

THE VETERANS' JUDICIAL REVIEW ACT TWENTY YEARS LATER: CONFRONTING THE NEW COMPLEXITIES OF THE VETERANS BENEFITS SYSTEM

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INTRODUCTION

Since Congress passed the Veterans' Judicial Review Act¹ (VJRA) twenty-two years ago, judges and scholars alike have characterized the Department of Veterans Affairs' (VA) claims adjudication system as a search for balance between a paternalistic charitable model and an adversarial entitlement model. In the paternalistic charitable model, there is "no legally enforceable . . . duty to provide benefits, which are given out of a sense of moral obligation" based upon discretionary judgment.² In contrast, in an adversarial entitlement model, "benefits provided [are] not mere gratuities to be distributed in an ad hoc and discretionary manner."³ Unfortunately, this false dichotomy obscures the true conflict afflicting veterans claims adjudication. A closer inspection reveals that the VA system is a paternalistic entitlement system, a hybrid of both characterizations. It is paternalistic because claimants receive significant procedural assistance. It is also an entitlement system because claimants pursue non-discretionary benefits.

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

2. Richard E. Levy, *Of Two Minds: Charitable and Social Insurance Models in the Veterans Benefits System*, 13 KAN. J.L. & PUB. POL'Y 303, 304 (2004).

3. *Id.* at 306. For specific examples of this type of analysis, see *Bailey v. West*, 160 F.3d 1360, 1365 (Fed. Cir. 1998) ("Since the [VJRA], it appears the system has changed from a nonadversarial, ex parte, paternalistic system for adjudicating veterans' claims, to one in which veterans like Bailey must satisfy formal legal requirements, often without the benefit of legal counsel, before they are entitled to administrative and judicial review.") (internal quotation marks omitted); Steven Reiss & Matthew Tenner, *Effects of Representation by Attorneys in Cases Before VA: The "New Paternalism"*, 1 VETERANS L. REV. 2 (2009); Levy, *supra* note 2, at 306. See also Kenneth M. Carpenter, *Why Paternalism in Review of the Denial of Veterans Benefits Claims is Detrimental to Claimants*, 13 KAN. J.L. & PUB. POL'Y 285 (2004); Theda Skocpol, *America's First Social Security System: The Expansion of Benefits for Civil War Veterans*, 108 POL. SCI. Q. 85 (1993).

By incorporating both paternalism and entitlement, the VA system suffers from internal conflict: it seeks to comprehensively cover all deserving claimants through substantively and procedurally complex rules intended to address all possible fact patterns,⁴ yet it also seeks to be informal so as to avoid denying claims on technicalities or requiring applicants to bear the expense of expert attorneys.⁵

Although the motivations behind these two aspects of the VA adjudication system are laudable, independent judicial review under the VJRA has illuminated the core tension between complexity and informality. After Congress authorized judicial review of veterans benefits claims decisions by federal courts, those courts imposed new requirements and standards on the VA system, increasing both transparency and accountability.⁶ However, this increase in turn pushed the system toward both complexity and informality, two distinctly different directions, with little introspection regarding the larger effects on the system generally.⁷ Compounding the complications brought about by judicial review, both Congress and VA have been altering the system in reaction to these judicial interpretations. As a result, the VA adjudication system today is very different from the one that existed prior to the VJRA, but the adjudication system has not necessarily improved.⁸ The challenge for the future will be integrating complexity and informality to produce satisfactory results in an acceptable amount of time.

4. See, for example, 38 C.F.R. § 3.7 (2009), which lists over fifty classes and subclasses of military service, including “[t]hree scouts/guides, Miguel Tenorio, Penedicto Taisacan, and Cristino Dela Cruz, who assisted the United States Marines in the offensive operations against the Japanese on the Northern Mariana Islands from June 19, 1944, through September 2, 1945,” 38 C.F.R. § 3.7(x)(32) (2008), and 38 C.F.R. Part 4, which contains thousands of diagnostic codes used to rate nearly all possible physical and mental disabilities. Schedule for Rating Disabilities, 38 C.F.R. pt. 4 (2008).

5. *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 321 (1985) (observing that Congress intended for VA system to be “managed in a sufficiently informal way” so as to eliminate need for “an attorney to obtain benefits to which a claimant was entitled, so that the claimant would receive the entirety of the award without having to divide it with a lawyer”).

6. See *infra* Parts III and IV.

7. See *infra* Part VI.

8. Prior retrospectives on the VJRA have focused on the federal courts’ effect upon and relationship with VA. See 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 (1994); Bill Russo, *Ten Years After the Battle for Veterans Judicial Review: An Assessment*, FED. LAWYER, June 1999. As will be seen, the purpose of this retrospective is to examine the courts’ direct and indirect effects upon veterans law itself.

Part I of this Article reviews the nature of the VA system prior to the Act's passage in 1988, and explains how the VJRA, although designed to have a limited impact, actually contained the seeds of a drastic overhaul. Part II examines how the efficiency and accuracy of the VA adjudication system has changed since the VJRA. Part III discusses the most significant changes in the decisionmaking process caused by judicial review. Part IV compares these changes in the decisionmaking process to the role courts have defined for claimant participation in the process. This comparison reveals that, although the process has grown more complex, the courts have shielded claimants from the need to understand the process. Part V examines the significant impact congressional and agency reactions to judicial review have had in shaping the development of the process since the VJRA. In conclusion, this Article assesses the current dynamic of the VA system and contemplates the challenges presented by the paternalistic entitlement model. Ultimately, both complexity and informality are characteristics intended to benefit veterans, but none of the stakeholders involved has developed a strategy for reconciling the inherent tension between the two.

I.

THE VJRA AND THE END OF THE VETERANS ADMINISTRATION'S NOT-SO-SPLENDID ISOLATION

A. *The Veterans Administration Adjudication System Prior to the VJRA*

There can be no doubt that the veterans benefits system has moved from a charitable model to an entitlement model.⁹ The bulk of this transformation occurred during the period of "splendid isolation"¹⁰ prior to the VJRA. During this 200-year period, various offices within the Departments of War, the Interior, and the Treasury made decisions on veterans benefits before VA was created in 1921;¹¹ and the decisions of these agencies were not subject to judicial review by federal courts.¹² This occurred because the first Congress refused to cede final authority over such claims to the judiciary.¹³ Although the first Congress passed a law allowing veter-

9. See Levy, *supra* note 2, at 307–15 (discussing history of system).

10. Brown v. Gardner, 513 U.S. 115, 122 (1994) (quoting H.R. REP. NO. 100-963, pt. 1, at 10 (1988)).

11. DEP'T OF VETERANS AFFAIRS, VA HISTORY IN BRIEF 3–8, available at <http://www1.va.gov/opa/feature/history/docs/histbif.pdf> (last updated June 10, 2010).

12. WILLIAM F. FOX, JR., THE LAW OF VETERANS BENEFITS: JUDICIAL INTERPRETATION 3–11 (3d ed. 2002).

13. See WILLIAM H. GLASSON, FEDERAL MILITARY PENSIONS IN THE UNITED STATES 56–57 (1918).

ans to file benefits claims in the federal courts, it granted the Secretary of War and itself the authority to reject decisions of the courts if either suspected “imposition or mistake.”¹⁴ The Supreme Court invalidated this review scheme on the grounds that the judiciary was a co-equal branch that could not issue opinions that the executive and legislature could treat as merely advisory.¹⁵ Rather than accept decisions of the federal courts as binding, Congress replaced the invalid statute with a scheme that excluded judicial review altogether.¹⁶ This immunity from judicial review continued even after the Economy Act of 1933¹⁷ laid the foundation for the system we know today by abolishing the prior patchwork of benefits laws pertaining to veterans of different wars and conflicts, and giving the President the power to establish a new, unified system through executive orders.¹⁸

The two levels of the modern veterans claims adjudication system—the regional VA offices (ROs) throughout the country, at which veterans initially file claims, and the Board of Veterans Appeals (BVA) in Washington, D.C., which decides appeals from RO decisions—were established by the end of World War II.¹⁹ Despite the lack of judicial review, pressure from veterans groups shaped

14. Act of March 23, 1792, 1 Stat. 243, 244 (1789).

15. *Hayburn’s Case*, 2 U.S. 409, 410 (1792). Notably, although *Marbury v. Madison*, 5 U.S. 137 (1803), is commonly cited as the case that established the Supreme Court’s authority to declare a statute unconstitutional, *Marbury* actually relies upon the Court’s prior decision in *Hayburn’s Case*.

It must be well recollected that in 1792, an act passed, directing the secretary at war to place on the pension list such disabled officers and soldiers as should be reported to him, by the circuit courts, which act, so far as the duty was imposed on the courts, was deemed unconstitutional.

Marbury, 5 U.S. at 171.

16. See GLASSON, *supra* note 13, at 60–61; FOX, *supra* note 12, at 4–5.

17. Economy Act of 1933, Pub. L. No. 73-2, 48 Stat. 8, Title I.

18. *Id.* at §§ 1 (general authority), 3 (power to create disability rating system), 4 (power to define periods of war), 7 (power to define authority of VA), 9 (power to create adjudication system).

19. See Exec. Order No. 6230 (1933) (creating BVA); Charles L. Cragin, *A Time of Transition at the Board of Veterans’ Appeals: The Changing Role of the Physician*, 38 FED. B. NEWS & J. 500, 500–01 (1991) (describing evolution of BVA from precursor bodies in 1920); Robert C. Mueller, *Two Down, One to Go: The Effort to Achieve Meaningful Due Process for Claimants of Veterans’ Benefits*, 38 FED. B. NEWS & J. 505, 505–07 (1991) (discussing evolution of RO decision teams in decades prior to VJRA). See generally ROBERT T. KIMBROUGH & JUDSON B. GLEN, *AMERICAN LAW OF VETERANS: AN ENCYCLOPEDIA OF THE RIGHTS AND BENEFITS OF VETERANS, AND THEIR DEPENDENTS, ARISING FROM SERVICE DURING WORLD WAR II, THE KOREAN CONFLICT AND LATER, WITH STATUTES, REGULATIONS, FORMS, AND PROCEDURE* §§ 59, 78 (2d ed. 1954).

the system long before Congress considered the VJRA.²⁰ For example, although RO decisions originally required no explanation, Congress added the “Statement of the Case” procedure in 1962, which required an RO to explain its decision in detail if a veteran disputed it.²¹ Pressure to provide veterans more procedural reforms continued to mount, and VA later adopted by regulation its first formal duty to assist claimants in 1972.²² This duty to assist requires VA to “assist a claimant in developing the facts pertinent to his claim and to render a decision which grants him every benefit that can be supported in law.”²³ Furthermore, by the time of the VJRA’s enactment, VA had been battling significant calls for judicial review for well over two decades.²⁴

Aside from procedure, prior to the VJRA, oversight offices discussed the quality of VA decisions from an entitlement perspective. In 1982, VA’s Office of Inspector General concluded that the rate of errors in benefits decisions was at least fifty percent higher than that documented by the internal reporting system of the adjudication division.²⁵ Following this finding was a Government Accounta-

20. See Laurence R. Helfer, *The Politics of Judicial Structure: Creating the United States Court of Veterans Appeals*, 25 CONN. L. REV. 155, 160–61 (1992) (discussing “pervasive” power of veterans groups in shaping system from at least 1940 to passage of VJRA).

21. See Pub. L. No. 87-666, 76 Stat. 553 (1962); see also Pensions, Bonuses, and Veterans’ Relief, 28 Fed. Reg. 28 (Jan. 1, 1963).

22. Due Process and Appellate Rights, 37 Fed. Reg. 14,780 (July 25, 1972) (amending 38 C.F.R. § 3.103(a)). This is not to say that VA was unhelpful prior to 1972. Rather, relevant policies were promulgated by directive and not organized or generally available to claimants. See Due Process and Appellate Rights: Disability, Death Benefits and Related Relief, 37 Fed. Reg. 10,745 (May 27, 1972) (notice of proposed rulemaking).

23. Due Process and Appellate Rights, 37 Fed. Reg. 14,780 (July 25, 1972) (amending 38 C.F.R. § 3.103(a)).

24. Donald Ivers, Judge (ret.), U.S. Court of Appeals for Veterans Claims, Remarks at the Tenth Judicial Conference of the Court of Appeals for Veterans Claims (Apr. 14–15, 2008), *in* 22 Vet. App. at XLV (2008) [hereinafter Judge Ivers Remarks]. Judge Ivers was General Counsel of VA from 1985 until he was appointed as one of the original judges of the CAVC. Bills concerning judicial review passed the Senate four times, but each died in the House. See S. 330, 96th Cong. (1979); S. 349, 97th Cong. (1982); S. 636, 98th Cong. (1983); S. 367, 99th Cong. (1985).

25. See U.S. GEN. ACCOUNTING OFFICE, IMPROVED PRODUCTIVITY CAN REDUCE THE COST OF ADMINISTERING VETERANS BENEFITS PROGRAMS, GAO-83-12, 6 (1982) [hereinafter PUBL’N NO. GAO-83-12] (*citing* VA OFFICE OF INSPECTOR GENERAL, DEP’T OF VETERANS BENEFITS STATISTICAL QUALITY CONTROL FOR BENEFITS AUTHORIZATIONS (1982)). The Author requested a copy of the Inspector General’s report pursuant to the Freedom of Information Act, but was informed that it had been destroyed pursuant to VA’s records retention policy. Letter from Shirley J. Landes,

bility Office (GAO) report questioning the productivity and staffing practices at the VA regional offices.²⁶ Several years later, the GAO found a number of “significant problems” in claims development, adjudication, and notice procedures in its efforts to calculate the extent of errors in VA claims processing.²⁷ Many of these reports assumed that each veteran’s benefits claim has an objectively correct outcome, consistent with an entitlement perspective. Thus, by the time of the VJRA, veterans benefits were not considered discretionary or subjective.²⁸

B. *The Many Facets of the VJRA*

In 1989, the unified front presented by VA, the congressional veterans affairs committees and the major veterans groups that had blocked past pushes for judicial review²⁹ finally broke down,³⁰ and Congress added judicial review to the system.³¹ However, accountability, not transformation, was the goal. Congress had “little inter-

Chief, Information Release Office, VA Office of Inspector General, to the Author (Apr. 29, 2009) (on file with Author).

26. See PUBL’N NO. GAO-83-12, *supra* note 25.

27. U.S. GEN. ACCOUNTING OFFICE, PROCESSING VETERANS’ DISABILITY CLAIMS, GAO-89-24, 2 (1989); see also U.S. GOV’T ACCOUNTABILITY OFFICE, IMPROVEMENTS NEEDED TO MEASURE THE EXTENT OF ERRORS IN VA CLAIMS PROCESSING, GAO-89-9 (1989) [hereinafter PUBL’N NO. GAO-89-9].

28. Arguably, the shift to an entitlement mentality began in 1919 when Congress deliberately used “compensation” in Public Law 66-104 (Dec. 24, 1919), rather than “pension.” See DAVIS R.B. ROSS, PREPARING FOR ULYSSES: POLITICS AND VETERANS DURING WORLD WAR II 21 (1969). However, the purpose of this semantic change was to limit benefits by linking them to a veteran’s proven loss rather than the nation’s generosity. *Id.*

29. See Judge Ivers Remarks, *supra* note 24, at XLVI (noting that these three groups were collectively known as the “Iron Triangle”). See generally PAUL C. LIGHT, FORGING LEGISLATION (1992).

30. One commentator described this breakdown as a successful insurgency by the upstart Vietnam Veterans of America against the older, established veterans service organizations. Helfer, *supra* note 20, at 162–64. One Senate staff member has written a comprehensive account of the legislative process that led to the passage of the VJRA, which largely confirms this view. See LIGHT, *supra* note 29 (detailing interplay between judicial review movement and efforts to elevate VA to cabinet department).

31. Veterans’ Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4105 (codified as amended in scattered sections of 38 U.S.C.). A few commentators would refer to this as a “republican moment,” at which dramatic change was brought to an administrative system by a wave of public sentiment that was able to transcend the entrenched resistance of the established interests. See James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287, 291–93 (1990).

est . . . in a comprehensive overhaul of . . . VA itself.”³² Nonetheless, even though Congress intended the VJRA to be “a fine-tuning process with particular emphasis placed on the format for judicial review,”³³ the VJRA did much more.

1. Two Layers of Judicial Review

The VJRA created two layers of judicial review. The first layer and major innovation of the VJRA was the creation of the U.S. Court of Appeals for Veterans Claims (CAVC),³⁴ a traditional appellate court that reviews BVA decisions deferentially based on the record at the time of the decision.³⁵ The CAVC is an Article I court whose judges are appointed for fifteen-year terms.³⁶ It may decide cases either by non-precedential, single-judge decisions or precedential, panel opinions.³⁷ Whereas the VA system is non-adversarial and claimant-friendly, the CAVC is an adversarial forum that favors neither side in a case. However, because only claimants may appeal to the CAVC,³⁸ the court acts as a one-way ratchet that tends to add rules favoring claimants—it is usually confronted with either affirming the status quo (under which the claimant lost before the BVA) or ruling in favor of the petitioner claimants by expanding substance or procedure in their favor. Rarely would a case present the option of creating rules further restricting claimants' interests. For this reason, rulings can expand the procedural and substantive rights of claimants beyond the Secretary of Veterans Affairs' (Secretary) original understanding of a statute or regulation, but the rulings are not needed when the Secretary is already providing the

32. Fox, *supra* note 12, at 16.

33. *Id.* This description is somewhat of an understatement. There was a contentious debate over the form that review would take and how intrusive the resulting supervision would be. See LIGHT, *supra* note 29, at 224–27 (discussing major positions and compromises that resulted in judicial review in its current form).

34. Originally, it was called the United States Court of Veterans Appeals. See Veterans' Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4113 (codified as amended in scattered sections of 38 U.S.C.). It was not renamed until 1998. Veterans Programs Enhancement Act of 1998, Pub. L. No. 105-368 § 511(b), 112 Stat. 3315, 3341 (1998).

35. 38 U.S.C. § 7261 (2006). See generally 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, 514–21 (2007) [hereinafter Allen, *Significant Developments*] (discussing differences between the two types of decisions in practice).

36. 38 U.S.C. §§ 7251, 7253 (2006).

37. *Id.* § 7254.

38. *Id.* § 7252(a).

assistance or benefits requested.³⁹ In the second layer of judicial review added by the VJRA, Congress gave the Federal Circuit limited jurisdiction to hear appeals as of right from the decisions of the CAVC.⁴⁰ Although either side may appeal from a decision of the CAVC, the Federal Circuit can only review questions of law.⁴¹

The dual levels of appellate review burden the system by adding uncertainty. This is because every interpretation of law by the CAVC is de facto tentative.⁴² If the CAVC's decision is directly appealed, it ordinarily adds a year or more of waiting before the Secretary knows what the final rule will be so that he or she can adjust the agency process accordingly if the rule requires such an alteration.⁴³ If it is not directly appealed, it may still be challenged in the appeal of a later case, sometimes years later. Whether or not the appeal is direct, the Federal Circuit can prolong the uncertainty if it

39. Many schemes of administrative and judicial review tend to operate in this one-way manner. See, e.g., EUGENE BARDACH & ROBERT A. KAGAN, *GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS* 185–86 (1982); Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1319 (1999) (arguing that judicial review of agency rulemaking acts as one-way ratchet because “[t]he functional result of an antiregulatory bias is to benefit special interests at the expense of the general public”); Lawrence M. Frankel, *The Flawed Institutional Design of U.S. Merger Review: Stacking the Deck Against Enforcement*, 1 UTAH L. REV. 159, 199–207 (2008) (arguing that review of corporate mergers by Federal Trade Commission and Department of Justice acts as one-way ratchet because “review is far less geared to reducing false positives at the expense of false negatives”); Peter DiCola, Note, *Choosing Between the Necessity and Public Interest Standards in FCC Review of Media Ownership Rules*, 106 MICH. L. REV. 101, 132 (2007) (arguing that Federal Communications Commission (FCC) review of media consolidation acts as one-way ratchet because “[t]he FCC can relax stricter media regulations more easily than it can tighten looser media regulations”). The one notable exception in the CAVC's jurisprudence is *Morton v. West*, 12 Vet. App. 477 (1999) (interpreting VJRA as unintentionally limiting VA's authority to provide medical examinations and opinions to claimants). See *infra* notes 227–35 and accompanying text for a discussion of *Morton* and the congressional response abrogating that decision.

40. 38 U.S.C. § 7292 (2006).

41. *Id.* § 7292(d).

42. The Chief Judge of the CAVC has told Congress that “because jurisdiction exists in another Federal appeals court, parties have less incentive to negotiate settlement in the USCAVC; a losing party can once again argue its case in the Federal Circuit.” *Battling the Backlog Part II: Challenges Facing U.S. Court of Appeals for Veterans Claims: Hearing Before the S. Comm. on Veterans' Affairs*, 109th Cong. 17 (2006) (statement of William P. Greene).

43. See *Ribaudo v. Nicholson*, 21 Vet. App. 137 (2007) (ruling on Secretary's motion to stay cases within VA pending his appeal of *Haas v. Nicholson*, 20 Vet. App. 257 (2006)); *Ramsey v. Nicholson*, 20 Vet. App. 16 (2006) (ruling on Secretary's motion to stay cases within VA pending his appeal of *Smith v. Principi*, 18 Vet. App. 448 (2004)).

disapproves of the CAVC's ruling on a procedural issue and remands for further proceedings without explaining what the correct procedure should have been,⁴⁴ which can add many years before a final ruling is provided.

Given that the Federal Circuit decides "only a small number of its appeals on the merits,"⁴⁵ it often takes years before the court weighs in, and its opinions, as noted above, can result in traumatic change or great uncertainty that trickles down through the system.⁴⁶ For example, in *Vazquez-Flores v. Peake*,⁴⁷ the CAVC held that VA's notice duty under 38 U.S.C. § 5103(a) was substantially more demanding than VA had interpreted it to be.⁴⁸ In his annual report for fiscal year 2008, the Chairman of the BVA noted how significant the CAVC ruling was, and commented that "[t]he Board [had] worked with [the rest of the VA adjudication system] to develop procedures that would provide the necessary notice with the least possible disruption to the processing of current claims and appeals."⁴⁹ Subsequently, the Federal Circuit reversed the CAVC decision and nullified the need for the changes developed by the Board.⁵⁰ This kind of traumatic change and corresponding uncertainty have resulted in friction between the two courts' decisions.⁵¹ This is not to say that the Federal Circuit has no regard for CAVC rulings or that it is oblivious to these potential effects,⁵² but it is

44. See FOX, *supra* note 12, at 222–24 (discussing how *Grantham v. Brown*, 114 F.3d 1156 (Fed. Cir. 1997), *sub silentio* called into question CAVC's en banc decision in *West v. Brown*, 7 Vet. App. 329 (1995)).

45. *Id.* at 220.

46. See *id.* at 222–24; see also 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, 144–45 [hereinafter Ridgway, *Why So Many Remands*] (discussing numerous Federal Circuit decisions over six years disapproving CAVC's attempts to formulate rule of prejudicial error notice violations under 38 U.S.C. § 5103(a) (2002)).

47. 22 Vet. App. 37 (2008).

48. See *id.* at 42–44, 47–48.

49. JAMES P. TERRY, FISCAL YEAR 2008 REPORT OF THE CHAIRMAN, BD. OF VETERANS APPEALS 12–13 (2009) [hereinafter BVA CHAIRMAN'S REPORT FOR FISCAL YEAR 2008].

50. See *Vazquez-Flores v. Shinseki*, 580 F.3d 1270, 1280–81 (Fed. Cir. 2009).

51. See Allen, *Significant Developments*, *supra* note 35, at 523–24 (observing that opinions of CAVC and Federal Circuit convey "a certain sense of distrust between them" and "tension" that contributes to "the sometimes odd interaction between them").

52. See *Emenaker v. Peake*, 551 F.3d 1332, 1339 (2008) ("[B]ecause it would be imprudent for us to address the issue without the benefit of its having been properly presented to, and decided by, the Veterans Court, we decline to address the issue in the first instance."). Recently, the Supreme Court reversed the Federal

inevitable from the dual layers of appellate review chosen by Congress that the VA adjudication system is often charting a course through a suddenly shifting landscape of precedential case law.⁵³

2. Attorney Involvement

One change that flowed naturally from the advent of judicial review was the revision of a Civil War-era statute that severely limited compensation of attorneys assisting in veterans benefits claims.⁵⁴ Although a small number of powerful claims agents had dominated the landscape of veterans benefits claims in the post-Civil War era,⁵⁵ by the time of the VJRA, a vast network of pro bono non-attorney representatives sponsored by veterans service organizations had replaced them.⁵⁶ The VJRA changed this setup by permitting appellants at the CAVC and Federal Circuit to hire attorneys and, if the matter were remanded, to keep them before all levels of VA.⁵⁷

Although Congress opened the door to attorneys, it could not force them through it. The statute's design may have contributed to the slow increase in attorney participation. The VJRA restricted attorney compensation⁵⁸ and allowed non-attorney practitioners such as veterans service officers (VSOs) employed by the major veterans organizations, who practiced before the BVA, to appear

Circuit's decision in *Sanders v. Nicholson*, 487 F.3d 881 (2007). The Court noted that the Federal Circuit's jurisdiction was limited, and that "the Veterans Court, which has exclusive jurisdiction over these cases, is likely better able than is the Federal Circuit to exercise an informed judgment" about the correct outcome of fact-specific problems. *Shinseki v. Sanders*, 129 S. Ct. 1696, 1707 (2009).

53. See also John Fussell & Jonathan Hager, *The Evolution of the Pending Claim Doctrine*, 2 VETERANS L. REV. 145 (2010) (describing years of uncertainty in this area as the CAVC and the Federal Circuit exchanged opinions addressing specific factual scenarios).

54. Charles L. Cragin, *The Impact of Judicial Review on the Department of Veterans Affairs' Claims Adjudication Process: The Changing Role of the Board of Veterans' Appeals*, 46 ME. L. REV. 23, 26–27 (1994) [hereinafter Cragin, *The Impact of Judicial Review*] (discussing history of the pre-VJRA \$10 fee limit).

55. RICHARD SEVERO & LEWIS MILFORD, *THE WAGES OF WAR: WHEN AMERICA'S SOLDIERS CAME HOME—FROM VALLEY FORGE TO VIETNAM* 171 (1989) (stating that one observer in 1880 estimated that over 85% of all pending pension claims filed were controlled by fewer than 100 lawyers).

56. In 1992, Veterans Service Officers represented eighty-five percent of the appellants before the BVA. CHARLES L. CRAGIN, ANNUAL REPORT OF THE CHAIRMAN, Bd. OF VETERANS' APPEALS, FOR FISCAL YEAR 1992 20 (1992) [hereinafter BVA CHAIRMAN'S REPORT FOR FISCAL YEAR 1992]. See also Helfer, *supra* note 20, at 159.

57. Veterans' Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4108 (codified as amended in scattered sections of 38 U.S.C.).

58. *Id.*

before the CAVC.⁵⁹ One scholar, recounting the history of the VJRA, asserted that Congress intentionally designed the Act to be hostile to attorney involvement in the system, which had been dominated by non-attorney service officers from the major veteran service organizations for most of the twentieth century.⁶⁰ Additionally, it is not clear that any veterans organizations actively encouraged attorneys to practice veterans law after the VJRA.⁶¹ Furthermore, many attorneys may have doubted whether developing a veterans law practice would be lucrative enough to justify having to learn an unfamiliar area of the law.⁶²

Unsurprisingly, in the first decade of the CAVC, appellants were overwhelmingly pro se.⁶³ Initially, attorneys appeared in fewer than a quarter of the first 5117 cases decided by the CAVC.⁶⁴ In fiscal year 1992 (the first year for which the BVA published statistics), attorneys appeared in only sixty-three of the 33,483 cases decided by the BVA.⁶⁵ Even today, there are “fewer than 500 attorneys nationwide whose practices are primarily in veterans law,”⁶⁶ despite the fact that the number of veterans benefits claims is more than twice the total of all cases filed in the federal district

59. *Id.*; Pub. L. No. 100-687, 102 Stat. 4116 (1988).

60. See Helfer, *supra* note 20, at 169–70. See generally DAVIS R.B. ROSS, PREPARING FOR ULYSSES: POLITICS AND VETERANS DURING WORLD WAR II 10–11 (1969) (describing how American Legion built influence prior to World War II by developing network of “service officers” to assist both members and non-members in pursuing claims).

61. See *infra* note 199.

62. See e.g., Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1164 (1990) (“When a court’s procedures are not common to those of other courts, the high cost of becoming familiar with such procedures provides serious disincentives for lawyers to practice before the specialized court only occasionally.”).

63. FOX, *supra* note 12, at 229–30. See U.S. COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORTS, 1999–2008, http://uscourts.cavc.gov/documents/Annual_Report_-_20081.pdf. However, in fiscal year 2008, attorneys appeared in 76% of the cases by the time of resolution by the CAVC. *Id.* That same year, the number of cases handled by attorneys at the BVA had risen to 3467. BVA CHAIRMAN’S REPORT FOR FISCAL YEAR 2008, *supra* note 49, at 23. That is still only 7.9% of the cases before the BVA. *Id.*

64. Remarks of Chief Judge Frank Q. Nebeker, First Judicial Conference of the Court of Appeals for Veterans Claims, 4 Vet. App. XXX (1992).

65. BVA CHAIRMAN’S REPORT FOR FISCAL YEAR 1992, *supra* note 56, at 20.

66. PARALYZED VETERANS OF AM. ET AL., THE INDEPENDENT BUDGET FOR THE DEPARTMENT OF VETERANS AFFAIRS FISCAL YEAR 2010, at 39 (2009) [hereinafter INDEPENDENT BUDGET FOR FISCAL YEAR 2010], available at http://www.independentbudget.org/pdf/IB_2010.pdf.

courts.⁶⁷ As a result, even after twenty-two years of judicial review, cases involving claimants without attorney representation dominate the landscape of veterans law.⁶⁸

Despite the prevalence of pro se litigants, the reintroduction of attorneys is a primary cause of more complex procedures for two reasons. First, by allowing attorneys to become involved only after the record on appeal is closed, the VJRA facilitates the complication of claim adjudication procedure.⁶⁹ On appeal, although attorneys can argue for reversal, in most situations it makes tactical sense to focus on arguing that procedural errors require a remand, so the case returns to the BVA where the record is reopened and issues can be fully developed.⁷⁰ For example, a lawyer who becomes involved at the CAVC level may realize that the veteran did not previously understand that his medical evidence was legally inadequate for some reason, such as his or her doctor's failure to state any rationale for the conclusion in the opinion. In this situation, ultimately prevailing on the merits depends on obtaining a remand from the CAVC on procedural grounds so that the attorney can introduce a new opinion to remedy the problem, regardless of the basis of the remand. Thus, the VJRA implicitly encourages attorneys to use the one-way ratchet of judicial review to expand the

67. Compare INST. OF MEDICINE OF THE NAT'L ACADEMIES, A 21ST CENTURY SYSTEM FOR EVALUATING VETERANS FOR DISABILITY BENEFITS 169 (2007) [hereinafter INSTITUTE OF MEDICINE], available at <http://www.iom.edu/CMS/26761/34247/43423.aspx> (reporting that VA received 806,000 claims for benefits in fiscal year 2006), with JAMES C. DUFF, STATISTICS DIV., ADMIN. OFFICE OF THE U.S. CTS., JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2007 ANNUAL REPORT OF THE DIRECTOR 14, available at <http://www.uscourts.gov/judbus2007/JudicialBusinesspdfversion.pdf> (reporting that 325,920 cases were filed in federal district courts in fiscal year 2007).

68. In fiscal year 2008, fewer than 8% of appellants at the BVA had an attorney, BVA CHAIRMAN'S REPORT FOR FISCAL YEAR 2008, *supra* note 49, at 23, and 24% of appellants at the CAVC were still pro se at the time their case was decided. U.S. COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORTS, *supra* note 63. The Federal Circuit has recently clarified that "the assistance provided by [a non-attorney VSO] is not the equivalent of legal representation" and is "insufficient to disqualify [a veteran] as a pro se claimant." *Comer v. Peake*, 552 F.3d 1362, 1369 (Fed. Cir. 2009).

69. See Veterans' Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4108 (codified as amended in scattered sections of 38 U.S.C.); see also *Bonhomme v. Nicholson*, 21 Vet. App. 40, 43-44 (2007) (discussing general process for appealing veterans' claims, and role courts play in process).

70. See Ridgway, *Why So Many Remands*, *supra* note 46, at 153 n.231 (arguing that lack of attorney involvement at BVA level leads most attorneys at CAVC to focus on obtaining remand based on procedural error so that case can be further developed with open record).

procedural complexity of the system in the interest of generating remands.

Second, attorneys have taken a legislative advocacy role. For example, the National Organization for Veterans Advocates (NOVA), founded in 1993 and composed primarily of attorneys,⁷¹ has become a significant force in Congress on issues relating to the VA adjudication system.⁷² In this role, NOVA often promotes additional procedures in the name of protecting veterans.⁷³ For example, NOVA Executive Director Richard Cohen recently advocated legislation to create a class-action procedure for veterans claims, in order to manage what issues the CAVC decides and to make the notice requirements of 38 U.S.C. § 5103(a) in a more detailed manner.⁷⁴ Although its motives are laudable, such policies also have an inherent tendency to promote complexity.

3. Statutory Duty to Assist

Another watershed aspect of the VJRA was a codified general duty for the Secretary to assist claimants.⁷⁵ Prior to the VJRA, Congress required the Secretary to furnish applications to claimants⁷⁶ and to inform them when an application was incomplete.⁷⁷ The Secretary's duty to provide more general assistance—such as gathering service medical records and other supporting documents—existed only in regulations.⁷⁸ In contrast, the VJRA requires the

71. See NOVA Membership Directory, <http://www.vetadvocates.com/membershipdirectory2.html> (last visited Feb. 25, 2010).

72. See, e.g., *Pending Benefits Legislation: Hearing Before the S. Comm. on Veterans' Affairs*, 110th Cong. III (2008) (including on witness list Richard Paul Cohen, Executive Director of NOVA); *Examining the Backlog and the U.S. Department of Veterans Affairs' Claims Processing System: Hearing Before the H. Comm. on Veterans' Affairs*, 110th Cong. iii (2008) (including on witness list Richard Paul Cohen, Executive Director of NOVA); *Oversight Hearing on Performance and Structure of the United States Court of Appeals for Veterans Claims: Hearing Before the S. Comm. on Veterans' Affairs*, 110th Cong. III (2007) (including on witness list Richard Paul Cohen, Executive Director of NOVA).

73. See, e.g., *Legislative Hearing on H.R. 952, the "Compensation Owed for Mental Health Based on Activities in Theater Post-Traumatic Stress Disorder Act": Hearing Before the H. Comm. on Veterans' Affairs*, 111th Cong. 11 (2009) (testimony of Richard Paul Cohen, Executive Director of NOVA) (equating incorrect denial of veterans benefit claim with conviction of innocent criminal defendant).

74. *Examining Appellate Processes and Their Impact on Veterans: Hearing Before the S. Comm. on Veterans' Affairs*, 111th Cong. (2009).

75. Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4106 (1988).

76. 38 U.S.C. § 3002 (1982).

77. 38 U.S.C. § 3003 (1982).

78. 38 C.F.R. §§ 3.102 (stating Secretary's duty to decide claims based upon all "procurable" evidence), 3.103 ("It is the obligation of the [VA] to assist a claim-

Secretary to assist a claimant “in developing the facts pertinent to the claim.”⁷⁹

The Senate Committee report on the Act indicates that Congress intended the section to “[c]odify . . . VA’s present practices of providing claimants all reasonable assistance in the development of claims and construing the evidence liberally in favor of the claimant [so that they] are not lost in reaction to the provision . . . authorizing judicial review of final decisions denying claims.”⁸⁰ At the very least, elevating the duty to assist from a regulatory requirement to a statutory requirement lowered the level of deference owed by the courts to the Secretary’s interpretation.⁸¹ In practice, the Secretary’s duty to assist, particularly by providing medical examinations of claimants, became a central—if not *the* central—battleground in the CAVC’s jurisprudence.⁸² Nonetheless, as will be shown, the central cause of this duty-to-assist litigation—the expulsion of staff physicians from VA’s adjudication process—did not occur until later.⁸³

4. Other Important Changes

The VJRA added other elements to the system as well. First, the VJRA imposed a statutory requirement on the BVA to provide hearings at ROs by a “traveling section” of the BVA.⁸⁴ Previously, the BVA provided such hearings on an *ad hoc* and discretionary basis, so the new law dramatically increased the workload on the BVA. In fact, the BVA held 880 hearings in fiscal year 1991 as compared

ant in developing the facts pertinent to his claim”) (1988). *See also supra* note 22 and accompanying text.

79. Veterans’ Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4106 (1988). The provision explicitly included requesting records in the custody of an agent of the federal government. *Id.*

80. S. Rep. No. 100-418, at 22 (1988).

81. *Compare* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) (requiring deference to “reasonable” agency interpretations of statute administered by agency), *with* Auer v. Robbins, 519 U.S. 452, 461 (1997) (reaffirming that agency’s interpretation of its own regulation is “controlling unless plainly erroneous or inconsistent with the regulation”) (internal quotation marks omitted).

82. For a comprehensive review of the court’s case law relating to the duty to assist, see VETERANS BENEFITS MANUAL 933–41 (Barton F. Stichman & Ronald B. Abrams eds., 2009); *see also* FOX, *supra* note 12, at 92–102.

83. *See infra* Part III.B.

84. Veterans’ Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4110–12 (codified as amended in scattered sections of 38 U.S.C.).

to the 10,652 hearings it held in fiscal year 2008.⁸⁵ Second, the VJRA abolishes the presumption that an appellant before the BVA agreed with any determination by the RO that was not explicitly contested,⁸⁶ which broadens the scope of issues the BVA is required to address. Third, the VJRA subjects VA's rulemaking to the notice and comment procedures of the Administrative Procedure Act (APA).⁸⁷ Fourth, the VJRA introduced a new level of legislative oversight of VA's adjudication system by mandating that the BVA Chairman prepare a detailed report for Congress each year.⁸⁸ Finally, the VJRA required more detailed decisions by the BVA.⁸⁹

With these profound changes, the VJRA ended the isolation of VA in myriad ways. After its passage, there has been a substantial increase in the interaction between different levels of VA, as well as more interaction with outside actors such as Congress, the federal courts, and attorneys. At its core, it provided a set of tools to review and expand almost every aspect of the adjudication process, including individual decisions, regulations and statutory interpretations, and VA's internal management issues. Rather than changing the established paternalistic entitlement model of the system, the VJRA brought numerous forms of transparency and accountability to bear upon it, which pushed towards increased complexity.

II.

OUTPUT OF THE VETERANS BENEFITS ADJUDICATION SYSTEM BEFORE AND AFTER THE VJRA

The changes brought by the VJRA have had a radical impact on the efficiency and accuracy of VA's ability to adjudicate claims. A consortium of the leading veterans organizations recently concluded that "[j]udicial review of VA decisions has, in large part, lived up to the positive expectations of its proponents,"⁹⁰ and a leading academic authority on veterans law opined that "[b]y most

85. Cragin, *The Impact of Judicial Review*, *supra* note 54, at 39; BVA CHAIRMAN'S REPORT FOR FISCAL YEAR 2008, *supra* note 49, at 3.

86. Veterans' Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4111 (codified as amended in scattered sections of 38 U.S.C.).

87. *Id.* at 102 Stat. 4106. Prior to the VJRA, litigants had only limited success in challenging VA regulations in federal courts on constitutional grounds. *See generally* Kenneth B. Kramer, *Judicial Review of the Theoretically Non-Reviewable: An Overview of Pre-COVA Court Action on Claims for Veterans Benefits*, 17 OHIO N.U. L. REV. 99-100 (1990).

88. Veterans' Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4112 (codified as amended in scattered sections of 38 U.S.C.).

89. *See infra* Part III.C.

90. INDEPENDENT BUDGET FOR FISCAL YEAR 2010, *supra* note 66, at 33.

measurements, the CAVC is doing a good job.”⁹¹ This praise is based on favorable results for veterans.

First, after the passage of the VJRA, VA grants a higher percentage of veterans claims. In the decade prior to the VJRA, VA denied approximately half of the 800,000 benefits claims received each year.⁹² Of those 400,000 annual denials, veterans contested an average of 60,000 such denials.⁹³ The BVA heard 36,000 appeals of these denials,⁹⁴ granting 12% and remanding 13% for further proceedings.⁹⁵ Twenty-two years after the passage of the VJRA, the numbers—to the extent they are comparable⁹⁶—are substantially different. The number of annual “claims” is now near 840,000.⁹⁷ Moreover, VA grants roughly 88% of claims for disability compensation⁹⁸ as to at least one disabling condition.⁹⁹ During fiscal year

91. Fox, *supra* note 12, at 251. Even more recently, another law professor who has studied the CAVC commented that judicial review has been successful, particularly in increasing the uniformity and predictability of VA decision making, enhancing the actual and perceived fairness of the system, and improving the overall quality of VA decisions. *Veterans’ Disability Compensation: Forging a Path Forward: Hearing Before the S. Comm. on Veterans’ Affairs*, 111th Cong. (2009) [hereinafter *Forging a Path Forward Hearing*] (testimony of Professor Michael P. Allen, Stetson University College of Law).

92. Fox, *supra* note 12, at 13.

93. *Id.*

94. An appeal may not result in a BVA decision for several reasons. In particular, benefits may be granted by the RO on review before the appeal is certified, or the appellant may fail to complete the appeal by filing a Substantive Appeal alleging specific allegations of error. See Ridgway, *Why So Many Remands*, *supra* note 46, at 148–49.

95. Fox, *supra* note 12, at 14.

96. Although VA reports statistics on “claims,” it uses the term to refer to applications received instead of individual claims for benefits. Ridgway, *Why So Many Remands*, *supra* note 46, at 145–47. Recent trends show that the number of individual benefits claimed per application has been rising in recent years. See *Veterans for Common Sense v. Peake*, 563 F. Supp. 2d 1049, 1070 (N.D. Cal. 2008); INSTITUTE OF MEDICINE, *supra* note 67, at 169. Moreover, between ten and twenty percent of all applications have new claims raised during the processing of the initial claims. *Veterans for Common Sense*, 563 F. Supp. 2d at 1072. Hence, the available numbers tend to obscure a more substantial increase in the number of individual benefits decisions that VA makes each year.

97. *Veterans for Common Sense*, 563 F. Supp. 2d at 1070. Cf. DEPT. OF VETERAN’S AFFAIRS, FISCAL YEAR 2008 PERFORMANCE AND ACCOUNTABILITY REPORT 2 (2008) (stating that “VA processed more than 899,800 claims for disability benefits” in fiscal year 2008).

98. In fiscal year 2006, 654,000 of the 806,000 claims received by VA were claims for compensation. INSTITUTE OF MEDICINE, *supra* note 67, at 169.

99. *Veterans for Common Sense*, 563 F. Supp. 2d at 1070.

2007, the BVA granted 21% of the claims appealed to it and remanded over 35%.¹⁰⁰

Second, in addition to the increased approval rates, the amount of compensation awarded has also risen. VA can rate a veteran's disabilities anywhere between non-compensable to 100% compensable, in 10% increments.¹⁰¹ "In fiscal year 1987, [VA] paid about \$14.3 billion [\$26.8 billion in 2008 dollars¹⁰²] in disability benefits to 3.8 million veterans."¹⁰³ That is an average of \$7,060 per recipient in 2008 dollars. In fiscal year 2008, VA paid approximately \$38 billion to 3.4 million veterans.¹⁰⁴ That is an average of \$11,200 per recipient: an increase of 59%.¹⁰⁵ Accordingly, twenty-two years after the passage of the VJRA, a veteran applying for benefits has a substantially higher chance of at least partial success and is also likely to receive substantially more compensation.¹⁰⁶ In this

100. JAMES P. TERRY, FISCAL YEAR 2007 REPORT OF THE CHAIRMAN, BD. OF VETERANS' APPEALS 19 (2008) [hereinafter BVA CHAIRMAN'S REPORT FOR FISCAL YEAR 2007]. These numbers have been relatively stable. In the 2006 fiscal year, 19% were granted and 32% were remanded. JAMES P. TERRY, FISCAL YEAR 2006 REPORT OF THE CHAIRMAN, BD. OF VETERANS' APPEALS 19 (2007) [hereinafter BVA CHAIRMAN'S REPORT FOR FISCAL YEAR 2006]. In fiscal year 2005, 21% were granted and 39% were remanded. JAMES P. TERRY, FISCAL YEAR 2005 REPORT OF THE CHAIRMAN, BD. OF VETERANS' APPEALS 17 (2006).

101. 38 U.S.C. § 1114 (2006).

102. See ROBERT C. SAHR, CONSUMER PRICE INDEX (CPI) CONVERSION FACTORS 1774 TO ESTIMATED 2019 TO CONVERT TO DOLLARS OF 2008, <http://oregon-state.edu/cla/polisci/faculty-research/sahr/cv2008.pdf> (presenting CPI conversion table) (last visited Jul. 3, 2010).

103. PUBL'N NO. GAO-89-9, *supra* note 27, at 8.

104. *Veterans for Common Sense*, 563 F. Supp. 2d at 1069.

105. This actually understates the increase because the real value of compensation rates has declined. For example, in 1987 the compensation for a total disability rating was \$1411 per month (\$2647 per month in 2008 dollars). 38 U.S.C. § 314 (1987). By 2008, that rate had declined 6.6% in real value to \$2471. 38 U.S.C.A. § 1114 (West 2008). Thus, the increase has occurred despite a decline in the real value of compensation rates. Although it is not entirely clear why the number of recipients has declined by 400,000, it seems likely due to the declining population of World War II veterans. Between 1994 and 2007, the number of living WWII veterans declined from 7.8 million to 2.9 million. Compare U.S. CENSUS BUREAU, 2009 STATISTICAL ABSTRACT OF THE U.S. Table 577, <http://www.census.gov/prod/1/gen/95statab/defense.pdf>, with U.S. CENSUS BUREAU, 1995 STATISTICAL ABSTRACT OF THE U.S., Table 576, <http://www.census.gov/prod/1/gen/95statab/defense.pdf>.

106. This is not to say that these are attributable entirely to the VJRA. Furthermore, it can be debated whether this is a positive development. See generally Michael Waterstone, *Returning Veterans and Disability Law*, 85 NOTRE DAME L. REV. 1081 (2010). Some have argued that the system is fundamentally flawed because "[t]he entire system seems designed to encourage chronic disability." David Dobbs, *The Post-Traumatic Stress Trap*, SCI. AM., Apr. 2009, at 68 (noting that "most

sense, judicial review has had the effect desired by veterans advocates: it has preserved and enhanced the entitlement system.

However, the overall value of judicial review has also been questioned, primarily because the adjudication process takes dramatically longer to complete without a corresponding increase in accuracy.¹⁰⁷ Prior to the VJRA, VA took an average of 106 days to adjudicate a claim for benefits.¹⁰⁸ As of the fiscal year 2008, that time had risen to 183 days.¹⁰⁹ Although that change is substantial, it is dwarfed by the increase in appellate processing time within the agency. Between the fiscal years 1991 and 2008, the average time to process an appeal has more than doubled from 462 days¹¹⁰ to almost three years.¹¹¹ As noted above, it is increasingly likely that an agency appeal will lead to a remand and even more delay before a final decision is reached.¹¹² This problem is not a recent development. For example, in 2000 the GAO reported that VA's backlog of

veterans getting PTSD treatment from the VA report worsening symptoms until they are designated 100 disabled—at which point their use of VA mental health services drops by 82 percent”). In this view, the system encourages veterans to focus—consciously or unconsciously—on their disabilities, rather than on trying to reintegrate with normal life.

107. See, e.g., William F. Fox, Jr., *Deconstructing and Reconstructing the Veterans Benefits System*, 13 KAN. J.L. & PUB. POL'Y 339, 342 (2004); James T. O'Reilly, *Burying Caesar: Replacement of the Veterans Appeals Process is Needed to Provide Fairness to Claimants*, 53 ADMIN. L. REV. 223 (2001).

108. OFFICE OF INSPECTOR GEN., DEP'T OF VETERANS AFFAIRS, REP. NO. 5D2-B01-013, AUDIT OF APPEALS PROCESSING IMPACT ON CLAIMS FOR VETERANS' BENEFITS (1995), available at <http://www.va.gov/oig/52/reports/1995/5D2-B01-013—appeals.htm>.

109. *Veterans for Common Sense*, 563 F. Supp. 2d at 1070. By way of comparison, the average time for an initial decision in a social security disability claim currently hovers around 120 days. See SOC. SEC. ADVISORY BD., DISABILITY DECISION MAKING: DATA AND MATERIALS 84 (2006) [hereinafter DISABILITY DECISION MAKING], available at <http://www.ssab.gov/sumrDisabilityChartbook.shtml>.

110. See CHARLES L. CRAGIN, ANNUAL REPORT OF THE CHAIRMAN, BOARD OF VETERANS' APPEALS, FISCAL YEAR 1991 8 (1992). The requirement that the BVA chairman produce an annual report was instituted in the VJRA, see *supra* note 88, and the fiscal year 1991 report was the first one prepared under the statute. See DEP'T OF VETERANS AFFAIRS, BOARD OF VETERANS APPEALS ANNUAL REPORTS TO CONGRESS: 1991–2008, http://www.bva.va.gov/Chairman_Annual_Rpts.asp.

111. BVA CHAIRMAN'S REPORT FOR FISCAL YEAR 2008, *supra* note 49, at 19. The VA adjudication system is not the only one so afflicted. In the twenty years between 1985 and 2005, the processing time for an administrative appeal of a social security disability claim nearly tripled from approximately 160 days to 422 days. DISABILITY DECISION MAKING, *supra* note 109, at 85. This has prompted similar criticisms of that system. See Paul R. Verkuil & Jeffrey S. Lubbers, *Alternative Approaches to Judicial Review of Social Security Disability Cases*, 55 ADMIN. L. REV. 731, 768 (2003).

112. See *supra* notes 96 and 100 and accompanying text.

claims had been growing since 1996, and that “problems with large backlogs and long waits for decisions have not yet improved, despite years of studying these problems.”¹¹³

In fairness to VA, the number of compensation claims—the most difficult to adjudicate¹¹⁴—received each year has increased about 53% over the last decade, from 468,000 to 719,000,¹¹⁵ and VA’s output has actually increased at a slightly faster pace over that time.¹¹⁶ Furthermore, although the adjudication times for appeals are extreme, they affect only a minority of claims. Claimants dispute only a little over 10% of RO decisions, and the BVA reviews only about 5% of claims.¹¹⁷ Beyond that, only about 0.5% of cases are appealed to the CAVC,¹¹⁸ often resulting in remands and further delay,¹¹⁹ and the number of veterans appeals that the Federal

113. U.S. GEN. ACCOUNTING OFFICE, VETERANS BENEFITS ADMINISTRATION: PROBLEMS AND CHALLENGES FACING DISABILITY CLAIMS PROCESSING, GAO/T-HEHS/AIMD-00-146 1–2 (2000) [hereinafter GAO REP. NO. GAO/T-HEHS/AIMD-00-146]. See also Cragin, *The Impact of Judicial Review*, *supra* note 54, at 41 (observing, five years after commencement of judicial review, that decisionmaking times “now has increased to more than threefold from what historically had been considered ‘timely’”). See generally U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-213, FURTHER EVALUATION OF ONGOING INITIATIVES COULD HELP IDENTIFY EFFECTIVE APPROACHES FOR IMPROVING CLAIMS PROCESSING (2010); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-07-512T, LONG-STANDING CLAIMS PROCESSING CHALLENGES PERSIST (2007); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-05-749T, CLAIMS PROCESSING PROBLEMS PERSIST AND MAJOR PERFORMANCE IMPROVEMENTS MAY BE DIFFICULT (2005) (testimony of Cynthia A. Bascetta before Committee on Veterans’ Affairs, U.S. Senate).

114. Compensation claims are difficult because they often raise complicated issues of medical diagnosis and causation, while most other benefits, such as educational benefits and home loan benefits, are based upon objective criteria that are usually easy to document. As a result, 94.4% of the appeals decided by the BVA each year involve compensation claims. See BVA CHAIRMAN’S REPORT FOR FISCAL YEAR 2008, *supra* note 49, at 22; BVA CHAIRMAN’S REPORT FOR FISCAL YEAR 2007, *supra* note 100, at 19; BVA CHAIRMAN’S REPORT FOR FISCAL YEAR 2006, *supra* note 100, at 19.

115. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-910T, PRELIMINARY FINDINGS ON CLAIMS PROCESSING TRENDS AND IMPROVEMENT EFFORTS 7 (2009) [hereinafter PUBL’N NO. GAO-09-910T].

116. *Id.* at 4.

117. See BVA CHAIRMAN’S REPORT FOR FISCAL YEAR 2008, *supra* note 49, at 18, 21 (analyzing statistics for VA in 2006, in which there were 806,000 applications for benefits filed, 101,000 administrative appeals filed, and 39,000 administrative appeals prosecuted to the issuance of a BVA decision). There are several reasons why an appeal might be terminated before reaching the BVA, including the possibility that further development and review at the RO level will lead to a grant of benefits without reaching the BVA. See Ridgway, *Why So Many Remands*, *supra* note 47, at 148–49.

118. Ridgway, *Why So Many Remands*, *supra* note 46, at 151.

119. See *id.* at 152–57.

Circuit hears on the merits is negligible compared to the overall volume of claims.¹²⁰ Accordingly, although troubling delays plague the appeals process, the overwhelming majority of veterans do not experience them.

Ultimately, the best measure of how well the system is performing is the accuracy of the decisionmaking. One commentator cautioned that “in any large scale benefit program that must make complex factual and legal determinations for a large number of cases, [i]t is easy to focus on the relatively small percentage of cases that are problematic and overlook the majority of cases in which the system works relatively well.”¹²¹ However, the small sample of cases appealed to the CAVC suggests agency errors are frequent, as the CAVC fully affirms fewer than 35% of the BVA decisions that it addresses on the merits.¹²² On a wider scale, VA’s Office of Inspector General released a report in March 2009 concluding that VA’s internal quality control system was under-reporting errors, and estimated that 203,000 of the 882,000 (24%) compensation claims decided over a one-year period contained non-technical errors that affected the amount of benefits paid.¹²³ This report followed a previous one that found disturbing variances in the treatment of claims between different ROs,¹²⁴ and a 2000 GAO report stating that stricter quality review measures implemented in 1999 showed that initial RO decisions were correct only 68% of the time.¹²⁵ Thus, there is ample reason to be concerned about how well the current VA adjudication process works.

120. See U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT, APPEALS FILED IN MAJOR ORIGINS, available at <http://www.cafc.uscourts.gov/pdf/10yrHistCaseldBy-Origin99-08.pdf> (showing that Federal Circuit has been receiving about 200 appeals from CAVC each year); Allen, *Significant Developments*, *supra* note 35, at 492 (noting that Federal Circuit issued only 63 written opinions on the merits in two years covered by study).

121. Levy, *supra* note 2, at 323.

122. See Ridgway, *Why So Many Remands*, *supra* note 46, at 154. It is difficult to extrapolate the results from CAVC appeals because there is no basis for determining whether these self-selected, largely pro se appeals are a representative sample of claims decided at the RO or BVA level.

123. VA OFFICE OF INSPECTOR GEN., DEP’T OF VETERANS AFFAIRS, REP. NO. 08-02073-96, AUDIT OF VETERANS BENEFITS ADMINISTRATION COMPENSATION RATING ACCURACY AND CONSISTENCY REVIEW ii (2009) (analyzing claims in the twelve months ending in February 2008). The report does not suggest that the errors systematically over- or under-paid claimants. See also U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-473T, CLAIMS PROCESSING CHALLENGES PERSIST, WHILE VA CONTINUES TO TAKE STEPS TO ADDRESS THEM (2008).

124. VA OFFICE OF INSPECTOR GEN., REP. NO. 05-00765-137, REVIEW OF STATE VARIANCES IN VA DISABILITY COMPENSATION PAYMENTS (2005).

125. See GAO REP. NO. GAO/T-HEHS/AIMD-00-146, *supra* note 113, at 5–6.

In summary, after twenty-two years of judicial review, claims are taking longer for VA to adjudicate, but are producing more favorable results for claimants. Unfortunately, empirical data suggests that a substantial portion of the decisions are unreliable. This raises the question of how the VJRA directly or indirectly caused this situation.

III. JUDICIAL REVIEW AND THE DECISIONMAKING PROCESS

A. *Prelude: The Appellate Judges*

One of the first steps in implementing the VJRA was for the President to nominate the judges for the newly formed CAVC. Article III appellate judges are frequently drawn from the ranks of the trial judges who, in turn, are often former trial attorneys.¹²⁶ It has been argued that this osmosis of experience between levels is a major contributing factor to the rate of affirmances by the appellate courts, due to the tendency of those judges to identify with their brethren “in the judicial trenches.”¹²⁷ In contrast, none of the original members of the CAVC, an Article I court, had any direct experience with adjudicating individual claims.¹²⁸ Currently, only two of the seven judges have any direct experience litigating veterans claims.¹²⁹ Consistent with this trend, none of the judges appointed to the Federal Circuit since Congress passed the VJRA have had any veterans law experience.¹³⁰ Thus, the judges conducting judicial review of the VA adjudication system have added new perspectives to the process rather than merely conducting deferential reviews of claims. This characteristic is neither completely positive nor negative, but it does increase the likelihood that such review will alter the status quo and lead to changes in the system, which ultimately leads to less predictability and a longer process for claimants.

126. UNITED STATES DEP'T OF STATE, OUTLINE OF THE U.S. LEGAL SYSTEM 142–43 (2004), available at <http://www.america.gov/publications/books//outline-of-u.s.-legal-system>.

127. See Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62, 79 (1985).

128. See FOX, *supra* note 12, at 260–63 (“Appendix C: Biographies of the Judges of the [CAVC]”).

129. United States Court of Appeals for Veterans Claims, Judges, <http://www.uscourts.cavc.gov/about/judges/> (last visited Jul. 3, 2010).

130. United States Court of Appeals for the Federal Circuit, Judicial Biographies, <http://www.cafc.uscourts.gov/judgbios.html> (last visited Jul. 3, 2010). See also Pamela Banner Krupka, *An Interview with Chief Circuit Judge Paul R. Michel*, 2 LANDSLIDE 18, 23 (2009).

B. *Colvin v. Derwinski and the Separation of Medical and Legal Issues*

One major effect not explicit in the VJRA was a makeover of the BVA by removing its staff physicians from the claims adjudication process. Prior to the VJRA, the BVA contained both lawyers and doctors, who reviewed cases in panels of three.¹³¹ Although this setup facilitated detailed discussions of medical and legal principles, the BVA did not record those discussions, and its decisions often rejected favorable medical evidence in the claims file while citing only “sound medical principles.”¹³² The CAVC quickly recognized that continuing this procedure would make judicial review a practical impossibility. Accordingly, in one of its earliest decisions, *Colvin v. Derwinski*,¹³³ the CAVC declared that the BVA must base its decisions upon “independent medical evidence.”¹³⁴

The practical effect of this decision was that VA decided to eliminate the physicians on the BVA and the RO rating teams.¹³⁵ As a result, the BVA and the RO now lack the medical expertise necessary to resolve claims (either favorably or unfavorably) if the medical evidence in the file was inadequate to resolve every medical issue,¹³⁶ and inadequate medical evidence accounts for about a third of all cases remanded by the BVA.¹³⁷ The importance of this

131. Cragin, *The Impact of Judicial Review*, *supra* note 54, at 24.

132. *Id.* at 25.

133. 1 Vet. App. 171 (1991).

134. *Id.* at 175.

135. Cragin, *The Impact of Judicial Review*, *supra* note 54, at 26. Shortly after *Colvin* was decided, the Chairman of the BVA publicly discussed how the BVA was having difficulty in deciding how to utilize the physician members of the BVA in light of the CAVC’s decision. See Cragin, *supra* note 19, at 501–04.

136. Medical opinions may be considered inadequate for a number of reasons. See, e.g., *Miller v. West*, 11 Vet. App. 345, 348 (1988) (failure to explain factual basis); *Reonal v. Brown*, 5 Vet. App. 458, 461 (1993) (reliance on factual basis that BVA rejects in whole or in part); *Steff v. Nicholson*, 21 Vet. App. 120, 124 (2007) (failure to provide reasons for conclusion reached); *Robinson v. Mansfield*, 21 Vet. App. 545, 553 (2008) (failure to address theory of causation suggested by record). See generally James D. Ridgway, *Lessons the Veterans Benefits System Must Learn on Gathering Expert Witness Evidence*, 18 FED. CIR. B.J. 405, 408–11 (2009) [hereinafter Ridgway, *Lessons the Veterans Benefits System Must Learn*].

137. See U.S. GOV’T ACCOUNTABILITY OFFICE, VA CAN IMPROVE ITS PROCEDURES FOR OBTAINING MILITARY SERVICES RECORDS, GAO-07-98, at 7 (1996) (reporting that between November 2004 and January 2006, leading basis for remand from the BVA to the RO was to obtain adequate medical opinion (36.3% of remanded cases)); *Hearing to Receive the Report of the VA Claims Processing Task Force (Cooper Report) Before the H. Comm. on Veterans’ Affairs*, 107th Cong. 79 (2001) [hereinafter *VA Claims Processing Task Force*] (reporting that inadequate medical evidence caused one third of remands from BVA).

change is difficult to overstate. Prior to the VJRA, the adjudication process was streamlined to gather medical records and put them before a panel of legal and medical specialists for a collaborative decision. After *Colvin*, VA splintered the process into separate procedures for analyzing medical evidence and then applying legal standards to it. Although the duty to assist was relatively straightforward when it focused on gathering records, *Colvin* completely changed its focus to generating independent medical opinions.¹³⁸ In other words, the VJRA indirectly caused the separation of legal and medical expertise within the system, and required the development of a more robust duty to assist to reconnect these halves.¹³⁹ Thus, it is not surprising that the duty to assist has been subjected to so much litigation, thereby increasing the cost and time of claim adjudication.¹⁴⁰

C. *The Reasons or Bases Requirement*

In addition to forcing a remake of the BVA, the CAVC also quickly developed one of the most demanding rubrics of appellate review known in the American legal system. Prior to the VJRA, the BVA's jurisdictional statute required only that "[t]he decisions of the [BVA] shall be in writing and shall contain findings of fact and conclusions of law separately stated."¹⁴¹ The VJRA added a further requirement that the BVA state "the reasons or bases for those findings and conclusions, on all material issues of fact and law

138. This change took a little time to develop. It was not until three years after *Colvin* that the CAVC explicitly held that the duty to assist "may, under appropriate circumstances, include a duty to conduct a thorough and contemporaneous medical examination." *Caffrey v. Brown*, 6 Vet. App. 377, 381 (1994). See generally Fox, *supra* note 12, at 92–102 (discussing development of CAVC's duty-to-assist case law). Although VA's duty to assist has been a statutory and regulatory issue for the last twenty-two years, the Federal Circuit may be on the verge of elevating many of the disputes to the constitutional due process level. See *Gambill v. Shinseki*, No. 2008-7120, slip op. at 1 (Fed. Cir. Aug. 13, 2009) (Moore, J., concurring) (arguing that claimants may have due process right to "confront" VA doctors who provide medical opinions on their claims, including right to serve them with interrogatories). But see *id.* (Bryson, J., concurring) (rejecting existence of such right under due process).

139. For a comprehensive review of the role of medical evidence in VA adjudications before and after *Colvin*, see Ridgway, *Lessons the Veterans Benefits System Must Learn*, *supra* note 136.

140. The "selective re-litigation" model would suggest that persistent litigation is a sign that the current rules are inefficient and that litigation will continue until the underlying rules are refined. See E. Donald Elliott, *Law and Biology: The New Synthesis?*, 41 ST. LOUIS U. L.J. 595, 600–01 (1997).

141. 38 U.S.C. § 4004(d) (West 1979).

presented on the record.”¹⁴² The early case law of the CAVC quickly turned this standard into an extremely probing form of review. The CAVC did not adopt the traditional appellate rule that a decision below be affirmed if there was any view of the evidence that supported the conclusion,¹⁴³ Instead the CAVC held that a reasons or bases error “frustrates judicial review,” and will ordinarily not reach the merits of an issue in such cases unless the BVA explicitly has made all the relevant findings of fact and explained why any unfavorable findings were resolved against the veteran; in such cases the CAVC remands without addressing the merits.¹⁴⁴ As a result of this requirement, the CAVC functionally required the BVA to earn deference before it would substantively review the matter.¹⁴⁵ Therefore, “[i]n practice, [the reasons or bases] requirement means that it is not enough that there be sufficient evidence of record to support a BVA decision. Instead, the decision must affirmatively discuss all the relevant evidence and law, and articulate a valid and comprehensive basis for denying benefits.”¹⁴⁶ This stern standard has been applied by the court “continuously and unremittingly since the Court began deciding cases in 1989.”¹⁴⁷ Both the BVA and veterans groups have asserted that this standard substantially increased the amount of work and length of time it takes to produce BVA decisions.¹⁴⁸ Thus, this standard has added a substantial layer of formality to a once highly informal system.

In retrospect, the development of this standard is not surprising. The original judges of the court had no direct experience with the adjudication of individual claims, they reviewed decisions by BVA members accustomed to announcing conclusions with little explanation, and they handled appeals that were overwhelmingly pro se.¹⁴⁹ These circumstances often put the CAVC in the “some-

142. Veterans’ Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4111 (codified as amended in scattered sections of 38 U.S.C.).

143. See *Gilbert v. Derwinski*, 1 Vet. App. 49, 57 (1990) (“[T]he Board must identify those findings it deems crucial to its decision and account for the evidence which it finds to be persuasive or unpersuasive. These decisions must contain clear analysis and succinct but complete explanations. A bare conclusory statement, without both supporting analysis and explanation, is neither helpful to the veteran, nor clear enough to permit effective judicial review, nor in compliance with statutory requirements.”) (internal quotation marks omitted).

144. See, e.g., *McNeely v. Principi*, 3 Vet. App. 357, 364 (1992) (relying on *Gilbert* to remand matter for Board to rule on issues raised by Court).

145. See Ridgway, *Why So Many Remands*, *supra* note 46, at 137.

146. *Id.* at 136.

147. Fox, *supra* note 12, at 108.

148. *Id.* at 109.

149. See *supra* note 56 and accompanying text.

what awkward position [of] handling review of a pro se appeal where the appellant [was] totally incapable of articulating, in terms [the court could] understand, what he or she [didn't] like about the decision of the [BVA]."¹⁵⁰ Faced with trained VA attorneys dismantling the arguments made in unsophisticated, informal briefs,¹⁵¹ the court developed this aggressive standard to ensure that the issues were presented in a meaningful way despite the disparity in the skills of the advocates, thereby providing meaningful review for the mostly pro se appellants.¹⁵² This is not to say that the CAVC has not been impartial. Rather, to provide meaningful judicial review, the court needed a tool to make sure that issues were presented to it in a meaningful way despite the disparity in skill of the advocates before it.¹⁵³ The heightened standard for the conclusions of the BVA made its reasoning more transparent, thereby sharply reducing the BVA's ability to avoid complex issues with vague statements and conclusory findings.

150. Nebeker, *supra* note 64, at XXXIII.

151. In the first "State of the Court" speech for the CAVC, then-Chief Judge Nebeker compared reviewing such cases to watching "a good tennis player who's pitted against a novice. Can't play worth a damn." *Id.* at XXX.

152. The Court also took an active interest in growing the veterans bar. Shortly after the court opened, Chief Judge Nebeker recommended to Congress that the unspent portion of the CAVC's budget be used "[t]o develop a pro bono representation program." *Departments of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations for Fiscal Year 1993: Hearing Before the H. Comm. on Veterans' Affairs*, 102nd Cong. (1992) (testimony of Chief Judge Frank Q. Nebeker) (describing recommendation and results). The Veterans Pro Bono Consortium was created in 1992. *See Dire Emergency Supplemental Appropriations and Transfers for Relief from the Effects of Natural Disasters, for Other Urgent Needs, and for the Incremental Costs of "Operation Desert Shield/Desert Storm" Act of 1992*, Pub. L. No. 102-229, 105 Stat. 1701, 1710 (1991); VETERANS CONSORTIUM PRO BONO PROGRAM, 2006 ANNUAL REPORT 2 (2007), available at http://www.vetsprobono.org/pdf/ProBono_AR06.pdf.

153. This raises the interesting issue of whether the uniform application of the reasons or bases requirement continues to be appropriate as more claims are presented with the full assistance of counsel below. The courts have struggled with this issue. *Compare* *Comer v. Peake*, 552 F.3d 1362, 1368–69 (Fed. Cir. 2009) ("A liberal and sympathetic reading of appeal submissions is necessary because a pro se veteran may lack a complete understanding of the subtle differences in various forms of VA disability benefits and of the sometimes arcane terminology used to describe those benefits."), *with* *Acciola v. Peake*, 22 Vet. App. 320, 323 (2008) ("[T]he Secretary concede[s] that all pleadings are read sympathetically regardless of any type of representation."). *See generally* Reiss & Tenner, *supra* note 3.

D. *The Right to “One Review on Appeal”*

The reasons or bases standard was not the most dramatic constraint on the BVA’s decisionmaking authority. Prior to the VJRA, the BVA consisted of a group of legal and medical professionals who reviewed the decisions of lay RO adjudicators de novo.¹⁵⁴ The advent of the VJRA’s judicial review limited the ability of the BVA to re-analyze claims when the CAVC held that “fair process” required the BVA to notify a claimant of any authorities that it intended to rely upon that had not been previously raised.¹⁵⁵

Nonetheless, VA continued to look for ways for the BVA to minimize remands and bring finality to claims. In 2002, it proposed to allow the BVA to develop new evidence and consider that evidence in the first instance.¹⁵⁶ However, the BVA’s jurisdictional statute provides that “[a]ll questions in a matter . . . subject to decision by the Secretary shall be subject to one review on appeal” by the BVA.¹⁵⁷ In *Disabled American Veterans v. Secretary of Veterans Affairs (DAV)*, the Federal Circuit concluded that this provision generally prohibits the BVA from considering new evidence.¹⁵⁸ The *DAV* decision forced VA to disband the BVA’s Evidence Development Unit and cede direct control to the ROs over correcting development problems, such as gathering relevant records and obtaining a comprehensive medical opinion based upon an accurate factual history.¹⁵⁹ Subsequently, VA promulgated regulations in response to *DAV* requiring remand of cases not only for consideration of new evidence developed by VA, but also of new evidence submitted by claimants during the appellate process.¹⁶⁰ As a result, the BVA’s role shifted from that of a superior trial court toward that of an inferior appellate court. In turn, procedural issues frequently arise when BVA decisions vary from the rationale stated by the RO so as to suggest it considered some piece of evidence or legal authority in the first instance.¹⁶¹

154. See Cragin, *The Impact of Judicial Review*, *supra* note 54, at 24.

155. *Thurber v. Brown*, 5 Vet. App. 119, 126 (1993).

156. 38 C.F.R. §§ 19.9(b)(2), 20.901(a) (2002).

157. 38 U.S.C. § 7104(a) (2006).

158. *Disabled American Veterans v. Secretary of Veterans Affairs*, 327 F.3d 1339, 1346–68 (Fed. Cir. 2003).

159. VETERANS BENEFITS MANUAL, *supra* note 82, § 13.5.4, at 1040–41.

160. 38 C.F.R. § 20.1304(c) (2009); *see also* 69 Fed. Reg. 53807 (Sept. 3, 2004) (noting that regulation had been modified from version issued in 67 Fed. Reg. 3105 (Jan. 21, 2002) “to conform to a recent decision from the United States Court of Appeals for the Federal Circuit”).

161. *See, e.g.*, *Gardner v. Shinseki*, 22 Vet. App. 415, 418 n.2 (2009) (questioning whether *DAV* permits BVA to address merits of claim after reversing RO deci-

In conclusion, a survey of a few of the key changes demonstrates that judicial review has been about much more than micromanaging specific aspects of the process that existed in 1989. Judicial review has fundamentally reinvented the process in a way that requires many more steps to complete and that demands VA show each step was completed properly. For example, the CAVC helped formalize detailed requirements based upon existing VA authorities in many areas of benefits adjudication with special procedures, including post-traumatic stress disorder claims,¹⁶² the rating of mental disabilities,¹⁶³ lost service records,¹⁶⁴ undiagnosed illnesses related to the first Gulf War,¹⁶⁵ exposure to chemical

sion declining to reopen claim); *Urban v. Principi*, 18 Vet. App. 143, 145–46 (2004) (per curiam) (observing that *DAV* might preclude *BVA* from addressing in the first instance new issues raised by favorable ruling on issue appealed by appellant); *Pelegrini v. Principi*, 18 Vet. App. 112, 123 (2004) (noting other regulatory provisions called into question by *DAV* to the extent that they appear to permit *BVA* to consider evidence in the first instance). The leading consortium of major veterans groups has concluded that these practical effects of *DAV* have not been healthy for the system and recently recommended that “Congress should allow the [*BVA*] to directly hear new evidence in cases certified to it, rather than require VA’s [*ROs*] to hear the evidence . . .” *AMVETS ET AL., THE INDEPENDENT BUDGET FOR THE DEPARTMENT OF VETERANS AFFAIRS FISCAL YEAR 2011*, 27 (2010) [hereinafter *INDEPENDENT BUDGET FOR FISCAL YEAR 2011*], available at http://www.independentbudget.org/2011/3_GOE.pdf.

162. See, e.g., *Bradford v. Nicholson*, 20 Vet. App. 200, 204–05 (2006) (detailing VA’s duty to seek corroboration of in-service sexual assault); *Sizemore v. Principi*, 18 Vet. App. 264, 270–75 (2004) (detailing VA’s duty to seek corroboration of claimant’s combat experience). See generally Shera Finn et al., *VA’s Duty to Assist in the Context of PTSD Stressor Verification: What Must VA Do to Fulfill the Veterans Claims Assistance Act of 2000?*, 1 *VETERANS L. REV.* 50 (2009) (discussing procedural aspects of VA’s verification duties under Veterans Claims Assistance Act).

163. See, e.g., *Mauerhan v. Principi*, 16 Vet. App. 436, 443 (2002) (holding VA’s rating criteria for mental disabilities allows adjudicators to consider symptom descriptions contained in *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (4th ed. 1994)); *Hood v. Brown*, 4 Vet. App. 301, 303–04 (1993) (addressing meaning of adjective “definite” as used to rate mental disabilities).

164. See, e.g., *Russo v. Brown*, 9 Vet. App. 46, 51 (1996) (holding that court’s case law establishes “heightened duty” to assist when appellant’s medical records have been lost or destroyed); *Cuevas v. Principi*, 3 Vet. App. 542, 548 (1992) (holding that *BVA*’s duty to assist claimant in cases in which his service medical records are lost or destroyed “includes the obligation to search for alternate medical records”).

165. See, e.g., *Stankevich v. Nicholson*, 19 Vet. App. 470, 472–73 (2006) (discussing the proper method for rating an undiagnosed condition); *Gutierrez v. Principi*, 19 Vet. App. 1, 9–10 (2004) (discussing acceptable lay evidence of undiagnosed condition).

agents¹⁶⁶ and exposure to radiation.¹⁶⁷ Increased complexity, such as these new requirements, has become a major issue for the adjudication system, as acknowledged by VA management,¹⁶⁸ VA adjudicators,¹⁶⁹ the major veterans service organizations,¹⁷⁰ and the GAO.¹⁷¹

IV. JUDICIAL REVIEW AND CLAIMANT RESPONSIBILITY

The increased complexity of the adjudication process stands in contrast to the relaxation of the procedural burdens on claimants. As in other areas of law that are receptive to simplified procedural requirements, such as relaxed pleading requirements for pro se liti-

166. See, e.g., *Stefl v. Nicholson*, 21 Vet. App. 120, 124 (2007) (holding that VA doctor cannot summarily conclude that condition is not related to Agent Orange merely because National Institute of Health has not recognized significant statistical correlation).

167. See, e.g., *Earle v. Brown*, 6 Vet. App. 558, 561–62 (1994) (discussing VA's duty to obtain dosage estimates for radiation exposed veterans).

168. See, e.g., *Battling the Backlog Part II: Challenges Facing U.S. Court of Appeals for Veterans Claims: Hearing Before the S. Comm. on Veterans' Affairs*, 109th Cong. 36 (2006) (statement of James P. Terry, Chairman of the BVA) (“[A]ll of us involved in the adjudication system agree that cases have grown more complex, with more numerous issues and much larger records to review and consider. Even a case with just a few simple issues takes more time to process, when, as is increasingly common, the record on appeal may constitute thousands and thousands of pages.”).

169. *Addressing the Backlog: Can the U.S. Department of Veterans Affairs Manage One Million Claims?: Hearing Before the Subcomm. on Disability Assistance & Memorial Affairs of the H. Comm. on Veterans' Affairs*, 111th Cong. 67 (2009) [hereinafter *Addressing the Backlog Hearing*] (statement of Michael Ratajczak, Decision Review Officer, VA Cleveland Regional Office on Behalf of the American Federation of Government Employees, AFL-CIO) (acknowledging increased complexity of claims and recommending additional training).

170. See, e.g., INDEPENDENT BUDGET FOR FISCAL YEAR 2010, *supra* note 66, at 30 (“It is vital . . . that Congress recognize that the backlog will not go away overnight: it developed through years of increasing complexity of the claims development process with an overlay of judicial review.”); *Examining the Backlog and the U.S. Department of Veterans Affairs' Claims Processing System: Hearing Before the H. Comm. on Veterans' Affairs*, 110th Cong. 101 (2008) (statement of Gerald T. Manar, Deputy Director, National Veterans Service, Veterans of Foreign Wars of the United States) (testifying that “as we have seen, increased complexity extends the time it takes to resolve claims and increases the opportunity for error”).

171. See PUBL'N NO. GAO-09-910T, *supra* note 115, at 8 (“Another factor impacting VA's claims workloads—particularly the average time to complete a claim—is the complexity of claims received.”).

gants,¹⁷² the VA system was intended to be informal and claimant-friendly.¹⁷³ For example, in another early ruling, the CAVC established that it would interpret pro se arguments liberally.¹⁷⁴ However, the relaxed procedure in the veterans benefits adjudication system extends beyond reading pleadings liberally.

A. *Informal Claims and Appeals*

One set of procedural rules involves determining when a claim has been raised. Although VA has a formal application for benefits,¹⁷⁵ any “informal communication in writing requesting a determination of entitlement or evidencing a belief in entitlement, to a benefit” constitutes a claim.¹⁷⁶ A veteran is not required to “specify with precision the statutory provisions or the corresponding regulations under which he is seeking benefits.”¹⁷⁷ As the CAVC explained:

It is the pro se claimant who knows what symptoms he is experiencing that are causing him disability . . . [and] it is the Secretary who knows the provisions of title 38 and can evaluate whether there is potential under the law to compensate an averred disability based on a sympathetic reading of the material in a pro se submission.¹⁷⁸

Moreover, the Federal Circuit has ruled that it is the responsibility of VA to determine when an informal claim has been filed.¹⁷⁹ Thus, any correspondence to VA that mentions a condition or a

172. See, e.g., *Hughes v. Rowe*, 449 U.S. 5, 15 (1980) (“An unrepresented litigant should not be punished for his failure to recognize subtle factual or legal deficiencies in his claims.”).

173. See *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998) (stating that courts have “long recognized that the character of the veterans’ benefits statutes is strongly and uniquely pro-claimant”).

174. *Myers v. Derwinski*, 1 Vet. App. 127, 130 (1991). In fact, the very first published opinion of the CAVC noted that the court accepted jurisdiction of the case based upon a liberal construction of the petitioner’s pro se pleadings because the veteran had not articulated a basis for the relief requested. *In re Quigley*, 1 Vet. App. 1, 1 (1990).

175. DEP’T OF VETERANS AFFAIRS, VETERAN’S APPLICATION FOR COMPENSATION AND/OR PENSION, VA FORM 21-526 (2004), available at <http://www.vba.va.gov/pubs/forms/VBA-21-526-ARE.pdf>.

176. 38 C.F.R. § 3.1(p) (2009). See also 38 C.F.R. § 3.155(a) (2009) (defining “informal claim” as “[a]ny communication or action, indicating an intent to apply for . . . benefits under the laws administered by the [VA]”).

177. *Akles v. Derwinski*, 1 Vet. App. 118, 121 (1991).

178. *Ingram v. Nicholson*, 21 Vet. App. 232, 256–57 (2007).

179. See *Moody v. Principi*, 360 F.3d 1306, 1310 (Fed. Cir. 2004).

symptom can potentially raise an informal claim, even if the claimant is unaware of it.

Similarly, the CAVC has held that any expression of disagreement with an RO decision will put a claim into appellate status. In *Anderson v. Principi*,¹⁸⁰ the CAVC held appellant's correspondence stating that he "wonder[ed] why [his claim] wasn't allowed back in 1985" was sufficient to put his claim into appellate status because it should have been "[l]iberally interpreted" by VA as a Notice of Disagreement with the effective date assigned to his award of benefits.¹⁸¹ Hence, VA must construe any correspondence expressing dissatisfaction with a decision as initiating an appeal. Notably, these rules have the effect of aiding claimants by expanding the scope and tenure of their claims, while simultaneously increasing the length and cost of adjudication for claimants.

B. Weak Abandonment

These generous rules of interpretation are particularly important because the veterans benefits adjudication system has a very weak concept of abandonment. The applicable provision of the Code of Federal Regulations declares claims abandoned when the claimant fails to respond to a VA request for evidence or an order to cooperate with a VA medical technician.¹⁸² However, the CAVC has limited this regulation by holding that a claimant who refuses to cooperate with a VA medical examination ordered in relation to an original claim for benefits is still entitled to a decision on the merits of the claim based upon the evidence in the record.¹⁸³ In addition, the CAVC has held that if a claim is put into appellate status by a statement of disagreement with a decision, the appeal remains pending indefinitely.¹⁸⁴ Even subsequent denials of the same claim by an RO will not resolve the appeal if the claim does not reach the BVA.¹⁸⁵ The CAVC later held in *Norris v. West* that if a claim were raised, but not adjudicated, then it would also remain pending indefinitely.¹⁸⁶ Ultimately, the CAVC explained,

[W]hen an appellant submits a claim or takes an action on a claim that puts the ball into the Secretary's court, it remains

180. 18 Vet. App. 371 (2004).

181. *Id.* at 375 (quotations omitted).

182. 38 C.F.R. § 3.158 (2009).

183. *See* *Kowalski v. Nicholson*, 19 Vet. App. 171, 176–77 (2005) (holding that 38 C.F.R. § 3.655(b) trumps 38 C.F.R. § 3.158(b)).

184. *Tablazon v. Brown*, 8 Vet. App. 359, 361 (1995).

185. *Myers v. Principi*, 16 Vet. App. 228, 235–36 (2002).

186. *Norris v. West*, 12 Vet. App. 413, 422 (1999).

there—possibly for years—until the Secretary takes appropriate action to return the onus to the claimant to act within the time periods specified by statute and regulation.¹⁸⁷

Moreover, even if a claimant were to receive a final decision from VA, the Federal Circuit has recently indicated that the claimant may still challenge it decades later on due process grounds, regardless of any intervening rulings on the claim.¹⁸⁸ Thus, issues and appeals are easy to raise and very hard to abandon, which lengthens the time and cost of the claims process.

C. *Sua Sponte Development*

The CAVC and the Federal Circuit have set forth very generous standards as to the Secretary's obligations after a claim has been raised. In *EF v. Derwinski*,¹⁸⁹ decided just three years after the passage of the VJRA, the CAVC built upon the liberal pleading standard established in *Myers* by holding that the Secretary's statutory duty to assist required VA to develop all issues raised in "all documents or oral testimony submitted prior to [a] BVA decision."¹⁹⁰ The CAVC has emphasized this point by frequently reiterating the duty in its published opinions.¹⁹¹ Thus, although *Myers* required the Secretary to address all theories raised by the appellant regardless of how inarticulately they were expressed, *EF* extended this duty to all theories of entitlement raised by the record, even if the claimant was never aware of them. The Federal Circuit endorsed this position in *Schroeder v. West*,¹⁹² when it held that the Secretary's duty to assist claimants "attaches to the investigation of *all* possible in-service causes of [a] current disability, including those unknown to

187. *Ingram v. Nicholson*, 21 Vet. App. 232, 242 (2007).

188. See *Cushman v. Shinseki*, 576 F.3d 1290, 1300 (Fed. Cir. 2009) (ruling that VA's original 1980 decision violated due process, and remanding matter for BVA to make de novo ruling on claimant's 1977 claim). However, the decision in *Cushman* was quickly criticized by another judge of the Federal Circuit. See *Edwards v. Shinseki*, 582 F.3d 1351, 1356–58 (Fed. Cir. 2009) (Rader, J., concurring) ("invit[ing] further inquiry" about *Cushman* and arguing that it was wrongly decided).

189. 1 Vet. App. 324 (1991).

190. *Id.* at 326.

191. See, e.g., *Urban v. Principi*, 18 Vet. App. 143, 145 (2004) ("When reviewing [the appellant's] claim, the Board was obligated to consider all reasonably raised matters regarding the issue on appeal."); *Brannon v. West*, 12 Vet. App. 32, 34 (1998) (concluding that Board must "adjudicate all issues reasonably raised by a liberal reading of the appellant's substantive appeal, including all documents and oral testimony in the record prior to the Board's decision").

192. 212 F.3d 1265 (Fed. Cir. 2000).

the veteran.”¹⁹³ Re-emphasizing this principle, the court later defined the broad breadth of VA’s duties in *Roberson v. Principi* by holding that VA must “fully and sympathetically develop the veteran’s claim to its optimum before deciding it on the merits.”¹⁹⁴ Hence, in practice, the courts have interpreted the VA system as one in which claimants are absolved of any responsibility other than to report their complaints and may often raise procedural errors by the Secretary years, if not decades, after the fact.

Recently, the courts have retreated slightly from this standard. In *Robinson v. Mansfield*¹⁹⁵ (*Robinson I*), the CAVC again acknowledged that “[a]s a nonadversarial adjudicator, the Board’s obligation to analyze claims goes beyond the arguments explicitly made,” but concluded, “it does not require the Board to assume the impossible task of inventing and rejecting every conceivable argument in order to produce a valid decision.”¹⁹⁶ This seemingly reasonable boundary provoked a dissent arguing that the Secretary’s duty was not limited to those theories raised by the claimant or the evidence, but rather extended to all “possible” theories.¹⁹⁷ Nonetheless, the Federal Circuit affirmed the majority decision in *Robinson I*, and agreed that “[w]here a fully developed record is presented to the Board with no evidentiary support for a particular theory of recovery, there is no reason for the Board to address or consider such a theory.”¹⁹⁸

The *Robinson* decisions are particularly noteworthy because the appellant was not pro se before VA.¹⁹⁹ In fact, he had been assisted by an attorney for six years during the agency proceedings.²⁰⁰ Both courts acknowledged the participation of the attorney, but concluded that it did not alter the Secretary’s duty to scour the evidence for theories of entitlement that the attorney failed to present.²⁰¹ That conclusion in the *Robinson* decisions was not without precedent. VA had previously conceded that its policy is to

193. *Id.* at 1271.

194. *Roberson v. Principi*, 251 F.3d 1378, 1384 (Fed. Cir. 2001). Notably, *Roberson* traced its holding to *Hodge*, which relied upon the legislative history of the VJRA, rather than any statute or regulation defining the scope of VA’s duty to claimants. *Id.* at 1384 (citing *Hodge*, 155 F.3d at 1362–63). See also *Ingram v. Nicholson*, 21 Vet. App. 232, 255 (2007) (discussing *Hodge*).

195. *Robinson v. Mansfield (Robinson I)*, 21 Vet. App. 545 (2008).

196. *Id.* at 553.

197. *Id.* at 559 (Schoelen, J., dissenting).

198. *Robinson v. Shinseki (Robinson II)*, 557 F.3d 1355, 1361 (Fed. Cir. 2009).

199. *Robinson I*, 21 Vet. App. at 554.

200. *Id.*

201. *Robinson II*, 557 F.3d at 1359–61; *Robinson I*, 21 Vet. App. at 552–53.

read *all* pleadings sympathetically, including those submitted by attorneys.²⁰² The CAVC has also concluded that if VA fails in its duty to notify a claimant of what general types of evidence are necessary to prove a claim, the fact that the claimant was represented by an attorney is not alone sufficient to rebut the presumption that such a notice error is prejudicial.²⁰³ Thus, the limited increase in attorney involvement in the system has done nothing to ease the procedural burdens on VA.

D. *Informality in Context*

Although these rules of informality are important, it is more important to understand the context in which they operate. The CAVC has noted that “VA ROs do not operate under any form of a claim docket number system” and that “[v]eterans benefits litigation is frequently piecemeal.”²⁰⁴ Often, the process is characterized by “a continuous stream of evidence and correspondence” from the veteran.²⁰⁵ Rather than a neatly organized docket that clearly defines the state of any given claim, all the paperwork pertaining to every claim filed by a single veteran ends up in a single pile.²⁰⁶ As a result, a veteran’s claim file will frequently be a disorganized “puzzle box.”²⁰⁷ Thus, it can be extraordinarily challenging to interpret any given document either when it arrives or when it is reviewed in retrospect.

More importantly, the non-attorney staff at VA’s ROs bear the initial responsibility for noticing every informal claim raised, every theory of entitlement suggested by any of the evidence received, and every less-than-articulate appeal that arose during the unstructured correspondence.²⁰⁸ This, however, is not to say that the sys-

202. *Acciola v. Peake*, 22 Vet. App. 320, 323 (2008).

203. *See Overton v. Nicholson*, 20 Vet. App. 427, 443–44 (2006) (determining that notice error was prejudicial even though claimant was represented by counsel). This holding provoked a dissent arguing that decision “create[d] a presumption that an attorney does not know how to prove a claim for VA benefits unless and until told how to do so by the Secretary[, which] is fundamentally inconsistent with an attorney’s ethical obligation to know the relevant law in any area in which he or she practices.” *Id.* at 445 (Lance, J., dissenting).

204. *Ingram v. Nicholson*, 21 Vet. App. 232, 253 (2007).

205. *Id.* at 254.

206. *Carpenter*, *supra* note 3, at 294–95 (describing in detail many problems with VA’s claims file system).

207. *See VETERANS BENEFITS MANUAL*, *supra* note 82, § 16.1.2, at 1324.

208. Although a plurality of RO adjudicators have college degrees, a quarter do not. DANIEL HARRIS, FINDINGS FROM Raters AND VSOs SURVEYS 14 (2007), *available at* https://www.1888932-2946.ws/vetscommission/edocumentmanager/gallery/Documents/2007_July/CNA_Raters&NVSO-Survey_FinalReport.pdf. Law-

tem has reached a point at which only attorneys have the sophistication to handle all of the duties imposed upon the Secretary. Nonetheless, as one union leader representing VA adjudicators has said, RO employees who are “expected to decide and evaluate [complex claims], in less than two hours, are generally not brain surgeons with law degrees.”²⁰⁹ Furthermore, as one VA attorney has written, the non-attorney staff at the ROs often brings a perspective to the job that is different from that ingrained in lawyers.²¹⁰ Even if they were to have both law and medical degrees, the RO staff is notoriously overworked and pressured to handle cases quickly.²¹¹

It is no mystery that VA’s regional offices are simply not set up to handle the procedural burdens placed upon them. It can be debated what combination of management, personnel, information technology, procedural, and other changes should be made to allow VA’s front lines to perform as intended.²¹² However, until changes are made, the appellate litigation will continue to follow a predictable pattern of focusing on issues overlooked below.

yers were originally part of the decisionmaking teams at the ROs, but VA phased them out prior to the VJRA rather than raise adjudicator salaries to remain competitive with inflation in the legal salary market. See Mueller, *supra* note 19, at 505.

209. American Federation of Government Employees, *Comment on Proposed Rule AM75: “Schedule for Rating Disabilities; Evaluation of Residuals of Traumatic Brain Injury”* 3–4 (2008), available at <http://www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&o=09000064803a7f6b>.

210. Jeffery Parker, *Two Perspectives on Legal Authority Within the Department of Veterans Affairs Adjudication*, 1 VETERANS L. REV. 208, 211–212 (2009) (arguing that non-attorney staff at ROs focus on decisionmaking rules articulated in sub-regulatory authorities because they are not trained in legal analysis of general rules and do not find higher authorities useful in communicating with lay veterans).

211. See, e.g., INDEPENDENT BUDGET FOR FISCAL YEAR 2010, *supra* note 66, at 21 (describing VA adjudicators as “[i]nadequately trained and overworked”). In 2008, a leader of the union representing VA adjudicators commented that the proposed regulation to rate traumatic brain injuries as “a difficult, burdensome regulation will be subverted by VA managers which will further pressure employees to take shortcuts on the case based on the threat of their livelihood.” American Federation of Government Employees, *supra* note 209, at 1.

212. See, e.g., INDEPENDENT BUDGET FOR FISCAL YEAR 2011, *supra* note 161, at 23–36 (containing reform recommendations from consortium of veterans groups); *Forging a Path Forward Hearing*, *supra* note 91 (Senate hearing on reform proposals); *Addressing the Backlog Hearing*, *supra* note 169 (House hearing on reform proposals).

E. Informality Rules and Litigation Incentives

Although the CAVC has held that VA has the responsibility to “review all the communications in the file”²¹³ to discover any “that could be interpreted as a formal or informal claim,”²¹⁴ in practice it is the attorneys who first become involved at the CAVC level who have the time and the training to mine a veteran’s file for issues that were not properly developed. Unfortunately, by the time an attorney raises a potential claim or an appeal that was missed below, it is likely that many years have passed.²¹⁵ At that point, it is possible that the relevant substantive or procedural law has changed, maybe multiple times, and that the procedural posture will be muddled by years of intervening developments, re-openings, or collateral attacks based upon a different view of the claim’s status.²¹⁶ Thus, the focus often becomes how to reassemble a procedural Humpty Dumpty. Moreover, there is often little evidence concerning the veterans’ conditions in the distant past and there may be other factual uncertainties complicating the claim.²¹⁷

Not only are the resulting procedural and factual issues difficult, but they are also attractive to attorneys. Because the broad duties to recognize claims and appeals have been applied retroactively,²¹⁸ they are among the most lucrative that an attorney can raise. Most paid attorneys in veterans cases work on a contingency fee basis based upon the amount of past due benefits awarded when a claim is granted.²¹⁹ The longer the gap between when a veteran

213. *Lalonde v. West*, 12 Vet. App. 377, 381 (1999).

214. *Id.*

215. *See supra* notes 107–113 (discussing length of time it takes to process claim at agency level).

216. *See, e.g., Savitz v. Peake*, 519 F.3d 1312, 1313–16 (Fed. Cir. 2008) (remanding for determination as to whether appellant’s 1946 claim remained pending due to court’s determination that common law mailbox rule should be applied); *Young v. Shinseki*, 22 Vet. App. 461, 468–70 (2009) (accepting appellant’s argument that BVA had misconstrued status of his claims after decade of adjudications, and remanding for potential application of pre-1996 law).

217. *See, e.g., Chotta v. Peake*, 22 Vet. App. 80, 85–86 (2008) (remanding claim for consideration of obtaining retrospective medical opinion on veteran’s condition from 1947 to 1999).

218. *See, e.g., Ingram v. Nicholson*, 21 Vet. App. 232, 257 (2007) (applying the duty to recognize claims to a 1986 application for benefits); *Criswell v. Nicholson*, 20 Vet. App. 501, 503 (2006) (considering on merits whether appellant had originally raised claim in 1947).

219. *Benefits Legislative Initiatives Currently Pending Before the U.S. Senate Committee on Veterans’ Affairs: Hearing Before the S. Comm. on Veterans’ Affairs*, 109th Cong. 43–44 (2006) (statement of Richard Weidman, Director, Government Relations, Vietnam Veterans of America). *C.f.* 38 C.F.R. § 20.609(h) (2007) (allowing VA to

first files a claim and when VA finally grants it, the larger the amount of past due benefits awarded.²²⁰ If a claim remains pending for decades before a court grants it, the potential award—and fee—can be quite large.²²¹ Therefore, when an attorney becomes involved in a case, there is a strong incentive to comb the appellant's file for old claims or appeals that VA should have recognized based upon a sympathetic reading of the file but failed to do so. Accordingly, the VJRA has inadvertently brought a new focus to the operation of the adjudication system. Rather than turning a new page on the adjudication system, it has invited close reexamination and reinterpretation of many VA decisions made in the era prior to the VJRA.

V. REACTIONS TO JUDICIAL REVIEW

As much as judicial review and the interpretation of established statutes and regulations have shaped the VA adjudication process, case law tells only the beginning of the story of the VJRA. Both Congress and VA have actively responded to the courts' decisions and the effects thereof.

A. *Congressional Involvement*

Since the VJRA, Congress has become more active in managing the claims adjudication system. First, there has been a marked increase in congressionally commissioned examinations of the process. Although the GAO had regularly reviewed VA prior to the

pay contingent fee directly to attorney from award of benefits so long as it did not exceed twenty percent). The major veterans groups deliberately advocated for the significant restrictions on fee agreements in veterans cases in order to provide opportunities for non-attorneys from those organizations to practice before the CAVC. *See Helfer, supra* note 20, at 169–70.

220. *See Wright v. Gober*, 10 Vet. App. 343, 346–47 (1997) (citing 38 U.S.C. § 5110(a)).

221. For example, in 2009, a veteran rated as totally disabled was entitled to benefits of \$2527 per month. 38 U.S.C.A. § 1114 (West 2009). Although the rate has been increased slightly every year, an award of a decade of back benefits can be worth a quarter million dollars, which translates to a \$50,000 fee if the veteran had agreed to the 20% contingency fee that VA had defined as presumptively reasonable under its authority to invalidate unreasonable fee agreements. 38 C.F.R. § 20.609(f) (2007). However, the period of time in question can amount to much more than a decade. *See, e.g., Ingram*, 21 Vet. App. at 257 (remanding in 2007 for determination of whether appellant's claim was first raised in 1986); *Criswell*, 20 Vet. App. at 503 (involving appellant in 2006 who argued claim had been pending since 1947).

VJRA,²²² the last two decades have witnessed numerous special, independent reviews requested by Congress.²²³

Second, Congress passed laws in response to appellate court rulings on the VA system, made possible by judicial review. Although the first decade of judicial review included some congressional alterations of the adjudication process, such as allowing the BVA to issue single-member decisions,²²⁴ requiring the ROs to include more detail in their decisions,²²⁵ and eliminating the requirement that private medical evidence be corroborated by a VA medical examination,²²⁶ Congress's most dramatic intervention occurred in 2000 with the passage of the Veterans Claims Assistance Act (VCAA).²²⁷ The immediate catalyst for the VCAA was the CAVC's ruling in *Morton v. West*²²⁸ that the Secretary did not have statutory authority to provide a medical opinion for a claim that did not meet the threshold of being well grounded.²²⁹ Thus, a claimant had to submit "a well grounded claim" before the Secretary was obligated under the duty to assist to obtain further medical evi-

222. See, e.g., PUBL'N NO. GAO-89-9, *supra* note 27; PUBL'N NO. GAO-83-12, *supra* note 25.

223. See generally VETERANS' DISABILITY BENEFITS COMM'N, HONORING THE CALL TO DUTY: VETERANS' DISABILITY BENEFITS IN THE 21ST CENTURY (2007) (produced pursuant to Pub. L. No. 108-136); INSTITUTE OF MEDICINE, *supra* note 67; CENTER FOR NAVAL ANALYSIS, FINAL REPORT FOR THE VETERANS' DISABILITY BENEFITS COMMISSION: COMPENSATION, SURVEY RESULTS, AND SELECTED TOPICS (2007), available at https://www.1888932-2946.ws/vetscommission/e-documentmanager/gallery/Documents/Reference_Materials/CNA_FinalReport_August2007.pdf; NAT'L ACADEMY OF PUB. ADMIN., MANAGEMENT OF COMPENSATION AND PENSION BENEFITS CLAIM PROCESSES FOR VETERANS vii (1997) (commissioned by Senate Committee on Appropriations); VETERANS' CLAIMS ADJUDICATION COMMISSION REPORT (1996) (produced pursuant to Pub. L. No. 103-446). Cf. SERVE, SUPPORT, SIMPLIFY: PRESIDENT'S COMM'N ON CARE FOR AMERICA'S RETURNING WOUNDED WARRIORS (2007) [hereinafter DOLE-SHALALA REPORT], available at <http://www.veteransforamerica.org/wp-content/uploads/2008/12/presidents-commission-on-care-for-americas-returning-wounded-warriors-report-july-2007.pdf>.

224. Board of Veterans' Appeals Administrative Procedures Act of 1994, Pub. L. No. 103-271, 108 Stat. 740, 742-43 (adjusting provisions relating to BVA's operation).

225. Veterans' Benefits Amendments of 1989, Pub. L. No. 101-237, 103 Stat. 2062, § 115.

226. Veterans' Benefits Improvement Act of 1994, Pub. L. No. 103-446, 108 Stat. 4645, § 301(b) (effectively modifying 38 C.F.R. § 3.157(b)(2) (1994)).

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

228. 12 Vet. App. 477 (1999).

229. *Id.* at 481.

dence.²³⁰ In effect, claimants could not obtain a medical opinion from VA unless they first submitted a private medical opinion.²³¹ The CAVC opinion recognized that Congress had probably not intended to add this threshold condition that claimants must satisfy when it created a statutory duty to assist in the VJRA and invited Congress to revise the statute.²³²

Congress responded, but did not limit its response to the issue decided in *Morton*. In addition to giving the Secretary broad authority to provide assistance to claimants, the VCAA required VA to seek government or private records in enumerated specific situations. The VCAA created the first explicit statutory duty to provide claimants with a medical opinion, and lowered the threshold from requiring a “well grounded claim” to requiring only evidence that “indicates” the claim might have merit.²³³ More importantly, Congress added an entirely new duty. Pursuant to the VCAA, the Secretary must provide claimants notice “of any information and any medical or lay evidence . . . necessary to substantiate” the claims made.²³⁴ Although this notice duty sounds straightforward in principle, in practice it has been subject to tremendous litigation and friction between the Secretary, who sought to satisfy this duty with generic notice letters, and veterans groups that wanted every notice letter tailored to the specific evidence already in the claims file.²³⁵

Congress followed the VCAA with mostly minor interventions²³⁶ and waded back into the thick of the adjudication system

230. *Grivois v. Brown*, 6 Vet. App. 136, 140 (1994) (“[N]o duty to assist arises absent a well-grounded claim.”).

231. This is not to say that *Morton* reached an absurd result. The well-grounded-claim threshold was still lower than that required to grant the claim. In many cases, claimants still needed a VA opinion because the private opinion that they submitted lacked sufficient detail to allow VA to grant the claim.

232. *Morton*, 12 Vet. App. at 485–86.

233. 38 U.S.C. § 5103A(d) (2006); *see also* *McLendon v. Nicholson*, 20 Vet. App. 79, 83–84 (2006).

234. 38 U.S.C. § 5103(a) (2006).

235. The Federal Circuit ultimately agreed with the CAVC that the notice requirement did not require the Secretary to pre-adjudicate the claim in order to provide notice. *Wilson v. Mansfield*, 506 F.3d 1055, 1062 (Fed. Cir. 2007) (reaching same conclusion as CAVC’s decision in *Locklear v. Nicholson*, 20 Vet. App. 410, 415 (2006)). However, the Federal Circuit has held that notice must be tailored to the specific type of claim, *Wilson*, 506 F.3d at 1062, and the CAVC has held that notice must also be tailored to any factual findings made in a prior adjudication. *Kent v. Nicholson*, 20 Vet. App. 1, 9–10 (2006). *See generally* VETERANS BENEFITS MANUAL, *supra* note 82, at § 12.5.3 (detailing years of litigation involving notice requirement).

236. *See, e.g.*, Veterans Benefits Act of 2003, Pub. L. No. 108-183, § 701(b), 117 Stat. 2651, 2670 (abrogating Federal Circuit’s interpretation of VCAA in *Para-*

with the Veterans Benefits Improvement Act of 2008 (VBIA).²³⁷ The VBIA addressed the increasing length of the adjudication process by creating a mechanism for assigning a temporary disability rating during the pendency of certain types of claims and permitting substitution of a surviving spouse or dependant in cases where the veteran died before a claim was final.²³⁸ However, perhaps wary of the litigation over the VCAA,²³⁹ its chief provisions required the establishment of pilot programs to experiment with specified changes to the process.²⁴⁰ The VBIA appears to represent a more cautious approach to intervention. Congress thus seems no less determined to tinker with the system, but has gained a new appreciation of how difficult it can be to translate abstract ideals into practice in such a complex yet informal system.

B. *The Department of Veterans Affairs' Reaction*

1. Management Strategy

Although VA has recognized the need to make changes to handle the developments brought about by judicial review, it has struggled to do so effectively. Like Congress, VA has repeatedly examined its processes.²⁴¹ For example, in June 1993, VA formed a “blue ribbon panel” to develop recommendations for revising the

lyzed Veterans v. Sec. of Veterans Affairs, 345 F.3d 1334, 1344–47 (Fed. Cir. 2003)); Veterans Benefits Act of 2002, Pub. L. No. 107-330, § 402, 116 Stat. 2820 (broadening jurisdiction of Federal Circuit over veterans claims).

237. Veterans' Benefits Improvement Act of 2008, Pub. L. No. 110-389, 122 Stat. 4145.

238. Veterans' Benefits Improvement Act of 2008, Pub. L. No. 110-389, §§ 211–212, 122 Stat. 4149–51 (authorizing temporary disability ratings for claimants asserting total unemployability and substitution upon death of claimant).

239. See *supra* note 235 and accompanying text (discussing litigation over substance of VCAA notice requirement) and note 46 (discussing years of litigation over how CAVC should consider whether VCAA notice error was prejudicial).

240. Veterans' Benefits Improvement Act of 2008, Pub. L. No. 110-389, § 221, 122 Stat. 4154 (creating pilot programs for expedited claim treatment and revised notice to claimants). VA and the major veterans groups continue to debate the relative success of these programs. See *Implementation and Status Update on the Veterans' Benefits Improvement Act, P.L. 110-389: Hearing Before the H. Subcomm. on Disability Assistance and Memorial Affairs of the H. Comm. on Veterans' Affairs*, 111th Cong. (2010).

241. See *VA Claims Processing Task Force*, *supra* note 137; OFFICE OF INSPECTOR GEN., REP. NO. 5D2-B01-013, *supra* note 108; BLUE RIBBON PANEL ON CLAIMS PROCESSING, PROPOSALS TO IMPROVE DISABILITY CLAIMS PROCESSING IN THE VETERANS BENEFITS ADMINISTRATION (Nov. 1993) [hereinafter VA BLUE RIBBON PANEL]. Furthermore, “[i]n September 2008, VA contracted with Booz Allen Hamilton to conduct a review of the rating-related claim development process to provide recommendations to improve the process,” although it does not appear that a for-

adjudication process.²⁴² The panel made numerous recommendations, but focused on replacing “the current assembly-line process[]” with one that would bring “ownership and accountability” to the RO system.²⁴³ Despite this recommendation, VA overhauled its procedures in 2001 at the RO level by adopting the more assembly-line driven “claims process improvement” (CPI) model.²⁴⁴ The essence of the model is that VA breaks up the initial adjudication of claims into steps and a specialized team handles each step.²⁴⁵ Not surprisingly, veterans groups have criticized the current system as suffering from a lack of accountability.²⁴⁶ The fundamental problem is that it is difficult, if not impossible, to assign blame when different teams performed their task correctly based upon their subjective interpretation of which evidence in the file was credible and persuasive, but the final outcome was defective because of differences between the teams in how the evidence was evaluated.²⁴⁷ As a result, there is a strong perception both outside and within VA that there is too much emphasis on productivity and too little emphasis on quality.²⁴⁸

The creation of the appeals management center (AMC) in 2003 was another change to the process made by VA that has since been criticized by veterans groups. The original concept of the AMC was to manage as many remands as possible in a single location that concentrated resources and expertise.²⁴⁹ It was designed

mal report was made available publicly. *See Forging a Path Forward Hearing*, *supra* note 91 (testimony of Patrick W. Dunne, Under Secretary for Benefits).

242. *VA Claims Processing Task Force*, *supra* note 137, at 2–3.

243. VA BLUE RIBBON PANEL, *supra* note 241, at 5.

244. INSTITUTE OF MEDICINE, *supra* note 67, at 140. *See generally VA Claims Processing Task Force*, *supra* note 137.

245. INSTITUTE OF MEDICINE, *supra* note 67, at 141–44.

246. *See* Ridgway, *Lessons the Veterans Benefits System Must Learn*, *supra* note 136, at 422–23 (pointing out problem that arises when different teams within RO evaluate same evidence differently). *Compare* VA BLUE RIBBON PANEL, *supra* note 241, at 9–13 (recommending unified decisionmaking process), *with Examining the Effectiveness of the Veterans Benefits Administration’s Training, Performance Management and Accountability: Hearing Before the H. Comm. on Veterans’ Affairs*, 110th Cong. (2008) (criticizing current fragmented process).

247. *See* Ridgway, *Lessons the Veterans Benefits System Must Learn*, *supra* note 136, at 422–23.

248. *See, e.g.*, INDEPENDENT BUDGET FOR FISCAL YEAR 2010, *supra* note 66, at 26 (urging VA to “change a mind-set focused mostly on quantity-for-quantity’s sake”), and note 211 and accompanying text.

249. *Board of Veterans’ Appeals Adjudication Process and the Appeals Management Center: Hearing Before the H. Subcomm. on Disability Assistance and Memorial Affairs of the H. Comm. on Veterans’ Affairs*, 110th Cong. 57 (2007) (statement of Arnold Russo, Director, AMC).

to operate as a specialized RO, whose staff would have expertise in interpreting BVA remand orders and developing the medical evidence needed to properly adjudicate remanded claims.²⁵⁰

Unfortunately, the AMC had difficulty in quickly meeting its goals due in large part to the steep learning curve for the new employees it hired.²⁵¹ Furthermore, a past president of the National Organization for Veterans Advocates (NOVA) noted in 2005 that more cases were being referred to the AMC than it was intended to handle and called it a “parking lot.”²⁵² At a recent hearing, the Disabled American Veterans organization argued for the elimination of the AMC because of its unacceptably high twenty-five percent rate of errors requiring a remand for further notice or evidentiary development.²⁵³ At the same hearing, NOVA added that the AMC operates as a “black hole” from which veterans can obtain no information about the status of their claims.²⁵⁴ Furthermore, Disabled American Veterans has argued that even if the AMC worked as intended, it would still have the undesirable effect of relieving the ROs from the responsibility of correcting their past mistakes.²⁵⁵ Accordingly, the current verdict on the AMC from veterans groups seems entirely negative.

The CPI model and the AMC may be the two most significant management changes in recent years, but they are far from the only practices of note. VA has also experimented with distributing hundreds of thousands of claims between regional offices in the last three years.²⁵⁶ However, the GAO has criticized VA's implementa-

250. *Id.* at 28 (response of Arnold Russo, Director, AMC to question from Subcommittee Chairman John Hall).

251. *Id.* at 28–29.

252. *Battling the Backlog: Challenges Facing the VA Claims Adjudication and Appeal Process: Hearing Before the S. Comm. on Veterans' Affairs*, 109th Cong. 39 (2005) (statement of Robert Chisholm, Former President of the Nat'l Org. of Veterans Advocates).

253. *Review of Veterans' Disability Compensation: What Changes are Needed to Improve the Appeals Process?: Hearing Before the S. Comm. on Veterans' Affairs*, 111th Cong. (2009) (testimony of Kerry Baker, Legislative Director of Disabled American Veterans) [hereinafter Baker Testimony].

254. *Review of Veterans' Disability Compensation: What Changes are Needed to Improve the Appeals Process?: Hearing Before the S. Comm. on Veterans' Affairs*, 111th Cong. 75 (2009) (statement of Richard Paul Cohen, Executive Director of National Organization of Veterans' Advocates).

255. Baker Testimony, *supra* note 253. In theoretical terms, this is a leverage problem. If only a small portion of an agency's decisions are being reviewed, then each error found must result in strong negative reinforcement if review is to affect behavior. See James Salzman et al., *Regulatory Traffic Jams*, 2 WYO. L. REV. 253, 258 (2002). If review does not result in any feedback, it cannot affect behavior.

256. PUBL'N No. GAO-09-910T, *supra* note 115, at 13.

tion of this program for its inability to measure the timeliness and consistency of decisions in such claims.²⁵⁷ VA has also established “Tiger Teams” to deal with claims that are over one year old²⁵⁸ and a Benefits Delivery at Discharge program for veterans that have recently concluded their active duty service.²⁵⁹ Unfortunately, none of these initiatives have achieved breakthrough success.²⁶⁰

Most of VA’s management choices are manifestations of its desire to deal with the increased burdens on the adjudication system through increases in productivity rather than staffing.²⁶¹ From 2000 to 2007, the staffing of VA’s adjudicative branch “remained essentially flat” despite the backlog of claims rising seventy-five percent.²⁶² However, in 2007, VA abandoned the strategy of focusing exclusively on productivity and hired 3000 new full-time employees to handle the backlog.²⁶³ In April 2009, VA announced its intent to

257. *Forging a Path Forward Hearing*, *supra* note 91 (testimony of Daniel Bertoni, Director Education, Workforce, and Income Security for GAO). The lack of good metrics is not unique to brokered claims. As a consortium of veterans groups has recognized, “claims are so complex, with so many potential variables, that meaningful trend analysis is difficult. As a consequence, [VA] rarely obtains data of sufficient quality to allow it to reform processes, procedures, or policies.” INDEPENDENT BUDGET FOR FISCAL YEAR 2010, *supra* note 66, at 26.

258. *Forging a Path Forward Hearing*, *supra* note 91 (testimony of Patrick W. Dunne, Under Secretary for Benefits).

259. PUBL’N NO. GAO-09-910T, *supra* note 115, at 13.

260. *See supra* Part II (detailing problems that continue to plague system). Nonetheless, VA continues to look ways to improve the process. Very recently, VA Secretary Shinseki announced that an effort to seek innovation ideas from VA employees had produced ten suggestions for improving the claims adjudication process. *See* Press Release, VA Office of Public and Intergovernmental Affairs, Shinseki Announces Winners of Innovation Competition for Improving Claims Processing (Feb. 19, 2010), *available at* <http://www1.va.gov/opa/pressrel/pressrelease.cfm?id=1852>.

261. *Battling the Backlog: Challenges Facing the VA Claims Adjudication and Appeal Process: Hearing Before the S. Comm. on Veterans’ Affairs*, 109th Cong. 37 (2005) (statement of Cynthia Bascetta, Director, Education, Workforce, and Income Security, Government Accountability Office) (discussing VA’s management strategy “in the face of increasing workloads and decreased staffing levels”).

262. THE INDEPENDENT BUDGET, CRITICAL ISSUES REPORT FOR FISCAL YEAR 2009, at 27 (2008), *available at* http://www.independentbudget.org/pdf/CI_FY09.pdf. These staffing problems were not unanticipated. In 1997, the National Academy of Public Administration reported that “[t]he bipartisan drive to reduce the deficit has put great pressure on administrative budgets government wide, and this pressure has resulted in planned reductions by FY 2002 of over 31 percent from levels of VBA staff allocated to adjudication in FY 1996.” NAT’L ACADEMY OF PUB. ADMIN., MANAGEMENT OF COMPENSATION AND PENSION BENEFITS CLAIM PROCESSES FOR VETERANS x (1997).

263. *The Fiscal Year 2010 Budget for Veterans’ Programs: Hearing Before the S. Comm. on Veterans’ Affairs*, 111th Cong. (2009) (statement of Eric K. Shinseki, Sec-

hire an additional 1500 “temporary claims processors.”²⁶⁴ This hiring spree has been slow to dent the backlog due to the years of training and experience it takes for a new employee to become familiar with the complex procedures and substance of veterans law.²⁶⁵ Shortly after his confirmation, VA Secretary Shinseki referred to this as a “brute force” approach to the backlog, but promised to supplement this strategy by completing long-overdue initiatives in modernizing VA’s recordkeeping system and other procedures.²⁶⁶ It remains to be seen whether this shift in strategy will have appreciable results in terms of claims backlog or veterans satisfaction. However, it demonstrates that the state of the VA adjudication system cannot be understood by looking at the law alone.

2. Procedural Initiatives

VA is also working on several other initiatives in response to judicial review. The VJRA gave the CAVC the power to review the validity of VA rules and regulations.²⁶⁷ The CAVC soon concluded that in many situations, the authorities regulating the Secretary’s duties presented “a confusing tapestry.”²⁶⁸ Shortly thereafter, the VA Blue Ribbon Panel observed:

Potential problems with the applicable regulations and implementing manuals and directive may be pervasive. It appears

retary of Veterans Affairs) [hereinafter *Shinseki Testimony*]. In 2004, VA had 12,000 adjudicators. Levy, *supra* note 2, at 319. See also *Hearing on Review of Veterans’ Disability Compensation: Undue Delay in Claims Processing: Hearing Before the S. Comm. on Veterans’ Affairs*, 110th Cong. 7 (2008) (statement of Patrick W. Dunne, Acting Under Secretary for Benefits) [hereinafter *Dunne Statement*].

264. Associated Press Report, *Washington Digest: Veterans Affairs*, WASH. POST, Apr. 3, 2009, at A4.

265. See PUBL’N NO. GAO-09-910T, *supra* note 115, at 12 (“[I]t takes about 3 to 5 years for newly hired rating specialists to become proficient given the complexity of the job.”); *Dunne Statement*, *supra* note 263. See generally OFFICE OF AUDIT, VA OFFICE OF INSPECTOR GEN., VETERANS BENEFITS ADMINISTRATION: REVIEW OF NEW HIRE PRODUCTIVITY AND THE AMERICAN RECOVERY AND REINVESTMENT ACT HIRING INITIATIVE (2010).

266. See *Shinseki Testimony*, *supra* note 263. VA’s Under Secretary for Benefits has recently testified that information technology is the chief roadblock to productivity improvements. *Forging a Path Forward Hearing*, *supra* note 91 (testimony of Patrick W. Dunne, Under Secretary for Benefits).

267. Veterans’ Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4113 (codified as amended in scattered sections of 38 U.S.C.).

268. *Hatlestad v. Derwinski*, 1 Vet. App. 164, 167 (1991) (describing provisions relating to unemployability and total disability ratings); see also *Golliday v. Brown*, 7 Vet. App. 249, 255 (1994) (describing provisions defining a helpless child); *Stillwell v. Brown*, 6 Vet. App. 291, 303 (1994) (describing provisions defining “surviving spouse”).

that VA regulations never have been subject to broad-based review to determine whether they are legally valid, consistent with each other, and provide the most effective means to afford claimants all the benefits to which they are entitled.²⁶⁹

The Panel cautioned that if VA did not comprehensively revise its rules and regulations, “it will be accomplished in a piecemeal fashion by the Courts through the litigation process.”²⁷⁰ Despite this warning, VA has been slow to conduct such a revision.²⁷¹ It was not until 2001 that VA began an organized effort to comprehensively rewrite its regulations.²⁷² Eight years later, the revised regulations still have not been issued.²⁷³

A more controversial initiative has been the Expedited Claims Adjudication Initiative (ECA).²⁷⁴ Under ECA, the Secretary has sought to speed up processing time by seeking waivers of certain procedural rights by claimants, such as the right to submit additional evidence for up to a year after receiving a request for information, the right to a hearing prior to each decision, and the right

269. VA BLUE RIBBON PANEL, *supra* note 241, at 22.

270. *Id.*

271. This delay is not a complete surprise. See Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1419–20 (1992) (discussing how close judicial review can discourage agencies from revising even clearly outdated and inefficient rules); Peter H. Schuck & E. Donald Elliott, *Studying Administrative Law: A Methodology for, and Report on, New Empirical Research*, 42 ADMIN. L. REV. 519, 532 (1990) (suggesting that data indicates that judicial review of rulemaking “may have had the perverse effect of discouraging its use”). See generally Sidney A. Shapiro & Richard W. Murphy, *Eight Things Americans Can’t Figure Out About Controlling Administrative Power*, 61 ADMIN. L. REV. 5 (2009) (discussing several sources of tension that arise when courts conduct judicial review of agency rulemaking).

272. William A. Moorman & William F. Russo, *Serving our Veterans Through Clearer Rules*, 56 ADMIN. L. REV. 207, 208 (2004).

273. See William L. Pine & William F. Russo, *Making Veterans Benefits Clear: VA’s Regulation Rewrite Project*, 61 ADMIN. L. REV. 407, 410 (2009). This is not to say that no rulemaking has occurred. The Secretary has repeatedly rewritten or eliminated regulations after receiving an adverse interpretation. See, e.g., Definition of Service in the Republic of Vietnam, 73 Fed. Reg. 20,566, 20,566–67 (proposed Apr. 16, 2008) (to be codified at 38 C.F.R. pt. 3) (abrogating *Haas v. Nicholson*, 20 Vet. App. 257 (2006)); Notice and Assistance Requirements and Technical Correction, 73 Fed. Reg. 23,353 (April 30, 2008) (to be codified at 38 C.F.R. pt. 3) (abrogating *Pelegri v. Principi*, 18 Vet. App. 112 (2004)); DIC Benefits for Survivors of Certain Veterans Rated Totally Disabled at Time of Death, 65 Fed. Reg. 3388 (Jan. 21, 2000) (to be codified at 38 C.F.R. pt. 3) (abrogating *Green v. Brown*, 10 Vet. App. 111 (1997)).

274. Board of Veterans’ Appeals: Expedited Claims Adjudication Initiative—Pilot Program, 73 Fed. Reg. 20,571 (proposed Apr. 16, 2008) (to be codified at 38 C.F.R. pts 3, 20) (proposal of pilot program).

to have all evidence considered first by an RO.²⁷⁵ The reaction of veterans groups has been mixed. The comments on the rulemaking proposal were overwhelmingly negative.²⁷⁶ However, Disabled American Veterans has recently supported a presumed waiver of certain rights so as to avoid having claims trapped at the RO, where a veteran submits a constant stream of correspondence that requires repetitive remands from the BVA to the RO for consideration of new material.²⁷⁷

Overall, VA's reactions to judicial review demonstrate that the VJRA has pressured it to rethink every aspect of the adjudication system. However, many of these initiatives have added more complexity and have not been implemented smoothly due to pushback from veterans groups and advocates who view them as inconsistent with the broad rights of veterans.

VI. THE FUTURE OF THE PATERNALISTIC ENTITLEMENT MODEL

The VJRA reinvented the adjudication process with the purpose of increasing transparency and making its promise of informality enforceable. After twenty-two years, the idea of a paternalistic entitlement model remains, but adding judicial review has highlighted the fundamental conflict between complexity and informality. On one hand, the system continues to add rules and procedures to achieve the “right” outcome in each claimant's case. On the other hand, both the courts and Congress have stressed that there is no requirement that claimants know these rules. Ironically, the mechanisms created to enforce informality have added more layers of procedural complexity, which make it very difficult for VA to produce decisions that withstand review. The net result is a process that can seem interminable for those who diligently pursue

275. Board of Veterans' Appeals: Expedited Clams Adjudication Initiative—Pilot Program, 73 Fed. Reg. 65,726, 65,729 (Nov. 5, 2008) (final rule creating pilot program) (“The purpose of the ECA is to evaluate whether claims processing can be expedited by claimants' voluntary waiver of certain existing statutory and regulatory response periods and pre-screening of cases by the [BVA].”). See generally Marcy W. Kreindler & Sarah B. Richmond, *Expedited Claims Adjudication Initiative (ECA): A Balancing Act Between Efficiency and Protecting Due Process Rights of Claimants*, 2 VETERANS L. REV. 55 (2010).

276. Board of Veterans' Appeals: Expedited Clams Adjudication Initiative—Pilot Program, 73 Fed. Reg. at 65,727 (summarizing comments as expressing seven criticisms).

277. Baker Testimony, *supra* note 253. See *supra* Part III.D (discussing evolution of right to “one review on appeal”).

their appellate rights. Twenty-two years of increasing the number of claimant-friendly rules appears to be producing a system that in some respects is more claimant-friendly—as more claims are adjudicated and more are approved—but in other respects is paradoxically less claimant-friendly—at least as measured by the length of the process and the expressions of dissatisfaction.²⁷⁸

The intent of this Article is to highlight the tension between complexity and informality²⁷⁹ so that the stakeholders can thoughtfully examine the issue to discuss potential improvements or trade-offs. There are no easy solutions to the conflict between complexity and informality. Both have been built into the system in the name of providing just outcomes across the near-limitless spectrum of service, medical, and legal fact patterns.

Scaling back can be characterized as unfriendly to claimants. Yet, emerging theories of administrative law suggest that, even if every component rule were perfectly clear and efficient, there is a limit to the number of rules that any regulatory system can apply efficiently.²⁸⁰ Eventually, the rules of an administrative system can reach a point at which even skilled and conscientious practitioners cannot keep track of all the rules or grasp their interactions.²⁸¹ Given that the National Veterans Legal Services Program's guide and reference materials for adjudication of veterans claims run

278. See, e.g., DOLE-SHALALA REPORT, *supra* note 223, at 6 (stating that only “38 percent of retired/separated service members are ‘very’ or ‘somewhat’ satisfied with [VA’s] disability evaluation system,” and only 42 percent “report that they ‘completely’ or ‘mostly understand the VA claims process’”); Fox, *supra* note 107, at 339 (“There are few persons who believe that the current system for administering these benefits is working properly.”).

279. At this point, it could be argued that the informality rules that have developed are merely another form of complexity facing the system. Even though that may be semantically true, it would obscure the fundamental point that the system needs to consciously address the tension between the increasing number of rules focused on achieving correct outcomes and those focused on reducing claimant responsibility. Although each set of rules has grown, there has been little effort to understand or address the interaction between the two.

280. See generally J.B. Ruhl & James Salzman, *Mozart and the Red Queen: The Problem of Regulatory Accretion in the Administrative State*, 91 GEO. L.J. 757 (2003). In 2000, the GAO reported that the RO process for making an initial decision on a compensation claim “contains as many as 66 decision points and 39 queues (or waiting points).” GAO REP. NO. GAO/T-HEHS/AIMD-00-146, *supra* note 113, at 6. The report included a flow chart diagramming the initial claim decision process. It covers eight full pages. *Id.* at 12–20.

281. See Salzman et al., *supra* note 255, at 261–62, 282–89.

4000 pages,²⁸² is it possible for lay adjudicators on the front line to decide claims quickly and accurately even if they were adequately staffed and supported?²⁸³ “Unlimited good intentions and money to back them up” are not enough if the system reaches a critical mass of complexity.²⁸⁴ How much truer must this be in a system that wants to remain informal and absolve claimants of the responsibility of understanding the complexities that govern their claims? Even a representative of the Veterans of Foreign Wars has dared to suggest to Congress that “the world in which the VA operates has changed and it may no longer be realistic to expect accurate benefit decisions in a short period of time.”²⁸⁵

Developing management systems for an agency that wants to be both complex and informal is a huge challenge. On top of that, the VA adjudication process continues to evolve. Twenty-two years after the VJRA, it is now clear that Congress, VA management, VA adjudicators, the courts, veterans groups, and veterans attorneys will each have a role in the debate and use different tools in different places to effect change.

With so many players pulling so many levers in so many places, the VA adjudication system is now “complex” in a formal, academic sense as well. In other words, the interactions have reached the point at which the effects of each change are difficult to predict, especially with so many changes happening concurrently.²⁸⁶ In such a system, an ex ante analysis of proposed changes is unlikely to

282. See VETERANS BENEFITS MANUAL, *supra* note 82 (2058 pages); NAT'L VETERANS LEGAL SERV. PROGRAM, FEDERAL VETERANS LAWS, RULES AND REGULATIONS (2009 ed.) (2100 pages).

283. The Chief Executive Officer of a company that was consulted about computerizing the decisionmaking process testified before Congress that VA's regulations are “so complicated that no human being can be expected to accurately negotiate its byzantine, sometimes conflicted, and ever changing rules in a timely and consistent manner.” *Hearing on Review of Veterans' Disability Compensation: Undue Delay in Claims Processing: Hearing Before the S. Comm. on Veterans' Affairs*, 110th Cong. 47 (2008) (statement of Howard Pierce, Chief Executive Officer, PKC Corporation). *Cf.* THE FEDERALIST No. 62 (James Madison) (“It will be of little avail to the people that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood . . .”).

284. Salzman et al., *supra* note 255, at 273.

285. *Addressing the Backlog Hearing*, *supra* note 169, at 57 (statement of Robert Jackson, Assistant Director, National Legislative Service, Veterans of Foreign Wars of the United States).

286. See generally Donald T. Hornstein, *Complexity Theory, Adaptation, and Administrative Law*, 54 DUKE L.J. 913 (2005); Thomas Earl Geu, *Chaos, Complexity, and Coevolution: The Web of Law, Management Theory, and Law Related Services at the Millennium*, 66 TENN. L. REV. 137 (1998); J.B. Ruhl, *The Fitness of Law: Using Complexity*

accurately predict system costs, benefits, or unintended consequences.²⁸⁷ This means that improvement will often be difficult and not every wrong turn will necessarily be anyone's fault. Nonetheless, there is a deep and abiding belief that the system should remain informal and claimant-friendly.

Two decades of transparency brought about by judicial review has illuminated the problem. Only time will tell if informality and complexity can be harmonized to create a system capable of finally producing timely, consistent, and accurate decisions.

Theory to Describe the Evolution of Law and Society and its Practical Meaning for Democracy, 49 VAND. L. REV. 1407 (1996).

287. Salzman et al., *supra* note 255, at 273. Despite these concerns, both an academic and a service organization have put radical change on the table. See Michael P. Allen, *The United States Court of Appeals for Veterans Claims at Twenty: A Proposal for a Legislative Commission to Consider Its Future*, 58 CATH. U. L. REV. 361 (2009); *Addressing the Backlog Hearing*, *supra* note 169 (statement of Kerry Baker, Assistant National Legislative Director of the DAV) (outlining DAV's "21st Century Claims Process" proposal).