

VETERANS FIGHTING WARS AT HOME AND ABROAD

Robert N. Davis*

I. INTRODUCTION.....	389
II. PROBLEMS FACING VETERANS TODAY.....	391
A. <i>Unemployment</i>	392
B. <i>Homelessness</i>	393
C. <i>Post-Traumatic Stress Disorder and Suicide</i>	394
D. <i>Physical Disabilities</i>	396
III. VA'S ROLE IN ADDRESSING THESE PROBLEMS.....	397
A. <i>Unemployment and Homelessness</i>	398
1. <i>Unemployment</i>	398
2. <i>Homelessness</i>	399
B. <i>The Claims Process</i>	400
IV. THE VETERANS' JUDICIAL REVIEW ACT: BENEFITS AND SHORTCOMINGS.....	404
A. <i>Attorney Representation and Payment</i>	405
B. <i>The United States Court of Appeals for Veterans Claims</i>	406
C. <i>United States Court of Appeals for the Federal Circuit Review</i>	408
D. <i>United States Supreme Court Review</i>	410
1. <i>Brown v. Gardner</i>	410
2. <i>Scarborough v. Principi</i>	411
3. <i>Shinseki v. Sanders</i>	413
4. <i>Henderson ex rel. Henderson v. Shinseki</i>	414
E. <i>Shortcoming of Judicial Review</i>	415
V. NOVEL ISSUES.....	416
VI. CONCLUSION.....	418

I. INTRODUCTION

Permit me, if you will, a few preliminary remarks before I get into the substance of my talk.¹ I have to admit that the events in the Middle East over

* Judge Davis is a federal appellate judge at the United States Court of Appeals for Veterans Claims in Washington, D.C. He would like to thank Kristi Lemoine, Esq. and Angel Caracciolo, Esq. for their assistance in the preparation of this Article.

the last couple of days caught me by surprise. They should not have, but they did. Being preoccupied with court business, I was saddened to turn on the television news yesterday morning to learn that our embassy in Benghazi, Libya, had been attacked and that Ambassador Christopher Stevens, Sean Smith, and several other embassy employees were killed.² Then I learned of the protests outside of the American embassy in Cairo, Egypt.³ And this morning, I also understand that there is unrest at our embassy in Yemen.⁴

These flashpoints, some of which were clearly planned ahead of time, especially the Libyan attack, and others, were originally reported as fueled by some kind of disgusting and reprehensible video.⁵ But the violent response was inexcusable.⁶ These were flashpoints fueled by extremist elements in places where the governments are unstable and in transition and should serve as a painful reminder to all of us that the world can be a dangerous place, particularly when you promote freedom and democracy to people beyond our borders. Because I am an American and a veteran, I know that these kinds of incidents will only make our determination and resolve that much stronger. I have absolutely no doubt that those responsible, wherever they may be, will be

1. The substance of the introductory remarks was taken from Judge Davis's presentation during the Walter B. Huffman Distinguished Lecture Series at the Texas Tech University School of Law on September 13, 2012.

2. *U.S. Defense Secretary Notes 'Enhanced' Capabilities Amid Mideast Unrest*, CNN (Sept. 16, 2012, 9:12 PM), <http://www.cnn.com/2012/09/16/world/meast/us-defense-mideast/index.html>.

3. *See id.*

4. *See id.*

5. *See id.*

6. Helene Cooper, *Obama Asks Arab World to Ensure Freedoms; In Address at U.N., He Warns Iran That Time for Nuclear Deal Is Limited*, INT'L HERALD TRIB., Sept. 26, 2012, at A1. Of the attacks, President Barack Obama issued a statement to the United Nations General Assembly in New York on Tuesday, September 25, 2012. *See id.* The *International Herald Tribune* reported the following:

While condemning the "crude and disgusting" video that prompted the protests in Libya and throughout the Muslim world, the President worked to explain—before a sometimes skeptical audience that has never completely bought into the American idea that even hateful speech is protected—why the United States values so highly its First Amendment.

"We do so because in a diverse society, efforts to restrict speech can become a tool to silence critics, or oppress minorities," Mr. Obama said. "We do so because given the power of faith in our lives and the passion that religious differences can inflame, the strongest weapon against hateful speech is not repression, it is more speech—the voices of tolerance that rally against bigotry and blasphemy, and lift up the values of understanding and mutual respect."

Americans, he said, "have fought and died around the globe to protect the right of all people to express their view. . . ."

And he said pointedly that "there is no speech that justifies mindless violence."

"There are no words that excuse the killing of innocents," Mr. Obama said. "There is no video that justifies an attack on an embassy. There is no slander that provides an excuse for people to burn a restaurant in Lebanon, or destroy a school in Tunis, or cause death and destruction in Pakistan."

Id. (quoting President Barack Obama, Address to the United Nations General Assembly (Sept. 25, 2012)).

held accountable. These events make the subject of my talk today even more poignant.

Veterans law is at the intersection of law and medicine.⁷ It is complex. It involves difficult statutory and regulatory interpretation and the evolution of both law and medicine. Sometimes it takes longer than we think it should. Just look at Martin Schram's book, *Vets Under Siege*, in which he describes the difficulty in getting the Department of Defense to recognize the illness that affected about 100,000 soldiers in the first Gulf War, having been exposed to gaseous releases as a result of the purposeful detonation of chemical weapons in Iraq.⁸ Now, that illness is understood to be Gulf War Syndrome.⁹ For the next few minutes, I am going to take you on an adventure in the veterans' arena, a journey to the world of veterans' affairs—veterans' benefits. It is kind of like Curiosity exploring Mars because what I am about to share with you is a system that is indeed otherworldly.

In the time we have remaining, I want to highlight problems facing the veterans; the Department of Veterans Affairs' (VA) role in addressing some of those problems; a little bit about the VA claims process; the creation of my court, the U.S. Court of Appeals for Veterans Claims; and veterans' issues in the larger judicial structure. I would like to also share with you a few highlights from four cases that wound their way to the United States Supreme Court from our court. And I will conclude with a case that is currently at the court that I believe has a very good chance of being heard by the Supreme Court.

II. PROBLEMS FACING VETERANS TODAY

The country's 22.2 million veterans, along with their estimated 34 million dependents, represent 18% of the population of the United States.¹⁰ VA provides compensation and pension benefits to more than 4.1 million of these veterans and their beneficiaries.¹¹ The emotional, social, and physical problems veterans face are as varied as the men and women who receive VA benefits and services. Yet certain prominent problems exist in the veteran population at large.

7. See Madeline McGrane, Note, *Post-Traumatic Stress Disorder in the Military: The Need for Legislative Improvement of Mental Health Care for Veterans of Operation Iraqi Freedom and Operation Enduring Freedom*, 24 J.L. & HEALTH 183, 193-94 (2010).

8. See MARTIN SCHRAM, *VETS UNDER SIEGE: HOW AMERICA DECEIVES AND DISHONORS THOSE WHO FIGHT OUR BATTLES* 71-72 (2008).

9. See George J. Annas, *Protecting Soldiers from Friendly Fire: The Consent Requirement for Using Investigational Drugs and Vaccines in Combat*, 24 AM. J.L. & MED. 245, 254-55 (1998).

10. DEP'T OF VETERANS AFFAIRS, DEPARTMENT OF VETERANS AFFAIRS (VA) 2011 PERFORMANCE AND ACCOUNTABILITY REPORT I-29 (Nov. 15, 2011) [hereinafter VA 2011 PERFORMANCE AND ACCOUNTABILITY REPORT], available at <http://www.va.gov/budget/report/> (follow "Fiscal Year 2011" under "Published Reports"; open "2011-VAPAR_Part_1.pdf").

11. *Id.* at I-4.

A. Unemployment

Certain veterans face an employment picture that is darker than that of the civilian population. In 2011, the unemployment rate for veterans and nonveterans over age eighteen was roughly the same—8.3% unemployed for veterans and 8.7% for nonveterans.¹² But upon closer examination, statistics show that young veterans have a much higher unemployment rate than do young nonveterans. Nonveteran men age eighteen to twenty-four had an unemployment rate of 17.6% in 2011, while male veterans age eighteen to twenty-four were unemployed at a rate of 29.1%.¹³ For women age eighteen to twenty-four, the unemployment rates were 14.5% for nonveterans and 36.1% for veterans.¹⁴

One possible explanation for the disproportionately high rate of unemployment among young veterans is their level of education. The Deputy Commissioner of the Bureau of Labor Statistics explained, “[Y]ounger veterans . . . have much different levels of education than do nonveterans of the same age.”¹⁵ While veterans age twenty-five to thirty-four are less likely than nonveterans to be high school dropouts, they are also less likely to have obtained a bachelor’s degree.¹⁶

Disabilities may further complicate the picture. In 2011, 3.3 million veterans received compensation for disabilities.¹⁷ That number includes 26% of “Gulf War era II” veterans who reported having a disability related to service, as contrasted with 14% of the veteran population at large.¹⁸ Veterans receiving benefits for a disability related to service are less likely to be employed than are veterans without such a disability.¹⁹ August 2009 statistics indicate that veterans without a disability related to service were employed at a rate of

12. BUREAU OF LABOR STATISTICS, HOUSEHOLD DATA ANNUAL AVERAGES 1 (2011), available at <http://www.bls.gov/cps/cpsaat48.pdf>. Other statistics indicate that the employment statistics for veterans of the Iraq and Afghanistan conflicts are particularly grim. A July 26, 2012, news article reported the following: “Unemployment among this group rose from 7.3 percent in 2008 to 12.1 percent in 2011, when the national average was 8.9 percent. For 18- to 24-year-old veterans, the rate was 30 percent last year, nearly double the 16.1 percent rate for non-veterans in that age group.” Phil Stewart, *Special Report: Obama’s Struggle to Mend Veterans’ Safety Net*, REUTERS (July 26, 2012), <http://www.reuters.com/article/2012/07/26/us-usa-veterans-obama-idUSBRE86P0JG20120726>.

13. BUREAU OF LABOR STATISTICS, *supra* note 12, at 1-2.

14. *Id.*

15. *Status of Veterans’ Employment: Hearing Before the Subcomm. on Econ. Opportunity of the H. Comm. on Veterans’ Affairs*, 111th Cong. 2 (2010) (statement of Philip L. Rones, Deputy Comm’r, Bureau of Labor Statistics).

16. *See id.* Two percent of veterans age twenty-five to thirty-four are high school dropouts, compared to 12% of nonveterans, as of 2008. *Id.* 2008 statistics reveal that only 19% of veterans in this age group had received a bachelor’s degree, while 33% of nonveterans had earned a degree. *Id.*

17. VA 2011 PERFORMANCE AND ACCOUNTABILITY REPORT, *supra* note 10, at I-28.

18. News Release, Bureau of Labor Statistics, U.S. Dep’t of Labor, Employment Situation of Veterans—2011, at 1 (Mar. 20, 2012). “Gulf War era II” veterans are veterans who served from September 2001 forward. *Id.* at 2.

19. *See id.* at 2 tbl.6.

81.9%, while veterans with a disability warranting a 60% disability rating or higher were employed at only a rate of 55.8%.²⁰

B. Homelessness

In addition to higher unemployment rates, veterans are also more likely than nonveterans to be homeless. “At [one] point in time in 2009, approximately 12 percent of all people (and 16 percent of adults) experiencing homelessness identified as a veteran, as did 10 percent of those homeless over the course of a year.”²¹ However, “[l]ess than 8 percent of the total U.S. population has veteran status.”²²

A 2011 report by VA found that the portion of the homeless male veteran population “was about 30% greater than the proportion of Veterans in the general population.”²³ Female veterans faced an even higher risk of becoming homeless—they were “overrepresented compared to the general population by a factor of two.”²⁴ “[A]fter controlling for poverty, age, race, and geographic variation, female Veterans were three times as likely as female non-Veterans to become homeless,” while “male Veterans were twice as likely as male non-Veterans to become homeless.”²⁵

Young veterans also face an unusually high risk of homelessness. “[V]eterans aged 18 to 30 are more than two times as likely to be homeless as young non-veteran adults. . . .”²⁶ Because “a growing share of veterans accessing shelter services are between the ages of 18 and 30,” this age group is overrepresented in the homeless veteran population.²⁷

Researchers have posed two theories as to why veterans are more likely than nonveterans to be homeless. One theory is that homelessness is “largely related to adjustment issues post-combat.”²⁸ Associated with this theory is the belief that “factors such as combat exposure, wartime trauma, and [PTSD] may have an indirect effect on the risk of homelessness among male veterans to the

20. News Release, Bureau of Labor Statistics, U.S. Dep’t of Labor, Employment Situation of Veterans—2009, at tbl.5 (Mar. 12, 2010).

21. U.S. DEP’T OF HOUSING AND URBAN DEV. & U.S. DEP’T OF VETERANS AFFAIRS, VETERAN HOMELESSNESS: A SUPPLEMENTAL REPORT TO THE 2009 ANNUAL HOMELESS ASSESSMENT REPORT TO CONGRESS, at i (2009) [hereinafter 2009 HUD & VA REPORT].

22. *Id.*

23. JAMISON FARGO ET AL., U.S. DEP’T OF VETERANS AFFAIRS, PREVALENCE AND RISK OF HOMELESSNESS AMONG U.S. VETERANS: A MULTISITE INVESTIGATION 3 (2011).

24. *Id.*

25. *Id.* at 4.

26. U.S. DEP’T OF HOUSING AND URBAN DEV. & U.S. DEP’T OF VETERANS AFFAIRS, VETERAN HOMELESSNESS: A SUPPLEMENTAL REPORT TO THE 2010 ANNUAL HOMELESS ASSESSMENT REPORT TO CONGRESS 15 (2010).

27. *Id.* at 35. A report by the U.S. Department of Housing and Urban Development and the U.S. Department of Veterans Affairs states that “[t]hese findings are particularly concerning given the anticipated number of new veterans returning from Afghanistan and Iraq.” *Id.*

28. FARGO ET AL., *supra* note 23, at 3.

extent that these conditions are associated with social isolation and psychiatric hospitalization, which directly increase a veteran's risk for homelessness."²⁹ The second theory is "that the risk of homelessness for veterans may be related to factors as diverse as age, race, psychiatric illness, and economic status prior to entry in the military."³⁰

C. Post-Traumatic Stress Disorder and Suicide

Moreover, veterans' mental health issues are so ubiquitous that they are recognized not only in the U.S. Court of Appeals for Veterans Claims but also in other courts. For example, in 2008, the United States District Court for the Northern District of California issued the decision *Veterans for Common Sense v. Peake*, in which the court considered the plaintiff's request for injunctive relief against VA based on the manner in which VA provided mental healthcare to veterans.³¹ In it, the district court recognized statistics that emphasize just how prevalent mental health issues—particularly post-traumatic stress disorder (PTSD)—are among veterans.³² "Approximately one out of every three soldiers returning from Iraq was seen in the VA for a mental health visit within a year of their return," the district court wrote, and "PTSD is a leading diagnosis for the mental health disorders of veterans returning from Iraq."³³ The court noted that approximately 18% of service members returning from Iraq and Afghanistan have PTSD.³⁴

The district court further recognized that PTSD is a leading diagnosis despite the fact that only "half of those who need treatment for PTSD seek it."³⁵ And the problem does not stop with veterans who have completed their service. A 2008 study cited by the district court estimated that 300,000 of the soldiers then deployed to Iraq and Afghanistan also suffered from PTSD and depression.³⁶

29. 2009 HUD & VA REPORT, *supra* note 21, at 3 (citing Robert Rosenheck & Alan Fontana, *A Model of Homelessness Among Male Veterans of the Vietnam Generation*, 151 AM. J. PSYCHIATRY 421 (1994)).

30. *Id.*

31. *Veterans for Common Sense v. Peake*, 563 F. Supp. 2d 1049, 1061-73 (N.D. Cal. 2008), *aff'd in part, rev'd in part sub nom. Veterans for Common Sense v. Shinseki*, 678 F.3d 1013 (9th Cir. 2012).

32. *See id.*

33. *Id.* at 1062. "An individual with [PTSD] re-experiences an extremely traumatic event, usually accompanied by increased arousal, nightmares, flashbacks, and difficulty sleeping, concentrating, and remembering. PTSD can first occur many years after the initial traumatic event." *Id.*

34. *Id.* (citing RAND CORP., *INVISIBLE WOUNDS OF WAR: PSYCHOLOGICAL AND COGNITIVE INJURIES, THEIR CONSEQUENCES, AND SERVICES TO ASSIST RECOVERY* (2008)). The district court also noted that Dr. Gerald Cross, VA's Deputy Under Secretary for Health, testified that "high rates of PTSD among Iraq veterans are the result of various factors, including multiple deployments, the inability to identify the enemy, the lack of real safe zones, and the inadvertent killing of innocent civilians." *Id.*

35. *Id.* at 1063 (citing RAND CORP., *supra* note 34).

36. *Id.* (citing RAND CORP., *supra* note 34).

As the district court noted, the mental health issues of veterans do not begin and end with PTSD.³⁷ Unfortunately, suicide rates are alarmingly high for veterans. The district court noted that one expert remarked that “depression and PTSD are two of the leading risk factors for suicide” and that suicide rates for veterans in 2008 were 3.2 times higher than those of the general population.³⁸ Other statistics the court cited indicated that there are eighteen suicides a day among veterans and “4-5 suicides per day among those who receive care from [VA].”³⁹ Although the district court in *Veterans for Common Sense* ultimately determined that it lacked jurisdiction to grant the relief requested, it aptly recognized that VA may not be meeting the needs of those veterans who suffer from such disabilities.⁴⁰

Indeed, while more veterans may be experiencing PTSD, VA is not necessarily better able to care for veterans with the disability. A May 2007 VA report published statistics regarding how quickly a patient referred for PTSD could be seen by a mental health professional at a VA health care facility.⁴¹ At 33.6% of the facilities, a veteran referred for PTSD could see a mental health professional the same day.⁴² A veteran could see a mental health professional in less than a week at 17.3% of the facilities and in 1-2 weeks at 17.3% of the facilities.⁴³ But a veteran was required to wait 2-4 weeks at 26.4% of VA health care facilities and 4-8 weeks at 5.5% of the facilities.⁴⁴ According to statistics cited by the district court in *Veterans for Common Sense v. Shinseki*, there were 84,450 veterans on waiting lists for Veterans Health Administration (VHA) mental health services in April 2008 and 37,902 veterans waiting more than thirty days for any type of medical appointment (not just mental health appointments) as of February 1, 2008.⁴⁵

37. *Id.* at 1063-64.

38. *Id.* (citing the testimony of Dr. Ronald Maris and the KATZ SUICIDE STUDY (2008)). The district court identified Dr. Maris as “an expert witness for Plaintiffs in suicidology.” *Id.* at 1064.

39. *Id.* at 1063 (citing an e-mail from Dr. Ira Katz, Deputy Chief of Patient Care Servs. Office for Mental Health for VA, internal VA e-mail (December 15, 2007) (on file with author)).

40. *Id.* at 1056.

41. See U.S. DEP’T OF VETERANS AFFAIRS, OFFICE OF INSPECTOR GENERAL, REPORT NO. 06-03706-126, HEALTHCARE INSPECTION: IMPLEMENTING VHA’S MENTAL HEALTH STRATEGIC PLAN INITIATIVES FOR SUICIDE PREVENTION 31 (2007) [hereinafter HEALTHCARE INSPECTION].

42. *Id.* at 32.

43. *Id.*

44. *Id.* In a September 10, 2007, follow-up report, VA reported that 524 of 700 Veterans Health Administration (VHA) patients were “seen with 30 days of their desired dates.” U.S. DEP’T OF VETERANS AFFAIRS, OFFICE OF INSPECTOR GENERAL, REPORT NO. 07-00616-199, AUDIT OF THE VETERANS HEALTH ADMINISTRATION’S OUTPATIENT WAITING TIMES, at ii (Sept. 10, 2007). “However, 176 (25 percent) of the appointments we reviewed had waiting times over 30 days . . .” *Id.* And despite the facts that VHA policy “requires that requests for appointments be acted on by the medical facility as soon as possible, but no later than 7 calendar days from the date of request,” *id.* at i, of “100 pending consults, 79 . . . were not acted on within the 7-day requirement,” *id.* at vi. “Of this number, 50 veterans had been waiting over 30 days without action on the consult request.” *Id.*

45. See *Veterans for Common Sense v. Shinseki*, 644 F.3d 845, 893 (9th Cir. 2011), *vacated on reh’g en banc*, 678 F.3d 1013 (9th Cir. 2012). The district court also noted that, according to VA, “as recently as

Furthermore, while there is a recognized link between PTSD and suicide, and in spite of VA's recognition that a "comprehensive suicide prevention program . . . should have a method for tracking at-risk patients to ensure that they receive timely and appropriate care," the May 2007 VA report stated that 70% of VA health care facilities had not implemented a tracking system for veterans with risk factors for suicide.⁴⁶

D. Physical Disabilities

As stated above, in 2011, 3.3 million veterans received compensation for disabilities.⁴⁷ In 2011, VA spent \$59.3 billion on compensation and pension payments.⁴⁸ In Texas alone, VA spent \$5.4 million to provide compensation and pension payments to 297,319 veterans.⁴⁹ These figures represent veterans who have previously filed claims for benefits and received an award.⁵⁰

But the process does not stop there—each year veterans file new claims. In 2011, VA processed 215,119 initial disability benefits claims, 464,259 claims to reopen a previously denied claim for disability benefits, and 173,376 claims for benefits related to Agent Orange.⁵¹ Claims may be as simple as a request for entitlement to benefits related to a knee disability, but many are much more complicated. Claims filed by veterans of the Iraq and Afghanistan

February 2007, there were as many as 182,141 veterans waiting more than 30 days for a medical appointment." Veterans for Common Sense v. Peake, 563 F. Supp. 2d 1049, 1067 (N.D. Cal. 2008), *aff'd in part, rev'd in part sub. nom.* Veterans for Common Sense v. Shinseki, 678 F.3d 1013 (9th Cir. 2012).

46. HEALTHCARE INSPECTION, *supra* note 41, at 33. Of the 30% of VA health care facilities that had implemented a tracking system, 81.8% tracked through electronic medical records, 33.3% tracked through a separate electronic registry or database, and 21.2% used some other method. *Id.*

47. VA 2011 PERFORMANCE AND ACCOUNTABILITY REPORT, *supra* note 10, at I-28.

48. *Id.* at I-31; *see also id.* at I-96 (stating that VA paid \$6 billion in compensation payments in 2011).

49. U.S. DEP'T OF VETERANS AFFAIRS, FISCAL YEAR 2011 GEOGRAPHIC DISTRIBUTION OF VA EXPENDITURES 7 (May 22, 2012). In 2011, VA spent \$5,426,288 on compensation and pension payments. *Id.* In 2010, there were 297,319 veterans receiving disability compensation and pension payments in Texas. U.S. DEP'T OF VETERANS AFFAIRS, OFFICE OF PUBLIC AFFAIRS, STATE SUMMARY: TEXAS AND THE U.S. DEPARTMENT OF VETERANS AFFAIRS 1 (Nov. 2010) [hereinafter STATE SUMMARY]. Of that number, 272,109 veterans received monthly disability compensation and 25,210 received pensions. *Id.* at 3.

50. *See* STATE SUMMARY, *supra* note 49, at 1.

51. VA 2011 PERFORMANCE AND ACCOUNTABILITY REPORT, *supra* note 10, at II-125; *see* DONNA K. BURNETT ET AL., *Chapter 2: Agent Orange and Other Herbicides Used in Vietnam*, in VIETNAM VETERANS AND AGENT ORANGE INDEPENDENT STUDY COURSE (2002), available at http://www.publichealth.va.gov/docs/vhi/VHlagentorange_text508.pdf ("Agent Orange is the name given to a specific blend of herbicides used for military purposes in Vietnam from 1965 to 1971. It was developed by the U.S. military for the purpose of eliminating plants and leaves from foliage in Vietnam that could have provided cover to the enemy. Vietnam veterans were exposed to many different health risks during the Vietnam War, including infectious diseases, smoke, unsanitary conditions, etc. However, Agent Orange remains even today a central focus for concerns about long-term health consequences of service in that war, among veterans, their families and others."); *see also* James D. Ridgway, *The Splendid Isolation Revisited: Lessons from the History of Veterans' Benefits Before Judicial Review*, 3 VETERANS L. REV. 135, 203-31 (2011).

conflicts have an average of eleven medical issues per claim, which is “more than twice the number filed by veterans from the Vietnam era.”⁵²

The explanation for these high instances of medical claims is found, at least in part, in the widespread use of improvised bombs in both conflicts and to improvements in battlefield medicine and armor.⁵³ The statistics regarding the impact of improvised explosive devices, commonly referred to as IEDs, are staggering. These small bombs have accounted for more than one-third of the deaths of United States troops in Afghanistan and Iraq.⁵⁴ Approximately “6,572 U.S. troops have died in Iraq and Afghanistan, and 2,483 of those deaths are IED related.”⁵⁵ As a weapon, IEDs have unfortunately been exceedingly effective.⁵⁶ They can be compact, disguised in a variety of nondescript containers, “cheap, readily available, largely off the shelf, easy to construct, lethal and accurate.”⁵⁷ These bombs can be hidden in trash or inside the dead bodies of humans or animals.⁵⁸ Thus, as a direct result of the increase in the use of IEDs, I anticipate that many of the Afghanistan and Iraq disability claims that will be filed with the VA will involve, in addition to PTSD and TBI (traumatic brain injury), the loss of limbs and the maiming and mangling of the bodies of United States troops. While IEDs are not new to warfare, their use by insurgents introduced a weapon into the war-fighting equation that caught the United States unprepared as neither its vehicles nor personnel were adequately armored or tactically experienced in combating the IED.⁵⁹ Regardless, due to medical improvements and better armor, more veterans are surviving those explosions, albeit with more disabilities than in prior conflicts.⁶⁰

III. VA’S ROLE IN ADDRESSING THESE PROBLEMS

To help address these problems, Congress empowered VA “to administer the laws providing benefits and other services to veterans and the dependents and the beneficiaries of veterans.”⁶¹ VA employs 291,000 people and

52. Stewart, *supra* note 12 (quoting retired Air Force Brigadier General Allison Hickey).

53. James Dao, *Veterans Wait for Benefits as Claims Pile Up*, N.Y. TIMES (Sept. 27, 2012), <http://www.nytimes.com/2012/09/28/us/veterans-wait-for-us-aid-amid-growing-backlog-of-claims.html?PageWanted=all>.

54. See Rowan Scarborough, *U.S. Troops Winning War Against IEDs of Taliban*, WASH. TIMES (May 24, 2012), <http://washingtontimes.com/news/2012/may/24/us-troops-winning-war-against-ieds-of-taliban/?page=all>.

55. William R. Levesque, *IEDs Continue to Kill and Maim U.S. Troops Despite Multibillion Dollar Effort*, TAMPA BAY TIMES (Sept. 27, 2012), <http://www.tampabay.com/news/military/war/ieds-continue-to-kill-and-maim-us-troops-despite-multibillion-dollar-effort/1253728>.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. Dao, *supra* note 53.

61. 38 U.S.C. § 301(b) (2006).

administers a budget of \$132.4 billion as it provides medical care, conducts medical research, provides compensation benefits and pensions, awards education benefits, conducts vocational and rehabilitation training, offers housing loans and insurance, conducts burial and memorial services, and administers various other programs.⁶² By 2013, VA's "major benefit programs—compensation for the disabled, pensions for the low-income[,] and educational assistance—are projected to cost about \$76 billion."⁶³ It "is the second largest agency of the Federal Government," but with its size comes both resources to solve problems and a bureaucracy that can impede movement.⁶⁴

A. Unemployment and Homelessness

Veterans' struggles with unemployment and homelessness have garnered recent national attention. Fortunately, the veterans' battles have led VA to take affirmative action to create programs to address these issues and to partner with other federal agencies in an attempt to pool resources and information so that the problems might be more effectively defined and, eventually, solved.

1. Unemployment

In 2011, Congress created the Veterans Retraining Assistance Program (VRAP).⁶⁵ Under VRAP, VA will provide twelve months of payments, at \$1,473 per month, to 45,000 program participants.⁶⁶ The program requires that participants, who must meet certain eligibility requirements, "be enrolled in a program of education approved for VA benefits that is offered by a community college or technical school"; that "program must lead to an Associate Degree, Non-College Degree, or a Certificate."⁶⁷ Significantly, the program of study must "train the Veteran for a high demand occupation."⁶⁸

62. VA 2011 PERFORMANCE AND ACCOUNTABILITY REPORT, *supra* note 10, at I-31; *see also* Dao, *supra* note 53 ("[T]he Department of Veterans Affairs has grown into a behemoth with more than 270,000 employees who maintain 131 cemeteries, operate 152 hospitals and disburse benefits to more than four million veterans.").

63. Dao, *supra* note 53.

64. *History of the VA*, U.S. DEP'T OF VETERANS AFF. (Nov. 9, 2009), http://www.va.gov/JOBS/VA_In_Depth/history.asp. The largest agency of the federal government is the Department of Defense. *See About the Department of Defense (DOD)*, U.S. DEP'T OF DEF., <http://www.defense.gov/about/> (last visited Dec. 17, 2012).

65. The Veterans Retraining Assistance Program is part of the VOW to Hire Heroes Act, Pub. L. No. 112-56, § 211, 125 Stat. 711, 713 (2011).

66. *See Veterans Retraining Assistance Program Factsheet*, U.S. DEP'T OF VETERANS AFF., http://benefits.va.gov/vow/docs/VRAP_Factsheet.pdf (last visited Oct. 21, 2012). "The program is limited to 45,000 participants" between July 1, 2012, and September 30, 2012. *Id.* (emphasis omitted). Between October 1, 2012, and March 31, 2012, 54,000 veterans may participate in the program. *Id.* The monthly full-time payment rate for the Montgomery GI Bill is \$1,473. *Id.*

67. *Id.* To be eligible to participate, a veteran must be between the ages of thirty-five and sixty, must be unemployed, must have received an other-than-dishonorable discharge, must not be eligible for any other VA

VA is not working alone to tackle the problem of veteran unemployment. Congress specified that the VRAP should be carried out by the Secretary of VA and the Secretary of Labor.⁶⁹ The VRAP was created by the VOW to Hire Heroes Act of 2011.⁷⁰ Likely recognizing the difficulty veterans face in obtaining employment, the Act amended the Internal Revenue Code to increase tax incentives for employers who hire unemployed veterans.⁷¹ It also provided for grants to be awarded to nonprofit organizations that “provide training and mentoring for eligible veterans who seek employment.”⁷²

2. Homelessness

While VA has worked to address the issue of veteran unemployment, it has made homelessness among veterans one of its major initiatives.⁷³ VA spent approximately \$799 million “in direct support of homeless Veterans” in 2011, and it estimates that it spent \$3.4 billion in health care treatment for homeless veterans.⁷⁴ VA also distributed \$59.5 million in grants “to 85 community agencies to prevent Veterans and their families from falling into homelessness.”⁷⁵

Just as it did on unemployment issues, VA worked with other federal agencies to address the issue of homelessness among veterans. VA partnered with the United States Interagency Council on Homelessness, the Department of Housing and Urban Development (HUD), the Department of Labor, the

education benefit program, must not be receiving VA compensation due to unemployability, and must not be enrolled in a federal or state job training program. *Id.* Within two weeks of being announced, VRAP had received over 12,000 online applications. Press Release, U.S. Dep’t of Veterans Affairs, New Education Benefit for Unemployed Veterans Has Strong Response (May 31, 2012), available at <http://www.va.gov/opa/pressrel/pressrelease.cfm?id=2322>. As of August 29, 2012, 52,498 applications had been received and 37,972 had been approved. *VOW to Hire Heroes Act 2011*, U.S. DEP’T OF VETERANS AFF., <http://benefits.va.gov/vow/education.htm> (last visited Dec. 17, 2012).

68. *VOW to Hire Heroes Act*, *supra* note 67. The Department of Labor has published a list of High Demand Occupations. See *High Demand Occupations*, U.S. DEP’T OF VETERAN AFF., http://benefits.va.gov/vow/docs/VRAP_High_Demand.pdf (last visited Oct. 21, 2012). That list includes the following: Computer Support Specialists, Chemical Technicians, Umpires, Forest and Conservation Technicians, Electricians, Real Estate Sales Agents, Airline Pilots, Tire Repairers, and Actors. *Id.*

69. VOW to Hire Heroes Act, Pub. L. No. 112-56, § 211(h)(1), 125 Stat. 711, 714 (2011).

70. *Id.*

71. *Id.* § 261; see also Press Release, Office of the Press Secretary, Fact Sheet: Returning Heroes and Wounded Warrior Tax Credits (Nov. 21, 2011) (“The Returning Heroes Tax Credit provides businesses that hire unemployed veterans with a maximum credit of \$5,600 per veteran . . .” (emphasis omitted)), available at <http://www.whitehouse.gov/the-press-office/2011/11/21/fact-sheet-returning-heroes-and-wounded-warrior-tax-credits>.

72. VOW to Hire Heroes Act § 234.

73. VA 2011 PERFORMANCE AND ACCOUNTABILITY REPORT, *supra* note 10, at I-68.

74. *Id.* “Direct support” is not defined. *Id.*

75. *Id.* On July 17, 2012, VA announced that it would award “nearly \$100 million more in grants to continue the fight as part of the goal to end [veteran homelessness] by 2015.” Esther Carey, *VA Redoubles Effort to Combat Homelessness*, FEDERALNEWSRADIO.COM (JULY 17, 2012, 2:44 PM), <http://www.federalnewsradio.com/index.php?nid=851&sid=2946857>.

Department of Education, and the Department of Health and Human Services.⁷⁶ As a result of the partnership with HUD, VA had 25,659 veterans actively housed as of August 31, 2011.⁷⁷ And VA planned to add permanent and transitional housing units for homeless Veterans and those at risk for homelessness through public-private arrangements that utilized VA's enhanced-use leasing authority and underutilized real property.⁷⁸

The VA-HUD partnership in particular has garnered significant attention. "The two departments administer the HUD-VA Supportive Housing Program (HUD-VASH), which combines HUD vouchers that provide assistance for veterans to rent privately-owned housing, and targeted VA case management services such as health care, mental health and substance abuse treatment, vocational assistance, job development and placement."⁷⁹ Possibly as a result of this initiative, statistics compiled by HUD and VA indicate that, between 2010 and 2011, "veteran homelessness dropped by 12 percent."⁸⁰

B. The Claims Process

While unemployment and housing programs assist many veterans, compensation benefits for veterans' mental and physical disabilities "are the most important benefits paid by the VA."⁸¹ A veteran is generally entitled to disability compensation if "(1) they were discharged or released under conditions other than dishonorable, (2) their disease or injury was incurred or aggravated in the line of duty, and (3) the disability is not a result of their own willful misconduct or abuse of alcohol or drugs."⁸²

The path to receiving such benefits, however, is often a long and winding road despite the fact that VA's claims adjudication system is paternalistic—that is, it is designed to be nonadversarial.⁸³ The paternalism is evident when one

76. VA 2011 PERFORMANCE AND ACCOUNTABILITY REPORT, *supra* note 10, at I-68.

77. *Id.* The veterans were housed through the HUD-VASH Program. *Id.*

78. *Id.*

79. *2012-Finalist—Citizen Services Medal: Susan Angell, Mark Johnston and the Homeless Veterans Initiative Team*, SAMUEL L. HEYMAN SERV. TO AM. MEDALS, <http://servicetoamericamedals.org/SAM/finalists/csm/angell-johnston.shtml> (last visited Dec. 17, 2012) [hereinafter *2012-Finalist*]. The program has grown significantly in recent years. *Id.* In 2008, the HUD-VASH program offered 1,800 vouchers; as of 2012, the "program is in the process of distributing 48,000 vouchers, with 10,000 more on the verge of approval in Congress." Ted Trautman, *Heyman Medal Finalists at HUD and VA Are Getting Veterans off the Streets*, WASH. POST (July 25, 2012), http://www.washingtonpost.com/local/trafficandcommuting/heyman-medal-finalists-at-hud-and-va-are-getting-veterans-off-the-streets/2012/07/25/gJQA98R69W_print.html.

80. Trautman, *supra* note 79. "The two federal departments reported a 12 percent drop in homelessness among veterans, from about 76,000 in 2010 to 67,000, as of January 2011." *2012-Finalist*, *supra* note 79.

81. VETERANS BENEFITS MANUAL 60 (Barton F. Stichman & Ronald B. Abrams eds., 2011).

82. *Id.* at 53; *accord* 38 U.S.C. § 1131 (2006). Disability compensation benefits are paid to veterans monthly and range between \$123 and \$2,673 for a single veteran without dependents. VETERANS BENEFITS MANUAL, *supra* note 81, at 53 (citing 38 U.S.C. § 1114 (2011)). These figures are accurate as of December 1, 2009. *Id.*

83. See *Collaro v. West*, 136 F.3d 1304, 1309 (Fed. Cir. 1998).

considers the many opportunities a claimant is given to submit evidence, the length of time he is given to file a Notice of Disagreement (NOD), the never-ending possibilities to submit new and material evidence, the opportunity to present hearsay evidence at a hearing before a member of the Board, and the fact that there is no deadline to file a motion for reconsideration of a Board decision (which effectively means that a final Board decision denying a claim is never really final).⁸⁴

Regardless, the complexity of VA's claims adjudication system is often overwhelming to a claimant. Indeed, the United States Court of Appeals for the Federal Circuit (Federal Circuit) has "referred to the process veterans face as the 'labyrinthine corridors of the veterans' adjudicatory system.'"⁸⁵ The Federal Circuit has also commented that veterans face a "seemingly interminable struggle to obtain disability benefits" and cautioned that VA's "disability compensation system is not meant to be a trap for the unwary, or a stratagem to deny compensation to a veteran who has a valid claim, but who may be unaware of the various forms of compensation available to him."⁸⁶

VA's claims adjudication system may have reached this cautionary worthy state because VA is a large federal government agency and, by its very nature, a bureaucracy. The bureaucratic nature of VA shines through initially when one examines the many steps involved in the claims adjudication process, which can be confusing, overwhelming, and intimidating to veterans.⁸⁷

The bureaucracy is also apparent when one considers the number of claims VA reviews at each step of the process and the resulting delays along the way. At the Regional Office (RO) level, in 2011, VA ROs decided 215,119 initial disability claims.⁸⁸ Each of those claims took an average of 219 days for an RO to decide.⁸⁹ In that same year, VA decided 464,259 reopened compensation

84. *Id.*

85. Michael P. Allen, *The Law of Veterans' Benefits 2008-2010: Significant Developments, Trends, and a Glimpse into the Future*, 3 VETERANS L. REV. 1, 50 (2011) [hereinafter Allen, *Law of Veterans' Benefits 2008-2010*] (quoting *Comer v. Peake*, 552 F.3d 1362, 1369 (Fed. Cir. 2009)).

86. *Id.* at 50, 51 (first alteration in original) (quoting *Comer*, 552 F.3d at 1369).

87. In his article *Due Process and the American Veteran: What the Constitution Can Tell Us About the Veterans' Benefits System*, Michael P. Allen noted that "[t]he great majority of troops involved in [the recent conflict in Iraq] were young men and women with relatively little formal education." Michael P. Allen, *Due Process and the American Veteran: What the Constitution Can Tell Us About the Veterans' Benefits System*, 80 U. CIN. L. REV. 501, 530 (2011). Allen remarked that, the U.S. District Court for the Northern District of California found in *Veterans for Common Sense*, that "82% of Army personnel and 89% of Marines had a high school education or less." *Id.* at 530 n.194. The U.S. district court judge there stated, "[M]any of these soldiers, once they separate and become veterans, may have difficulty navigating complex benefit application procedures unless they are provided with substantial assistance." *Veterans for Common Sense v. Peake*, 563 F. Supp. 2d 1049, 1070 (N.D. Cal. 2008), *aff'd in part, rev'd in part sub nom. Veterans for Common Sense v. Shinseki*, 678 F.3d 1013 (9th Cir. 2012).

88. VA 2011 PERFORMANCE AND ACCOUNTABILITY REPORT, *supra* note 10, at II-125.

89. *Id.* In 2009, VA had 11,000 claims rating decisions that exceeded 365 processing days at the ROs; an internal audit found that 90% of these 11,000 claims had been "unnecessarily delayed an average of 187 days because of inadequate workload management" by VA. *Id.* at II-157.

claims, which each took an average of 214 days to decide.⁹⁰ This is far off VA's "strategic goal of averaging 125 days to complete rating claims."⁹¹

The delay does not end at the receipt of an initial decision. Once a claimant receives a rating decision and files a NOD to that rating decision, the claimant waits an average of 257 days to receive a Statement of the Case from the RO.⁹² If the claimant then files a substantive appeal to the Board, an average of 585 days elapses before the appeal was certified to the Board.⁹³

Claimants endure another lengthy delay once their claims are at the Board. In fiscal year 2011, 38,606 substantive appeals were filed, and 47,763 appeals were physically received and docketed at the Board.⁹⁴ From the time the certified appeal was received at the Board until the Board issued its decision, an average of 240 days elapsed.⁹⁵ If the Board remanded a matter, it spent an average of 427 days at the RO on remand.⁹⁶

Processing delays have many probable culprits. First, despite the fact that VA has increased its manpower in the past decade, there are still insufficient employees to handle the growing caseload.⁹⁷ Moreover, sources cite inadequate training, poor management, a complicated system that requires a significant amount of experience before workers become productive, and production quotas, all of which lead workers to set aside complicated cases in favor of simpler ones.⁹⁸ In addition, overworked VA medical workers must make quick determinations as to whether disabilities originated in service—findings that necessarily involve speculation.⁹⁹ And there remains the fundamental conflict: VA workers must not only advocate for veterans but also "be stewards of the

90. *Id.* at II-125.

91. *Id.* at II-157.

92. BOARD OF VETERANS' APPEALS, REPORT OF THE CHAIRMAN, FISCAL YEAR 2011, at 18 (Feb. 1, 2011). In fiscal year 2010, claimants filed 150,475 NODs, while they filed 122,663 NODs in fiscal year 2011. *Id.* at 20.

93. *Id.* at 20. After the appeal is certified to the Board, the claimant may participate in a hearing before a member of the Board. *Id.* at 9. The Board conducted 14,727 hearings in fiscal year 2011. *Id.* at 24.

94. *Id.* at 15. In fiscal year 2010, 57,925 appeals were filed, and 52,526 appeals were docketed at the Board. *Id.* at 16.

95. *Id.* at 18. In fiscal year 2011, there were 94 acting members of the Board; each veterans law judge decided an average of 784 appeals.

96. *Id.* In fiscal year 2011, in deciding appeals of compensation claims, the Board allowed benefits in 29% of the appeals, denied benefits in 23.3% of the appeals, and remanded the matter in 44.6% of the appeals. *Id.* at 21.

97. Dao, *supra* note 53 ("[T]he Veterans Benefits Administration, the division that oversees entitlement programs, has grown significantly in the past decade, to 20,600 employees from 12,150, it still often assigns mandatory overtime to meet workload demands.").

98. *Id.*

99. *Id.* As James Dao of the New York Times puts it, "Medical questions without simple answers must be settled by harried bureaucrats and overworked doctors applying black-and-white rules to very gray ailments. Their decisions mean the difference between monthly checks of a few hundred dollars versus a few thousand." *Id.*

public dime, called on to distinguish between the truly needy from the less needy from the fraudulent.”¹⁰⁰

It would be reasonable to assume that, in light of the time it takes to make each of these decisions, VA would consistently make accurate decisions.¹⁰¹ This is not necessarily the case. During one five-year period, the Veterans Benefits Administration’s “national accuracy rates for rating claims decisions remained the same or declined every year[,] going from 88.6 percent in [fiscal year] 2006 to 83.8 percent in [fiscal year] 2010.”¹⁰²

In addition to problems with the accuracy—or inaccuracy—of rating decisions, VA faces serious problems concerning its methods for handling claims files and mail. A veteran’s claims file contains service records, medical records, and other “personally identifiable information.”¹⁰³ In 2009, of the 4.2 million claims folders that should have been in ROs, “approximately 296,000 . . . were in locations that were different from that shown in” an electronic tracking system.¹⁰⁴ And “approximately 141,000 claims folders were lost.”¹⁰⁵ Lost claims folders frustrate a claimant’s ability to establish his entitlement to benefits, pose a risk for identity theft, and delay an already slow adjudication system; the problem of lost or misfiled claims folders presents a serious impediment to efficient adjudication.¹⁰⁶

Furthermore, VA has a documented problem with its processing of mail. At every step of the claims adjudication process, a claimant must communicate with VA in writing. This generally means that claims, NODs, substantive appeals, and other time-sensitive documents are mailed to VA. In 2009, VA inspected sixteen ROs and found that claims-related mail was mishandled at 63% of the ROs.¹⁰⁷ VA reported that the personnel “responsible for reviewing,

100. *Id.*

101. VA 2011 PERFORMANCE AND ACCOUNTABILITY REPORT, *supra* note 10, at II-130 (showing that the average number of days accrued between the filing of an NOD and the final decision by the Board is 747 days).

102. *Id.* at II-156. VA Secretary Eric Shinseki has stated that the Department has a “transformation plan” . . . that . . . will improve speed and accuracy in processing claims; creation of special teams to handle complex claims; and new digital technology that will replace the current paper-choked system.

When all of those pieces are in place by 2015, Mr. Shinseki says that every claim will be processed in fewer than 125 days, with almost no errors

Dao, *supra* note 53.

103. VA 2011 PERFORMANCE AND ACCOUNTABILITY REPORT, *supra* note 10, at II-158.

104. *Id.*

105. *Id.*

106. See SCHRAM, *supra* note 8, at 71-72 (“Veterans who have had dealings with [VA] know that there will be delays and lost files, then more delays and more lost files. To the veterans it begins to seem as though the bureaucrats are dancing the VA Two-Step. To the younger veterans it is infuriating. To the older veterans, it is often far more desperate as they fight to outlive their VA appeals.”).

107. VA 2011 PERFORMANCE AND ACCOUNTABILITY REPORT, *supra* note 10, at II-158. James Dao of the New York Times reports that “a 2009 review by the department’s inspector general found rampant cases of mishandled mail, including documents being improperly put in shred bins at 40 of the department’s 57 regional offices.” Dao, *supra* note 53.

controlling, and processing or routing all incoming mail received from the [RO] mailroom . . . did not timely record receipt and process 21 percent of the incoming mail.”¹⁰⁸ Additionally, mail staff did not use the electronic tracking system to track the location of 24% of the claims-related mail.¹⁰⁹ In one particularly egregious RO, there were “1,462 pieces of mail waiting to be associated with Veterans’ claims folders.”¹¹⁰ For a claims adjudication process that deals with veterans who may not be represented by attorneys during the initial steps of the adjudication process—and relies on the submission of written materials, postmarked NODs, and other mailed materials—these omissions are a significant delay and may be fatal to a claimant’s initial application or appeal.¹¹¹

IV. THE VETERANS’ JUDICIAL REVIEW ACT: BENEFITS AND SHORTCOMINGS

Veterans’ growing discontent with the VA claims processing system caught the attention of Congress and veterans service organizations decades ago,¹¹² as did the fact that Board decisions could not be appealed outside VA.¹¹³ But the status quo persisted until a crush of post-Vietnam claims in the 1970s and ’80s turned the spotlight on a process in need of reform.¹¹⁴ Individual veterans and several veterans’ advocacy groups increasingly pressed for some sort of judicial review.¹¹⁵ The result of veterans’ fights at home and abroad was the creation of the Veterans’ Judicial Review Act of 1988.¹¹⁶

108. VA 2011 PERFORMANCE AND ACCOUNTABILITY REPORT, *supra* note 10, at II-158.

109. *Id.*

110. *Id.*

111. *See* discussion *infra* Part IV.C.

112. *See* Chief Justice William Rehnquist, Remarks to the Sixth Judicial Conference of the U.S. Court of Appeals for Veterans Claims, in 15 Vet. App. LI, LII (2000) (“Legislation subjecting [Board] benefits decisions to judicial review was considered by Congress as early as 1952 . . .”).

113. 38 U.S.C. § 211 (1970); *see also* Act of Aug. 12, 1970, Pub. L. No. 91-376, § 8(a), 84 Stat. 787, 790. Congress amended § 211 to preclude review of any decision of the Administrator “on any question of law or fact under any law administered by the Veterans’ Administration.” Act of Aug. 12, 1970, Pub. L. No. 91-376, § 8(a), 84 Stat. 787, 790. Congress enacted this amendment subsequent to several decisions by the U.S. Court of Appeals for the District of Columbia Circuit that held that the term “claim,” as used in a previous version of § 211(a), related only to an initial claim for veterans benefits and did not preclude review of challenges to VA decisions to discontinue benefits. *See Tracy v. Gleason*, 379 F.2d 469, 470 (D.C. Cir. 1967); *Wellman v. Whittier*, 259 F.2d 163, 168 (D.C. Cir. 1953).

114. *See* SCHRAM, *supra* note 8, at 183-94 (discussing veterans’ efforts to have VA recognize their claims for health benefits related to exposure to Agent Orange).

115. Rehnquist, *supra* note 112, at LI, LII.

Pressure for judicial review of veterans’ claims became stronger during the 1970s, as returning Vietnam veterans discovered that the existing system of Veterans’ Administration procedures would not address their needs and concerns. While many Vietnam era veterans had joined the mainstream veterans’ organizations, these groups were not likely to raise opposition to the Veteran’s Administration’s non-adversarial claim system by pressing the complex claims of Vietnam veterans. More and more Vietnam veterans began to break away from the traditional

The Veterans' Judicial Review Act accomplished several functions to assist veterans. First, it eliminated a long-standing cap on fees that could be paid to attorneys in veterans' cases, instead permitting attorneys to be paid for their representation of veterans at certain phases of the adjudication.¹¹⁷ It also created a court for judicial review of VA decisions where none had previously existed—the U.S. Court of Appeals for Veterans Claims—and established that the Federal Circuit would review certain decisions of that newly created court.¹¹⁸

A. Attorney Representation and Payment

The Veterans' Judicial Review Act removed a disincentive to attorneys to represent veterans as they navigate some murky waters in the claims process. Prior to the passage of the Act, and since 1864, Congress had “prohibited attorneys from charging more than \$10 for prosecuting a claim for VA benefits.”¹¹⁹ This \$10 limitation was “backed by a criminal penalty of a maximum of two years' imprisonment ‘at hard labor,’ developed long ago into an economic barrier preventing members of the private bar from serving as veterans' representatives.”¹²⁰ The Act struck out this penalty for a violation and instead inserted a provision that violators “shall be fined as provided in title 18, or imprisoned not more than one year, or both.”¹²¹

Now, under a valid fee agreement, “the total fee payable to the . . . attorney may not exceed 20 percent of the total amount of any past-due benefits awarded on the basis of the claim” and could be paid to the attorney directly from any past-due benefits awarded.¹²²

Attorneys could enter into those fee agreements and represent claimants in certain—but not all—proceedings before VA.¹²³ The legislation specified that an attorney could not represent a claimant “before the date on which the Board . . . first makes a final decision in the case” and then “only if an agent or

veterans organizations to form their own groups. These groups then began to lobby Congress to address the concerns of the Vietnam era veterans.

IHOR GAWDIK ET AL., *VETERANS BENEFITS AND JUDICIAL REVIEW: HISTORICAL ANTECEDENTS AND THE DEVELOPMENT OF THE AMERICAN SYSTEM* 68 (1992) (footnote omitted); *see also* Ridgway, *supra* note 51, at 215-16 (discussing the role of Vietnam Veterans of America in the establishment of judicial review).

116. Veterans' Judicial Review Act of 1988 (VJRA), Pub. L. No. 100-687, 102 Stat. 4105 (codified as amended at 38 U.S.C.).

117. *Id.*

118. *Id.* The Court was originally named the United States Court of Veterans Appeals. *Id.* The Court was renamed in 1998. *See* 38 U.S.C. § 7251 (1998). For convenience, this Article will only use the later name—U.S. Court of Appeals for Veterans Claims.

119. Barton F. Stichman, *The Veterans' Judicial Review Act of 1988: Congress Introduces Courts and Attorneys to Veterans' Benefits Proceedings*, 41 ADMIN. L. REV. 365, 366 (1989).

120. *Id.* at 367 (footnote omitted).

121. VJRA § 104(b) (codified as amended at 38 U.S.C. § 5905 (2006)).

122. § 104(a).

123. *Id.*

attorney is retained with respect to such case before the end of the one-year period beginning on that date.”¹²⁴ This limitation did not apply to “services provided with respect to proceedings before a court.”¹²⁵

However, despite the passage of legislation permitting attorneys to be paid to represent veterans before the court, the number of pro se appellants was very high in the early years of the court and remains significant today. In 1995, 80% of appellants were unrepresented at the time they filed their appeals at the court; that number dropped to 54% at the time their cases were closed subsequent to decision by the court.¹²⁶ By 2002, those numbers had decreased to 58% unrepresented at filing and 29% unrepresented at closing.¹²⁷ Those numbers have remained fairly consistent, with 2011 statistics indicating 54% of appeals filed by pro se appellants and 24% of appellants unrepresented at closing.¹²⁸ Because appeals filed by pro se appellants present a significant amount of work for the court’s judges—more so than an appeal filed by a represented appellant—further delay in claims processing may occur.¹²⁹

B. *The United States Court of Appeals for Veterans Claims*

“There is hereby established, under Article I of the Constitution of the United States, a court of record”¹³⁰ Thus begins the legislation that created what is now called the U.S. Court of Appeals for Veterans Claims—the court that would “have exclusive jurisdiction to review decisions of the Board

124. *Id.* The limitations on attorney practice before VA were changed slightly in 2006. *See* Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, § 101, 120 Stat. 3403, 3405-06. The 2006 amendment changed the language of the statute from “date on which the Board . . . first makes a final decision in the case” to “date on which a notice of disagreement is filed with respect to” the case. § 101(c)(1)(A). The 2006 amendment also struck out the restriction stating that a fee would only be allowed when an attorney was retained with respect to the case before the end of the one-year period beginning on the date the Board first made a final decision in the case. *Id.* The 2006 amended version was effective for notices of disagreement filed after June 19, 2007. *See* § 101(h); 38 C.F.R. § 14.636 (2012).

125. VJRA § 104(a).

126. U.S. COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORT, FISCAL YEAR 1995 (1996) [hereinafter 1995 ANNUAL REPORT].

127. U.S. COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORT, FISCAL YEAR 2002 (2007) [hereinafter 2007 ANNUAL REPORT], available at http://www.uscourts.cavc.gov/documents/Annual_Reports_2007.pdf.

128. ANNUAL REPORT: U.S. COURT OF APPEALS FOR VETERANS CLAIMS—OCTOBER 1, 2010 TO SEPTEMBER 30, 2011 (FISCAL YEAR 2011), at 1 (2012) [hereinafter 2011 ANNUAL REPORT], available at http://www.uscourts.cavc.gov/documents/FY_2011_Annual_Report_FINAL_Feb_29_2012_1PM_.pdf.

129. Interview with Judge Ron Holdaway, retired Judge of the U.S. Court of Appeals for Veterans Claims (Oct. 3, 2005). According to former Judge Ron Holdaway, “I think, in a way the pro se people had a little bit of an advantage because you [the judges] had to do their work, the work that their lawyers or counsel would have done. You had to do it for them, because you can’t just rely on the Secretary [to accurately and completely represent the appellant’s arguments].” *Id.* at 14-15. Rather, said Judge Holdaway, “[Y]ou have got to make sure that the case is balanced, so I think there is a lot more for a judge to do in a pro se case.” *Id.* at 15.

130. VJRA § 4051.

of Veterans' Appeals."¹³¹ Congress specified that VA could not seek review of Board decisions, allowing only applicants for benefits to seek review of Board decisions in the court.¹³²

The legislation further stated that the court could "decide all relevant questions of law, interpret constitutional, statutory, and regulatory provisions, . . . compel action of the Administrator unlawfully withheld, [and] hold unlawful and set aside" findings of material fact that it found to be "clearly erroneous."¹³³ However, in keeping with the appellate nature of the court it had created, Congress limited the court's review to the evidence that was before the Board when it made its decision.¹³⁴ The court may not gather or receive new evidence.¹³⁵

Although the veterans' court provides the important benefit of judicial review and oversight of VA decision making, this review necessarily adds even more time to the already lengthy adjudication process that veterans endure. When the court began operation on October 16, 1989, it began with three sitting judges; by August 1990, it had four more judges.¹³⁶ In 1996, when statistics for the length of time that elapsed between filing and disposition were first available, an average of 393 days elapsed between filing and disposition of an appeal.¹³⁷ In 2008, that number had climbed to 446 days.¹³⁸ In 2011, that number was again down to 328 days.¹³⁹ In a departure from the standard operating procedure for other appellate courts that hear all cases by a panel of judges, Congress left it to the court to determine when it would decide a case by a single judge sitting alone and when it would decide a case by a panel of three or more judges.¹⁴⁰ Congress's stated reason for this allowance was that decisions should "be made as quickly as practicable."¹⁴¹

131. § 4052(a). Congress gave the court had the power to "affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate." *Id.*

132. *Id.*

133. § 4061(a).

134. *Id.*

135. Stichman, *supra* note 119, at 376; *see also* Veterans' Judicial Review Act of 1988 (VJRA), Pub. L. No. 100-687, § 4064, 102 Stat. 4105, 4113 (establishing the rules of practice and procedure for the court).

136. These numbers represent calendar-year totals. *See* U.S. COURT OF APPEALS FOR VETERANS CLAIMS, CASEFLOW REPORT (1993); U.S. COURT OF APPEALS FOR VETERANS CLAIMS, CASEFLOW REPORT (1994).

137. 1995 ANNUAL REPORT, *supra* note 126.

138. U.S. COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORTS, FISCAL YEAR 2008, *available at* http://www.uscourts.cavc.gov/documents/Annual_Reports_2007.pdf.

139. 2011 ANNUAL REPORT, *supra* note 128, at 3. The 2011 ANNUAL REPORT provides additional information regarding median time from filing an appeal to disposition that was not available in earlier reports. *See id.* The 328 days represents the median time for the court as a whole. *Id.* For appeals decided by a single judge, 79 days elapse once a case has been assigned to chambers; 584 days elapse in total, including pre-chambers procedural activity. *Id.* For appeals decided by a panel of judges, 148 days elapse once a case has been assigned to a panel; 763 days elapse in total, including pre-chambers procedural activity. *Id.*

140. VJRA § 4067. The Court set forth criteria for when an appeal could be reviewed by a single judge, as opposed to a panel of three judges, in *Frankel v. Derwinski*, 1 Vet. App. 23, 25-26 (1990).

141. § 4067.

Thus, one of the efficiency-related decisions the court made early on was to resolve a majority of appeals through single-judge decisions rather than panel decisions.¹⁴² This is not to say that the court shies away from issuing decisions from a panel of three judges or by a full-court panel when novel issues arise,¹⁴³ although cases decided by a full court panel generally add additional processing time, such cases help develop the law so that other cases may be processed consistently and expeditiously. In any view of the matter, the court's caseload makes the court "one of the busiest federal appellate courts."¹⁴⁴

C. *United States Court of Appeals for the Federal Circuit Review*

Congress also established that the Federal Circuit would have exclusive jurisdiction to hear appeals from decisions of the newly created court, but only "of the decision with respect to the validity of any statute or regulation . . . or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the Court in making the decision."¹⁴⁵ While only the person

142. The Court set forth criteria for when an appeal could be reviewed by a single judge, as opposed to a panel of three judges, in *Frankel*, 1 Vet. App. at 25-26. A typical appeal that can be handled by a single judge is one in which the appellant argues that the Board has committed one of several common errors. For example, the appellant may argue that the Board provided an inadequate statement of the reasons or bases for its decision, see 38 U.S.C. § 7104(d)(1) (1996), failed to ensure that VA provided an adequate medical examination, see 38 U.S.C. § 5103A(d) (2000), failed to obtain relevant medical records that the appellant adequately identified, see 38 U.S.C. § 5103A(a), or failed to consider the claimant's application for benefits broadly (to include the specified symptoms rather than just the named disability), see *Clemons v. Shinseki*, 23 Vet. App. 1, 5 (2009), which held that the scope of a claim is generally defined by the symptoms for which a veteran is seeking compensation.

143. In fiscal year 2011, of the cases that were disposed of by judges, 2,661 cases were decided by a single judge, 149 were decided by a panel of three judges of the court, and 10 were decided by the en banc court. 2011 ANNUAL REPORT, *supra* note 128, at 1-2. The court disposed of a total of 7,562 cases in 2011. *Id.* at 1.

144. Michael P. Allen, *The United States Court of Appeals for Veterans Claims at Twenty: A Proposal for a Legislative Commission to Consider Its Future*, 58 CATH. U. L. REV. 361, 371 (2009) (quoting H.R. REP. NO. 110-789, at 18 (2008)) (internal quotation marks omitted). By way of comparison, the federal circuit courts with the highest termination numbers for calendar year 2010 were the Ninth Circuit with 13,471 terminations, the Fifth Circuit with 7,529 terminations, and the Eleventh Circuit with 6,362 terminations. U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT, THE JUDICIAL BUSINESS OF THE UNITED STATES COURTS OF THE SEVENTH CIRCUIT tbl. 3 (2010) [hereinafter JUDICIAL BUSINESS OF THE SEVENTH CIRCUIT], available at http://www.ca7.uscourts.gov/rpt/2010_report.pdf. The U.S. Court of Appeals for Veterans Claims would rank second on that list, with 7,562 terminations. 2011 ANNUAL REPORT, *supra* note 128. In terms of written opinions, the veterans court issued a total of 2,820 decisions by single judges, panels, and the en banc court in fiscal year 2011. *Id.* By way of comparison, the federal circuit courts with the highest numbers of written decisions in calendar year 2010 were the Ninth Circuit with 6,571, the Fifth Circuit with 3,786, the Second Circuit with 3,170, and the Eleventh Circuit with 3,092. JUDICIAL BUSINESS OF THE SEVENTH CIRCUIT, *supra*, at tbl. 1.

145. VJRA § 4092(a) (codified as 38 U.S.C. § 7292 (2006)).

seeking benefits may appeal the Board decision to the court, either that party or VA may appeal the court's decision to the Federal Circuit.¹⁴⁶

However, Federal Circuit review has, in and of itself, caused further problems for veterans. First, the Federal Circuit's jurisdiction is limited. The Federal Circuit is empowered to review decisions of the U.S. Court of Appeals for Veterans Claims "with respect to the validity of any statute or regulation . . . or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the Court in making the decision."¹⁴⁷ As the Federal Circuit regularly explains in its decisions resolving appeals from the court, its "authority . . . does not extend to the ability to review factual determinations or the application of a law or regulation to a particular set of facts unless a constitutional issue is presented."¹⁴⁸ Because the process of pursuing a claim and then an appeal "has grown more complex [and] the courts have shielded claimants from the need to understand the process," appellants often do not understand this distinction.¹⁴⁹ The Federal Circuit routinely dismisses veterans' appeals for lack of jurisdiction.¹⁵⁰

Next, despite the frequency with which the Federal Circuit dismisses appeals originating at the court, this added layer of appellate review adds time to the resolution of the claimant's appeal. In fiscal year 2011, the median time between docketing of a case at the Federal Circuit and disposition date was six months.¹⁵¹ This represents an improvement over the 12.9 months required from docketing to disposition in fiscal year 2002.¹⁵²

This time requirement may, in part, be because "[v]eterans-benefits cases . . . often involve terms of art and an alphabet soup of acronyms that can be difficult for an outsider to navigate."¹⁵³ Of significance is that "no sitting

146. *Id.* ("[A]ny party to the case may obtain a review of the decision with respect to the validity of any statute or regulation . . . or any interpretation thereof . . . that was relied on by the Court in making the decision.").

147. *Id.*

148. *See, e.g.,* *Morris v. Shinseki*, 678 F.3d 1346, 1351 (2012) (citing 38 U.S.C. § 7292(d)(2) (2006)); *see also* Allen, *Law of Veterans' Benefits 2008-2010*, *supra* note 85, at 55 nn.325 & 326 (citing numerous cases that have grappled with the issue of the court's jurisdiction); Michael P. Allen, *Significant Developments in Veterans Law (2004-2006) and What They Reveal About the U.S. Court of Appeals for Veterans Claims and the U.S. Court of Appeals for the Federal Circuit*, 40 U. MICH. J.L. REFORM 483, 490 n.48 (2007) (citing Appendix B at 1-3).

149. James D. Ridgway, *The Veterans' Judicial Review Act Twenty Years Later: Confronting the New Complexities of the Veterans Benefits System*, 66 N.Y.U. ANN. SURV. AM. L. 251, 253 (2010).

150. *See, e.g.,* *Trost v. Shinseki*, No. 2011-7192 (Fed Cir. Aug. 10, 2012) ("Trost's appeal merely challenges the Board's findings or application of law to the facts, affirmed by the Veterans Court 'The evaluation and weight of evidence and the drawing of appropriate inferences from it are factual determinations,' and this court 'lack[s] jurisdiction to review these determinations.[']" (second alteration in original) (quoting *Bastien v. Shinseki*, 599 F.3d 1301, 1306 (Fed. Cir. 2010)).

151. U.S. Court of Appeals for the Fed. Circuit, *Statistics: Median Time to Disposition of Cases Terminated After Hearing or Submission*, U.S. CT. APPEALS FOR FED. CIRCUIT (Feb. 2011), http://www.cafc.uscourts.gov/images/stories/the-court/statistics/Median_Disposition_Time_table_02-11.pdf.

152. *Id.*

153. Paul R. Gugliuzza, *Rethinking Federal Circuit Jurisdiction*, 100 GEO. L.J. 1437, 1467 (2012).

judge [at the Federal Circuit] has any discernable experience in [the area of veterans cases].”¹⁵⁴ The quantity of veterans cases filed at the Federal Circuit, however, demands that the judges there quickly become familiar with the unique facets of veterans’ appeals.¹⁵⁵

D. United States Supreme Court Review

The Act’s creation of judicial review had the effect of allowing Federal Circuit decisions to be appealed even further. Consequently, occasionally, veterans must continue to fight their battles all the way to the United States Supreme Court.¹⁵⁶ Since the veterans court’s creation, the Supreme Court has issued decisions in four cases that originated at the court.

I. Brown v. Gardner

In the first, *Brown v. Gardner*, veteran Fred P. Gardner received surgical treatment at a VA medical facility for a herniated disc.¹⁵⁷ Mr. Gardner “then had pain and weakness in his left calf, ankle, and foot, which he alleged was the result of the surgery.”¹⁵⁸ Mr. Gardner filed a claim for disability benefits under statute 38 U.S.C. § 1151, which at the time stated that VA would compensate for “an injury or an aggravation of an injury” that occurred “as a result of hospitalization, medical or surgical treatment . . . so long as the injury was ‘not the result of such veteran’s own willful misconduct.’”¹⁵⁹

VA and the Board denied Mr. Gardner’s claim for benefits.¹⁶⁰ They reasoned that although the statute did not specify that VA must be at fault in causing an injury, the regulation that interpreted the statute, 38 C.F.R. § 3.358(c)(3) (1993), “only covers an injury if it ‘proximately resulted [from] carelessness, negligence, lack of proper skill, error in judgment, or similar instances of indicated fault’ on the part of the VA, or from the occurrence during the treatment . . . of an ‘accident,’ defined as an ‘unforeseen, untoward’ event.”¹⁶¹

154. *Id.* at 1475. Gugliuzza made this statement with regard to the judges’ experience in the areas of both veterans and personnel cases. *Id.*

155. *Id.*

156. *See, e.g.,* *Brown v. Gardner*, 513 U.S. 115, 115 (1994).

157. *Id.* at 116.

158. *Id.*

159. *Id.* (quoting 38 U.S.C. § 1151 (1988 ed., Supp. V)). Amendments passed in 1996 struck this language from the statute. *See* Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, Pub. L. No. 104-204, § 422(a), 110 Stat. 2879, 2920-27 (1996) (codified as amended at 38 U.S.C. § 1151).

160. *Brown*, 513 U.S. at 116-17.

161. *Id.* at 117 (first alteration in original) (quoting 38 C.F.R. § 358(c)(3) (1993)).

The U.S. Court of Appeals for Veterans Claims reversed the decision of the Board, “holding that [the statute] neither imposes nor authorizes adoption of the fault-or-accident requirement set out in [the regulation],” and the Federal Circuit affirmed the decision of the veterans court.¹⁶² The Secretary of VA, Jesse Brown, appealed the decision to the Supreme Court.¹⁶³

The Court faced the question of whether a VA regulation “requiring a claimant for certain veterans’ benefits to prove that disability resulted from negligent treatment by the VA or an accident occurring during treatment, is consistent with the controlling statute.”¹⁶⁴ Justice Souter, writing for the Court, held that the regulation was not consistent with the controlling statute and affirmed the decision of the Federal Circuit.¹⁶⁵ Despite arguments by VA that the Court should read into the statute a requirement that VA be at fault in causing injury or aggravation to an injury, the Court rejected these arguments, stating, “Without some mention of the VA’s fault, it would be unreasonable to read the text of § 1151 as imposing a burden of demonstrating it upon seeking compensation for a further disability.”¹⁶⁶

At the end of the opinion, Justice Souter “dispose[d] of the Government’s argument that the VA’s regulatory interpretation of [the statute] deserves judicial deference due to its undisturbed endurance for 60 years.”¹⁶⁷ Noting that a “regulation’s age is no antidote to clear inconsistency with a statute,” the Court further explained that “where consistent application and age can enhance the force of administrative interpretation, the Government’s position would suffer from the further factual embarrassment that Congress established no judicial review for VA decisions until 1988.”¹⁶⁸

2. Scarborough v. Principi

In 2004, the Supreme Court decided *Scarborough v. Principi*, which involved the statutory requirements for an award of attorney’s fees.¹⁶⁹ Mr. Scarborough had been a prevailing party in an action against VA for disability

162. *Id.*

163. *See id.*

164. *Id.* at 116.

165. *Id.* at 116-17.

166. *Id.* at 117-20. The Court concluded its analysis as follows: “In sum, the text and reasonable inferences from it give a clear answer against the Government, and that, as we have said, is ‘the end of the matter.’” *Id.* at 120 (quoting *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 409 (1993)) (internal quotation marks omitted).

167. *Id.* at 122.

168. *Id.* (citations omitted). The Court continued, “As the Court of Appeals for the Federal Circuit aptly stated: ‘Many VA regulations have aged nicely simply because Congress took so long to provide for judicial review. The length of such regulations’ unscrutinized and unscrutinizable existence’ could not alone, therefore, enhance any claim to deference.” *Id.* (quoting *Gardner v. Brown*, 5 F.3d 1456, 1463-64 (Fed. Cir. 1993)).

169. *Scarborough v. Principi*, 541 U.S. 401, 405 (2004).

benefits, and he had his attorney file a timely application for attorney's fees under the Equal Access to Justice Act (EAJA).¹⁷⁰ Although Mr. Scarborough's EAJA application met the statutorily required pleading requirements of showing his eligibility to receive an award under EAJA, of listing the amount sought, and of including an itemized statement, the application "failed initially to allege . . . that 'the position of the United States was not substantially justified.'"¹⁷¹ The government moved to dismiss the application for attorney's fees based on this omission.¹⁷² Mr. Scarborough filed an amended application, adding the missing statement regarding substantial justification, but the amended application was filed outside of the thirty-day period allowed for the filing of an EAJA application.¹⁷³

Because the amended application was late, the veterans court granted the government's motion to dismiss the application; the Federal Circuit affirmed the dismissal.¹⁷⁴ Mr. Gardner then appealed to the Supreme Court.¹⁷⁵ The Court granted certiorari "in view of the division of opinion among the Circuits."¹⁷⁶

Justice Ginsburg, writing for the Court, stated that a timely attorney's fees application could be amended after the thirty-day filing period had run in order to cure an initial failure to allege that the government's position in the underlying litigation lacked substantial justification.¹⁷⁷ Justice Ginsburg relied on the "relation-back doctrine," stating that "[j]ust as failure initially to verify a charge or sign a 'pleading, written motion, [or] other paper,' was not fatal to the petitioners' cases in [two other cases], so here, counsel's initial omission of the assertion that the Government's position lacked substantial justification is not beyond repair."¹⁷⁸ Justice Ginsburg also noted that permitting a curative amendment advanced Congress's purpose in enacting EAJA of reducing the potential cost of challenging unjust governmental action.¹⁷⁹

170. *Id.*; see 28 U.S.C. § 2412(d)(1)(B) (2006).

171. *Scarborough*, 541 U.S. at 405 (quoting § 2412(d)(1)(B)). The requirement to allege that the government's position in the underlying litigation lacked substantial justification is one of three required allegations for a valid attorney's fees application under the EAJA. See § 2412(d)(1)(B).

172. *Scarborough*, 541 U.S. at 401.

173. *Id.*

174. *Id.*

175. *See id.*

176. *Id.* at 412.

177. *Id.* at 406.

178. *Id.* at 418-19 (second alteration in original) (citation omitted) (quoting FED. R. CIV. P. 11(a)). In this quoted passage, the Court referenced two cases: *Edelman v. Lynchburg College*, 535 U.S. 106 (2002), and *Becker v. Montgomery*, 532 U.S. 757 (2001). *Scarborough*, 541 U.S. at 419.

179. *Id.* at 417.

3. *Shinseki v. Sanders*

The Supreme Court next dealt with veterans' issues that originated at the court in *Shinseki v. Sanders*, a case that involved certain notice that must be provided to veterans.¹⁸⁰ Specifically, when VA processes a claim, it provides the "claimant with a letter that tells the claimant (1) what further information is necessary to substantiate [the] claim; (2) what portions of that information the VA will obtain for the claimant; and (3) what portions the claimant must obtain."¹⁸¹ But what if a claimant did not receive the proper notice letters? The veterans court had developed a method by which to evaluate notice errors. A failure to explain what further information was needed was a "Type One" error and was deemed to have the "natural effect" of harming the claimant.¹⁸² But failure to provide the other required information was both a "Type Two" and a "Type Three" error, and the claimant would have to show how he was harmed by the failure to receive the required notice.¹⁸³ For example, a claimant could state "in particular just 'what evidence' he would have provided (or asked the Secretary to provide) had the notice not been defective, and explain[] just 'how the lack of that notice and evidence affected the essential fairness of the adjudication.'"¹⁸⁴

The Federal Circuit, in reviewing appeals of decisions of the veterans court, developed its own framework for reviewing notice errors.¹⁸⁵ The Federal Circuit stated that, "when the VA provides a claimant with a notice letter that is deficient in *any* respect . . . , the Veterans Court 'should . . . presum[e]' that the notice error is 'prejudicial, requiring reversal unless the VA can show that the error did not affect the essential fairness of the adjudication.'"¹⁸⁶ To make this showing, VA was required to "demonstrate" that the "defect was cured by [the claimant's] actual knowledge" or that "a benefit could not have been awarded as a matter of law."¹⁸⁷

The Supreme Court reviewed the lawfulness of the "harmless-error" framework that the Federal Circuit had established, and Justice Breyer, writing for the Court, determined it was not consistent with a statutory requirement that the veterans court "take due account of the rule of prejudicial error."¹⁸⁸ Justice Breyer stated that the Federal Circuit's harmless-error framework imposed "an

180. See *Shinseki v. Sanders*, 556 U.S. 396, 396 (2009).

181. *Id.* at 400.

182. *Id.* at 401.

183. *Id.*

184. *Id.* (quoting *Mayfield v. Nicholson*, 19 Vet. App. 103, 121 (2005)).

185. *Id.* at 407.

186. *Id.* at 403-04 (second and third alterations in original) (quoting *Sanders v. Nicholson*, 487 F.3d 881, 889 (2007)).

187. *Id.* at 404 (quoting *Sanders*, 487 F.3d at 889) (internal quotation marks omitted).

188. *Id.* at 406 (quoting 38 U.S.C. § 7261(b)(2) (2006)).

unreasonable evidentiary burden upon the VA” and “exhibit[ed] the very characteristics that Congress sought to discourage.”¹⁸⁹

The Court explained that the veterans court should “apply the same kind of ‘harmless-error’ rule that courts ordinarily apply in civil cases.”¹⁹⁰ The Court noted that it had “previously warned against courts’ determining whether an error is harmless through the use of mandatory presumptions and rigid rules rather than case-specific application of judgment, based upon examination of the record.”¹⁹¹

The Court continued,

It is the Veterans Court, not the Federal Circuit, that sees sufficient case-specific raw material in veterans’ cases to enable it to make empirically based, nonbinding generalizations about “natural effects.” And the Veterans Court, which has exclusive jurisdiction over these cases, is likely better able than is the Federal Circuit to exercise an informed judgment as to how veterans are harmed by which kinds of notice errors.¹⁹²

4. *Henderson ex rel. Henderson v. Shinseki*

The Supreme Court’s most recent foray into veterans’ appeals originating at the court is the 2011 decision *Henderson ex rel. Henderson v. Shinseki*, a case that involved the statutorily denoted 120-day time period for appealing a decision from the Board to the veterans court.¹⁹³

Mr. Henderson was a Korean War veteran with a 100% disability rating for paranoid schizophrenia, effective 1992.¹⁹⁴ In 2001, Mr. Henderson filed a claim for supplemental benefits due to a need for in-home care.¹⁹⁵ The RO denied the claim, as did the Board.¹⁹⁶ Mr. Henderson filed an appeal to the veterans court, but he filed fifteen days after the 120-day deadline to file.¹⁹⁷

The veterans court dismissed the appeal as untimely “because he had not shown that his illness had caused his tardy filing” but on reconsideration determined that a panel would hear the matter.¹⁹⁸ The veterans court ultimately dismissed Mr. Henderson’s appeal as untimely, determining that the 120-day

189. *Id.* at 408.

190. *Id.*

191. *Id.* at 407.

192. *Id.* at 412. Michael P. Allen writes, “It is impossible to read *Sanders* without getting the clear impression that the Supreme Court believes that the Veterans Court is often the entity that should be the predominant judicial voice in the area of veterans’ benefits law.” Allen, *Law of Veterans’ Benefits 2008-2010*, *supra* note 85, at 20.

193. *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1200 (2011).

194. *Id.* at 1201.

195. *Id.*

196. *Id.*

197. *Id.*; see 38 U.S.C. § 7266(a) (2006).

198. *Henderson*, 131 S. Ct. at 1201.

period was jurisdictional.¹⁹⁹ The Federal Circuit affirmed in a divided en banc decision, and the Supreme Court granted certiorari.²⁰⁰

Once there, the Supreme Court considered “whether a veteran’s failure to file a notice of appeal within the 120-day period should be regarded as having ‘jurisdictional’ consequences.”²⁰¹ Justice Alito, writing for the Court, stated that the 120-day period was “an important procedural rule” and that, on remand, the veterans court should determine whether Mr. Henderson’s appeal should fall within any exception to the rule.²⁰² *Henderson* effectively reinstated previous case law establishing criteria for when the 120-day period to file an appeal would be equitably tolled.²⁰³

E. Shortcoming of Judicial Review

Although judicial review is a benefit to veterans, the length of time and the steps involved in resolving appeals before the court, the Federal Circuit, and the Supreme Court of the United States sometimes can be excessive. The case of one appellant, Ms. Cathleen Golden, exemplifies this delay.²⁰⁴ Ms. Golden first filed a Notice of Appeal with the court in August 2004.²⁰⁵ The court dismissed the appeal in March 2005 for lack of jurisdiction to hear the appeal.²⁰⁶ Ms. Golden appealed to the Federal Circuit in August 2005.²⁰⁷ The Federal Circuit remanded the matter in April 2007.²⁰⁸ The court stayed the matter in July 2007, pending resolution of a similar case.²⁰⁹ The court lifted the stay in September 2008 and again dismissed the appeal for lack of jurisdiction.²¹⁰ In November

199. *Id.* at 1201-02.

200. *Id.* at 1202.

201. *Id.* at 1200; *see* § 7266(a) (“In order to obtain review by the Court of Appeals for Veterans Claims of a final decision of the Board of Veterans’ Appeals, a person adversely affected by such decision shall file a notice of appeal with the Court within 120 days after the date on which notice of the decision is mailed . . .”).

202. *Henderson*, 131 S. Ct. at 1206.

203. *See* *Bove v. Shinseki*, 25 Vet. App. 136 (2011) (per curiam) (applying *Henderson*, 131 S. Ct. 1197); *see also* *Arbas v. Nicholson*, 403 F.3d 1379, 1381 (Fed. Cir. 2005) (physical illness); *Barrett v. Principi*, 363 F.3d 1316, 1321 (Fed. Cir. 2004) (mental illness rendering one incapable of handling his own affairs); *Brandenburg v. Principi*, 371 F.3d 1362, 1364 (Fed. Cir. 2004) (Notification of Arrival (NOA) submitted to Board); *Jaquay v. Principi*, 304 F.3d 1276 (Fed. Cir. 2002) (en banc); *Bailey v. West*, 160 F.3d 1360, 1363-64 (Fed. Cir. 1998) (en banc) (relying on *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89 (1990), and holding that equitable tolling generally was available in suits against the United States, unless Congress has expressed its intent to the contrary); *McCreary v. Nicholson*, 19 Vet. App. 324, 328-34 (2005) (extraordinary circumstances), *adhered to on reconsideration* by 20 Vet. App. 86 (2006).

204. *See* *Golden v. Shinseki*, No. 04-1385, 2012 WL 1765439, at *1 (Vet. App. May 18, 2012).

205. *Golden v. Nicholson*, 19 Vet. App. 506, No. 04-1385, 2005 WL 668715, at *1 (Mar. 16, 2005) (Table of Unpublished Decisions).

206. *Id.* at *3.

207. *Golden v. Nicholson*, 20 Vet. App. 149, No. 04-1385 (Aug. 26, 2005) (Table of Unpublished Decisions).

208. *Golden v. Nicholson*, 222 F. App’x 998, 999 (Fed. Cir. 2007).

209. *See* General Docket at 07/31/2007, *Golden v. Shinseki* (No. 04-1385).

210. *See id.* at 09/09/2008.

2008, Ms. Golden again appealed to the Federal Circuit.²¹¹ In May 2011, the Federal Circuit again remanded the appeal to the court.²¹² In July 2011, the court stayed the case, and in May 2012, the court determined that the appeal was timely.²¹³

Now, six-and-a-half years after Ms. Golden first filed her Notice of Appeal, the court may consider the merits of the appeal.²¹⁴ Ms. Golden's appeal typifies what one commentator calls "[t]he challenge for the future[:] integrating complexity and informality to produce satisfactory results in an acceptable amount of time."²¹⁵

V. NOVEL ISSUES

The types of battles that veterans fight at home vary wildly and are often complex. There is, for example, a case assigned to a panel of judges at the Court of Appeals for Veterans Claims, addressing additional compensation benefits for a dependent same-sex spouse.²¹⁶ In the appeal, *Cardona v. Shinseki*, veteran Ms. Carmen Cardona, who was in receipt of benefits for a disability related to service, filed a claim for additional dependency compensation for a dependent spouse.²¹⁷ Under Connecticut law, Ms. Cardona had a legally recognized same-sex marriage to another woman.²¹⁸ The RO and the Board denied Ms. Cardona's claim because VA statute and regulation define "spouse" as a person of the opposite sex.²¹⁹

Ms. Cardona appealed the Board's decision to the court. She argued first that, by defining "marriage" and "spouse" to exclude same-sex spouses, both the governing statute and the Defense of Marriage Act (DOMA) discriminate against married same-sex couples.²²⁰ Second, she argued that marriage was an area of regulation that belonged to the states under the Tenth Amendment and that, by excluding legally married couples from federal spousal benefits, the applicable statute and DOMA violated Connecticut's right to define and regulate marriage.²²¹

The Secretary of VA responded, conceding that "section 3 of DOMA and section 101(31) of title 38 unconstitutionally discriminate on the basis of sexual

211. *See id.* at 11/25/2008.

212. *Golden v. Shinseki*, 424 F. App'x 954, 955 (Fed. Cir. 2011).

213. *See Golden v. Shinseki*, No. 04-1385, 2012 WL 1765439, at *2 (Vet. App. May 18, 2012).

214. *See id.*

215. Ridgway, *supra* note 149, at 252.

216. *See Internal Operating Procedures*, U.S. CT. APPEALS FOR VETERANS CLAIMS, http://www.uscourts.cavc.gov/court_procedures (last visited Dec. 17, 2012).

217. *See* Appellant's Principal Brief at 1-3, *Cardona v. Shinseki*, No. 11-3083 (Vet. App. Apr. 19, 2012).

218. *See id.* at 2.

219. *See* 38 U.S.C. § 101(31) (2006); 38 C.F.R. § 3.50(a) (2012).

220. *See* Appellant's Principal Brief, *supra* note 217, at 4. Ms. Cardona's arguments relate to only a portion of the DOMA, 1 U.S.C. § 7 (1996).

221. *Id.* at 28.

orientation, in violation of the equal protection component of the Fifth Amendment, with regard to same-sex couples who are legally married under state law.”²²² He argued, however, that if the court held DOMA and the applicable statute constitutional under the equal protection clause of the Fifth Amendment, then “it should also hold that neither statute violates the Tenth Amendment.”²²³ The Secretary reasoned that both DOMA and the statute “prescribe the terms and conditions of federally funded programs and federal tax schemes, and thus are within the Spending Clause’s general grant of authority to Congress.”²²⁴

An intervenor-appellee has also been joined as a party in the case, representing the interest of the Bipartisan Legal Advisory Group of the United States House of Representatives. In their brief, they argue that the applicable statute, the VA regulation, and DOMA “fully comport with the equal protection component of the Due Process Clause” and that the Supreme Court has previously settled this matter by rejecting “arguments that equal protection requires the extension of marriage rights to same-sex couples.”²²⁵

On December 7, 2012, the Supreme Court granted a petition for certiorari in *United States v. Windsor*, a case challenging the constitutionality of DOMA, which defines marriage for all federal purposes as the union of one man and one woman.²²⁶ On the same date, the Supreme Court also granted certiorari in *Hollingsworth v. Perry*, a federal challenge to California’s state ballot initiative—a 2008 amendment to the California Constitution (also known as Prop. 8)—eliminating the right of same sex couples to marry in California.²²⁷ Because the constitutionality of DOMA is a central issue in the Cardona appeal, the Court stayed this appeal until the resolution of *Windsor*.

While Ms. Cardona’s appeal is not typical of appeals filed at the court, it exemplifies just one of the unique, panel-worthy issues the court faces. It also demonstrates that matters before the court often track with matters in society and matters facing the larger judicial system.²²⁸ Indeed, this particular veteran’s battle may reach the Supreme Court, creating precedent for many similarly situated veterans.

222. Brief of Appellee at 5, *Cardona v. Shinseki*, No. 11-3083 (Vet. App. June 11, 2012).

223. *Id.* at 6.

224. *Id.* at 42.

225. Brief of Intervenor-Appellee’s at 1-2, No. 11-3083 (citing *Baker v. Nelson*, 409 U.S. 810 (1972)).

226. *United States v. Windsor*, 699 F.3d 169 (2d Cir. 2012), *cert. granted*, 81 U.S.L.W. 3116 (U.S. Dec. 7, 2012) (No. 12-307).

227. *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *cert. granted*, *Hollingsworth v. Perry*, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144).

228. *See, e.g.*, *Perry v. Brown*, 671 F.3d 1052, 1092 (9th Cir. 2012); *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1, 5 (1st Cir. 2012).

VI. CONCLUSION

As our armed forces return from fighting abroad, their battles with unemployment, homelessness, and physical and mental disabilities continue. And while the nonadversarial VA system is noble in its efforts and indeed successful in providing veterans' benefits, it is ignoble in the convoluted, lengthy, and confusing processes that veterans must navigate there when pursuing such benefits. When they seek to invoke the benefit of judicial review, the process is no more swift.

However, despite the myriad of problems with the system, there are opportunities here for reform. Perhaps some of these problems can be solved with more people: more VA physicians, more ratings specialists, more Board hearing officers, more judges. Perhaps VA needs to have electronic claims files and centralized databases to keep track of veterans' records and of community resources available. Perhaps the system of judicial review needs to be simplified by eliminating Federal Circuit involvement, which may have outlived its usefulness.

But certainly, the key to conquering the battles that veterans are facing at home is the involvement of people who have a passion for this work, for serving veterans who have fought for our country, and for serving their families. We need people in this field who are willing to push the envelope and tackle these difficult and complex issues involved in veterans' benefits. Most importantly, we need people who can see off into the future and envision a veterans' benefits system that is efficient and fair, a system that would ensure that those veterans who fight our wars abroad need not return and fight wars at home.