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## Representing Veterans

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## REPRESENTING VETERANS

Jennifer D. Oliva\*

### ABSTRACT

*Federal law has long deprived American veterans of certain fundamental legal rights enjoyed by non-veterans and attributable to veteran sacrifice. Federal case law, for example, denies veterans the right to bring an action in tort against the federal government to vindicate in-service injuries. And the United States Code deprives veterans of their right to robust judicial oversight of Department of Veterans Affairs (VA) service-connected benefit decisions. This pair of due process deprivations is compounded by the federal statute that prohibits veterans from exercising the fundamental right to counsel during the initial stage of the VA claims process. This Article examines the federal statutory scheme and pertinent case law that has long denied veterans the right to counsel throughout the VA veteran claims adjudication process, debunks the rationales underlying that law, and concludes by recommending that the federal government extend to veterans the right to counsel throughout the VA's benefits adjudication proceedings.*

“What an irony that the veterans who have fought to see that we all have these legal rights, are the very ones who are being denied those rights now.”<sup>1</sup>

### I. INTRODUCTION

It is important to concede up front that the task at hand—the diagnosis and treatment of the singular most formidable legal challenge currently faced by American veterans—is beyond the capacity of this Article. The litany of ways in which federal law deprives our former service members of fundamental legal rights enjoyed by non-veterans and attributable to veteran sacrifice makes it impossible to reasonably choose just one culprit. More frustrating, the purportedly “pro-veteran” American public appears either unaware of—or unconcerned about—the law’s anomalous treatment of veterans insofar as basic due process rights are concerned. As United States Marine Corps veteran and law professor Andrew

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\* Associate Professor of Law, Seton Hall University School of Law; J.D., Georgetown University; M.B.A., University of Oxford; B.S., United States Military Academy. This Article is dedicated to the brave Americans who have selflessly served our nation in the United States Armed Forces.

1. S. 11, *The Proposed Veterans' Administration Adjudication Procedure and Judicial Review Act*, and S. 2292, *Veterans' Judicial Review Act: Hearing Before the S. Comm. on Veterans' Affairs*, 100th Cong. 47 (1988) (statement of Sen. Thomas A. Daschle).

Popper has explained, “Service members are routinely called heroes—and they are. It is the highest public calling. Yet these gestures seem, at best, incomplete when accompanied by a deprivation of . . . the basic rights due to all citizens.”<sup>2</sup>

Federal case law, for example, has stripped veterans of the right to bring a cause of action in tort against the federal government to vindicate injuries incurred in service. Title 38 of the United States Code also denies veterans the right to robust judicial oversight of Department of Veterans Affairs’ (VA) decisions denying them their hard-earned, service-connected benefit entitlements. These unjustified, veteran-centric due process deprivations are compounded by the federal statute that prohibits veterans from exercising the fundamental right to counsel during the initial stage of the VA claims process. This Article, therefore, argues that the federal statutory scheme and pertinent case law that have long denied veterans the right to counsel throughout the VA’s veterans’ claims adjudication process are ripe for reform.

This Article proceeds in four parts. Part II explains the federal doctrine that denies veterans the right to bring a private cause of action to remedy in-service injuries caused by the federal government’s tortious conduct. Part III details the genesis of the federal law that denied veterans the right to judicial oversight of VA’s service-connected claims decisions until recently and examines the ongoing inadequacy of the current veteran judicial review scheme. Part IV provides an overview of both the legacy and newly enacted veterans’ service-connected disability claims processes. It then explores the historic—and bogus—rationales underlying the nation’s long-standing refusal to extend the right to counsel to veterans during VA claims adjudication proceedings. Part V concludes this Article by recommending that federal law be reformed to extend the right to obtain legal representation to veterans during the initial stage of the VA claims process and offering myriad arguments in favor of that proposal.

## II. THE RIGHT TO BRING A PRIVATE CAUSE OF ACTION

Unlike their civilian counterparts, service members and veterans are deprived of the basic right to bring civil lawsuits against the government to vindicate particular injuries. The plain language of the 1946 Federal Torts Claims Act (FTCA) extended to *all persons* the right to bring civil suits against the federal government for injuries inflicted by the sovereign’s negligent and intentional tortious conduct, including rape, sexual assault, battery, medical malpractice, torture, and murder.<sup>3</sup> Four years after the FTCA was enacted, however, the Supreme Court held in *Feres v. United States* that the federal government was immune from suit brought by current and former members of the armed forces who had incurred injuries “incident to [military] service” because, among other things, such suits would adversely affect military order and discipline.<sup>4</sup>

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2. Andrew Popper, *Rethinking Feres: Granting Access to Justice for Service Members*, 60 B.C. L. REV. 1491, 1498 (2019) (footnote omitted).

3. 28 U.S.C. §§ 1346(b)(1), 1402(b), 2401(b), 2402, 2671–2680 (2018) (originally enacted as Legislative Reorganization Act of 1946, Pub. L. No. 79-601, tit. IV, 60 Stat. 812, 842–47 (amended 2006)).

4. *Feres v. United States*, 340 U.S. 135, 146 (1950).

As one veteran commentator has noted, “The force of [*Feres*] was apparent immediately: most [service members] injured incident to military service would be denied access to the very system of justice they pledged to defend.”<sup>5</sup> The *Feres* doctrine’s seven-decade reign of injustice has well-fulfilled that prediction. Imagine a scenario in which a group of civilians and service members developed life-threatening diseases due to their exposure to harmful toxins emitting from a military installation proximate to their respective residences. Under current law, the affected civilians would be entitled to initiate an FTCA action against the Department of Defense to recover for their injuries, but similarly situated service members would be entirely precluded from bringing suit. Worse yet, the lower federal courts have applied the *Feres* doctrine to bar current and former service members who have been raped or otherwise viciously assaulted in service from the right to sue to vindicate their injuries.<sup>6</sup> Certain circuits have even held that service members and veterans are precluded from pursuing a cause of action to vindicate diseases contracted by their *in utero* infants, which are causally connected to a service member parent’s exposure to health-harming toxins—including radiation—while in service.<sup>7</sup>

“Both academics and [the] lower [federal] courts have condemned the [*Feres*] doctrine as unfounded, unfair, and even un-American.”<sup>8</sup> Moreover, the doctrine’s unmooring from the plain language of the FTCA has provoked the ire of prominent Supreme Court textualists. Justice Scalia, for example, has argued that the plain language of the FTCA not only undermines *Feres*, it mandates the opposite result insofar as it indicates that

Congress thought . . . barring recovery [for service members] might adversely affect military discipline. After all, the morale of Lieutenant Commander Johnson’s comrades-in-arms will not likely be boosted by news that his widow and children will receive only a fraction of the amount they might have recovered had he been piloting a commercial helicopter at the time of his death.<sup>9</sup>

Notwithstanding these persuasive critiques, *Feres* remains the law of the land and continues to force veterans to seek the substandard remedies offered by the dysfunctional VA service-connected disability benefits system, which is discussed in greater detail below.

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5. Popper, *supra* note 2, at 1495.

6. See, e.g., *Klay v. Panetta*, 924 F. Supp. 2d 8, 13 (D.D.C. 2013) (barring the tort claim of a former service member who suffered an in-service sexual assault pursuant to *Feres*), *aff’d*, 758 F.3d 369 (D.C. Cir. 2014).

7. See, e.g., *Mondelli v. United States*, 711 F.2d 567, 568 (3d Cir. 1983) (barring a suit under *Feres* brought on behalf of an infant whose “genetic injuries [were] caused by her father’s exposure to radiation while he was on active duty in the United States Army” while “acknowledg[ing] the result to be a harsh one”).

8. Jonathan Turley, *Pax Militaris: The Feres Doctrine and the Retention of Sovereign Immunity in the Military System of Governance*, 71 GEO. WASH. L. REV. 1, 2 (2003).

9. *United States v. Johnson*, 481 U.S. 681, 700 (1987) (Scalia, J., dissenting).

## III. THE RIGHT TO JUDICIAL REVIEW

“[T]here has been significant dissatisfaction with the exercise of judicial review functions [governing veterans’ claims].”<sup>10</sup>

The United States also has an extensive history of depriving veterans of the basic due process right to judicial review. Congress denied former service members any independent judicial oversight of VA claims decisions until 1988, when it enacted the Veterans’ Judicial Review Act (VJRA) and, thereby, created the United States Court of Appeals for Veterans Claims (CAVC).<sup>11</sup> Prior to the establishment of the CAVC, veterans were proscribed from challenging VA claims denial decisions—regardless of their illegality—because those agency determinations were final and unreviewable.<sup>12</sup>

VA staunchly opposed judicial oversight of the agency’s benefits decisions.<sup>13</sup> “VA’s most frequently voiced concern was that [such review] would impair its long-standing, supportive, non-[adversarial] role in its relationship with veterans.”<sup>14</sup> As provided in the next section, VA has repeatedly invoked the highly debatable and self-serving argument that veterans must be deprived of basic due process rights, including the right to judicial oversight of VA claims decisions and attorney representation, in order to preserve the agency’s purportedly paternalistic, pro-veteran, and non-adversarial benefits adjudication system. VA also advanced several other reasons in support of its opposition to judicial oversight, including the contention that such review would increase agency costs and incentivize opportunistic attorneys to swindle veterans out of their well-deserved benefits.<sup>15</sup>

It was no secret in Congress that VA’s long-standing immunity from judicial review was aberrant in the federal system. A 1988 U.S. House of Representatives Report expressly acknowledged that “the Veterans’ Administration stands in ‘splendid isolation as the single federal administrative agency whose major functions are explicitly insulated from judicial review.’”<sup>16</sup> Unsurprisingly, and as

10. Richard E. Levy, *Of Two Minds: Charitable and Social Insurance Models in the Veterans Benefits System*, 13 KAN. J.L. & PUB. POL’Y 303, 321 (2004).

11. Veterans’ Judicial Review Act, Pub. L. No. 100-687, tit. III, 102 Stat. 4105, 4113–22 (1988) (codified as amended in scattered sections of 38 U.S.C. (2018)).

12. Veterans’ Benefits Act of 1957, Pub. L. No. 85-56, § 211(a), 71 Stat. 83, 92 (“[D]ecisions of the Administrator on any question of law or fact concerning a claim for benefits or payments under any law administered by the Veterans Administration shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision.”).

13. See, e.g., Hugh B. McClean, *Delay, Deny, Wait Till They Die: Balancing Veterans’ Rights and Non-Adversarial Procedures in the VA Disability Benefits System*, 72 SMU L. REV. 277, 288 (2019) (explaining that “the VA vehemently opposed judicial oversight and, as one scholar put it, . . . was brought ‘kicking and screaming’ into the realm of due process”); Levy, *supra* note 10, at 320.

14. Charles L. Cragin, *The Impact of Judicial Review on the Department of Veterans Affairs’ Claims Adjudication Process: The Changing Role of the Board of Veterans’ Appeals*, 46 ME. L. REV. 23, 26–27 (1994).

15. Stacey-Rae Simcox, *Thirty Years After Walters the Mission Is Clear, the Execution Is Muddled: A Fresh Look at the Supreme Court’s Decision to Deny Veterans the Due Process Right to Hire Attorneys in the VA Benefits Process*, 84 U. CIN. L. REV. 671, 689–90 (2016).

16. H.R. REP. 100-963, at 10 (1988), as reprinted in 1988 U.S.C.C.A.N. 5782, 5791 (quoting

Professor Michael Wishnie has wisely pointed out, such legal isolation operated over time to undermine the civil rights and legal interests of veterans<sup>17</sup> while protecting VA from public scrutiny and potential reform.

There is little doubt that subjecting VA claims decisions to judicial review was a welcome improvement for veterans. In theory at least, Congress enacted such oversight to ensure that VA follows its own rules throughout its administrative benefits proceedings. The court that Congress created to adjudicate veteran claims, however, is an Article I court of limited jurisdiction. As such, the CAVC's scope of review and peculiar procedures depart in critical ways from that of the regional Article III appellate courts of general jurisdiction—frequently to the detriment of veterans.

First, while the CAVC is technically an appellate court, its decisions are reviewed by a separate intermediate appellate court, the United States Court of Appeals for the Federal Circuit, before they are ripe for certiorari petition to the United States Supreme Court.<sup>18</sup> This structure, which demands that veterans obtain at least two appellate court rulings before seeking review from the court of last resort, is not only unusual—it is frustrating insofar as it adds another time-consuming layer to a claims decision process that is already laborious, riddled with error, and defined by delay. To make matters worse, veterans often have no right whatsoever to appeal certain CAVC decisions as a result of the Federal Circuit's circumscribed appellate jurisdiction over VA claims, which is limited to reviewing legal issues.<sup>19</sup> The Federal Circuit, for example, is expressly prohibited by statute from considering a veteran's challenge “to [a VA] factual determination” or “to a [VA] law or regulation as applied to the facts of a particular case.”<sup>20</sup>

Second, the overwhelming majority of CAVC claims appeals are decided on the paper record, without oral argument, and by a single judge.<sup>21</sup> Because single-judge decisions are not precedential,<sup>22</sup> they leave “veteran claimants and the agency . . . without binding guidance on how the law should be interpreted and applied in different factual contexts, which, in turn, generates additional appeals at both the agency and judicial levels.”<sup>23</sup> Even more concerning is a recent empirical study which found that “the outcomes in [single-judge CAVC] cases depend heavily upon which judge decides the appeal.”<sup>24</sup> Needless to say, a

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Robert L. Rabin, *Preclusion of Judicial Review in the Processing of Claims for Veterans' Benefits: A Preliminary Analysis*, 27 STAN. L. REV. 905, 905 (1975).

17. Michael J. Wishnie, “A Boy Gets in Trouble”: *Service Members, Civil Rights, and Veterans' Law Exceptionalism*, 97 B.U. L. REV. 1709, 1709–10, 1712 (2017).

18. 38 U.S.C. § 7292(c) (2018).

19. *Id.* § 7292(c)–(d).

20. *Id.* § 7292(d)(2).

21. U.S. COURT OF APPEALS FOR VETERANS CLAIMS, FISCAL YEAR 2018 ANNUAL REPORT 2, 5 (2018) [hereinafter CAVA FY 2018 REPORT], <https://www.uscourts.cavc.gov/documents/FY2018AnnualReport.pdf> [https://perma.cc/89AP-DF6U]; see also James D. Ridgway et al., “Not Reasonably Debatable”: *The Problems with Single-Judge Decisions by the Court of Appeals for Veterans Claims*, 27 STAN. L. & POL'Y REV. 1, 11 (2016) (explaining that “in recent years, single-judge dispositions have come to dominate to a degree far greater than non-precedential decisions used in the other federal courts of appeals”).

22. 38 U.S.C. § 7254(b).

23. Ridgway et al., *supra* note 21, at 3.

24. *Id.*

veteran's right to service-connected benefits ought not hinge on the luck of that veteran's judicial draw in any given CAVC appeal.

Third, the CAVC is highly unlikely to resolve a veteran's benefits claim appeal on the merits. The court has the statutory authority to affirm, modify, or reverse a VA claims determination, or to remand the case to VA for additional development.<sup>25</sup> Yet, the CAVC very rarely flexes its authority to render a final decision.<sup>26</sup>

In 2018, for example, the CAVC reversed and remanded non-extraordinary relief cases to VA in whole or in part approximately 80% of the time,<sup>27</sup> which matches the rate at which the court reversed and remanded those same types of claims in 2008.<sup>28</sup> Such astronomical remand rates are disturbing for at least two reasons. Most obviously, they indicate that VA reached an inadequate or erroneous result in approximately *four out of five* veterans claims it decided over the most recent ten-year period for which claims data are available. Equally concerning, the CAVC's practice of remanding claims back to VA for do-overs—instead of exercising its authority to modify or decide the appeal—exacerbates the unconscionably lengthy periods of time it takes the agency to favorably decide and implement veteran claim awards, which currently average 2,213 days, or more than six years.<sup>29</sup>

The CAVC's habit of reversing and remanding claims back to the VA in lieu of issuing final decisions “simply put[s] the aging veteran back on what has been called the ‘hamster wheel’ of [VA] claims recycling”<sup>30</sup>—a seemingly endless process that veterans characterize as “Delay, Deny, Wait Till They Die.”<sup>31</sup> By all accounts, the VA claims process has earned this moniker. A recent VA Inspector General's report acknowledged that 1,100 American veterans with unresolved service-connected disability claims that had been pending before VA for more than a year died in 2016 alone.<sup>32</sup> As Professor Wishnie wryly observed, “It is easy to justify judicial review of veterans benefits claims, but it is difficult to defend the current system.”<sup>33</sup>

25. 38 U.S.C. § 7252(a).

26. McClean, *supra* note 13, at 296 (noting that while the CAVC “has the power to modify or reverse Board decisions, . . . it has used that power sparingly”).

27. CAVA FY 2018 REPORT, *supra* note 21, at 3.

28. U.S. COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORTS (1999–2008), [https://www.uscourts.cavc.gov/documents/Annual\\_Report\\_-\\_20081.pdf](https://www.uscourts.cavc.gov/documents/Annual_Report_-_20081.pdf) [<https://perma.cc/7XRH-RNPQ>].

29. OFFICE OF INSPECTOR GEN., U.S. DEP'T OF VETERANS AFFAIRS, 16-01750-79, VETERANS BENEFITS ADMINISTRATION: REVIEW OF TIMELINESS OF THE APPEALS PROCESS 4 (2018) [hereinafter VA IG TIMELINESS REPORT], <https://www.va.gov/oig/pubs/VAOIG-16-01750-79.pdf> [<https://perma.cc/UL7Z-JGQX>].

30. James T. O'Reilly, *Burying Caesar: Replacement of the Veterans Appeals Process Is Needed to Provide Fairness to Claimants*, 53 ADMIN. L. REV. 223, 238 (2001).

31. McClean, *supra* note 13, at 277 (explaining that “‘Delay, Deny, Wait Till They Die’ . . . is a battle cry for soldiers, sailors, and airmen who have long put aside their armaments but remain entangled in the unending appeals process of the [VA] disability benefits system”).

32. VA IG TIMELINESS REPORT, *supra* note 29, at 12.

33. Wishnie, *supra* note 17, at 1733.

## IV. THE RIGHT TO COUNSEL

The above-described, due-process-depriving aspects of the veterans claims judicial review regime are exacerbated by the federal law that denies veterans the fundamental right to counsel during the initial stage of the VA claims process. This Article contends that the law that denies our former service members the basic right to representation is the single biggest challenge veterans face in the VA system. Therefore, it advocates for either the repeal of the statute that limits a veteran's right to representation or an overturning of the Supreme Court's 1985 decision in *Walters v. National Ass'n of Radiation Survivors*, which upheld the constitutionality of that law.<sup>34</sup> In order for the reader to thoroughly appreciate the import of extending a right to counsel to veterans at the initial stage of the VA claims process, however, it is imperative to first describe the ever-evolving and increasingly complex VA service-connected disability claims process, detail the country's long history of denying veterans access to counsel in that system, and explain and debunk the patronizing half-truths that VA continues to advance in defense of the status quo.

## A. THE VA SERVICE-CONNECTED DISABILITY BENEFITS SYSTEM

“Within the Veterans Benefits Administration (VBA), disabled veterans are being retraumatized by an overburdened and dysfunctional benefits system that Congress intended to be ‘veteran-friendly,’ but in fact prevents veterans from obtaining the benefits they earned in service.”<sup>35</sup>

State-sponsored legislative schemes designed to provide benefits to disabled service members date back to at least sixteenth-century Elizabethan England.<sup>36</sup> Such American veteran compensation systems, which trace their roots to the British regime, developed in response to colonial warmongering with indigenous North Americans and, therefore, predate the founding of the United States.<sup>37</sup> “The evolution of the American system of veteran disability compensation is closely tied to the evolution of American warfare and, as such, finds its ascendancy in the very first war the country fought as a nation.”<sup>38</sup> Indeed, the overwhelming

34. *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 334 (1985), *superseded on other grounds by statute*, Veterans' Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4105 (codified as amended in scattered sections of 38 U.S.C. (2018)).

35. McClean, *supra* note 13, at 280.

36. Geoffrey L. Hudson, *Disabled Veterans and the State in Early Modern England*, in *DISABLED VETERANS IN HISTORY* 117, 117 (David A. Gerber ed., 2012).

37. H. COMM. ON VETERANS' AFFAIRS, 90TH CONG., *MEDICAL CARE OF VETERANS 2* (Comm. Print 1967) (reporting that the 1593 English-disabled-veterans compensation scheme was “the cornerstone of the entire structure of the American compensation and pension system, and Federal care for disabled veterans, that came into being centuries later”); Jennifer D. Oliva, *Son of Sam, Service-Connected Entitlements, and Disabled Veteran Prisoners*, 25 *GEO. MASON L. REV.* 302, 306–07 (2018) (explaining that “the very first such law was ‘enacted in 1636 by Plymouth [and] provided money to those disabled in the colony’s defense against [the Pequot] Indians’” (alterations in original) (quoting U.S. DEPT OF VETERANS AFFAIRS, *VA HISTORY IN BRIEF* 3, [https://www.va.gov/opa/publications/archives/docs/history\\_in\\_brief.pdf](https://www.va.gov/opa/publications/archives/docs/history_in_brief.pdf) [<https://perma.cc/LA4T-U4AH>])).

38. Oliva, *supra* note 37, at 307.



majority of major developments in veterans law were enacted during or preceding significant American conflicts as a result of veteran dissatisfaction with the then-in-place system.

Congress established the Bureau of Pensions—the first federal department authorized to administer veteran disability benefits and a precursor to VA—in 1833.<sup>39</sup> The ensuing Civil War era marked the rise of powerful veterans' service organizations, which successfully lobbied the federal government for enhanced veterans' benefits.<sup>40</sup> In 1862, for example, Congress enacted a statute that compensated veterans for service-connected disabilities and diseases, granted additional benefits for veterans' dependents, and provided disability payments to veterans with non-wartime service.<sup>41</sup> It was not until after the United States entered World War I and reinstated the draft, however, that Congress created a schedule to rate and compensate service-connected disabilities similar to the current system administered by VA.<sup>42</sup>

Under the modern regime, veterans are entitled to service-connected disability compensation so long as they were discharged or released under conditions other than dishonorable<sup>43</sup> and can establish that (1) they suffer a current disability; (2) they experienced an in-service event; and (3) the in-service event either caused or aggravated their current disability.<sup>44</sup> In response to widespread criticism of VA's then-existing claims adjudication process,<sup>45</sup> Congress enacted the Veterans Appeals Improvement and Modernization Act of 2017 (AMA).<sup>46</sup> The AMA established a new VA disability claims process, which is examined below. Before the AMA's February 19, 2019 effective date, veterans were required to persist through the VA's legacy claims adjudication process (the legacy system), which the agency itself has characterized as "complicated, opaque, [and] unpredictable."<sup>47</sup>

Under VA's legacy benefits administration system, veterans were first required

39. U.S. DEP'T OF VETERANS AFFAIRS, *supra* note 37, at 4 ("When Congress authorized the establishment of the Bureau of Pensions in 1833, it was the first administrative unit dedicated solely to the assistance of veterans. The new Bureau of Pensions was administered from 1833 to 1840 as part of the Department of War, and from 1840 to 1849 as the Office of Pensions under the Navy Secretary. The office then was assigned to the new Department of the Interior, and renamed the Bureau of Pensions.").

40. INST. OF MED. OF THE NAT'L ACADS., A 21ST CENTURY SYSTEM FOR EVALUATING VETERANS FOR DISABILITY BENEFITS 96 (Michael McGeary et al. eds., 2007) [hereinafter IOM REPORT]; Levy, *supra* note 10, at 310 ("The Civil War, which left many veterans severely wounded, marked a significant expansion of benefits, as the size of the veteran population and the problems they faced forced Congress to become more involved and to initiate new programs."); McClean, *supra* note 13, at 285 (discussing the "high remand rates of the Board and the Veterans Court").

41. Act of July 14, 1862, ch. 166, 12 Stat. 566; see IOM REPORT, *supra* note 40, at 95-96.

42. See Act of Oct. 6, 1917, Pub. L. No. 65-90, §§ 301-02, 40 Stat. 398, 405-06.

43. 38 U.S.C. § 101(2) (2018); 38 C.F.R. § 3.1(d) (2019).

44. 38 U.S.C. §§ 1110, 1131.

45. *Legislative Hearing on: H.R. 3216, H.R. 4150, H.R. 4764, H.R. 5047, H.R. 5083, H.R. 5162, H.R. 5166, H.R. 5392, H.R. 5407, H.R. 5416, H.R. 5420, H.R. 5428: Hearing Before the H. Comm. on Veterans' Affairs*, 114th Cong. 40 (2016) [hereinafter *Legislative Hearing*] (testimony of Sloan Gibson, Deputy Secretary for the Department of Veterans Affairs).

46. Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115-55, 131 Stat. 1105 (codified as amended in scattered sections of 38 U.S.C.).

47. Stacey-Rae Simcox, *Thirty Years of Veterans Law: Welcome to the Wild West*, 67 U. KAN. L. REV. 513, 548 (2019) (internal quotation marks omitted) (quoting *Legislative Hearing*, *supra* note 45, at 18 (statement of Sloan Gibson, Deputy Secretary for the Department of Veterans Affairs)).

to file an initial claim with one of the VA's fifty-six regional offices (VAROs).<sup>48</sup> A VARO employee, who is not required to have any formal legal training, would then decide the veteran's claim. A veteran dissatisfied with the VARO's decision could appeal the claim by filing a Notice of Disagreement (NOD).<sup>49</sup> The VARO, thereafter, was required to respond to the NOD with a Statement of the Case (SOC), which provided the veteran a more detailed explanation concerning the VARO's claim decision.<sup>50</sup> In 2016, it took the VAROs an average of 408 days to issue a SOC explaining its own previously issued claims decision.<sup>51</sup>

The legacy system required veterans unsatisfied with their SOC to appeal their claim to the Board of Veterans' Appeals (Board) by filing a VA Form 9.<sup>52</sup> The Board—which is staffed exclusively with VA employees—was then responsible for issuing a claims decision.<sup>53</sup> Although the Board is authorized to make a final determination on any veteran's claim, it, instead, remands approximately three-quarters of the appeals that it decides<sup>54</sup> back to the VARO due to error during the initial claims decision proceedings.<sup>55</sup>

A Board remand effectively amounts to a redo of the hamster wheel-like VA claims cycle, restarting it at the VARO-claims-decision stage of the process. As a recent GAO report reveals, “[V]eterans waited an average of 3 years from the date they initiated their appeal to resolution by either VBA or the Board—and a cumulative *average of 7 years* for appeals resolved by the Board” in fiscal year 2017.<sup>56</sup> Once the Board issues a final decision, the veteran can appeal the claim to the CAVC,<sup>57</sup> which, as previously explained, remands approximately 80% of the non-emergency petition claims it reviews back to the Board for further proceedings.<sup>58</sup>

The AMA's purpose is to reduce the extravagant VA claims backlog and to expedite the claims decision process for veterans. To VA's credit, the agency took the position during the AMA congressional hearings that its legacy claims adjudication process was broken and ought to be revamped. VA, in fact, conceded

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

49. 38 U.S.C. § 7105(a)-(b)(1)(C).

50. 38 C.F.R. §§ 19.26(d), 19.29.

51. VA IG TIMELINESS REPORT, *supra* note 29, at 4.

52. 38 U.S.C. § 7104(a).

53. *Id.*

54. Simcox, *Thirty Years of Veterans Law*, *supra* note 47, at 528 (“In 2017, the Board remanded or reversed 73% of the appeals of Regional Office decisions.”).

55. Catherine Trombley, *The Appeals Process: When an Appeal Is Remanded*, U.S. DEP'T OF VETERANS' AFFAIRS: VANTAGE POINT (Feb. 24, 2016, 11:00 AM), <https://www.blogs.va.gov/VAntage/26013/the-appeals-process-remands/> [<https://perma.cc/3VL6-ZYUG>] (“In VA's circular system, appeals are remanded for many reasons. A remand may be necessary if there has been a change in law, a worsening of a disability on appeal or the Veteran introduces new evidence or theory of entitlement at the Board.”).

56. U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-352, VA DISABILITY BENEFITS: IMPROVED PLANNING PRACTICES WOULD BETTER ENSURE SUCCESSFUL APPEALS REFORM 1 (2018) (emphasis added).

57. 38 U.S.C. § 7252(a).

58. BD. OF VETERANS' APPEALS, U.S. DEP'T OF VETERANS APPEALS, ANNUAL REPORT FISCAL YEAR 2018, at 14 fig., [https://www.bva.va.gov/docs/Chairmans\\_Annual\\_Rpts/BVA2018AR.pdf](https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2018AR.pdf) [<https://perma.cc/5LXK-32H5>] [hereinafter VA ANNUAL REPORT FY 2018].

that the system had devolved into a “complicated, opaque, unpredictable and less veteran-friendly” process that “makes adversaries out of veterans and [the] VA” and “is ridiculously slow.”<sup>59</sup> Veterans who filed their claims prior to the AMA’s February 19, 2019 effective date may remain in the legacy system or opt into the AMA process upon receipt of a SOC.<sup>60</sup>

The AMA departs from the legacy system process upon the veteran’s receipt of the initial VARO claims decision and, thereafter, provides three different pathways to pursue an appeal. First, a veteran can seek a higher-level, *de novo* review of the claim at the VARO within one year of the initial decision on the record evidence.<sup>61</sup> This pathway varies significantly from the legacy system, which permits veterans to submit new evidence during the pendency of any appeal. Second, the veteran can submit a NOD requesting Board review of the claim.<sup>62</sup> This pathway eliminates the legacy system’s threshold requirements that the VARO provides a SOC and the veteran completes a VA Form 9 in order to perfect a Board appeal. Finally, a veteran can submit a “supplemental claim” if the initial VARO decision is more than a year old or if the veteran has received a decision by the higher-level authority, the Board or the CAVC, within a year.<sup>63</sup> This pathway requires a veteran to submit “new and relevant evidence,” and, if the veteran elects this option once a year has passed since the VA or CAVC has made the *at-issue* claims decision, the benefits effective date (the date a veteran is deemed eligible for compensation) shifts from the earlier date of filing the initial claim to the later date of filing the supplemental claim to the veteran’s detriment.<sup>64</sup>

Once a veteran’s appeal is perfected before the Board, the AMA, again, provides veterans with a trifecta of distinct options. Veterans who elect the first pathway are entitled to a hearing before the Board with the concomitant right to submit additional evidence for the Board’s consideration.<sup>65</sup> Veterans who choose the second pathway are permitted to submit additional evidence to the Board but must forfeit any hearing.<sup>66</sup> Finally, veterans may opt to permit the Board to decide their appeal on the record but, in so doing, forfeit their hearing and the submission of any additional evidence for the Board’s review.<sup>67</sup>

#### B. VETERAN RIGHT-TO-COUNSEL LIMITATIONS: HISTORY AND BASES

“[N]onadversarial procedures depart dramatically from our usual conception

59. *Legislative Hearing*, *supra* note 45, at 18 (statement of Sloan Gibson, Deputy Secretary for the Department of Veterans Affairs).

60. Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115-55, § 2(x)(5), 131 Stat. 1105, 1115 (codified as 38 U.S.C. § 101 note (Effective and Applicability Provisions)).

61. 8 U.S.C. § 5104B(a)(1), (b)(1)(B), (d)-(e).

62. *Id.* §§ 5104C(a)(1)(C), 7105(b)(1)(A).

63. *Id.* § 5104C(a)(1)(B), (b).

64. *Id.* §§ 5108(a), 5110(a)(3).

65. *Id.* §§ 7105(b)(3)(A), 7113(b)(1)-(2).

66. *Id.* §§ 7105(b)(3)(B), 7113(c)(1)-(2); see VA ANNUAL REPORT FY 2018, *supra* note 58, at 15 fig. (depicting the VA claims adjudication process under the AMA).

67. 8 U.S.C. §§ 7105(b)(3)(C), 7113(a).

of due process and their fairness rests on the assumption that the system truly operates in a pro-veteran manner.”<sup>68</sup>

Statutory provisions proscribing a veteran’s right to counsel in veteran benefit proceedings date back to the Civil War. In 1862, Congress enacted a law limiting the fee that an attorney was permitted to charge a veteran for benefits-related services to five dollars.<sup>69</sup> Two years later, on July 4, 1864, Congress increased that cap to ten dollars,<sup>70</sup> where it remained unchanged for 124 years until the passage of the Veterans’ Judicial Review Act in 1988.<sup>71</sup>

As Army veteran and law professor Stacey-Rae Simcox has explained, the primary impetus for the Civil War-era attorney fee limitation was congressional concern about unscrupulous lawyers bilking unsuspecting veterans out of their hard-earned entitlements.<sup>72</sup> Professor Simcox points to remarks provided by Senator Edward Bragg of Wisconsin during an 1886 congressional debate about veteran-widow pension legislation as axiomatic of “Congress[’s] . . . disdain for attorneys in the 1860s to 1890s.”<sup>73</sup> She makes a powerful point. During that debate, Senator Bragg characterized attorneys’ fees as “blood taken from the soldiers whom they pretend to love.”<sup>74</sup> He went on to say: “[T]hese (attorneys) that present to be ‘friends of soldiers’ are the friends of soldiers as vultures are the friends of dead bodies—because they feed and fatten them. . . . They have the voice of Jacob, but their hand has the clutch of Esau.”<sup>75</sup>

In 1983, a group of veterans, veterans’ organizations, and a veteran’s widow filed suit in federal district court challenging the constitutionality of the \$10 attorney fee limitation in *National Ass’n of Radiation Survivors v. Walters*.<sup>76</sup> The *Walters* plaintiffs contended that the fee cap effectively precluded them from hiring qualified attorneys to advocate their VA service-connected disability and death claims related to their in-service exposure to radiation and Agent Orange in violation of their Fifth Amendment right to procedural due process and First Amendment rights to free association and redress of grievances.<sup>77</sup>

The district court analyzed the veterans’ Fifth Amendment procedural due process claim under the three-pronged *Mathews v. Eldridge* balancing test, which requires the weighing of the following factors: (1) “the private interest that will be affected by the official action”; (2) “the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of any additional or substitute procedural safeguards”; and (3) “the Government’s interest, including the function involved and the fiscal and administrative

68. Levy, *supra* note 10, at 315–16.

69. Act of July 14, 1862, ch. 166, § 6, 12 Stat. 566, 568.

70. Act of July 4, 1864, ch. 247, § 12, 13 Stat. 387, 389.

71. See Veterans’ Judicial Review Act, Pub. L. No. 100-687, § 104, 102 Stat. 4105, 4108 (1988) (codified as amended at 38 U.S.C. § 5904(c)-(d)).

72. Simcox, *Thirty Years After Walters*, *supra* note 15, at 681–85.

73. *Id.* at 682.

74. *Id.* (internal quotation marks omitted) (quoting WILLIAM H. GLASSON, FEDERAL MILITARY PENSIONS IN THE UNITED STATES 214 (David Kinley ed., 1918)).

75. *Id.* (internal quotation marks omitted) (quoting GLASSON, *supra* note 74, at 214).

76. 589 F. Supp. 1302, 1306 (N.D. Cal. 1984), *rev’d*, 473 U.S. 305 (1985).

77. *Id.* at 1306, 1310.

burdens that the additional or substitute procedural requirement would entail.”<sup>78</sup> With regard to the first *Mathews* prong, the district court determined that “[t]he veterans’ interest in obtaining service-connected death and disability benefits is extremely high.”<sup>79</sup> It based that ruling in part on the fact that “the VA claims procedure is the veterans’ sole remedy against the government [because] [t]hey cannot sue for disabilities stemming from their military service under the Federal Torts Claims Act” as a result of the *Feres* doctrine.<sup>80</sup>

The district court next held that the risk of an erroneous deprivation of the veterans’ significant interest in obtaining VA disability and death benefits was substantial without adequate attorney representation. In reaching that result, the court made at least two findings supported by the record that are worth highlighting. First, it explained that “[t]he undisputed factual evidence submitted by the plaintiffs in th[e] case show[ed] that both the procedures and the substance entailed in presenting [service-connected death and disability] claims to the VA [we]re extremely complex.”<sup>81</sup>

Procedurally claimants are faced with an interplay between the following: statutes; regulations published in the Code of Federal Regulations; the Procedural Manual M-21-1; the BVA Manual; the Program Guide; the Filed Appellate Procedures Manual M1-1; adjudication memoranda; VA circulars; informal memoranda; and BVA decisions. The interrelationship between these various rules is so complex that one VA adjudication officer . . . developed his own personal cross-index on file cards in an attempt to master the complexity. . . .

Veterans’ failure to comply with the VA’s procedural regulations may result in denial of their claims. . . .

Claims for service-connected death and disability benefits often turn on very complicated substantive analyses as well. The determination of the degree of disability frequently rests on a difficult medical analysis, and proof of service connection may raise causation issues which require both medically and legally complex analyses. . . .

Often, to make a convincing claim, veterans or their families have to gather and present vast amounts of factual information regarding both the medical nature of the veteran’s illness and also the circumstances which might have given rise to that illness. . . . Adequate preparation of such claims may often require hundreds of hours of work, and will in many cases necessitate obtaining expert testimony.<sup>82</sup>

The court also flatly rejected the VA’s age-old, go-to argument in support of its consistent opposition to the extension of basic legal rights to former service members: that is, that permitting veterans to hire counsel would undermine the

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78. *Id.* at 1314 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

79. *Id.*

80. *Id.*

81. *Id.* at 1319.

82. *Id.* at 1319–20 (citations omitted).

agency's pro-claimant, informal, and non-adversarial benefits adjudication system. The record before the court sorely undermined that contention, demonstrating not only that VA frequently failed to assist veterans but often actively encouraged them to abandon important procedural rights.<sup>83</sup> "[G]iven . . . VA's apparent inability to protect a claimant's interests as fully as might that claimant's personal paid attorney, both claimants and attorneys familiar with the VA system view that system as adversarial, despite the contrary description [provided by VA regulations]."<sup>84</sup>

The district court then took up its analysis of the third *Mathews* factor: the government's interest in maintaining the \$10 attorney fee cap. The court held that VA had "failed to demonstrate that it would suffer any harm if the statutory fee limitation, in existence in some form since 1862, were lifted."<sup>85</sup> The court went on to note that the only harm that VA even proffered that it would suffer should the fee limitation be eliminated was its self-appointed position as "the paternalistic protector of claimants' supposed best interests."<sup>86</sup> Consequently, the district court issued a nationwide injunction on the attorney fee limitation, which the purportedly pro-veteran VA promptly appealed to the United States Supreme Court.

VA made several now-familiar arguments in its campaign to convince the high court to keep \$10 attorney fee cap in place. First, the agency contended that "the presence of retained counsel is not necessary to a fair procedure" because of VA's "informal and non[-]adversarial claims system for processing veterans' benefits, in which the VA is responsible for assisting veterans to establish their claims."<sup>87</sup> Second, VA insisted permitting veterans to hire counsel was unnecessary because veterans had the right to seek the assistance of non-law-trained veteran service organization (VSO) personnel "to provide . . . representation to veterans without charge."<sup>88</sup> Finally, the agency maintained—without citation to any support—that "the fee limit ensures that veterans' benefits are not depleted through payments to counsel and that veterans are protected from overreaching and unscrupulous attorneys."<sup>89</sup>

Appellant American G.I. Forum, the nation's "largest Hispanic veteran's organization," responded to VA by asserting that

The government's euphoric and sanitized description of the [agency's] alleged "non-adversarial" system is in conflict with the record below and is an elaborate legal camouflage of a reality that no court, particularly this court, can or should ignore.

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83. *See id.* at 1320–21.

84. *Id.* at 1321 (citation omitted).

85. *Id.* at 1323 (footnote omitted).

86. *Id.*

87. Brief for Appellants at 15, *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) (No. 84-571), 1985 WL 669992, at \*15.

88. *Id.*

89. *Id.*

....

... None of the more than six thousand Agent Orange cases and only one percent (15 of 2,000) of atomic radiation cases [submitted to VA] have been adjudicated in favor of the [veteran].<sup>90</sup>

Numerous organizations intervened on appeal as amici curiae in support of the veteran appellees, including the Federal Bar Association, which contended:

No legitimate Governmental interest compels shutting the VA door to retained counsel. Appellants' suggestion that, because these benefits are assertedly "gratuities," the Constitution should tolerate an "experiment" that fails to comport with due process, or other Constitutional norms, is an argument long ago rejected by this Court. The paternalistic notion that proceeding without legal advice is really in the veteran's best interest is punctured when the system as it actually operates is examined and the "claimed benefits [are] candidly appraised." The Government's other asserted interests—that there is some worth in keeping the proceedings informal and that veterans and their survivors must be protected from unscrupulous lawyers—simply do not warrant the draconian measure of restricting access to retained counsel. If informality is desirable, it need not be incompatible with legal representation.<sup>91</sup>

Federal Bar counsel went on to emphasize what the extensive district court record and VA regulations proved: "[T]hat the VA's supposed paternalism does not inure to the veterans' best interests" and "in view of the mandate that VA employees may assist veterans to develop their claims 'while protecting the interests of the Government,' the VA personnel possess a divided loyalty assuring that the VA cannot fully serve the best interests of the applicants."<sup>92</sup> The National Association of Atomic Veterans pressed a similar argument, asserting that VA's attempt to maintain the attorney fee limitation

[S]imply by dubbing [its] process "informal" and "nonadversarial" not only distorts the facts, but fundamentally misconceives the nature of the problem. Regardless of the degree of formality of V.A. hearings, the burden of proof is on the applicant, and if he fails to develop and present available evidence due to ignorance or incapacity, the proof fails, even in the absence of an "adversary."<sup>93</sup>

These contentions, however, fell on deaf ears. Notwithstanding the record evidence, the Supreme Court adopted VA's arguments *in toto* and held, in a 6-3 decision, that the attorney fee limitation comported with a veteran's Fifth

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90. Brief for Intervenor-Appellee American G.I. Forum at 1, 6-8, *Walters*, 473 U.S. 305 (No. 84-571), 1985 WL 669996, at \*1, \*6-8 (citations omitted).

91. Brief for the Federal Bar Ass'n as Amicus Curiae at 6-7, *Walters*, 473 U.S. 305 (No. 84-571), 1985 WL 670015, at \*6-7 (alteration in original) (citations omitted).

92. *Id.* at 21 (emphasis added) (citation omitted).

93. Brief for the National Ass'n of Atomic Veterans as Amicus Curiae in Support of Appellees at 15-16, *Walters*, 473 U.S. 305 (No. 84-571), 1985 WL 670021, at \*15-16 (citations omitted).

Amendment right to due process.<sup>94</sup> In so doing, the Court pointed to several aspects of the VA disability claims process that it characterized as inherently pro-veteran and non-adversarial, such as the ex parte nature of the proceedings before the Board, which do not include a government lawyer; VA's obligation to both "assist [a veteran] in developing the facts pertinent to his claim" and give the veteran the benefit of the doubt—that is, grant a veteran's claim when the evidence is in equipoise; and lack of imposition of any statute of limitations or res judicata effect on veterans' claims.<sup>95</sup>

Writing for the majority, then-Justice Rehnquist relied heavily on statistics that showed that (1) only "a tiny fraction" of veterans claims are properly characterized as "complex" cases,<sup>96</sup> and (2) veterans represented by pro bono counsel before the Board were only marginally more successful than those represented by non-law-trained VSOs on appeal.<sup>96</sup> Justice Rehnquist further asserted that the Court owed deference to the legislative concern about attorney fee-splitting even though he acknowledged Congress's on-the-record concession that "the original stated interest in protecting veterans from unscrupulous lawyers was 'no longer tenable.'"<sup>97</sup> The *Walters* majority concluded by adopting VA's argument that the introduction of lawyers to its claims adjudication system would make VA's informal, pro-claimant process more adversarial: "[E]ven apart from the frustration of Congress' principal goal of wanting the veteran to get the entirety of the award, the destruction of the fee limitation would bid fair to complicate a proceeding which Congress wished to keep as simple as possible."<sup>98</sup> In a blistering dissent, Justice Stevens wrote that,

[R]egardless of the nature of the dispute between the sovereign and the citizen—whether it be a criminal trial, a proceeding to terminate parental rights, a claim for social security benefits, a dispute over welfare benefits, or a pension claim asserted by the widow of a soldier who was killed on the battlefield—the citizen's right to consult an independent lawyer and to retain that lawyer to speak on his or her behalf is an aspect of liberty that is priceless.<sup>99</sup>

Three years after the Supreme Court decided *Walters*, Congress repealed the \$10 attorney fee limitation and replaced it with a statute that permitted veterans to hire attorneys for a reasonable fee—but not until the Board had reached a final decision on the veteran's claim and the evidentiary record was closed.<sup>100</sup> Congress has since adjusted the rule that controls a veteran's right to hire an attorney during the VA claims adjudication process on several occasions. Under current law, veterans are entitled to pro bono attorney assistance at all stages of the VA claims process. Veterans remain prohibited, however, from hiring counsel to represent

94. *Walters*, 473 U.S. at 334.

95. *Id.* at 310 (internal quotation marks omitted) (quoting 38 C.F.R. § 3.103(a) (1984)).

96. *Id.* at 330–31.

97. *Id.* at 322 (quoting S. REP. NO. 97-466, at 50 (1982)).

98. *Id.* at 326.

99. *Id.* at 371 (Stevens, J., dissenting).

100. Veterans' Judicial Review Act, Pub. L. No. 100-687, § 104, 102 Stat. 4105, 4108 (1988) (codified as amended at 38 U.S.C. § 5904(c)–(d) (2018)).



them in VA proceedings until after a VARO has reached a decision on their claim and the veteran files an NOD.<sup>101</sup> In other words, veterans remain barred by statute from hiring an attorney to assist them during the initial claims stage in the VA benefits system.

#### V. RECOMMENDED REFORM: A VETERAN RIGHT-TO-COUNSEL AT ALL STAGES OF THE VA CLAIMS ADJUDICATION PROCESS

“The absence of legal representation does not benefit veterans.”<sup>102</sup>

This Article advocates for the extension of the fundamental right to counsel to veterans at all stages of the VA claims process. This reform can be accomplished in one of two ways: either the Supreme Court can overturn *Walters*, or Congress can repeal the statute that prohibits veterans from hiring an attorney until the appellate stage of the VA claims adjudication process. This proposal is supported by both an army of good reasons and numerous legal experts, many of whom are themselves either veterans or veterans’ advocates.<sup>103</sup>

First, *Walters* was difficult to defend at the time it was decided. As explained above, the Supreme Court was persuaded that permitting veterans to hire attorneys in agency proceedings would disrupt the purportedly non-adversarial, pro-claimant VA claims process. The Court reached that conclusion, however, by largely ignoring the record evidence, which was unrefuted by VA and established that (1) the VA adjudication system was so procedurally and substantively complex that even seasoned attorneys deemed the scheme extraordinarily complicated to navigate; (2) VSOs lacked the expertise and resources to provide adequate representation to veterans in those complex proceedings; (3) VA not only frequently neglected to satisfy its duty to assist veterans with their claims, it encouraged veterans to waive important rights throughout the proceedings; and (4) VA’s contention that its claims adjudication was non-adversarial was suspect because VA regulations expressly stated that VA employees were obligated to protect the interests of the government. Moreover, and even assuming arguendo that *Walters* properly characterized the VA claims process as pro-veteran and non-adversarial, VA failed to advance any reasonable rationale as to why such a veteran-friendly system would be hampered—instead of helped—by permitting veterans to hire counsel to ensure that VA fulfills its duties to veterans when evaluating and adjudicating their service-related entitlement claims.

Second, while *Walters* was most likely wrongly decided in 1985, the decision is impossible to avow today. It is uncontroversial that the VA claims adjudication process has become increasingly adversarial and complex since the mid-1980s. Just three years after *Walters* was issued, in fact, Congress enacted the VJRA, which both mandated judicial oversight of VA claims decisions for the first time in American history and repealed the \$10 attorney fee limitation in favor of a rule

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101. See 38 U.S.C. § 5904(c)(1).

102. Wishnie, *supra* note 17, at 1721.

103. See, e.g., McClean, *supra* note 13, at 307–16; Simcox, *Thirty Years After Walters*, *supra* note 15, at 731–35; Wishnie, *supra* note 17, at 1730–41.

that permitted veterans to hire an attorney after the Board issued its initial decision. The VJRA, therefore, “struck at the core of the non-adversarial system.”<sup>104</sup>

Several of the qualities of the VA system on which the *Walters* Court relied in concluding that the claims adjudication process is “pro-veteran” and “non-adversarial” have been proven either nonexistent or illusory since 1985. For example, while there was scant record evidence to support the Supreme Court’s determination that the VA claims process was “simple” to navigate thirty-five years ago, there is no proof whatsoever that such is the case today.<sup>105</sup> “VA benefits involve a lengthy and confusing statutory scheme, implemented through hundreds of pages of regulations and sub-regulatory agency guidelines, and often turning on assessment of conflicting medical information.”<sup>106</sup> Myriad experts have opined on the ever-increasing complexity of the VA benefits process, and some have even attributed the VA’s extravagant decisional error rates at both the VARO and the Board stages of the process to system complexity.<sup>107</sup> Perhaps most telling, even the CAVC has described VA regulations as “a confusing tapestry for the adjudication of claims.”<sup>108</sup>

*Walters* also pointed to the agency’s “veteran-friendly canons,” which impose on VA the duties to assist veterans to develop their claims<sup>109</sup> and to extend to them the benefit of the doubt in the adjudication process<sup>110</sup> as evidence that the VA system is non-adversarial. The duty to assist requires VA to help veterans obtain their military and medical records<sup>111</sup> as well as provide veterans a medical assessment pertinent to their claim, which VA calls a “compensation and pension” (C&P) examination.<sup>112</sup> VA, however, has long been criticized for failing to fulfill its duty to assist veterans.<sup>113</sup>

As Air Force veteran and law professor Hugh McClean has expounded, “Violations of the duty to assist are common . . . and are often the basis for remands from the Board and [CAVC].”<sup>114</sup> VA’s track record on “assisting” veterans to obtain their service and medical records is so poor that the leading treatise on veterans law flatly states that “[a]dvocates simply cannot rely upon the

104. McClean, *supra* note 13, at 288; *see also id.* at 307 (explaining that “[s]ince the implementation of judicial review in 1988, Congress has marched steadily toward a more legalistic and technical administrative system for adjudicating benefits”).

105. *See Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 330 (1985).

106. Wishnie, *supra* note 17, at 1739.

107. Simcox, *Thirty Years After Walters*, *supra* note 15, at 731.

108. *Hatlestad v. Derwinski*, 1 Vet. App. 164, 167 (1991). One CAVC judge has gone so far as to say that “[t]here is an unfortunate—and not entirely unfounded—belief that veterans law is becoming too complex for the thousands of regional office adjudicators that must apply the rules on the front lines in over a million cases per year.” *DeLisio v. Shinseki*, 25 Vet. App. 45, 63 (2011) (Lance, J., concurring).

109. 38 C.F.R. §§ 3.159(c)(1)–(4), 21.1032(a)–(c) (2019).

110. *Gilbert v. Derwinski*, 1 Vet. App. 49, 53 (1991).

111. 38 U.S.C. § 5103A(c)(1)–(2) (2018).

112. *Id.* § 5103A(d)(1)–(2); VA *Claim Exam (C&P Exam)*, U.S. DEP’T OF VETERANS AFFAIRS, <https://va.gov/disability/va-claim-exam> [<https://perma.cc/JGB9-9JFY>] (last updated Feb. 7, 2020).

113. Levy, *supra* note 10, at 317 (contending that “one of the most frequently lodged criticisms of the VA relates to its alleged failure to fulfill [its] duty to assist” veterans).

114. McClean, *supra* note 13, at 286.

VA to assist in gathering the necessary evidence on a claim.”<sup>115</sup> Moreover, VARO adjudicators concede that VA C&P examinations are subpar, and 56% of these adjudicators in a recent poll contended that inadequate medical exams made it challenging to decide veterans claims.<sup>116</sup> VA also has acknowledged that “[t]he [in]adequacy of medical examinations and opinions, such as those with incomplete findings or supporting rationale for an opinion, has remained one of the most frequent reasons for remand” because they constitute a violation of the duty to assist.<sup>117</sup> VA has been similarly—and frequently—criticized for failing to follow the veteran-benefit-of-the-doubt canon faithfully.<sup>118</sup>

Worse yet, VA recently—and successfully—lobbied Congress to enact limitations on its duty to assist veterans. Under the VA’s legacy claims system, VA was obligated to assist a veteran throughout its administrative adjudicative proceedings—from the initial claims stage until the Board made a final determination on the veteran’s claim. Under the recently effective AMA, however, the VA’s duty to assist terminates upon the veteran’s receipt of the initial VARO claim decision.<sup>119</sup> This watered-down version of a long-standing, “veterans-friendly” canon of VA law marks a clear move toward a more adversarial process and directly implicates the validity of *Walters*. As Professor Simcox has explained, “One of the apprehensions with this [restriction] on the duty to assist is that due to the limitation on when veterans may hire legal counsel, most veterans will not have the benefit of [hiring] an attorney before choosing [one of the three AMA pathways] of appeal.”<sup>120</sup>

VA, in fact, has demonstrated a troubling pattern of backpedaling on its duty to assist in additional ways in order to ease its claims-administration burden since the Court decided *Walters*. In 2014, for example, VA implemented a new rule that formalized the claims process by requiring veterans to execute particular forms in order to initiate a claim and thereby preserve their “effective date”—the date on which they are entitled to VA compensation benefits.<sup>121</sup> Under the pre-2014 rules and in keeping with the alleged non-adversarial, “veteran-friendly” nature of the VA claims process, veterans were permitted to commence their claims and informally preserve the claims’ effective dates by sending something as simple as a handwritten note to VA.<sup>122</sup> “The advent of newly required forms to file . . . claims that eat away at advantages to the veteran and attempt to shift burdens to the veteran ‘to speed things up’ are examples of the needle moving

115. O’Reilly, *supra* note 30, at 232 (alteration in original) (internal quotation marks omitted) (quoting BARTON F. STICHMAN ET AL., VETERANS BENEFIT MANUAL § 1.1.2 (1999)).

116. McClean, *supra* note 13, at 293–94.

117. *Why Are Veterans Waiting Years on Appeal? A Review of the Post-Decision Process for Appealed Veterans’ Disability Benefits Claims: Hearing Before the Subcomm. on Disability Assistance & Mem’l Affairs of the H. Comm. on Veterans’ Affairs*, 113th Cong. 26 (2013) (statement of Laura H. Eskanazi, Principal Deputy Vice Chairman, Board of Veterans’ Appeals).

118. Levy, *supra* note 10, at 316 (“But notwithstanding frequent proclamations of the pro-veteran character of the [VA] system, a common criticism of the benefits process is that VA does not really give the benefit of the doubt to claimants.”).

119. 38 U.S.C. § 5103A(e)(1) (2018).

120. Simcox, *Thirty Years of Veterans Law*, *supra* note 47, at 556–57.

121. 38 C.F.R. § 3.155(b)(1)–(6) (2019).

122. 38 C.F.R. § 3.155(a) (2013).

towards a less veteran-friendly environment than was envisioned by the [Walters] Court.”<sup>123</sup>

Third, the egregious and ever-increasing length of time it takes VA to make a final determination on veterans’ claims as a result of the agency’s exasperatingly high decisional error rate is reason—standing alone—to permit veterans to hire counsel at the inception of the claims process. In 2017, the CAVC remanded 86% of the appeals it decided on the merits back to VA as a result of Board error.<sup>124</sup> During the same time period, the Board remanded 73% of appeals it decided to a VARO due to agency error in the initial claims process.<sup>125</sup>

This system—riddled with decisional error and dominated by a seemingly endless cycle of remands—requires veterans to wait seven years on average in order to receive a final benefits decision from VA.<sup>126</sup> Disturbingly, thousands of our most vulnerable veterans die every year while waiting for a VA claims decision. As VA’s own adjudication-related statistics prove, “In terms of making timely and accurate compensation determinations, the VA sets low standards, and consistently fails to meet them.”<sup>127</sup> The seven-year delay between the date a veteran files an initial claim and the date that veteran receives a final VA claims decision constitutes an unconscionable deprivation of due process and, without regard to any of the other issues raised in this Article, demands that veterans be permitted to hire an attorney to advocate on their behalf throughout the egregiously inadequate VA claims adjudication system.

Finally, and for any remaining skeptics, there is good support for the argument that the injection of attorneys at the initial stage of VA proceedings could help reduce costs. First, attorneys could help filter frivolous claims out of the system by fulfilling their ethical duties under the rules of professional responsibility.<sup>128</sup> Second, VA-derived empirical evidence supports the argument that permitting veterans to hire attorneys at the initial stage of VA claims proceedings would reduce the extravagant costs associated with the VA’s high rate of claim determination errors.<sup>129</sup> As Army veteran and attorney Benjamin Wright has argued:

The rationale for proscribing attorney involvement was that if veterans had attorneys then so would the VA, and costs and time would increase. However, an equally strong argument can be made that lawyers would draft clear, complete, accurate claims with the legal framework in mind, and would thus assist VARO officials in reaching the correct disability compensation determination the first time. In doing so, attorneys would

123. Simcox, *Thirty Years After Walters*, *supra* note 15, at 732.

124. Simcox, *Thirty Years of Veterans Law*, *supra* note 47, at 528.

125. *Id.*

126. McClean, *supra* note 13, at 284.

127. Benjamin W. Wright, *It’s All About the Money: Denying Disabled Veterans the Right to an Attorney*, 6 NAELA J. 203, 209 (2010).

128. See MODEL RULES OF PROF’L CONDUCT r. 3.1 (AM. BAR ASS’N 2018) (“A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.”).

129. Wright, *supra* note 127, at 211.

help reduce the overall cost of the process and the amount of time it takes to adjudicate a claim.<sup>130</sup>

Relying on the Board's fiscal year 2008 statistics, Mr. Wright determined that "attorneys achieve a positive outcome for their . . . veteran clients more than any other form of representation" because veterans represented by attorneys were 5.6% more likely to succeed on their claims than veterans represented by VSOs.<sup>131</sup> The Board's fiscal year 2018 statistics are even more compelling: veterans represented by attorneys were nearly 9% more likely to succeed on their claims than their counterparts represented by VSOs.<sup>132</sup>

## VI. CONCLUSION

Fundamental legal rights enjoyed by virtually all Americans—including the right to vindicate the federal government's tortious conduct, the right to robust judicial review, and the right to hire counsel at all stages of legal proceedings—are directly attributable to the immense sacrifices that our veterans have made on behalf of the nation. There is, therefore, no justification for the federal government's ongoing refusal to extend those basic rights to veterans. Instead of participating in culturally popular, cosmetic gestures—such as saluting veterans at local sporting events or thanking them for their service—this Article implores all Americans who truly appreciate veteran service and sacrifice to lobby their congressional delegations to repeal the law that denies veterans the right to hire counsel at all stages of the increasingly complex and adversarial VA claims adjudication proceedings and, thereby, deprives veterans of their best chance to realize their hard-earned, service-connected entitlements.

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130. *Id.* at 211 (footnote omitted).

131. *Id.* at 216.

132. VA ANNUAL REPORT FY 2018, *supra* note 58, at 31.