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# **The Importance of Preserving the Pro-Claimant Policy Underlying the Veterans' Benefits Scheme: A Comparative Analysis of the Administrative Structure of the Department of Veterans Affairs Disability Benefits System**

By Rory E. Riley<sup>1</sup>

## **INTRODUCTION**

On December 8, 2008, the United States Supreme Court heard oral argument in the case of *Shinseki v. Sanders*.<sup>2</sup> In considering the issue of whether “actual prejudice” to a veteran must be shown when the Department of Veterans Affairs (VA) failed to timely provide notice required under the Veterans Claims Assistance Act of 2000, Justice Ginsberg observed that “agencies come in many sizes and shapes.”<sup>3</sup> She continued to state that the Supreme Court had “never held that across the board, no matter what agency we are talking about” that there was one uniform application of certain rules and procedures of the Administrative Procedure Act (APA).<sup>4</sup>

Justice Ginsberg’s observation that “agencies come in many sizes and shapes” is particularly pertinent when analyzing VA. Although administrative agencies do in fact come in all sizes and shapes, no other administrative agency is quite similar in size or shape to VA.<sup>5</sup> Most notably, VA is distinct from other administrative agencies because “the character of the veterans’

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<sup>2</sup> See Transcript of Oral Argument, *Shinseki v. Sanders*, 129 S. Ct. 1696 (2009) (No. 07-1209), available at [http://www.supremecourt.us/oral\\_arguments/argument\\_transcripts/07-1209.pdf](http://www.supremecourt.us/oral_arguments/argument_transcripts/07-1209.pdf).

<sup>3</sup> *Id.* at 5.

<sup>4</sup> *Id.* at 6.

<sup>5</sup> See, e.g., Federal Agencies & Commissions, [http://www.usa.gov/Agencies/Federal/All\\_Agencies/index.shtml](http://www.usa.gov/Agencies/Federal/All_Agencies/index.shtml) (last visited Nov. 27, 2009).

benefits statutes is strongly and uniquely pro-claimant.”<sup>6</sup> Examples of VA’s tradition as a uniquely nonadversarial and pro-claimant system can be seen in the fact that the agency does not have a statute of limitations for bringing a claim for disability benefits, and when adjudicating such claims, a more favorable standard of proof, the benefit of the doubt doctrine, is applied.<sup>7</sup> Furthermore, and perhaps most importantly, as captured by VA’s mission statement, VA is the only agency committed to fulfilling President Lincoln’s promise: “[t]o care for him who shall have borne the battle, and for his widow, and his orphan” by serving and honoring the men and women who are America’s veterans.<sup>8</sup>

Nonetheless, despite the unique features and admirable mission statement of VA’s purpose and procedures, the agency has recently fallen victim to much criticism due to outdated technological procedures, delayed processing times, and a seemingly insurmountable backlog of claims.<sup>9</sup> In addition, as the current veteran population ages and more military members transition from active duty to veteran status after tours of duty in Iraq and Afghanistan, VA is expecting its current number of claims to increase.<sup>10</sup> Due to these concerns, numerous proposals have been suggested on how to improve the current VA disability claims processing system.

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<sup>6</sup> *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998); *see also Hayre v. West*, 188 F.3d 1327, 1333-34 (Fed. Cir. 1999) (pointing out Congress’ recognition of “the strongly and uniquely pro-claimant system of awarding benefits to veterans”).

<sup>7</sup> *See, e.g., Gilbert v. Derwinski*, 1 Vet. App. 49, 53 (1990) (stating that “[a] unique standard of proof applies in decisions on claims for veterans’ benefits. Unlike other claimants and litigants, pursuant to 38 U.S.C. § 3007(b), a veteran is entitled to the ‘benefit of the doubt’ when there is an ‘approximate balance of positive and negative evidence’”).

<sup>8</sup> *See* Department of Veterans Affairs, Mission, Vision, Core Values & Goals, [http://www.va.gov/about\\_va/mission.asp](http://www.va.gov/about_va/mission.asp) (last visited Nov. 27, 2009).

<sup>9</sup> *See* Press Release, H. Comm. on Veterans’ Affairs, House Veterans’ Affairs Subcommittee Reviews Historic Legislation to Reform the VA Benefits Claims Processing System (Apr. 10, 2008), *available at* <http://veterans.house.gov/news/PRArticle.aspx?NewsID=231>.

<sup>10</sup> *See* INST. OF MED., COMM. ON MED. EVALUATION OF VETERANS FOR DISABILITY COMP., BOARD ON MILITARY AND VETERANS HEALTH, A 21st CENTURY SYSTEM FOR EVALUATING VETERANS FOR DISABILITY BENEFITS 37 (Michael McGeary et al. eds., 2007); *see also* Bob Deans, *Groups Sue VA Over Slow Disability Claims Process*, PALM BEACH POST, Nov. 10, 2008, [http://www.palmbeachpost.com/nation/content/nation/epaper/2008/11/10/a1a\\_valawsuits\\_1111.html](http://www.palmbeachpost.com/nation/content/nation/epaper/2008/11/10/a1a_valawsuits_1111.html) (last visited Nov. 27, 2009).

One such approach suggests departing from VA's current system entirely, and instead, imitating the structure of other administrative agencies. For example, one recent proposal suggests adopting the claims processing system of the Internal Revenue Service (IRS), which would involve granting all claims and conducting random audits of large or unusual claims to ensure accuracy.<sup>11</sup> Similarly, various proposals have circulated throughout the years which suggest that VA should either mimic or merge with the Social Security Administration (SSA), an administrative agency which also processes disability claims.<sup>12</sup>

Providing veterans and their families with quality, timely decisions is certainly of the utmost importance. Accordingly, those who have devoted time and resources to researching this topic should certainly be commended for their efforts. However, due to the diversity of structures and objectives of other administrative agencies, it appears that adopting the pre-existing structure of one of these administrative agencies will not solve VA's current problems. This is primarily because such a pre-existing structure fails to account for VA's long history as a nonadversarial, pro-claimant system.<sup>13</sup> Indeed, as Justice Ginsberg noted, agencies come "in many sizes and shapes" and as such, so do their purposes and procedures.<sup>14</sup> Therefore, this Article advocates that although improvements to the current VA disability benefits claims processing system are certainly warranted, any such improvements that are undertaken must be implemented in such a way as to preserve VA's unique nonadversarial and pro-claimant structure.

Part I of this Article provides a brief history and overview of the VA disability claims process with emphasis on the unique

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<sup>11</sup> See Linda Bilmes, *The Battle of the Wounded*, L.A. TIMES, Jan. 5, 2007, at A23.

<sup>12</sup> See, e.g., Richard E. Levy, *Of Two Minds: Charitable and Social Insurance Models in the Veterans Benefits System*, 13 KAN. J.L. & PUB. POL'Y 303, 323-24 (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, 244 (2001).

<sup>13</sup> See, e.g., *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998).

<sup>14</sup> Transcript of Oral Argument, *supra* note 2, at 5.

aspects of the VA system. Part II discusses the current state of the VA disability benefits system, to include a description of many of the current problems facing the agency. Part III provides a comparative analysis of the proposals pertaining to how the VA system can be improved by applying the pre-existing structure of other administrative agencies, focusing on recent proposals pertaining to the IRS and the SSA. Lastly, a conclusion for this analysis is provided.

## I. THE UNIQUE STRUCTURE OF THE VA DISABILITY BENEFITS SYSTEM

Although VA is one of the newest cabinet departments, obtaining cabinet status in 1989,<sup>15</sup> the practice of providing American veterans with benefits has existed since the colonial era.<sup>16</sup> Since obtaining cabinet status, VA, formerly known as the Veterans Administration, has been the sole agency responsible for providing federal benefits to veterans and their families.<sup>17</sup> In addition to being the only government entity focused on this mission, VA, with its disability benefits system, is unique in several other important aspects. Most notably, the veterans' benefits system is pro-claimant and nonadversarial.<sup>18</sup> Aspects of this pro-claimant and nonadversarial system include the absence of a statute

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<sup>15</sup> See Department of Veterans Affairs Act, Pub. L. No 100-527, 102 Stat. 2635 (1988) (codified in scattered sections of 38 U.S.C.) (while enacted in 1988, the Department of Veterans Affairs Act did not take effect until March 15, 1989); see also DEPARTMENT OF VETERANS AFFAIRS, VA HISTORY IN BRIEF 26 [hereinafter VA HISTORY IN BRIEF], <http://www.va.gov/opa/feature/history/docs/histbrf.pdf>.

<sup>16</sup> VA HISTORY IN BRIEF, *supra* note 15, at 3.

<sup>17</sup> Fact Sheet: Facts About the Department of Veterans Affairs (January 2009) [hereinafter Fact Sheet], <http://www.va.gov/opa/fact/vafacts.asp> (last visited Nov. 27, 2009).

<sup>18</sup> See *Brown v. Gardner*, 513 U.S. 115, 118 (1994) (stating, in the context of statutory interpretation, “interpretive doubt is to be resolved in the veteran’s favor”); *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998) (stating that “[t]his court and the Supreme Court both have long recognized that the character of the veterans’ benefits statutes is strongly and uniquely pro-claimant” and describing “the historically non-adversarial system of awarding benefits to veterans”); *Trilles v. West*, 13 Vet. App. 314, 325-26 (2000) (describing “the pro-claimant environment created by the general VA statutory scheme”); *Moore v. West*, 13 Vet. App. 69, 74 (1999) (Steinberg, J., concurring) (describing “the pro-claimant nature of the VA adjudication process”).

of limitations for bringing disability compensation claims, as well as the favorable benefit of the doubt standard of proof.<sup>19</sup> However, before one can understand why the VA disability benefits system is so unique, a basic understanding of the system itself is first required.

**A. A Brief Summary of the VA Disability  
Benefits Adjudication Process**

In order to receive VA disability benefits, a claimant begins by filing a claim at one of fifty-eight VA regional offices (RO) located throughout the United States and its territories.<sup>20</sup> Once a claim for VA benefits is filed, the Veterans' Claims Assistance Act of 2000 (VCAA), provides that VA must notify the claimant about information or evidence needed to substantiate the claim; and that it must assist the claimant by making reasonable efforts to obtain the evidence needed.<sup>21</sup> The notice required must be provided to the claimant before the initial unfavorable decision on a claim for VA benefits and must (1) inform the claimant about the information and evidence not of record that is necessary to substantiate the claim, (2) inform the claimant about the information and evidence that VA will seek to provide, and (3) inform the claimant about the information and evidence the claimant is expected to provide.<sup>22</sup> In addition, VA has a duty to provide a VA medical examination and/or a VA medical opinion when necessary.<sup>23</sup>

Once the appropriate evidence has been collected, a decision is issued by the RO handling the veteran's claim. In addition to

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<sup>19</sup> See 38 U.S.C. § 5107(b) (2006); 38 C.F.R. §§ 3.102, 3.303 (2008).

<sup>20</sup> BOARD OF VETERANS' APPEALS, HOW DO I APPEAL?, 3 (2002) [hereinafter HOW DO I APPEAL], <http://www.va.gov/vbs/bva/010202A.pdf>; Board of Veterans' Appeals, Understanding The Appeal Process, <http://www.va.gov/vbs/bva/glossary.htm> (last visited Nov. 27, 2009); see also 38 C.F.R. § 20.3(f) (defining a claim as an "application made under title 38, United States Code, and implementing directives for entitlement to Department of Veterans Affairs benefits or for the continuation or increase of such benefits, or the defense of a proposed agency adverse action concerning benefits").

<sup>21</sup> 38 U.S.C. §§ 5103(a), 5103A; 38 C.F.R. § 3.159(b); see also *Quartuccio v. Principi*, 16 Vet. App. 183, 187 (2002).

<sup>22</sup> 38 U.S.C. § 5103(a); 38 C.F.R. § 3.159(b)(1); *Pelegri v. Principi*, 18 Vet. App. 112, 120 (2004).

<sup>23</sup> 38 C.F.R. § 3.159(c).

providing its determination, the RO must inform the claimant, in writing, of the reason(s) for the decision, and provide the claimant with notice of the necessary procedures and time limits to initiate an appeal of the decision, as well as notice of his or her appellant rights, including the right to a hearing on any issue involved in the claim.<sup>24</sup>

A claimant may challenge a RO decision by filing a notice of disagreement within one year from the date the agency mailed notice of the decision.<sup>25</sup> In response, the RO will issue a statement of the case (SOC), which provides a list of the evidence relating to the issue(s) with which the veteran disagrees, a summary of the pertinent laws and regulations, and the RO determination on the issue(s) on appeal.<sup>26</sup> If the claimant remains dissatisfied with the RO's decision, he or she may file a substantive appeal up to sixty days from the date the SOC was mailed or for the remainder of the one-year period from the date that notice of the rating decision was mailed, whichever is later.<sup>27</sup> Once an appeal has been perfected in this manner, the RO will certify the claimant's case to the Board of Veterans' Appeals (BVA or "the Board").<sup>28</sup> The Board considers appeals in docket order and issues a decision usually on a *de novo* basis.<sup>29</sup> It may grant the claim, deny the claim, or remand the case back to the RO for further development of the record.<sup>30</sup> The Board is required to issue a decision that is based on "the entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law and regulation."<sup>31</sup>

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<sup>24</sup> 38 U.S.C. § 5104; 38 C.F.R. § 3.103(b); *see also* 38 C.F.R. § 3.103(a). However, the right to representation is limited. *See* 38 U.S.C. § 5904.

<sup>25</sup> 38 C.F.R. § 20.302; *see also* 38 C.F.R. § 20.201 (defining what constitutes a notice of disagreement).

<sup>26</sup> 38 U.S.C. § 7105; 38 C.F.R. § 19.29. If additional evidence is submitted the Regional Office (RO) may also issue a supplemental statement of the case (SSOC). 38 C.F.R. § 19.31.

<sup>27</sup> 38 U.S.C. § 7105(d)(3); 38 C.F.R. §§ 19.30, 20.202 (stating that while a substantive appeal typically consists of a VA Form 9, other writings containing particular information may also be acceptable).

<sup>28</sup> 38 C.F.R. § 19.35; *see* 38 U.S.C. § 7105(d)(5).

<sup>29</sup> 38 U.S.C. § 7107; 38 C.F.R. § 20.900 (a)–(b).

<sup>30</sup> *See* 38 C.F.R. § 20.1405 (d)–(e).

<sup>31</sup> 38 U.S.C. § 7104(a).

If a claimant is still not satisfied with the decision issued by the Board, the claimant may appeal to the United States Court of Appeals for Veterans Claims (CAVC or “the Court”), and then to the United States Court of Appeals for the Federal Circuit (“the Federal Circuit”).<sup>32</sup> However, because the CAVC and the Federal Circuit are independent of VA,<sup>33</sup> and because the focus of this article is the VA disability benefits system, appeals to the CAVC and to the Federal Circuit will not be discussed any further.<sup>34</sup>

## **B. Unique Features of the Veterans Disability Benefits System**

As stated above, the VA disability benefits adjudication process is nonadversarial and pro-claimant, it does not have a statute of limitations for filing claims, and it affords claimants a more liberal burden of proof than is usually seen in other adjudicatory systems.

### *i. Nonadversarial and Pro-claimant*

In the United States, traditional legal systems, such as criminal and civil proceedings, are typified by the adversarial process.<sup>35</sup> Within this traditional adversarial setting, “lawyers on opposing sides argue their cases before [a] neutral and passive trier of fact.”<sup>36</sup> In so doing, attorneys present evidence and argument in an attempt to persuade the trier of fact that its presentation is more persuasive than that of the other side.<sup>37</sup> The adversarial system is beneficial because attorneys have

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<sup>32</sup> 38 U.S.C. §§ 7252, 7292(c).

<sup>33</sup> See, e.g., Veterans’ Judicial Review Act, Pub. L. No. 100-687, § 301, 102 Stat. 4105 (1988); see also 38 U.S.C. § 7282 (allowing the United States Court of Appeals for Veterans Claims (CAVC or “the Court”) to submit budget requests directly to the President without agency review).

<sup>34</sup> It should also be noted that if the claimant is not satisfied with a Federal Circuit decision, he or she may ultimately appeal to the United States Supreme Court. See, e.g., *Sanders v. Nicholson*, 487 F.3d 881 (Fed. Cir. 2007), *rev’d sub nom. Shinseki v. Sanders*, 129 S. Ct. 173 (2009).

<sup>35</sup> See Kirsten Debarba, Note, *Maintaining the Adversarial System: The Practice of Allowing Jurors to Question Witnesses During Trial*, 55 VAND. L. REV. 1521, 1524-28 (2002) (noting that the United States has used an adversarial justice system since the American revolutionary era).

<sup>36</sup> *Id.* at 1527. Note that a trier of fact may be a judge or jury. *Id.* at 1528.

<sup>37</sup> *Id.* at 1528.



strong incentive to uncover the most favorable facts for their clients. The process presents useful information to the trier of fact, which will in turn ensure the most accurate results.<sup>38</sup> In addition, such a system is said to avoid “decisionmaker bias” which can result when decisionmakers also act as fact finders.<sup>39</sup>

The system for adjudicating claims for VA benefits is quite different. The CAVC has commented that “VA takes pride in operating a system of processing and adjudicating claims for benefits that is both informal and nonadversarial.”<sup>40</sup> For example, a review of pertinent regulations shows that rather detailed procedural safeguards are in place for a variety of situations in which a claimant’s benefits may be reduced.<sup>41</sup> Indeed, Congress has indicated its desire that the system and its proceedings “be as informal and [as] nonadversarial as possible.”<sup>42</sup> Under VA’s system, the burden of proving entitlement to benefits is not placed solely on the claimant.<sup>43</sup> Furthermore, at the early stages of VA’s disability benefits claims process, most claimants are not represented by legal counsel and are, therefore, dependent on VA to assist them in obtaining evidence as well as making a decision on the claim.<sup>44</sup>

The foundation for the nonadversarial nature of the VA disability benefits system dates back to sixteenth century British legal

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Littke v. Derwinski*, 1 Vet. App. 90, 91 (1990); *see also Majeed v. Principi*, 16 Vet. App. 421, 433 (2002) (“It is well settled that the veterans-benefits system is a pro-claimant system.”).

<sup>41</sup> *See, e.g.*, 38 C.F.R. § 3.105(e)-(i) (2008).

<sup>42</sup> *See Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 323-24 (1985).

<sup>43</sup> *See, e.g.*, 38 U.S.C. §§ 5103, 5103A (2006); 38 C.F.R. § 3.159.

<sup>44</sup> *See Santana-Venegas v. Principi*, 314 F.3d 1293, 1298 (Fed. Cir. 2002) (noting that Mr. Santana-Venegas relied on the nonadversarial and pro-claimant character of the veterans’ benefits system and pursued his statutory entitlements without the assistance of legal counsel, and was therefore entitled to rely on the VA to fully comply with its duty to assist in a timely manner); *see also* 38 U.S.C. § 5904(c)(1) (prohibiting fee agreements with an attorney until the issuance of a notice of disagreement); *Jaquay v. Principi*, 304 F.3d 1276, 1282 (Fed. Cir. 2002) (en banc) (“[T]he law prohibiting lawyers from charging a fee has the practical effect of limiting the ability of veterans to retain a lawyer at the early stages of the claim process.”).

practices.<sup>45</sup> Under this system, veterans' benefits were considered a form of charity provided by the government based on ethical obligations.<sup>46</sup> Therefore, because disability benefits were provided to veterans based on this theory, rather than as a matter of entitlement, nonadversarial procedures were put in place.<sup>47</sup> Such procedures have continued throughout the long history of veterans' benefits in the United States. In 1988, when Congress created the Veterans Court,<sup>48</sup> it specifically expressed its desire to maintain "a beneficial nonadversarial system of veterans benefits" that would be preserved even with the added layer of independent judicial review. Congress went on to state that "[im]plicit in such a beneficial system has been an evolution of a completely ex[-]parte system of adjudication . . . ."<sup>49</sup>

Thus, because of this longstanding tradition as a nonadversarial and pro-claimant system, VA must provide a significant amount of assistance to a veteran seeking benefits in a typical disability benefits claim.<sup>50</sup> As was discussed above, when a claimant files a claim, VA

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<sup>45</sup> WILLIAM F. FOX, JR., *THE LAW OF VETERANS BENEFITS: JUDICIAL INTERPRETATION* 3-5 (Paralyzed Veterans of America 2002); 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.* 117 (2008).

<sup>46</sup> Levy, *supra* note 12, at 304-305; Ridgway, *supra* note 45, at 117.

<sup>47</sup> Levy, *supra* note 12, at 305, (indicating one of these procedures puts limits on when a veteran could hire an attorney). See, e.g., *Walters*, 473 U.S. at 305 (rejecting the challenge to the constitutionality of the fee limitation for attorneys in VA proceedings). However, this restriction was recently changed so that an attorney may represent a claimant after the filing of a notice of disagreement. See 38 U.S.C. § 5904(c)(1); see also Ridgway, *supra* note 45, at 117.

<sup>48</sup> See United States Court of Appeals For Veterans Claims History, <http://www.uscourts.cavc.gov/about/History.cfm> (last visited Nov. 27, 2009) (indicating that although the Veterans Court was originally "named the United States Court of Veterans Appeals. On March 1, 1999, the name was changed by the Veterans' Programs Enhancement Act of 1998 to what it is known today as the U.S. Court of Appeals for Veterans Claims (CAVC).").

<sup>49</sup> Veterans' Judicial Review Act -- Veterans' Benefits and Programs Improvement Act of 1988, Pub. L. No. 100-687, 102 Stat. 4105 (1988), *reprinted in* 1988 U.S.C.A.N. 5782, 5795; see also *Hayre v. West*, 188 F.3d 1327, 1333-34 (Fed. Cir. 1999) (pointing out Congress' recognition of "the strongly and uniquely pro-claimant system of awarding benefits to veterans . . .").

<sup>50</sup> See, e.g., 38 U.S.C. §§ 5103, 5103A; 38 C.F.R. § 3.159 (2008); but see Tom Philpott, *Law to Help Vets Also Slowed Claims*, July 10, 2008, <http://www.military.com/features/0,15240,171460,00.html> (stating that after the passage of the Veterans Claims Assistance Act of 2000, two thirds of the time required to process a claim is committed to blocks of time set up to develop evidence to support the claim).

must notify and assist the veteran in the development of all evidence pertinent to that claim.<sup>51</sup> In addition, VA has a duty to sympathetically read claims filed within the disability benefits system, as well as to sympathetically develop the claim to its optimum.<sup>52</sup> Furthermore, although unappealed decisions are final, a claimant can reopen a previously denied claim at any time by presenting new and material evidence.<sup>53</sup> In addition, a claimant may request that an adverse decision be revised on the basis of clear and unmistakable error (“CUE”).<sup>54</sup>

Given the provisions on new and material evidence and CUE, a claimant may attempt to reopen a claim numerous times.<sup>55</sup> Conversely, collateral attacks on decisions in other traditional legal systems are much less frequent.<sup>56</sup> For example, in civil proceedings, collateral attacks are rare, in part because of the difficulty in bringing such a successful action.<sup>57</sup> While collateral attacks are more common in criminal cases, it is also extremely difficult to prevail on such a claim.<sup>58</sup> Thus, it is evident that the VA disability

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<sup>51</sup> See 38 U.S.C. §§ 5103, 5103A; *see also* 38 C.F.R. § 3.103(a) (explaining that “[p]roceedings before VA are ex parte in nature, and it is the obligation of VA to assist a claimant in developing the facts pertinent to [a] claim and to render a decision which grants every benefit that can be supported in law while protecting the interests of the [g]overnment.”).

<sup>52</sup> *Szemraj v. Principi*, 357 F.3d 1370, 1373 (Fed. Cir. 2004); *Schroeder v. West*, 212 F.3d 1265, 1269-70 (Fed. Cir. 2000); *but see Andrews v. Nicholson*, 421 F.3d 1278, 1284 (Fed. Cir. 2005) (stating that VA’s duty to sympathetically read a claimant’s pleadings does not apply to pleadings filed by counsel that allege clear and unmistakable error).

<sup>53</sup> See 38 U.S.C. § 5108; 38 C.F.R. § 3.156 (stating, “New evidence means existing evidence not previously submitted to agency decisionmakers” and “[m]aterial evidence means existing evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim”).

<sup>54</sup> 38 U.S.C. §§ 5109A, 7111.

<sup>55</sup> See 38 U.S.C. §§ 5108, 5109A, 7111; 38 C.F.R. §§ 3.156, 20.1400.

<sup>56</sup> See *generally* *Ridgway*, *supra* note 45, at 129.

<sup>57</sup> See *generally* FED. R. CIV. P. 60 (stating the rule relating to “Relief from a Judgment or Order”); *see also* STEPHEN C. YEAZELL, *CIVIL PROCEDURE* 190-91 (6th ed. 2004) (stating “[O]ne might ask if it would be easy to mount a collateral attack on a judgment. . . . In fact, the answer is ‘probably not,’ though the few cases that have dealt with this question have not been resolved consistently”).

<sup>58</sup> See *United States v. Frady*, 456 U.S. 152, 167-68 (1982) (stating that in order to collaterally attack a conviction or sentence based upon errors that could have been but were not pursued on direct appeal, the movant must show cause and actual prejudice resulting from the errors of which he complains or he must demonstrate that a miscarriage of justice

benefits system is unique in that a claimant may continue pursuing a previously denied claim with relative ease.

In summary, the CAVC was certainly correct when it stated that “[i]t is well settled that the veterans-benefits system is a pro-claimant system.”<sup>59</sup> Given how often this aspect of the VA benefits system is mentioned by both Congress and the courts, it is evident that being nonadversarial and pro-claimant is an integral part of the system. As is discussed in the two sections that follow, several other aspects of the VA disability benefits system also stem from the nonadversarial and pro-claimant nature of the VA system, and in turn contribute to the unique nature of the VA disability benefits system.

ii. *Absence of Statute of Limitations*

Although VA processes claims covering a vast number of issues, such as burial benefits, compensation, education, insurance, loan guarantees, medical issues and pension, the majority of claims filed are for compensation benefits.<sup>60</sup> In order to obtain compensation benefits, a Veteran must demonstrate that he or she has a service-connected disability.<sup>61</sup> A basic service connection claim requires medical evidence of (1) a current disability; (2) medical, or in certain circumstances, lay evidence of in-service incurrence or aggravation of a disease or injury; and (3) medical evidence of a nexus between the claimed in-service disease or injury and the present disease or injury.<sup>62</sup>

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would result from the refusal of the court to entertain the collateral attack); *see also* Murray v. Carrier, 477 U.S. 478, 488-89 (1986) (stating that the existence of cause for a procedural default must turn on something external to the defense, such as the novelty of the claim or a denial of the effective assistance of counsel, and, in order to demonstrate that a miscarriage of justice would result from the refusal of the court to entertain the collateral attack, a movant must show actual innocence by clear and convincing evidence).

<sup>59</sup> *Majeed v. Principi*, 16 Vet. App. 421, 433 (2002) (and cases cited).

<sup>60</sup> *See, e.g.*, BOARD OF VETERANS APPEALS REP. OF THE CHAIRMAN, FISCAL YEAR 2008, 22 (2009) [hereinafter BVA FY 2008 REP.], *available at* <http://www.va.gov/Vetapp/ChairRpt/BVA2008AR.pdf> (stating that 94.4 percent of claims appealed to the BVA are claims for disability compensation or survivor benefits).

<sup>61</sup> *See* 38 C.F.R. § 3.4 (2008).

<sup>62</sup> *See, e.g.*, *Hickson v. West*, 12 Vet. App. 247, 253 (1999); *Caluza v. Brown* 7 Vet. App. 498, 506 (1995).

Most areas of law in the United States have an applicable statute of limitations that requires a claimant to initiate his or her legal action within a specified period of time.<sup>63</sup> The primary purpose of such statutes is to avoid “the litigation of stale or fraudulent claims” by establishing “periods of limitation that are sufficiently long to [prevent] a real threat of loss or diminution of evidence, or an increased vulnerability to fraudulent claims.”<sup>64</sup> In addition, statutes of limitations supplant “evidence lost or impaired by lapse of time, by raising a presumption which renders proof unnecessary.”<sup>65</sup>

However, in the case of VA compensation claims, no such statute of limitations exists.<sup>66</sup> The absence of any statute of limitations in filing a claim for VA compensation benefits allows veterans to file claims for disabilities manifesting many years after service.<sup>67</sup> Although such a policy clearly favors veterans, the length of time that passes between the veteran’s active service and the filing of a claim often leads to difficulties obtaining relevant evidence; demonstrating what occurred during service, and determining whether the current disability is related to service as

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<sup>63</sup> See, e.g., 8 U.S.C. § 1158(a)(2)(B) (2006) (stating that aliens present in the United States may apply for asylum under 8 U.S.C. § 1158 so long as they file their application “within 1 year after the date of the alien’s arrival in the United States”); N.Y. C.P.L.R. 214-a (McKinney 2009) (stating that a medical malpractice action must be brought within two and a half years from the act or omission complained of or from the end of a continuous treatment during which the act or omission took place).

<sup>64</sup> *Mills v. Habluetzel*, 456 U.S. 91, 99 (1982); see also *Ridgway*, *supra* note 45, at 116.

<sup>65</sup> *United States v. Or. Lumber Co.*, 260 U.S. 290, 299 (1922). For a further discussion of the policy behind statutes of limitations, particularly in the context of veterans’ claims, see *Ridgway*, *supra* note 45, at 116 n.15.

<sup>66</sup> Although there is no statute of limitations with regard to the filing of claims, once a claim has been filed, other time limits are in place, such as the one-year time limit for filing a notice of disagreement and the requirement that a substantive appeal be filed within one year from the date the Veteran is notified of the rating decision or 60 days from the date of the SOC, whichever is later. 38 C.F.R. § 20.302 (2008); see also 38 U.S.C. § 7105; 38 C.F.R. § 19.26, 19.30.

<sup>67</sup> See, e.g., *Brammer v. Derwinski*, 3 Vet. App. 223, 225 (1992) (holding that a current disability is a necessary element of a service connection claim). Therefore, a veteran’s claim may not be ripe for adjudication until he or she demonstrates a current disability, which may not be until many years after the veteran’s period of active service.

opposed to some other factor or factors, such as “an intervening event, or the natural aging process.”<sup>68</sup> Furthermore, because VA compensation claims for service-connected disabilities that are filed many years after the veteran’s period of active service “often present very difficult factual issues” delays may be encountered after the claim is filed and before a final decision is rendered.<sup>69</sup>

Although there is no statute of limitations for when a veteran may file a claim for compensation benefits, it should be noted that there are time limits for filing an appeal. In this regard, a claimant has one year from the date he or she is mailed notice of a rating decision to file a notice of disagreement.<sup>70</sup> In addition, a claimant has 60 days from the date of the SOC, or the remainder of the one-year period from when the claimant was notified of the rating decision, to file a substantive appeal.<sup>71</sup> Thus, the VA disability benefits system is not entirely without deadlines.

The fact remains that there is no statute of limitations on when a claimant may bring a disability benefits compensation claim. In accordance with VA’s nonadversarial and pro-claimant nature, this policy allows more veterans to bring claims and obtain benefits that they would otherwise be ineligible for if a typical statute of limitations were in place.

### iii. *The Benefit of the Doubt Doctrine*

The VA disability benefits system is also unlike any other legal system in that throughout the adjudication process, the veteran is afforded the “benefit of the doubt.”<sup>72</sup> When evidence for and against

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<sup>68</sup> Ridgway, *supra* note 45, at 116.

<sup>69</sup> *Id.*

<sup>70</sup> 38 U.S.C. § 7105(b); 38 C.F.R. § 20.302. For further discussion on the timeframe for filing a notice of disagreement, see Phyllis L. Childers, *VA Disability Appeals & 38 U.S.C. § 7105: Is the One Year Timeframe for the Filing of a Notice of Disagreement Excessive?* 1 VETERANS L. REV. 242 (2009).

<sup>71</sup> See 38 U.S.C. § 7105(c)(3); 38 C.F.R. § 20.302.

<sup>72</sup> 38 U.S.C. § 5107; 38 C.F.R. § 3.102.

a claim is in equipoise, the benefit of any doubt is afforded to the Veteran and the claim is decided in his favor.<sup>73</sup> This means that VA will deny the claim only if the weight of the evidence is against the claim. This standard is different from that employed by most traditional legal systems. For example, the “‘preponderance of [the] evidence’ standard is the traditional standard in civil and administrative proceedings” and “is the [standard] contemplated by the APA.”<sup>74</sup> The preponderance of the evidence standard is typically defined as “a 50+ percent statistical probability.”<sup>75</sup> As interpreted by the courts, this standard has traditionally been understood to mean:

that something is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence as, when considered and compared with that opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proved is more likely true than not true. This rule does not, of course, require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.<sup>76</sup>

The Supreme Court has stated that the standard of proof applied to a particular type of adjudication implies “the degree of confidence our society thinks [the fact finder] should have in the correctness of factual conclusions for a particular type of adjudication.”<sup>77</sup> The Supreme Court stated that “even if the particular standard-of-proof catchwords do not always make a great difference in a particular case, adopting a ‘standard of proof is more than an empty semantic exercise’ . . . ‘[t]he standard of proof [at a minimum] reflects the value society

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<sup>73</sup> *Gilbert v. Derwinski*, 1 Vet. App. 49 (1990).

<sup>74</sup> *Sea Island Broad. Corp. of S.C. v. FCC*, 627 F.2d 240, 243 (1980), *cert. denied*, 449 U.S. 834 (1980).

<sup>75</sup> Richard W. Wright, *Liability for Possible Wrongs: Causation, Statistical Probability, and the Burden of Proof*, 41 LOY. L.A. L. REV. 1295, 1298 (2008).

<sup>76</sup> *Id.* at 1315 (quoting 3 EDWARD H. DEVITT ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS (CIVIL) § 72.01, at 32 (4th ed. 1987)); *see also* Richard W. Wright, *Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts*, 73 IOWA L. REV. 1001, 1065 & n.337-39 (1988).

<sup>77</sup> *Addington v. Texas*, 441 U.S. 418, 423 (1979).

places on individual liberty.”<sup>78</sup> Thus, given the liberal standard of proof applied to veterans’ claims, it is clear that our society has placed a high value on the ability of veterans to obtain benefits.

In *Gilbert v. Derwinski*, the CAVC examined the benefit of the doubt doctrine in great detail.<sup>79</sup> In that case, the Court explained that the benefit of the doubt standard of proof was “at the farthest end of the spectrum,” differentiating the benefit of the doubt from more commonly applied standards of proof, such as “‘beyond a reasonable doubt,’ by ‘clear and convincing evidence,’ or by a ‘fair preponderance of evidence.’”<sup>80</sup> The Court stated that[t]his unique standard of proof is in keeping with the high esteem in which our nation holds those who have served in the Armed Services. It is in recognition of our debt to our veterans that society has through legislation taken upon itself the risk of error when, in determining whether a veteran is entitled to benefits, there is an “approximate balance of positive and negative evidence.” By tradition and by statute, the benefit of the doubt belongs to the veteran.<sup>81</sup>

This liberal standard does have its limits. Indeed, a claim still requires supporting evidence before the benefit of the doubt standard is applied.<sup>82</sup> Accordingly, there is “an inherent tension” in the adjudication of VA disability benefits claims, “between requiring evidence on difficult factual issues and the aversion to denying uncertain claims.”<sup>83</sup> Nonetheless, in cases where the evidence is at least evenly balanced, the veteran receives the benefit of the doubt and VA will grant the claim. As the Court analogized in *Gilbert v. Derwinski*, “the tie goes to the runner.”<sup>84</sup>

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<sup>78</sup> *Id.* at 425.

<sup>79</sup> 1 Vet. App. 49 (1990).

<sup>80</sup> *Id.* at 54.

<sup>81</sup> *Id.*

<sup>82</sup> See *id.* (explaining that the benefit of the doubt doctrine applies where there is “an approximate balance of positive and negative evidence”) (emphasis added).

<sup>83</sup> Ridgway, *supra* note 45, at 118.

<sup>84</sup> *Gilbert*, 1 Vet. App. at 56.



#### iv. Conclusion

For the reasons stated above, the VA disability benefits system is unlike any other legal system. In addition to being the only government entity that is dedicated to serving America's veterans and their families, the VA disability benefits system is distinctive from other legal systems and government agencies in its nonadversarial and pro-claimant nature, its lack of a statute of limitations for bringing compensation claims, and its application of a more favorable burden of proof. Therefore, although VA may share certain common characteristics with other government agencies, such as the handling of disability claims and the distribution of monetary compensation benefits, its distinctive features set VA apart from other government agencies.<sup>85</sup>

## II. CURRENT PROBLEMS FACING THE VA DISABILITY BENEFITS SYSTEM

Despite the unique features of the VA disability benefits system, the VA system is not necessarily an idyllic model of adjudication. The VA disability benefits system has recently been plagued with a large backlog of claims, lengthy processing times, technological problems, and other difficulties.<sup>86</sup>

In the last several years, VA has experienced increasing delays in the processing of disability claims.<sup>87</sup> Although as of July 2008 VA was processing more claims than it received, working through

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<sup>85</sup> See, e.g., *Hodge v. West*, 155 F.3d 1356 (Fed. Cir. 1998) (holding that the Veterans Court improperly applied a standard used by the SSA and discussing the dissimilarities between VA's statutory scheme for awarding benefits and that of the SSA. Specifically, the Federal Circuit noted the uniquely pro-claimant principles applicable to veterans' claims for benefits that do not apply to Social Security claimants).

<sup>86</sup> See, e.g., Rick Maze, *Vets File Suit Over Slow VA Claims Processing*, THE ARMY TIMES, Nov. 10, 2008, available at [http://www.armytimes.com/news/2008/11/military\\_veterans\\_lawsuit\\_111008w/](http://www.armytimes.com/news/2008/11/military_veterans_lawsuit_111008w/); Amanda Ruggeri, *Military Veterans' Benefit Claims Records Wrongly Headed for VA Shredders*, U.S. NEWS & WORLD REPORT, Oct. 31, 2008, available at <http://www.usnews.com/articles/news/national/2008/10/31/military-veterans-benefit-claims-records-wrongly-headed-for-va-shredders.html>.

<sup>87</sup> Hope Yen, *Judge Warns of Disability Appeal Backlog*, USA TODAY, May 22, 2007, available at [http://www.usatoday.com/news/washington/2007-05-22-328987556\\_x.htm](http://www.usatoday.com/news/washington/2007-05-22-328987556_x.htm).

this backlog has proven difficult as VA faces an increasing number of claims filed by veterans returning from the current conflicts in Iraq and Afghanistan.<sup>88</sup> In fact, “VA received 891,547 claims in 2008, over 53,000 more than the 838,141 received in 2007,” which amounts to a 9 percent increase.<sup>89</sup> Furthermore, VA is also receiving large numbers of “reopened claims from veterans with chronic progressive conditions, and additional claims from an aging veteran population.”<sup>90</sup> Other factors contributing to VA’s difficulty in addressing the large backlog of claims include the complexity of veterans law, recent court decisions that interpret those laws, technological issues, the sheer number of claims filed, and staffing issues.<sup>91</sup> While increases in VA funding for fiscal year 2010 have allowed VA to hire additional staff,<sup>92</sup> which will presumably help in reducing the backlog of pending claims, such benefits will not be seen immediately.<sup>93</sup> On average, it takes two to three years for newly hired decision-makers to become fully productive members of VA’s workforce.<sup>94</sup> Given these concerns,

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<sup>88</sup> Rick Maze, *VA Picks Up Pace In Processing Claims*, THE AIR FORCE TIMES, July 12, 2008, available at [http://www.airforcetimes.com/news/2008/07/airforce\\_claims\\_071208p/](http://www.airforcetimes.com/news/2008/07/airforce_claims_071208p/) (noting that as of the end of May 2008, VA’s pending inventory had been reduced to 390,000, its lowest level since September 2006).

<sup>89</sup> See DEP’T OF VETERANS AFFAIRS, FY 2008 PERFORMANCE AND ACCOUNTABILITY REPORT 85 (2008), [http://www.va.gov/budget/report/2008/PartI/Performance\\_Shortfall\\_Analysis.pdf](http://www.va.gov/budget/report/2008/PartI/Performance_Shortfall_Analysis.pdf).

<sup>90</sup> *Department of Veterans Affairs Challenges: Hearing Before the H. Subcomm. on Military Construction, Veterans Affairs and Related Agencies, H. Comm. on Appropriations*, 111th Cong. (2009) (statement of Maureen T. Regan, Counselor to the Inspector General, Department of Veterans Affairs).

<sup>91</sup> *Id.*

<sup>92</sup> Jason Leopold, *Obama’s VA Budget Proposal Aims to Eliminate Benefits Claims Backlog*, INTELLIGENCE DAILY, March 2, 2009, available at <http://www.inteldaily.com/news/173/ARTICLE/9933/2009-03-02.html> (noting that in his fiscal year 2010 budget, President Obama “proposed a 15 percent increase to VA’s budget, from \$97.7 billion [in fiscal year 2009] to \$112.8 billion for the fiscal year beginning Oct. 1, 2009 on top of the \$1.4 billion already set aside for VA projects in the American Recovery and Reinvestment Act of 2009”).

<sup>93</sup> See FY 2008 PERFORMANCE AND ACCOUNTABILITY REPORT, *supra* note 89, at 85 (stating that “VA hired nearly 2,000 [additional] employees to process claims in 2008” but noting that “[t]his significant increase in new employees decreased the output for VBA employees nationally.”).

<sup>94</sup> *Disability Compensation Program: Hearing Before the S. Comm. on Veterans’ Affairs*, 110th Cong. (2007) (statement of Daniel L. Cooper, Under Secretary for Benefits, Department of Veterans Affairs), available at <http://www.va.gov/OCA/testimony/svac/07030720.asp>; but see FY 2008 PERFORMANCE AND ACCOUNTABILITY REPORT, *supra* note 89 (noting that the additional staff hired in 2008 were expected to become more proficient in claims processing in 2009, which VA hopes will “increase the output as measured by the productivity index”).

Senator Daniel Akaka (D-HI), the Senate Veterans' Affairs Committee Chairman, has stated that “[t]imeliness cannot take precedence over accuracy.”<sup>95</sup>

In addition to the length of time required to process VA disability benefits claims and the large backlog of claims, VA has also been the subject of criticism due to several modernization issues. In this regard, Secretary Eric K. Shinseki has remarked:

If you were to walk into one of our rooms where adjudication or decisions are being made about disability for veterans, you would see individuals sitting at a desk with stacks of paper that go up halfway to the ceiling. And as they finish one pile, another pile comes in.<sup>96</sup>

In a statement before the House Committee on Veterans Affairs, Secretary Shinseki announced that President Obama charged him “with transforming VA into a 21st century organization—a transformation demanded by new times, new technologies, new demographic realities, and new commitments to today’s Veterans.”<sup>97</sup> Secretary Shinseki stated that updating information technology systems was an essential component in accomplishing this task.<sup>98</sup> Specifically, Secretary Shinseki noted that VA would continue to focus on its paperless processing initiative in order to improve both the timeliness and accuracy of VA claims processing.<sup>99</sup> He continued by stating that after implementing the initial features of the paperless processing initiative in 2010, he expected to have a fully electronic benefits delivery system by 2012.<sup>100</sup>

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<sup>95</sup> Maze, *supra* note 88.

<sup>96</sup> *The State of the U.S. Department of Veterans Affairs: Hearing Before the H. Comm. on Veterans' Affairs*, 111th Cong. 6-7 (2009) (testimony of Eric K. Shinseki, Secretary of the Department of Veterans Affairs).

<sup>97</sup> *U.S. Department of Veterans Affairs Budget Request for Fiscal Year 2010, Hearing Before the H. Comm. on Veterans' Affairs*, 111th Cong. (2009) (statement of Eric K. Shinseki, Secretary of the Department of Veterans Affairs) [hereinafter *Hearing*].

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

In addition, VA has undertaken several other efforts to improve the disability benefits system. Notably, VA has commenced work on updating the Disability Rating Schedule<sup>101</sup> and an expedited claims adjudication initiative.<sup>102</sup> Furthermore, Secretary Shinseki has emphasized that he will “encourage teamwork, reward initiative, seek innovation, demand the highest levels of integrity, transparency, and performance in leading the Department through the fundamental and comprehensive change it must quickly undergo.”<sup>103</sup> He further stated that “[p]eople induce change, not technology or processes, so transformation is ultimately a leadership issue. We have a capable and dedicated workforce, and I am prepared to help lead the Department through this.”<sup>104</sup>

Nonetheless, the recent discovery of important claim-related documents being hidden and found in paper shredders, as well as the intentional misdating of claims to improve productivity statistics, has diminished the public trust of VA.<sup>105</sup> Michael Walcoff, VA’s Under Secretary for Benefits, noted that “veterans have lost trust in VA . . . [t]hat loss of trust is understandable, and winning back that trust will not be easy.”<sup>106</sup> The lack of trust has caused veterans to take action to bring about a better, faster process.

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<sup>101</sup> See, e.g., Press Release, U.S. Dep’t of Veterans Affairs, VA Announces Changes to the Disability Ratings Schedule for Traumatic Brain Injuries and Burn Scars (Sept. 23, 2008), available at <http://www1.va.gov/opa/pressrel/pressrelease.cfm?id=1582> (outlining VA’s update of rating criteria to better evaluate traumatic brain injuries and scarring).

<sup>102</sup> BVA FY 2008 REP., *supra* note 60, at 8-9.

<sup>103</sup> *Hearing, supra* note 97, at 42.

<sup>104</sup> *Id.* For further analysis on the problems currently facing the Department of Veterans Affairs disability system, and proposed solutions, see Rory E. Riley, *Preservation, Modification or Transformation? The Current State of the Department of Veterans Affairs Disability Benefits Adjudication Process and Why Congress Should Modify, Rather Than Maintain or Completely Redesign, the Current System*, 18 FED. CIR. B.J. 1 (2008).

<sup>105</sup> Rick Maze, *Unopened Claims Letters Hidden at VA Offices*, THE ARMY TIMES, March 4, 2009, available at, [http://www.armytimes.com/news/2009/03/military\\_veteransaffairs\\_unopenedmail\\_030309w/](http://www.armytimes.com/news/2009/03/military_veteransaffairs_unopenedmail_030309w/).

<sup>106</sup> *Id.*

On November 10, 2008, two veterans' groups filed a suit in federal court in an effort to order interim benefits for veterans whose VA disability benefits claims take longer than a prescribed period of time to be processed.<sup>107</sup> Although U.S. District Judge Reggie Walton ruled that the court did not have the authority to compel VA to prescribe a timeframe to process disability claims, this lawsuit provides an example of veterans' current levels of discontent and frustration with the current VA disability benefits system.<sup>108</sup>

### III. A COMPARATIVE ANALYSIS OF THE VA SYSTEM WITH OTHER ADMINISTRATIVE AGENCIES

Although there are many positive elements to the VA disability benefits system, the system has recently experienced a number of problems, most notably in the areas of the large backlog of claims, the length of time taken to process claims, and difficulties with modernization of the claims processing system. Given these problems, many recent proposals suggest altering VA's unique structure and imitating the structure of various other administrative agencies. For example, one proposal suggests transforming the VA benefits system from its current format to that of the IRS,<sup>109</sup> and others have suggested a system analogous to the one employed by SSA.<sup>110</sup> The analysis below will focus on comparisons between the administrative structure employed by VA, and the structures used by these two agencies.

VA, the IRS, and the SSA are all governed by the APA, which lays the framework for decision-making by federal agencies.<sup>111</sup> While the APA controls all three agencies, the APA does not require that all

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<sup>107</sup> Maze, *supra* note 88 (indicating "Vietnam Veterans of America and Veterans of Modern Warfare want an interim payment equal to what is paid for a 30 percent disability rating – between \$356 and \$497 a month, depending on the number of dependents – if an initial claim takes more than 90 days or an appeal of a denied claim takes longer than 180 days").

<sup>108</sup> *Federal Judge Rejects Request by Veterans Groups to Require VA to Process Disability Claims Within 90 Days*, MEDICAL NEWS TODAY, Dec. 19, 2008, <http://www.medicalnewstoday.com/articles/133678.php>.

<sup>109</sup> See, e.g., Bilmes, *supra* note 11.

<sup>110</sup> See, e.g., O'Reilly, *supra* note 12.

<sup>111</sup> See generally 5 U.S.C. §§ 101-105 (2006).

entities strictly adhere to one structure. This would be impractical due to the large variety of governmental entities covered by the APA, and the vast array of different circumstances in which these agencies operate.<sup>112</sup> Nonetheless, in analyzing systemic problems within certain administrative agencies, many critics tend to look to other agencies for guidance and possible improvements.<sup>113</sup>

That VA is one of the systems in need of systemic improvement is not in dispute. There is certainly no shortage of discussion on VA's lengthy claims processing time for administering disability benefits, or of recommendations on how to decrease the current backlog of claims.<sup>114</sup> However, adopting the structure of another administrative agency to resolve these issues at VA is not the best way to address this problem. Indeed, complaints about delay in judicial proceedings, and in administrative proceedings in particular, are not unique to VA.<sup>115</sup> In fact, delay has been generally noted as "an increasingly prominent fixture in administrative law."<sup>116</sup> One of the leading treatises on administrative law notes that "[m]ost judges and all Supreme Court Justices have criticized agency delay on many occasions and in many contexts."<sup>117</sup>

One of the main sources for this delay is the inherent conflict between the demand for accuracy and due process, and the desire to decrease processing time in agency decisions. Nowhere is this conflict

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<sup>112</sup> Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1108 (2009).

<sup>113</sup> See, e.g., Bilmes, *supra* note 11; O'Reilly, *supra* note 12.

<sup>114</sup> See *id.*; see also *Battling the Backlog: Challenges Facing the VA Claims Adjudication and Appeal Process: Hearing Before the S. Comm. on Veterans' Affairs*, 109th Cong. 42-64 (2005) (statement of Rick Surrat, Deputy National Legislative Director, Disabled American Veterans); 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, 46-51 (1994); Christopher D. Knopf, *One Last Battle: Reform of the Veterans' Administration Claims Procedure*, 74 VA. L. REV. 937 (1988); Bill Russo, *Ten Years After the Battle for Veterans Judicial Review: An Assessment*, 46 FED. LAW. 26 (1999).

<sup>115</sup> Gary E. O'Connor, *Rendering to Caesar: A Response to Professor O'Reilly*, 53 ADMIN. L. REV. 343, 387 (2001).

<sup>116</sup> Jacob E. Gersen & Anne Joseph O'Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923, 927 (2008).

<sup>117</sup> 2 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 12.1 (4th ed. 2001).

more apparent than in the VA system. In this regard, VA has doubled its disability claims processing staff during the past decade; however, during this same time period the average length of time to process a claim has increased from four months to six.<sup>118</sup> When asked at a July 2008 Senate Veterans Affairs Committee hearing what had changed during this time that could possibly account for this increase in claims processing time, Michael Walcoff, Deputy Under Secretary for the Veterans' Benefits Association, pointed to the enactment of the (VCAA).<sup>119</sup> An IBM study of the VA claims processing system confirmed that compliance with the VCAA greatly increased the time required to process claims, noting that approximately two thirds of the time needed to process a claim was devoted to developing evidence in support of the claim as required by the VCAA.<sup>120</sup> As one scholar has noted, in the context of the nonadversarial veterans' claims process:

Accuracy and due process require[s] time and resources. It takes longer for a decisionmaker to consider and address ten pieces of evidence than it does to consider and address five pieces of evidence. It takes longer to order a medical examination, or get medical or other records, than it does not to get them. It takes longer to double check than to check once.<sup>121</sup>

Although improving the VA benefits system by applying the methodology of other government agencies may appear logical at first glance, as will be explained below, such theories are ultimately impractical. The VA disability benefits system is simply too distinctive to be regulated by specific legal standards formulated in advance to fit the structure of another government agency with a different purpose and different ideals.

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<sup>118</sup> Philpott, *supra* note 50.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> O'Connor, *supra* note 115, at 387-88.

### A. The Internal Revenue Service

Revenue legislation in the United States has a long history. Although the Treasury Department had not yet been created, on July 4th, 1789, Congress enacted a duty on goods, wares, and merchandises imported into the United States.<sup>122</sup> Prior to the Civil War era, most taxes consisted of duties on imports, with the exception of two short-lived attempts by Congress at internal taxation, from 1791 to 1802 and from 1813 to 1817.<sup>123</sup>

During the Civil War era, in 1862, President Abraham Lincoln created the role of commissioner of Internal Revenue and enacted an income tax to assist with the payment of the Union's war efforts.<sup>124</sup> However, a mere ten years later, the income tax was repealed.<sup>125</sup> In 1894, Congress reinstated the income tax, but the Supreme Court ruled it unconstitutional shortly thereafter.<sup>126</sup>

In 1913, the 16th Amendment was ratified, which gave Congress the power to collect an income tax.<sup>127</sup> This, in combination with the corporate income tax of 1909, greatly increased the divisions and responsibilities of the Bureau of Internal Revenue.<sup>128</sup> In this regard, the number of tax returns multiplied ten-fold.<sup>129</sup> Initially, auditing was not used, as the Bureau's policy was to review nearly every return.<sup>130</sup> In the

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<sup>122</sup> Act of July 4, 1789, ch. 2, § 1, 1 Stat. 24; *see also* Act of Sept. 2, 1789, ch. 12, 1 Stat. 65; Sheryl Phillabaum, Comment, *To What Extent Can Taxpayers Rely on IRS Regulations and Rulings to Predict Future IRS Conduct?* 25 GONZ. L. REV. 281, 283 (1989/90).

<sup>123</sup> Phillabaum, *supra* note 122, at 283 (citing U.S. GOV'T PRINTING OFFICE, HISTORY OF THE INTERNAL REVENUE SERVICE 1791-1929 (1930)).

<sup>124</sup> IRS, A Brief History of the IRS, Nov. 1, 2007, <http://www.irs.gov/irs/article/0,,id=149200,00.html>.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> Phillabaum, *supra* note 122, at 284 (citing H. DUBROFF, THE UNITED STATES TAX COURT – AN HISTORICAL ANALYSIS 14 (1974) (citing BUREAU OF INTERNAL REVENUE, THE WORK AND JURISDICTION OF THE BUREAU OF INTERNAL REVENUE 5-28 (1948)).

<sup>129</sup> *Id.* (citing R. PAUL, TAXATION IN THE UNITED STATES 140 (1954)).

<sup>130</sup> *Id.* (citing H. DUBROFF, THE UNITED STATES TAX COURT – AN HISTORICAL ANALYSIS 14 (1974) (citing BUREAU OF INTERNAL REVENUE, THE WORK AND JURISDICTION OF THE BUREAU OF INTERNAL REVENUE 5-28 (1948)).



1950s, the Bureau of Internal Revenue was reorganized and became known as the Internal Revenue Service.<sup>131</sup> The IRS was again restructured into its current form as part of the IRS Restructuring and Reform Act of 1998.<sup>132</sup>

Currently, the IRS possesses the power to enforce federal tax laws. Pursuant to applicable law, the Secretary of the Treasury has a duty to search for any person who may be liable for violating federal tax laws.<sup>133</sup> To aid the IRS in executing this task, Congress has provided the agency with “a broad subpoena power, authorizing the IRS to examine relevant documents, summon persons relevant to its investigation, and administer oaths to and take testimony of relevant witnesses.”<sup>134</sup> In addition, the IRS may enforce summonses through the use of federal district courts.<sup>135</sup> A person’s failure to respond to an IRS summons is a misdemeanor, subjecting the individual to up to one year in prison and a fine of no more than \$1,000.<sup>136</sup> Furthermore, sections 7206 and 7207 of the Internal Revenue Code provide for criminal liability for any person who willfully makes false statements on a tax return or willfully furnishes the IRS with fraudulent tax returns.<sup>137</sup>

Recently, Linda Bilmes, a professor and lecturer on public policy at Harvard University’s Kennedy School of Government, has proposed that the Veterans Benefits Administration (VBA) implement the same approach to claims processing as the IRS.<sup>138</sup> In other words, Bilmes recommends processing most transactions

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<sup>131</sup> A Brief History of the IRS, *supra* note 124.

<sup>132</sup> *Id.*

<sup>133</sup> 26 U.S.C. § 7601 (2006).

<sup>134</sup> Mikah K. Story Thompson, *To Speak or Not to Speak? Navigating the Treacherous Waters of Parallel Investigations Following the Amendment of Federal Rule of Evidence 408*, 76 U. CIN. L. REV. 939, 953 (2008) (citing 26 U.S.C. § 7602(a)).

<sup>135</sup> *Id.* (citing 26 U.S.C. § 7604(b)).

<sup>136</sup> *Id.* (citing 26 U.S.C. § 7210).

<sup>137</sup> *Id.* (citing 26 U.S.C. §§ 7206, 7207).

<sup>138</sup> *Examining the U.S. Department of Veterans Affairs Claims Processing System: Hearing Before the H. Comm. on Veterans Affairs*, 111th Cong. (2009) (statement of Linda J. Bilmes, professor and lecturer of public policy at Harvard University’s Kennedy School of Government).

with minimal development and to audit only a small portion of the total number, such as large or unusual claims.<sup>139</sup> According to Bilmes, there is an expectation in the IRS that the majority of claims “are *approximately* correct.”<sup>140</sup> She goes on to state that if VA would adopt a similar system based upon a similar expectation, then this system would cut down on the overall amount of claims processing time.<sup>141</sup> She asserts that nearly 90 percent of VA disability compensation benefits claims are ultimately granted.<sup>142</sup> Therefore, in her opinion, a more productive claims processing model would involve automatically accepting all disability claims involving veterans returning from a war zone, rather than examining each individual application for benefits.<sup>143</sup> In order to prevent exploitation of such a system, Bilmes recommends auditing a sample of claims, as the IRS does for tax filings, in order to deter fraud.<sup>144</sup>

First and foremost, professor Bilmes should certainly be applauded for her innovative and detailed research on this important topic. To the extent that Bilmes argues that the veterans’ benefits process is in need of temporal improvement, she is correct. No one thinks that waiting approximately six months for a decision is ideal. However, Bilmes’s proposal appears to work better in theory than it would in practice. As discussed below, although the concept of initially granting all claims may appear to be extremely pro-claimant, in reality, such a system is actually at odds with the nature of the veterans’ benefits system. Furthermore, because Bilmes’s proposal recommends minimal development of all veterans’ benefits claims, it would render the VCAA, a law designed to guarantee and protect certain rights of veterans, virtually obsolete.<sup>145</sup>

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<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*; see also Bilmes, *supra* note 11.

<sup>143</sup> See Bilmes, *supra* note 11.

<sup>144</sup> *Id.*

<sup>145</sup> Philpott, *supra* note 50 (quoting Michael Walcoff, Deputy Under Secretary for Benefits, Veterans’ Benefits Administration).

Preliminarily, it should be noted that one of the main differences between filing a tax return with the IRS and filing a claim with the VBA is that filing one's taxes is required by law, whereas filing a claim for VA benefits is a voluntary application for benefits.<sup>146</sup> In this regard, VA benefits are an entitlement, meaning that they are provided by the government to veterans that have such a statutory entitlement.<sup>147</sup> Therefore, one presumably has more incentive to be truthful or accurate in filing one's taxes than in filing for VA benefits, because the penalty for fraud or inaccuracy, with regard to federal tax obligations, is a fine, imprisonment, or both.<sup>148</sup> The penalty for filing a fraudulent or inaccurate claim for VA benefits is merely denial or forfeiture of VA benefits.<sup>149</sup> This is not to say that a large number of veterans would attempt to obtain fraudulent benefits. However, veterans law is complex and many veterans genuinely believe that they are rightly entitled to the benefits they are claiming, even though such entitlement is simply not shown by the evidence of record or is barred by law.<sup>150</sup> Moreover, the filing of fraudulent VA claims is an unfortunate reality even under the current system.<sup>151</sup> Although Bilmes has contended that a random audit of VBA claims would

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<sup>146</sup> See 26 U.S.C. § 7203 (2006) (stating “Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$25,000 (\$100,000 in the case of a corporation), or imprisoned not more than 1 year, or both, together with the costs of prosecution.”).

<sup>147</sup> See, e.g., 38 U.S.C. §§ 1110, 1131 (outlining “basic *entitlement*” to disability benefits) (emphasis added).

<sup>148</sup> 26 U.S.C. § 7203.

<sup>149</sup> 38 C.F.R. §§ 3.900, 3.901 (2008).

<sup>150</sup> See *Owings v. Brown*, 8 Vet. App. 17, 23 (1995) (holding that the Board must apply “the law as it exists, and cannot ‘extend . . . benefits out of sympathy for a particular [claimant]’” (quoting *Kelly v. Derwinski*, 3 Vet. App. 171, 172 (1992))).

<sup>151</sup> See, e.g., Press Release, U.S. Dep’t of Justice, Bakersfield Veteran Convicted of Defrauding Department of Veterans Affairs (Feb. 26, 2009), [http://www.usdoj.gov/usao/cae/press\\_releases/docs/2009/02-26-09RemyTrialConviction.pdf](http://www.usdoj.gov/usao/cae/press_releases/docs/2009/02-26-09RemyTrialConviction.pdf); Press Release, U.S. Dep’t of Justice, Westerville Woman Pleads Guilty to Veterans Benefits Fraud (Jan. 30, 2008), <http://www.usdoj.gov/usao/ohs/Press/01-30-08.pdf>.

deter fraudulent claims, it is unclear from her argument what the penalties would be for the filing of a fraudulent claim and whether such penalties would be enough to deter the filing of such claims.

Public perception also presents a potential problem for Bilmes's proposal. Commenting on this, David W. Gorman, the executive director of the Disabled American Veterans (DAV), states that "[t]he integrity of the system is the key. . . . The system can't be seen as being tainted or it will lose its public acceptance."<sup>152</sup> He further provides that skeptics believe that Bilmes's proposal "can endanger the system by endangering the integrity of the system."<sup>153</sup> Gorman also raised the concern that were this system to be put in place, many Americans who never served in the military may come to feel that many veterans are receiving government benefits that are in excess of what they earned or what they deserve.<sup>154</sup> In his book *Vets Under Siege*, Martin Schram argues that such criticism "must be avoided in a democracy, especially one that has no military draft and safeguards itself only with an all-volunteer military."<sup>155</sup> Indeed, Schram states that it would be detrimental for all if public perception were that veterans are authorized to "just reach out and take as much as they want from the U.S. treasury."<sup>156</sup> Thus, Schram concluded that it is of the utmost importance that the American people continue to hold a positive and compassionate view of our nation's veterans.<sup>157</sup>

In addition to problems of public perception, because Bilmes's proposal involves granting all claims that are filed, complications may arise in terms of recovering disability benefits that were incorrectly or fraudulently paid. Although VA's Committee on Waivers and Compromises currently has procedures in place

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<sup>152</sup> MARTIN SCHRAM, *VETS UNDER SIEGE: HOW AMERICA DECEIVES AND DISHONORS THOSE WHO FIGHT OUR BATTLES* 273 (1st ed. 2008).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 274.

<sup>157</sup> *Id.*

to recuperate overpayments and other debts to VA,<sup>158</sup> assuming a larger role as creditor is not within VA's best interests. Blimes fails to discuss the length of time required to reduce or sever benefits. The most frequently voiced complaints about the current VA benefits adjudication process concern the lengthy delays while claims are being processed and appealed.<sup>159</sup> Currently, due to the pro-claimant nature of the VA system, very specific due process procedures must be followed before a veteran's disability benefits can be severed or reduced.<sup>160</sup> Specifically, a rating decision proposing such a reduction or discontinuation of compensation benefits must be issued in advance of the actual reduction and it must set forth the reasons for the proposed reduction or discontinuation.<sup>161</sup> The claimant then has 60 days to present additional evidence as to why the benefits should be continued at their current level.<sup>162</sup> Furthermore, with respect to reduction of total (100 percent) disability ratings, additional protective procedures provide that such total ratings "will not be reduced, in the absence of clear error, without examination showing material improvement in physical or mental condition."<sup>163</sup>

Thus, reducing a veteran's benefits after a random audit or initial approval period appears to be at odds with the pro-claimant nature of the veterans' benefits system. The CAVC has previously held that "[t]o the extent that the Secretary concludes that he is authorized to create such an 'appeal-at-your-own-risk' scenario, he faces a heavy burden to explain adequately how such a scenario

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<sup>158</sup> 38 U.S.C. § 5302(c) (2006); 38 C.F.R. § 1.964(a)(2) (2008).

<sup>159</sup> Press Release, H. Comm. on Veterans' Affairs, House Veterans' Affairs Subcommittee Reviews Historic Legislation to Reform the VA Benefits Claims Processing System (Apr. 10, 2008), <http://veterans.house.gov/news/PRArticle.aspx?NewsID=231>.

<sup>160</sup> See 38 C.F.R. § 3.105(d); see also *Baughman v. Derwinski*, 1 Vet. App. 563, 566 (1991).

<sup>161</sup> 38 C.F.R. § 3.105(d)-(h); see also *O'Connell v. Nicholson*, 21 Vet. App. 89, 93 (2007); *Majeed v. Principi*, 16 Vet. App. 421, 433 (2002).

<sup>162</sup> 38 C.F.R. § 3.105(d).

<sup>163</sup> 38 C.F.R. § 3.343(a); see also *Reizenstein v. Peake*, 22 Vet. App. 202, 209 (2008) (determining that 38 C.F.R. § 3.343 was intended to protect veterans who had come to rely on disability ratings, and the compensation attached thereto, already in effect from arbitrary reductions in those ratings without evidence that their condition had improved).

comports with the pro-claimant nature of the veterans-benefits system.”<sup>164</sup> Accordingly, reducing or severing a veteran’s benefits after an audit would also result in lengthy processing time and ultimately further frustration and dissatisfaction with the system. Furthermore, Bilmes’s proposal overestimates the efficiency of the IRS. Currently, the IRS is battling its own problems with inefficiency and paperwork.<sup>165</sup> In addition, despite the current criticisms of the VA disability benefits adjudication process, the IRS model of processing claims is also wildly unpopular.<sup>166</sup> Just as many people resent paying taxes, they may grow to resent paying for veterans’ benefits that they feel are unwarranted. Thus, although an initial grant of all VA benefits claims may seem to be an extremely pro-claimant measure, as well as a means to alleviate the current backlog of claims, in the long run, it may not only exacerbate many of the problems with the current system, but also create new ones. Most notably, the detailed procedural safeguards that are in place for reducing or discontinuing VA compensation benefits would complicate the auditing process and lengthy processing times will be incurred. Therefore, VA’s pro-claimant system would not be served by such a plan. Although such a plan would alleviate the backlog of claims, it would only be able to do so at the expense of due process.

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<sup>164</sup> *Majeed*, 16 Vet. App. at 434.

<sup>165</sup> See Proposed Collection; Comment Request for Regulation Project, 74 Fed. Reg. 7128 (proposed Feb. 12, 2009) (noting that the Department of the Treasury, “as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on proposed and/or continuing collections, as required by the Paperwork Reduction Act of 1995”).

<sup>166</sup> See generally CHARLES O. ROSSOTTI, *MANY UNHAPPY RETURNS: ONE MAN’S QUEST TO TURN AROUND THE MOST UNPOPULAR ORGANIZATION IN AMERICA* 21 (2005) (noting that the Internal Revenue Service (IRS) had the largest number of customers and the lowest approval rating of any institution in America at the time of the author’s appointment as the Commissioner of the IRS in 1997); Eric A. Lustig, *IRS, Inc. – The IRS Oversight Board – Effective Reform or Just Politics? Some Early Thoughts from a Corporate Law Perspective*, 42 DUQ. L. REV. 725, 726 (2004) (stating “Americans have long disliked, and even despised, taxes and tax collectors. As the nation’s tax collector, the [IRS] provides an easy target for criticism because of its long-standing unpopularity with the American taxpayer.”); Eileen Sullivan, *Poll: TSA is as Unpopular as IRS*, SEATTLE TIMES, Dec. 21, 2007, available at [http://seattletimes.nwsourc.com/html/nationworld/2004085537\\_airports21.html](http://seattletimes.nwsourc.com/html/nationworld/2004085537_airports21.html) (implying the unpopularity of the IRS, noting that “complaints and other frustrations make the nation’s airport-security agency about as popular as the IRS”).

In summary, Bilmes should certainly be praised for her in-depth research and novel proposal, as well as for bringing attention to this important topic. However, to have the VA disability benefits system operate on an honor system similar to the IRS is unrealistic. Problems with limited funds, fraudulent claims, public perception, and enforcement would certainly cause VA additional problems and ultimately exacerbate current complaints. Therefore, while VA and the IRS are both administrative agencies within the meaning of the APA, the agencies' current systems for addressing their respective workloads are not fungible.

## **B. The Social Security Administration**

Although Bilmes's proposal of adapting a claims processing system modeled after the IRS has recently received much attention, the VA's disability benefits system has also been compared to the benefits system employed by the SSA.<sup>167</sup> One of the most obvious similarities between VA and the SSA are that both agencies process disability claims. However, the courts have recognized that VA and the SSA systems are different in that the SSA is not a pro-claimant system.<sup>168</sup> Thus, the agencies are not as similar as they may at first appear.

Although Social Security was not officially established until 1935, America's first "Social Security" system was actually the pension program put in place during the Civil War era to assist disabled veterans injured in the war, their widows, and their

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<sup>167</sup> See, e.g., WILLIAM F. FOX, THE UNITED STATES BOARD OF VETERANS' APPEALS: THE UNFINISHED STRUGGLE TO RECONCILE SPEED AND JUSTICE DURING INTRA-AGENCY REVIEW 79-82 (Paralyzed Veterans of America ed. 2000) (comparing the VA Board of Veterans' Appeals to the SSA, the Board of Immigration Appeals, and the Department of Labor Benefits Review Board); 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); Levy, *supra* note 12; O'Reilly, *supra* note 12.

<sup>168</sup> See *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998) (stating "[t]his court and the Supreme Court both have long recognized that the character of the veterans' benefits statutes is strongly and uniquely pro-claimant. . . . It is our understanding that the system through which social security benefits are awarded . . . is not similarly designed").

orphans.<sup>169</sup> In 1890, the nexus requirement for service-connected disabilities was removed and any disabled Civil War veteran automatically qualified for benefits.<sup>170</sup> Shortly thereafter, in 1906, old age by itself became a sufficient qualification for benefits.<sup>171</sup> By 1910, Civil War veterans and their survivors were entitled to receive both disability and old-age benefits, similar to the Social Security programs in place today.<sup>172</sup> Nonetheless, this system was for Civil War veterans only; such benefits were not extended to the general population.<sup>173</sup> Despite this, American society continued to evolve toward the modern day SSA system throughout the twentieth century through the introduction of pension plans for industrial workers.<sup>174</sup>

After the onset of the Great Depression in 1929, poverty among the elderly population grew considerably.<sup>175</sup> According to the SSA, in 1934 more than half of America's elderly population did not have the means to support themselves.<sup>176</sup> Further exacerbating this poverty was the fact that benefits for the elderly were essentially non-existent at that time.<sup>177</sup> In the years leading up to the passage of the Social Security Act, 30 states passed limited pension legislation for the elderly; however, these programs generally proved insufficient and ineffective.<sup>178</sup>

In response to the Great Depression, Franklin Delano Roosevelt spurred congress to enact the Social Security Act in 1935 in order "to provide for the 'security of the men, women and children of the Nation against certain hazards and vicissitudes of

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<sup>169</sup> Larry DeWitt, Historical Background and Development of Social Security (Mar. 2003), <http://ssa.gov/history/briefhistory3.html>.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*



life.”<sup>179</sup> Upon its initial enactment, the SSA provided for a range of programs in addition to social security retirement insurance benefits.<sup>180</sup> Benefits for disabled workers became part of the SSA system in 1954, known as the Disability Insurance Benefits program (“SSDI”).<sup>181</sup> Supplemental Security Income (“SSI”) benefits were subsequently enacted in 1972 for persons who were disabled and met certain income requirements, and who had not been employed long enough to qualify for other SSA benefits such as SSDI or Social Security Retirement Income (“SSRI”).<sup>182</sup>

SSDI is the most clearly analogous program to the disability benefits program administered by the Veterans Benefits Administration (VBA). In 2008, 2.5 million workers, aged 18 to 64, applied for SSDI.<sup>183</sup> Approximately two-thirds of these SSDI claims were denied upon initial application or at the first level of appeal.<sup>184</sup> In 2008, SSDI claimants who appealed further waited an average of 500 days for the next level of appeal, which involves a hearing before an administrative law judge (ALJ).<sup>185</sup> In addition, the SSA has also experienced problems with inconsistent decisions from various states as well as a high rate of reversal on appeal.<sup>186</sup> Thus, the SSA shares some of VBA’s problems in terms of a large number of claims and lengthy processing times and has further difficulties with inconsistency in its decisions. Nonetheless, the SSA’s system for administering SSDI and VBA system for administering VA disability benefits are not as comparable as they may initially appear.

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<sup>179</sup> Donna M. Nesselbush, *Social Security Disability Law: The Facts and Some Recent Changes*, 54 R.I. B.J. 7 (2005) (quoting President Roosevelt’s January 17, 1934 message to Congress).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> Lynda Yamamoto, *The ABCs of SSDI, DIB*, N.J. LAW, Feb. 2009, at 47.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> COMM. ON IMPROVING THE DISABILITY PROCESS IMPROVING SOCIAL SECURITY DISABILITY DECISION PROCESS 57 (John D. Stobo et. al. eds., National Academies Press 2007).

In 2001, James T. O'Reilly of the American Bar Association proposed that a "better approach" to the veterans' benefits system would be to "eliminate the CAVC and the Board of Veterans Appeals, and replace both with the appeals process already in place at the Social Security Administration," by merging the two systems together, to include the use of the same Administrative Law Judges.<sup>187</sup> O'Reilly argues that doing so would be more economical.<sup>188</sup> He noted that in Germany and England, a system that merges veterans' claims with social security claims is already in place.<sup>189</sup> As for the United States social security system, he argued that the SSA system is more receptive to claimants since appeals of SSA disability determinations are decided nationwide, and are thus addressed through a more localized process than the current VA appeals system, in which Board decisions emanate only from Washington, DC. In this regard, O'Reilly correctly notes that "[t]he sense of due process observed in person is a positive aspect of the SSA system of appeals."<sup>190</sup> However, O'Reilly also concedes that the SSA disability system is "more adversarial" than the current VA disability benefits system.<sup>191</sup> Furthermore, while O'Reilly extols the benefits of hearings provided by SSA, he fails to point out that every veteran who appeals a VA disability benefits determination is entitled to a personal hearing before a member of the Board of Veterans Appeals.<sup>192</sup>

In 2004, Richard D. Levy, a professor at the University of Kansas School of Law, also compared the SSA system with the VA system, noting that the two systems arose under different models of government. He asserts that the VA system arose under a "charity" model of government benefits.<sup>193</sup> Levy stated that under the charity model, "whatever moral obligation the nation may owe its veterans, the fulfillment of that responsibility is, from a legal perspective,

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<sup>187</sup> O'Reilly, *supra* note 12, at 243.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 246.

<sup>190</sup> *Id.* at 244.

<sup>191</sup> *Id.* at 239.

<sup>192</sup> See 38 U.S.C. § 7107 (2006); 38 C.F.R. §§ 20.702, 20.704 (2008).

<sup>193</sup> Levy, *supra* note 12, at 303.

a voluntary undertaking.”<sup>194</sup> Accordingly, under such a system, legal safeguards such as adversarial procedures and judicial review are “unnecessary, inappropriate, and undesirable.”<sup>195</sup> Levy thus acknowledged that the VA system is unique, in that because the veterans’ benefit system materialized when the charity model of government benefits prevailed, many of VA’s distinctive features are products of that model.<sup>196</sup> However, Levy noted that other current government benefit programs, including Social Security, operate under a “social insurance” model of benefits.<sup>197</sup> Under this model, “the government uses its taxing and spending powers to spread the costs of old age, disability, unemployment, and poverty.”<sup>198</sup> In addition, it follows a more traditional legal system, to include the adversarial process and independent judicial review.<sup>199</sup> Levy argued that many of VA’s problems stem from its use of the charity model and that some of these problems could be alleviated by adhering to a strictly social insurance model of benefits.

Like Bilmes, the above scholars should be commended for their efforts to draw attention to this area of the law and for suggesting improvements to the veterans’ benefits system. As was noted above, providing veterans with quality, timely decisions of their disability claims is of the utmost importance, and all avenues of obtaining this goal should be explored. Nonetheless, merging with or mimicking the SSA system is not the best option to fix VA’s claims processing system. As explained below, although VA and the SSA both deal with disability benefits, the SSA system is adversarial; it is not pro-claimant. Moreover, like VA, the SSA has also been the subject of much criticism due to lengthy appeals processing times.

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<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 202-04.

<sup>199</sup> *Id.* at 304.

The differences between VA and the SSA have previously been recognized by the Federal Circuit. In *Hodge v. West*, the Federal Circuit held that the CAVC improperly applied a test from the SSA in the context of determining whether evidence was “new and material” for the purpose of reopening a veteran’s claim.<sup>200</sup> In its decision, the Federal Circuit noted that the CAVC “inexplicably borrowed a definition of materiality from *an entirely different benefits scheme* – the administration of social security benefits - rather than relying on the character of and precedents from the veterans’ benefits system . . . .”<sup>201</sup> The Federal Circuit went on to explain that the definition borrowed from the SSA was “inconsistent with the general character of the underlying statutory scheme for awarding veterans’ benefits.”<sup>202</sup> In fact, both the Federal Circuit and the Supreme Court have repeatedly emphasized “that the character of the veterans’ benefits statutes *is strongly and uniquely pro-claimant*.”<sup>203</sup> The Federal Circuit opinion stated that pursuant to its understanding, the systems through which SSA disability benefits and VA disability benefits are determined are not similarly constructed.<sup>204</sup>

To further emphasize its holding, the Federal Circuit cited to specific statutory provisions and noted that Congress, like the Supreme Court, has acknowledged and maintained the distinctive character and structure of the VA system.<sup>205</sup> For instance, when Congress passed the Veterans’ Judicial Review Act and the Veterans’ Benefits Improvement Act of 1988, it stressed the non-adversarial nature of the veterans’

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<sup>200</sup> *Hodge v. West*, 155 F.3d 1356, 1361 (Fed. Cir. 1998).

<sup>201</sup> *Id.* (emphasis added) (citations omitted).

<sup>202</sup> *Id.* at 1362.

<sup>203</sup> *Id.* (emphasis added) (citing *Coffy v. Republic Steel Corp.*, 447 U.S. 191, 196, (1980) (veterans statutes must be liberally construed for the benefit of the returning veteran (citing *Fishgold v. Sullivan Drydock & Repair Corp.*, 382 U.S. 275, 285 (1946)); *McKnight v. Gober*, 131 F.3d 1483, 1485 (Fed. Cir. 1997) (noting “that, where a statute is ambiguous, ‘interpretive doubt is to be resolved in the veteran’s favor’” (citing *Brown v. Gardner*, 513 U.S. 115, 118 (1994)); *Smith v. Brown*, 35 F.3d 1516, 1522 (Fed. Cir. 1994) (noting the “uniquely pro-claimant principles underlying the veterans’ benefits dispensation scheme”)).

<sup>204</sup> *Hodge*, 155 F. 3d at 1362. Most importantly, VA disability benefits require a nexus to an in-service disease or injury, whereas Social Security Administration (SSA) disability requires a showing of unemployment.

<sup>205</sup> *Id.*

benefits system and affirmed its intent to maintain the unique character of the system despite the imposition of judicial review.<sup>206</sup> In so stating, Congress referred to the non-adversarial aspect of the system as beneficial to veterans as it required VA to fully and sympathetically develop a veteran's claim before issuing a decision and to give the veteran the benefit of the doubt.<sup>207</sup> The Federal Circuit noted that such statements provided evidence that Congress intended to maintain the historic, non-adversarial system of veterans' benefits.<sup>208</sup>

In addition to legislative intent, the Federal Circuit also emphasized the importance of fairness in the context of VA claims. The Federal Circuit stated that using a test designed for the social security system would "undermine public confidence, particularly among veterans, that the system is fair . . . ." <sup>209</sup> Accordingly, the Federal Circuit held that adopting regulations from the SSA would alter the uniquely pro-claimant character of the VA system and, thus, would disadvantage veterans.<sup>210</sup>

In summary, the Federal Circuit concluded that because VA and the SSA systems are "inconsistent in purpose and procedure, it seems inappropriate to adopt wholesale . . . from one benefits scheme for application in the other."<sup>211</sup> Nonetheless, this is precisely what some commentators on the VA system have proposed.

Furthermore, in addition to the fact that the VA and SSA systems differ in purpose and procedure, the SSA, like the IRS, is also not necessarily an ideal administrative agency. The Social Security system has also been the subject of frequent criticism.<sup>212</sup> In 2007, the

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<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 1362-63 (citing H.R. Rep. No. 100-963 at 13 (1988), *reprinted in* 1998 U.S.C.C.A.N. 5782, 5794-95).

<sup>208</sup> *Id.* at 1363.

<sup>209</sup> *Id.* at 1363-64.

<sup>210</sup> *Id.* at 1364.

<sup>211</sup> *Id.* at 1362.

<sup>212</sup> *See, e.g.,* IMPROVING THE SOCIAL SECURITY DISABILITY DECISION PROCESS, *supra* note 186; O'Connor, *supra* note 115, at 389 (citing John C. Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings*, 97 COLUM. L. REV. 1289 (1997)).

SSA asked the National Institute of Medicine to make suggestions as to how the agency could improve the timeliness and accuracy of its disability decisions.<sup>213</sup> In its report, the National Institute of Medicine found that the chief problems with SSA's current disability determinations system included the length of time required to process an appeal, the inconsistency of outcomes between different SSA offices, and the high reversal rate on appeal.<sup>214</sup> In fact, the Government Accountability Office (GAO) added both VA and the SSA to its list of high-risk government programs in 2003.<sup>215</sup> However, the CAVC has been cited as deciding cases fifty percent faster than the district courts in SSA cases, with CAVC determinations made in approximately twelve months as compared to approximately eighteen months for determinations in the district courts.<sup>216</sup> Thus, because VA and the SSA suffer from similar problems, it appears that VA's current problems would not be resolved by imitating or fusing with the SSA.

Moreover, both Levy and O'Reilly have alluded to reasons why the SSA system is not the panacea to all VA's problems. Levy recognized that the veterans' benefits system is a "unique and highly specialized area of law,"<sup>217</sup> O'Reilly himself has acknowledged that his proposal is not flawless. He recognized that geographic differences between the twelve circuit courts which review SSA appeals are not uncommon, thus producing inconsistent decisions and causing SSA adjudicators to engage in "avoidance behaviors known as nonacquiescence" – a practice of not following a particular circuit court's precedent.<sup>218</sup>

Lastly, while many of the problems cited by O'Reilly relate to veterans law rather than the VA system itself, his chief argument is to replace VA adjudicators with the social security system's ALJs,

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<sup>213</sup> IMPROVING THE SOCIAL SECURITY DISABILITY DECISION PROCESS, *supra* note 186, at 1.

<sup>214</sup> *Id.* at 57.

<sup>215</sup> *Id.*

<sup>216</sup> Paul R. Verkuil & Jeffrey S. Lubbers, *Alternative Approaches to Judicial Review of Social Security Disability Cases*, 55 ADMIN. L. REV. 731, 771 (2003).

<sup>217</sup> Levy, *supra* note 12, at 303.

<sup>218</sup> O'Reilly, *supra* note 12, at 244 (internal quotations omitted).

rather than to reform the law that VA adjudicators currently apply. Therefore, to the extent that veterans law, and not VA adjudicators, is the problem, it seems unlikely that merging the adjudicators will solve this problem.<sup>219</sup>

In summary, although both VA and the SSA process disability appeals, the procedure and purpose of these two systems are very different. As recognized by the Federal Circuit in *Hodge*, the SSA system does not share in VA's unique pro-claimant history.<sup>220</sup> As such, laws and regulations that were written with the SSA's purposes and procedures in mind cannot be applied to the VA disability benefits system without straying from VA's goal of maintaining a nonadversarial system. Accordingly, a system analogous to the one used by the SSA will not assist VA with resolving its current problems.

## CONCLUSION

Sigmund Freud once said that “[a]nalogies, it is true, decide nothing, but they can make one feel more at home.”<sup>221</sup> Indeed, while analogizing the VA disability benefits system to other administrative agencies such as the IRS and the SSA does not solve VA's current problems, such analogies do make sense to scholars involved with other areas of law. Interestingly, most proposals suggesting that VA adopt the structure of another administrative agency, including those discussed above, come from commentators who have not worked with, or within, the VA system. On the contrary, those who have worked with the VA system, such as members of various Veterans Service Organizations and judges at the CAVC, support modifications to the current system that preserve VA's unique pro-claimant system, rather than the proposals discussed above.<sup>222</sup> Although analysts outside

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<sup>219</sup> O'Connor, *supra* note 115, at 389.

<sup>220</sup> See *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998).

<sup>221</sup> Sigmund Freud Quotes, [http://brainyquote.com/quotes/authors/s/Sigmund\\_freud.html](http://brainyquote.com/quotes/authors/s/Sigmund_freud.html) (last visited Nov. 27, 2009).

<sup>222</sup> See generally *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) (statement of Bruce E. Kasold, J., U.S. Court of Appeals for Veterans Claims)

the system cite the reasons for this as those within the system resisting change,<sup>223</sup> the fact remains that the pro-claimant nature of the VA system is an integral part of the agency.<sup>224</sup> As such, it must be considered when analyzing VA's disability benefits system.

Therefore, when it comes to making recommendations as to how to improve the current VA disability benefits system, looking for a quick fix in the form of another administrative agency's system is simply not the answer. As discussed at length in this article, VA stands apart from other administrative agencies in several key aspects. Most notably, it does not have a statute of limitations for filing claims for disability benefits, it is nonadversarial and pro-claimant in nature, and it applies a more liberal standard of proof, known as the benefit of the doubt standard. More importantly, however, our nation's veterans are an honorable and admirable group of citizens. They, as well as the agency that serves them, deserve individual consideration.

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("[T]he claimant and the Secretary should be working together to maximize the claimant's benefits, . . . The Secretary has an affirmative duty to assist the veteran in gathering evidence, which includes, *inter alia*, liberally reading the scope of his claim, gathering evidence, advising the claimant what is needed to substantiate the claim, and providing a medical examination when needed."); *id.* (statement of James P. Terry, Chairman, Board of Veterans' Appeals) ("In considering legislative and policy recommendations, we must remember that the system of adjudicating claims and appeals is designed to give the benefit of the doubt to all veterans."); *id.* (statement of Richard Paul Cohen, Executive Director, National Organization of Veterans' Advocates) ("The VA's benefits system is premised on a 'claimant-friendly, non-adversarial' approach to deciding claims. Accordingly, the VA, the veteran, and the veteran's representative are all meant to share the same goal: making sure veterans and their dependents receive the VA benefits they deserve.").

<sup>223</sup> See generally Hagel & Horan, *supra* note 114, at 53-56 (discussing evidence suggesting that the VA has been reluctant to change its adjudication practices to conform them to the requirements of judicial review); O'Reilly, *supra* note 12, at 248 ("The CAVC structure, created as an Article I court in 1988, acted as a catalyst for reluctant changes in the bureaucracy.").

<sup>224</sup> See, e.g., *Gambill v. Shinseki*, 576 F.3d 1307, 1315 (Fed. Cir. 2009) (Bryson, J., concurring) (stating "that the informal and uniquely pro-claimant nature of the veterans' disability compensation system is of critical importance in assessing the constitutionality of the procedures that are employed by the [ ]VA").



As previously stated, the recent proposals from notable scholars on the issue of how to improve the VA disability benefits system are certainly commendable. However, the fact remains that any improvements to VA's current system must be made in the context of VA's unique structure. These recent proposals are not mindful of this fact. Although the structure of other administrative agencies may be looked to for some guidance when analyzing the VA disability benefits system, VA is simply too distinctive to be regulated by rules and regulations designed with another agency's purpose in mind.