financial or medical hardship while awaiting a VA decision."¹⁶⁴ The CAVC rejected this request,¹⁶⁵ citing CAVC decisions reaching back to 1991 holding that class actions at the CAVC were impossible to adjudicate because:

[the CAVC] lacks the power to adopt a rule of the kind proposed for class actions, . . . and, in any event, that (2) such a procedure in this appellate court would be highly unmanageable, and that (3) such a procedure is unnecessary in light of the binding effect of this Court's

160. *Young v. Shinseki*, 25 Vet. App. 201, 215 (2012) (Lance, J., dissenting).

161. *See Monk v. Shulkin*, 855 F.3d 1312, 1314 (Fed. Cir. 2017). Separately, Mr. Monk was applying to the Board of Corrections of Naval Records for an upgrade of his discharge from service. *Id.*

162. *Id.* at 1314–15.

163. *Id.* at 1315.

164. *Monk v. McDonald*, No. 15-1280, 2015 WL 3407451, at *2 (Vet. App. May 27, 2015), *rev'd and remanded sub nom. Monk v. Shulkin*, 855 F.3d 1312 (Fed. Cir. 2017).

165. *Id.* at *3 (first citing *Harrison v. Derwinski*, 1 Vet. App. 438 (1991) (en banc); then citing *Lefkowitz v. Kerwinski*, 1 Vet. App. 439, 440 (1991)).

published opinions as precedent in pending and future cases.¹⁶⁶

Mr. Monk appealed this decision to the Federal Circuit.¹⁶⁷ By the time the Federal Circuit decided Mr. Monk's case, the VA had awarded him 100% disability for his claimed conditions.¹⁶⁸ The Federal Circuit found that the portion of Mr. Monk's case requesting that a writ of mandamus be issued to force the Secretary to act upon his specific claims was mooted by the decision.¹⁶⁹ However, the Federal Circuit found that the question of a class action was not mooted and held that the CAVC does in fact have the authority and jurisdiction to adjudicate class action suits.¹⁷⁰ The Federal Circuit relied in part on the All Writs Act's¹⁷¹ authority to aggregate claims, which it found applied to the CAVC.¹⁷² Additionally, the Federal Circuit found no inherent prohibition on hearing class action suits in the VJRA, which established the CAVC's jurisdictional authority.¹⁷³ The Federal Circuit remanded Mr. Monk's case to the CAVC and allowed the CAVC to determine the appropriateness of aggregation in this instance and the procedures that would best effectuate that type of litigation.¹⁷⁴

On remand, the CAVC noted that "we are all in uncharted waters."¹⁷⁵ The CAVC acknowledged and noted its insufficient procedures and interest in the participation of a number of stakeholders in the determination of when a class action is appropriate and other issues surrounding Mr. Monk's case.¹⁷⁶ Therefore, the CAVC requested that the parties provide input on twelve questions.¹⁷⁷ The CAVC received

166. *Harrison*, 1 Vet. App. at 438.

167. *Monk*, 855 F.3d at 1315.

168. *Id.* at 1316.

169. *Id.*

170. *Id.* at 1316–18.

171. 28 U.S.C. § 1651(a) (2012).

172. *Monk*, 855 F.3d at 1318–19.

173. *Id.* at 1319–20.

174. *Id.* at 1321–22.

175. *Monk v. Shulkin*, No. 15-1280, 2018 WL 507445, at *2 (Vet. App. Jan. 23, 2018).

176. *Id.* at *2–4.

177. *Monk v. Shulkin*, No. 15-1280, 2017 WL, at *2 (Vet. App. Oct. 26, 2017). Specifically, the CAVC requested input on these twelve questions:

1. What framework should the Court use to determine whether class/aggregate action is warranted (for example, Federal Rule of Civil Procedure 23; an omnibus rule (see, e.g., Office of the Special Masters of the U.S. Court of Federal Claims); or another framework) to reflect the unique nature of this appellate court?
2. Are there likely difficulties in managing the putative class, and, if so, should such difficulties be a factor that the Court considers in certifying a class?
3. If the Court decides to certify a class, how should it select counsel for the class?

seven amici briefs on these twelve questions from various groups including The National Law School Veterans Clinic Consortium,¹⁷⁸ The National Organization of Veterans Advocates, veterans organizations, a group of interested administrative law professors, a group of varied organizations including a homeless advocacy network, and two former General Counsels of the VA.¹⁷⁹

...

4. How should the Court determine whether a putative class member demonstrates medical or financial hardship, as defined by 38 U.S.C. § 7107(a)(2)(B) and (C)?

5. Is this Court able to make the findings necessary to certify a class, given that 38 U.S.C. § 7261(c) prohibits the Court from making factual findings in the first instance? . . . Assuming the Court would not be barred from making such findings, what mechanism(s) should the Court use to do so (e.g., mandatory disclosures, preliminary record by the Secretary, discovery, etc.)?

6. If the Court decides to certify a class, should the Court direct any notice to the class members? In answering this question, please also address whether class members should have the right to opt out of the class and, if so, what notice should be provided on that matter. Also, should the Court adopt an opt-in approach instead? . . .

7. How would a class action be superior to a precedential decision from this Court in fairly and efficiently adjudicating the due process issue raised by the petitioner? Does the type of relief the petitioner seeks from the Court play a role in determining whether the Court should issue a precedential decision or certify a class?

8. How should the Court define the “extraordinary” circumstances that warrant the issuance of a writ of mandamus when the petitioner seeks aggregate resolution?

...

9. How should the Court assess whether VA’s delay in adjudicating appeals constitutes a violation of constitutional due process? Does the analysis of whether there has been a deprivation of due process differ from the analysis of whether VA adjudication of appeals has been “unreasonably delayed”?

...

10. How does the absence of congressionally mandated VA deadlines factor into the Court’s due process determination of whether delay in VA adjudications constitutes a due process violation?

...

11. If the Court were to certify a class and grant the writ, what is the appropriate remedy? Please identify the sources of law, including specific VA laws, regulations, or policies, if any, that support the grant of the requested relief. Additionally, if the relief requested by the petitioner creates delays for other VA claimants, should this be a factor that the Court considers before granting the requested relief?

12. Would the administration of the relief requested require individual determinations if the class-wide allegations are proven? If yes, what is the Court’s role in monitoring compliance with the writ?

Id. at *2–4.

178. See NATIONAL LAW STUDENTS VETERANS CLINIC CONSORTIUM, www.nlsvcc.org [<https://perma.cc/5FZ6-C9GD>] (“The NLSVCC is a collaborative effort of the nation’s law school legal clinics dedicated to addressing the unique legal needs of U.S. military veterans on a pro bono basis.”).

179. Monk v. Shulkin, 2017 U.S. App. Vet. Claims LEXIS 1543. These briefs may be obtained on the CAVC’s website. See Case Search, U.S. COURT OF APPEALS FOR VETERANS CLAIMS, <https://efiling.uscourts.cavc.gov/cmecf/servlet/TransportRoom?servlet=CaseSearch.jsp> [<https://perma.cc/CHR6-FSAR>] (enter “15-1280” in the “Case Number / Range” box, click

Question eight, regarding the circumstances appropriate for a writ of mandamus, was subsequently answered by the Federal Circuit's opinion in *Martin*, already discussed.¹⁸⁰ Regarding questions relating to a due process analysis of the delay in the VA system, the possibility that delay does result in a due process violation is not a new one. The Supreme Court has held that delay can violate a claimant's Fifth Amendment rights. The Court held that due process includes the opportunity to have one's concerns heard "at a meaningful time and in a meaningful manner"¹⁸¹ and has found that delay of one hundred days in other administrative benefits contexts was too long to satisfy the Fifth Amendment's requirements for procedural due process when withholding a claimant's property rights.¹⁸² Amici and the parties agreed that the balancing test in *Mathews v. Eldridge*¹⁸³ should be applied to any due process analysis of delay.¹⁸⁴ The *Mathews* test considers three factors: (1) the nature and weight of the petitioner's private interest, (2) the risk of erroneous deprivation of that interest through existing procedures and the probable value of additional safeguards, and (3) the Government's interest in maintaining the existing procedures.¹⁸⁵

The recommendations for how to create rules and procedures for class action suits, which were the bulk of questions the CAVC posited, resulted in the majority of the amici briefs.¹⁸⁶ In January 2018, the CAVC issued an order acknowledging that there are very few appellate courts in the position of hearing class action suits.¹⁸⁷ The CAVC then announced that it intended to follow the U.S. Supreme Court's procedures for when it has authority to act as a trial court.¹⁸⁸ In those instances, the Court uses the Federal Rules of Civil Procedure (FRCP) and the Federal Rules of Evidence (FRE).¹⁸⁹

On August 23, 2018, the CAVC issued an order in which it made no decision on the merits of the contentions in *Monk*.¹⁹⁰ The order merely

"Search," then click the "15-1280" hyperlink, click "Full Docket" near the top of the page, and click "Run Docket Report").

180. See *supra* notes 151–57 and accompanying text.

181. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

182. See *Fusari v. Steinberg*, 419 U.S. 379, 383–84, 388–90 (1975).

183. 424 U.S. 319 (1976).

184. Brief for Petitioners at 54, *Monk v. Wilkie*, 30 Vet. App. 167 (Aug. 23, 2018) (No. 15-1280); Brief for Respondents at 67, *id.*

185. *Mathews*, 424 U.S. at 335.

186. See generally amici briefs, *supra* note 179.

187. *Monk v. Shulkin*, No. 15-1280, 2018 WL 507445, at *2 (Vet. App. Jan. 23, 2018).

188. *Id.*

189. *Id.*

190. *Monk v. Wilkie*, 30 Vet. App. 167, 170 (2018) (plurality opinion).

ruled on the issue of class certification.¹⁹¹ The court, in a plurality, applied FRCP 23 and held that the proposed class of “all individuals who applied for and have been denied VA disability compensation benefits and have not received a decision from the Board of Veterans’ Appeals (Board) within 12 months of the date of filing a timely NOD” failed to meet the standards required for class certification.¹⁹² In particular, the court in reviewing the four prerequisites under FRCP 23(a) for class certification found that the proposed class failed to meet the prerequisite of a common question for the cause of the delay in adjudicating the veterans’ appeals.¹⁹³ The court’s order that the petitioners failed to meet the commonality prerequisite prevented the court’s review of any of the other requirements of class certification.

In analyzing the commonality requirement, the court noted that the Supreme Court in *Wal-Mart Stores, Inc. v. Dukes* required the proposed class to demonstrate class members suffered the same injury, but in doing so cannot rely merely on the fact that all members suffer from the same violation of law.¹⁹⁴ The requirement is more broadly read to require that the “common contention . . . is capable of classwide resolution . . . in one stroke.”¹⁹⁵ Petitioners’ theory of commonality rested on the fact that some amount of time, in this instance over one year, is *too* long for the VA to take to decide an appeal.¹⁹⁶ The reasons for the delay are inconsequential because the delay is “both unconstitutional and ‘unreasonable’ no matter the reason.”¹⁹⁷

In the plurality’s reasoning that no commonality exists, the opinion expends a large amount of energy parrying the dissent’s contentions that commonality does exist, and in doing so becomes an instructive read in the arguments and counter arguments to each point of view.¹⁹⁸ Therefore, it seems prudent to consider the dissent and the plurality’s response to its specific concerns.

191. *Id.*

192. *Id.* at 181.

193. *Id.* at 175–81; *see id.* at 174 (discussing the four requirements of class certification under Rule 23) (citing FED. R. CIV. P. 23(a). “The four prerequisites . . . are . . . 1.) Numerosity: The class is so numerous that joinder of all members is impracticable; 2.) Commonality: There are questions of law or fact common to the class; 3.) Typicality: The claims or defenses of the representative parties are typical of the claims and defenses of the class; and 4.) Adequacy: The representative parties will fairly and adequately protect the interests of the class.”).

194. *Id.* at 175 (citing *Wal-Mart Stores v. Duke*, 564 U.S. 338, 349–50 (2011)).

195. *Id.* (quoting *Wal-Mart*, 564 U.S. at 350) (internal quotes omitted).

196. *Wal-Mart*, 564 U.S. at 350.

197. *Monk*, 30 Vet. App. at 177 (plurality opinion).

198. *Id.* at 177–78.

The dissent notes that class certification is extremely important in regards to resolving the delay issue. In support of this proposition, the dissent cited the Federal Circuit's decision in *Ebanks v. Shulkin*, where the court "commented that it was uncomfortable with granting a writ in an individual case for 'veterans who claim unreasonable delay in VA's first-come-first-served queue . . . without resolving the underlying problem of overall delay.'"¹⁹⁹ The Federal Circuit then went on to suggest addressing the issue of delay by class action with aggregate relief.²⁰⁰ The dissent, in which two other judges concurred or dissented in part, primarily asserted that the plurality required the petitioners to meet "too high a bar" for certification due to "conflating resolution of the merits of the petitioners' claims with the procedural question of commonality."²⁰¹ This conflation occurs because the plurality possess a "flawed understanding of the petitioners' claims . . . not based on the petitioners' theory of the case."²⁰²

The conflation comment stems from a disagreement regarding how deeply courts must explore the merits of petitioners' claim. If the determination of commonality in this case relies on the assertion of the petitioner that the cause of the unreasonable delay is a systemic problem, the reasons for delay would not matter and the inquiry regarding commonality can end. This was the dissent's position.²⁰³ The dissent asserted that the court can answer the question of whether the delay suffered by the petitioners was too long, either in terms of unreasonableness or resulting in a violation of one's constitutional rights.²⁰⁴ The answer to either of these questions will affect every one of the petitioners in a similar fashion.

If however the analysis requires a more detailed digging into the reason for each particular delay, a deeper inquiry drawing closer to the heart of the merits of the claim is necessary.²⁰⁵ The VA asserted that it was impossible to determine the reasonableness of delay without

199. *Id.* at 187 (Allen, J., dissenting) (citing *Ebanks v. Shulkin*, 877 F.3d 1037, 1039–40 (Fed. Cir. 2017)).

200. *Id.* (citing *Ebanks*, 877 F.3d at 1040).

201. *Id.* at 184.

202. *Id.* at 194.

203. *Id.* at 190–91. The dissent vividly describes the commonality using the imagery of a pool of water, which represents commonality and boats on the water, which represent each individual veteran's claim. The question of commonality should be limited to whether or not there is one common action that will cause the water in the pool to rise, thus causing all boats to rise, or the water to fall, thus causing all boats to fall. *Id.* at 191.

204. *Id.* at 191–92.

205. *Id.* at 190–91.

exploring the reason for delay in each appeals adjudication.²⁰⁶ Some reasons for delay may be due to the veteran's request for a hearing, other adjudications may require the VA to comply with the duty to assist the veteran in obtaining evidence, and in yet others the delay may be caused by the difficulty of the claims on appeal.²⁰⁷

The plurality agrees with the VA's position, asserting that "the substantive law underscores that a central inquiry that must be resolved is whether the VA's delay is unreasonable" and that the only way to determine reasonability is to consider the reasons for each individual veterans' delayed adjudication.²⁰⁸ Because the petitioners could not point to one practice of the VA that leads to the delay, the court was left having to weigh individual reasons for the delay, thus negating the ability to rule on a common question that could resolve all cases in "one stroke."²⁰⁹ "Our insistence that the petitioners identify the reasons for delay is so that we may determine whether commonality exists."²¹⁰

The *Monk* dissent's assessment of the impact of the plurality's decision to avoid the merits of the issues and decline to certify a class in this case is insightful. The dissent notes "[t]he plurality's reading of the commonality requirement makes it functionally impossible to certify a class in many delay claims" and "in so doing . . . has effectively precluded the Court from playing a meaningful role in addressing the systemic deficiencies plaguing the veterans benefits system—at least for today."²¹¹ If a bright light comes out of the court's ultimate brushing aside of one of the most pressing issues of constitutionality regarding veterans' benefits, it is that the entirety of the court agreed the CAVC will in the future consider utilizing class action procedures under the guidance of FRCP 23, at least until the court adopts its own aggregate procedures rules.²¹²

Other class action suits filed at the CAVC address various aspects of the VA adjudication system. One such case, *Skaar v. Wilkie*, regarding veterans' exposure to radiation, was recently argued *en banc*.²¹³ In

206. *Id.* at 178–79 (plurality opinion).

207. *Id.*

208. *Id.* at 178.

209. *Id.* at 178–79; *Wal-Mart Stores v. Duke*, 564 U.S. 338, 350 (2011).

210. *Monk*, 30 Vet. App. at 178 (plurality opinion).

211. *Id.* at 187, 185 (Allen, J., dissenting).

212. *Id.* at 171 (plurality opinion); *id.* at 184 (Allen, J., dissenting).

213. *Skaar v. Wilkie*, No. 17-2574 (Vet. App. Argued Sept. 25, 2018); *see also* *Rosinski v. Shulkin*, 29 Vet. App. 183, 186 (2018) (arguing that the VA's policy of allowing VSOs access to claimant decisions harmed those veterans represented by attorneys but dismissing the case for lack of standing).

February 2019, the CAVC issued a limited remand back to the Board to clarify an issue on the merits of the case before returning the case to the CAVC for a decision on class certification.²¹⁴ The *Skaar* order was a surprise and not because it made no decision on class certification. For years, the CAVC complied with its holding in *Cleary v. Brown* and relinquished jurisdiction of a case back to the Board on remand.²¹⁵ By ordering a limited remand in *Skaar* the CAVC has once again changed the landscape of the practice of veterans law and actually overruled “more than 2 decades of Court caselaw and chang[ed] long-established procedural norms” regarding the CAVC’s jurisdiction.²¹⁶ In a concurrence to the order, Chief Judge Davis encouraged the CAVC to grasp the “broad discretion to define the scope of its remand authority” that other Federal appellate courts exercise.²¹⁷ The dissent to this order was concerned about, among other things, the sweeping aside of decades of precedent with little discussion and a potential overreaching of the CAVC’s statutory jurisdiction.²¹⁸ The import of this sea change in the CAVC’s view of its own jurisdictional authority will be an interesting development to watch over time. To be sure, retaining jurisdiction over the class for purposes of class certification will both spur the Board to make a decision on the merits of the case more quickly. It will also avoid a tactic employed by the Secretary and discussed previously in this article—the VA making decisions in favor of veterans in order to prevent them from seeking remedy at the CAVC that may result in precedent.

While the CAVC has not yet explicitly ordered how and when class actions will be utilized in the VA system, the use of this mechanism may finally be coming to fruition for advocates who have long seen this as a possible benefit of judicial review.

4. Final Observations

Judge Allen’s article analyzing the growth of the CAVC a decade ago was prescient in many ways.²¹⁹ He foresaw that the class action mechanism would be desirable in a system overrun by delay.²²⁰ He also repeatedly commented on the uncertainty of veterans law when appellate

214. *Skaar v. Wilkie*, No. 17-2574, 2019 WL 405679, at *1–2.

215. *Cleary v. Brown*, 8 Vet. App. 305, 308 (1995).

216. *Skaar*, 2019 WL 405679, at *11.

217. *Id.* at *9.

218. *Id.* at *25, 29–31.

219. See Allen, *supra* note 50.

220. *Id.* at 404.

judicial decision-making is shared between the Federal Circuit and the CAVC.²²¹ This tension creates “doctrinal confusion on matters of law” that results in “additional delays for veterans and other claimants.”²²² This type of confusion is on full display in *Martin*, a Federal Court decision which changed decades of CAVC precedent relied upon by thousands of veterans and their advocates. Judge Allen also noted that the CAVC tended to limit its own authority to its detriment and was often disrespected in the larger legal system²²³—a position validated by the Federal Circuit’s decision in *Monk*.

In 2017, Professor Michael Wishnie of Yale Law School noted that many of Judge Allen’s concerns in 2008 were still relevant a decade later. Professor Wishnie argues that the CAVC itself has become “ghettoized”—cordoned off from other areas of law and afforded less status because of the nature of the court’s specialization.²²⁴ He suggests that a de-specialized system of judicial review would better serve the needs of veterans and help prevent some of the delay inherent in the CAVC’s limited judicial authority.²²⁵ Professor Allen suggested prior to joining the CAVC bench that elevating the CAVC to Article III status might well alleviate many of the concerns.²²⁶

The observations of Judge Allen and Professor Wishnie are valid ones. Indeed, the conversation regarding changes to judicial review is necessary to ensure that this unique system works to the benefit of the nation as it seeks to care for veterans. However, this author believes that changes to the structure of judicial review are important to discuss but will ultimately amount to nothing if the administrative agency being reviewed is unable to implement the law as decided by any court regardless of its stature. The VA’s decision-making process over the past thirty years demonstrates this problem. Changes in the earliest stages of decision-making and appeals at the VA level seem to be the place where pioneers could actually change the system for the better. Others have agreed that changes in the beginning of the appeals process are not only desired, but necessary, thus setting the stage for the recent enactment of the most sweeping legislation to affect the way the VA

221. *Id.* at 393–94; 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. L. REFORM 483 (2007).

222. Allen, *supra* note 50, at 394.

223. *Id.* at 387.

224. See Wishnie, *supra* note 135, at 1733–37.

225. *Id.* at 1738–40.

226. See Allen, *supra* note 50, at 399–402.

does business in thirty years.²²⁷

III. SHIFTING FRONTIERS: THE VETERANS APPEALS IMPROVEMENT AND MODERNIZATION ACT OF 2017

In 2016, the VA began efforts to propose legislative changes to its adjudicative system in Congress.²²⁸ The VA's concern was that appeals procedures at the VA were "a collection of process that have accumulated over time, unlike any other appeals process in government. Layers of additions to the process have made it a complicated, opaque, unpredictable, and less veteran-friendly. It makes adversaries out of veterans and VA and it is ridiculously slow"²²⁹

To address these concerns, the VA gathered with eleven major stakeholders in the VA process and over the course of several months began to form a plan to reshape the appeals procedures.²³⁰ Those invited to the table included the "Big 6" Veterans Service Organizations²³¹, National Veterans Legal Services Program, National Organization of Veterans Advocates, and county veterans service organizations.²³² These sometimes all-day, closed-door sessions built upon work begun in 2014 by a similar and smaller working group.²³³ In the end, the Veterans Appeals Improvement and Modernization Act of 2017 (Appeals Modernization Act) emerged from Congress and was signed into law by President Trump in August 2017.²³⁴ This legislation is truly a new

227. *Legislative Hearing on: H.R. 3216, H.R. 4150, H.R. 4764, H.R. 5047, H.R. 5083, H.R. 5162, H.R. 5166, H.R. 5392, H.R. 5407, H.R. 5416, H.R. 5420, H.R. 5428: Hearing Before the H. Comm. on Veterans' Affairs*, 114th Cong. 5 (2016) [hereinafter *Legislative Hearing*] (statement of Rep. Dina Titus).

228. U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-349T, VA DISABILITY BENEFITS: OPPORTUNITIES EXIST TO BETTER ENSURE SUCCESSFUL APPEALS REFORM I (2018).

229. *Legislative Hearing*, *supra* note 227, at 18 (statement of Sloan Gibson, Deputy Secretary for the Department of Veterans Affairs).

230. *Id.* at 6 (statement of Rep. Dina Titus); *id.* at 21 (testimony of Paul Varela, Assistant National Legislative Director for the Disabled American Veterans).

231. The "Big 6" is a term used to refer to the Veterans Service Organizations with the largest membership and includes Vietnam Veterans of America, the American Legion, the Disabled American Veterans, the Veterans of Foreign Wars, AMVETS, and Paralyzed Veterans of America. See "*The Big 6*" *United Behind Veterans First Act*, DISABLED AMERICAN VETERANS (July 7, 2016), <https://www.dav.org/learn-more/news/2016/big-6-united-behind-veterans-first-act/> [<https://perma.cc/A99Q-GJQ7>].

232. *Legislative Hearing*, *supra* note 227, at 27 (statement of Rick Weidman, Executive Director for Policy and Government Affairs, Vietnam Veterans of America).

233. *Id.* at 45 (statement of Paul Varela, Assistant National Legislative Director, Disabled American Veterans).

234. Veterans Appeals Improvement and Modernization Act of 2017, Pub L. No. 115-55, 131 Stat. 1105.

frontier for those who are willing and able to advance veterans' rights and to shape the future.

A. Major Aspects of the Appeals Modernization Act

1. Multiple Paths

The new legislation picks up in the VA process after the VARO makes its initial decision on a veteran's claim. If the veteran is dissatisfied with the VA decision in the current system of appeals, a period referred to as the "legacy system," the veteran had to file a Notice of Disagreement,²³⁵ wait for the VA to issue a Statement of the Case,²³⁶ and then file a VA Form 9 to appeal to the Board of Veterans' Appeals.²³⁷ After these steps, the veteran had the opportunity to appeal to the Court of Appeals for Veterans Claims.²³⁸

Under the Appeals Modernization Act, the veteran now has three different paths to appeal a VARO decision. The whole process is very much like a "choose your own adventure" story. There are multiple pathways, each with very different processes and ends. According to the VA, "(t)he essential feature of this newly shaped design would be to step away from an appeals process that tries to do many unrelated things inside a single process and replace that with differentiated lanes, which give Veterans clear options after receiving an initial decision on a claim."²³⁹

The first path allows the veteran to file for a higher level review at the VARO itself.²⁴⁰ This request must be made within one year of the VARO decision.²⁴¹ The review at this level is *de novo*, as it is in every level of appellate review created in the new legislation, but is limited to the evidence already in the record.²⁴² The veteran has no opportunity in this review to submit additional evidence. This evidentiary change is a sharp divergence from the legacy system. The higher-level review will sound very similar to those already familiar with the VA adjudication

235. 38 U.S.C. § 7105(b)(1) (2012 & Supp. 2017).

236. 38 C.F.R. § 19.26 (2016).

237. 38 U.S.C. § 7104(a) (2012).

238. 38 U.S.C. § 7252(a) (2012).

239. *Legislative Hearing, supra* note 227 at 41 (statement of Sloan Gibson, Deputy Secretary, Department of Veterans Affairs).

240. 38 U.S.C. § 5104B (Supp. 2017).

241. *Id.* § 5104B(b)(1)(B).

242. *Id.* § 5104B(d)-(e).

system as the Decision Review Officer (DRO) review.²⁴³ The DRO review in the current system is a supplemental level of review by a more-experienced employee of the VA. The VA's implementation of the Appeals Modernization Act anticipates that the training and experience of the higher-level review will be commensurate with the current DRO positions, and that VAROs will initially fill the higher-level review positions with DROs.²⁴⁴

The second path allows the veteran to file what the new legislation refers to as a "supplemental claim."²⁴⁵ Supplemental claims are filed in two circumstances. The first is when more than a year has passed since the original VARO decision was issued.²⁴⁶ Those veterans wishing to have the VARO adjudicate the claim again must file their own supplemental statement of the case. In the legacy system, filing a claim with the VARO after a year had passed was referred to as "reopening a claim" and required new and material evidence to effect. The supplemental claim requires "new and relevant evidence" to readjudicate the claim.²⁴⁷ As discussed in more detail below, this new standard is not intended to construe a higher standard than the previous "new and material" standard in the legacy system.²⁴⁸ The second circumstance when a supplemental claim may be filed is within a year of a decision by the higher-level authority, the Board, or the CAVC, in order to add new and relevant evidence to the file for further review of the claim.²⁴⁹ This new mechanism has a tremendous impact on the start date of a veteran's disability award, if granted, (called the "effective date of the claim"), which will be discussed further below.

The third option is to file a Notice of Disagreement,²⁵⁰ which like its previous incarnation in the legacy system must be filed within one year of the VARO decision and will lead the veteran to the Board for review.²⁵¹ However, unlike the legacy system, the Statement of the Case and the VA Form 9 are now removed from the new system. The Notice

243. See 38 C.F.R. § 3.2600 (2018); see U.S. DEP'T OF VETERANS AFF., M21-1, ADJUDICATION PROCEDURE MANUAL, PT. I, CH. 5, § C(2)(a) (2015).

244. U.S. DEP'T OF VETERANS AFFAIRS, COMPREHENSIVE PLAN FOR PROCESSING LEGACY APPEALS AND IMPLEMENTING THE MODERNIZED APPEALS SYSTEM 12-13 (2017), <https://benefits.va.gov/benefits/docs/appeals-report-201711.pdf> [<https://perma.cc/FC5G-5QD6>].

245. 38 U.S.C. § 5104C(a)(1)(B).

246. *Id.* § 5104C(b).

247. 38 U.S.C. § 5108(a) (Supp. 2017).

248. *Id.* § 5108 note (Rule of Construction).

249. 38 U.S.C. § 5110(a)(2) (2012 & Supp. 2017).

250. 38 U.S.C. § 5104C(a)(2)(C) (Supp. 2017).

251. 38 U.S.C. § 7105(b)(1)(a) (2012 & Supp. 2017).

of Disagreement is the only document the veteran must file to effectuate Board review.

Once the claim arrives at the Board, there are three possible paths for the veteran to take. The first path to Board review allows the veteran to have a hearing before the Board and to submit new evidence for the Board's consideration.²⁵² These hearings will be limited in the future to the Board's primary location in Washington, D.C. or by video-teleconference to a VA facility.²⁵³ The Board will consider evidence available to the VARO in its original decision and any evidence submitted by the veteran at the Board hearing and within ninety days following the hearing.²⁵⁴ The current option of having a hearing before a live judge who travels to the veteran's local facility, a VA travel board, will no longer be available in the new system. The second route allows the veteran to submit additional evidence to the Board without a hearing.²⁵⁵ In this instance, the veteran may submit evidence either with the Notice of Disagreement or within ninety days of filing the Notice of Disagreement.²⁵⁶ The final path is Board review without a hearing or additional evidence being submitted.²⁵⁷ In this review, the Board's review of the veteran's claim is limited to the evidence of record.²⁵⁸

2. Changing Standards

As mentioned, the previous standard of "new and material" evidence necessary to reopen a claim has been replaced with "new and relevant" evidence necessary to file a supplemental claim.²⁵⁹ Providing material evidence to the VA required a veteran to submit "evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim."²⁶⁰ In contrast, the definition of "relevant" in the new standard can be found in 38 U.S.C. § 101 as "evidence that tends to prove or disprove a matter in issue."²⁶¹ The newer standard of relevant appears to be a lower standard as it only needs to prove or disprove the claim at issue, not relate to an

252. *Id.* § 7105(b)(3)(A).

253. *Id.* § 7107(c).

254. *Id.* § 7113(b)(1)–(2).

255. *Id.* § 7105(b)(3)(B).

256. *Id.* § 7113(c).

257. *Id.* § 7105(b)(3)(C).

258. *Id.* § 7113(a).

259. *Id.* § 5103A(f)(2).

260. 38 C.F.R. § 3.156 (2016).

261. 38 U.S.C. § 101(35) (2012 & Supp. 2017).

unestablished fact that would substantiate the claim. In any event, the VA has acknowledged that this relevant evidence requirement is not intended to “impose a higher evidentiary threshold than the previous new and material evidence standard”²⁶²

However, as one commentator noted, the new standard does not appear to make supplemental claims easier to adjudicate than reopened claims. “[M]erely trading ‘relevant’ for ‘material’ will not significantly reduce the adjudication burden on VA. Removing ‘relevant’ allows VA to adjudicate the merits every time and eliminates the need to make a threshold determination.”²⁶³ The VA’s new regulations on the implementation of the Appeals Modernization Act were issued in January of 2018. The new regulations provide that “relevant” evidence can include evidence that raises a theory of entitlement that was not previously addressed by the VA.²⁶⁴ As the regulations are not yet in effect, it remains to be seen how the VAROs will actually apply these standards in the future.

3. Effective Dates

In the legacy system, a veteran can only receive benefits back to the filing date of their most current claim. This start date for the award of benefits is referred to as the effective date of the claim. If the veteran fails to file an appeal within a year or exhausts all avenues of appeal and still finds no relief, the veteran would be forced to file a reopened claim. If the reopened claim were granted, the effective date of the veteran’s benefits would be as of the date of the reopened claim. Under the Appeals Modernization Act, a major boon for veterans is a change that now allows veterans to maintain the original effective date of a claim no matter how many times they appeal.²⁶⁵ All that is required is that the veteran submit new and relevant evidence within a year of the most recent decision made on the claim.²⁶⁶ If a supplemental claim is filed after a year has passed, the new effective date will be the date of the supplemental claim.²⁶⁷

262. 38 C.F.R. § 3.2501(a) (2018).

263. *Pending Legislation: Hearing Before the S. Comm. on Veterans’ Affairs*, 114th Cong. 2 (written testimony of Diane Rauber, Exec. Dir. National Organization of Veterans Advocates) (May 24, 2016) [hereinafter *Pending Legislation*], <https://www.veterans.senate.gov/imo/media/doc/NOVA%20Rauber%20Testimony%205.24.16.pdf> [https://perma.cc/9GQV-WK32].

264. 38 C.F.R. § 3.2501(a)(1) (2018).

265. 38 U.S.C. § 5110(a)(1)–(2) (2012 & Supp. 2017).

266. *Id.*

267. *Id.* § 5110(a)(3).

For example, in the current legacy system a veteran who files a claim, appeals to the Board, then appeals to the CAVC, and fails to do anything else after that has come to the end of the claim. If six months after the CAVC decision the veteran were to find the key medical evidence needed to reopen the claim and subsequently wins an award of benefits, the effective date begins when the claim is reopened.

In the new system, when the veteran finds that key piece of evidence six months after the CAVC opinion or his Board opinion, the veteran can file a supplemental claim and the effective date will be the date of the initial claim (which could have been several years earlier). It is not limited to the date the veteran filed the supplemental claim. However, as mentioned before, to benefit from this new rule, the veteran has to file the supplemental claim within one year of the Board or CAVC decisions.

The VA also noted in testimony to Congress that these new rules regarding effective dates would allow veterans to better understand what evidence was necessary to prove their claims from higher stages of appellate review. The veteran could then come back and file a supplemental claim with that necessary evidence, all “without fearing an effective-date penalty for choosing to go to the Board first.”²⁶⁸

4. Favorable Findings

Another improvement on the VA adjudication system is that now favorable findings made at any level of adjudication are binding upon all subsequent adjudications with the VARO and Board, unless clear and convincing evidence to rebut the favorable finding is presented.²⁶⁹ This protection will have a significant impact on the legacy system where every review by the various levels of the VA is de novo.

B. Major Concerns with the Appeals Modernization Act

1. Legacy Claims

The implementation date of the Appeals Modernization Act will be, at the earliest, February 2019.²⁷⁰ With some exceptions noted below

268. *Legislative Hearing, supra* note 227, at 41 (statement of Sloan Gibson, Deputy Secretary, Department of Veterans Affairs).

269. 38 U.S.C. § 5104A (Supp. 2017).

270. *Id.* § 101 note (Applicability, In General); *see also* Pub. L. No. 115-55, § 2(x)(1), 131 Stat. 1105, 1115 (2017) (VA must certify to Congress that it has systems in place to process all legacy and new appeals before full implementation.).

which are part of a pilot or phased rollout of the Act, claims that are waiting in the system and those claims filed before the official implementation of the Appeals Modernization Act, will be processed under the legacy system. As of September 2018, there were 403,000 legacy appeals pending.²⁷¹

To begin implementing the new system, Congress authorized the VA to start a phased rollout of newly created policies and procedures.²⁷² This rollout is referred to in the VA as the RAMP program (Rapid Appeals Modernization Program).²⁷³ To begin, in November 2017 the VA mailed invitations to 500 veterans with a currently pending Notices of Disagreement or Form 9, or with cases pending certification to the Board or remand from the Board.²⁷⁴ The invitations informed the veterans of the RAMP program and asked them to participate by transferring their currently pending appeals to the higher level review or supplemental claim lanes of the new act.²⁷⁵ The letters also advise

Participation in RAMP is voluntary; however, taking advantage of this unique opportunity to use several aspects of the new process may help you avoid the delays you are experiencing in the current process. Participation in RAMP requires withdrawing your pending compensation benefit appeal(s) and substituting the review procedures set forth in the Appeals Modernization Act. VA will process all of your eligible appeals under the review lane you select. For the issues addressed under RAMP, you will not be able to request additional review of VA's decision under the current (legacy) appeals process; however, you will have access to all the review options and benefits of the new process.²⁷⁶

The VA finalized the regulations necessary to implement the Appeals Modernization Act on January 18, 2019, and the Secretary certified to Congress that the VA is ready to implement the Act.²⁷⁷ The

271. U.S. DEP'T OF VETERANS AFFAIRS, *supra* note 244, at 6.

272. Pub. L. No. 115-55, § 2(x)(4), 131 Stat. 1105, 1115 (2017).

273. U.S. DEP'T OF VETERANS AFFAIRS, COMPREHENSIVE PLAN FOR PROCESSING LEGACY APPEALS AND IMPLEMENTING THE MODERNIZED APPEALS SYSTEM: NOVEMBER 2018 UPDATE 5 (2018), <https://benefits.va.gov/benefits/docs/appeals-report-201811.pdf> [<https://perma.cc/AN62-6EWF>].

274. Letter from U.S. Dep't of Veterans Affairs, to Client (June 1, 2018) (on file with author).

275. U.S. DEP'T OF VETERANS AFFAIRS, *supra* note 244, at 19; Letter from U.S. Dep't of Veterans Affairs, *supra* note 274.

276. Letter from U.S. Dep't of Veterans Affairs, *supra* note 274.

277. VA Claims and Appeals Modernization, 84 Fed. Reg. 138-01 (Jan. 18, 2019) (to be codified at 38 C.F.R. pts. 3, 8, 14, 19, 20 and 21). U.S. DEP'T OF VETERANS AFFAIRS, <https://www.va.gov/opa/pressrel/pressrelease.cfm?id=5183> [<https://perma.cc/6MTE-EWVK>] ("VA To Implement Appeals Modernization in February").

official implementation date of the Act will be February 19, 2019.²⁷⁸ After that date, veterans in the legacy system may opt into the new system after they receive a Statement of the Case, or they can remain in the legacy system and continue through that process.²⁷⁹

The VA reported to Congress that 10% of eligible veterans would need to opt into the program to make RAMP meaningful as an early trial of the Appeals Modernization Act procedures.²⁸⁰ As of September 2018, the VA reported that 60,000 legacy appeals had been voluntarily transferred to the RAMP program.²⁸¹

The numbers of veterans voluntarily entering the RAMP program are not encouraging. Neither are the rates of granting a veteran's claims in the Higher Level review path or the Supplemental Claim path, according to numbers currently available. As of September²⁸² 2018, the total claims approved in the RAMP program was 27% of those considered, with 27.2% of those being a Higher Level review and 28.4% being Supplemental Claims. The rate of approval has steadily been decreasing. In May of 2018, the total RAMP claims approved were 36% and in March 2018 the approved claims were 53%.²⁸³ One veterans' advocate posits that this downturn in approval rates may be because the VA expanded the claims permitted to move into RAMP from veterans targeted specially by the VA to the entirety of the claims in the legacy system.²⁸⁴

The Government Accounting Office (GAO) has expressed other concerns with the VA's plans to deal with the 400,000-plus claims currently in the legacy system. For instance, the VA has no estimated time frame for when it will be completely finished with processing legacy claims.²⁸⁵ The GAO has also expressed concern that the VA's

278. *Id.*

279. Pub. L. No. 115-55, § 2(x)(5), 131 Stat. 1105, 1115 (2017); U.S. DEP'T OF VETERANS AFFAIRS, *supra* note 244, at 24.

280. U.S. DEP'T OF VETERANS AFFAIRS, *supra* note 244, at 21.

281. U.S. DEP'T OF VETERANS AFFAIRS, COMPREHENSIVE PLAN FOR PROCESSING LEGACY APPEALS AND IMPLEMENTING THE MODERNIZED APPEALS SYSTEM: NOVEMBER 2018 UPDATE 5 (2018), <https://benefits.va.gov/benefits/docs/appeals-report-201811.pdf> [<https://perma.cc/F5S2-HDRR>].

282. *Id.* at 15.

283. U.S. DEP'T OF VETERANS AFFAIRS, COMPREHENSIVE PLAN FOR PROCESSING LEGACY APPEALS AND IMPLEMENTING THE MODERNIZED APPEALS SYSTEM: MAY 2018 UPDATE 5 and 17 (2018).

284. E-mail from Matthew Wilcut, Esq., to Stacey-Rae Simcox, Assoc. Professor of Law, Stetson Univ. Coll. of Law (July 3, 2018, 15:16 CST) (on file with author).

285. U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-352, VA DISABILITY BENEFITS: IMPROVED PLANNING PRACTICES WOULD BETTER ENSURE SUCCESSFUL APPEALS REFORM 17 (2018).

plan to implement the Appeals Modernization Act does not appropriately designate resources to the two parallel systems running side-by-side for an unknown number of years into the future.²⁸⁶ This failure creates “an appeals plan that does not specifically articulate how VA will manage the two processes in parallel [and] exposes the agency to risk that veterans with appeals in the legacy process may experience significant delays or otherwise poor results relative to those in the new appeals process or vice versa.”²⁸⁷

2. Duty to Assist

Despite the concern of stakeholders expressed in meeting to discuss the proposed Act, the VA advocated for a limitation in the VA’s duty to assist a veteran. The VA argued that this limitation was necessary because in the legacy system “appeals have no defined endpoint and require continuous evidence gathering and re-adjudication.”²⁸⁸

In the legacy system, as has been previously discussed,²⁸⁹ under the Veterans Claims Assistance Act and for decades before this codification, the VA has had a duty to help a veteran at all steps in the adjudication process at the VARO and Board. Under the Appeals Modernization Act, the VA’s duty to assist will apply only to a claim or to a supplemental claim. After the initial decision at the VARO is made on these claims, the VA’s duty to assist ends and the veteran is on his own in the process of appealing the claim.²⁹⁰ Congress specifically added language to the Appeals Modernization Act to ensure that the duty to assist did not apply in the Board or higher-level review process.²⁹¹ While the language of the statute provides for a remand to be ordered by the Board back to the VARO when violations of the duty to assist at the VARO are discovered (for instance, the Board is specifically given authority to remand claims regarding the failure to order a medical opinion to the VARO), the concerns still exist regarding this change in the law.²⁹²

One of the apprehensions with this limitation on the duty to assist is

286. *Id.* at 15.

287. *Id.*

288. *Legislative Hearing, supra* note 227, at 40 (statement of Sloan Gibson, Deputy Secretary, U.S. Department of Veterans Affairs).

289. *See supra* Section III.A.1.

290. 38 U.S.C. § 5103A(e)(1) (2012 & Supp. 2017).

291. *Id.* § 5103A(e)(2).

292. *Legislative Hearing, supra* note 227, at 40 (statement of Sloan Gibson, Deputy Secretary, U.S. Department of Veterans Affairs).

that due to the limitation on when veterans may hire legal counsel, most veterans will not have the benefit of an attorney before choosing the path of appeal. Although the Appeals Modernization Act now permits veterans to hire attorneys after receiving the initial decision of the VARO, most will likely proceed in decision-making without consulting an attorney.²⁹³ Failing to explore the options of presenting new evidence to an appellate adjudicator can affect a veteran's chances of succeeding on her claims. In the author's experience, new evidence, particularly new medical opinions concerning etiology of disabling conditions, has helped the VA change their minds and grant a veteran benefits approximately 84% of the time.²⁹⁴ This potential for a veteran to fail to consider an appellate option to submit new medical evidence is particularly important in light of the poor medical evaluations provided by the VA that purport to, but do not, comply with the duty to assist standard. The VA has previously admitted that "[t]he adequacy of medical examinations and opinions, such as those with incomplete findings or supporting rationale for an opinion, has remained one of the most frequent reasons for remand."²⁹⁵ One veterans' advocate has noted that "[w]hile VA often cites the veteran's submission of evidence as triggering the need for additional development, the reality is VA has consistently demonstrated difficulty fulfilling its fundamental obligation to provide veterans with adequate medical examinations and opinions in the first instance."²⁹⁶ Considering this medical examination and opinion inadequacy problem, in addition to the other problems the VA has at every level that were previously discussed,²⁹⁷ it seems odd that the VA would receive Congressional authority to eschew the duty to assist veterans with hopes to avoid delay at the expense of aiding veterans.

This legislative advocacy to eliminate the Board's duty to assist in the Appeals Modernization Act was not the first time that the VA has suggested limiting the duty to assist would make adjudicating veterans'

293. 38 U.S.C. § 5904(c).

294. Stacey-Rae Simcox, *Lightening the VA's Rucksack: A Proposal for Higher Education Medical-Legal Partnerships to Assist the VA in Efficiently and Accurately Granting Veterans Disability Compensation*, 25 CORNELL J.L. & PUB. POL'Y 141, 180 (2015).

295. *Why are Veterans Waiting Years on Appeal?: A Review of the Post-Decision Process for Appealed Veterans' Disability Benefits Claims: Hearing Before the Subcomm. on Disability Assistance and Memorial Affairs of the H. Comm. on Veterans' Affairs*, 113th Cong. 26 (2013) (statement of Laura H. Eskenazi, Principal Deputy Vice Chairman, Board of Veterans' Appeals, U.S. Department of Veterans Affairs).

296. *Hearing on Pending Legislation: Hearing Before the S. Comm. on Veterans' Affairs*, 114th Cong. 104 (2016) (statement of Diane Boyd Rauber, Executive Director, National Organization of Veterans Advocates).

297. See *supra* Section II.B.1.

claims go more quickly. Recently, the VA has begun to systematically chip away at the duty to assist veterans in order to speed up the processing of claims. In 2009, the VA began a push towards the filing of “Fully Developed Claims” (FDC).²⁹⁸ The FDC process promised faster results in processing a veteran’s claim if the veteran would only shoulder some of the burden the VA faces by retrieving the veteran’s own privately held medical records and all other relevant evidence.²⁹⁹ As of February 2019, alleviating itself of the burden of requesting veterans’ records has sped the process of adjudicating claims up by four days on average, reducing the processing time from 111.4 days on average to 107.2 days.³⁰⁰

In 2015, the VA began formalizing the claims process in order to make the VA adjudication process easier for the VA.³⁰¹ The end result of this formalization now requires veterans fill out specific VA forms to file claims and notices of disagreement.³⁰² This change moved the system away from one that complied with the veteran-friendly spirit of the system and considered most communications from the veteran as an intent to file a claim or appeal. Now veterans are required to file formal claims and disagreements with specifications.³⁰³

Each time the VA chips away at the duty to assist, the VA changes course farther away from its guiding principles “to ensure that claimants are afforded every opportunity to substantiate their claim, with VA

298. *Breaking Through the Backlog: Evaluating the Effectiveness of the New State Strike Force Team: Hearing Before the H. Subcomm. on Disability Assistance and Memorial Affairs of the Comm. on Veterans’ Affairs*, 112th Cong. 29 (2012) (statement of Diana Rubens, Deputy Under Secretary for Field Operations, Veterans Benefits Administration, Department of Veterans Affairs).

299. *VA Claims System: Review of VA’s Transformation Process: Hearing Before the S. Comm. on Veterans’ Affairs*, 113th Cong. 17–18 (2013) (statement of Allison A. Hickey, Under Secretary for Benefits, Veterans Benefits Administration); *Fully Developed Claims: Claims and Evidence*, U.S. DEP’T OF VETERAN AFFAIRS, <https://www.benefits.va.gov/FDC/checklist.asp> [<https://perma.cc/E4PC-E6JX>] (last visited Jan. 11, 2019).

300. *Veterans Benefits Administration Reports: Fully Developed Claims*, U.S. DEP’T OF VETERANS AFFAIRS https://benefits.va.gov/reports/mmwr_va_claims_online.asp [<https://perma.cc/8C5K-P9J8>] (last visited Feb. 5, 2019).

301. Simcox, *supra* note 95, at 718.

302. Catherine Trombley, *VA taking guesswork out of filing for benefits by requiring forms*, VANTAGE POINT (Mar. 18, 2015, 11:49 AM), <http://www.blogs.va.gov/VAntage/18183/va-taking-guesswork-out-of-filing-for-benefits-by-requiring-forms/> [<https://perma.cc/CMU8-G6HW>]; see VA FORM 21-526EZ, NOTICE TO VETERAN/SERVICE MEMBER OF EVIDENCE NECESSARY TO SUBSTANTIATE A CLAIM FOR VETERANS DISABILITY COMPENSATION AND RELATED COMPENSATION BENEFITS, U.S. DEP’T OF VETERAN AFFAIRS (2015), <http://www.vba.va.gov/pubs/forms/VBA-21-526EZ-ARE.pdf> [<https://perma.cc/GM6G-2QAB>]; FORM 21-0958, NOTICE OF DISAGREEMENT, U.S. DEP’T OF VETERAN AFF. (2015) <http://www.vba.va.gov/pubs/forms/VBA-21-0958-ARE.pdf> [<https://perma.cc/YAY9-FJLS>].

303. Simcox, *supra* note 95, at 717.

liberally construing the claim, providing assistance, generating evidence, developing a claim to its optimum, and granting every benefit that can be supported in law.”³⁰⁴ As the process of VA adjudication becomes less and less veteran-friendly, the effect that these changes have on veterans’ due process rights, for instance the right to hire an attorney at the beginning of the VA process, will require further scrutiny in the future.³⁰⁵

3. Rating Decision Explanations

Based upon the working group’s recommendations, Congress determined “that [VA rating] decision notification letters must be clear, easy to understand and easy to navigate. The notice letter must convey not only VA’s rationale for reaching its determination, but also the options available to claimants after receipt of the decision.”³⁰⁶ To accomplish this goal, the Appeals Modernization Act mandates that each decision letter provide the veteran (1) an identification of the issues adjudicated, (2) a summary of the evidence considered, (3) a summary of applicable laws and regulations, (4) identification of findings favorable to the veteran, (5) identification of elements not satisfied that led to a denial, (6) an explanation of how to obtain or access evidence used in decision-making, and (7) identification of criteria that must be satisfied to grant service connection at the next higher level of compensation.³⁰⁷ While in theory this list sounds like a major benefit of the new system, these things are already required in the legacy system when the VA issues a Statement of the Case.³⁰⁸ Unfortunately, these notifications are notoriously poor, with the VA satisfying its duty to explain its decision-making by copying and pasting dozens of pages worth of single spaced portions of the Code of Federal Regulations and sending them to the veteran.³⁰⁹ One hopes that this new legislation will remedy the problems

304. Corrected Brief for Respondent-Appellee at 49, *Martin v. O’Rourke*, 891 F.3d 1338 (Fed. Cir. 2018) (No. 17-1747), 2017 WL 5127945, at *49.

305. See, e.g., *Simcox*, *supra* note 95.

306. *Veterans’ Dilemma*, *supra* note 97, at 81 (statement of Paul R. Varela, Assistant National Legislative Director, Disabled American Veterans).

307. 38 U.S.C. § 5104(b) (2012 & Supp. 2017).

308. Statements of the case are required to provide the veteran with a summary of the evidence in the case; a summary of the applicable laws and regulations, with appropriate citations, and a discussion of how such laws and regulations affect the determination; and the determination of the agency of original jurisdiction on each issue and the reasons for each such determination with respect to which disagreement has been expressed. 38 C.F.R. § 19.29 (2017).

309. See examples of statements of the case on file with author. See also U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-02-395, VETERANS BENEFITS ADMINISTRATION: CLARITY OF LETTERS TO CLAIMANTS NEEDS TO BE IMPROVED 8 (2002), <https://www.gao.gov/assets/240/>

that evolved with the Statement of the Case, but it is worth keeping an eye on to see how this portion of the legislation evolves in action.

4. Same Problems, Different Legislation

Other concerns about the Appeals Modernization Act revolve around one basic consideration: without fixing underlying problems within the VA adjudication system the method in which veterans appeal these decisions will not make any appreciable difference. Certainly, these changes may cut the backlog and delay in obtaining decisions, but if these decisions are not adequate or accurate, veterans will also lose in the end.

The Disabled American Veterans spokesperson properly commented during congressional hearings on the new appeals legislation that “the most important principle for reforming the claims process was getting the decision right the first time”³¹⁰ The decision-making must be reformed first and has been laboring in inadequacy for quite a while. In the 1980s the VA indicated that remnants of VARO decisions:

may be an indication of several system wide problems—for example, poor original claims development within the DVA regional offices, inadequate medical examinations conducted by private or VA physicians, overworked adjudications within both DVB [Department of Veterans Benefits of the Veterans Administration] and BVA, [and] uncertainties regarding the resolution of highly complex cases like post-traumatic stress disorder or radiation exposure.³¹¹

Unfortunately, poor development and inadequate medical examinations are cited as the most common problems in adjudication over thirty years later.³¹² The Appeals Modernization Act focuses on process but “is devoid of reform to the foundational underpinning of the claims adjudication and appeals process, i.e., the need for an adequate medical examination and opinion.”³¹³

Additionally, much of the success of the Appeals Modernization Act

234416.pdf [https://perma.cc/85WM-A4HX].

310. *Legislative Hearing*, *supra* note 227, at 54 (statement of Paul Varela, Assistant National Legislative Director, Disabled American Veterans).

311. Hagel & Horan, *supra* note 16, at 54–55.

312. *See, e.g.*, Stacey-Rae Simcox, *The Need for Better Medical Evidence in VA Disability Compensation Cases and the Argument for More Medical-Legal Partnerships*, 68 S.C. L. REV. 223 (2016).

313. *Pending Legislation*, *supra* note 263, at 10.

depends upon the VA's own proposed implementation schedule. As the National Organization for Veterans Advocates executive director noted:

Successful execution of VA's proposed process hinges on its ability to consistently meet its goals of adjudicating and issuing decisions in the 125-day window identified in its "middle lane" and deciding appeals within the one-year period before BVA. As demonstrated with the prior backlog of original claims and scheduling of medical appointments, VA often struggles to meet its own internal goals to the detriment of veterans.³¹⁴

The GAO has also expressed concern that the VA discusses measuring progress by the time it takes to process claims, but has no particular plan to measure "accuracy of decision, veteran satisfaction with the process, or cost."³¹⁵ By overlooking these basic concerns, "VA could be inadvertently creating skewed incentives by focusing on one area of program performance to the detriment of other areas (e.g., processing claims quickly but inaccurately)."³¹⁶

Unfortunately, one commentator summed up the relationship between the VA and veterans when Congress mandates the VA change this way:

From the veteran's perspective, it can be put this way: now that the VA is forced to play by the rules, it wants to change them. Consequently, it appears that the veteran's battle for effective judicial review of VA decisions is not over; it has just moved to a new phase: consolidation and preparation for a VA counterattack in both the legislative and regulatory theaters.³¹⁷

Veterans, Congress, and advocates will want to pay particular attention to how the VA measures success in the implementation of this new process to ensure that veterans are actually giving up current benefits, such as the duty to assist throughout the process, for true gains.

IV. A QUESTION OF CHARACTER

America has been conducting two major wartime operations since 2001. Since that time, the military has been faced with the monumental task of taking a servicemember trained for military service and, once that

314. *Id.* at 9 (emphasis omitted).

315. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 285, at 13.

316. *Id.*

317. *See* Hagel & Horan, *supra* note 16, at 56.

service is completed, reintegrating them back into civilian society.³¹⁸ These 2.7 million returning current-conflict veterans exist alongside of the 3.4 million Vietnam veterans, many of whom bear not just physical scars from combat, but psychological scars that have remained undiagnosed and untreated for decades.³¹⁹ For many military veterans, the reintegration into civilian society is seamless. For others, particularly those suffering from PTSD, traumatic brain injuries (TBIs), and other “invisible wounds of war,” the integration can be more complicated.³²⁰ Some estimates indicate that almost 24% of post-9/11 veterans suffer from a mental health condition.³²¹ “Both PTSD and mTBI (mild TBI) may result in a series of cognitive, behavioral, and mood changes impacting an individual’s ability to function in society. Some of those changes include poor attention, memory difficulties, depressed mood and rapid fluctuations in mood, poor impulse control, and disregard for social norms.”³²² For veterans suffering from any of these conditions, there is a higher likelihood of using alcohol, illicit substances, or prescription drugs to ameliorate the symptoms of these illnesses, particularly if they are undiagnosed or untreated.³²³

Oftentimes, the behavior associated with PTSD and TBI is behavior that puts servicemembers directly at odds with their commanders and the larger military culture. Certain symptoms associated with PTSD and TBI, such as poor impulse control, loss of temper, impaired thinking, and poor exercise of judgment, may appear indistinguishable from the behavior of a servicemember who has chosen to rebel against the good order and discipline so necessary to the military’s culture. Those who exhibit such symptoms, particularly if the conditions are undiagnosed or

318. PHILLIP CARTER ET AL., *PASSING THE BATON: A BIPARTISAN 2016 AGENDA FOR THE VETERAN AND MILITARY COMMUNITY* 14 (2015), https://s3.amazonaws.com/files.cnas.org/documents/CNASReport_PassingtheBaton_151104_final.pdf?mtime=20160906082231 [<https://perma.cc/57PU-9SWH>].

319. *Id.* at 9. Post-traumatic stress disorder was not recognized as a mental health condition under the Diagnostic and Statistics Manual until 1980, which left a number of Vietnam veterans who served during the conflict, which officially ended in the 1970s, without a diagnosis for their suffering. See Matthew J. Friedman, *PTSD History and Overview*, U.S. DEP’T OF VETERANS AFFAIRS, https://www.ptsd.va.gov/professional/treat/essentials/history_ptsd.asp [<https://perma.cc/XU7W-4USJ>] (last visited Jan. 13, 2019).

320. CARTER ET AL., *supra* note 318, at 18.

321. *Id.*

322. Stacey-Rae Simcox et al., *Symposium: Traumatic Brain Injury and the Law: Article: Understanding TBI in Our Nation’s Military and Veterans: Its Occurrence, Identification and Treatment, and Legal Ramifications*, 84 UMKC L. REV. 373, 380 (2015).

323. *Substance Abuse in the Military: Mental Health Problems in Returning Veterans*, NAT’L INST. ON DRUG ABUSE, <https://www.drugabuse.gov/publications/drugfacts/substance-abuse-in-military> [<https://perma.cc/M662-E454>] (last updated Mar. 2013).

untreated, are at risk of being involuntarily separated from the military, or being court-martialed (i.e. criminally prosecuted) for their behavior.

When servicemembers leave active military service, their branch of service assigns a characterization of the discharge to describe their service in the military. Servicemembers leave the military for any number of reasons to include the natural expiration of their contract to serve, involuntarily separation from service, or discharge by sentence of a court-martial. There are primarily five different characterization of service, or discharges: Honorable, General (Under Honorable Conditions), Other Than Honorable, Bad Conduct, and Dishonorable.³²⁴ The first three—Honorable, General, and Other Than Honorable—are assigned during the military’s administrative assessment of whether the servicemember should be separated from the service.³²⁵ An Honorable discharge indicates that the servicemember “has met the standards of acceptable conduct and performance of duty for military personnel.”³²⁶ These discharges are normally assigned to those servicemembers who have had no significant disciplinary problems during service and are either at the natural expiration of their service commitment or have a need for an administrative separation not due to misconduct, such as a voluntary discharge due to pregnancy.³²⁷ General discharges are assigned to servicemembers who have a disciplinary history, “when the positive aspects of the [s]ervice member’s conduct or performance of duty outweigh negative aspects”³²⁸ A discharge under Other than Honorable conditions is assigned “when the reason for separation is based upon a pattern of behavior” or upon “one or more acts or omissions that constitute a significant departure from the conduct expected”³²⁹

Servicemembers court-martialed under the Uniform Code of Military Justice who receive a punitive discharge as a part of their sentence can receive either a Bad Conduct discharge or a Dishonorable discharge.³³⁰ “[The Bad Conduct] discharge is less severe than a [D]ishonorable

324. Bradford Adams & Dana Montalto, *With Malice Toward None: Revisiting the Historical and Legal Basis for Excluding Veterans from “Veteran” Services*, 122 PENN ST. L. REV. 69, 95–96 (2018).

325. See, e.g., Active Duty Enlisted Administrative Separations, AR 635-200 (Dec. 19, 2016) (providing the U.S. Army’s policies for administratively separating servicemembers from the Army).

326. Dep’t of Def. Instruction No. 1332.14, Enclosure 4.3b(2)(a) (Aug. 28, 2008) (incorporating Change I, 03/29/2010).

327. See AR 635-200, *supra* note 325, at 73–79.

328. Dep’t of Def. Instruction No. 1332.14, Enclosure 4.3(b)(2)(b) 30.

329. *Id.* § 4.3(b)(2)(c)(1)(a) 31.

330. Adams & Montalto, *supra* note 324, at 74.

discharge . . . [i]t is also appropriate for an accused who has been convicted repeatedly of minor offenses and whose punitive separation appears to be necessary.”³³¹ The Dishonorable discharge “should be reserved for those who should be separated under conditions of dishonor, after having been convicted of offenses usually recognized in civilian jurisdictions as felonies, or of offenses of a military nature requiring severe punishment.”³³²

As a practical matter, the standard discharge is an Honorable, and a servicemember is perceived to have been a substandard performer or disciplinary problem to have received any discharge but Honorable. For veterans who receive discharges that are not Honorable or General, the consequences can be severe. These discharges can affect their rights to benefits administered by the VA, such as educational grants, home loans, healthcare, and disability benefits.³³³ Veterans with poor discharges also find problems later with securing employment.³³⁴

Since the Vietnam War, America’s military has had a problem determining the character of service for veterans who suffer service-caused injuries that are not physically apparent. For many Vietnam veterans, the primary invisible condition affecting behavior is PTSD.³³⁵ Iraq and Afghanistan veterans find themselves suffering from higher numbers of brain injury in addition to PTSD, a result of the life-saving technologies and body armor, which help to limit the impact of explosions that in previous conflicts would have caused death.³³⁶ While this problem does not affect all of our current-conflict veterans, it is broader than our society would like, and its actual effect on those who have been on the receiving end of these discharge determinations can be devastating. The inability of the military to appropriately diagnose and treat servicemembers, thereby denying them appropriate medical discharges or VA benefits when the leave active service is equally damaging.

331. Rules for Courts-Martial 1003(b)(8)(C) (2016).

332. *Id.* at (b)(8)(B).

333. 38 U.S.C. § 101(2) (2012 & Supp. 2017); 38 C.F.R. § 3.12 (2017).

334. Marcy L. Karin, “*Other Than Honorable*” *Discrimination*, 67 CASE W. RES. L. REV. 135, 165 (2016); Claire Voegelé, *Never Again: Correcting the Administrative Abandonment of Vietnam Veterans with Other Than Honorable Discharges Induced by Post-Traumatic Stress Disorder*, 68 S.C. L. REV. 245, 252 (2016).

335. *See generally* RICHARD A. KULKA ET AL., NATIONAL VIETNAM VETERANS READJUSTMENT STUDY: CONTRACTUAL REPORT OF FINDINGS VOLUME I (1988), https://www.ptsd.va.gov/professional/articles/article-pdf/nvvr_voll.pdf [<https://perma.cc/RYL6-NH69>] (reporting that PTSD affected Vietnam veterans in higher numbers than other disabling conditions).

336. Simcox et al., *supra* note 322, at 382.

The failure of the United States military to understand the effect that combat had on Vietnam veterans at the time of their service and misconduct is logically understandable because PTSD was not even a recognized mental health condition until years after many Vietnam veterans left service.³³⁷ However, the failure of the military to recognize and treat servicemembers from our current conflicts is inexcusable. There have been several investigative reports and journalistic efforts on whether this failure is nefarious or merely due to incompetence. Either way, the damage to these injured veterans is tremendous. As just one example, Fort Carson, Colorado, is home to a large and storied Army division, the 4th Infantry Division. While the bulk of the division was located at Fort Hood, Texas until 2009, some portions of the division began to relocate to Fort Carson as early as 2006.³³⁸ In addition, Fort Carson was already home to other combat units including the 4th Engineer Battalion (Combat Effects), the 13th Air Support Operations Squadron, an Air Force component—which provides close air support, the 3rd Armored Brigade Combat Team—which deployed to Iraq combat three times from 2003-2008, and the 10th Special Forces Group, consisting of over 2000 special forces soldiers.³³⁹ In the early stages of the wars in the Middle East, Fort Carson had numerous combat troops and was deploying thousands of servicemembers to Iraq and Afghanistan.

However, as early as 2006, reports began circulating that something was amiss in the Army's treatment of soldiers returning to Fort Carson who exhibited symptoms of PTSD. Some of these suffering soldiers were treated as untouchables by friends and military supervisors.³⁴⁰ One sergeant/supervisor explained that there is contempt for soldiers who develop PTSD because others saw the same "horrors of the war" and are "not falling apart."³⁴¹ "People are trying to say they have problems who don't. Just because people are, you know, getting in trouble and they're

337. See Friedman, *supra* note 319.

338. *Fort Carson: 2nd Infantry Brigade Combat Team, 4th Infantry Division*, MY BASE GUIDE, http://www.mybaseguide.com/army/40-658/fort_carson_units [<https://perma.cc/Y7CF-5GX8>] (last updated Sep. 12, 2018).

339. *Fort Carson: 3rd Armored Brigade Combat Team, 4th Infantry Division and 10th Special Forces Group*, MY BASE GUIDE, http://www.mybaseguide.com/army/40-658/fort_carson_units [<https://perma.cc/Y7CF-5GX8>] (last updated Sept. 12, 2018).

340. Daniel Zwerdling, *Soldiers Say Army Ignores, Punishes Mental Anguish*, NAT'L PUB. RADIO, (Dec. 4, 2006), <https://www.npr.org/2006/12/04/6576505/soldiers-say-army-ignores-punishes-mental-anguish> [<https://perma.cc/CF2C-WL85>].

341. Daniel Zwerdling, *Soldiers Face Obstacles to Mental Health Services*, NAT'L PUB. RADIO (Dec. 4, 2006), <https://www.npr.org/templates/story/story.php?storyId=6575431> [<https://perma.cc/AYY5-2BP5>].

blaming it on PTSD.”³⁴² These soldiers were described as “weak,” “dirt bags,” and told that “[t]hey [don’t] belong in the Army.”³⁴³ Others were shuffled off to other units or punished for PTSD-related behavior because the command had no time to deal with soldiers needing special attention while the units were getting ready to immediately deploy to Iraq. As one sergeant put it “When I’m dealing with [one soldier’s] personal problems on a daily basis, I don’t have time to train soldiers to fight in Iraq. I have to get rid of him, because he is a detriment to the rest of the soldiers.”³⁴⁴

Another soldier reported (and his supervisor confirmed) that his chain of command at Fort Carson required him to participate in training exercises that forced him to miss PTSD and family therapy appointments.³⁴⁵ One soldier in 10th Special Forces Group was court-martialed for cowardice after suffering an involuntary panic attack in Iraq upon seeing a mangled body.³⁴⁶ It was the first time in thirty-five years that anyone had been charged with the crime of cowardice, which comes with a penalty of death. He was acquitted of the charges four years later.³⁴⁷ Reports such as this prompted several U.S. Senators to write the Department of Defense in 2006, urging it to launch an investigation into how commanders at Fort Carson treated those suffering from PTSD.³⁴⁸

In 2008, more troubling events occurred at Fort Carson, which indicate that it was not just a problem of bad discharges affecting soldiers, but also a problem of inaccurate mental health diagnoses that could affect potential future benefits from the VA and military. In June of that year, a soldier who was suffering from TBI and PTSD surreptitiously recorded a conversation between himself and the Fort Carson psychologist assigned to evaluate him for medical retirement.³⁴⁹ The soldier recorded the conversation because he was experiencing

342. *Id.*

343. Zwerdling, *supra* note 341.

344. Zwerdling, *supra* note 340.

345. Zwerdling, *supra* note 341.

346. Joel Warner, *The Good Soldier*, WESTWORD (Mar. 20, 2008) <https://www.westword.com/news/the-good-soldier-5098099> [<https://perma.cc/9JTP-7KX6>].

347. *Id.*

348. Letter from Senators Barbara Boxer, Christopher Bond, and Barack Obama to William Winkenwerder, Jr. Assistant Secretary of Defense for Health Affairs (Dec. 7, 2006), https://www.npr.org/documents/2006/dec/letter_to_winkenwerder.pdf [<https://perma.cc/3XHK-SCNM>].

349. Mark Benjamin & Michael De Yoanna, *I am Under a Lot of Pressure to Not Diagnose PTSD*, SALON (Apr. 8, 2009), <https://www.salon.com/2009/04/08/tape/> [<https://perma.cc/3S4P-84FX>].

memory problems and could not remember what the doctors were saying to him—he needed to have the recording to let his wife know the details of the doctor’s treatment.³⁵⁰ The psychologist, Dr. McNinch, was recorded telling the soldier:

“I will tell you something confidentially that I would have to deny if it were ever public. Not only myself, but all the clinicians up here are being pressured to not diagnose PTSD and diagnose anxiety disorder NOS (not otherwise specified) [instead].” McNinch told him that Army medical boards were “kick[ing] back” his diagnoses of PTSD, saving soldiers had not seen enough trauma to have “serious PTSD issues.”³⁵¹

These types of misdiagnoses could result in improper treatment and lower disability payments if the Army discharges a soldier from the military.³⁵² The Army investigated itself after this incidence and found there was no wrongdoing.³⁵³

The Fort Carson problems are one example of what injured soldiers in the military, particularly in the early to mid-2000s, were up against when it came to military discharges. These issues were not just limited to Fort Carson. For instance, a government report issued in 2008 revealed that the Department of Defense had erroneously discharged hundreds of veterans between 2001 and 2010 for “personality disorder,” a condition not entitled to receive benefits from the VA, when in fact the veterans had been suffering from PTSD or TBI.³⁵⁴ A few years later, the Army settled a class action suit brought on behalf of 1,029 veterans who were wrongfully denied disability benefits due to the Army’s failure to adequately assess the severity of their conditions.³⁵⁵ The numbers of servicemembers suffering from mental health conditions and brain injuries who are separated from service for misconduct is equally concerning. Between 2011 and 2015, 11% of servicemembers separated for misconduct suffered TBI, and 47% suffered from a mental health

350. *Id.*

351. *Id.*

352. *Id.*

353. *Id.*

354. MELISSA ADER ET AL., CASTING TROOPS ASIDE: THE UNITED STATES MILITARY’S ILLEGAL PERSONALITY DISORDER DISCHARGE PROBLEM, VETERANS LEGAL SERVICES CLINIC, JEROME N. FRANK LEGAL SERVICES ORGANIZATION, YALE LAW SCHOOL (Mar. 2012), https://law.yale.edu/system/files/documents/pdf/Clinics/VLSC_CastingTroopsAside.pdf [<https://perma.cc/VNJ7-YGRB>].

355. *Sabo v. United States: OIF & OEF Veterans with Post Traumatic Stress Disorder (PTSD)*, NVLSP, <http://www.nvlsp.org/what-we-do/class-actions/sabo-ptsd-lawsuit> [<https://perma.cc/XMX8-4UZ7>] (last visited Jan. 13, 2019).

condition that shares symptoms with PTSD such as depression and anxiety (8% of these were diagnosed with PTSD).³⁵⁶ A Government Accountability Office report also found that the branches of the military often were not following their own regulations requiring them to consider PTSD and TBI as mitigating factors before making decisions on the character of a veteran's discharge.³⁵⁷

For veterans wishing to request that the military upgrade their discharges or change the reason for discharge after the fact (for example, changing a discharge from personality disorder to a retirement for PTSD) they must apply directly to their former service branch. Each branch (Army, Navy, Air Force, and Coast Guard) has two boards that can review discharges.³⁵⁸ The first level is referred to as the Discharge Review Board.³⁵⁹ These boards can change a discharge under the theories of propriety and equity.³⁶⁰ The second level of review, to which the veteran can appeal from the Discharge Review Board, is called the Board for Correction of Military Records. This Board has much broader authority to correct any "issue involving a veteran's military service that constitute an injustice, including changing and upgrading discharges . . . if there is material error or injustice."³⁶¹ Decisions by the boards can be appealed to federal court.³⁶²

While it seems there is a procedure in place to adequately and fairly fix problems that may occur when a servicemember is discharged from active duty with a bad or inappropriate discharge, the evidence says otherwise. In 2014, an investigative journalist published an article after she had reviewed over 3,000 applications made to the Army's Board for Correction of Military Records and interviewed veterans and Board members alike.³⁶³ Her article shockingly uncovered that the Board has only three minutes and forty-five seconds on average to review a veteran's application for upgrade, despite the fact that some submit

356. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-17-260, ACTIONS NEEDED TO ENSURE POST-TRAUMATIC STRESS DISORDER AND TRAUMATIC BRAIN INJURY ARE CONSIDERED IN MISCONDUCT SEPARATIONS 12-13 (2017).

357. *Id.* at 9.

358. Thomas J. Reed & Jason W. Manne, § 12.05 *Overview of the Current Military Discharge Upgrade Process*, in *SERVICEMEMBER AND VETERANS RIGHTS* (Brian Clauss & Stacey-Rae Simcox eds., 2017).

359. 10 U.S.C. § 1553 (2012 & Supp. 2017); 32 C.F.R. § 70.9 (2017).

360. *Id.*

361. Reed & Manne et al., *supra* note 358; 10 U.S.C. § 1552.

362. *Id.*

363. Joshua Kors, *Investigative Reporter Alissa Figueroa Exposes Stunning Flaws in Veterans' Benefits System*, HUFFINGTON POST (Dec. 29, 2014, 9:38 AM), https://www.huffingtonpost.com/joshua-kors/investigative-reporter-al_b_6382880.html [https://perma.cc/8PAT-G4MX].

evidence that makes the application several hundred pages long. Between 2009 and 2012, the Board reviewed over 36,000 applications for upgrade, but granted only one veteran's request for a personal appearance with the Board.³⁶⁴ The reporter, Alissa Figueroa, said that she was stunned after reading the Board's opinions: "[t]hey were filled with derogatory language, denigrating the injured soldiers who were appealing their cases. And so many of the decisions were based on factual errors, crazy mistakes that led to these bizarre conclusions. Other decisions had such mangled logic, they blew my mind."³⁶⁵ Tom Moore, an advocate with the National Veterans Legal Service Program, remarked that "[t]his is the last chance for these servicemembers to have their records corrected, and when we look through these cases we see these incredible errors that are so blatant."³⁶⁶ One former Army Board employee chalked the problems up to the fact that "in an effort to decide cases quickly they reject admissible evidence, do not hold hearings, and issue summary denials to applicants that often do not address evidence brought."³⁶⁷ Low rates of approval for discharge upgrades have been fairly consistent, even before the influx of current conflict veteran applications. Over the last fifteen years, petitions for upgrade based upon PTSD submitted by Vietnam veterans were denied 95% of the time.³⁶⁸

To force the Department of Defense to deal with inadequate processes for seeking upgrades, five Vietnam combat veterans filed suit against the Department of Defense in 2014 "seeking relief for tens of thousands of similarly situated veterans who developed PTSD and were subsequently discharged with Other Than Honorable characterization."³⁶⁹

Based upon stories like these as well as the tireless advocacy of

364. Alissa Figueroa, *A Losing Battle: How the Army Denies Veterans Justice Without Anyone Knowing*, FUSION (2014) <http://interactive.fusion.net/a-losing-battle/> [<https://perma.cc/UQ67-UN5H>].

365. Kors, *supra* note 363.

366. Figueroa, *supra* note 364.

367. Alissa Figueroa, *Former Army Board Staff Lawyer Speaks Out About Unjust Practices and Calls for Reform*, FUSION (Nov. 24, 2014, 9:22 AM), <https://fusion.tv/story/29474/former-army-board-staff-lawyer-speaks-out-about-unjust-practices-and-calls-for-reform/> [<https://perma.cc/GTE2-MGU7>].

368. SUNDIATIA SIDIBE & FRANCISCO UNGER, UNFINISHED BUSINESS: CORRECTING "BAD PAPER" FOR VETERANS WITH PTSD I (2014).

369. Claire Voegelé, "Never Again": *Correcting the Administrative Abandonment of Vietnam Veterans With Other Than Honorable Discharges Induced by Post-Traumatic Stress Disorder*, 68 S.C. L. REV. 245, 262 (2016). After issuance of the Hagel Memo, the case was remanded back to the boards by the US District Court of Connecticut for processing under the Memo's provisions. *Id.* at 263. All five plaintiffs had their petitions for upgrade approved. *Id.*

various Veterans Service Organizations and other stakeholders, the Boards are being forced to consider potential mitigating factors for a veteran's misconduct. In 2014, in an effort to recognize that Vietnam veterans with bad discharges may have committed their misconduct because of undiagnosed PTSD and almost certainly in response to the *Monk v. Mabus* filings, Secretary of Defense Chuck Hagel issued guidance to the Department of Defense on how to handle requests by these veterans for a discharge upgrade.³⁷⁰ Issuing what is now referred to as "the Hagel Memo," he ordered that for every application of upgrade made by a veteran who claims to have suffered from PTSD, the Boards must give "liberal consideration" to cases where service records document any symptom of PTSD, despite having no diagnosis available, or where a veteran received a subsequent PTSD diagnosis that is deemed to be service-connected. The Boards are then ordered to view these conditions as mitigating factors for the misconduct that occurred during active service.³⁷¹ Supplemental guidance expanded these directives to apply to the Discharge Review Boards as well and to veterans from every era of service, not just those who served in Vietnam.³⁷²

As the Department of Defense began to clean its own house, Congress also got involved. In 2016, Congress passed with bipartisan approval the Fairness for Veterans Act of 2016, which would have required the boards to review veterans' applications for upgrade with "a rebuttable presumption in favor of the former member that post-traumatic stress disorder or traumatic brain injury materially contributed to the circumstances resulting in the discharge of a lesser characterization."³⁷³ While this bill died in Congress,³⁷⁴ the National Defense Authorization Act of 2017 did include a memorialization of the Hagel Memo along with other guidelines to help the boards improve

370. See Memorandum from Chuck Hagel, Sec'y of Def., Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming Post Traumatic Stress Disorder (Sept. 3, 2014).

371. *Id.*

372. Memorandum from Brad Carson, Acting Principle Deputy Under Sec'y of Def., Consideration of Discharge Upgrade Requests Pursuant to Supplemental Guidance to Military Boards for Corrections of Military/Naval Records (BCMRs/BCNR) by Veterans Claiming Post Traumatic Stress Disorder (PTSD) or Traumatic Brain Injury (TBI) (Feb. 24, 2016).

373. Fairness for Veterans Act of 2016, H.R. 4683, 114th Cong. § 2(3)(B)(ii) (2016).

374. While Congress passed the Fairness for Veterans Act and sent it to the President, it was not signed into law and Congress adjourned before the expiration of the ten-day presidential comment period. Therefore, the bill died before becoming law. This is referred to as a "pocket veto." U.S. CONST. art. I, § 7; *How Our Laws are Made—Learn About the Legislative Process*, U.S. CONGRESS, <https://www.congress.gov/resources/display/content/How+Our+Laws+Are+Made+-+Learn+About+the+Legislative+Process#HowOurLawsAreMade-LearnAbouttheLegislativeProcess-PresidentialAction> [<https://perma.cc/6JYU-BS7Q>].

their processes in reviewing applications for upgrade.³⁷⁵

The need for advocacy and expansion of this area of veterans law still exists despite legislation and the Department of Defense's acknowledgement of its problems in the discharge upgrade process. The initial numbers for the Board's review of discharge upgrade cases under the Hagel Memo looked promising. The first year saw 45% of requests for discharge upgrades due to PTSD granted, compared to 3.7% the prior year.³⁷⁶ More interestingly, due to massive pushes by veterans' advocates in the media and within their own clientele, and on the order of Secretary Hagel that the branches should reach out to potentially affected veterans, applications for upgrade based upon PTSD rose five times in that same year.³⁷⁷ However, two current-conflict veterans filed suit against the Army in 2016, seeking class-action status because the Army was not implementing the Hagel guidance at the Discharge Review Board level.³⁷⁸ One plaintiff, when discussing that before he filed his lawsuit his application was denied and yet after he filed suit the same application was approved by the Army's Discharge Review Board, remarked:

We didn't add anything to what I filed originally and got a completely different result because a judge was watching, . . . [t]o take the exact same case and come to a completely different outcome shows the need for everyone to get a review like this. When no one is watching, they are not doing this properly, It shouldn't take a small army of lawyers, a class action lawsuit, and eight years to get the Army to follow their own rules, . . . most veterans with PTSD are in no position to fight the Army like this, and veterans are dying while the Army drags its feet on properly handling these cases.³⁷⁹

The efforts of veterans advocacy organizations to train attorneys helping veterans navigate the discharge upgrade process, with the efforts of organizations such as the National Veterans Legal Services Program, the Vietnam Veterans of America, law school veterans clinics across the country—in particular Yale Law School's Jerome N. Frank Legal Services Organization—that litigate the Department of Defense's failure

375. S. 2943, § 535 National Defense Authorization Act of 2017, Pub. L. No. 114-328, § 535, 130 Stat. 2000, (codified at 10 U.S.C. § 1553(d) (2012 & Supp. 2017)).

376. SIDIBE & UNGER, *supra* note 368, at 2.

377. *Id.* at 8.

378. See Amended Complaint, *Kennedy v. Fanning*, No. 16-2010 (D. Conn. Apr. 17, 2017), ECF No. 11.

379. Peggy McCarthy, *Connecticut Army Veteran Gets Discharge Upgrade*, HARTFORD COURANT (Apr. 2, 2018, 11:20 AM), <http://www.courant.com/news/connecticut/hc-veteran-discharge-upgrade-20180402-story.html> [<https://perma.cc/7L9W-D8XL>].

to correctly implement its own guidelines, are paving the way for increased efforts on behalf of veterans in this previously-stagnating area of veterans law. The development of discharge upgrades and the Department of Defense's retooling of regulation to prevent unjust discharge from occurring in the first place will be worth tracking in the next few years as these efforts come to fruition and spark new efforts.

V. CONCLUSION

For decades, veterans' advocates have lobbied Congress to do more for our veterans, by filling in the gaps that the VA is unable to fill on its own. Slowly but surely, Congress has listened. From the creation of the CAVC to the Appeals Modernization Act, the law applying to veterans benefits has been forever altered, in ways that are always challenging, but on the whole beneficial for veterans.

The expansion of the CAVC's authority to affect the issue of delay in the VA's adjudication system by allowing class-action lawsuits to be filed could be the most significant change in veterans law in the past thirty years. The qualification "could be" is a telling one. The CAVC must seize their newfound capability to aggregate veterans' claims in order to effectuate major change in a system that continues to have the same problems decade after decade while the agency accusingly points the finger of blame at various foes. The complicated nature of the claims being processed, the increasing numbers of veterans, the recent appearance of judicial review, the changes in the regulations by the Secretary, the VCAA, and the duty to assist have all, at one time or another, been the villain in VA's constant tap-dance before Congress to explain why more money, employees, and years to implement judicial decisions have not made an impact on the VA's ability to keep up. The VA has skirted these issues in court, primarily by mooting lawsuits with quick decisions granting all of the veterans' benefits. As taxpayers, one must question the VA's motives and competency when those decisions are made so much more quickly than other claims and in a manner that seems calculated to protect the VA's bureaucratic interests. The CAVC may finally be able to make decisions that will force the VA to change the way it does business internally. For example, the CVAC could ensure better medical evaluations are sought in the first instances of a claim.

The Appeals Modernization Act's alteration of the appeals process leading to the CAVC brings welcome change to the process, yet it raises some significant concerns. It does not change the underlying systemic problems in the VARO or Board, but does limit the benefits of a veteran-

friendly process in a monumental sweeping change of course. The changes appear to value speed of adjudication over accuracy, and the ability of the changes to affect how quickly decisions will be made is questionable—particularly in light of the GAO’s concerns regarding implementation of the Act and measurements of success. The new legislation demonstrates that there is an incredible amount of work to do and law to make in the very near future that will affect the millions of veterans and their families in the United States. It is an ever-changing backdrop of legal authority that can be shaped into a tool for veterans or a weapon against their interests, depending on the quality of the advocates and implementers both inside and outside the VA who step into the breach.

The spotlight recently shined upon the labors of veterans struggling with unjust discharges has already made a difference for large numbers of veterans previously denied relief. The job is not over. The military continues to struggle with cultural taboos regarding identification and treatment of PTSD and TBI that must be overcome for our future servicemembers. The rectification of this situation for our current veterans is of paramount importance if we are to continue to reintegrate them into society as a whole.

As veterans advocates know, the content of Congress’ answers to veterans’ queries is not the final answer. It is in the execution of the resulting programs and laws where one finds the true work that must be done. Each day, veterans and their advocates have the opportunity to change the conversation and alter the legal landscape affecting veterans benefits, discharges, and legal involvement. Veterans law offers unexplored possibilities, beyond the legal boundaries that exists today, much like the Wild West. As these examples demonstrate, change is possible with creativity, work, and an understanding of the most important aspect of this area of law—serving those who have served our nation. Practicing veterans law in the next decade will offer unlimited opportunities for those brave-of-heart who choose to demonstrate the spirit of a true pioneer and look for different ways to shape the landscape for the benefit of our nation’s veterans. As John Wayne said, “[s]ometimes it isn’t being fast that counts, or even accurate; but willing.”³⁸⁰ Welcome to the Wild West!

380. John Wayne Enterprises, LLC, *supra* note 1.