

Fighting on Too Many Fronts: Concerns Facing Elderly Veterans in Navigating the United States Department of Veterans Affairs Benefits System

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**FIGHTING ON TOO MANY FRONTS: CONCERNS FACING
ELDERLY VETERANS IN NAVIGATING THE UNITED
STATES DEPARTMENT OF VETERANS AFFAIRS BENEFITS
SYSTEM**

*Benjamin Pomerance**

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“The willingness with which our young people are likely to serve in any war, no matter how justified, shall be directly proportional as to how they perceive veterans of earlier wars were treated and appreciated by their nation.”¹

“America’s commitment to its veterans are not just lines on a budget. They are bonds that are sacred—a sacred trust we’re honor bound to uphold.”²

I. INTRODUCTION

From America’s earliest days, questions have abounded about the nation’s policies toward its military veterans.³ Since 1792, our federal

¹ See 152 CONG. REC. 14, 18965 (2003) (referenced by Sen. John McCain as a quotation by George Washington). Although some scholars dispute the attribution of this quotation to Washington, it nevertheless clearly reflects an enduring national sentiment for America’s obligation to care for veterans. See Yuval Levin, *Misquoting Washington*, NATIONAL REVIEW, Feb. 4, 2008, <http://www.nationalreview.com/corner/158276/misquoting-washington/yuval-levin>.

² *Obama’s Every Word—And Promise—To the VFW*, L.A. TIMES, Aug. 17, 2009, <http://latimesblogs.latimes.com/washington/2009/08/obama-speech-transcript-vfw.html> (transcribing President Barack Obama’s speech to the Veterans of Foreign Wars Convention in 2009).

government has held that when a member of our armed services makes it home from military service, the nation owes that veteran something in return.⁴ With approximately 23 million veterans living in the United States today,⁵ the obligation to our veterans is greater than ever. Yet disputes have arisen regarding the way in which our nation seeks to fulfill this obligation.⁶ Issues of inefficiency and dishonesty have rightfully led to criticism that the country still has not found the best way to serve our military veterans.⁷

In particular, concerns have emerged in recent years regarding veterans who now grow older and depend more than ever on their country for support.⁸ This is not a marginal issue. Approximately one-third of all senior citizens in the United States are veterans who served during a time of war or the surviving spouse of a veteran who served during a time of war.⁹ In the year 2000, forty percent of the nation's entire veteran population was at least

³ See David Kimball Stephenson, *Economics and Austerity Relative to Veterans' Claims and the Veterans Appeal Process*, 211 MIL. L. REV. 179, 181–89 (2012) (outlining the history of government-sponsored benefits for veterans in the United States); James D. Ridgway, *The Splendid Isolation Revisited: Lessons from the History of Veterans' Benefits Before Judicial Review*, 3 VETERANS L. REV. 135 (2011) (describing the history of America's treatment of military veterans from the pre-Civil War era through the present day); William F. Fox, Jr., *Deconstructing and Reconstructing the Veterans' Benefits System*, 13 KAN. J.L. & PUB. POL'Y 339, 340 (2004); see also U.S. DEP'T OF VETERANS AFFAIRS, VA HISTORY IN BRIEF, http://www.va.gov/opa/publications/archives/docs/history_in_brief.pdf (last visited Oct. 18, 2013) (providing a timeline of how the U.S. Department of Veteran's Affairs (VA) has evolved over time).

⁴ Stephenson, *supra* note 3, at 181–83 (discussing the Invalid Pension Act of 1792, the first law passed by Congress to ensure benefits payments to veterans injured in the course of their service). Interestingly, the concept of veterans' benefits long precedes this law, dating back to the empires of ancient Egypt, Babylon, Greece, and Rome. See Ridgway, *supra* note 3, at 137.

⁵ 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 (2011).

⁶ See, e.g., Ridgway, *supra* note 3, at 141–42 (detailing the federal government's failure to honor the Continental Congress's promise to provide a general service pension for veterans of the Revolutionary War); Stephenson, *supra* note 3, at 182 (discussing the heated debates about the Invalid Pension Act of 1792 that involved Supreme Court Justices John Jay and William Cushing).

⁷ See *infra* Parts IV–VII.

⁸ See, e.g., Janet M. Wilmoth & Andrew S. London, *Aging Veterans: Needs and Provisions*, in HANDBOOK OF SOCIOLOGY AND AGING 445 (Richard A. Settersten, Jr. & Jacqueline L. Angel eds., 2011); Craig M. Kabatchnick, *Obstacles Faced by the Elderly Veteran in the VA Claims Adjudication Process*, 12 MARQ. ELDER'S ADVISOR 185 (2010); Ronald B. Abrams, *Representing Veterans in the Battle for Benefits*, 42 TRIAL 30 (2006); Valentine M. Villa et al., *The Health and Functional Status of U.S. Veterans Aged 65+: Implications for VA Health Programs Serving an Elderly, Diverse Veteran Population*, 18 AM. J. MED. QUALITY 108, 111–14 (2003); Lindsay Wise, *94-Year-Old World War II Vet Stuck in VA Backlog Again*, HOUS. CHRON. (July 8, 2012), www.chron.com/news/houston-texas/article/94-year-old-World-War-II-veteran-from-Houston-3691979.php.

⁹ See Martin Higgins, *Caring for Senior Veterans*, SENIOR CITIZEN'S GUIDE TO SOUTH JERSEY, <http://www.seniorcitizensguide.com/articles/southjersey/caring-for-senior-veterans.htm> (last visited Nov. 2, 2013).

65 years old.¹⁰ Since 2000, this proportion has only increased.¹¹ Many of these elderly veterans suffer from one or more physical or mental disabilities¹² and require a heightened degree of care.¹³ Many are in mediocre or even poor financial situations.¹⁴ An appalling number of elderly veterans are homeless.¹⁵

When the system designed to assist American military veterans fails, the oldest veterans often feel the most negative impact. Elderly veterans are often placed in positions of vulnerability by one or more factors.¹⁶ While all veterans clearly deserve the full complement of benefits and services to which they are entitled, elderly veterans arguably constitute the demographic that needs benefits and services the most—and which is harmed most by delays and abuses of the very system created to help them.¹⁷

Recognizing this, Congress authorized the United States Department of Veterans Affairs (VA) to provide a wide range of benefits to veterans and their families.¹⁸ Many of the benefits offered by the VA provide financial support, as well as other assistance, and can greatly aid older veterans, particularly elderly veterans with disabilities.¹⁹ Veterans who successfully access these benefits can receive assistance for themselves, their spouses, and their dependent children.²⁰

Far too often, though, this system fails to function smoothly. To begin, many older veterans do not realize the full extent or are completely unaware of VA benefits for which they may be eligible.²¹ Even when a

¹⁰ Wilmoth & London, *supra* note 8, at 445.

¹¹ See Villa et al., *supra* note 8, at 109 (noting that the proportion of elderly veterans will continue to increase during the years ahead).

¹² See *id.*; Wilmoth & London, *supra* note 8, at 452; Kabatchnick, *supra* note 8, at 210.

¹³ See Villa et al., *supra* note 8, at 115.

¹⁴ See *id.* at 112.

¹⁵ Indeed, a majority of elderly homeless Americans have served time in our nation's military. Elderly veterans are three times more likely to be homeless than elderly non-veterans. U.S. DEP'T OF HOUS. & URB. DEV. & U.S. DEP'T OF VETERANS AFFAIRS, VETERAN HOMELESSNESS: A SUPPLEMENTAL REPORT TO THE 2009 ANNUAL HOMELESS ASSESSMENT REPORT TO CONGRESS 12 (2009). See also *Veterans Make Up 1 in 4 Homeless*, USA TODAY (Nov. 7, 2007), usatoday30.usatoday.com/news/nation/2007-11-07-homeless-veterans_N.htm (including homeless children, youth, and young adults in the one-in-four statistic).

¹⁶ See Kabatchnick, *supra* note 8, at 210; Wilmoth & London, *supra* note 8, at 445, 452; Villa et al., *supra* note 8, at 109–15.

¹⁷ See *supra* notes 8–9.

¹⁸ To qualify under federal law as “a veteran” an individual must be “a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable.” 38 C.F.R. § 3.1(d) (2013). Title 38 of the Code of Federal Regulations provides the authority and specifications for VA benefits.

¹⁹ See *infra* Parts III–IV.

²⁰ See *id.*

²¹ See, e.g., Abrams, *supra* note 8, at 30 (“Many veterans don’t realize that these benefits are available to them Some wait 50 years before they seek out VA benefits.”).

veteran is aware of the available options, he or she still must navigate a procedural minefield just to apply.²² One wrong step in the VA claims process can bar an otherwise eligible veteran from receiving benefits to which he or she is otherwise entitled.²³ Roadblocks often arise for veterans facing physical or mental limitations that can come with aging.²⁴ If a veteran feels that he or she was wrongfully denied benefits, the appeals process presents another set of challenging procedures that the veteran must navigate.²⁵

Even if a qualified veteran clears all of these hurdles, there is no guarantee that the veteran will receive approval for VA benefits during his or her lifetime. The VA's administrative backlog is notorious.²⁶ The VA's long delays in reviewing claims can prove especially problematic for elderly veterans: approximately 3,000 veterans die each year with their disability compensation claims still mired in some stage of the agency's adjudication process.²⁷

Additional problems have developed in recent years, causing setbacks that are particularly injurious for many elderly veterans. For instance, a veteran receiving VA benefits can lose control over those benefits if the VA deems the veteran incompetent.²⁸ In such situations, the VA possesses power to appoint a fiduciary to manage the benefits in the veteran's place.²⁹ Even where a veteran has executed a durable power of attorney, the VA will not recognize that power of attorney with regard to the veteran's VA benefits.³⁰ Instead, the VA will appoint a paid fiduciary of the VA's choosing and send the benefit payments directly to a bank account over which the fiduciary exercises exclusive access and control.³¹

Worse still, under the determination that the veteran is "incompetent," VA rules do not require the appointed fiduciary to seek any

²² See *infra* Parts III.A, IV.

²³ See *infra* Parts III.A, IV.

²⁴ See Villa et al., *supra* note 8, at 109–15; Kabatchnick, *supra* note 8, at 210; Wilmoth & London, *supra* note 8, at 445.

²⁵ See *infra* Part III.B.

²⁶ See *infra* Part IV.B.

²⁷ Katharine Russ, *Shamefully Delayed Care is Killing America's Veterans*, CITYWATCH (Dec. 29, 2011), www.citywatchla.com/archive/2656-shamefully-delayed-care-is-killing-americas-veterans-v15-2656 (quoting attorneys at the law firm of Kirkland & Ellis). See also John Solomon, *Sick Veterans Wait for Obama's Promise*, WASH. TIMES (Nov. 11, 2012), www.washingtontimes.com/news/2012/nov/11/sick-veterans-wait-for-obamas-promise (noting that the delays in processing VA claims have become worse than ever, with nearly 70% of claims taking more than 125 days to process).

²⁸ See *infra* Part VI.

²⁹ 38 C.F.R. § 13.55 (2013).

³⁰ See, e.g., *Solze v. Shinseki*, 26 Vet. App. 118 (2013) (refusing to honor the durable Power of Attorney executed by a 90-year-old World War II veteran). See *infra* Part V (discussing *Solze* and this issue in greater detail).

³¹ See *infra* Part VI. See also 38 C.F.R. § 13.59 (the VA will also recognize a court-appointed fiduciary).

approval from the veteran (nor any concerned family members) regarding how the money is being used.³² Thus, a veteran who has been receiving VA benefits for years, but who is suddenly deemed “incompetent” by the VA, can lose all access to his or her benefits virtually overnight, forced to cede complete financial authority to someone whom the veteran does not and will likely never know.³³

In 2012, a new issue came to the forefront. A Government Accountability Office (GAO) report revealed that many veterans have been victims of “pension poaching,” meaning the practice of private companies illegally charging fees to help veterans enroll in VA pension programs.³⁴ Veterans too frequently fall prey to “sleazy con men and rip-off artists” using business names like “Veterans Benefits Foundation” to create a false impression of connection to the VA.³⁵ Pension poachers have charged vulnerable veterans as much as \$10,000 in “counseling fees.”³⁶ These “counseling services” also encourage veterans to engage in a legal but deceptive practice: rapidly transferring assets—sometimes as much as \$1 million in assets—to another party in order to qualify for a VA pension.³⁷ This “game” is allowable because of the VA’s lack of a “look-back” provision to examine recent transfers before granting approval and badly exploits the VA program which is primarily aimed at assisting lower-income veterans.³⁸

Taken together, the landscape is daunting for any veteran, particularly elderly veterans. This article examines that landscape in greater depth, highlighting certain areas that are especially damaging to elderly veterans, and looks at potential reforms for the well-intentioned but flawed veterans’ benefits system.

Part II provides an overview of VA benefits, focusing on categories of VA benefits that are extremely beneficial for elderly veterans, and explains the eligibility requirements for each category. Part III looks at the process of applying for VA benefits, as well as the procedure available for a

³² See *infra* Part VI.

³³ See *infra* Part VI (describing this issue in *Solze* and other recent cases with similarly shocking fact patterns).

³⁴ U.S. GOV’T ACCOUNTABILITY OFFICE, VETERANS’ PENSION BENEFITS: IMPROVEMENTS NEEDED TO ENSURE ONLY QUALIFIED VETERANS AND SURVIVORS RECEIVE BENEFITS 21 (May 2012) [hereinafter GOV’T ACCOUNTABILITY OFFICE].

³⁵ Dana Ferguson, *Utah, U.S. Veterans Are Targeted By ‘Pension Poachers’*, SALT LAKE TRIB. (June 7, 2012), www.sltrib.com/sltrib/54245491-78/veterans-pension-aging-schow.html.csp.

³⁶ GOV’T ACCOUNTABILITY OFFICE, *supra* note 34, at 21.

³⁷ See *id.* at 21–22, 31 (quoting a financial management company representative stating “[I]’ve had people with over a million dollars qualify for this benefit”).

³⁸ See *id.* at 22, 59 (reprinting the VA’s written response to the GAO report, including the following statement: “Because of their financial need and often advanced age, pension recipients are among the Department’s most vulnerable beneficiaries.”). See also *infra* Part V (discussing the issue of pension poaching in greater detail).

veteran to appeal if his or her claim is denied. Part IV examines some of the potential pitfalls that veterans face when applying for VA benefits, as well as the extraordinary backlog of VA claims and its impact on elderly veterans. Part V studies the recently revealed issue of “pension poaching.” Part VI looks at concerns with the VA’s fiduciary program. Lastly, Part VII examines alternatives to the VA’s current process, including several solutions already proposed by Congress, veterans’ advocates, and the VA itself, which could lead to better results for elderly veterans.

II. THE BENEFITS: WHAT THE VA SYSTEM CAN OFFER AN ELDERLY VETERAN

For veterans, the first—and sometimes most overwhelming—step in receiving VA benefits is knowing what benefits are available. Too often, veterans who are eligible for one or more classifications of VA benefits do not apply for them simply because they do not know or understand the requirements.³⁹ Stories of veterans waiting forty or fifty years before first applying for VA benefits are innumerable.⁴⁰

In this section, we try to elucidate the wide swath of benefits available through the VA. In particular, we look at the requirements of the two broad varieties of VA benefits utilized by elderly veterans: pensions and compensations.

A. Pensions

More than 500,000 veterans or their surviving spouses are currently the recipients of a VA pension.⁴¹ Yet this benefit is still underused, as approximately two million veterans or their surviving spouses are currently eligible for a VA pension but are not receiving one.⁴²

As the name implies, this classification of VA benefit focuses most heavily on the veteran’s age, making it a potential resource for elderly veterans.⁴³ However, a veteran does not automatically receive a VA pension merely by reaching the threshold age. He or she must meet several other requirements in order to qualify.

³⁹ See, e.g., Kabatchnick, *supra* note 8, at 213–15 (discussing the low level of knowledge that veterans commonly possess about the workings of the VA benefits system).

⁴⁰ See, e.g., Abrams, *supra* note 8, at 30.

⁴¹ U.S. DEP’T OF VETERANS AFFAIRS, ANNUAL BENEFITS REPORT (FISCAL YEAR 2011) 30 (2012).

⁴² See Chris Adams, *2 Million Veterans, Widows Miss Out On VA Pensions*, CONTRA COSTA TIMES (Dec. 22, 2005), www.veteranaid.org/docs/2million.pdf.

⁴³ See MARGARET C. JASPER, *VETERANS’ RIGHTS AND BENEFITS* 18 (Oxford Univ. Press 2009).

1. Basic Pension Requirements

In general, to qualify for a VA pension of any sort, the veteran must prove that he or she meets a length of “active military service” requirement⁴⁴ with at least one of those days of service taking place during a “wartime period.”⁴⁵ The veteran must also show that he or she received a discharge other than dishonorable,⁴⁶ and that he or she has a “countable income” below the maximum annual pension rate,⁴⁷ established by Congress.⁴⁸ The veteran also must have a “net worth” which is not “excessive,” although the VA does not set a specific dollar threshold for this requirement.⁴⁹ Lastly, the veteran must be permanently and totally disabled⁵⁰ or at least sixty-five years old.⁵¹

Several of these terms merit closer examination. First, “active military service” does not exclusively refer to combat, although combat duty is certainly included under this umbrella.⁵² Any full-time military service qualifies, as does any period of training during which the individual suffered a disability or aggravated an existing disability while in the line of duty.⁵³ Similarly, the “wartime period” requirement *does not* mean that the veteran must actually serve in a war zone to be eligible for a pension.⁵⁴ The fact that

⁴⁴ 38 U.S.C. § 101(2) (2012); 38 C.F.R. § 3.12(a) (2013).

⁴⁵ 38 U.S.C. § 1521(j) (2012).

⁴⁶ See 38 U.S.C. § 101(2); 38 C.F.R. § 3.12(a). Indeed, in accordance with these statutory and regulatory sections, the very definition of the word “veteran” hinges upon the service member’s discharge with status other than dishonorable. Notably, though, a veteran’s discharge *does not* need to be classified solely as “honorable” in order for him or her to qualify for VA benefits. For instance, a “general discharge” will also be acceptable for a veteran to maintain eligibility for benefits. See CHRISTINE SCOTT, “WHO IS A VETERAN?”—BASIC ELIGIBILITY FOR VETERANS’ BENEFITS 3–4 (Cong. Research Serv. 2012).

⁴⁷ See U.S. DEP’T OF VETERANS AFFAIRS, IMPROVED DISABILITY BENEFITS PENSION RATE TABLE, available at <http://benefits.va.gov/pension/rates.asp> (click “To go to the Improved Disability Pension Rate Tables”) (last visited Oct. 19, 2013) (listing the Maximum Annual Pension Rate (MAPR) for various pension rates that have been in effect since December 1, 2011).

⁴⁸ See *id.*

⁴⁹ 38 U.S.C. § 1522 (2012); JASPER, *supra* note 43, at 19.

⁵⁰ 38 U.S.C. § 1521(a). Note that the disability cannot be caused by the veteran’s own willful misconduct. *Id.* See also 38 U.S.C. § 1502(a) (2012) (providing a detailed definition of the requirements of “permanent and total disability”). Willful misconduct does not include suicide by a veteran who is of “unsound mind,” such as a veteran suffering from post-traumatic stress disorder. See 38 C.F.R. § 3.302 (2014).

⁵¹ 38 U.S.C. § 1513 (2012).

⁵² See 38 U.S.C. § 101.

⁵³ See *id.* Time spent in military training, however, will qualify toward active duty time only under certain circumstances. See 38 U.S.C. § 101(22)–(23); 38 C.F.R. § 3.6(c)–(d) (2013). Service for the National Guard or Reserve duty is also governed by some limiting authority with regard to the active duty requirement. In general, service in the National Guard or Reserves is not considered active service unless the individual was killed or disabled from an injury suffered or exacerbated in the line of duty. 38 U.S.C. § 101(24); 38 C.F.R. § 3.6(a).

⁵⁴ See JASPER, *supra* note 43, at 18, 21–22 (emphasis added). This is a common misapprehension made by veterans when considering whether to file a claim for benefits. Too

the veteran has served for at least one day during a time in which the United States was at war is all that is necessary to satisfy this prong.⁵⁵

With regard to the length of service requirement, any veteran who enlisted after September 7, 1980, must demonstrate that he or she served either twenty-four months of continuous active duty or the full period for which he or she was ordered to active duty.⁵⁶ There are exceptions, however. For instance, a veteran who was discharged from military service because of a hardship does not need to demonstrate fulfillment of the twenty-four months.⁵⁷ Also, as discussed in greater detail below, the VA does not enforce any minimum duty requirement for veterans seeking compensation benefits for a service-connected disability.⁵⁸

“Countable income” for VA purposes includes virtually all money received by the veteran and his or her dependents, with the exception of money received from public assistance programs.⁵⁹ Thus, any salary earned by the veteran and his dependents would count, as would any money received in disability benefits, retirement benefits, interest, or dividends.⁶⁰ However, money received from food stamps and Supplemental Security Income (SSI), as well as any other federal, state, and local welfare programs, is not factored into the veteran’s countable income.⁶¹

Furthermore, a portion of unreimbursed medical expenses—costs incurred by the veteran for medical care which are not covered by any health plan—can reduce the veteran’s countable income if the unreimbursed medical expenses exceed five percent of the pension’s maximum amount.⁶² In other words, if the veteran has spent money for medical services or products and the veteran will not be reimbursed by Medicaid or by a private insurance provider for these expenses, the veteran should inquire into whether that money makes him or her eligible for a deduction from countable

often, veterans believe that, because they were not in a “war zone,” they are not eligible for these benefits. However, the VA does not require service *in* a war zone. A veteran who served anywhere, doing anything, even for one day on active duty during a wartime period meets this requirement. See 38 U.S.C. §101 (11) (defining “period of war”); 38 U.S.C. §101 (12) (defining “veteran of any war”); see also *VA Aid & Attendance: What Does A ‘War Time’ Veteran Mean?*, Alabama Elder Lawyer, <http://www.alabamaelderlawyer.com/2013/02/va-aid-attendance-what-does-a-war-time-veteran-mean/>.

⁵⁵ See 38 U.S.C. § 1521(j). Congress establishes the official dates of “wartime periods.” See 38 U.S.C. § 101(8); 38 C.F.R. § 3.2 (2013).

⁵⁶ 38 U.S.C. § 5303A(b) (2012); 38 C.F.R. § 3.12a(a)(1) (2013). Veterans who enlisted prior to that date need to show ninety days of military service in order to be pension-eligible, again with at least one of those days occurring during a wartime period. See *Veterans Pension—Supplemental Income for Wartime Veterans*, U.S. Dep’t of Veterans’ Affairs, <http://benefits.va.gov/PENSIONANDFIDUCIARY/pension/vetpen.asp>.

⁵⁷ 38 U.S.C. § 5303A(b)(3)(a); 38 C.F.R. § 3.12(a)(d)(1).

⁵⁸ See *infra* Part II.B.

⁵⁹ JASPER, *supra* note 43, at 19.

⁶⁰ See *id.*

⁶¹ See *id.*

⁶² 38 U.S.C. § 1503(a)(8) (2012).

income.⁶³ Under certain circumstances, the veteran's education expenses can also be deducted, as can a portion of the veteran's education expenses for a child over the age of eighteen.⁶⁴

A veteran's "net worth" is a more elusive concept. The law demands that the veteran's net worth cannot be excessive but does not define what "excessive" means in this context.⁶⁵ Given this lack of a specific monetary cap, the VA is able to decide whether a veteran's net worth is excessive on a subjective, case-by-case basis.⁶⁶ Some commentators have recently stated that a net worth that is deemed excessive for VA pension purposes generally exceeds \$50,000 in assets for a veteran who is single or \$80,000 in assets for a married veteran.⁶⁷ However, application of this suggested income ceiling is still far from an exact science. The only guidance provided by the VA, other than the fact that decisions are dependent solely on each individual's particular case,⁶⁸ is the agency's language that "VA's needs-based programs are not intended to protect substantial assets or build up an estate for the benefit of heirs."⁶⁹

To calculate how much money a veteran will receive in a pension, the VA subtracts the veteran's countable income (after all of the proper deductions have been removed) from the relevant Maximum Annual Pension Rate (MAPR), then divides that amount by twelve to determine the monthly pension payment.⁷⁰ For example, the current MAPR for a veteran with no spouse and no children is \$12,256.⁷¹ If a veteran in that situation receives \$8,000 in income of various forms and has \$1,000 in unreimbursed medical expenses,⁷² then that veteran has a total countable income of \$7,000. In

⁶³ See *id.*; see also JASPER, *supra* note 43, at 19.

⁶⁴ 38 U.S.C. § 1503(a)(9), (a)(10)(B).

⁶⁵ See JASPER, *supra* note 43, at 19.

⁶⁶ See 38 C.F.R. § 3.274(a) (2013); see also JASPER, *supra* note 43, at 19 ("Net worth refers to the net value of the assets of the veteran and his or her dependents The decision as to whether a claimant's net worth is excessive depends on the facts of each individual case. All net worth should be reported to the VA.").

⁶⁷ This is the threshold at which the VA will require the veteran to file a VA Form 21-8049 ("Request for Details of Expenses"). However, the VA can elect to determine that a veteran's net worth is "excessive" at any dollar amount.

⁶⁸ See U.S. DEP'T OF VETERANS AFFAIRS, VETERANS PENSION, <http://benefits.va.gov/pension/vetpen.asp> (last visited Nov. 2, 2013).

⁶⁹ See Statement of Office of the Inspector General, United States Department of Veterans' Affairs, Before the Special Committee on Aging, United States Senate, June 6, 2012, at 1 available at <http://www.va.gov/oig/pubs/statements/VAOIG-statement-20120606-AAP.pdf>. The Inspector General's statement attributes this statement to the VA's website, and this statement was present when the author first viewed the VA's website in preparing this article. However, this statement has since been removed from the VA's website.

⁷⁰ U.S. DEP'T OF VETERANS AFFAIRS, HOW TO CALCULATE VETERANS PENSION, <http://benefits.va.gov/pension/vetpen.asp> (last visited Nov. 2, 2013).

⁷¹ See IMPROVED DISABILITY BENEFITS PENSION RATE TABLE, *supra* note 47.

⁷² See *supra* note 64 (providing a look at the impact of unreimbursed medical expenses on this calculation).

calculating that veteran's pension, the VA would subtract \$7,000 (the countable income) from \$12,256 (the MAPR for that category of veteran). The outcome of this calculation is \$5,256. Lastly, the VA would divide that amount into twelve equal shares. The result, \$438, is the amount that this veteran would receive for his pension each month.⁷³

2. Aid and Attendance

If a veteran is eligible for a VA pension and suffers from a particularly immobilizing disability, he or she should also apply for Aid and Attendance benefits.⁷⁴ Unfortunately, many veterans fail to explore this option.⁷⁵ One commentator calls it the VA's "best-kept secret."⁷⁶ VA officials themselves have noted that Aid and Attendance benefits are one of their department's "most underutilized offerings."⁷⁷

The keystone of eligibility for Aid and Attendance is reliance on another person's assistance in order to perform basic, everyday, personal functions.⁷⁸ For instance, if the pension-eligible veteran requires aid from another individual for daily necessities such as feeding, dressing, cleaning, communicating, bathing or other essential hygiene tasks, medical care (including help with a prosthetic device), or protection "from the hazards of his or her daily environment," then the veteran is likely entitled to receive

⁷³ See 38 U.S.C. § 1508 (2012) (establishing that VA pension benefits are to be paid monthly).

⁷⁴ See 38 U.S.C. § 1502(b).

⁷⁵ See, e.g., Susan Seliger, *A Little-Known Benefit for Aging Veterans*, N.Y. TIMES, Sept. 19, 2012, newoldage.blogs.nytimes.com/2012/09/19/few-know-of-benefit-to-help-aging-veterans/; Debbie Burak, *Introduction to the Veterans' Aid and Attendance Improved Pension*, VETERANAID.ORG, <http://www.veteranaid.org/index.php> (last visited Oct. 18, 2013) ("The Veterans Administration offers Aid and Attendance as part of an 'Improved Pension' Benefit that is largely unknown"); SENIOR VETERANS SERV. ALLIANCE, WHAT IS THE VETERANS AID & ATTENDANCE PENSION BENEFIT?, http://www.veteransaidbenefit.org/veterans_aid_attendance_pension_benefit_explained.htm (last visited Oct. 18, 2013) ("[M]ost people don't know the aid and attendance Pension benefit . . . can help cover home health care costs paid to any person or professional providers.").

⁷⁶ Yale Hauptman, *VA Aid and Attendance: The Best-Kept Secret in Long-Term Care*, ELDER L. TODAY (Apr. 30, 2008), <http://www.hauptmanlaw.com/new-jersey-elder-law-podcasts/elder-law-today-show-5-va-aid-and-attendance-the-best-kept-secret-in-long-term-care>.

⁷⁷ See *id.*; Seliger, *supra* note 75 (reporting "Of the 1.7 million World War II veterans alive as of 2011 [and eligible for Aid and Attendance], only 38,076 veterans and 38,685 surviving spouses were granted the A&A benefit that year" and quoting VA spokesperson Randy Noller as saying that Aid and Attendance is "probably one of the lesser-known benefits").

⁷⁸ See 38 U.S.C. § 1502(b).

Aid and Attendance benefits.⁷⁹ Bedridden pension-eligible veterans are almost certainly also eligible for Aid and Attendance.⁸⁰

In addition, Aid and Attendance is available for pension-eligible veterans who are nursing home patients.⁸¹ If a pension-eligible veteran is blind, having “visual acuity of 5/200 or less” or having “concentric contraction of the visual field to 5 degrees or less,” a specific provision of Aid and Attendance will cover him or her, too.⁸²

Aid and Attendance benefits are paid in addition to, not in place of, the VA pension that the veteran is already receiving.⁸³ Thus, a veteran who is awarded Aid and Attendance benefits can benefit greatly from this additional source of money, as it can help pay for the heightened level of medical care and attention that this veteran needs.⁸⁴

Commonly, veterans believe that they cannot receive Aid and Attendance benefits unless they are completely incapacitated.⁸⁵ This belief is incorrect. As long as the veteran can prove to the VA that he or she cannot complete one or more of these daily tasks independently, that veteran should be able to receive Aid and Attendance, provided that he or she meets the other eligibility requirements for a basic VA pension.⁸⁶

3. Housebound Benefits

Pension-eligible veterans with particularly severe disabilities may also be qualified to receive Housebound benefits from the VA. To meet the Housebound criteria, the VA must evaluate the veteran to have a permanent

⁷⁹ JASPER, *supra* note 43, at 20.

⁸⁰ See 38 C.F.R. § 3.352 (2013) (discussing the specific criteria for a veteran to be deemed “bedridden” and thus eligible for Aid and Attendance).

⁸¹ 38 U.S.C. § 1502(b).

⁸² 38 C.F.R. § 3.352(a)(2) (2013).

⁸³ See JASPER, *supra* note 43, at 20; Burak, *supra* note 75; Seliger, *supra* note 75; Hauptman, *supra* note 76.

⁸⁴ See, e.g., Debbie Burak, *My Personal Aid and Attendance Story*, VETERANAID.ORG, <http://www.veteranaid.org/mystory.php> (last visited Oct. 18, 2013) (describing how Burak’s parents would have been eligible for up to \$160,000 from Aid and Attendance payments had they applied when they became severely disabled and discussing how this money could have improved the family’s ability to care for them).

⁸⁵ See Seliger, *supra* note 75 (also quoting Debbie Burak’s statement that when a veteran reaches age sixty-five, the VA automatically classifies that veteran as “totally disabled”).

⁸⁶ See *id.*; JASPER, *supra* note 43, at 20. Note the specific language in 38 U.S.C. § 1502(b): a veteran is eligible for Aid and Attendance if “*significantly* disabled as to need or require the regular aid and attendance of another person” (emphasis added). See also 38 C.F.R. § 3.352(a) (“The particular personal functions which the veteran is unable to perform should be considered in connection with his or her condition as a whole. *It is only necessary that the evidence establish that the veteran is so helpless as to need regular aid and attendance, not that there be a constant need.*”) (emphasis added).

disability that is 100% disabling.⁸⁷ In addition, the veteran must either be confined to his or her home “permanently and substantially” or possess at least one other disability evaluated by the VA as at least 60% disabling.⁸⁸

Like Aid and Attendance benefits, Housebound payments accrue in addition to the veteran’s basic pension.⁸⁹ However, a veteran cannot receive both Housebound benefits and Aid and Attendance benefits simultaneously.⁹⁰ If the veteran is eligible for both, then the VA should award the greater of the two benefits.⁹¹

4. Pension Benefits for Surviving Spouses and Dependents

If a veteran is married, even if his or her spouse is not a veteran, the spouse may be eligible to receive pension benefits from the VA after the veteran passes away. Similarly, dependent children of a veteran may also be eligible to receive certain pension benefits after the veteran dies. Eligibility for these benefits can be particularly important for older veterans to consider when engaging in end-of-life planning with their family members.

An unmarried surviving spouse or an unmarried child of a deceased wartime veteran can receive a VA benefit that carries the macabre name of “Death Pensions.”⁹² To qualify, the deceased veteran must have served at least one day of active military service during a wartime period⁹³ and received a discharge that was not classified as dishonorable.⁹⁴ The decedent also will be subject to a length-of-service requirement of at least ninety days of active military service.⁹⁵ If the decedent entered active duty after September 7, 1980, he or she must meet the heightened length-of-service

⁸⁷ 38 C.F.R. § 3.350(i) (2013).

⁸⁸ 38 C.F.R. § 3.350(i)(A)–(B).

⁸⁹ This is why applying for Aid and Attendance or for Housebound benefits requires the filing of yet another form: VA Form 21-2680 (“Examination for Housebound Status or Permanent Need for Regular Aid and Attendance”).

⁹⁰ See JASPER, *supra* note 43, at 21.

⁹¹ This is consistent with the VA’s statutory duty to assist. See *infra* notes 149–151.

⁹² “Surviving spouse” is defined by law at 38 U.S.C. §101(3). See also JASPER, *supra* note 43, at 81. To apply, a surviving spouse or dependent child will need to complete and submit VA Form 21-534 and submit it to a VA Regional Office for review.

⁹³ 38 U.S.C. § 1541(a) (2012); 38 U.S.C. § 1521(j) (specifying ninety days as the general threshold, but allowing for veterans released or discharged from wartime service prior to ninety days for a service-connected disability).

⁹⁴ This follows the definition of “veteran” for all VA pension eligibility purposes. See 38 U.S.C. §101(2) (defining “veteran” as “a person who . . . was discharged or released [from active duty] under conditions other than dishonorable.”).

⁹⁵ 38 U.S.C. § 1521(j).

requirement of at least twenty-four months or “the full period for which called or ordered to active duty.”⁹⁶

The spouse or dependent child entering the claim is also bound by the annual countable income limit set by Congress.⁹⁷ As with countable income for a basic VA pension, money from public assistance, such as Supplemental Security Income, is not counted in the income total.⁹⁸ Unreimbursed medical expenses are again deducted.⁹⁹ In certain circumstances, a surviving spouse’s medical expenses and a portion of the education expenses of a child over age eighteen can be deducted as well.¹⁰⁰ In addition, the VA will also consider expenses of the veteran’s last illness and burial costs paid by the surviving spouse or the dependent child making the claim for deduction from the countable income total.¹⁰¹

Again, the VA establishes no specific ceiling for the “net worth” of the surviving spouse or the dependent children.¹⁰² As before, the agency states only that the total assets of the surviving spouse and his or her children cannot be “excessive.”¹⁰³ Thus, the evaluations in this particular area are likewise very case-specific.

Additionally, a surviving spouse or surviving dependent child who is eligible for a “death pension” can receive Aid and Attendance or Housebound benefits.¹⁰⁴ If the pension-eligible survivor meets the criteria described above for either of these benefits,¹⁰⁵ then he or she should apply to receive Aid and Attendance or Homebound funds in addition to their survivor’s pension payments.¹⁰⁶

Importantly, there are no age restrictions for an unmarried surviving spouse to receive these benefits.¹⁰⁷ However, if that spouse ever remarries, the benefits will typically cease immediately.¹⁰⁸ For a dependent child to qualify, on the other hand, he or she must be either under the age of eighteen,

⁹⁶ 38 U.S.C. § 5303A(b); 38 C.F.R. § 3.12a(a)(1). Notably, the same exceptions described earlier with regard to pensions also apply to these benefits for surviving spouses. *See supra* note 59.

⁹⁷ *See* 38 U.S.C. § 1541.

⁹⁸ *See* JASPER, *supra* note 43, at 82.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *See* 38 U.S.C. § 1543 (2012); 38 C.F.R. § 3.263 (2013); *see also* 38 C.F.R. § 3.274.

¹⁰³ *See* 38 C.F.R. § 3.263(a), (d).

¹⁰⁴ 38 U.S.C. § 1541(d)–(e).

¹⁰⁵ *See supra* Part II.A.2–3.

¹⁰⁶ *See supra* notes 103–104 and accompanying text.

¹⁰⁷ *See* 38 U.S.C. § 1541. Importantly, the surviving spouse must have either been married to the veteran for one year or more, for any period of time if their union produced a child, or for a period on or before a date specified for the particular wartime period during which the veteran served. 38 U.S.C. § 1541(f).

¹⁰⁸ 38 C.F.R. § 3.50 (2013). However, certain exceptions to this rule apply. *See* 38 C.F.R. § 3.55 (2013).

in school and under the age of twenty-three, or incapable of self-support before the age of eighteen.¹⁰⁹ Likewise, the child must remain unmarried to be classified as a “dependent” for these purposes.¹¹⁰

B. Compensation

A veteran can receive a VA disability compensation for injuries sustained or exacerbated while he or she was serving active duty.¹¹¹ Unlike the pension system, age is not a factor for disability compensation.¹¹² Instead, as the name implies, the most important elements of a disability compensation claim is the veteran’s medical condition or conditions.¹¹³

To qualify, a veteran first must have a discharge classification other than dishonorable.¹¹⁴ After passing this requirement, the VA next looks at whether the veteran currently suffers from a disability.¹¹⁵ After a veteran clears this hurdle, the VA examines three factors: the link between that disability and the veteran’s military service; the severity of the disability; and the date on which the VA received the application for compensation.¹¹⁶

Veterans are permitted to seek VA compensation for a disability caused or aggravated in military service many years, even decades, after that injury occurred or was worsened.¹¹⁷ Generally speaking, there is no process of “time-barring” a veteran for not filing a compensation claim with the VA fast enough.¹¹⁸ In fact, some older veterans have successfully submitted claims for disability compensation as late as fifty years after the actual injury took place.¹¹⁹

The greatest challenge for a veteran filing decades after the injury, however, is proving that his or her disability actually is service-connected.¹²⁰ This is the step at which many VA disability compensation claims fail.¹²¹ A

¹⁰⁹ See JASPER, *supra* note 43, at 81.

¹¹⁰ *Id.*

¹¹¹ 38 U.S.C. § 1110 (2012).

¹¹² 38 C.F.R. § 4.19 (2013).

¹¹³ See 38 U.S.C. § 1110.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*; see also 38 C.F.R. § 3.303 (2013). Notably, a veteran cannot receive disability compensation for any injury that is directly connected with tobacco use, even if that tobacco use stems from the veteran’s days in the military. See 38 U.S.C. § 1103 (2012).

¹¹⁸ See Stephenson, *supra* note 3, at 196.

¹¹⁹ See, e.g., Abrams, *supra* note 8, at 30 (“Some [veterans] wait 50 years before they seek out VA benefits.”).

¹²⁰ See *id.*; see also Fox, *supra* note 3, at 341.

¹²¹ See, e.g., Fox, *supra* note 3, at 341; Kabatchnick, *supra* note 8, at 211–12 (“Many of the veterans are not given adequate ratings, and the United States Department of Veterans Affairs provides them with a rating that does not provide enough compensation, yet the veterans are not in strong enough physical shape to work.”).

veteran can prove that his or her disability was service-connected by showing that it was: (1) directly connected to military service, (2) aggravated by military service, or (3) presumptively service-connected.¹²² Medical evidence, ideally shown through Service Medical Records detailing the cause and severity of the veteran's disability, is extremely important for a veteran to prevail in his or her claim.¹²³

Absent such evidence, the veteran faces a tougher battle in pursuit of receiving a service-connected determination for his or her disability. Yet, it is far from impossible. To begin with, the VA presumes that particular forms of active service caused certain disabilities, even if the veteran lacks any medical documentation establishing this nexus.¹²⁴ For instance, certain disabilities are presumed to be service-connected when they occur in veterans exposed to ionizing radiation during military service¹²⁵ or to varieties of herbicides like Agent Orange.¹²⁶ Multiple sclerosis is a disease also presumed to be service-connected where the veteran contracted it within seven years of separation from the service,¹²⁷ as are any "chronic diseases" which occur within a year after the veteran's separation from military service.¹²⁸ In addition, several classifications of disability are presumed service-connected when they occur in veterans who were confined as prisoners of war.¹²⁹

Even if the veteran does not fall into one of these presumptive categories, he or she can still demonstrate a nexus between disability and active service without substantial medical records. "Competent lay evidence" can suffice for proving service-connectivity, even without any precise official record to reinforce it.¹³⁰ If a veteran is unable to get medical records or a statement from a physician who specifically treated his or her injury, that veteran can still prevail through evidence such as reports from specialists in the relevant field testifying as to the cause of the disability or articles

¹²² See 38 U.S.C. § 1110; 38 C.F.R. § 3.303 (regarding diseases incurred or aggravated in military service); 38 U.S.C. § 1112 (2012); 38 C.F.R. § 3.309 (2013) (regarding diseases that are presumed to be service-connected).

¹²³ See Kabatchnick, *supra* note 8, at 205–08. It is important to note that medical evidence can include both inpatient and outpatient records. As the subsequent paragraphs will show, however, lack of such direct evidence in Medical Service Records is *not* fatal to a veteran's disability compensation claim.

¹²⁴ See 38 U.S.C. § 1112; 38 C.F.R. § 3.309.

¹²⁵ 38 U.S.C. § 1112(c).

¹²⁶ 38 U.S.C. § 1116 (2012). Agent Orange is a defoliant to which many Vietnam War veterans were exposed. See 38 U.S.C. § 1116(b)(2) (taking note of the prevalence of Agent Orange in the Vietnam War).

¹²⁷ 38 U.S.C. § 1112(a)(4).

¹²⁸ 38 U.S.C. § 1112(a)(1).

¹²⁹ 38 U.S.C. § 1112(b)(1). Note that this section does not provide an exhaustive list of disabilities presumed to be service-connected by the VA. See, e.g., 38 C.F.R. § 3.309 (listing additional presumptive service-connected disabilities).

¹³⁰ 38 C.F.R. § 3.307(b) (2013); Kabatchnick, *supra* note 8, at 207–08.

published in peer-reviewed medical journals.¹³¹ “Buddy statements” from somebody who served alongside that veteran provide another manner of acceptable evidence in support the veteran’s assertion of service-connectivity.¹³²

If the veteran’s disability is deemed to be service-connected, the VA then determines an “effective date” for that disability and, based on medical evaluation results, establishes a “rating percentage” for the disability.¹³³ The rating percentage is literally designed to reflect the degree to which the veteran is disabled.¹³⁴ Higher rating percentages lead to larger payouts from the VA.¹³⁵ Notably, VA disability compensation payments are not taxed.¹³⁶

Like VA pensions, the VA’s disability compensation program allows spouses and children the opportunity to continue receiving compensation payments after the veteran passes away. A surviving spouse who has not remarried or a surviving dependent child can receive monthly Dependency and Indemnity Compensation payments from the VA.¹³⁷ They can receive Dependency and Indemnity benefits, however, only if the veteran died while on active duty or was discharged under conditions other than dishonorable.¹³⁸ If the veteran was eligible to receive a VA disability compensation for a condition evaluated as totally disabling but died from a non-service-connected condition,¹³⁹ Dependency and Indemnity Compensation would be available if the veteran had the disability evaluated as 100% disabled at least ten years before death or if the disability was evaluated as 100% since the veteran’s discharge from active duty and for at least five years directly before death.¹⁴⁰

In addition, for a surviving spouse to receive Dependency and Indemnity Compensation payments from the VA that spouse must have “cohabitated with the veteran continuously until the veteran’s death or, if separated, was not at fault for the separation.”¹⁴¹ Furthermore, the spouse must fit one of three possible categories in order to be eligible for Dependency and Indemnity benefits.¹⁴² He or she must have either (1) had a child with the veteran, (2) remained married to the veteran for a period of at

¹³¹ See Kabatchnick, *supra* note 8, at 207–08.

¹³² *Id.* at 208–09.

¹³³ See *infra* Part III.A (providing a more detailed discussion on this process).

¹³⁴ See Fox, *supra* note 3, at 341.

¹³⁵ See *id.*

¹³⁶ See JASPER, *supra* note 43, at 17.

¹³⁷ 38 U.S.C. § 1311 (2012).

¹³⁸ 38 U.S.C. § 1310(b) (2012).

¹³⁹ See JASPER, *supra* note 43, at 79.

¹⁴⁰ See *id.*

¹⁴¹ Tammy Walters, *Dependency and Indemnity Compensation (DIC)*, STAR J. (Mar. 4, 2012), www.starjournalnow.com/news/government/141292523.html (explaining DIC and qualification requirements); 38 C.F.R. §§ 3.52–3.53 (2013).

¹⁴² 38 C.F.R. § 3.54(c) (2013).

least one year, or (3) married the veteran within fifteen years after his or her discharge from military service.¹⁴³ For a surviving child to become eligible for Dependency and Indemnity Compensation, the child must be under age eighteen, or between ages eighteen and twenty-three and attending school.¹⁴⁴ Lastly, in order to receive Dependency and Indemnity Compensation, the surviving spouse or dependent child typically must remain unmarried.¹⁴⁵ Upon marriage, the Dependency and Indemnity payments generally will stop.¹⁴⁶

Yet this is not where the complexities of the VA benefits system end. In this next section, we briefly look at the actual application process for VA benefits and the procedure for appealing adverse decisions. These, too, provide an astonishing number of complications that could easily discourage or confuse not only elderly veterans, but veterans of all ages.

III. THE PROCESS: HOW A VETERAN CAN APPLY FOR BENEFITS AND APPEAL IF THAT APPLICATION IS NOT GRANTED

Taken from start to finish and stretched as far as it can go, the application and appeals process for any variety of VA benefit is formidable. For the more specialized benefits, such as Aid and Attendance, the procedure can become even more intimidating, with multiple hoops through which the veteran must jump. Overall, the VA's processes are rather unusual, passing through a mix of administrative, quasi-judicial, and fully judicial decision-making in order to reach results.

A. Applications

Regardless of whether a veteran is applying for a pension or for disability compensation, the process begins at essentially the same point: VA Form 21-526, the Veteran's Application for Compensation and/or Pension.¹⁴⁷

¹⁴³ *Id.*

¹⁴⁴ See 38 C.F.R. § 3.57 (2013).

¹⁴⁵ See 38 C.F.R. § 3.55. However, note the exceptions also contained within this particular section of the Code. For instance, a marriage that is voided or judicially annulled will not bar payment of Dependency and Indemnity Compensation. 38 C.F.R. § 3.55(1)(i)–(ii). Also, if a surviving spouse remarried after October 1, 1998, and then the remarriage ended by the new spouse's death or by valid divorce or annulment, the surviving spouse should receive Dependency and Indemnity Compensation payments again once the new marriage is terminated. 38 C.F.R. § 3.55(3).

¹⁴⁶ *Id.*

¹⁴⁷ See U.S. DEP'T OF VETERANS' AFFAIRS, VA Form 21-526 (Sep. 2009). A veteran can obtain this form by sending a signed and dated letter to the nearest Regional Office stating that he or she wishes to apply for benefits, including "any benefits that I may be entitled to." See Charlene Stoker Jones et al., *Explaining the VA Claims and Appeals Process*, in THE AMERICAN VETERANS AND SERVICEMEMBERS SURVIVAL GUIDE 162 (Veterans for Am.

The veteran completes the relevant portions of this form and submits it, with any supporting documentation, to the nearest VA Regional Office.¹⁴⁸

Importantly, if the veteran is eligible for both a VA pension and VA disability compensation, the Regional Office should calculate how much the veteran would receive under each option and award the veteran the higher of the two benefits.¹⁴⁹ This is consistent with the VA's statutory duty to assist veterans in the claims process.¹⁵⁰ Additionally, if a veteran lacks certain pieces of required or suggested documentation to substantiate his or her claim, the VA is required by law to help the veteran obtain that missing evidence.¹⁵¹

If the VA Regional Office approves the veteran for a pension and the veteran also wishes to be considered for Housebound benefits or Aid and Attendance benefits, the veteran must make a separate application to the same Regional Office where the Form 21-526 was filed.¹⁵² The veteran does so by writing to that Regional Office, requesting consideration for Aid and Attendance or Housebound benefits, and sending supporting medical evidence—preferably an attending physician's report stating that the veteran cannot independently perform one or more tasks of daily living—to the Regional Office.¹⁵³

A veteran seeking VA disability compensation must follow a somewhat different path. After the Regional Office receives the application, a Veterans Service Representative (VSR) will contact the claimant to schedule a medical examination with a VA doctor.¹⁵⁴ The doctor is obligated to review the veteran's entire record and provide a full report of the veteran's

2007). The veteran should then submit the completed Form 21-256 to the Regional Office within one year after receiving the form from the Regional Office. While a veteran is not required to abide by this mandate, doing so can help the veteran financially. If the veteran is approved for benefits, the VA will also pay retroactive benefits back to the date when the veteran's initial letter was received by the Regional Office, provided that the veteran returned the completed Form 21-526 within one year. *See id.*; 38 U.S.C. § 5110(b)(2)(a) (2012).

¹⁴⁸ Supporting documentation should include the veteran's discharge papers. If the veteran has a disability, then he or she should also submit medical evidence of that disability with the Form 21-526. *See JASPER, supra* note 43, at 18.

¹⁴⁹ 38 C.F.R. § 3.151 (2013) ("A claim by a veteran for compensation may be considered to be a claim for pension; and a claim by a veteran for pension may be considered to be a claim for compensation. The greater benefit will be awarded, unless the claimant specifically elects the lesser benefit.").

¹⁵⁰ 38 U.S.C. § 5103A (2012).

¹⁵¹ *Id.*; *see also* *Shinseki v. Sanders*, 556 U.S. 396, 415 (2009) (Souter, J., dissenting) ("The VA differs from virtually every other agency in being itself obliged to help the claimant develop his claim . . .").

¹⁵² *See JASPER, supra* note 43, at 21.

¹⁵³ *Id.*

¹⁵⁴ *See* Jones et al., *supra* note 147, at 166.

present condition.¹⁵⁵ Thus, the VA doctor should have access to the veteran's entire claims file at the time of the examination.¹⁵⁶

After the exam, the medical data, coupled with the information in any supporting documents submitted by the veteran, will be compiled into one file.¹⁵⁷ As noted earlier, the VA is statutorily required to assist a veteran in obtaining evidence to support the veteran's disability claim.¹⁵⁸ In addition, the VA is also bound by law to alert the veteran to the existence of any claim for benefits that appears viable based on the veteran's medical records and supporting documents. This is required even if the veteran does not assert that specific claim in his or her initial application.¹⁵⁹ For example, if it becomes obvious to the VSR that the veteran is suffering from post-traumatic stress disorder (PTSD), the VSR must tell the veteran that he or she likely has a disability claim for PTSD and then assist the veteran in gathering the evidence necessary to substantiate that claim.¹⁶⁰ The VA calls this process the "Development Phase."¹⁶¹

After the conclusion of this evidence-gathering work, the veteran's claim then moves to the "Decision Phase."¹⁶² Here, a Rating VSR in the Regional Office reviews the veteran's entire file, including the findings from the medical examination and any supporting evidence submitted by the veteran.¹⁶³ If the VSR determines that the evidence does not support the veteran's assertion that his or her disability is service-connected, then the veteran receives a 0% rating for that condition.¹⁶⁴ If the VSR determines the evidence does show service-connectivity, then he or she assigns a percentage to reflect the degree to which the veteran is disabled.¹⁶⁵ The VSR also

¹⁵⁵ *Id.* (discussing VA doctor's duty to "provide a thorough and current medical examination to the veteran").

¹⁵⁶ *Id.* Commentators also recommend that a veteran see a private doctor as well, if they can afford the private doctor's visit, and ask that private doctor to write a medical report with their opinion about the severity of the veteran's disability. *See id.*

¹⁵⁷ This file is known as a "claims file," customarily referred to as a "C-file." *See Jones et al., supra* note 147, at 166 (a veteran has the right to request one free copy of his or her entire C-file).

¹⁵⁸ 38 U.S.C. § 5103A.

¹⁵⁹ *See id.*; *see also Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1205–06 (2011) (discussing the importance of this statutory duty to assist in the VA's "non-adversarial" process).

¹⁶⁰ *See Abrams, supra* note 8, at 32–33 (describing some of the challenges and successes of seeking VA disability compensation for veterans suffering from PTSD).

¹⁶¹ Wise, *supra* note 8.

¹⁶² *Id.*

¹⁶³ The Representative (also called a "Rating Officer" by some sources) is statutorily mandated to take into account "all evidence and material of record and applicable provisions of law and regulation" when making the determination of a veteran's service-connected disability rating. 38 U.S.C. § 7104(a) (2012).

¹⁶⁴ *See* 38 C.F.R. § 4.31 (2013).

¹⁶⁵ *Id.*

determines an “effective date” representing the date when the veteran first filed for benefits.¹⁶⁶

The last step in this process is the “Notification Phase,” in which the veteran receives a written explanation of the Regional Office’s decision.¹⁶⁷ If the VA grants the claimant’s request, then the veteran will customarily receive benefits retroactive to the “effective date.”¹⁶⁸ If a veteran learns that his or her claim has been denied or that he or she has received an improper effective date or lower-than-desired disability rating, then he or she has the right to appeal this decision.¹⁶⁹

B. Appeals

A veteran disagreeing with any claims decision rendered by a Regional Office first registers his or her objection through administrative procedures. The veteran commences this process by filing a Notice of Disagreement with the VA, stating precisely why the veteran believes the Regional Office’s decision to be erroneous.¹⁷⁰ The veteran must file the Notice of Disagreement within one calendar year after the date on the decision letter from the Regional Office.¹⁷¹ The VA rigidly enforces this deadline.¹⁷² Missing the deadline will bar the veteran from appealing the decision from the Regional Office.¹⁷³

After the veteran files the Notice of Disagreement, the Regional Office responds by mailing the veteran a Statement of the Case.¹⁷⁴ In this document, the Regional Office is required to explain what evidence it considered in deciding the veteran’s claim and discuss how it applied this evidence to the relevant statutory provisions and regulations.¹⁷⁵ The Regional Office also sends the veteran a Substantive Appeal Form¹⁷⁶ in this same mailing.¹⁷⁷ This form gives the veteran a chance to point out any errors in the

¹⁶⁶ 38 U.S.C. § 5110.

¹⁶⁷ See Jones et al., *supra* note 147, at 168; Wise, *supra* note 8.

¹⁶⁸ 38 U.S.C. § 5110; 38 C.F.R. §§ 3.151, 3.400 (2013).

¹⁶⁹ See *infra* Part III.B.

¹⁷⁰ 38 U.S.C. § 7105 (2012) (a veteran also has the right to request review of the claim by a Decision Review Officer); 38 C.F.R. § 3.2600 (2013) (the Decision Review Officer can alter a Regional Office’s decision only if it contains “clear and unmistakable error”); see also *Bouton v. Peake*, 23 Vet. App. 70, 72 (2008) (defining “clear and unmistakable error” as used in the VA benefits context).

¹⁷¹ 38 U.S.C. § 7105.

¹⁷² See Jones et al., *supra* note 147, at 168.

¹⁷³ *Id.* (“There are no extensions to this deadline and you will lose your right to appeal if the deadline is missed. If the (VA’s) decision becomes final, a veteran can re-open his or her claim, but a showing of new and material evidence may be required.”).

¹⁷⁴ 38 U.S.C. § 7105(d).

¹⁷⁵ *Id.*

¹⁷⁶ U.S. DEP’T OF VETERANS AFFAIRS, VA Form 9 (Nov. 2009).

¹⁷⁷ Jones et al., *supra* note 147, at 168.

Statement of the Case.¹⁷⁸ It also presents the veteran with the opportunity to request an optional non-adversarial personal appearance before an official from either the Regional Office or with a member of the VA's Board of Veterans' Appeals.¹⁷⁹ For the veteran to proceed with the appeal, the Regional Office must receive the fully completed appeal form within sixty days from either the date when the Regional Office mailed the Statement of the Case or within one year from when the VA mailed its original decision,¹⁸⁰ whichever date comes later.¹⁸¹

If the veteran timely files the Substantive Appeal Form, a member of the Board of Veterans' Appeals—which, notably, is part of the VA but *not* part of the Veterans Benefits Administration¹⁸²—will then review the veteran's full file and issue a decision.¹⁸³ The Board has authority to approve or deny the veteran's claim.¹⁸⁴ It can also remand a claim back to the Regional Office with a request for more information.¹⁸⁵ As the Board's review is *de novo*, it is required not to assign any weight to the determination made by the Regional Office.¹⁸⁶ In fact, a veteran can even present new evidence to the Board that was not part of his or her initial claim.¹⁸⁷

If the veteran is still dissatisfied after receiving the written decision from the Board, he or she can ask the Regional Office to re-open the claim.¹⁸⁸ To do so, the veteran must demonstrate the existence of “new and material evidence” that could lead the Regional Office to issue a different decision.¹⁸⁹ Alternatively, the veteran can request the Board to reconsider the claim based on “obvious error” in the Board's determination, describing in detail where these errors occurred.¹⁹⁰ Lastly, if the veteran does not wish to pursue either of these avenues, then he or she can appeal to the United States Court of Appeals for Veterans Claims.¹⁹¹

The Court of Appeals for Veterans Claims is an independent appellate court, created by Congress in 1988.¹⁹² Notably, Congress did not

¹⁷⁸ *Id.*

¹⁷⁹ *See* 38 U.S.C. § 7105.

¹⁸⁰ *Id.* If a veteran misses this deadline, then the decision rendered by the Regional Office becomes final. 38 U.S.C. § 7105(c). If needed, an applicant can request an extension from the VA for filing. 38 C.F.R. § 20.303 (2013).

¹⁸¹ 38 C.F.R. § 20.302 (2013); *see also* 38 U.S.C. § 7105.

¹⁸² Jones et al., *supra* note 147, at 171.

¹⁸³ 38 U.S.C. § 7104.

¹⁸⁴ *Id.*

¹⁸⁵ *See* Fox, *supra* note 3, at 342.

¹⁸⁶ *See* Stephenson, *supra* note 3, at 197.

¹⁸⁷ *See* Fox, *supra* note 3, at 342.

¹⁸⁸ 38 U.S.C. § 5108 (2012).

¹⁸⁹ *Id.*

¹⁹⁰ 38 U.S.C. § 7103 (2012).

¹⁹¹ 38 U.S.C. § 7292 (2012).

¹⁹² 38 U.S.C. § 7251 (2012). Seven judges sit on this court, all of them “appointed by the President with the advice and consent of the Senate.” JASPER, *supra* note 43, at 102.

create this court under Article III of the federal Constitution, the Article from which the federal courts derive their authority.¹⁹³ Instead, Congress fashioned the Court of Appeals for Veterans Claims pursuant to Article I of the Constitution,¹⁹⁴ which allows Congress to create “tribunals” inferior to the Supreme Court.¹⁹⁵ Thus, as an Article I court, the Court of Appeals for Veterans Claims is not considered part of the federal court system. Instead, it is recognized as a court of exclusive, narrowly-drawn subject-matter jurisdiction, which hears cases under its jurisdictional authority from anywhere in the country, much like the United States Tax Court¹⁹⁶ and the other Article I courts.¹⁹⁷

Congress’s creation of this court marked the first time in history that an American court received jurisdiction over the VA’s process in awarding benefits.¹⁹⁸ Previously, the VA held sole discretion over veterans’ benefits, creating a system of “splendid isolation.”¹⁹⁹ Many VA leaders objected strenuously to the creation of this court, arguing that the introduction of judicial review in the VA claims process could turn a system designed to be “claimant friendly”²⁰⁰ into a much more adversarial process.²⁰¹ However,

However, the full court rarely decides a case. Often, appeals are decided by only one judge or by a panel of three judges. *See id.*

¹⁹³ *See* U.S. CONST. art. III, § 1.

¹⁹⁴ 38 U.S.C. § 7251.

¹⁹⁵ U.S. CONST. art. I, § 8, cl. 9 (granting Congress the power “[t]o constitute Tribunals inferior to the [S]upreme Court”).

¹⁹⁶ *See* 26 U.S.C. § 7441 (2012) (establishing the United States Tax Court under Article I of the Constitution).

¹⁹⁷ Other Article I courts include the United States Court of Federal Claims and the United States Court of Military Appeals.

¹⁹⁸ *See* Allen, *supra* note 5, at 502 (noting that prior to the creation of the Court of Appeals for Veterans Claims, “the VA’s decisions concerning veterans’ entitlement to benefits were not reviewable by any court”).

¹⁹⁹ *See, e.g.,* Ridgway, *supra* note 3; Allen, *supra* note 5, at 502; H.R. REP. NO. 100-963, pt. 1, at 10 (1988).

²⁰⁰ The “claimant friendly” nature of the system is something which the VA has long emphasized. This is the underpinning of the VA’s statutory duty to assist veterans in developing their claims to the fullest feasible extent. 38 U.S.C. § 5103A. Furthermore, the traditionally “non-adversarial” relationship between the VA and a veteran claimant has been discussed at length in cases heard not only by the Court of Appeals for Veterans Claims, but also by the Federal Circuit Court of Appeals and even the United States Supreme Court. *See, e.g., Henderson*, 131 S. Ct. at 1204; *Barrett v. Nicholson*, 466 F.3d 1038, 1044 (Fed. Cir. 2006) (“The government’s interest in veterans’ cases is not that it shall win, but rather that justice shall be done, that all veterans so entitled receive the benefits due to them.”); *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998); *Washington v. Nicholson*, 19 Vet. App. 362, 370–71 (2005); *see also* H.R. REP. NO. 100-963, at 12 (“Congress has designed and fully intends to maintain a beneficial non-adversarial system of veterans benefits.”).

²⁰¹ Indeed, the VA’s duty to assist a veteran with his or her claim terminates when the veteran appeals to the Court of Appeals for Veterans Claims. Instead, this court proceeding involves the type of adversarial relationship that one would expect between any two parties coming before an American tribunal. *See Jones et al., supra* note 147, at 175–77 (discussing the adversarial process between the veteran and the VA, in which the VA is no longer helping

Congress—spurred largely by testimony from several veterans service organizations criticizing the VA as unduly rigid and driven by fiscal concerns more than justice—determined that a level of judicial oversight was necessary.²⁰²

Only the veteran is permitted to appeal a claims decision to the Court of Appeals for Veterans Claims.²⁰³ The court cannot hear appeals from the VA or from any VA official objecting to a Board ruling.²⁰⁴ Additionally, a veteran cannot have the outcome of his or her Board decision “worsened” (e.g., a reduction of a veteran’s disability rating from 50% to 30%) by the Court of Appeals for Veterans Claims.²⁰⁵ A veteran who disagrees with the outcome of his or her claim therefore has nothing to lose by appealing to the Court of Appeals for Veterans Claims.

A veteran wishing to appeal to the Court of Appeals for Veterans Claims must file a Notice of Appeal within 120 days after the mailing date of the Board’s decision.²⁰⁶ Notably, if the Board has remanded the case to the Regional Office, the case cannot be appealed to the Court of Appeals for Veterans Claims.²⁰⁷ In such a situation, the veteran would be required to wait until the Regional Office acts on the remanded claim. Then the Board would re-hear the case and would have to issue a decision before that veteran would have standing to appeal to the Court of Appeals for Veterans Claims.²⁰⁸

After the veteran files the Notice of Appeal, the VA must provide the court with the veteran’s entire claims file, highlighting the documents which the veteran wants the court to closely examine.²⁰⁹ These documents, copies of which must be provided to the veteran (or his or her advocate), are known as the “Designation of the Record.”²¹⁰ The veteran then has the opportunity to submit additional documents not contained in the Designation of the

the veteran but rather is merely the “opposing party”). In cases heard by the Court of Appeals for Veterans Claims, the Secretary of Veterans Affairs is always named as the appellee. *Id.* at 175.

²⁰² See *Judicial Review Legislation: Hearing on S. 11, The Proposed Veterans Administration Adjudication Procedure and Judicial Review Act, and S. 2292, Veterans’ Judicial Review Act Before the Comm. on Veterans’ Affairs of the United States Senate*, 100th Cong., 2d Sess. 2841, 49–54, 177–270, 270–311, 383–430 (1988) (containing statements from leaders of the American Veterans Committee, The American Legion, the National Vietnam Veterans Coalition, Paralyzed Veterans of America, and other noted veterans service organizations). See generally P.L. 100-687, 102 Stat. 4105 (1988) (discussing the rationale for creating the Court of Appeals for Veterans Claims as well as the jurisdiction and basic procedures of this court).

²⁰³ 38 U.S.C. § 7252(a) (2012).

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ 38 U.S.C. § 7266(a) (2012).

²⁰⁷ See Jones et al., *supra* note 147, at 175.

²⁰⁸ See *id.*

²⁰⁹ See JASPER, *supra* note 43, at 102. According to statute, the General Counsel for the VA always represents the Secretary. 38 U.S.C. § 7263(a) (2012).

²¹⁰ *Id.* at 103.

Record for the court to review.²¹¹ This is called the “Counter Designation of the Record.”²¹² Together, the Designation and Counter Designation constitute the “Record on Appeal” for that case.²¹³

Following receipt of the Record on Appeal, the court will order the veteran or the veteran’s advocate to submit their brief within sixty days.²¹⁴ The VA’s attorney will then have sixty days after the veteran’s brief is filed to prepare and file its own brief.²¹⁵ In most cases, the court will request the parties to appear for oral arguments.²¹⁶

If the court finds that the Board’s holding was “clearly erroneous” or otherwise contrary to the basic standards of law, then the court will reverse the decision.²¹⁷ In practice, the court often remands the decision back to the Board, seeking more information.²¹⁸ If a case is remanded to the Board, the Board is required to expedite the re-hearing of the veteran’s claim.²¹⁹ In situations where there appears to be a virtual “tie” between the merits presented by both sides, the court is required, both by statute and by regulation, to give the veteran the benefit of the doubt and rule in the veteran’s favor.²²⁰

A veteran who disagrees with the Court of Appeals for Veterans Claims’ decision is statutorily permitted to appeal to the United States Court

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *See* JASPER, *supra* note 43, at 103.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ 38 U.S.C. § 7261(a)(3)–(4)(2012) (directing the court to set aside VA actions regarding benefits that are found to be arbitrary and capricious, contrary to constitutional rights, overstepping jurisdictional limits, in violation of procedure established by law, or clearly erroneous).

²¹⁸ The court has deemed remand to the Board appropriate “where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inaccurate.” *Tucker v. West*, 11 Vet. App. 369, 374 (1998). Typically, the court’s decision to remand is not subject to judicial review. *See Adams v. Principi*, 256 F.3d 1318, 1320 (D.C. Cir. 2001). However, under certain specific circumstances spelled out in a three-part test, a veteran can seek review by the Federal Circuit of the court’s decision to remand to the Board. *See Byron v. Shinseki*, 670 F.3d 1202, 1204–05 (D.C. Cir. 2012).

²¹⁹ 38 U.S.C. § 7112 (2012). Similarly, if a case from the Board is ever remanded to the Regional Office for further development, that case is also required to receive expedited action. 38 U.S.C. § 5109B (2012).

²²⁰ *See* 38 U.S.C. § 5107(b) (2012); 38 C.F.R. § 3.102 (2013) (“By reasonable doubt is meant one which exists because of an approximate balance of positive and negative evidence which does not satisfactorily prove or disprove the claim.”). One of the leading cases applying the “benefit of the doubt” standard is *Gilbert v. Derwinski*, 1 Vet. App. 49, 54–56 (1990). *But see Ortiz v. Principi*, 274 F.3d 1361, 1364–66 (2001) (“The statutory benefit of the doubt rule thus would apply *only when the factfinder determines that the positive and negative evidence relating to the veteran’s claim are ‘nearly equal,’* thus rendering any decision on the merits ‘too close to call.’”) (emphasis added).

of Appeals for the Federal Circuit.²²¹ As an Article III court, the Federal Circuit can overrule the Court of Appeals for Veterans Claims only in situations where questions of law are at issue.²²² If a veteran were unsatisfied by a decision rendered by the Federal Circuit, the veteran could petition for a writ of certiorari with the United States Supreme Court as a final measure of appeal in hope that the Supreme Court would elect to hear the case.²²³

The role of attorneys in this appellate process has remained controversial since the 1860s. In the aftermath of the Civil War, Congress imposed a \$10 limit on fees for lawyers assisting veterans in benefits claims—a monetary cap which remained in place until 2007.²²⁴ Not surprisingly, few lawyers wanted to help veterans prepare claims for the VA. Furthermore, in an action meant to preserve the “pro-claimant nature” of the claims process, the VA instituted a rule that prevented veterans from hiring an attorney until after the veteran received an adverse decision from the Board.²²⁵

Today, however, there is no \$10 limit, and a veteran is permitted to hire an attorney once that veteran files a Notice of Disagreement objecting to a decision made by the Regional Office.²²⁶ (A lawyer can represent a veteran *pro bono* at any stage in the process, including helping the veteran prepare and file the original claim.)²²⁷ Notably, though, only attorneys who have been accredited by the VA are permitted to represent veterans in “the preparation, presentation, and prosecution of claims of laws administered by the Secretary.”²²⁸ This additional demand of accreditation allows the VA to prevent attorneys who have ever been disbarred or suspended from representing veterans in benefits appeals.²²⁹ It also permits the VA to regulate the conduct of its accredited attorneys, almost as if the agency were an

²²¹ 38 U.S.C. § 7292.

²²² 38 U.S.C. § 7292(d)(2).

²²³ 38 U.S.C. § 7292(c) (citing 28 U.S.C. § 1254 (2012)).

²²⁴ See Allen, *supra* note 5, at 509–10 (citing Act of July 4, 1864 §§ 12–13, 13 Stat. 387, 389).

²²⁵ Of course, this rule existed during the infancy of the Court of Appeals for Veterans Claims. Prior to Congress creating this court, veterans lacked the authority to seek judicial review of VA benefits decisions and thus had no access to an attorney to assist them in such matters.

²²⁶ See 38 U.S.C. § 5904 (2012).

²²⁷ Tellingly, § 5904(c)(1) notes only that an attorney cannot receive money for assisting a veteran prior to filing the Notice of Disagreement, leaving the door ajar for *pro bono* assistance by attorneys. See Abrams, *supra* note 8, at 34.

²²⁸ 38 U.S.C. § 5904(a); see also 38 C.F.R. §§ 14.627(a), 14.629(b)(1) (2013). As these provisions note, accreditation is required for any attorney or other advocate to represent a veteran before the VA. For an individual (an attorney or a veterans service organization official) to apply for accreditation, he or she must begin by completing and submitting a VA Form 21-22a (“Appointment of Individual as Claimant’s Representative”). See 38 C.F.R. § 14.629(n).

²²⁹ 38 U.S.C. § 5904(a)(4); see also 38 C.F.R. § 14.629(b)(1).

independent bar association.²³⁰ Importantly, the additional demand for accreditation further allows the VA to oversee any fee agreement set by the attorney for payment from the veteran.²³¹

Still, many interested parties have denounced the fact that lawyers can represent veterans before the Board, despite the accreditation requirement and continuing limits on attorney representation.²³² Around the time this change was introduced, for example, a retired Air Force Lieutenant Colonel remarked that allowing lawyers to represent veterans earlier in the claims process was “like inviting the wolf into the chicken house.”²³³ Arguably, this heightened role of lawyers has made the claims process more adversarial than ever before. However, it also provides the representation many veterans need in order to steer through the complex and deadline-driven claims process.

IV. PITFALLS AND PROBLEMS: WHERE THE SYSTEM GOES PARTICULARLY WRONG FOR AMERICA’S ELDERLY VETERANS

There is no denying that the VA’s benefits system is well-intended. The scope of benefits that a veteran can receive from the VA is impressive, and these benefits greatly assist many veterans. However, few would deny that the VA system fails to serve veterans, particularly older veterans, as efficiently as it should.²³⁴ In the subsections that follow, we look at several of the most damaging roadblocks in the VA’s benefits system, focusing on obstacles that especially harm elderly veterans.

A. Complexity

Even the most cursory review of the above sections demonstrates the tangled nature of veterans’ benefits law.²³⁵ Not surprisingly, one of the most frequently cited barriers to veterans receiving—or even applying for—VA

²³⁰ See 38 U.S.C. § 5904(a); 38 C.F.R. § 14.629.

²³¹ 38 U.S.C. § 5904(a)(5).

²³² See, e.g., Lawrence Messina, *Veterans’ Advocate Seeks to Change Attorneys’ Role in Disability Claims*, INSURANCE J., Nov. 26, 2012, <http://www.insurancejournal.com/news/national/2012/11/26/271573.htm> (quoting a Disabled American Veterans leader about “egregious cases where veterans have paid an awful lot of money [to attorneys] regardless of the level of representation.”).

²³³ See Tom Philpott, *Vets Fight Over Lawyers*, MILITARY.COM (Sept. 1, 2006), <http://www.military.com/features/0,15240,112059,00.html> (quoting Lt. Col. Charley Burch after the Senate passed the law allowing compensated attorneys to represent veterans during part of the claims process).

²³⁴ This is particularly evident when considering the age of most veterans applying for VA pensions.

²³⁵ See *supra* Parts II–III.

benefits is a veteran's inability to understand the system.²³⁶ Eligibility qualifications alone are filled with myriad permutations and complications.²³⁷ Similarly, VA application procedures often present time-consuming challenges to veterans. The appellate process, with its unforgiving deadlines, is even more daunting.²³⁸

The number of veterans who never get the benefits for which they are qualified demonstrates the degree to which veterans are discouraged from applying for VA benefits. As of 2005, an estimated two million veterans or their surviving spouses who were eligible for a VA pension were not receiving pension benefits, leaving an estimated \$22 billion annually in unpaid VA pensions.²³⁹ Studies have shown that only approximately one-fourth of veterans eligible for Aid and Attendance benefits are actually participating in this program.²⁴⁰ And, pensions are not the only underused VA benefit. Current estimates indicate that well over 500,000 veterans who are eligible for some level of disability compensation from the VA are not receiving it.²⁴¹

Sometimes, the complexity of VA benefits qualifications and procedures leads to veterans simply throwing up their hands and neglecting to apply at all.²⁴² "Veterans get so frustrated trying to deal with that system," one longtime Vietnam Veterans of America member told the *Tulsa World* in October 2012. "[I]f you don't have help dealing with the paperwork, you'll never get it done."²⁴³ Other veterans attempt to apply for benefits, but

²³⁶ See, e.g., THE STATUS OF EFFORTS TO IDENTIFY PERSIAN GULF VICTIMS 61 (Christopher Shays ed., 1999) ("VA regulations are difficult to understand, both for veterans and for the VA personnel whose charter it is to serve them."); William L. Pine & William F. Russo, *Making Veterans Benefits Clear: VA's Regulation Rewrite Project*, 61 ADMIN. L. REV. 407, 408 (2009) ("[T]hese regulations have become progressively complex, difficult to understand, and sometimes ambiguous, causing uncertainty in the claim process and costly litigation."); Fox, *supra* note 3, at 339 ("There are few persons who believe that the current system for administering these benefits is working properly."); Kabatchnick, *supra* note 8, at 187 ("The United States Department of Veterans' Affairs (VA) has an exhaustive, arduous, and comprehensive claims adjudication process by which benefits are awarded to a veteran.").

²³⁷ See *supra* Part II.

²³⁸ See *supra* Part III.

²³⁹ Adams, *supra* note 42.

²⁴⁰ See Diane C. Lade, *Little-known VA Program Can Help Vets With Out-of-Pocket Medical Costs*, S. FLA. SUN-SENTINEL (Feb. 16, 2006), www.veteranaid.org/docs/AA.pdf. In addition, less than 20% of surviving spouses eligible for Aid and Attendance benefits are taking part in this program. *Id.* These figures come from a study organized by the VA. *Id.*

²⁴¹ See Adams, *supra* note 42. However, a portion of this figure is likely due less to the system's complexity and more to the egregious backlog of unresolved VA cases. See *infra* Part IV.B.

²⁴² See *supra* note 236 and accompanying text.

²⁴³ Casey Smith, *Many Military Veterans Frustrated By Claims Backlog*, TULSA WORLD (Oct. 15, 2012), www.tulsaworld.com/archives/many-military-veterans-frustrated-by-claims-backlog-endless-process/article_8c3a1e50-415e-539a-b943-989697ef4563.html.

confusion regarding the various requirements results in them missing deadlines,²⁴⁴ failing to file the proper paperwork,²⁴⁵ applying for benefits for which they are ineligible,²⁴⁶ or neglecting to apply for benefits for which they are eligible.²⁴⁷

Elderly veterans—especially elderly veterans with one or more disabilities—are particularly hindered by this extremely intricate system.²⁴⁸ For instance, veterans with vision impairments (the occurrence of which is greater in older adults)²⁴⁹ can have a tough time just reading through the pages and pages of detailed requirements, much less filling out all of the required forms. A veteran with any level of cognitive disability would find this process utterly impossible. And while help applying for benefits is available from Veterans Service Organizations,²⁵⁰ reluctance among older individuals to ask for help may result in many older veterans never taking the first step—or the right step—in this process.

Worse still, the VA is presently proposing amendments to the Code of Federal Regulations that would allow the agency to ignore any claim that is not submitted on a specific VA form, even if the veteran claimant is fully eligible to receive benefits.²⁵¹ The forms that would be required under these regulatory changes include a complex income questionnaire for standardized pension applicants, a burden that could overwhelm many elderly veterans seeking pensions.²⁵² If these alterations are promulgated, one could expect that even more veterans—particularly elderly veterans who might lack easy

²⁴⁴ See *Henderson*, 131 S. Ct. 1197 (holding that the VA must be less rigid, vis-à-vis civil claims, regarding the filing deadlines for veterans appealing to the Court of Appeals for Veterans Claims).

²⁴⁵ See James Dao, *Veterans Wait for Benefits as Claims Pile Up*, N.Y. TIMES (Sept. 27, 2012), www.nytimes.com/2012/09/28/us/veterans-wait-for-us-aid-amid-growing-backlog-of-claims.html?pagewanted=all (quoting the daughter of an elderly veteran stating that “It seems you get lost in this bureaucratic paperwork.”).

²⁴⁶ See Adams, *supra* note 42.

²⁴⁷ See, e.g., Kabatchnick, *supra* note 8, at 213–14; Adams, *supra* note 42; Dao, *supra* note 245.

²⁴⁸ See, e.g., Ridgway, *supra* note 3, at 197; Kabatchnick, *supra* note 8, at 213–14; see also Alan Caldwell, *Veterans and their Families May Be Missing Out on Benefits*, ANNARBOR.COM (Aug. 20, 2012), <http://www.annarbor.com/health/elizabeth-hurwitz-elder-law-attorney-len-pytak-cpa-accountant-for-seniors-hurwitz-law-offices/> (quoting elder law attorney Elizabeth Hurwitz as saying that many older veterans and their family members misinterpret VA requirements and do not even apply for benefits for which they are eligible).

²⁴⁹ See generally R.L. Brown & A.E. Barrett, *Visual Impairment and Quality of Life Among Older Adults: An Examination of Explanations for the Relationship*, 66 J. GERONTOLOGY PSYCH. SCI. & SOC. SCI. 364–73 (2011).

²⁵⁰ See *infra* notes 328–332 and accompanying text (discussing the importance of veterans service organizations in assisting veterans with the VA benefits process).

²⁵¹ See Standard Claims and Appeals Forms, 78 Fed. Reg. 65489 *et seq.* (Oct. 31, 2013) (proposing to amend multiple provisions in 38 C.F.R. 3, 38 C.F.R. 19, and 38 C.F.R. 20).

²⁵² See *id.* The detailed income questionnaire is particularly relevant to the proposed changes to 38 C.F.R. § 3.160.

access to these specific standardized forms—will be denied benefits solely on procedural grounds, regardless of their actual eligibility.

Perhaps the subtlest issues in this area arise when a veteran is granted a VA benefit, but the benefit given is not the best result the veteran could potentially attain. Longtime veterans' attorney Ronald B. Abrams has spoken at length regarding veterans in nursing homes receiving a lower standard VA pension when they are eligible for VA disability compensation of a higher amount.²⁵³ The elderly veteran thus loses money because he or she—or the person helping him or her submit the claim—is not applying for the type of benefit that could bring the best possible result.²⁵⁴

B. Delay

William J. Maxson survived combat duty in World War II.²⁵⁵ Yet, the 94-year-old former Army infantry member is now fighting another battle, one in which the enemy is time.²⁵⁶ For seven years, Maxson tried to get the VA to increase his disability compensation payments for hearing loss, complications from shrapnel in his back, and PTSD.²⁵⁷ Finally in 2009, he received notice that the VA had increased his disability rating to 100%.²⁵⁸ At that time, he had just celebrated his ninety-first birthday.²⁵⁹

Now, Maxson is embroiled in another encounter with the VA.²⁶⁰ When his nursing home raised its rates, the nonagenarian moved in with his son and applied to the VA for Aid and Attendance benefits.²⁶¹ By the summer of 2012, after nearly a year of waiting, Maxson had still heard nothing about whether he would be approved for the benefits.²⁶² Now, Maxson has begun to worry that he will already be dead by the time the VA gets around to his claim.²⁶³

²⁵³ See Abrams, *supra* note 8, at 30.

²⁵⁴ *Id.* (“The danger is that an advocate . . . might get a veteran a non-service-connected pension, which allows that veteran’s family to spend down his or her assets over time and keep the veteran in a nursing home. But it’s possible that the conditions for which the vet is in the nursing home could be service-connected [thus making the veteran eligible for a VA disability compensation]. So instead of receiving \$800 a month, the veteran could be receiving \$2,400 a month in benefits. That’s \$144,000 over five years.”).

²⁵⁵ Wise, *supra* note 8.

²⁵⁶ *Id.*

²⁵⁷ Lindsay Wise, *VA Benefits Will Finally Increase For 91-Year-Old Vet*, HOUS. CHRON. (Oct. 24, 2009), www.chron.com/news/houston-texas/article/VA-benefits-will-finally-increase-for-91-year-old-1738719.php.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ Wise, *supra* note 8.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.*

Unfortunately, Maxson's case is not an abnormality.²⁶⁴ The VA's claims processing system backlog has become notorious, with approximately 900,000 claims still pending nationwide.²⁶⁵ As one frustrated veteran whose claims battle lasted nearly thirteen years stated, "I feel like the VA is waiting for us veterans to die."²⁶⁶

There is no concrete indication that the VA is actually "waiting for veterans to die." The agency has expressed a desire to fix the claims backlog, pledging to eliminate it by 2015.²⁶⁷ According to the VA's own data, however, the number of unresolved claims continues to increase.²⁶⁸ Veterans now wait an average of eight months for the VA to decide a claim.²⁶⁹ Despite significant investigations into the issue by the media,²⁷⁰ by Congress,²⁷¹ and

²⁶⁴ *Id.*; see also Bob Brewin, *VA's Disability Claims Backlog Pushes 900,000*, NAT'L J. (Apr. 23, 2012), available at <http://www.nationaljournal.com/congress/va-s-disability-claims-backlog-pushes-900-000-20120419>; Dao, *supra* note 245. This is despite the fact that the VA reportedly processed around one million claims each year in 2010 and 2011 and was on pace to do the same in 2012. Rick Maze, *VA Secretary Sees Improvement in Claims Backlog*, USA TODAY (Nov. 11, 2012), www.usatoday.com/story/news/nation/2012/11/11/veterans-affairs-backlog-claims/1697847/; Maria L. La Ganga, *Angry Vets Demand End to Backlog of Disability Claims*, L.A. TIMES (May 22, 2012), articles.latimes.com/2012/may/22/local/la-me-oakland-veterans-20120522; Fox, *supra* note 3, at 340 (noting that the VA benefits system today is "typified by a great deal of bureaucratic gridlock").

²⁶⁵ See *supra* note 264. Interestingly, according to a recent investigation by the Center for Investigative Reporting, veterans in certain geographic areas wait a particularly long period of time. Veterans in California deal with a lengthier processing time than most areas of the country, and metropolitan hubs, such as New York City, Los Angeles, and Chicago, are also exceptionally slow. Aaron Glantz, *Veterans Waiting Even Longer for Benefits, Especially in Big Cities*, DAILY BEAST (Aug. 29, 2012), www.thedailybeast.com/articles/2012/08/29/veterans-waiting-even-longer-for-benefits-especially-in-big-cities.html.

²⁶⁶ Kabatchnick, *supra* note 8, at 204 (describing the case of disabled veteran David Best, who fought the VA for thirteen years before ultimately winning his battle for benefits).

²⁶⁷ See Glantz, *supra* note 265.

²⁶⁸ See *id.*

²⁶⁹ *Id.*

²⁷⁰ See, e.g., Matt Cover, *Backlog of Veterans' Disability Claims Increases 179% Under Obama*, CNS NEWS (Oct. 4, 2012), cnsnews.com/news/article/backlog-veterans-disability-claims-increases-179-under-obama; Glantz, *supra* note 265; Wise, *supra* note 8; Dao, *supra* note 245.

²⁷¹ Congress even passed a bill in 2012 ordering the VA to reduce the backlog. At the time of writing this article, the bill is still before the Senate. See Andy Wright, *Congress Passes Bill Requiring VA to Reduce Backlog of Disability Claims*, THE BAY CITIZEN PULSE OF THE BAY BLOG (June 1, 2012, 1:36 PM), <http://www.baycitizen.org/blogs/pulse-of-the-bay/house-representatives-calls-va-fix/>.

by the VA itself,²⁷² there is no respite from these lengthy delays on the immediate horizon.²⁷³

Waiting for such lengthy periods to receive an answer on a claim is unacceptable treatment for any veteran. For a veteran the age of William Maxson, however, these delays can literally prove to be fatal to the claim.

An elderly veteran could die during the lengthy period between when the claim is filed and when the VA makes its decision. Such a story made headlines in September 2012 when 86-year-old Richard Scott, a World War II veteran who fought with the American army on D-Day, passed away with his claims still unresolved.²⁷⁴ He had been waiting nearly a year for a decision from the VA.²⁷⁵ Scott is far from the only elderly veteran who has died while waiting for an answer from the agency.²⁷⁶

To make matters worse, many unresolved claims will typically die with the veteran.²⁷⁷ The VA may allow certain individuals to continue a pending VA pension claim, for example a spouse who lived with the veteran continuously from the date of marriage to the date of death and who was married to the veteran at the time of death,²⁷⁸ or a child who is either under age eighteen or who is under age twenty-three and permanently incapable of

²⁷² The most recent—and most thorough—VA investigation into this issue produced what the agency is calling its “Transformation Plan” to alleviate the number of pending claims. *See also infra* Part VII.B.

²⁷³ *See, e.g.,* Glantz, *supra* note 265; Dao, *supra* note 245. One attempt at alleviating at least part of the backlog emerges from the VA’s new “Fully Developed Claims” pilot program. If a veteran submits a disability compensation claim and provides the VA with all the pieces of evidence that he or she wants the VA to consider when adjudicating that claim, the VA promises to expedite its decision on that claim. *See* US. DEP’T OF VETERANS AFFAIRS, VA Form 21-526EZ. However, this effort, while admirable, still does not help the delays confronting many veterans who do not have all of their medical evidence readily available when they file their disability compensation claims with the VA.

²⁷⁴ Claudia Gomez, *World War II Vet Dies While Waiting for VA Benefits*, MY FOX PHILLY (Sept. 18, 2012), www.myfoxphilly.com/story/19566840/wwii-vet-dies-waiting-for-va-benefits.

²⁷⁵ *Id.*

²⁷⁶ A look on the VeteranAid.org online message board for veterans, for example, revealed the recent story of an elderly veteran who died while his application for Aid and Attendance benefits was still pending. *See Vet Dies While A&A Claim Pending*, VETERANAID.ORG FORUM (June 28, 2011, 10:02 PM), <http://www.veteranaid.org/forums/index.php?topic=1367.0>.

²⁷⁷ *See* 38 U.S.C. § 5121(a) (2012) (stating specifically that benefits can be payable to another party only if the veteran was entitled to those benefits *at the time of death*, based on “existing ratings or decisions”); *see also* Jones v. West, 136 F.3d 1296 (D.C. Cir. 1998) (denying veteran’s widow unpaid benefits because the veteran’s claim for VA pension had time-lapsed at the time of his death); Taylor v. Nicholson, 21 Vet. App. 126 (2007) (holding denial of compensation benefits for a veteran with a documented seizure disorder was proper because the veteran’s claim was still pending at the time of his death).

²⁷⁸ *See* 38 U.S.C. § 5121A (2012). In past court cases, spouses have on occasion been successful with regard to pending VA claims. *See, e.g.,* Martin v. Brown, 7 Vet. App. 196 (1994); Blackburn v. Brown, 4 Vet. App. 395 (1993).

supporting himself.²⁷⁹ If there is nobody in the veteran's family who meets these criteria, however, the pension claim is thrown out.²⁸⁰ Thus, not only veterans, but also their family members can become victims of the VA's tardiness.

Even if a claimant does not pass away while waiting for a decision, he or she can still be adversely affected by the backlog. For elderly individuals, many of whom are living on fixed incomes, the VA's delay can result in a tremendous financial strain. A September 2012 article in the *New York Times* described the widow of a World War II veteran who filed for a "death pension" based on her husband's service.²⁸¹ The VA took nearly two years to process the woman's claim.²⁸² The widow consequently used \$12,000 of her daughter's savings to pay nursing home bills.²⁸³

There are many potential reasons for these destructive slowdowns. The recent influx of claims from veterans of the Iraq and Afghanistan wars has certainly not helped the agency's efficiency.²⁸⁴ In 2011, veterans filed approximately 1.3 million claims, twice as many claims than were filed in 2001.²⁸⁵ Still, the legacy of delays extends back before the 9/11 terrorist attacks, demonstrating that this recent increase in volume only exacerbates a preexisting problem.²⁸⁶ The massive amount of paperwork that accompanies every VA claim—the result of a system that calls out for some sort of streamlining—is also a primary culprit.²⁸⁷ In August 2012, VA Undersecretary for Benefits Allison Hickey told the Center for Investigative Reporting about the "stacks and stacks of paper"—with each sheet part of a claim for VA benefits—located in every Regional Office.²⁸⁸ Understaffing within the VA is another commonly cited contributing factor to this problem.²⁸⁹ Delays also result when a veteran misunderstands one or more

²⁷⁹ 38 U.S.C. § 5121A.

²⁸⁰ See *supra* note 277; see also 38 C.F.R. § 3.1000 (2013).

²⁸¹ Dao, *supra* note 245 (relating the story of Doris Hink).

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ See *id.*

²⁸⁵ *Id.* Also, compare with only one million claims processed each year, and it becomes increasingly obvious that the backlog is not currently getting any better. See *supra* notes 264–266 and accompanying text.

²⁸⁶ Dao, *supra* note 245.

²⁸⁷ See, e.g., Glantz, *supra* note 265. In 2012, Congress passed a bill ordering the VA to make their claims system paperless in an effort to reduce the log jam of pending claims. See Ramsey Cox, *Senate Passes Bipartisan, Bicameral Veterans' Benefits Bill*, THE HILL'S FLOOR ACTION BLOG (July 18, 2012, 7:30 PM), <http://thehill.com/blogs/floor-action/senate/238841-senate-passes-bipartisan-bicameral-veterans-benefits-bill>. At the time of this writing, the bill is still awaiting the President's signature.

²⁸⁸ Glantz, *supra* note 265.

²⁸⁹ See, e.g., Sabrina Eaton, *Sen. Sherrod Brown Says Veterans Groups Can Help Reduce Benefit Claim Backlog*, CLEVELAND PLAIN-DEALER (May 23, 2012), www.cleveland.com/open/index.ssf/2012/05/sen_sherrod_brown_says_veteran.html.

steps in the application process, causing the VA to perform additional administrative work.²⁹⁰

Importantly, the VA has recently made some efforts to try and correct these problems.²⁹¹ However, the fact that the delays are not only continuing but worsening does not stimulate much hope for improvement in the upcoming years.²⁹²

C. Inaccuracy

Along with its reputation for slowness, the VA's claims system has also gained notoriety for inaccuracy.²⁹³ Too often, stories surface about Regional Office employees failing to meet their statutory duty of assisting veterans in gathering adequate evidence to support their claims.²⁹⁴ In a 2009 interview, attorney Ronald Abrams spoke of situations where Regional Offices would write to a veteran, asking for more information about their medical situation or service record, then deny the veteran's claim long before

²⁹⁰ See Abrams, *supra* note 8, at 31–32 (noting that a veteran can save a lot of time and aggravation if he or she files everything correctly the first time).

²⁹¹ See *infra* Part VII.

²⁹² See Dao, *supra* note 245; Glantz, *supra* note 265. As of August 2012, the VA was averaging eight months to process a claim. Glantz, *supra* note 265. The Government Accountability Office found that between 2008 and 2011, the average number of days for veterans who had served in active duty to have their disability claims processed by the VA rose from 283 days to 394 days. DANIEL BERTONI, MILITARY DISABILITY SYSTEM: PRELIMINARY OBSERVATIONS ON EFFORTS TO IMPROVE PERFORMANCE 6 (2012), available at <http://www.gao.gov/assets/600/591061.pdf>.

²⁹³ As of November 2012, the error rate acknowledged by the VA is 14%. Aaron Glantz, *Accuracy Isn't Priority As VA Battles Disability Claims Backlog*, NEWS 10 ABC (Nov. 11, 2012), available at <http://www.news10.net/news/article/216883/2/Accuracy-isnt-priority-as-VA-battles-disability-claims-backlog>. According to findings by the Center for Investigative Reporting, the rate could be even higher, potentially as high as 33%. Read another way, if the Center's findings are correct, the VA makes an error of some sort in one out of every three claims. See *id.*

²⁹⁴ See, e.g., *Military Construction, Veterans Affairs, and Related Agencies Appropriations Bill, 2013: General Operating Expenses, Veterans Benefits Administration*, H.R. Rep. No. 112-491 (2012), available at http://thomas.loc.gov/cgi-bin/cpquery/?&sid=cp112NCKu8&r_n=hr491.112&dbname=cp112&&sel=TOC_136248& (calling on the VA to improve the accuracy of its claims processing system); AMVETS et al., *Culture Change Needed To Fix The Claims-Processing System*, in INDEPENDENT BUDGET FISCAL YEAR 2012 26 (2012), available at http://www.independentbudget.org/2012/IB_FY2012.pdf (“[B]y the (VA's) own measurement, the accuracy of disability compensation rating decisions continues to trend downward, with its quality assurance program . . . reporting only an 83 percent accuracy rating for the 12-month period ending May 31, 2010.”); Steve Vogel, *For VA, Mountains of Disability Claims Remain a Problem as Vets Wait for Help*, WASH. POST (Nov. 10, 2012), www.washingtonpost.com/politics/for-va-mountains-of-disability-claims-remain-a-problem-as-vets-wait-for-help/2012/11/10/c67fc386-2a7f-11e2-96b6-8e6a7524553f_story.html; Glantz, *supra* note 293; Dao, *supra* note 245; Solomon, *supra* note 27; Wise, *supra* note 8.

that information arrived.²⁹⁵ Other times, the VA has unwittingly provided inaccurate advice to veterans, telling them that they are not eligible for certain benefits when in fact they qualify.²⁹⁶ In such situations, the VA's vaunted "non-adversarial, claimant-friendly" process ends up causing more harm than good.

Carelessness with veterans' records also appears to be surprisingly common within the VA system. Incidents are all too frequent in which VA representatives lose veterans' claims applications, discharge paperwork, medical records, or other vital documents.²⁹⁷ A 2009 Inspector General review uncovered documents from veterans improperly placed in the shredding bin at forty VA Regional Offices, with more than 140,000 claims files lost in the process.²⁹⁸ *New York Times* military correspondent James Dao lists "lost or mishandled documents" as the top complaint from veterans who have filed claims with the VA.²⁹⁹

As with the backlog, inaccurate information and carelessness with records tends to leave a particularly deep wound on elderly veterans. The 2012 *New York Times* article, for instance, discusses the case of 69-year-old Dennis Selsky, a Vietnam War veteran who suffers from multiple sclerosis.³⁰⁰ Due to the VA repeatedly losing part of his file, Selsky's disability compensation claim has stretched to fifteen months with no answer from the Regional Office.³⁰¹ Such mistakes could leave veterans without the means necessary to properly provide for themselves and their loved ones. At worst, the veteran could die with the claim unresolved, likely leaving the veteran and his or her family left out completely from the benefits that the veteran had earned.

Of course, a veteran can appeal an inaccurate Regional Office decision and hope for a favorable outcome from the Board or the Court of Appeals for Veterans Claims.³⁰² Yet any appeal also comes at a time cost. In 2011, the average wait between a veteran filing an appeal to the Board and the Board rendering a decision was 883 days.³⁰³ Appeals to the Court of Appeals for Veterans Claims require a lengthy waiting period, too.³⁰⁴ Thus,

²⁹⁵ Abrams, *supra* note 8, at 32. Part of the reason for this high level of inaccuracy could be the fact that Regional Offices are commonly evaluated on the speed at which they process their claims, leading to careless errors. *Id.* at 31–32.

²⁹⁶ See, e.g., Dao, *supra* note 245; Abrams, *supra* note 8.

²⁹⁷ See, e.g., AMVETS et al., *supra* note 294, at 26; H.R. REP. NO. 112-491, *supra* note 294; Vogel, *supra* note 294.

²⁹⁸ U.S. DEP'T OF VETERANS AFFAIRS OFFICE OF INSPECTOR GEN., AUDIT OF VA REGIONAL OFFICE CLAIM-RELATED MAIL PROCESSING i–iv, 3–7 (2009); see also AMVETS et al., *supra* note 294, at 26.

²⁹⁹ Dao, *supra* note 245.

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² See *supra* Part III.B (discussing this part of the appeals procedure).

³⁰³ BD. OF VETERANS' APPEALS, REPORT OF THE CHAIRMAN 18 (2012).

³⁰⁴ See Glantz, *supra* note 265.

when a Regional Office gets something wrong, the veteran at the very least is forced to spend a significant amount of unnecessary time and energy appealing the decision. As already noted throughout this article, time is a particularly precious commodity for elderly veterans, a resource that should not be wasted because of VA errors.

D. Accessibility

Successfully applying for VA benefits requires the veteran to meet a series of deadlines, including certain appointments at VA offices.³⁰⁵ Professor Craig M. Kabatchnick, Director of the Veterans Law Program at North Carolina Central University School of Law, makes the important point that many elderly veterans do not own a vehicle.³⁰⁶ Consequently, these veterans have a difficult time traveling to VA facilities for key meetings, such as the medical examination.³⁰⁷ Likewise, transportation limitations can become a problem for veterans engaging in the appeals process, particularly if the veteran wishes a personal hearing before the Board.³⁰⁸

The VA is required to reimburse a veteran for additional transportation expenses sustained because of his or her disability.³⁰⁹ However, this still does not remove the burden faced by many elderly veterans in making the trip from their home to a VA clinic, a VA Regional Office, or some other location. Elderly veterans living in rural regions often face especially overwhelming challenges in this regard.³¹⁰

E. Lack of Documentation

As the years pass, a veteran may become less likely to retain mementos from his or her past military service.³¹¹ Items discarded by a veteran can unfortunately include not only trinkets acquired during days of active duty, but also documents that are vital to the success of a claim for VA benefits. The VA will certainly ask to see a veteran's discharge paperwork when he or she files a claim.³¹² Other service records could contain

³⁰⁵ See *supra* Part II.

³⁰⁶ Kabatchnick, *supra* note 8, at 196–203.

³⁰⁷ See *id.* at 197–98.

³⁰⁸ See *id.*

³⁰⁹ *Id.* at 197 (citing 38 C.F.R. § 21.154 (2013)).

³¹⁰ See *id.* at 198.

³¹¹ See, e.g., Kabatchnick, *supra* note 8, at 205.

³¹² The form that the VA will almost certainly want to see is a “Certificate of Release or Discharge from Active Duty,” known colloquially as a “DD-214.” Importantly, the lack of a DD-214 is not fatal to a veteran seeking VA benefits. However, that form contains important information, beginning with proof of the individual’s military service and discharge status, which will greatly help the VA in processing the veteran’s claim.

information that would greatly bolster a veteran's case.³¹³ Without these documents, the veteran will likely be placed at a disadvantage.

In addition, elderly veterans seeking copies of their service records for the first time in decades can receive a nasty shock. They often discover that part or all of their files cannot be found.³¹⁴ This realization is especially common for veterans whose records were stored in the National Personnel Records Center prior to July 12, 1973.³¹⁵ On that date, an office fire destroyed at least sixteen million military personnel files, none of which were backed up.³¹⁶ Making matters worse, there still is no comprehensive listing of which veterans' records were lost in the blaze.³¹⁷ Because of this, many veterans do not realize that their records are gone until they file a claim for benefits and learn that there is no remaining documentation of their time in the military.

Out of all of the military documents, a veteran's discharge papers are probably the most important in filing a claim for benefits. The DD-214, Certificate of Release or Discharge from Active Duty, will show whether the veteran was discharged under a classification other than dishonorable, a basic requirement for virtually all VA benefits.³¹⁸ If the veteran has lost his or her DD-214, he or she can obtain a new one for free by writing to the National Personnel Records Center. Even if the veteran learns that his or her documents were ruined in the 1973 fire, the veteran still should be able to obtain a DD-214 (or equivalent documentation) from the Records Center, especially if the veteran knows his or her dates of service, first and last units of assignment, service number, and place of discharge.³¹⁹

As noted earlier, a veteran who does not possess service records still has other available avenues for proving his or her case, such as obtaining

³¹³ Remember that a veteran, if seeking disability benefits, will need to prove some nexus between his or her disability and his or her military service. *See, e.g.*, *Boyer v. West*, 210 F.3d 1351, 1353 (D.C. Cir. 2000); *Dalton v. Nicholson*, 21 Vet. App. 23, 36–37 (2007).

³¹⁴ *See Jones et al., supra* note 147, at 166.

³¹⁵ *See* U.S. NAT'L ARCHIVES & RECORDS ADMIN., THE 1973 FIRE, NATIONAL PERSONNEL RECORDS CENTER, <http://www.archives.gov/st-louis/military-personnel/fire-1973.html>.

³¹⁶ *See id.* As many as eighteen million files of veterans from the U.S. Army and U.S. Air Force were destroyed. *Id.*

³¹⁷ *Id.*

³¹⁸ For the full details about this important document, see *Certificate of Release or Discharge from Active Duty*, DEP'T OF DEFENSE INSTRUCTION, No. 1336.1 (Jan. 6, 1989), available at <http://dd214.us/reference/133601p.pdf>.

³¹⁹ *See* NAT'L VETERANS LEGAL PROGRAM, FACT SHEET: THE 1973 ST. LOUIS FIRE AND LOST RECORDS, available at <http://nvls.org/Information/ArticleLibrary/ServiceRecords/MILREC-1973FIRE-LOSTRECORDS.htm>; *see also* Steve Giegerich, *Labor of Love and Duty at St. Louis County Records Center After 1973 Fire*, ST. LOUIS POST-DISPATCH (Feb. 8, 2012), www.stltoday.com/news/local/metro/labor-of-love-and-duty-at-st-louis-county-records/article_ed6db9a4-268e-5a67-ab3c-d1df72c1aef2.html. If a veteran is unable to obtain reconstructed records, he or she should request a formal finding of unavailability from the National Personnel Records Center.

buddy statements (which can also be a stumbling block for elderly veterans)³²⁰ or using statements from doctors who specialize in the relevant medical field.³²¹ By law, a veteran can prevail in his or her VA claim without any official records, as long as he or she has evidence “sufficient to establish” a service connection.³²² Yet, it also instinctively seems that veterans has a far better chance of establishing their case when they have military documentation of their time of active service.³²³ The importance of these documents is one of the primary reasons why the VA has a statutory duty to assist veterans in tracking down the evidence to substantiate their claims—and also one of the primary reasons why it is vital for the VA to fulfill that duty completely.³²⁴

F. Lack of Representation

The limited role for attorneys in the early stages of VA claims poses yet another impediment for many veterans. While the VA now allows attorneys to step in earlier than before, provided that they are accredited by the VA, the system still leaves veterans vulnerable to critical mistakes at the most important portion of the process.³²⁵

Already, we have discussed the lengthy delays that a veteran can incur if he or she makes a wrong move in this complex procedural framework.³²⁶ Of course, the veteran need not enter the time-consuming thicket of the appellate process if the Regional Office approves his or her claim outright. Therefore, the veteran’s most crucial step is the first one, the initial filing. Yet it is precisely this stage—the “preparation, presentation, and prosecution” of the veteran’s claim—at which the VA prevents veterans from hiring an attorney to assist them.³²⁷

³²⁰ See Kabatchnick, *supra* note 8, at 208–09.

³²¹ See *id.* at 207–08.

³²² 38 C.F.R. § 3.307(b); see also *Davidson v. Shinseki*, 581 F.3d 1313 (D.C. Cir. 2009); *Barr v. Nicholson*, 21 Vet. App. 303 (2007); *Charles v. Principi*, 16 Vet. App. 370 (2002) (all finding that lay evidence was sufficient to prove the existence of service-connected disabilities).

³²³ See generally *Jones et al.*, *supra* note 147, at 166.

³²⁴ *Id.*

³²⁵ See, e.g., *The State of the Veterans Benefits Administration: Hearing Before the H. Comm. On Veterans Affairs*, 111th Cong. (June 15, 2010) [hereinafter *Cohen Testimony*] (statement of Richard Paul Cohen, Esq., Executive Director, Nat’l Organization of Veterans Advocates, Inc.), available at <http://archives.democrats.veterans.house.gov/hearings/Testimony.aspx?TID=72652&Newsid=595&Name=%20Richard%20Paul%20%20Cohen595> (“In FY 2009, those claimants who had attorney representation at the BVA received a larger percentage of favorable results than did those without attorney representation and a larger percentage of favorable results than did those who were represented by VSOs.”); see also *Abrams*, *supra* note 8, at 32 (“If a veteran wants to pay an attorney to help him or her obtain VA benefits, that veteran should be allowed to hire a lawyer.”).

³²⁶ See *supra* Part IV.B.

³²⁷ See *supra* text accompanying notes 226–230.

Notably, a veteran can utilize the services of a *pro bono* attorney at this first phase of the process.³²⁸ The veteran can also receive free assistance from one of the many veterans service organizations with members trained and accredited to assist veterans in filing VA claims. However, the number of attorneys willing to provide *pro bono* representation of veterans at this first stage is limited.³²⁹ And while the vast majority of Veterans Service Officers are quite proficient in helping veterans prepare their claims, it does not temper the fact that a veteran is barred from retaining an attorney to assist him or her at this level, even if the veteran wants to benefit from the lawyer's day-to-day legal experience and expertise.³³⁰

It is worth noting that the Federal Circuit does not consider assistance from a veterans service organization to be legal representation.³³¹ Thus, absent an attorney willing to help out on a *pro bono* basis, a veteran is prohibited from legal representation at this key first stage.³³² This lack of legal representation can presumably increase the likelihood of veterans making mistakes in their applications, particularly if they do not seek the help of a Veterans Service Officer. This, in turn, can result in a denial of benefits when a veteran should be eligible. It can likewise result in a veteran receiving less money from the VA than the amount to which they are entitled.

When this happens, the veteran may go through life without the VA benefits to which he or she is entitled. Or, conversely, the veteran may decide to enter the time-consuming appellate process in which a lawyer then is allowed to represent the veteran for profit.³³³

This is certainly not an exhaustive list of difficulties that the VA seems to invite upon itself in the claims process. However, these are many of the primary issues that an elderly veteran—or, indeed, any veteran—confronts when applying for VA benefits. Regrettably, the problems for elderly veterans within the VA system do not end here. We look next at a nationwide concern recently brought to light: the deceptive practice of “pension poaching.”

³²⁸ See *supra* note 227.

³²⁹ Abrams, *supra* note 8, at 31 (stating that there is “very limited *pro bono* representation by attorneys before the VA regional offices and before the Board”).

³³⁰ See *supra* note 325.

³³¹ *Comer v. Peake*, 552 F.3d 1362, 1369 (D.C. Cir. 2009). Under this logic, courts have also held that they should give a more “sympathetic” reading to veterans’ claims and appeals brought without the assistance of an attorney. See, e.g., *Szemraj v. Principi*, 357 F.3d 1370, 1373–74 (D.C. Cir. 2004).

³³² See *Cohen Testimony*, *supra* note 325.

³³³ See *supra* Part III.

V. HUNTERS AND HUNTED: HOW “PENSION POACHERS” ARE VIOLATING THE OBJECTIVE, IF NOT THE LETTER, OF THE VA PENSION SYSTEM

Move a million dollars in assets, and get a VA pension. Such was the strategy of multiple veterans in the last several years.³³⁴ Previously, millionaire veterans clearly belonged in the VA’s category of having “excessive” net worth, which prohibited them from qualifying for any VA pension.³³⁵ Yet when millionaire veterans rapidly transferred their holdings—typically at the advice of private companies charging these veterans for claims application assistance³³⁶—they suddenly became pension-eligible.³³⁷ Practically overnight, millionaires were able to access the benefits that the VA specifically designates for lower-income veterans.³³⁸

This practice of asset-dumping is not illegal.³³⁹ Technically speaking, it is not even unethical.³⁴⁰ Instead, it results from the VA’s astonishing inability to protect the goals of its own pension programs. Remarkably, in creating a system that frightens many veterans with its complexity, the VA still managed to omit certain basic standards that are commonplace in other federal benefits programs.³⁴¹ Now, with the 2012 release of a Government Accountability Office report highlighting the number of wealthy veterans receiving VA pensions,³⁴² it appears that these failures in administrative oversight have come back to haunt the VA.

This asset-dumping problem stems primarily from the lack of a “look-back provision” within the VA pension programs.³⁴³ Currently, no procedures exist by which the VA is permitted to examine a claimant’s

³³⁴ See GOV’T ACCOUNTABILITY OFFICE, *supra* note 34, at 6, 31.

³³⁵ *Id.*

³³⁶ *Id.*

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ See *id.* at 7; see also James Dao, *Veterans Pension Program is Being Abused, Report Says*, N.Y. TIMES (June 5, 2012), www.nytimes.com/2012/06/06/us/veterans-pension-program-is-being-abused-report-says.html; Sarah Bloom, *Chesterfield Woman Fights So-Called ‘Pension Poachers’*, NBC12.COM (June 13, 2012), www.nbc12.com/story/18743282/chesterfield-woman-fights-so-called-pension-poachers; Ferguson, *supra* note 35.

³⁴⁰ See, e.g., Merwyn J. Miller, *Transferring Assets Is Not Illegal!*, ABOUTLIVINGTRUSTS.COM (LAW OFFICES OF MERWYN J. MILLER) (June 11, 2012), <http://aboutlivingtrusts.com/blog/elderlaw/transferring-assets-is-not-illegal/> (arguing that, from an attorney’s perspective, counseling veterans to transfer assets in order to qualify for a VA pension is perfectly legal and assisting the best interests of the client). While this is true, the fact remains that the current VA pension system leaves veterans vulnerable to high-cost exploitation by the financial firms discussed in the Government Accountability Office’s report.

³⁴¹ See *infra* text accompanying notes 348–351.

³⁴² See GOV’T ACCOUNTABILITY OFFICE, *supra* note 34, at 6, 31.

³⁴³ See *id.* at 7; Dao, *supra* note 339; Ferguson, *supra* note 35.

recent asset transfers.³⁴⁴ Therefore, a wealthy veteran seeking a VA pension needs only to shift a substantial portion of his or her assets to another person's name. Then, he or she immediately falls below the excessive net worth threshold.³⁴⁵ The VA pays no attention to whether the veteran transferred assets for less than fair market value.³⁴⁶ Conceivably, a veteran could move a \$500,000 painting into an annuity or trust, and the VA would care only about the fact that the \$500,000 asset was no longer in the veteran's name.³⁴⁷

This lack of scrutiny appears to be unique among federal benefits programs.³⁴⁸ By contrast, Medicaid will disqualify applicants for up to three years if they transfer any assets for less than fair market value within five years prior to their application date.³⁴⁹ Similarly to Medicaid, the Social Security Administration will reject candidates for benefits if they have "dispose[d] of resources for less than fair market value" anytime within a specified period after the claimant files an application for benefits (or, if later, the date on which the individual disposes of the assets for less than fair market value).³⁵⁰ Yet such a concept is foreign to the VA's system of deciding pension claims. There are a seemingly infinite number of ways to be denied benefits by the VA,³⁵¹ yet, a deceptive transfer of assets immediately before filing the claim is not one of them.

In fact, the VA appears to devote little attention to oversight of its own financial eligibility requirements for pensions.³⁵² According to the GAO investigation, the VA rarely requests tax records, bank statements, or other

³⁴⁴ See *supra* note 341.

³⁴⁵ See *supra* note 341.

³⁴⁶ See *id.* Thus far, the greatest champion for reform in this area appears to be Debbie Burak, founder of the online organization Veteranaid.org. Burak has met with leaders in federal government, including Senator Ron Wyden of Oregon and Senator Richard Burr of North Carolina, about seeking immediate reform in this area. Susan Seliger, *The 'Long and Unacceptable' Wait for a Veterans' Benefit*, THE NEW OLD AGE (May 15, 2013, 6:00 AM), http://newoldage.blogs.nytimes.com/2013/05/15/the-long-and-unacceptable-wait-for-a-veterans-s-benefit/?_r=0. See Eric Braun, *Senate Investigates 'Pension Poachers' that Target Veterans*, EXAMINER.COM (June 21, 2012), www.examiner.com/article/senate-investigates-pension-poachers-that-target-veterans. Through her advocacy on the floor of Congress and through the media, Burak has played a large role in encouraging Congress to consider a bipartisan bill instituting a three-year look back provision on VA pension applications. *Id.* She also authored a heated "open letter" to the VA, charging the agency with building "a fortress keeping out the very veterans whom you are to honor, and take care of in exchange for their service." See Debbie Burak, *An Open Letter to the Veterans Administration*, VETERANAID.ORG, <http://www.veteranaid.org/letter.php> (last visited Oct. 18, 2013).

³⁴⁷ See Dao, *supra* note 339.

³⁴⁸ See GOV'T ACCOUNTABILITY OFFICE, *supra* note 34, at 7.

³⁴⁹ 42 U.S.C. § 1396p(c)(B)(i) (2012).

³⁵⁰ 42 U.S.C. § 1382b(c)(1)(B)(i) (2012).

³⁵¹ See *supra* Parts III–IV.

³⁵² See GOV'T ACCOUNTABILITY OFFICE, *supra* note 34, at 8–12; see also Ferguson, *supra* note 35; Dao, *supra* note 339; Bloom, *supra* note 339.

supporting documents to evaluate the truth of what the veteran wrote on his or her application.³⁵³ Some forms of income or assets, including annuities, trusts, and private retirement income, are not even covered on the pension application form.³⁵⁴ Under such a policy, it is no wonder that this means-based pension system ends up supporting veterans whose net worth is indeed “excessive.”

The most egregious evil uncovered by the GAO, however, came not from the veterans but from the individuals advising them. In its report, the GAO found more than 200 private businesses that, for a price, will guide veterans through the process of transferring assets for less than market value to become pension-eligible.³⁵⁵ Using names designed to give the false impression that they have some official contact with the VA,³⁵⁶ these private entities have charged veterans as much as \$10,000 to move assets out of veteran’s name.³⁵⁷

Often, these companies target elderly veterans by aggressively advertising their services in nursing homes, assisted-living facilities, senior centers, and other locations frequented by senior citizens.³⁵⁸ At times, representatives from these businesses have delivered presentations to individuals with dementia, urging them to make financial decisions even though they clearly lack the capacity to do so.³⁵⁹ This can result in the extremely undesirable situation of a veteran making a life-changing decision about his or her finances without fully appreciating the consequences the decision may have.³⁶⁰

Given that an *attorney* is not permitted to receive payment for helping a veteran prepare his or her claim, the legality of what these private

³⁵³ GOV’T ACCOUNTABILITY OFFICE, *supra* note 34, at 8.

³⁵⁴ *Id.*

³⁵⁵ *Id.* at 15.

³⁵⁶ *See, e.g.,* Ferguson, *supra* note 35 (noting that firms have used names like “Veterans Benefits Foundation” to allude to a tie with the VA, even though no such tie actually exists).

³⁵⁷ GOV’T ACCOUNTABILITY OFFICE, *supra* note 34, at 21; *see also Aid and Attendance, a Department of Veteran Affairs Program: Hearing Before the S. Special Comm. On Aging*, 112th Cong. (June 6, 2012) [hereinafter *Perkio Testimony*] (statement of Lori Perkio, Assistant Director, American Legion Division of Veterans’ Affairs & Rehabilitation) (describing multiple “horror stories” about veterans losing money from paying for counseling regarding their VA benefits, including an organization in California which charged a veteran \$1,700 to prepare paperwork for a pension worth \$1,800 per month and an attorney boasting in his office newsletter of receiving more than \$200,000 for helping veterans maximize their chances of receiving VA benefits).

³⁵⁸ *See* GOV’T ACCOUNTABILITY OFFICE, *supra* note 34, at 20; Dao, *supra* note 339 (“Investigators working for the GAO and the Special Committee on Aging found that financial planners and lawyers often worked through nursing homes or assisted living centers for the elderly to gain access to veterans.”).

³⁵⁹ GOV’T ACCOUNTABILITY OFFICE, *supra* note 34, at 20.

³⁶⁰ *See id.*

businesses are doing seems dubious at best.³⁶¹ Ironically, these services, which are often costly when provided by a financial planner, are available for free at true veterans service organizations.³⁶²

The high costs of using one of these private companies does not necessarily equate to better results for the veteran, either. The most common way in which these assets are transferred out of the veteran's name is in the form of a gift or through establishment of a trust or annuity.³⁶³ However, careless planning could result in serious consequences for the veteran. For example, the GAO report discussed the consequences of placing a veteran's assets into a deferred annuity, a move that could prevent the veteran from accessing that money without paying high withdrawal fees.³⁶⁴ Yet according to the report, some financial planning organizations have done exactly that in their scramble to get property out of a veteran's name, leaving the veteran at a disadvantage.³⁶⁵

In the end, it is clear that "pension poaching" occurs on two levels: the decisions by the veterans themselves to transfer assets well below market value in order to artificially qualify for a VA pension and the deliberate maneuvering by the private organizations that encourage veterans to engage in these asset-dumping practices.³⁶⁶ Both produce undesirable results for the VA,³⁶⁷ American taxpayers,³⁶⁸ and often the veterans themselves.³⁶⁹ Now that the GAO's report has let the proverbial cat out of the bag, something needs to be done—and soon—to curb this practice if the VA truly wishes its pensions to go to veterans of more limited means.

³⁶¹ See *supra* note 227 and accompanying text.

³⁶² See *Perkio Testimony*, *supra* note 357 (stating that although many veterans are paying money to these for-profit financial firms, veterans service organizations like the American Legion provide these same services to veterans free of charge).

³⁶³ GOV'T ACCOUNTABILITY OFFICE, *supra* note 34, at 18; Bloom, *supra* note 339; Dao, *supra* note 339 ("In calls to 19 firms, they [Government Accountability Office investigators] were told time and again that [veterans] could qualify even with assets worth hundreds of thousands of dollars, provided they put their money in annuities or trusts, for which the firms charged administrative fees").

³⁶⁴ GOV'T ACCOUNTABILITY OFFICE, *supra* note 34, at 19.

³⁶⁵ *Id.*

³⁶⁶ See generally GOV'T ACCOUNTABILITY OFFICE, *supra* note 34; *Perkio Testimony*, *supra* note 357; Bloom, *supra* note 339; Dao, *supra* note 339.

³⁶⁷ With so many veterans transferring assets and suddenly becoming eligible for pensions, the VA's backlog only increases. Plus, this practice defeats the VA's statements, described in Part II.A, that the pensions are "not intended to protect substantial assets or build up an estate for the benefit of heirs." See *supra* note 69 and accompanying text.

³⁶⁸ Essentially, these pension poaching methods scam the general public. Tax dollars are used to pay pensions for veterans who really should not be eligible for these benefits.

³⁶⁹ Not only are veterans paying substantial amounts of money for a service which they can receive for free from a veterans service organization, but the advice their money buys is not always beneficial. See *supra* notes 355–360 and accompanying text.

VI. LOSING WHAT THEY EARNED: A FIDUCIARY PROGRAM FOR VETERANS THAT FAILS TO HONOR THEIR CLEAR WISHES

Robert Solze was evaluated to be 100% disabled by the VA in 2011.³⁷⁰ Based on the effective date of his filing, the VA also awarded him a substantial amount of money in retroactive benefits: a total of more than \$10,500.³⁷¹ Yet the 90-year-old retired Lieutenant Colonel from the Marine Corps has seen very little of these benefits.³⁷² In fact, the VA has not paid one cent of his benefits since September 2011.³⁷³ And, now that the Court of Appeals for Veterans' Claims has ruled in the agency's favor, Solze will have no control over his VA benefits for the remainder of his life.³⁷⁴

The problem arose from a VA determination in April 2011 that Solze was incompetent and thus could not properly manage his benefits.³⁷⁵ From here, the steps would seem to be simple. A decade earlier, Solze had executed a durable power of attorney,³⁷⁶ naming his wife as his attorney-in-fact—the person who would manage Solze's financial affairs in his best interest if he became incapacitated³⁷⁷—and naming his daughter as his alternate.³⁷⁸ By the time the VA declared Solze incapacitated, his wife had passed away, but his daughter was still alive.³⁷⁹ In fact, the daughter had been caring for her father's financial matters for more than a decade.³⁸⁰ Logically, one would expect that Solze's daughter, under the authority of her father's

³⁷⁰ See *Solze*, 2012 WL 4801411, at *2.

³⁷¹ *Id.*

³⁷² *Id.*; see also Petitioners' Response to the Secretary's Show Cause Response at 10, *Solze*, 2012 WL 4801411.

³⁷³ See *Solze*, 2012 WL 4801411, at *2 (stating that at that point, the VA "payments stopped without notice").

³⁷⁴ This is the nature of the VA's fiduciary system: a full stripping of control over VA benefits monies not only from the incapacitated veteran, but also potentially from the agent appointed by the veteran in a validly executed power of attorney to handle the veteran's assets in the event of incapacity. This system and its flaws are discussed in greater detail in the upcoming paragraphs.

³⁷⁵ See Petitioners' Response, *supra* note 372, at Exhibit A (letter from the Togus Regional Office of the VA to Robert Solze informing him of the VA's findings that he was not competent to manage his VA benefits).

³⁷⁶ *Solze*, 2012 WL 4801411, at *1.

³⁷⁷ The legal requirement that the attorney-in-fact will make financial decisions in the best interest of the principal is a requirement common to state statutes governing power of attorney appointments throughout the nation. See, e.g., Lori Stiegel & Ellen Klem, *Power of Attorney Laws: Citations, By State*, AMERICAN BAR ASSOC. COMM. ON LAW & AGING (2008), http://www.americanbar.org/content/dam/aba/migrated/aging/about/pdfs/power_of_attorney_1_aws_citations_by_state.authcheckdam.pdf (providing the complete list of power of attorney statutes in every state, including laws describing the fiduciary duties of the attorney-in-fact).

³⁷⁸ *Solze*, 2012 WL 4801411, at *1.

³⁷⁹ *Id.*

³⁸⁰ *Id.*

durable power of attorney, would automatically step in to manage his VA benefits just as she had done for his other financial concerns.

Yet, there was a problem. The VA does not recognize durable powers of attorney when it comes to deciding who should manage the benefits of a veteran whom the VA deems incompetent.³⁸¹ Instead, the agency, pursuant to its standard procedure, declared that it should appoint a fiduciary on Solze's behalf.³⁸² Solze's daughter would have to submit to a field examination by VA personnel in order to be considered as a candidate to accept her father's VA benefits on his behalf.³⁸³ Even then, the VA could determine that she was unfit and appoint someone else—somebody whom Solze had never laid eyes on—to fill the fiduciary's role.³⁸⁴ When Solze's daughter objected, citing the power of attorney and her decade-long track record of managing her father's finances as evidence that he was “very well cared for,”³⁸⁵ the VA ultimately stopped paying Solze's benefits entirely.³⁸⁶

According to the United States Court of Appeals for Veterans' Claims, the VA's conduct was legally allowable.³⁸⁷ Despite noting displeasure with the VA for failing to pay Solze one cent of his benefits while the dispute was pending, a majority of the three-judge panel held that it

³⁸¹ See, e.g., 38 C.F.R. § 13.55 (stating that the VA is permitted to select as a fiduciary “the person or legal entity best suited to receive Department of Veterans Affairs benefits . . . for a beneficiary who is mentally ill” with no mention of a valid power of attorney controlling the VA's decision); see also H.R. REP. NO. 112-678, § 2 (2012), available at <http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt678/pdf/CRPT-112hrpt678.pdf>.

³⁸² *Solze*, 2012 WL 4801411, at *1.

³⁸³ See 38 C.F.R. § 13.2 (2013) (“Field Examinations”).

³⁸⁴ Indeed, this appears to be what the VA tried to do here, appointing somebody known to the court only as “Ms. LR” as the fiduciary for Mr. Solze. *Solze*, 2012 WL 4801411, at *3. Unfortunately, this scenario is all-too-common within the VA fiduciary system. See, e.g., H.R. REP. NO. 112-678, § 2; Lise Olsen, *Disabled Vets' Families Fight VA Over Fiduciaries*, HOUS. CHRON. (June 16, 2012), www.chron.com/news/houston-texas/article/Disabled-vets-families-fight-VA-over-fiduciaries-3639797.php; *Veteran's Family Asking About Their Money*, PRO8NEWS (May 25, 2011), www.pro8news.com/news/Veterans-Family-Wonders-Where-Money-Is-122549599.html; John Schwartz, *Instead of Helping, Trustee Program is Hurting Veterans, Families Say*, N.Y. TIMES (Apr. 7, 2011), www.nytimes.com/2011/04/08/us/08vets.html?pagewanted=all. See also Telephone Interview with Katrina J. Eagle, Principal of The Law Office of Katrina J. Eagle in San Diego, Cal., and former President of the National Organization of Veterans' Advocates (Nov. 7, 2012) [hereinafter *Eagle Interview*]. Ms. Eagle served as co-counsel for Mr. Solze and his daughter, Lois Dimitre, in this action. She also represents eight other clients who are challenging the VA's fiduciary system. Earlier in 2012, she testified before Congress about the VA's fiduciary system. See *Reforming VA's Flawed Fiduciary System: Hearing Before the H. Comm. On Veterans Affairs, Subcomm. on Oversight and Investigations*, 112th Cong. (Feb. 9, 2012) [hereinafter *Eagle Testimony*] (statement of Katrina Eagle, Attorney, Law Office of Katrina J. Eagle, Esq.), available at <http://veterans.house.gov/witness-testimony/katrina-eagle>.

³⁸⁵ *Solze*, 2012 WL 4801411, at *2.

³⁸⁶ *Id.* at *3.

³⁸⁷ *Solze v. Shinseki*, 26 Vet. App. 118 (2013).

could not force the VA to do so.³⁸⁸ Even more damagingly, the majority approved the VA's practice of appointing its own separate fiduciary in situations where the veteran had already designated an agent through a valid power of attorney.³⁸⁹ Judge Alan G. Lance dissented vigorously, arguing that the VA had breached its obligation to act in an incapacitated veteran's best interest and declaring that the case supported "the growing consensus outside of (the) VA that the fiduciary system is broken."³⁹⁰ However, even Judge Lance's strong words could not convince his colleagues to rule in the elderly veteran's favor.

On its face, the fiduciary concept seems acceptable. In situations where the VA deems a veteran beneficiary unable to manage his or her own benefits, the VA possesses the discretion to appoint a fiduciary to accept the payments on the veteran's behalf and use the money in the veteran's best interest.³⁹¹ The fiduciary would protect the incapacitated veteran, using the money to pay the veteran's bills in a timely manner and to ensure that the veteran had adequate "food, shelter, clothing, medical expenses, and other necessities."³⁹² Additionally, the federal regulations for this program provide due process safeguards for the veteran's personal autonomy. For instance, absent medical evidence that "leaves no doubt as to the person's incompetency," the regulations prohibit the agency from finding the veteran to be incompetent.³⁹³ Any doubts are to be resolved in favor of a finding that the veteran is competent.³⁹⁴ Such standards are meant to protect the veteran's ability to use his or her own benefits unless the veteran clearly lacks capacity to do so.

Yet like other apparently well-intentioned policies discussed in this article, the VA fiduciary system has not produced desired results. Instead, it has created a messy situation of delay, corruption, and actions that seem to run contrary to some of the United States' most basic principles of justice.

Of all the flaws in the fiduciary program, the worst may be the VA's failure to recognize durable powers of attorney. As a result, a veteran who uses a legal instrument to assign a particular individual—presumably somebody whom he or she knows and trusts—to manage his affairs in the event of his incompetence is denied this right once his or her faculties are gone. Instead, the veteran must rely on the VA field examiners to decide whether to appoint the person named in the power of attorney as the fiduciary for his VA benefits.³⁹⁵ Instead of honoring the autonomy of the

³⁸⁸ *Id.* at 124–25.

³⁸⁹ *Id.* at 124.

³⁹⁰ *Id.* at 127 n.13 (Lance, J., dissenting in part).

³⁹¹ See 38 U.S.C. § 5502 (2012); 38 C.F.R. § 13.1 (2013).

³⁹² H.R. REP. NO. 112-678, § 2.

³⁹³ 38 C.F.R. § 3.353(c) (2013).

³⁹⁴ 38 C.F.R. § 3.353(d).

³⁹⁵ See 38 C.F.R. § 13.2.

veteran and the conscious choice he or she made by appointing an attorney-in-fact, the veteran becomes helpless as the agency takes over this decision. In the end, if the VA does not find the individual appointed as attorney-in-fact to be qualified, the veteran's autonomy can be stripped even further, potentially leaving the veteran with a complete stranger controlling his or her money from the VA.³⁹⁶

This serious issue is far from the only problem. After the VA appoints a fiduciary, the agency then sends the veteran's payments every month into a bank account over which the fiduciary has exclusive and complete control.³⁹⁷ Neither the veteran nor a person appointed by the veteran as attorney-in-fact has any access to this bank account.³⁹⁸ In fact, they are not even told the location of the bank in which the account is housed.³⁹⁹ The fiduciary is not ordered to provide a formal accounting to the veteran noting how the money from the VA benefits is being spent.⁴⁰⁰ Furthermore, the fiduciary is prevented by law from releasing any significant amount of funds from that account to the veteran without pre-approval from the VA.⁴⁰¹ Because of the VA's substantial power in this situation, the fiduciaries have been described in testimony before Congress as "micro-managed agents of [the] VA."⁴⁰²

Far too many of these agents have their own set of problems. The VA has appointed convicted felons—including individuals with a history of financial crimes such as tax fraud—as fiduciaries.⁴⁰³ Fiduciaries have embezzled significant amounts of benefits money from the veterans whose interests they were assigned to represent.⁴⁰⁴ Other issues have arisen from

³⁹⁶ See, e.g., Lise Olsen, *Some Vets' Money Managed—And Stolen—By Scoundrels*, HOUS. CHRON. (June 18, 2012), www.chron.com/news/houston-texas/article/Disabled-veterans-are-the-target-of-thieves-3639639.php; *Eagle Testimony*, *supra* note 384; Schwartz, *supra* note 384.

³⁹⁷ See *Eagle Testimony*, *supra* note 384.

³⁹⁸ *Id.*

³⁹⁹ *Id.*

⁴⁰⁰ *Id.*; see also H.R. REP. NO. 112-678, § 2.

⁴⁰¹ If the expense is more than \$1,000, then the VA always must sign off on it. However, even for lower amounts, fiduciaries will typically ask the VA for permission, even though this is not required by law. See *Eagle Interview*, *supra* note 384.

⁴⁰² *Eagle Testimony*, *supra* note 384, at 4.

⁴⁰³ See Jennifer Kraus, *VA Hires Convicted Felon to Manage Veterans' Money*, CBS (Nashville) (Feb. 21, 2011), <http://www.newschannel5.com/story/14071970/va-hires-convicted-felon-to-manage-veterans-money>; Olsen, *supra* note 396; Schwartz, *supra* note 384. Between October 1998 and March 2010, there have been 132 arrests and more than \$7 million recovered for fraud perpetrated by VA fiduciaries. See Schwartz, *supra* note 384.

⁴⁰⁴ See, e.g., Eric Nalder & Lise Olsen, *Disabled Vets Increasingly Cheated by Fund Managers*, S.F. CHRON. (June 17, 2012), www.sfgate.com/nation/article/Disabled-vets-increasingly-cheated-by-fund-3639771.php; Press Release, U.S. Dep't of Justice, Houston Attorney and Wife Charged With Misappropriating Funds of Veterans, Making False Statements and Tax Fraud (June 29, 2010), available at <http://www.justice.gov/>

fiduciaries refusing to permit veterans to use money from their VA benefits for basic personal needs. In one egregious case, a fiduciary refused to release funds to an older incapacitated veteran for air conditioner repairs in the middle of summer, stating that the VA found the expense to be frivolous.⁴⁰⁵ In another, the fiduciary rejected a request to release funds to pay for medication the veteran needed for a heart condition.⁴⁰⁶ In still another, a fiduciary simply refused to pay the veteran's utility bills.⁴⁰⁷

For this work, the fiduciary is eligible to receive a commission of up to four percent of the annual benefits that the veteran receives from the VA⁴⁰⁸—a commission rate higher than that of Social Security's much larger Representative Payee Program.⁴⁰⁹ Beyond this, reports show that certain VA field examiners have violated the law by permitting fiduciaries to take commissions from non-VA benefits as well.⁴¹⁰

Additional problems stem from the interactions between VA fiduciaries and the family members of the incapacitated veteran. Not surprisingly, this relationship is often contentious at best and dysfunctional at worst.⁴¹¹ Family members can end up using their own savings to assist these veterans while the veteran's payments from the VA sit in a separate bank account, outside the veteran's control.⁴¹² When family members try to object to the VA, they are too commonly treated with undue suspicion and are rarely granted any meaningful information from the agency.⁴¹³

Thankfully, a veteran or a person legally appointed as an attorney-in-fact or a guardian for that veteran now retains the right to appeal VA fiduciary appointments. This right of judicial review for fiduciary appointments was not instituted until 2011, when the Court of Appeals for Veterans Claims decided the case of *Freeman v. Shinseki*.⁴¹⁴ Today, these fiduciary appointments can be appealed to the Board of Veterans' Appeals.⁴¹⁵ Adverse decisions from the Board can be appealed to the Court of Appeals

usao/txs/1News/Releases/2010%20June/062910%20Phillips_print.htm; H.R. REP. NO. 112-678, § 2.

⁴⁰⁵ *Eagle Testimony*, *supra* note 384, at 4.

⁴⁰⁶ *Id.*

⁴⁰⁷ H.R. REP. NO. 112-678, § 2.

⁴⁰⁸ 38 C.F.R. § 13.64(b) (2013).

⁴⁰⁹ H.R. REP. NO. 112-678, § 2.

⁴¹⁰ *See, e.g.*, Rick Maze, *Lawmakers OK Tighter Rules for Vet Fiduciaries*, ARMY TIMES (July 11, 2012), www.armytimes.com/news/2012/07/military-lawmakers-vote-tighten-rules-veteran-fiduciaries-071112w/ (discussing multiple real-life scenarios when veterans with disabilities have been cheated by their fiduciaries and advocating for sweeping reforms in this area of the law).

⁴¹¹ *Eagle Interview*, *supra* note 384.

⁴¹² *See Eagle Testimony*, *supra* note 384, at 6.

⁴¹³ *Id.*; *see also* Nalder & Olsen, *supra* note 404; Schwartz, *supra* note 384.

⁴¹⁴ *Freeman v. Shinseki*, 24 Vet. App. 404 (2011).

⁴¹⁵ *Id.* at 417–18.

for Veterans Claims.⁴¹⁶ Still, this right of appeal, while a vital improvement for the rights of veterans, is not a panacea. Given the sheer number of cases in the appellate system, particularly before the Board of Veterans' Appeals,⁴¹⁷ this is hardly a pathway to quick relief for a veteran wronged by the VA's fiduciary program.⁴¹⁸ In the words of a recent House of Representatives report focusing on flaws in the VA fiduciary system, "the appeals process . . . is difficult, slow, and often results in healthy, capable veterans being unable to remove themselves from the program."⁴¹⁹

Today, more than 110,000 veterans have their benefits in accounts under fiduciary management.⁴²⁰ More than \$3 billion is currently under the control of these appointed fiduciaries.⁴²¹ A system of this magnitude should not be permitted to operate with so many fundamental flaws remaining unchecked. These shortcomings hurt veterans, particularly elderly veterans, and their family members. As with other problems cited by this article, changes are greatly needed.

VII. A CALL TO ACTION AND SOME RESPONSES: A LOOK AT VARIOUS RECENT PROPOSALS TO IMPROVE THE VA BENEFITS SYSTEM AND THEIR POTENTIAL IMPACT

There is no doubt that policies within the VA benefits system negatively impact many veterans and have a particularly detrimental effect on the elderly members of this group. Yet providing a critique of this agency's dealings and its fallout is only one piece of the puzzle. The more important pieces come from solutions. Thankfully, in light of the recent negative attention paid to the VA, proposed resolutions to some of these problems have appeared from a variety of sources, including Congressional committees, individual veterans' rights advocates, and even the VA itself. In this section, we turn our attention to some of these proposals and examine their possible utility in improving the present situation for elderly veterans.

A. *The Rewrite Project*

Since 2001, the VA has engaged in "a comprehensive review" of the federal regulations governing all VA pension and compensation programs.⁴²² The goal of this review, according to then-VA Secretary Anthony J. Principi,

⁴¹⁶ *Id.* at 417.

⁴¹⁷ *See supra* notes 303–304 and accompanying text.

⁴¹⁸ *Eagle Testimony*, *supra* note 384, at 3.

⁴¹⁹ H.R. REP. NO. 112-678, § 2.

⁴²⁰ *See* John Schwartz, *Court Rules Against V.A. on Fiduciaries*, N.Y. TIMES (Apr. 27, 2011), atwar.blogs.nytimes.com/2011/04/27/court-rules-against-v-a-on-fiduciaries/.

⁴²¹ *Id.*

⁴²² *See* Pine & Russo, *supra* note 236.

was “to determine what regulations need modification, are out of date, or are no longer pertinent.”⁴²³ When the task force charged with implementing this project recommended that the regulations be re-written and re-organized “in a logical and coherent manner,”⁴²⁴ the VA’s “Rewrite Project” was born.⁴²⁵

Operating out of the agency’s Office of Regulation Policy and Management, the project is presently in the process of publishing its recommended regulatory changes as Notices of Proposed Rulemaking.⁴²⁶ If all goes according to plan, the VA will then move forward in writing these changes as one comprehensive “final rule” which will be published as Part 5 in Title 38 of the Code of Federal Regulations.⁴²⁷

This endeavor is an important one, hopefully with results that lessen the unnecessary complexities noted in Part II of this article.⁴²⁸ Improving the clarity of the regulations, along with disposing of regulations that are unnecessary, should also improve the speed at which claims are processed, potentially reducing, at least by a little, the VA’s benefits processing backlog.

One primary focus of this initiative includes the logical organization of the regulations, such as grouping related regulations together.⁴²⁹ Streamlining the language of the rules—in one case eliminating the phrase “in the absence of the provision of” and replacing it with a simple “without”—is another area of concern.⁴³⁰ Another objective highlighted by the project is adding precedents established through landmark cases decided by the Court of Appeals for Veterans Claims.⁴³¹ While some of these changes may appear trivial up front, all proposed changes are aimed at the vital target of making the VA’s regulations more accessible to the people they are meant to benefit: the veterans.

However, the VA has made one particularly suspect choice in organizing the Rewrite Project’s efforts. The only individuals who are providing input regarding these revisions are employees of the VA.⁴³² While multiple divisions within the VA are represented—including the Office of General Counsel, the Board of Veterans’ Appeals, and staff from various

⁴²³ U.S. DEP’T OF VETERANS AFFAIRS, SUMMARY OF REGULATION REWRITE PROJECT, available at http://www.va.gov/ORPM/Summary_of_Regulation_Rewrite_Project.asp (last updated Jan. 18, 2012).

⁴²⁴ *Id.*

⁴²⁵ *Id.*

⁴²⁶ *Id.*

⁴²⁷ *Id.*

⁴²⁸ See Pine & Russo, *supra* note 236, at 410 (“The Rewrite Project strives to use plain language in writing the regulations so that veterans, their representatives, and VA employees will more easily discern which regulations are relevant to specific claims and how they apply.”).

⁴²⁹ *Id.* at 410–12.

⁴³⁰ *Id.* at 416.

⁴³¹ *Id.* at 417–18.

⁴³² *Id.* at 413.

Regional Offices⁴³³—the reviewers are solely people from inside the VA. It would seem the VA would benefit from the insights of well-informed stakeholders beyond the agency walls, such as leaders of veterans service organizations and VA-accredited attorneys. There is nothing in the Project’s reports indicating why such non-VA individuals are excluded from this process. One can only fear this is yet another example of the VA’s desire for “splendid isolation” rearing its head.

Nevertheless, the Rewrite Project is an effort that certainly merits watching. If the Rewrite Project ultimately accomplishes its goals of streamlining the regulations regarding VA benefits without imposing new burdens on the veterans who are applying for these benefits, then the positive effect on veterans could be substantial.

B. The Transformation Plan

Noting that the log jam of unresolved claims continues to grow despite record-breaking efforts of the past three years,⁴³⁴ the VA has announced a “sweeping, multi-faceted, major change” in its benefits process.⁴³⁵ Labeled the “Transformation Strategy,” this initiative purports to put forth improvements in the “people, process, and technology” of claims processing.⁴³⁶ By implementing these improvements, the VA looks to substantially reduce the backlog of claims for disability compensation.⁴³⁷ Furthermore, the agency has established a goal of processing all claims within 125 days at a 98% accuracy rate by 2015.⁴³⁸ These goals strike at some of the major criticisms levied against the VA.⁴³⁹

As part of this plan, the VA is implementing a new eight-week employee training program for claims processing, called “Challenge,” to decrease claims processing time and increase accuracy.⁴⁴⁰ The VA is also developing a “segmented-lanes” program for claim intake, a process that is designed to place applications from veterans who meet certain criteria (i.e., former prisoners of war, veterans suffering from a traumatic brain injury, veterans with PTSD associated with military sexual trauma, etc.) into the

⁴³³ *Id.*

⁴³⁴ See U.S. DEP’T OF VETERANS AFFAIRS, VBA’S TRANSFORMATION PLAN, <http://benefits.va.gov/TRANSFORMATION/index.asp> (last updated Sept. 5, 2013).

⁴³⁵ U.S. DEP’T OF VETERANS AFFAIRS, HOW VBA WILL ROLL-OUT TRANSFORMATION, http://benefits.va.gov/TRANSFORMATION/Trans_rollout.asp (last updated Mar. 28, 2013) [hereinafter *Transformation Roll-Out*].

⁴³⁶ *Id.*

⁴³⁷ *Id.*

⁴³⁸ *Id.*; see also Glantz, *supra* note 265.

⁴³⁹ See *supra* Part IV.B–C.

⁴⁴⁰ See Richard Allen Smith, *A Modern Claims Process for a Modern VA*, VANTAGE POINT (July 11, 2012), <http://www.blogs.va.gov/VAntage/7538/a-modern-claims-process-for-a-modern-va/>; Dao, *supra* note 245.

hands of reviewers who are specially trained in those issues.⁴⁴¹ In addition, the VA is streamlining the way in which medical evidence is obtained for claims, for example simplifying the disability benefits questionnaires that veterans must complete for their applications.⁴⁴²

Perhaps the most talked-about portion of the Transformation Strategy, however, is the apparent technological upgrade.⁴⁴³ Currently, the VA benefits system relies primarily on paper file folders to organize data and hold pending claims.⁴⁴⁴ Commentators have cited this as a key factor contributing to the VA's lack of efficiency in this process.⁴⁴⁵ By 2015, however, the VA hopes to install a web-based Veterans Benefits Management System—at the cost of \$300 million⁴⁴⁶—in all of its Regional Offices.⁴⁴⁷ The VA asserts that moving the benefits system to “an electronic, automated, rules-based, multi-channel access environment” will vastly improve processing efficiency, as well as the accuracy of the process.⁴⁴⁸

As of August 2012, however, the computer system had been installed in just four of the VA's Regional Offices.⁴⁴⁹ Additionally, some observers are skeptical whether the computer system will actually provide a sizeable improvement. In the past, the VA's computer programs have not always been particularly smooth. Larry Scott, operator of a VA watchdog group in Washington, has stated with regard to past technology initiatives that the VA

⁴⁴¹ Robin Wulffson, *VA Improves Claims Processing for Needy Veterans*, EXAMINER.COM (July 11, 2012), www.examiner.com/article/va-improves-claims-processing-for-needy-veterans; *VA to Prioritize Disability Claims*, FEDERAL DAILY (July 12, 2012), federaldaily.com/articles/2012/07/12/va-to-prioritize-disability-claims.aspx; Tom Philpott, *New Steps to Reduce VA Claims Backlog*, KITSAPSUN.COM (July 20, 2012), <http://www.kitsapsun.com/news/2012/jul/20/tom-philpott-new-steps-to-reduce-va-claims/#axzz2i5Ux0sD1>; Catherine Trombley, *Segmented Lanes: A New Process For Claims*, VANTAGE POINT (July 12, 2012), <http://www.blogs.va.gov/Vantage/7555/segmented-lanes/>. The segmented lanes system is scheduled to be implemented in all Regional Offices by December 2013.

⁴⁴² See *Transformation Roll-Out*, *supra* note 435.

⁴⁴³ *Id.*

⁴⁴⁴ See Glantz, *supra* note 265 (quoting VA Undersecretary for Benefits Allison Hickey as saying that “[i]f you have ever walked into one of our regional offices, you would see stacks and stacks of paper”).

⁴⁴⁵ See, e.g., Randi Kaye & Scott Bronstein, *Hundreds of Thousands of War Vets Still Waiting for Health Benefits*, CNN (Oct. 29, 2012), www.cnn.com/2012/09/29/health/delayed-veterans-benefits/index.html (“The vast majority [of VA regional offices] are still tracking veterans on entirely paper files—a process that's not only slow and inefficient but also requires massive space and numbers of files.”); David Martin, *Massive Veterans Affairs Backlog Leaves Half a Million Waiting for Benefits*, CBS (July 11, 2012), www.cbsnews.com/8301-18563_162-57469804/massive-veterans-affairs-backlog-leaves-half-a-million-waiting-for-benefits/ (noting that the VA has fallen behind virtually every other federal agency in converting their files from paper to electronic).

⁴⁴⁶ Glantz, *supra* note 265.

⁴⁴⁷ See *Transformation Roll-Out*, *supra* note 435.

⁴⁴⁸ *Id.*

⁴⁴⁹ See Glantz, *supra* note 265.

is “creating an electronic nightmare to go along with their paper nightmare.”⁴⁵⁰ Noted veterans’ rights attorney Katrina Eagle also points out that many of the VA’s own software programs are designed so that they cannot “talk” to each other, leading to significant disconnects among the various levels of the claims process.⁴⁵¹

It is extremely unlikely that the VA will meet its goal of eliminating the backlog by 2015.⁴⁵² Hopefully, however, the VA will successfully implement the improvements in its Transformation Strategy by 2015, leading to improved efficiency and accuracy. Even if the Transformation Strategy does not prove to be a cure-all for the ailing system, one can hope that it will at least produce some important signs of recovery.

C. Time Limits

At least one commentator in recent years has called for a “reasonable claim time limit” for veterans applying for certain VA benefits.⁴⁵³ Under this rationale, the VA would be permitted to bar claims for disability compensation filed “after a liberal time period has elapsed subsequent to a veteran’s last day of [military] service.”⁴⁵⁴ In other words, veterans would essentially face a statute of limitations in applying for disability compensation, one that would start running on the day of their separation from the military. Attempts to file a claim for disability compensation after that period ends would be time-barred.⁴⁵⁵ This would, in theory, “generate fiscal savings in the veterans’ claims process” as well as reduce the backlog by lowering the number of VA claims in the system.⁴⁵⁶

However, this idea would appear to produce some detrimental outcomes for veterans, particularly older veterans. To begin with, as proponents of this idea themselves have noted, exceptions would need to exist for medical conditions which do not typically manifest within the statutorily required period.⁴⁵⁷ This alone could make the law unwieldy, as arguments would constantly arise about whether a veteran suffering from a certain condition should be time-barred from filing for disability compensation. For veterans experiencing multiple service-connected health

⁴⁵⁰ See Bob Brewin, *VA Benefits System Continues to Encounter Processing Problems*, NEXTGOV (May 4, 2009), available at <http://www.nextgov.com/technology-news/2009/05/va-benefits-system-continues-to-encounter-processing-problems/43752/>.

⁴⁵¹ Eagle Interview, *supra* note 384.

⁴⁵² See, e.g., Dao, *supra* note 245 (noting that most observers of these policy issues are skeptical that the VA will meet this ambitious goal in such a short period of time).

⁴⁵³ See Stephenson, *supra* note 3.

⁴⁵⁴ *Id.* at 202.

⁴⁵⁵ *Id.* at 202–03.

⁴⁵⁶ *Id.* at 203.

⁴⁵⁷ *Id.*

problems, the decisions as to whether their compensation claims should be time-barred could become particularly arduous.

Even more importantly, such a policy would allow the VA to unjustly avoid its obligation to compensate individuals who not only served our nation in the armed services but also incurred or exacerbated some sort of disability as a result of their service. It is a well-documented fact that many veterans are unaware of the benefits available to them when they separate from the military.⁴⁵⁸ Many veterans might not be aware that their disability was actually service-connected until much later in their life.⁴⁵⁹ Others might feel uneasy about applying for VA disability compensation money when they are younger but might decide to apply when they are older and, perhaps, in greater need of the monetary benefits. These veterans should not be barred from receiving disability compensation benefits simply due to their lack of knowledge about an admittedly complex process, because they failed to immediately understand the connection between their military service and their disability, or because of their initial uneasiness about applying for these benefits.

In his second Inaugural Address, Abraham Lincoln stated that America's government owed an obligation "to care for [the veteran] who shall have borne the battle and for his widow, and his orphan."⁴⁶⁰ He did not say that the government owed this obligation only toward veterans who applied for benefits within a set time limit. To live up to our former President's call to care—which the VA has long touted as the cornerstone of their mission—any system of time-barring veterans who do not file "quickly enough" must be avoided.

D. Overcoming Transportation Barriers

For elderly veterans who are unable to make it to a VA office, there appear to be ways to bring the VA to them. Some of the most notable strides in this direction have been made at the North Carolina Central University School of Law, where the school's Veterans Law Program has established broadband hook-ups with all of the VA medical centers in the state.⁴⁶¹ This allows elderly veterans to engage in consultations with members of the law clinic from afar.⁴⁶² Veterans who are unable to travel outside the medical

⁴⁵⁸ See, e.g., Kabatchnick, *supra* note 8, at 213–14.

⁴⁵⁹ See, e.g., Abrams, *supra* note 8, at 30.

⁴⁶⁰ See U.S. DEP'T OF VETERANS AFFAIRS, THE ORIGIN OF THE VA MOTTO, <http://www.va.gov/opa/publications/celebrate/vamotto.pdf> (last visited Oct. 18, 2013). Today, a plaque inscribed with this motto hangs at the main entrance of the VA offices.

⁴⁶¹ Kabatchnick, *supra* note 8, at 201.

⁴⁶² *Id.*

center are thus able to seek advice about their VA claims from individuals who can help them with this process.⁴⁶³

A rise in such virtual services programs within the VA would be an important piece in providing greater services for elderly veterans. For instance, several state and federal organizations have implemented “telemedicine” systems with extremely positive results.⁴⁶⁴ In fact, the VA presently utilizes a widespread telemedicine program of its own, one that “links patients and health care providers by telephones and includes telephone-based data transmission.”⁴⁶⁵ This VA program already serves around 35,000 patients across the country.⁴⁶⁶

Many states have established transportation assistance programs for veterans who need to access a VA medical center, Regional Office, or other site.⁴⁶⁷ For veterans who cannot even utilize those programs, however, the use of these telemedicine becomes extremely important. If medical examinations for VA benefits could take place through a telemedicine system, for instance, this would be a tremendous service for veterans with disabilities who have no other means of accessing the agency’s medical personnel. Likewise, consultations with service officers at the Regional Offices could take place by telephone rather than the veteran coming to the VA office in person.

Resources now exist so that veterans facing transportation barriers are not prevented from seeking their VA benefits. It is important that these continued resources be developed, expanded, and utilized so that a veteran’s transportation limitations do not also become obstacles to accessing the VA system.

E. Attorney Involvement

The VA continues to significantly limit the role of attorneys in the VA benefits process.⁴⁶⁸ Claimants cannot hire an attorney to represent them until after they issue a Notice of Disagreement objecting to the Regional

⁴⁶³ *Id.*

⁴⁶⁴ *See, e.g.,* JONATHAN EDWARDS, CASE STUDY: A TEXAS TELEMEDICINE PROGRAM OFFERS LESSONS FOR GOVERNMENTS AND CARE DELIVERY ORGANIZATIONS WORLDWIDE (2008), *available at* http://telehealth.utmb.edu/news/Gartner%20case_study_a_texas_telemedic_157582.pdf.

⁴⁶⁵ *See* Ass’n of the U.S. Army, *Fiscal 2011 Budget Details for the Veterans’ Administration*, LEGISLATIVE NEWSLETTER UPDATE, Feb. 15, 2010, <http://www.ansa.org/legislation/newsletter/Pages/LegislativeNewsletterUpdate15February2010.aspx> (noting that the federal government allocated \$42 million in Fiscal Year 2011 toward the continued development of the VA’s telehealth program).

⁴⁶⁶ *Id.* As of 2010, the VA’s telehealth program was the largest such program in the world. *Id.*

⁴⁶⁷ Kabatchnick, *supra* note 8, at 199.

⁴⁶⁸ *See supra* notes 224–233 and accompanying text.

Office's decision.⁴⁶⁹ Thus, an attorney cannot be paid for assisting a veteran in his or her initial claim.⁴⁷⁰

Several observers have called for a change in this regulation.⁴⁷¹ While the VA objects to introducing too much of an "adversarial relationship" into the claims process,⁴⁷² an adversarial relationship of sorts already results every time the agency denies a veteran's claim for benefits.⁴⁷³ These denials—or, at the very least, a significant slowdown within the claim processing time—can occur often because the veteran is unsure how to properly file the claim. For instance, to meet their statutory duty to assist the claimant, Regional Office staff members face delays every time they have to hunt for appropriate evidence for a veteran filing an unsubstantiated claim. Similarly, veterans are often unaware of the full complement of benefits for which they are eligible, and thus frequently do not apply for the type of benefits that would most greatly assist them.⁴⁷⁴

Presumably, at least some of this delay and disadvantage for veterans could be avoided if veterans could hire a VA-accredited attorney from the start.⁴⁷⁵ If a veteran were able to receive professional assistance up front in preparing their VA claim, the Regional Offices would hopefully receive a higher ratio of claims that were fully ready for review, allowing them to decide these claims without spending agency time searching for evidence on the veteran's behalf. The veteran would also gain from the lawyer's knowledge of the full landscape of VA benefits, helping the veteran apply for

⁴⁶⁹ *Id.*

⁴⁷⁰ *Id.*

⁴⁷¹ The Senate even passed a bill in recent years allowing veterans to retain an attorney at any stage of the claims process. Unfortunately, the Veterans' Choice of Representation and Benefits Enhancement Act of 2006 died in the House of Representatives. See Veterans' Choice of Representation and Benefits Enhancement Act § 2694, 109th Cong. (2006). The strong statements in favor of enacting this legislation echoed this notion of granting veterans the right to choose whether they wanted to retain a lawyer at any stage of the process. See, e.g., *Veterans Choice of Representation Act, Hearing Before the S. Comm. On Veterans' Affairs*, 109th Cong. (June 8, 2006) (statement of Barton F. Stichman, Co-Director, Nat'l Veterans Legal Services Program) ("Veterans deserve the right to choose to hire an attorney to represent them on a claim for VA benefits. It makes no rational sense to deny them this right when the right to choose to hire an attorney is enjoyed by criminal defendants, claimants for other Federal Government benefits including social security, and non-citizens opposing Federal Government efforts to deport them."); *Cohen Testimony*, *supra* note 325 ("[T]he VA [has] been disseminating mixed messages by recognizing the difficulty in developing claims yet not attempting to obtain attorney assistance in developing claims.").

⁴⁷² See *supra* notes 198–202, 233 and accompanying text.

⁴⁷³ See Fox, *supra* note 3, at 340 ("The goal of a non-adversarial system has morphed into one typified by a great deal of bureaucratic gridlock and antagonism among the various constituencies.").

⁴⁷⁴ See, e.g., Abrams, *supra* note 8, at 30, 32.

⁴⁷⁵ This was one of the key arguments made in favor of passing the Veterans' Choice of Representation and Benefits Enhancement Act. Unfortunately, while it swayed the Senate, this argument evidently failed to convince enough members of the House.

all benefits for which he or she appears to be eligible.⁴⁷⁶ Thus, the overall result would be more thorough and complete initial applications for claims that could be examined and processed faster by the Regional Offices, along with better information conveyed to the veteran before their claim reaches the VA.

Such an idea would receive staunch opposition from the VA.⁴⁷⁷ The agency has vehemently argued that it is their duty to assist the veteran at this phase of the proceedings, not the job of a lawyer. However, completely absorbing this duty has contributed largely to the backlog the VA faces today.⁴⁷⁸ In addition, there are also too many reports that certain Regional Offices are not coming even close to meeting their statutory duty to assist.⁴⁷⁹ By permitting veterans to hire attorneys—who are bound not only by the standards of their profession but also by threat of a malpractice suit if they blatantly fail in their obligations—to help them from the outset, the outcome for veterans would appear to be better overall. In addition, it is simply incongruous that the VA forbids veterans to hire attorneys in preparing their claims but allows veterans to retain a lawyer for pay once the Notice of Disagreement is filed—even though the VA’s duty to assist remains in effect up to the Board of Veterans’ Appeals stage in the proceedings.⁴⁸⁰

Notably, it is true that attorneys can currently assist veterans *pro bono* in preparing claims for the Regional Office.⁴⁸¹ However, while this is a fine aspiration, it is unrealistic to expect enough attorneys to work *pro bono* to meet the current national need.⁴⁸² Also, accredited representatives from service organizations can help veterans prepare these claims to the Regional

⁴⁷⁶ Importantly, the attorneys would still be required to receive accreditation from the VA in order to practice in this area of the law. Thus, their degree of knowledge about the VA system should be quite strong.

⁴⁷⁷ Even the regulated role that attorneys currently assume in the claims process has met with significant opposition from the VA and other organizations. *See supra* notes 200, 233 and accompanying text; *see also Cohen Testimony, supra* note 325 (noting that the VA opposed the Veterans’ Choice of Representation Act).

⁴⁷⁸ The math seems simple: if attorneys were able to assist veterans at the outset, the burden of hunting down obscure pieces of supporting evidence would not fall as heavily on the VA’s shoulders. While the VA’s duty to assist would remain in effect, the agency would have help providing the assistance if veterans could hire lawyers to assist with their benefits claims.

⁴⁷⁹ *See supra* Part IV.C (noting that instead of helping veterans, inaccuracies in the claims process too often become a hindrance to veteran-claimants).

⁴⁸⁰ In other words, the VA already allows attorneys to step in at a stage when the agency still owes a statutory duty to help veterans. Thus, it does not make sense that the agency would use the argument of the duty to assist as a reason for preventing attorneys from helping veterans at the outset of the claims process. The mere presence of an attorney assisting a veteran does not automatically establish an adversarial relationship between the veteran and the VA.

⁴⁸¹ 38 U.S.C. § 5904; *see also supra* note 227.

⁴⁸² Abrams, *supra* note 8, at 32.

Offices, and many do so with great success.⁴⁸³ Yet a veteran should still be allowed to hire an attorney at this initial phase if he or she chooses. In addition to the prospective advantages outlined above, a veteran who ultimately decides to appeal the Regional Office's decision would benefit from having the assistance of an attorney from the outset. Under the current system, however, the attorney must enter into the case after significant decisions have already been made and must sift through all of the evidence that has been submitted rather than deciding up front what evidence would best help his or her client's chances.

Also, veterans too often do not even try to retain counsel when they appeal a Regional Office decision. The Court of Appeals for Veterans Claims has the highest rate of *pro se* cases of any American appellate court.⁴⁸⁴ This means that far too many veterans come before this court to argue a highly complex body of law without counsel to advise them. Opening the door to attorneys at the first steps of this process could improve the likelihood that a veteran will retain qualified counsel to represent them in the appellate phases as well.

It would be a controversial move, to be sure, and one that could seem like a money grab by attorneys. Yet, for the reasons discussed in the preceding paragraphs, the VA benefits system would be better off if lawyers were allowed to assist veterans from the very start of the claims process.

F. Pension Protection

In the wake of the Government Accountability Office's discoveries about rampant "poaching" of VA pensions,⁴⁸⁵ both Congress and outside commentators have loudly called to establish a look-back provision similar to Medicaid, Social Security, and other means-tested benefits programs.⁴⁸⁶ Other observers have asked for greater review of statements made by veterans on their claims applications, such as requiring bank statements and tax records to verify that what the application asserts is true.⁴⁸⁷

Both are reforms worthy of immediate implementation. This is one of those very rare areas where the VA's procedures actually do not demand enough from the claimant. If the VA's pension program is truly designed for

⁴⁸³ Remember, though, in the eyes of the law, representation by a veterans service organization is not equivalent to representation by an attorney. *See Comer*, 552 F.3d at 1369.

⁴⁸⁴ Fox, *supra* note 3, at 343 ("There is no other federal court of appeals in the United States with a *pro se* rate anywhere near that of the [Court of Appeals for Veterans Claims].").

⁴⁸⁵ GOV'T ACCOUNTABILITY OFFICE, *supra* note 34.

⁴⁸⁶ *Id.*; see also *Perkio Testimony*, *supra* note 357; Ferguson, *supra* note 35; Bloom, *supra* note 339.

⁴⁸⁷ See GOV'T ACCOUNTABILITY OFFICE, *supra* note 34, at 8.

veterans whose holdings are not enough to support themselves and their families,⁴⁸⁸ then greater administrative oversight is clearly needed.

The more controversial of these two measures will undoubtedly be the look-back provision. By way of comparison, the Medicaid measures for reviewing transfer of assets have been rather divisive from the outset.⁴⁸⁹ The VA could potentially avoid some of this tension by using a smaller look-back time frame than Medicaid (i.e., three years instead of five years).⁴⁹⁰ Other debates over Medicaid spring from the more recent provision that starts the look-back clock running from the time when the individual applied for Medicaid rather than when the person transferred his or her assets.⁴⁹¹ With a VA pension, either starting date could be adopted to accomplish the desired result.

Even if controversial, adopting a look-back provision is necessary for the VA, as is a greater review of the veteran's supporting documents. This is not, as one commentator moaned in the wake of the Government Accountability Office report, an attempt by the government to make a veteran "become impoverished before we help him with his long-term care needs."⁴⁹² "Impoverished" is a long way from the VA's assets requirement for pension eligibility.⁴⁹³ Instead, it is a means of ensuring that those elderly veterans who have the greatest need for the VA pension benefits—those veterans whose income and assets are both relatively low—are helped by the VA pension benefits particular program.

In an additional effort to protect against pension poaching, the VA should impose a requirement on financial firms similar to the agency's demand on attorneys. Any entity looking to assist a veteran in "VA benefits planning" should undergo some sort of accreditation by the VA, just as lawyers are required to receive VA accreditation in order to represent veterans appealing their claims decisions. This would guarantee the VA a degree of supervision over the practices of these financial planning

⁴⁸⁸ Specifically, the VA states that pension benefits are "not intended to protect substantial assets or build up an estate for the benefit of heirs." *See supra* note 69.

⁴⁸⁹ *See, e.g.,* Martha C. White, *Medicaid Madness: 'Look-back' Period Creates Financial Hardship for Many Americans*, DAILY FIN. (July 29, 2010), www.dailyfinance.com/2010/07/29/medicaid-madness-look-back-period-creates-financial-hardship-f/ (arguing that increasing the look-back period to five years increases the risk that an elderly individual would require nursing home care during that "gap" of time).

⁴⁹⁰ Indeed, a three-year look-back would match the period used by Medicaid until 2005. In 2012, Senator Ron Wyden introduced a bill calling for a review of uncompensated transfers of assets for three years prior to filing the VA pension application into Congress, but it did not receive enough support to become law. *See* S. 3270, 112th Cong. (2012).

⁴⁹¹ *See, e.g.,* White, *supra* note 489.

⁴⁹² Josh Sweigart & Andrew J. Tobias, *VA Pension Fund Exploited*, W. STAR (June 8, 2012), www.western-star.com/news/news/local/va-pension-fund-exploited/nPR7S/ (quoting attorney Ted Gudorf of Dayton, Ohio).

⁴⁹³ As noted before, the VA requires only that the veteran's *assets not be excessive* in order to meet the VA pension assets requirement. *See* 38 C.F.R. § 3.274(a).

businesses that have encouraged veterans to make these large asset transfers in the past. Such oversight, if applied properly by the VA, would hopefully hamper greatly the ability of these firms to advise veterans to make such transfers. If a greater degree of review over the veterans applying for pensions is to be enacted—and it should be—then a greater degree of scrutiny over these financial organizations is also a necessary component to guard against these “poaching” practices.

G. Ending Fiduciary Madness

If there is a single VA benefits-related program that must be eliminated to curb injustice to elderly veterans, then the VA’s tortured fiduciary system is that program. While there are certainly plenty of upstanding, honest fiduciaries who look out for a veteran’s best interest, the very nature of this arrangement goes against some of the most rudimentary concepts of justice that we recognize in our nation.

Every state in the United States recognizes the legally binding status of a power of attorney.⁴⁹⁴ Under state statutes, a validly executed power of attorney must be respected unless there is some reasonable cause to doubt the attorney-in-fact’s authority or if the attorney-in-fact is trying to breach his or her obligation to act in the principal’s best interest.⁴⁹⁵ Under the VA’s fiduciary system, however, the VA is permitted to go against the wishes of a veteran as expressed in a legal document and appoint a total stranger to manage that veteran’s benefits.⁴⁹⁶

There are no piecemeal forms that can revise such a system. The VA must be required by law to recognize the authority of a veteran’s validly executed power of attorney. Holding otherwise allows the VA to circumvent a basic precept of the American legal system: that an individual possesses the right to determine what should happen with his or her personal property within the bounds of the law.⁴⁹⁷

Given that veterans have a constitutional due process property interest in their VA benefits, including those benefits that they are to be paid in the future,⁴⁹⁸ it is unjust in every way for the VA to unilaterally assign those benefits to somebody other than the person the veteran has chosen to manage his or her assets. As veterans’ rights attorney Katrina Eagle put it,

⁴⁹⁴ See Stiegel & Klem, *supra* note 377.

⁴⁹⁵ *Id.*

⁴⁹⁶ See *supra* Part VI.

⁴⁹⁷ Most significantly of all, our federal Constitution prohibits deprivation of “life, liberty, and property without due process of law.” U.S. CONST. amend. V.

⁴⁹⁸ *Cushman v. Shinseki*, 576 F.3d 1290 (D.C. Cir. 2009); see generally Allen, *supra* note 5.

“The VA accepts marriage license and birth certificates on their face. A Power of Attorney should be the same thing.”⁴⁹⁹

In addition, veterans who do not have a valid power of attorney in place should not be left without rights. The VA should require all fiduciaries to provide a monthly accounting to the veteran stating how much the veteran is receiving in VA benefits and precisely what that money is being used for (i.e., how much is presently in the bank account, how much was used during that month for medical expenses, how much for food, etc.). A more intensive screening process is also necessary to prevent individuals who are convicted felons or who do not have the requisite knowledge about their fiduciary duties from serving in this important role. Greater oversight from the VA is needed to remove fiduciaries who are breaching their vital obligation toward the veteran. A basic sense of justice for veterans demands it.

VIII. FINAL THOUGHTS

Without a doubt, the VA’s benefits system is of paramount importance to veterans. For the elderly veterans who constitute such a significant proportion of the United States’ senior citizen population, receiving a VA pension or disability compensation can make a tremendous difference in their “golden years.” Given the important service these men and women have provided for our country, it is only right that our veterans receive the financial support promised by our country after their military service is done. The courts have recognized the magnitude of these benefits from the VA by carving out a constitutional due process right not only for the benefits themselves, but also for the claims that a veteran makes to the VA in hopes of receiving these benefits.

Therefore, it is essential that such an important program operate in the most effective manner possible. Unfortunately, as this article shows, the VA is presently burdened by systemic problems in inefficiency, inaccuracy, and, at times, outright injustice. Far too often, the VA’s own regulations are not even obeyed. Too many veterans are being hurt as a result, with elderly veterans sustaining particularly negative impact.

The ideas discussed in this article provide potential solutions for some of the VA’s major concerns, though this list is certainly not comprehensive. The most important realization is that something needs to be done. Furthermore, it needs to be done soon. As the years pass, the number of veterans—and elderly veterans in particular—will grow larger than ever.⁵⁰⁰ Measures must be taken to prevent them from being harmed by a system, which in many ways is currently well-intended but poorly executed.

⁴⁹⁹ Eagle Interview, *supra* note 384.

⁵⁰⁰ Already, the Census Bureau reports that there are around nine million veterans over the age of sixty-five. See U.S. Census Bureau, *Profile America Facts for Features: Older Americans Month: May 2011* (Mar. 23, 2011), <https://www.census.gov/newsroom/>

From this nation's earliest days to the present times, American leaders have expressed concern for our country's veterans. Now, it is time to translate this concern into reforms within the VA's benefits system. This system can be fixed. The time to begin fixing it is now.

releases/archives/facts_for_features_special_editions/cb11-ff08.html. And today, with veterans presently returning from two simultaneous wars, the number of veterans growing older in the present generation is guaranteed to be substantial.