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# **“A BOY GETS INTO TROUBLE”: SERVICE MEMBERS, CIVIL RIGHTS, AND VETERANS’ LAW EXCEPTIONALISM**

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## **INTRODUCTION**

There is a paradox at the heart of veterans’ law. Former service members receive more generous disability, health care, housing, and other public benefits than those available to indigent or disabled members of the general public.<sup>1</sup> At the same time, veterans are subject to anomalous legal principles and practices

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<sup>1</sup> A veteran without dependents who is rated 100% disabled, for instance, is eligible to receive \$2916 per month, tax free, from the U.S. Department of Veterans Affairs (the “VA”). *Compensation: Veterans Compensation Benefits Rate Tables - Effective 12/1/16*, U.S. DEP’T OF VETERANS AFF., [http://www.benefits.va.gov/compensation/resources\\_comp01.asp](http://www.benefits.va.gov/compensation/resources_comp01.asp) [<https://perma.cc/89U7-C5PJ>] (last visited Sept. 14, 2017).

and isolated from broader developments in administrative and constitutional law. This veterans' law exceptionalism often undermines the civil rights of former service members.

Members of the armed forces enjoy fewer workplace protections than other public and private employees;<sup>2</sup> and the theories and doctrines that shape veterans' law;<sup>3</sup> the agencies and courts that adjudicate veterans cases;<sup>4</sup> and the lawyers, lay advocates, and organizations that commonly represent veterans<sup>5</sup> operate largely outside the mainstream of U.S. law and legal institutions. This legal separation has not aided veterans. In recent decades, moreover, veterans' law has rarely received the sustained attention of legal scholars<sup>6</sup> or legal services programs,<sup>7</sup> nor the scrutiny of attorneys, judges, and bar associations other than those already primarily engaged in this specialized field.<sup>8</sup> There is no inherent

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<sup>2</sup> See, e.g., Federal Employees' Compensation Act, 5 U.S.C. § 8101(1) (2012) (defining "employee" for federal worker compensation scheme as a "civil officer or employee" and certain other non-military personnel); *Gonzalez v. Dep't of the Army*, 718 F.2d 926, 928 (9th Cir. 1983) (holding that Title VII of the Civil Rights Act of 1964 does not apply to uniformed personnel); *Verbeck v. United States*, 89 Fed. Cl. 47, 61-62 (2009) (holding that whistleblower protections of the Civil Service Reform Act of 1978 do not extend to uniformed service members).

<sup>3</sup> See, e.g., *Feres v. United States*, 340 U.S. 135, 135 (1950) (holding military immune in Federal Tort Claims Act suits for injuries incident to military service).

<sup>4</sup> See, e.g., 10 U.S.C. §§ 1552-1553 (2012 & Supp. II 2013-2015) (establishing boards for correction of military records to upgrade discharge status and make other changes to military records); 38 U.S.C. §§ 7251-7252 (2012) (establishing U.S. Court of Appeals for Veterans Claims to review veterans benefits claims).

<sup>5</sup> See, e.g., *Veterans Affairs, ABA, Legal Services Corp. Announce Program to Help with Veterans' Disability Claims*, A.B.A. (Aug. 11, 2013, 4:10 PM), [http://www.americanbar.org/news/abanews/aba-news-archives/2013/08/veterans\\_affairsab.html](http://www.americanbar.org/news/abanews/aba-news-archives/2013/08/veterans_affairsab.html) [https://perma.cc/L7FB-2N36] (announcing partnership to address dearth of legal aid for veterans).

<sup>6</sup> Leading law journals have published almost no scholarship on veterans' law in the past decade, notwithstanding the laudable labors of a small number of scholars. See generally, e.g., 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) [hereinafter Allen, *Due Process*]; Michael P. Allen, *The United States Court of Appeals for Veterans Claims at Twenty: A Proposal for a Legislative Commission to Consider its Future*, 58 CATH. U. L. REV. 361 (2009) [hereinafter Allen, *Twenty*]; Eugene R. Fidell, *The Boards for Correction of Military and Naval Records: An Administrative Law Perspective*, 65 ADMIN. L. REV. 499 (2013); Daniel L. Nagin, *The Credibility Trap: Notes on a VA Evidentiary Standard*, 45 U. MEM. L. REV. 887 (2015).

<sup>7</sup> There are a handful of notable exceptions, including CONN. VETERANS LEGAL CTR., <https://ctveteranslegal.org> (last visited Sept. 14, 2017); SWORDS TO PLOWSHARES, <https://www.swords-to-plowshares.org/> (last visited Sept. 14, 2017); URB. JUST. CTR.'S VETERANS ADVOC. PROJECT, <http://vap.urbanjustice.org> (last visited Sept. 14, 2017).

<sup>8</sup> Other specialized practice areas have profited from the engagement of thoughtful minds not steeped within the field. See, e.g., Steering Comm. of the N.Y. Immigrant Representation

logic requiring that veterans' law stand apart from other bodies of law with which it analytically coheres, such as administrative, disability, public benefits, and employment law.<sup>9</sup> Nor is it apparent that segregating veterans' law cases in specialized courts, or serving low-income veterans largely outside the existing network of legal services offices, furthers the interests of veterans. Like other areas of law that are treated as exceptional,<sup>10</sup> veterans' law is a backwater that generally lags behind developments in constitutional due process, administrative law, and civil rights law.

Veterans' law is not exceptional because it involves few cases. There are nearly twenty-two million veterans in the United States,<sup>11</sup> and they and their dependents file more than one million benefits claims with the U.S. Department of Veterans Affairs (the "VA") each year,<sup>12</sup> in one of the three great federal mass adjudication systems.<sup>13</sup> In addition, veterans file tens of thousands of record correction applications annually.<sup>14</sup>

The paradox, then, is this: official recognition that veterans deserve special treatment has long resulted in more generous benefits than those provided to the

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Study Report, *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, 33 CARDOZO L. REV. 357, 360 (2011) (discussing the initiative of "the Study Group on Immigrant Representation, convened by Judge Robert A. Katzmann of the U.S. Court of Appeals for the Second Circuit").

<sup>9</sup> Veterans' law is barely mentioned in leading textbooks on these topics. *See, e.g.*, STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES (7th ed. 2011); MARTIN H. MALIN ET AL., PUBLIC SECTOR EMPLOYMENT: CASES AND MATERIALS (3d ed. 2016).

<sup>10</sup> *See, e.g.*, Heather K. Gerken, *Election Law Exceptionalism? A Bird's Eye View of the Symposium*, 82 B.U. L. REV. 737, 748 (2002) (examining the "ongoing debate about election law exceptionalism"); Rachel E. Rosenbloom, *The Citizenship Line: Rethinking Immigration Exceptionalism*, 54 B.C. L. REV. 1965, 1984 (2013) ("[I]mmigration law remains largely outside mainstream American constitutional jurisprudence.").

<sup>11</sup> *National Center for Veterans Analysis and Statistics: Veteran Population*, U.S. DEP'T OF VETERANS AFF., [http://www.va.gov/vetdata/Veteran\\_Population.asp](http://www.va.gov/vetdata/Veteran_Population.asp) [https://perma.cc/SG8N-66NE] (last visited Sept. 14, 2017).

<sup>12</sup> *Veterans Benefits Administration Reports: VA Claims Inventory*, U.S. DEP'T OF VETERANS AFF., [http://www.benefits.va.gov/REPORTS/mmwr/2013/2013\\_index.asp](http://www.benefits.va.gov/REPORTS/mmwr/2013/2013_index.asp) [https://perma.cc/5PFG-AE9Z] (last visited Sept. 14, 2017) ("VA completed a record-breaking 1 million claims per year in fiscal years 2010, 2011, and 2012 . . .").

<sup>13</sup> Michael D. Sant'Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 COLUM. L. REV. 1992, 2011 (2012) (discussing Social Security, veterans benefits, and immigration claims).

<sup>14</sup> Fidell, *supra* note 6, at 501 & nn.21-22 (calculating applications). The most recent annual Army report states that this service branch alone processed 25,000 applications in fiscal year 2012. ARMY REVIEW BDS. AGENCY, 2012 ANNUAL REPORT 1 (2012), <http://arba.army.pentagon.mil/documents/ARBA%20Annual%20Report%202012.pdf> [https://perma.cc/75HC-B9FG].

general public, but also a legal isolation that, over time, has undermined the interests of former service members.<sup>15</sup> Indeed, at several moments in the past century, when serious proposals to integrate veterans' programs with other government programs were raised, powerful voices have objected that to do so would endanger the special treatment afforded to veterans and risk degrading their valor and sacrifice. There is no inherent reason, however, that generous benefits require the exclusion of veterans' law and practice from modern legal principles and procedures in related areas of law.

Exceptionalism in other areas of the law, such as tax and immigration, is subject to criticism by many scholars and advocates.<sup>16</sup> This article explores the overlooked costs of veterans' law exceptionalism.<sup>17</sup> It considers how exceptionalism operates in four areas at the center of contemporary veterans' law debates, each with significant civil rights consequences: (1) the structure of judicial review in VA benefits cases; (2) adjudication of disability claims arising from sexual harassment and assault; (3) the availability of class actions to address the VA claims backlog and other systemic issues; and (4) procedural and qualitative shortcomings at the record correction boards, especially regarding applications by veterans with less-than-honorable discharges, many of whom carry mental health injuries and suffer a lifetime of stigma, employment barriers, and benefits ineligibility. Examination of these matters reveals important deficiencies in the current systems of adjudication. A substantial cause for these failings is the isolation of veterans' law.

This article concludes that the harms of maintaining veterans' law in isolation have been significantly underestimated, and that this isolation may be reduced without forfeiting the beneficial substantive treatment of veterans. To make veterans' law more consistent with other related disciplines is not to disrespect the unique courage and sacrifice inherent in military service; rather, it is the exclusion of veterans from contemporary procedural protections and adjudicatory values that can no longer be justified.

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<sup>15</sup> Notably, the segregation of veterans' law and practice mirrors the increasing isolation of veterans in the broader population, as the number and proportion of households containing a veteran or member of the military declines. *The Military-Civilian Gap: Fewer Family Connections*, PEW RES. CTR. (Nov. 23, 2011) <http://www.pewsocialtrends.org/2011/11/23/the-military-civilian-gap-fewer-family-connections/> [<https://perma.cc/YQF4-PX2Z>].

<sup>16</sup> See, e.g., Gerken, *supra* note 10, at 737-38 (discussing election law exceptionalism); Kristin Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1541 (2006) (discussing judicial deference as an example of tax exceptionalism).

<sup>17</sup> By "veterans' law," I refer to legal regimes to which only former service members (or their family members) are subject, and in particular, claims for VA benefits and applications to the U.S. Department of Defense (the "DoD") to correct military records, including to upgrade a discharge status.

## I. THE JURISPRUDENCE OF EXCEPTIONALISM AND HISTORY OF VETERANS' LAW

Evaluation of the impact of veterans' law exceptionalism on contemporary civil rights struggles requires an understanding of the relevant doctrinal traditions and regulatory structures. Congress has enacted and amended the twin statutory schemes governing veterans benefits and record correction matters over many years. It has legislated against background principles of substantial judicial deference to military decisionmaking and, in the case of benefits, a longstanding prohibition on judicial review that was repealed only at the end of the twentieth century. Part A introduces the concept of legal exceptionalism as it has been analyzed in other areas of law before Part B provides brief surveys of the history and current structure of veterans benefits and Part C discusses adjudication of applications to upgrade a bad discharge.

### A. *Doctrines of Legal Exceptionalism*

Scholars and other commentators have criticized many areas of law for their exceptionalism, with tax,<sup>18</sup> immigration,<sup>19</sup> and family law<sup>20</sup> among the most egregious modern offenders. In general, the criticism focuses on the adoption or preservation of anomalous doctrines that depart from developments in administrative law, due process, federal jurisdiction, or other trans-substantive areas, without obvious justification. As Paul Caron argued, the tax field must

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<sup>18</sup> See, e.g., Stephanie Hoffer & Christopher J. Walker, *The Death of Tax Court Exceptionalism*, 99 MINN. L. REV. 221, 222 (2014) ("For decades, tax jurisprudence and scholarship have suffered from what has been labeled 'tax exceptionalism'—the perception that tax law is so different from the rest of the regulatory state that general administrative law doctrines and principles do not apply."). Two prominent critics of tax law exceptionalism are Paul L. Caron and Kristin Hickman. See, e.g., Paul L. Caron, *Tax Myopia Meets Tax Hyperopia: The Unproven Case of Increased Judicial Deference to Revenue Rulings*, 57 OHIO ST. L.J. 637, 637 (1996) (criticizing the idea of "tax myopia"); Paul L. Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow Up to Be Tax Lawyers*, 13 VA. TAX REV. 517, 532 (1994) [hereinafter Caron, *Tax Lawyers*] (faulting judges in tax cases "for ignoring nontax developments in statutory construction and legislative process theory"); Hickman, *supra* note 16, at 1541 (discussing the problems associated with the view that tax law is different or special).

<sup>19</sup> See, e.g., Rosenbloom, *supra* note 10, at 1969 (looking at immigration exceptionalism and "its implications for the rights of both citizens and noncitizens"); David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. L. REV. 583, 584 (2017) ("Immigration law is famously exceptional. The Supreme Court's jurisprudence is littered with special immigration doctrines that depart from mainstream constitutional norms.").

<sup>20</sup> See, e.g., Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism—Introduction to the Special Issue on Comparative Family Law*, 58 AM. J. COMP. L. 753, 755 (2010) (analyzing methods for "de-exceptionalizing the family from the market").

“start opening up . . . to the light of nontax insights . . .”<sup>21</sup> Those who defend legal exceptionalism, by contrast, tend to justify these departures on the grounds of history, complexity, or unique functions and purposes.

Family law exceptionalism exemplifies departures based on history. The treatment of marriage, divorce, and other domestic relations law as distinct from other forms of contract traces ancient historical roots, at least to Friedrich Carl von Savigny’s *System of the Modern Roman Law*.<sup>22</sup> Family law was long said to be local in nature and separate from market principles,<sup>23</sup> leading to doctrinal idiosyncrasies such as the “domestic relations” exception to diversity jurisdiction<sup>24</sup>—and for centuries shielding sexual discrimination and violence from ordinary criminal or civil culpability.<sup>25</sup> Veterans’ law does not have a pedigree like family law and its exceptional treatment cannot be justified on the basis of history alone.

Legal disciplines such as tax, immigration, and patent law have also justified doctrinal departures on the grounds of complexity. These areas of law are no doubt complicated, with lengthy, jargon-rich statutes, regulations, and case law. And yet, the same can be said for many other areas of law as well. To the extent the “complexity” justification also contains a claim of interdisciplinary analysis—fluency in patent law, for instance, may require a degree of scientific knowledge—the same is true for many other areas of law.<sup>26</sup> A claim for doctrinal exceptionalism based on complexity alone is unpersuasive.

Most compelling, perhaps, is the contention that the function or purpose of a particular area of law requires a departure from ordinary legal principles. Judicial deference to certain actions in the area of military or foreign affairs, for

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<sup>21</sup> Caron, *Tax Lawyers*, *supra* note 18, at 589.

<sup>22</sup> 1 FRIEDRICH CARL VON SAVIGNY, *SYSTEM OF THE MODERN ROMAN LAW* (William Holloway trans., Hyperion Press 1979) (1867).

<sup>23</sup> JILL ELAINE HASDAY, *FAMILY LAW REIMAGINED* 21 (2014) (“The presumption of family law’s localism is central to the Supreme Court’s recent federalism jurisprudence . . .”).

<sup>24</sup> See *Ankenbrandt v. Richards*, 504 U.S. 689, 693–704 (1992) (tracing history of domestic relations exception to federal diversity jurisdiction).

<sup>25</sup> See Cary Franklin, *Inventing the “Traditional Concept” of Sex Discrimination*, 125 HARV. L. REV. 1307, 1314–16 (2012) (discussing how perceptions of family roles influenced the shape of early workplace sex discrimination after Title VII); Emily J. Sack, *From the Right of Chastisement to the Criminalization of Domestic Violence: A Study in Resistance to Effective Policy Reform*, 32 T. JEFFERSON L. REV. 31, 33–34 (2009) (observing that notions of family privacy delayed the criminalization of domestic violence).

<sup>26</sup> See generally Eric Biber, *Which Science? Whose Science? How Scientific Disciplines Can Shape Environmental Law*, 79 U. CHI. L. REV. 471 (2012) (explaining that environmental law fundamentally depends on environmental science); S. Paul Posner, Book Review, 21 STAN. L. REV. 442 (1969) (discussing foundational use of economics in antitrust law); see also Lawrence A. Cunningham, *Sharing Accounting’s Burden: Business Lawyers in Enron’s Dark Shadows*, 57 BUS. LAW. 1421, 1456 n.200 (2002) (stating that a bankruptcy attorney is held to a higher standard as to “the level of requisite accounting knowledge” than other lawyers).

instance, is explained by the need to allow the executive branch latitude to act swiftly and unconstrained by judicial review.<sup>27</sup> For years, a degree of judicial deference to tax regulations different from the standard rule set forth in *Chevron* was defended based on the indispensability of the revenue-raising function to governance.<sup>28</sup> In immigration, the plenary power doctrine has long held that courts must defer to discriminatory and abusive practices adopted or implemented by the political branches that “would be unacceptable if applied to citizens.”<sup>29</sup> Scholars have condemned any functional justification for this immigration exceptionalism, which has endured as a formal doctrine even as courts have significantly eroded its operation in practice.<sup>30</sup>

Veterans' law exceptionalism cannot be easily defended on the grounds of history or complexity. As discussed below, there are strong similarities between adjudication of veterans benefits claims and Social Security claims, for instance, and many other legal fields, from securities law and antitrust to bankruptcy and land use law, are arguably more complex than both. Record correction cases, in turn, are no more complicated than other employment disputes involving claims of wrongful discharge, whether arising in public or private employment. As for purpose or function, VA benefits and record correction cases—involving claims often submitted years or decades after the conclusion of military service, where the underlying military decision is not itself subject to challenge—would not seem to implicate the concerns motivating doctrines of judicial deference to the conduct of military affairs. Any functional justification for veterans' law exceptionalism, however, as well as the ways in which this exceptionalism undermines the civil rights of veterans, is best evaluated by analyzing their operation in the legal and policy debates considered below.

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<sup>27</sup> See, e.g., *Feres v. United States*, 340 U.S. 135, 146 (1950).

<sup>28</sup> Compare *Nat'l Muffler Dealers Ass'n v. United States*, 440 U.S. 472, 484 (1979) (holding that Commissioner's reading of regulation § 501(c)(6) of 1954 Internal Revenue Code “merits serious deference”), with *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984) (establishing a two-step approach for determining the appropriate level of deference to afford an agency's construction of a statute it administers). The Supreme Court harmonized the differing levels of deference in *Mayo Foundation for Medical Education & Research v. United States*, 562 U.S. 44, 56 (2011) (“We see no reason why our review of tax regulations should not be guided by agency expertise pursuant to *Chevron* to the same extent as our review of other regulations.”).

<sup>29</sup> *Mathews v. Diaz*, 426 U.S. 67, 80 (1976). Scholars have also made a functional argument that judicial deference to political choices may justify “election law exceptionalism.” See Gerken, *supra* note 10, at 739 (discussing examples of election law exceptionalism where “the Supreme Court has modified constitutional doctrine to reflect the unique nature of democratic rights and the political process”).

<sup>30</sup> Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 549-50 (1990) (arguing that the plenary power doctrine “is in some state of decline,” but noting that the “current vitality” of the doctrine is much more complicated).

B. *History and Structure of Veterans Benefits*

Compensation for wounded warriors may be as old as armed conflict itself.<sup>31</sup> Plymouth Colony provided assistance to those injured in battles with Native Americans, and the Continental Congress authorized half-pay for veterans disabled in the Revolutionary War.<sup>32</sup> After the establishment of the United States, claims of disabled veterans first took the form of petitioning to federal and state legislatures.<sup>33</sup> In 1792, Congress assigned adjudication of claims to the district courts, subject to review by the Secretary of War and Congress.<sup>34</sup> The Supreme Court invalidated this structure,<sup>35</sup> and Congress subsequently established a Pension Bureau to process claims, without provision for judicial review.<sup>36</sup>

After the Civil War, the volume of claims increased dramatically. Claims agents and increasingly powerful veterans' organizations advocated for increased benefits and improved administrative processing.<sup>37</sup> Politics and patronage also contributed to the expansion of aid programs.<sup>38</sup> In this era, courts

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<sup>31</sup> James D. Ridgway, *The Splendid Isolation Revisited: Lessons from the History of Veterans' Benefits Before Judicial Review*, 3 VETERANS L. REV. 135, 137 & nn.8-12 (2011) (discussing ancient empires that "all had some organized form of benefits for veterans").

<sup>32</sup> Mariano Ariel Corcilli, Note, *The History of Veterans Benefits: From the Time of the Colonies to World War Two*, 5 U. MIAMI NAT'L SECURITY & ARMED CONFLICT L. REV. 47, 49 (2015) (providing a historical overview of how "[t]he United States of America has provided benefits to veterans since even before the birth of our nation").

<sup>33</sup> See, e.g., Ridgway, *supra* note 31, at 163 ("The tradition of private bills in Congress to add disappointed claimants to the pension rolls continued through the post-Civil War era."); Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667, 701-03 (2003) (detailing "the very first petition approved by the very First Congress," for the benefit of Baron de Glaubeck, "a German who had served in the Revolutionary Army and sought a pension").

<sup>34</sup> Act of Mar. 23, 1792, ch. 11, 1 Stat. 243 (repealed in part and amended by Act of Feb. 28, 1793, ch. 17, 1 Stat. 324); Maeva Marcus & Robert Teir, *Hayburn's Case: A Misinterpretation of Precedent*, 1988 WIS. L. REV. 527, 529-30 (discussing the history of the Invalid Pensions Act of 1792).

<sup>35</sup> *Hayburn's Case*, 2 U.S. 409, 409-11 (1792) (denying mandamus to compel district court to adjudicate pension claim); see also Ridgway, *supra* note 31, at 143-45, 145 nn.61-62 (describing unpublished 1794 Supreme Court decision in *United States v. Yale Todd*).

<sup>36</sup> Ridgway, *supra* note 31, at 148 (discussing 1818-1820 reforms at the Pension Bureau, which "restored confidence in the pension program").

<sup>37</sup> *Id.* at 165-66 (noting how the Grand Army of the Republic helped advocate for more clerks being authorized for the Pension Bureau, the construction of a building devoted solely to the administration of veterans benefits, additional pension benefits, and other kinds of political activities).

<sup>38</sup> See generally THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* 67-151 (1992).



refused to review agency decisions adverse to veterans.<sup>39</sup> While veterans' groups succeeded in winning additional staffing and benefits from Congress,<sup>40</sup> such that veterans benefits amounted to an extraordinary 30-40% of the entire federal budget in the late nineteenth century,<sup>41</sup> the agency adjudicating claims was widely regarded as having deteriorated into a "political patronage system."<sup>42</sup>

After World War I, Congress reorganized the veterans benefits programs and imposed new restrictions, including statutes of limitations, higher burdens of proof, and a requirement that a veteran be disabled, not only elderly, to obtain support.<sup>43</sup> After years of congressional debate and vetoes by two Presidents, Congress enacted a "bonus" payment program for World War I veterans.<sup>44</sup> In 1930 Congress consolidated several programs into a single entity, the Veterans' Administration.<sup>45</sup>

At the start of the New Deal, Congress granted President Franklin Roosevelt significant power to reorganize government agencies,<sup>46</sup> which he deployed to reform veterans benefits programs and also to reduce payments.<sup>47</sup> Congress insisted, however, that agency decisions about veterans benefits remain immune from judicial review.<sup>48</sup> Notably, shortly after the United States entered World War II, President Roosevelt attempted to integrate veterans benefits with programs for other disabled workers, but his attempt failed when veterans'

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<sup>39</sup> See, e.g., *Decatur v. Paulding*, 39 U.S. 497, 517 (1840) (holding court lacks jurisdiction to mandamus the Secretary of the Navy to adjudicate or grant claim); *Daily v. United States*, 17 Ct. Cl. 144, 148 (1881) (same as to benefits denial).

<sup>40</sup> See, e.g., *Ridgway*, *supra* note 31, at 164-66 (discussing the Arrears Act of 1879 and the Disability Pension Act of 1890).

<sup>41</sup> *Id.* at 168-69.

<sup>42</sup> *Id.* at 164.

<sup>43</sup> *Id.* at 170 ("The legislation further restricted benefits by requiring (1) medical proof that a veteran's disability was related to service, (2) that the disability manifested within one year of service, and (3) that the claim be filed within five years of service.").

<sup>44</sup> *Id.* at 171 ("The law . . . provided each veteran of World War I a bonus of a dollar for each day of service, plus an additional twenty-five cents for each day served overseas . . .").

<sup>45</sup> Act of July 3, 1930, ch. 863, 46 Stat. 1016 (authorizing the President to consolidate and coordinate various agencies affecting veterans); *Ridgway*, *supra* note 31, at 175 ("[T]he Veterans Administration . . . was created [in 1930] by uniting the Veterans' Bureau with the Bureau of Pensions and the National Homes for Disabled Volunteer Soldiers.").

<sup>46</sup> Economy Act of 1933, ch. 3, 48 Stat. 8 (granting the president the power to issue regulations pertaining to veterans benefits system).

<sup>47</sup> *Ridgway*, *supra* note 31, at 180-81 ("[Roosevelt] promptly used the broad powers granted to him by the Act to slash benefits for veterans, freeing money to pay for his New Deal." (footnote omitted)). Congress overturned many of the Roosevelt reductions in veterans benefits in the Independent Offices Appropriation Act of 1934. *Id.* at 180.

<sup>48</sup> Economy Act § 5 (declaring that decisions rendered under the title "shall be final and conclusive" and that "no other official or court of the United States shall have jurisdiction").

organizations objected.<sup>49</sup> In 1944, Congress passed what became known as the “G.I. Bill,” providing education and other benefits to facilitate re-adjustment to civilian life.<sup>50</sup>

President Eisenhower sought to rationalize what he believed had become a confusing and inefficient network of veterans’ programs, and appointed General Omar Bradley to lead a broad review.<sup>51</sup> The Bradley Commission recommended that federal programs focus more specifically on rehabilitation and integration.<sup>52</sup> The Commission also suggested that the development of social safety net programs might obviate the need for some veteran-specific programs.<sup>53</sup> However, veterans’ groups fiercely resisted the notion that veterans be treated the same as other citizens or that their special status as former service members be diminished in any way.<sup>54</sup> Congress largely sided with the veterans’ organizations.

The last round of legislative reforms to the structure of veterans benefits systems occurred in response to the demands of the Vietnam generation, who founded their own organizations, independent from the powerful and often conservative groups that had long dominated the political debate about veterans.<sup>55</sup> The Vietnam veterans exposed the horrendous quality of medical care at many VA hospitals, fought for the recognition of Post-Traumatic Stress Disorder (“PTSD”),<sup>56</sup> and eventually secured acknowledgment that Agent Orange had caused cancers, birth defects, and other diseases.<sup>57</sup>

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<sup>49</sup> Ridgway, *supra* note 31, at 183 (“After a nine-month struggle that bridged the Seventy-Seventh and Seventy-Eighth sessions of Congress, veterans prevailed and the Disabled Veterans Rehabilitation Act of 1943 was passed.”).

<sup>50</sup> *Id.* at 184-85 (describing the G.I. Bill as “the most prominent piece of a comprehensive program that provided veterans’ benefits and preferences”). Southern members of Congress initially delayed the bill’s passage by objecting to making African-American veterans eligible for benefits. *Id.* at 185.

<sup>51</sup> *Id.* at 190.

<sup>52</sup> PRESIDENT’S COMM’N ON VETERANS’ PENSIONS, FINDINGS AND RECOMMENDATIONS VETERANS’ BENEFITS IN THE UNITED STATES 5, 11 (1956).

<sup>53</sup> *Id.* at 4-5.

<sup>54</sup> Ridgway, *supra* note 31, at 192.

<sup>55</sup> See generally GERALD NICOSIA, HOME TO WAR: A HISTORY OF THE VIETNAM VETERANS’ MOVEMENT (2001).

<sup>56</sup> The American Psychiatric Association added PTSD as a medical diagnosis to its Diagnostic and Statistical Manual of Mental Disorders (DSM-III) in 1980. See Matthew J. Friedman, *PTSD History and Overview*, U.S. DEP’T OF VETERANS AFF., <http://www.ptsd.va.gov/professional/PTSD-overview/ptsd-overview.asp> [<https://perma.cc/KXA2-YDPS>] (last visited Sept. 14, 2017).

<sup>57</sup> See Agent Orange Act of 1991, Pub. L. No. 102-4, 105 Stat. 11 (codified as amended in scattered sections of 38 U.S.C.) (establishing a presumption that certain diseases will be considered service connected, if “associated with exposure to certain herbicide agents”).

The Vietnam veterans had to overcome not only political apathy and budgetary concerns in Congress but also the opposition of older veterans' groups who disapproved of the Vietnam generation's anti-war views and regarded legislation benefitting Vietnam veterans as potentially coming at the expense of benefits for older generations.<sup>58</sup> These established organizations also feared incursions into their political power.<sup>59</sup> Nevertheless, the Vietnam generation persevered. Structurally, their legacy was threefold: (1) creation of a network of more than 130 community-based, outpatient counseling centers, known as Vet Centers;<sup>60</sup> (2) elevation of the VA to the U.S. Department of Veterans Affairs;<sup>61</sup> and (3) establishment of the U.S. Court of Appeals for Veterans Claims to review VA benefits decisions, whose opinions are subject to appeal to the U.S. Court of Appeals for the Federal Circuit.<sup>62</sup>

Today, an application for VA benefits begins online or at one of the more than fifty VA Regional Offices ("VAROs").<sup>63</sup> VA benefits include health care, disability compensation, pension, education, burial, and others.<sup>64</sup> However, most applications are for disability compensation, a program of tax-free monthly payments that generally requires active-duty service, an honorable or general

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<sup>58</sup> The denigration of their members' sacrifice by older veterans groups remains evident in the motto of the Vietnam Veterans of America ("VVA"): "*Never again will one generation of veterans abandon another.*" *About Us*, VIET. VETERANS OF AM., <https://vva.org/who-we-are/about-us-history/> [<https://perma.cc/E468-3GFF>] (last visited Sept. 14, 2017); *see also* Laurence R. Helfer, *The Politics of Judicial Structure: Creating the United States Court of Veterans Appeals*, 25 CONN. L. REV. 155, 162 (1992) ("Although some of the VVA's deficiency of influence can be traced to the American public's reticence over the Vietnam War, much of it was linked to the hostility with which the older VSOs viewed the VVA."); Ridgway, *supra* note 31, at 196 ("[T]he major veterans' groups initially perceived the demands of Vietnam veterans . . . as a threat to the funding of programs for the rapidly aging World War II generation.").

<sup>59</sup> Helfer, *supra* note 58, at 159-62 (noting the immense power of the veteran service organizations, including their ability to substantially influence the VA and Congress).

<sup>60</sup> Ridgway, *supra* note 31, at 202 ("By 1981, VA had established 137 'Vet Centers' across the country.").

<sup>61</sup> Department of Veterans Affairs Act, Pub. L. No. 100-527, 102 Stat. 2635 (1988).

<sup>62</sup> Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988) (codified as amended in scattered sections of 38 U.S.C.). *See generally* Michael P. Allen, *Significant Developments in Veterans' Law (2004-2006) and What They Reveal About the U.S. Court of Appeals for Veterans Claims and the U.S. Court of Appeals for the Federal Circuit*, 40 U. MICH. J.L. REFORM 483, 488 (2007) (discussing the implications of the creation of the Veterans Court).

<sup>63</sup> BARTON F. STICHMAN ET. AL, VETERANS BENEFITS MANUAL § 12.1.1 (2016) [hereinafter NVLSP MANUAL] (describing the process of submitting a claim for veterans benefits).

<sup>64</sup> *Id.* at 55-65, 719-25, 839-63.

discharge,<sup>65</sup> and proof of a service-connected disability.<sup>66</sup> More than 4.1 million veterans currently receive disability compensation benefits.<sup>67</sup>

The VA has long been obliged to accept nearly any indication by a veteran who seeks to apply for benefits, even a short hand-written note,<sup>68</sup> and it has a far-reaching duty to assist the veteran in completing the application and ensuring its success.<sup>69</sup> The VA must give a sympathetic reading to any claim,<sup>70</sup> there is no statute of limitations, and no *res judicata*, such that a veteran can simply file a new application rather than appeal a denied claim.<sup>71</sup> In addition, there is a

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<sup>65</sup> Service members who receive bad paper are generally ineligible for VA benefits. 38 C.F.R. § 3.12 (2016). The VA is supposed to conduct its own “character of discharge” determination and may conclude that a veteran’s service is honorable for VA purposes, but in practice, VAROs rarely do so. *See* VETERANS LEGAL CLINIC, LEGAL SERVS. CTR. OF HARVARD LAW SCHOOL, UNDERSERVED: HOW THE VA WRONGFULLY EXCLUDES VETERANS WITH BAD PAPER 9-17 (NVLSP & Swords to Plowshares 2016) [hereinafter *UNDERSERVED*]. A rulemaking petition to address the VA’s exclusion of veterans with bad paper is pending. *See* Swords to Plowshares et al., Petition for Rulemaking to Amend 38 C.F.R. §§ 3.12(a), 3.12(d), 17.34, 17.36(d) Regulations Interpreting 38 U.S.C. § 101(2) Requirement for Service “Under Conditions Other Than Dishonorable,” at 4 (Dec. 19, 2015), available at <http://www.legalservicescenter.org/wp-content/uploads/2012/10/VA-Petition-for-Rulemaking-to-amend-regulations-interpreting-38-USC-1012.pdf> [<https://perma.cc/L3KP-HJUY>].

<sup>66</sup> *See* NVLSP MANUAL, *supra* note 63, at 55-57 (providing an overview of service-connected disability compensation).

<sup>67</sup> U.S. DEP’T OF VETERANS AFFAIRS, VETERANS BENEFITS ADMINISTRATION ANNUAL BENEFITS REPORT FISCAL YEAR 2015, at 5 (2016), [http://www.benefits.va.gov/REPORTS/abr/ABR-ALL\\_SECTIONS-FY15-12122016.pdf](http://www.benefits.va.gov/REPORTS/abr/ABR-ALL_SECTIONS-FY15-12122016.pdf) [<https://perma.cc/6RFS-A7NK>].

<sup>68</sup> In 2014, the VA revised a regulation that had permitted informal claims and appeals but which now requires a veteran to use specified forms. Standard Claims and Appeals Forms, 79 Fed. Reg. 57,695-96 (Sept. 25, 2014). The Federal Circuit recently rejected a rulemaking challenge to this change. *Veterans Justice Grp., LLC v. Sec’y of Veterans Affairs*, 818 F.3d 1336, 1341 (Fed. Cir. 2016).

<sup>69</sup> *See, e.g.*, 38 U.S.C. § 5102(a) (2012) (“Upon request . . . the Secretary shall furnish . . . free of all expense, all instructions and forms necessary to apply for that benefit.”); *id.* § 5103 (requiring the Secretary to give the applicant notice of any missing evidence necessary for a claim); *id.* § 5103A (detailing the Secretary’s duty to assist claimants in obtaining records); NVLSP MANUAL, *supra* note 63, at 913-25 (describing the VA’s obligations to give the applicant notice of evidence necessary to complete a successful claim and the VA’s obligations to assist in obtaining records).

<sup>70</sup> *See, e.g.*, *Robinson v. Shinseki*, 557 F.3d 1355, 1359-60 (Fed. Cir. 2009) (requiring the Board to read “filings by claimants ‘in a liberal manner,’ regardless of whether the claimant is represented by an attorney”).

<sup>71</sup> A veteran may reopen old claims based on new and material evidence. 38 U.S.C. § 5108 (allowing reconsideration of disallowed claims based on new and material evidence). A prior decision is also subject to revision if there was a clear and unmistakable error, or the veteran

network of lay advocates, accredited by the VA<sup>72</sup> and present at all or nearly all VAROs, available to assist the veteran in completing the application and developing additional evidence, without charge.<sup>73</sup> Finally, lawyers are rarely involved in VARO applications. Almost no legal services offices offer representation to veterans in their VARO proceedings, and federal statutes prohibit private lawyers from charging a fee for assistance in the initial applications.<sup>74</sup> The absence of legal representation does not benefit veterans.<sup>75</sup>

In recent years, the VAROs have received and adjudicated over one million applications annually, of which approximately 33% are first-time claims and 67% involve supplemental claims for additional benefits or the resubmission of previously denied claims.<sup>76</sup> The VA aspires to adjudicate each application within 125 days of submission but often fails to do so. For example, in 2012, 68% of applications were pending for more than 125 days.<sup>77</sup> Delays at the initial application stage have declined,<sup>78</sup> in part because the VA has redeployed appellate staff—leading to grotesque delays in administrative appeals.<sup>79</sup>

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may simply resubmit the same claim again after a denial. *Id.* § 5109A; see Allen, *Due Process*, *supra* note 6, at 508-09 (arguing res judicata concerns are less significant because veterans can reopen claims based on “clear and unmistakable error”).

<sup>72</sup> 38 U.S.C. §§ 5901-5902, 5904 (providing for the recognition of such advocates by the VA); 38 C.F.R. § 14.629 (2016) (stating requirements for accrediting service organization representatives, agents, and attorneys).

<sup>73</sup> NVLSP MANUAL, *supra* note 63, at 1421-26 (describing the roles and importance of lay advocates).

<sup>74</sup> See A.B.A., *supra* note 5 (launching a pilot program through which attorneys will offer pro bono services to veterans); see also 38 U.S.C. § 5904(c)(1) (prohibiting agents and attorneys from charging fees for filing a claim for benefits); Act of July 14, 1862, ch. 166, § 6, 12 Stat. 566, 568 (describing the limits on fees for attorneys helping veterans file a claim for pension or benefits). A relatively small number of law school clinics also provide representation to veterans. See Karen Sloan, *Law Clinics Answer the Call: Veterans Finding Allies in Dealing with VA and More*, NAT'L L.J. ONLINE, July 6, 2015, Lexis Advance.

<sup>75</sup> See, e.g., Michael P. Allen, *Justice Delayed; Justice Denied? Causes and Proposed Solutions Concerning Delays in the Award of Veterans' Benefits*, 5 U. MIAMI NAT'L SECURITY & ARMED CONFLICT L. REV. 1, 23-25 (2015) (arguing expanded role for lawyers in initial claims stage would reduce claims backlog).

<sup>76</sup> See U.S. DEP'T OF VETERANS AFF., *supra* note 12.

<sup>77</sup> *Veterans Benefits Administration Reports: 2012 Monday Morning Workload Reports*, U.S. DEP'T OF VETERANS AFF., <http://www.benefits.va.gov/REPORTS/mmwr/historical/2012/index.asp> [<https://perma.cc/7VFR-G6H8>] (last visited Sept. 14, 2017).

<sup>78</sup> *Veterans Benefits Administration Reports: Claims Backlog*, U.S. DEP'T OF VETERANS AFF., [http://benefits.va.gov/REPORTS/detailed\\_claims\\_data.asp](http://benefits.va.gov/REPORTS/detailed_claims_data.asp) [<https://perma.cc/4KWT-BVX7>] (last visited Sept. 14, 2017) (“Claims Backlog” tab) (showing approximately 80,000 initial and supplemental claims pending more than 125 days, down from a high of 611,000 such claims in March 2013).

<sup>79</sup> MARK LANCASTER, *FIXING THE APPEALS PROCESS AT THE DEPARTMENT OF VETERANS*

A veteran who objects to the VARO's disposition of a claim may file a Notice of Disagreement with the local VA office.<sup>80</sup> The veteran may request an in-person hearing at the VARO,<sup>81</sup> an informal proceeding that resembles a "fair hearing" in the public benefits context,<sup>82</sup> or proceed directly with an administrative appeal to the Board of Veterans Appeals (the "BVA"). The VARO then prepares a written decision, called a Statement of the Case.<sup>83</sup> In fiscal year 2015, VAROs took an average of 419 days to prepare a written decision explaining the disposition decision the VARO had already made.<sup>84</sup>

To prosecute a BVA appeal, the veteran files a notice of appeal.<sup>85</sup> In fiscal year 2015, it took an average of 537 days for VAROs to certify the record to the BVA.<sup>86</sup> It then took another nine months or so for the BVA, acting in single-judge panels, to adjudicate each appeal.<sup>87</sup> In 2015, the BVA received about 52,000 appeals and decided about 56,000, for which it held nearly 13,000 hearings (59% by videoconference).<sup>88</sup> The Board remanded in about one-half of these cases, allowed the appeal in about one-third, and denied the appeal in about one-fifth.<sup>89</sup>

Until 1989, there was no further appeal available.<sup>90</sup> Since the Veterans' Judicial Review Act (the "VJRA"), however, veterans may appeal to the U.S.

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AFFAIRS 11 (2014), [http://luskin.ucla.edu/sites/default/files/14-VeteransAffairs\\_1.pdf](http://luskin.ucla.edu/sites/default/files/14-VeteransAffairs_1.pdf) [<https://perma.cc/E8VQ-VJGY>] ("Some experts believe that the most significant cause of the appeals increase is that the VA shifted almost all its appeals personnel over to claims processing.").

<sup>80</sup> 38 U.S.C. § 7105 (2012).

<sup>81</sup> The hearing is held before a "Decision Review Officer" or DRO. 38 C.F.R. § 3.2600 (2016). The veteran may appear with a veterans service organization or counsel, present testimony, witnesses, and evidence, and respond to questions from the hearing officer. *Id.*; *see also id.* § 3.103(c)-(d).

<sup>82</sup> *See, e.g.,* N.Y. SOC. SERV. LAW § 22 (McKinney 2003) (describing a hearing in the public benefits context in the state of New York).

<sup>83</sup> 38 C.F.R. §§ 19.26, 19.29.

<sup>84</sup> BD. OF VETERANS' APPEALS, DEP'T OF VETERANS AFFAIRS, ANNUAL REPORT FISCAL YEAR 2015, at 21 (2016), [http://www.bva.va.gov/docs/Chairmans\\_Annual\\_Rpts/BVA2015AR.pdf](http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2015AR.pdf) [<https://perma.cc/MH4J-9AC2>].

<sup>85</sup> 38 U.S.C. § 7105; 38 C.F.R. § 19.30.

<sup>86</sup> BD. OF VETERANS' APPEALS, *supra* note 84, at 21.

<sup>87</sup> *Id.* (reporting in fiscal year 2015, the BVA took 270 days on average to adjudicate an appeal once received).

<sup>88</sup> *Id.* at 18, 26, 29.

<sup>89</sup> In fiscal year 2015, the BVA allowed 31% of disability compensation appeals, remanded 47%, and denied 17.78%. *Id.* at 26.

<sup>90</sup> The Supreme Court recognized a narrow exception for constitutional claims. *See Johnson v. Robison*, 415 U.S. 361, 366-74 (1974) (holding U.S. district courts had jurisdiction to adjudicate claims of unconstitutional race discrimination).

Court of Appeals for Veterans Claims (the “CAVC”).<sup>91</sup> Approximately 3000-4500 CAVC appeals have been filed annually in recent years<sup>92</sup>—about 10% of the veterans who appeal to the BVA and 0.5% of those who first apply at the VARO. The CAVC decides nearly all appeals on the papers, holding almost no oral arguments,<sup>93</sup> and acts primarily through single-judge panels.<sup>94</sup> Empowered to “affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate,”<sup>95</sup> the CAVC is precluded from making its own factual determinations.<sup>96</sup> Nearly half the veterans who seek review at the CAVC are pro se upon filing the appeal, but this number declines significantly by the time of decision.<sup>97</sup> The CAVC adjudicates appeals in about eight months, affirming in about one-tenth of its cases, dismissing the appeal in about one-tenth, remanding in about one-quarter, and ordering some combination of a partial affirmance, dismissal, and remand in the rest.<sup>98</sup>

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<sup>91</sup> Veterans’ Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988) (codified as amended in scattered sections of 38 U.S.C.).

<sup>92</sup> See U.S. COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORT: OCTOBER 1, 2014 TO SEPTEMBER 30, 2015 (FISCAL YEAR 2015) 1 (2015), <http://www.uscourts.cavc.gov/documents/FY2015AnnualReport.pdf> [<https://perma.cc/G9BV-KXLC>] [hereinafter ANNUAL REPORT FY2015] (4506 appeals filed); U.S. COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORT: OCTOBER 1, 2013 TO SEPTEMBER 30, 2014 (FISCAL YEAR 2014) 1 (2014), <http://www.uscourts.cavc.gov/documents/FY2014AnnualReport06MAR15FINAL.pdf> [<https://perma.cc/G3QT-DPJD>] [hereinafter ANNUAL REPORT FY2014] (3745 appeals filed); U.S. COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORT: OCTOBER 1, 2012 TO SEPTEMBER 30, 2013 (FISCAL YEAR 2013) 1 (2013), <http://www.uscourts.cavc.gov/documents/FY2013AnnualReport.pdf> [<https://perma.cc/9857-Z89F>] [hereinafter ANNUAL REPORT FY2013] (3521 appeals filed).

<sup>93</sup> ANNUAL REPORT FY2015, *supra* note 92, at 4 (fourteen oral arguments held); ANNUAL REPORT FY2014, *supra* note 92, at 4 (twenty oral arguments held); ANNUAL REPORT FY2013, *supra* note 92, at 4 (nineteen oral arguments held).

<sup>94</sup> ANNUAL REPORT FY2015, *supra* note 92, at 1 (1851 cases were decided by a single judge); ANNUAL REPORT FY2014, *supra* note 92, at 1 (2036 cases were decided by a single judge); ANNUAL REPORT FY2013, *supra* note 92, at 1 (1960 cases were decided by a single judge).

<sup>95</sup> 38 U.S.C. § 7252(a) (2012).

<sup>96</sup> *Id.* § 7261(c).

<sup>97</sup> At the time of filing between 27% and 38% of all appeals are filed pro se. These numbers drop to between 12% and 21% at the time of disposition. ANNUAL REPORT FY2015, *supra* note 92, at 1; ANNUAL REPORT FY2014, *supra* note 92, at 1; ANNUAL REPORT FY2013, *supra* note 92, at 1. This reduction is due to the work of the Veterans Consortium Pro Bono Program, which screens pro se filings and places many with volunteer counsel. See THE VETERANS CONSORTIUM PRO BONO PROGRAM, <http://www.vetsprobono.org/> (last visited Sept. 14, 2017).

<sup>98</sup> ANNUAL REPORT FY2015, *supra* note 92, at 2-3.

Either the veteran or the VA may appeal further, to the U.S. Court of Appeals for the Federal Circuit, on the ground of legal error.<sup>99</sup> In fiscal year 2015, there were eighty appeals to the Federal Circuit<sup>100</sup>—about 2% of cases heard by the CAVC, 0.14% of cases heard by the BVA, and 0.008% of cases filed in the VAROs. Finally, the Supreme Court has granted a handful of petitions for certiorari in veterans benefits cases.<sup>101</sup>

C. *Record Correction and Discharge Review Boards*

The term “bad paper” refers to an other-than-honorable, bad conduct, or dishonorable discharge, and may include a general discharge as well. A veteran with bad paper is generally ineligible for VA benefits, including disability compensation, pension, and health care,<sup>102</sup> as well as housing and employment programs. Discharge status is also a powerful barrier to private-sector employment as many large employers request discharge paperwork and decline to hire veterans with a bad paper discharge. Veterans with bad paper are more likely to suffer mental health conditions or homelessness and to be involved with the criminal justice system, and they take their own lives twice as often as other veterans.<sup>103</sup> In this regard, a bad paper discharge for former service members has many of the same adverse employment consequences as a criminal conviction has for ex-offenders.<sup>104</sup> Bad paper is deeply shameful, imposing a lifetime stigma that marks the former service member as having failed family, friends, and country.<sup>105</sup>

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<sup>99</sup> 38 U.S.C. § 7292.

<sup>100</sup> ANNUAL REPORT FY2015, *supra* note 92, at 4. In fiscal year 2014, there were only 115 appeals to the Federal Circuit. ANNUAL REPORT FY2014, *supra* note 92, at 4.

<sup>101</sup> *See, e.g., Henderson v. Shinseki*, 562 U.S. 428, 431 (2011) (deciding whether the deadline for filing a notice of appeal with the Veterans Court has any jurisdictional consequences).

<sup>102</sup> The narrow exceptions to bad paper are grudgingly applied by VA adjudicators. *See, e.g.,* 38 U.S.C. § 5303(b) (describing an exception where veteran was “insane” at the time of misconduct resulting in bad paper discharge); 38 C.F.R. § 3.354(a) (2016); *Gardner v. Shinseki*, 22 Vet. App. 415, 420 (2009) (faulting the VA for unduly narrow construction and application of “insanity” exception). The VA also routinely fails to undertake a “character of service” determination to assess whether the military service of a veteran with bad paper is nevertheless honorable for VA purposes, such that one’s benefits eligibility is preserved. *See Swords to Plowshares et al., supra* note 65, at 75-79.

<sup>103</sup> VETERANS LEGAL CLINIC, LEGAL SERVS. CTR. OF HARVARD LAW SCHOOL, *supra* note 65, at 2.

<sup>104</sup> *See, e.g., Kimani Paul-Emile, Beyond Title VII: Rethinking Race, Ex-Offender Status, and Employment Discrimination in the Information Age*, 100 VA. L. REV. 893, 902-15 (2014) (analyzing negative employment consequences of reliance on criminal history).

<sup>105</sup> CONN. VETERANS LEGAL CTR., VETERANS DISCHARGE UPGRADE MANUAL 9-10 (2011).



The discharge process has become more formalized in modern times, but it is still largely a matter of rough justice. Often, service members are hastily discharged in the field. Marginalized populations, such as service members of color<sup>106</sup> and those who report sexual harassment or assault,<sup>107</sup> are at increased risk of a bad discharge, as were gay and lesbian service members before 2011.<sup>108</sup> So too are those struggling with the invisible wounds of PTSD or Traumatic Brain Injury ("TBI")<sup>109</sup> or other mental health injuries.<sup>110</sup> During the Vietnam

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<sup>106</sup> DEP'T OF DEF., REPORT OF THE TASK FORCE ON THE ADMINISTRATION OF MILITARY JUSTICE IN THE ARMED FORCES 33-36 (1972) (concluding that in Vietnam era, African-American service members were twice as likely to receive a bad paper discharge as white service members); PROTECT OUR DEFS., RACIAL DISPARITIES IN MILITARY JUSTICE: FINDINGS OF SUBSTANTIAL AND PERSISTENT RACIAL DISPARITIES WITHIN THE UNITED STATES MILITARY JUSTICE SYSTEM i (2017), [http://www.protectourdefenders.com/wp-content/uploads/2017/05/Report\\_20.pdf](http://www.protectourdefenders.com/wp-content/uploads/2017/05/Report_20.pdf) [<https://perma.cc/964Q-MCHH>] ("[F]or every year reported and across all service branches, black service members were substantially more likely than white service members to face military justice or disciplinary action . . ."); see also David F. Addlestone & Susan Sherer, *Battleground: Race in Vietnam*, 292 C.L. 1, 1-2 (1973) (describing "institutionalized racism of the military" during Vietnam War). This racial discrimination was so severe that the Equal Employment Opportunity Commission concluded that employers who relied on discharge status in hiring or promotion might be liable for unlawful employment discrimination. EEOC Decision No. 74-25, 10 Fair Empl. Prac. Cas. (BNA) 265-66 (1975).

<sup>107</sup> *Booted: Lack of Recourse for Wrongfully Discharged U.S. Military Rape Survivors*, HUMAN RIGHTS WATCH (May 19, 2016) [hereinafter HRW, *Booted*], <https://www.hrw.org/report/2016/05/19/booted/lack-recourse-wrongfully-discharged-us-military-rape-survivors#page> [<https://perma.cc/G8U7-3KP2>] (finding that service members who reported a sexual assault are particularly susceptible to retaliatory bad discharges).

<sup>108</sup> Dave Philipps, *Ousted as Gay, Aging Veterans Are Battling Again*, N.Y. TIMES, Sept. 7, 2015, at A1 ("By some estimates, as many as 100,000 service members were discharged for being gay between World War II and the 2011 repeal of the military's 'don't ask, don't tell' policy. Many were given less-than-honorable discharges that became official scarlet letters—barring them from veterans' benefits, costing them government jobs and other employment, and leaving many grappling with shame for decades.").

<sup>109</sup> Dave Philipps, *Veterans Want Past Discharges to Recognize Post-Traumatic Stress*, N.Y. TIMES, Feb. 22, 2016, at A9 ("Congress has recognized in recent years that some of these discharges were the fault of dysfunctional screening for PTSD and other combat injuries, and it has put safeguards in place to prevent more—including requirements for mental health professionals to review all discharges.").

<sup>110</sup> See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-1013T, DEFENSE HEALTH CARE: STATUS OF EFFORTS TO ADDRESS LACK OF COMPLIANCE WITH PERSONALITY DISORDER SEPARATION REQUIREMENTS (2010); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-31, DEFENSE HEALTH CARE: ADDITIONAL EFFORTS NEEDED TO ENSURE COMPLIANCE WITH PERSONALITY DISORDER SEPARATION REQUIREMENTS 7 (2008) ("DOD does not have reasonable assurance that its key personality disorder separation requirements have been followed."); MELISSA ADER ET AL., CASTING TROOPS ASIDE: THE UNITED STATES MILITARY'S

War, 260,000 service members received bad paper,<sup>111</sup> fewer than 3% of those who served, but since 2001, approximately 6.5% of service members (over 135,000 persons) have received bad paper.<sup>112</sup>

Negative administrative discharges began in 1892,<sup>113</sup> and legislative petitioning was a veteran's only recourse until World War II,<sup>114</sup> when veterans' organizations lobbied successfully to establish an administrative review process.<sup>115</sup> A provision of the Servicemen's Readjustment Act of 1944 established a discharge review board ("DRB") in each service branch,<sup>116</sup> and two years later Congress created the boards for correction of military records ("BCMRs") as well, while also banning private bills.<sup>117</sup> The broad purpose of the 1944 Act was to legislate a "bill of rights to facilitate the return of service men and women to civilian life."<sup>118</sup> As Representative Cunningham explained, Congress was especially concerned about young service members who, "scared to death," mistakenly agreed to a bad paper discharge.

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ILLEGAL PERSONALITY DISORDER DISCHARGE PROBLEM 1 (2012), [https://www.law.yale.edu/system/files/documents/pdf/Clinics/VLSC\\_CastingTroopsAside.pdf](https://www.law.yale.edu/system/files/documents/pdf/Clinics/VLSC_CastingTroopsAside.pdf) [<https://perma.cc/2FM6-3E4G>] (finding that DoD systematically issues unlawful bad paper discharges to servicemen with alleged personality disorders); BLAKE BOGHOSSIAN ET AL., DISORDER IN THE COAST GUARD: THE UNITED STATES COAST GUARD'S ILLEGAL PERSONALITY AND ADJUSTMENT DISORDER DISCHARGES 1 (2014), [https://www.law.yale.edu/system/files/documents/pdf/Clinics/vlsc\\_disorderintheCoastGuard.pdf](https://www.law.yale.edu/system/files/documents/pdf/Clinics/vlsc_disorderintheCoastGuard.pdf) [<https://perma.cc/5APL-ELAN>] (finding that "[t]he vast majority of [adjustment disorder] and [personality disorder] discharges failed to comply with Coast Guard regulations"); Joshua Kors, *How Specialist Town Lost His Benefits*, NATION, Apr. 9, 2007, at 11.

<sup>111</sup> See Rebecca Izzo, Comment, *In Need of Correction: How the Army Board for Correction of Military Records is Failing Veterans with PTSD*, 123 YALE L.J. 1587, 1588 (2014).

<sup>112</sup> UNDERSERVED, *supra* note 65, at 2.

<sup>113</sup> DAVID F. ADDLESTONE ET AL., MILITARY DISCHARGE UPGRADING AND INTRODUCTION TO VETERANS ADMINISTRATION LAW: A PRACTICE MANUAL 1/2 (1982).

<sup>114</sup> Fidell, *supra* note 6, at 500; *see also* Ogden v. Zuckert, 298 F.2d 312, 313 (D.C. Cir. 1961).

<sup>115</sup> ADDLESTONE ET AL., *supra* note 113, at 1/2. The U.S. military court martialled one of every eight service members during World War II, and more than 15% of those veterans received a bad discharge. This poor treatment of so many World War II veterans motivated veterans' organizations to press for some form of review. *Id.* at n.9.

<sup>116</sup> Servicemen's Readjustment Act of 1944, ch. 268, 58 Stat. 284 (codified at 10 U.S.C. § 1553 (2012)).

<sup>117</sup> Legislative Reorganization Act of 1946, ch. 753, § 207, 60 Stat. 812, 837 (codified at 10 U.S.C. § 1552); *see* John J. Field, *Military Personnel Law: Waiving the Discretionary Statute of Limitations Governing the Boards for Correction of Military Records*, 62 GEO. WASH. L. REV. 920, 934 (1994) (analyzing historical context of statute).

<sup>118</sup> S. REP. NO. 78-755, at 2 (1944).

A boy gets into trouble when he is in the service . . . . That boy might be scared by his commanding officer or someone over him and sign a statement that he was a deserter or admit that he was a deserter, and be kicked out for that reason, when, as a matter of fact, he was not a deserter. . . . If he had not been scared to death or had been properly defended before a court martial, it may have been proven that he was only absent without leave. It was the thought of the committee in approving this that it would open the door for these boys to present any evidence that they could get to clear up their record.<sup>119</sup>

In 1977, President Jimmy Carter established a Special Discharge Review Program to upgrade the status of Vietnam veterans with bad paper,<sup>120</sup> but Congress swiftly overruled the order, enacting legislation denying VA benefits to any veteran whose discharge status was upgraded under the Carter Program, unless affirmed under uniform standards by a discharge review board.<sup>121</sup> For nearly all veterans, the legislation nullified the effect of the Carter Program.

Procedures before the boards are straightforward. On application, a DRB may review a bad discharge, except one resulting from a general court-martial, and must grant an in-person hearing upon request.<sup>122</sup> These hearings are conducted before a panel of five officers, who hear fact and expert testimony, admit records, and render decisions.<sup>123</sup> The statute of limitations for application to a DRB is fifteen years and is not waivable.<sup>124</sup> An adverse decision from a DRB may be appealed to the relevant BCMR, but it is also a final agency action subject to judicial review.<sup>125</sup> DRBs appear to grant approximately 30-40% of discharge upgrade applications when the veteran exercises the right to a personal appearance,<sup>126</sup> and far fewer when review is based solely on the papers

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<sup>119</sup> 78 CONG. REC. 4538 (1944).

<sup>120</sup> Warren Brown, *Bills Would Deny Benefits for Upgraded Discharges*, WASH. POST, June 1, 1977, at A6.

<sup>121</sup> Act of Oct. 8, 1977, Pub. L. No. 95-126, 91 Stat. 1106.

<sup>122</sup> 10 U.S.C. § 1553(a).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> Fidell, *supra* note 6, at 500-03.

<sup>126</sup> See Complaint at 26, Monk v. Mabius, No. 3:14-cv-00260 (D. Conn. Nov. 18, 2014), ECF No. 1 (“[O]f all veterans who applied to the [Army Board for Correction of Military Records, or] ABCMR (2009, 2010, and 2012) for any reason, or for discharge upgrades to the Army Discharge Review Board . . . (2009, 2010, and 2012) or NDRB (2007-2013), 30.58% of their records were corrected, according to the National Veterans Legal Services Program.”).

submitted to the board.<sup>127</sup> Veterans represented by counsel before the DRBs have a higher success rate.<sup>128</sup>

BCMRs have broader jurisdiction, but they rarely grant a request for a personal appearance.<sup>129</sup> They also approve applications at a lower rate, and have been widely criticized for their poor quality of adjudication.<sup>130</sup> These boards have a shorter statute of limitations, three years compared to the DRBs' fifteen years, but it is waivable in the interest of justice.<sup>131</sup> BCMRs have sweeping statutory powers to upgrade a discharge when "necessary to correct an error or remove an injustice."<sup>132</sup>

Decisions of the record correction boards are subject to judicial review pursuant to the Administrative Procedure Act ("APA").<sup>133</sup> In the 1970s and 1980s, there was significant litigation of these cases, including a successful class-action challenge to illegal urinalysis procedures leading to bad discharges,<sup>134</sup> and repeated suits to invalidate a regulation unlawfully imposing a statute of limitations on motions to reconsider.<sup>135</sup> Discharge upgrade litigation, however, nearly disappeared until the mid-2000s.

The absence of legal representation for veterans seeking a record correction has left the boards free to act with impunity, and, unfortunately, they have often done so. The boards make public little information about their outcomes or case-handling procedures,<sup>136</sup> and practitioners report the sort of routine violations of

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<sup>127</sup> Kathleen Gilberd, *Upgrading Less-Than-Fully-Honorable Discharges*, in THE AMERICAN VETERANS AND SERVICEMEMBERS SURVIVAL GUIDE 346, 348 (2009) (finding that the success rate for upgrade applicants who did not appear before the Air Force Discharge Review Board was only 15% compared to 45% for those who did appear); see also ADDLESTONE ET AL., *supra* note 113, at 1/3.

<sup>128</sup> ADDLESTONE ET AL., *supra* note 113, at 9/14 & n.64 (reporting on pilot program and finding that "82% of the applicants represented [by an attorney] received an upgrade in discharge").

<sup>129</sup> Fidell, *supra* note 6, at 502 ("The Army Board for Correction of Military Records conducted no live hearings in fiscal year 2012. The [Board for Correction of Naval Records, or] BCNR has not conducted one in the last twenty years. The Coast Guard board has not conducted one in the last ten years.").

<sup>130</sup> *Id.* at 502-03 ("[O]ne of the correction boards—the BCNR—is given to short-form letter rulings that are often little more than boilerplate."); *id.* at 503-05 (describing the complicated procedural history and controversy of "a case from hell").

<sup>131</sup> 10 U.S.C. § 1552(b) (2012).

<sup>132</sup> *Id.* § 1552(a)(1).

<sup>133</sup> See, e.g., *Blassingame v. Sec'y of Navy*, 811 F.2d 65, 72 (2d Cir. 1987) (holding that courts should apply APA's arbitrary and capricious standard of review).

<sup>134</sup> *Giles v. Sec'y of Army*, 627 F.2d 554, 556 (D.C. Cir. 1980).

<sup>135</sup> See, e.g., *Lipsman v. Sec'y of Army*, 335 F. Supp. 2d 48, 53-55 (D.D.C. 2004) (invalidating ABCMR regulation that unlawfully imposed a one-year statute of limitations on motions to reopen).

<sup>136</sup> Fidell, *supra* note 6, at 506 (describing effort to obtain basic board statistics).

basic notions of procedural due process and administrative law that recall horror stories of an earlier, pre-*Goldberg v. Kelly* era.<sup>137</sup> In just the small number of cases handled by the Veterans Legal Services Clinic at Yale, for instance, BCMRs have relied on secret evidence never shared with the applicant,<sup>138</sup> summarily denied applications with boilerplate language,<sup>139</sup> ignored arguments of counsel,<sup>140</sup> applied a board regulation previously enjoined as unlawful by a federal court,<sup>141</sup> rejected an application for failure to comply with an ultra vires rule not set forth in regulations,<sup>142</sup> and denied relief without a hearing in every case not remanded from the district court.

In short, in VA benefits and record correction cases—two principal areas of veterans' law practice—former service members confront specialized courts, doctrines, and practices. The consequences of veterans' law exceptionalism for the civil rights of former service members are considered next.

## II. EXCEPTIONALISM AND VA BENEFITS

This Section examines three contemporary issues in veterans benefits law and the role that veterans' exceptionalism plays in each: (1) the structure of judicial review; (2) adjudication of disability claims arising from military sexual trauma ("MST"); and (3) collective actions and the backlog of benefits appeals. Each controversy implicates important civil rights concerns, and, in each, the malignant influence of veterans' law exceptionalism is manifest.<sup>143</sup>

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<sup>137</sup> See *id.* at 503-05 (describing "case from hell" remanded seven times by district court); Izzo, *supra* note 111, at 1596-1600 (summarizing and quoting cases); see generally *Goldberg v. Kelly*, 397 U.S. 254 (1970).

<sup>138</sup> See Amended Complaint at 10, *Shepherd v. McHugh*, No. 3:11-cv-00641 (D. Conn. dismissed Nov. 17, 2013), ECF No. 51 (describing the ABCMR's reliance on secret evidence withheld from veteran and his counsel); Izzo, *supra* note 111, at 1600 (arguing that the ABCMR relied on evidence to which the applicant and his counsel had no access).

<sup>139</sup> *Cowles v. McHugh*, No. 3:13-cv-01741, 2014 U.S. Dist. LEXIS 138927, at \*33 (D. Conn. Sept. 30, 2014) (concluding that the ABCMR "simply relied upon the presumptive legitimacy" of the Army diagnosis); Amended Complaint, *supra* note 138, at 8-9 (alleging ABCMR rejected application with summary language and conclusory reasoning).

<sup>140</sup> Amended Complaint, *supra* note 138, at 10 (alleging that the ABCMR did not address several of the applicant's arguments in its denial of a discharge upgrade).

<sup>141</sup> Complaint at 9, *Dolphin v. McHugh*, No. 3:12-cv-01578 (D. Conn. Nov. 18, 2014), ECF No. 1 (challenging the ABCMR's rejection of application as time-barred under 32 C.F.R. § 581.3(g)(4)(ii)).

<sup>142</sup> Complaint at 10, *Spires v. James*, No. 3:16-cv-01905 (D. Conn. filed Nov. 18, 2016), ECF No. 1 (alleging that the ABCMR "ignored its own rules" when it returned the plaintiff's application for lack of a service number).

<sup>143</sup> These issues do not exhaust the menu of contemporary civil rights struggles involving the VA. The agency continues to lag years behind science in recognizing the disabling consequences of toxic exposure. See, e.g., *The Few, the Proud, the Forgotten v. U.S. Dep't of Veterans Affairs*, No. 3:16-cv-00647, 2017 WL 2312354, at \*18 (D. Conn. May 26, 2017).

### A. *Structure of Judicial Review*

Access to courts and to meaningful judicial review is fundamental to the civil rights of veterans. The congressional decision to establish judicial review of veterans' benefits claims was controversial in 1988,<sup>144</sup> but there has been no significant effort since then to eliminate judicial review and return to the "splendid isolation" of the prior 150 years.<sup>145</sup> Rather, the debate since 1988 has centered on the efficacy of the anomalous structure Congress created: an Article I court, constructed like an appeals court but situated like a district court beneath the U.S. Court of Appeals for the Federal Circuit. Moreover, the CAVC behaves like a trial court in important ways—deciding nearly all appeals by a single-judge panel in decisions that are not binding on other single-judge panels or even that particular judge in the future.<sup>146</sup> Unlike a district court, however, the CAVC almost never hears oral argument, denying litigants an opportunity to be heard

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(denying in large part summary judgment motion by the VA in Freedom of Information Act suit for records regarding adjudication of disability claims arising from contaminated groundwater at Camp Lejeune). There is a critical need for better access to mental health care. *VA Conducts Nation's Largest Analysis of Veteran Suicide*, U.S. DEP'T OF VETERANS AFF. (July 7, 2016, 9:56 AM), <http://www.va.gov/opa/pressrel/pressrelease.cfm?id=2801> [<https://perma.cc/YY4C-H4PX>] (discussing VA finding that twenty veterans died from suicide each day in 2014). The VA wrongfully excludes thousands of veterans with bad paper from medical or disability benefits, *see Petition for Rulemaking*, *supra* note 65, at 1, and the VA has failed to police abuse of education benefits by for-profit colleges, *see* Gardiner Harris, *Veterans Groups Seek Crackdown on Deceptive Colleges*, N.Y. TIMES, May 22, 2016, at A4.

<sup>144</sup> NICOSIA, *supra* note 55, at 299-300 (discussing campaign to reform the VA); Helfer, *supra* note 58, at 159-62 (outlining arguments made by veterans service organizations against allowing judicial review).

<sup>145</sup> Allen, *Twenty*, *supra* note 6, at 364. Nicholas Bagley has argued that "[b]ecause of the demands of judicial review, [VA] disability decisions have swelled in length and intricacy." Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1288 (2014). Bagley characterizes the establishment of judicial review for VA claims as congressional capitulation to years of judicial rulings favoring reviewability, but that is not the account contained in more detailed legislative histories. *See* Helfer, *supra* note 58, at 159-67; Ridgway, *supra* note 31, at 213-16. Nor is Bagley's claim that judicial review is a significant factor in the VA's claim backlog consistent with more comprehensive analyses of the delays in adjudication. *See* Allen, *Twenty*, *supra* note 6, at 377-78; James D. Ridgway, *The Veterans' Judicial Review Act Twenty Years Later: Confronting the New Complexities of the Veterans Benefits System*, 66 N.Y.U. ANN. SURV. AM. L. 251, 265 (2010) ("The changes brought by the VJRA have had a radical impact on the efficiency and accuracy of VA's ability to adjudicate claims.").

<sup>146</sup> 38 U.S.C. § 7254 (2012); *see* James D. Ridgway, Barton F. Stichman & Rory E. Riley, "Not Reasonably Debatable": *The Problems with Single-Judge Decisions by the Court of Appeals for Veterans Claims*, 27 STAN. L. & POL'Y REV. 1, 23-41 (2016) (reviewing 4000 single-judge opinions and finding significant variation in outcome and repeated violation of rule against single-judge panel deciding novel issue).

in person<sup>147</sup> and depriving the court of the give-and-take between counsel and the bench that aids other courts in fashioning practical solutions to otherwise paper-bound problems.

Some judges of the CAVC have questioned the need for two levels of appellate review (CAVC and Federal Circuit), suggesting that Congress should constitute the CAVC as a full-fledged Article III court, end Federal Circuit appeals, and make CAVC decisions reviewable only on certiorari to the Supreme Court.<sup>148</sup> Conversely, scholars have noted that the CAVC itself might be eliminated, channeling appeals from the BVA directly to the Federal Circuit.<sup>149</sup> At a minimum, the unusual structure of VA appeals, which can journey through four levels of review as of right, together with the widespread frustration at overwhelming delays and the high error rate on appeal, suggests that the current system warrants reform.

The most radical reform proposal in recent years has been James T. O'Reilly's suggestion that Congress eliminate the BVA and the CAVC and "replace both with the appeals process already in place at the Social Security Administration."<sup>150</sup> This involves an initial application at a local Social Security Administration ("SSA") office or online, referral of eligible claimants to a state government agency under contract with the SSA, and an opportunity for de novo review of adverse decisions by an Administrative Law Judge ("ALJ"), which by law must be held within seventy-five miles of the claimants' home.<sup>151</sup> These are non-adversarial, in-person hearings, and frequently involve unrepresented claimants submitting new evidence or arguments.<sup>152</sup> From there, a claimant may seek review by the Appeals Council—a national body—and then in the district

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<sup>147</sup> In recent years, the CAVC has held approximately twenty oral arguments annually, in fewer than 1% of the appeals docketed. See ANNUAL REPORT FY2015, *supra* note 92, at 4.

<sup>148</sup> See Allen, *Twenty*, *supra* note 6, at 399-402. Allen notes that Congress could convert the CAVC to an Article III court while retaining the role of the Federal Circuit, somewhat like the Court of International Trade (an Article III court whose decisions are subject to review in the Federal Circuit). *Id.* at 399.

<sup>149</sup> See *id.* at 404-05, 409; James T. O'Reilly, *Burying Caesar: Replacement of the Veterans Appeals Process Is Needed to Provide Fairness to Claimants*, 53 ADMIN. L. REV. 223, 243-45 (2001).

<sup>150</sup> O'Reilly, *supra* note 149, at 243. O'Reilly concludes that the CAVC has been subject to regulatory capture by government lawyers, leading to endless remands and recycling of cases. *Id.* at 249 ("An Article III judge can take or leave an agency's goodwill and affection, secure in his or her life tenure and diversity of constituencies. The smaller the universe for the Article I judge, however, the less willing might one be to challenge the vision of the world held by the Article I agency to which the judge is appended.").

<sup>151</sup> *Id.* at 244 (citing 2 HARVEY L. MCCORMICK, SOCIAL SECURITY CLAIMS AND PROCEDURE § 563 (3d ed. 1983)); see also HAROLD J. KRENT & SCOTT MORRIS, ACHIEVING GREATER CONSISTENCY IN SOCIAL SECURITY DISABILITY ADJUDICATION: AN EMPIRICAL STUDY AND SUGGESTED REFORMS 5-6 (2013).

<sup>152</sup> O'Reilly, *supra* note 149, at 244.

court in the district where the claimant resides.<sup>153</sup> Further appeal is available in the regional courts of appeals, rather than to specialized courts like the CAVC or Federal Circuit.

The SSA appeals system is widely regarded as superior to the “VA morass”<sup>154</sup> not only in efficiency but also in fairness. The “national dispersal of the ALJ hearings and of the reviewing district courts bring the adjudications closer to the individual claimant”<sup>155</sup> and conveys a “sense of due process observed in person.”<sup>156</sup> The importance of procedural justice in earning the respect and acceptance of decisions by claimants has been confirmed by substantial social science research.<sup>157</sup> O’Reilly’s proposal was a formal “merger” of the VA claims system with the SSA disability review process,<sup>158</sup> whereby initial applications for veterans benefits would still begin at a VARO, but appeals would proceed through the SSA system, first to a local SSA ALJ, then to the SSA Appeals Council, and finally to the local district court.<sup>159</sup>

Less dramatically, Michael P. Allen proposed enactment of a legislative commission to review the work of the CAVC and to consider reforms to improve processing of VA benefits claims.<sup>160</sup> Allen applauds the establishment of judicial review and credits the CAVC with developing a body of law that has brought a measure of predictability and transparency to the VA system,<sup>161</sup> as well as with increasing the quality of administrative adjudications.<sup>162</sup> Nevertheless, Allen has

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<sup>153</sup> 42 U.S.C. § 405(g) (2012); O’Reilly, *supra* note 149, at 244.

<sup>154</sup> O’Reilly, *supra* note 149, at 243 (portraying the SSA’s use of ALJ as a model) (citing 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, 40 (1994)).

<sup>155</sup> O’Reilly, *supra* note 149, at 244.

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

<sup>157</sup> See Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 297-301 (2003) (examining why society may view a procedure as fair).

<sup>158</sup> O’Reilly, *supra* note 149, at 245 (arguing for the conversion of “the unworkable mess [of VA claims] into a subset of the SSA adjudication appeals process”).

<sup>159</sup> *Id.* at 246. Allen has also noted the possible benefits of abandoning centralized review, and its attendant uniformity, in favor of regionalizing administrative appeals by the BVA, or even judicial review via district courts. Allen, *Twenty*, *supra* note 6, at 406-07 & nn.244-45. However, his proposals for regional review still depend on a single streamlined appeal to the CAVC or Federal Circuit. *Id.* at 407.

<sup>160</sup> Allen, *Twenty*, *supra* note 6, at 406-07, 407 nn.244-45.

<sup>161</sup> *Id.* at 372-73; see also Ridgway, *supra* note 145, at 265 (“[T]he VJRA brought numerous forms of transparency and accountability to bear upon [VA adjudications], which pushed towards increased complexity.”).

<sup>162</sup> Allen identifies the CAVC’s “rigorous enforcement of the statutory requirement that the Board provide adequate reasons and bases for its decisions” as especially important in this improvement. Allen, *Twenty*, *supra* note 6, at 377.



advocated for a re-examination of the system for judicial review of veterans benefits claims, emphasizing a set of modest potential improvements.<sup>163</sup>

It is easy to justify judicial review of veterans benefits claims, but it is difficult to defend the current system. Claims languish for months or years, churned in the “hamster wheel”<sup>164</sup> of appeals and remands. The CAVC rarely sits for argument, and appears to litigants more like another level of administrative review, laboring in a narrow, ghettoized world of veterans’ law. Much criticism within the veterans’ law community has focused on the four layers of review, and the particular failings of the VAROs and BVA, but this account has overlooked a broader structural problem that is familiar to federal courts scholars and a powerful manifestation of veterans’ law exceptionalism: the deficiencies of the CAVC as a specialized court.

The common justifications for a specialized court include a heightened need for uniformity, efficiency concerns, and an expectation that expertise must be applied to complex law or facts. Uniformity considerations animated the establishment of the Court of Customs Appeals, one of the country’s first specialized courts,<sup>165</sup> and played a prominent role in the creation of the Federal Circuit in 1982, to which Congress channeled all patent appeals.<sup>166</sup> Efficiency arguments suggest that a specialized court might be of value where the law or underlying facts are complex, such as in tax or patent cases, or perhaps where the cases are routine.<sup>167</sup> Finally, the complexity justification holds that in

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<sup>163</sup> *Id.* at 395-97 (suggesting commission might recommend funding more judges, permitting informal discovery, improving training for VARO adjudicators, and adopting a CAVC summary disposition rule); *see id.* at 403-04 (discussing congressional expansion of Federal Circuit appellate jurisdiction to include review of factual findings, and of the CAVC to make factual determinations, as well as codifying explicit authority for the CAVC to hear aggregate litigation).

<sup>164</sup> *See, e.g., Veterans’ Dilemma: Navigating the Appeals System for Veterans Claims: Hearing Before the Subcomm. on Disability Assistance and Mem’l Affairs of the H. Comm. on Veterans’ Affairs*, 114th Cong. 36 (2015) (statement of Bart Stichman, Joint Executive Director, National Veterans Legal Services Project).

<sup>165</sup> Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1117 (1990) (“[T]he creation of the Court of Customs Appeals in 1909 was premised in large part on the special evils of dis-uniformity in the application of customs duties.” (footnote omitted)).

<sup>166</sup> *Id.* (discussing the “coherence of a statutory scheme” as one benefit of having a specialized court such as the Federal Circuit); *see also* Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 2 & n.6 (1989) (noting variation in outcome of patent litigation by choice of forum prior to establishment of Federal Circuit).

<sup>167</sup> Ellen R. Jordan, *Specialized Courts: A Choice?*, 76 NW. U. L. REV. 745, 747 (1981) (arguing that complex areas of the law may “strain the capacity to understand of even the wisest judge” in a generalist court). *But see* Jessica M. Bungard, *The Fine Line Between Security and Liberty: The “Secret” Court Struggle to Determine the Path of Foreign*

complicated areas of the law, such as tax, or where interdisciplinary skills are necessary, such as patent cases, a specialized court may be preferable to burdening general courts with certain cases that would be time-consuming and might be poorly decided.<sup>168</sup>

On the other hand, specialized courts have received substantial criticism. First, specialized courts foster “ghettoization” that can stultify and isolate courts, litigants, and the development of the law and generate a kind of “tunnel vision.”<sup>169</sup> Critics have faulted the Federal Circuit’s patent law jurisprudence for reflecting these negative traits.<sup>170</sup> A generalist judge who adjudicates cases across multiple subject matter areas will hear arguments from a wide range of legal and social perspectives and may be better able to consider the consequences of a decision<sup>171</sup> and its coherence with developments in related areas of law.<sup>172</sup> Stephen Legomsky has explained that inter-judicial conflicts are salutary, for “[a]s courts adopt varying approaches to similar problems, new insights emerge and analyses mature.”<sup>173</sup> Relatedly, Judge Richard Posner has warned that the lower prestige of specialized courts may lead to their staffing by less qualified judges, which in turn will undermine respect for the opinions of such courts and prompt parties to pursue litigation strategies that avoid them.<sup>174</sup>

Second, there has been substantial concern about the risk of capture and bias in specialized courts. This problem may manifest in appointment and

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*Intelligence Surveillance in the Wake of September 11th*, 4 PITT. J. TECH. L. & POL’Y 1, 2 (2004) (criticizing FISA court as rubber-stamping what appear to be routine applications).

<sup>168</sup> Revesz, *supra* note 165, at 1117 (arguing that specialized courts may be more likely to produce correct decisions in complex areas of the law).

<sup>169</sup> Richard A. Posner, *Will the Federal Courts of Appeals Survive Until 1984? An Essay on Delegation and Specialization of the Judicial Function*, 56 S. CAL. L. REV. 761, 780 (1983) (discussing whether specialized courts might attract specialized yet less able lawyers).

<sup>170</sup> Dreyfuss, *supra* note 166, at 3 (outlining the arguments against specialized adjudication, including tunnel vision, increased susceptibility to capture, and vulnerability to lobbyists).

<sup>171</sup> See generally STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 5-12 (2005) (arguing that judges should consider real-world consequences of competing legal interpretations, about which they may learn from party and amicus briefing).

<sup>172</sup> Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1237-51 (1987).

<sup>173</sup> Stephen H. Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 IOWA L. REV. 1297, 1393 (1986); see Richard L. Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677, 690 (1984) (“[D]ivergent interpretations of federal law actually help the Supreme Court because they fully air issues before the Court is called upon to decide them.”).

<sup>174</sup> Posner, *supra* note 169, at 779-80 (positing that specialization may produce underqualified judges and lawyers due to the monotony of the cases and procedure).

nomination fights<sup>175</sup> and in the quality of adjudication. The capture concern is especially acute where one party appears in all cases before a specialized court and thereby develops insider knowledge and other repeat-player advantages. When the court is fixed in one location, proximate to the repeat player, the burden on non-repeat litigants and the risk of capture may be even larger.<sup>176</sup>

Third, critics warn that on appeal, generalist courts may defer to specialized courts, for reasons of complexity and efficiency, leaving the decisions of the specialty courts substantially unreviewed. This dynamic, in turn, can exacerbate the ghettoization effects, frustrate dialogue among courts and judges, and deprive a legal field of the innovation that would ordinarily arise from disparate rulings and approaches to a common set of legal questions.<sup>177</sup>

Finally, specialized courts have frequently confronted challenges to their public legitimacy, whether as a function of diminished prestige or suspicion about capture and bias.<sup>178</sup> This may frustrate the ability of the court's administrators to secure adequate resources, attract talented judges and staff, and to sustain the public respect on which all courts depend.<sup>179</sup> Forty years ago, a major analysis discouraged creation of specialized courts because they tend:

[T]o develop tunnel vision; impose judges' personal views of policy; reduce incentive for thorough and persuasive opinions; dilute or eliminate regional influence; reduce the number of opinions by generalist judges; possibly dilute the quality of appointments; and be captured by special interest groups.<sup>180</sup>

A generation later, the Judicial Conference of the United States accepted that there may be narrow circumstances in which a specialized court is warranted, but refused to endorse the establishment of new Article III specialized courts,

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<sup>175</sup> Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 331-32 (1991) (noting public choice problem intensifies when lobbying by interest groups on obscure appointments distorts judicial selection).

<sup>176</sup> *Id.* (noting that repeat litigants "possess natural advantages over occasional participants").

<sup>177</sup> Revesz, *supra* note 165, at 1157-58.

<sup>178</sup> STEPHEN H. LEGOMSKY, SPECIALIZED JUSTICE: COURTS, ADMINISTRATIVE TRIBUNALS, AND A CROSS-NATIONAL THEORY OF SPECIALIZATION 16, 28 (1990) (discussing the possibility of "clannishness" that may arise from having a specialized, closed group of attorneys and judges).

<sup>179</sup> Cf. Stephen Breyer, *Making Our Democracy Work: The Yale Lectures*, 120 YALE L.J. 1999, 2006-09 (2011) (explaining how enforcement of even celebrated decisions like *Brown v. Board of Education* and *Cooper v. Aaron* depends on their public acceptance).

<sup>180</sup> Allan N. Littman, *Restoring the Balance of Our Patent System*, 37 IDEA 545, 550 (1997).

concluding that “in most instances the well-known dangers of judicial specialization outweigh any such benefits.”<sup>181</sup>

The current structure for judicial review of veterans benefits claims confirms many of the criticisms of specialized courts. The four-level system of review, with the CAVC unable to make factual determinations and the Federal Circuit unable to review them, is cumbersome and contributes to the “hamster wheel” of churning cases.<sup>182</sup> The CAVC is isolated, often disrespected,<sup>183</sup> and barred from hearing cases outside the veterans benefits realm that would expose its judges to developments in procedural due process, administrative law, disability law, public benefits and employment law, and other related fields. The Secretary of Veterans Affairs is a party in every case before the CAVC, highlighting the risk of capture and bias. And VA benefits cases may be complicated, but they are no more complex than many other kinds of cases routinely heard in non-specialized courts, including the other classes of federal agency mass-adjudications—Social Security appeals (which are heard in district courts) and immigration cases (which proceed directly to the regional courts of appeals). Nor do VA benefits cases require the application of scientific or medical training, such as justified channeling patent appeals to the Federal Circuit<sup>184</sup>—in fact, few CAVC judges have had such specialized training.<sup>185</sup> In any event, district courts succeed in adjudicating Social Security appeals, which are quite similar to VA disability compensation claims, the large majority of CAVC cases.<sup>186</sup>

To suggest that the CAVC confirms the problems of specialized courts is not to denigrate the value of judicial review of VA benefits claims. Judicial review

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<sup>181</sup> Judicial Conference of the United States, *Long Range Plan for the Federal Courts*, 166 F.R.D. 49, 103 (1995). There is no consensus as to whether the Federal Circuit’s exclusive appellate jurisdiction in patent cases has reaped the benefits of specialization while avoiding its pitfalls. Compare LeRoy L. Kondo, *Untangling the Tangled Web: Federal Court Reform Through Specialization for Internet Law and Other High Technology Cases*, 2002 UCLA J.L. & TECH. 1, with Littman, *supra* note 180, at 552-53.

<sup>182</sup> O’Reilly, *supra* note 149, at 238.

<sup>183</sup> See Allen, *Twenty*, *supra* note 6, at 394 (discussing instances where Article III courts, the VA, and Congress have ignored or disrespected the CAVC and its decisions).

<sup>184</sup> See, e.g., Paul R. Gugliuzza, *Rethinking Federal Circuit Jurisdiction*, 100 GEO. L.J. 1437, 1445-53 (2012) (discussing patent specialization in the federal courts).

<sup>185</sup> See *About the Court: Judges*, U.S. COURT OF APPEALS FOR VETERANS’ CLAIMS, <http://www.uscourts.cavc.gov/judges.php> [<https://perma.cc/KTV9-FUMK>] (last visited Sept. 14, 2017) (listing biographies of CAVC judges).

<sup>186</sup> See James D. Ridgway, *Why So Many Remands?: A Comparative Analysis of Appellate Review by the United States Court of Appeals for Veterans Claims*, 1 VETERANS L. REV. 113, 115-16, 116 n.12 (2009) (reporting that disability compensation claims “represent over 95% of the claims that are appealed to the BVA”).

appears to have improved the quality of agency decisionmaking<sup>187</sup> and fostered greater transparency and consistency in the VA system.<sup>188</sup> The CAVC has established the field of VA benefits law and resolved many foundational legal questions.<sup>189</sup> Indeed, it has survived far longer than one of the earliest experiments with a specialized court, the Commerce Court, formed in 1910 to review decisions of the Interstate Commerce Commission and abolished three years later.<sup>190</sup>

Yet the four-tiered system of review may have exacerbated the backlog of claims.<sup>191</sup> Frustrated litigants seek to press their claims outside of the CAVC-Federal Circuit system of review,<sup>192</sup> as predicted by Judge Posner.<sup>193</sup> Moreover, the CAVC has not received widespread respect for its decisions, and signs of agency capture and bias exist.<sup>194</sup> Wounded veterans deserve better, and better models for judicial review are available.

James T. O'Reilly makes a persuasive argument for the merger of VA benefits cases with Social Security appeals, into the more highly-regarded and better-functioning Social Security system of regionalized ALJs. Michael P. Allen and Ridgway, Stichman & Riley offer a host of less radical reforms that might well reduce the delays and improve the quality of VA adjudications. Current agency and legislative proposals focus on streamlining administrative appeals, especially by prohibiting the veteran from supplementing the record on appeal.<sup>195</sup> But there is another available model, whose utility in this field has not been acknowledged: immigration appeals.

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<sup>187</sup> See Ridgway, *supra* note 145, at 265-71 (detailing how after the passage of the VJRA, grant rates by VAROs rose, grant/remand rates by the BVA rose, and disability ratings also increased).

<sup>188</sup> See Allen, *Twenty*, *supra* note 6, at 375-76 (discussing the improvements in fairness and process for veterans under the current system); O'Reilly, *supra* note 149, at 227-29.

<sup>189</sup> See, e.g., *Copeland v. Shinseki*, 26 Vet. App. 86, 89 (2012) (holding that the CAVC may invalidate a statutory provision if it is inconsistent with the Constitution); *Padgett v. Peake*, 22 Vet. App. 159, 162 (2008) (adopting Article III case or controversy requirements of standing).

<sup>190</sup> Dreyfuss, *supra* note 166, at 3 n.17.

<sup>191</sup> See O'Reilly, *supra* note 149, at 225-27.

<sup>192</sup> See *Veterans for Common Sense v. Shinseki* (*Veterans for Common Sense II*), 678 F.3d 1013, 1028-29 (9th Cir. 2012) (en banc) (holding court lacks jurisdiction over claim that "the VA's system for adjudicating veterans' eligibility for disability benefits suffers from unconscionable delays"); *Cooper-Harris v. United States*, 965 F. Supp. 2d 1139, 1141 (C.D. Cal. 2013) (invalidating a VA statute barring additional compensation to same-sex spouses as unconstitutional).

<sup>193</sup> See *supra* note 174 and accompanying text.

<sup>194</sup> See O'Reilly, *supra* note 149, at 246.

<sup>195</sup> See *Budget Request for Fiscal Year 2017: Presentation before the H. Comm. on Veterans' Affairs*, 114th Cong. 19-22 (2016) (statement of the Hon. Robert A. McDonald,

In addition to Social Security and veterans benefit cases, the third great system of federal mass-adjudications is the immigration system, which annually adjudicates hundreds of thousands of deportation cases (relabelled “removal” cases in 1996).<sup>196</sup> Like VA benefits cases, removal cases begin with a localized fact-finder, an immigration judge who sits in one of sixty immigration courts around the country. The parties develop the record and the immigration judge decides whether to order removal or grant relief. Removal cases are adversarial, with the government represented before the immigration court by a corps of experienced prosecutors, so they differ in this respect from VA benefits and Social Security cases.<sup>197</sup> But immigration courts are similar to VAROs and SSA ALJs in that the administrative record is developed locally, subject to flexible evidentiary rules,<sup>198</sup> and offers an opportunity for in-person appearances. There is also an administrative appeal in removal cases to the Board of Immigration Appeals (the “BIA”) within the Department of Justice.<sup>199</sup> Like the BVA, the BIA often decides cases in single-judge panels<sup>200</sup> and in opinions that are not binding on other judges or the board as a whole. The BIA does not sit locally but decides cases at its offices in Virginia.

The path for immigration appeals diverges from that of SSA and VA cases when it proceeds to judicial review. An immigrant may appeal an adverse BIA decision to the court of appeals,<sup>201</sup> on a petition for review and subject to familiar administrative law procedures that are only modestly adapted to the immigration context.<sup>202</sup> Thus, immigration appeals avoid the problems of specialized courts and the four-layer review of both VA and SSA cases. Immigration appeals capture the benefits of review by generalized Article III courts, without the inefficiency and delay of an extra level of review in the CAVC or district courts. The centralizing role of the BIA reclaims some of the uniformity that is lost by

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Secretary of Veterans Affairs) (describing the VA’s proposed “Simplified Appeals Initiative”).

<sup>196</sup> See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546.

<sup>197</sup> But see Allen, *supra* note 62, at 526-28 (noting that VA system is increasingly adversarial, even if deemed otherwise by courts and Congress).

<sup>198</sup> See, e.g., Baliza v. INS, 709 F.2d 1231, 1233 (9th Cir. 1983) (finding that administrative proceedings are not bound by strict rules of evidence and thus federal hearsay rules did not apply); Matter of Wadud, 19 I. & N. Dec. 182, 188 (B.I.A. 1984) (holding that the rules of evidence do not apply in immigration court).

<sup>199</sup> 8 C.F.R. § 1003.1(a)(1) (2016).

<sup>200</sup> *Id.* § 1003.1(e) (assigning many cases to single Board member for disposition).

<sup>201</sup> 8 U.S.C. § 1252 (2012).

<sup>202</sup> *Id.* Immigration appeals are generally subject to the Hobbs Act (codified at 18 U.S.C. § 1951 (2012)) and APA-type review, modified in part by the Immigration and Nationality Act, 8 U.S.C. §§ 1101-1537.

review in the courts of appeal, while permitting vital inter-circuit debate and development of the law.

One might object that, unlike immigration cases, VA benefits cases are too numerous to require a unique system of review, but this is not entirely accurate. There are more VA cases at the VARO level (more than one million annual filings in recent years) than there are new removal cases filed in the immigration courts (approximately three hundred thousand immigration court cases filed annually since fiscal year 2011).<sup>203</sup> But the appeal rate in immigration cases is far higher, yielding comparable numbers at the administrative appeal level (40,000-50,000 BVA annual appeals, as compared to approximately 30,000 BIA appeals), and larger numbers in the federal courts (3000-4500 CAVC annual appeals and about 100 appeals to the Federal Circuit, as compared to approximately 6000 immigration petitions for review to the courts of appeals).<sup>204</sup> In other words, the number of administrative appeals is roughly comparable in VA benefits and immigration cases, and, in fact, more immigrants than veterans seek judicial review each year. Thus, volume alone is not a ground to distinguish administrative or judicial review of immigration and VA benefits cases.

Separately, one might contend that 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. Yet these features do not distinguish VA cases from Social Security cases, which proceed through localized administrative review directly into an Article III court on appeal. Immigration cases also arise under a complicated statute, implemented through a morass of regulations, and frequently turn on challenging factual disputes about social or political conditions in a foreign country, which federal judges may struggle to assess. Yet it cannot be seriously argued that Article III judges lack the capacity to adjudicate VA benefits cases because they are of a greater complexity than immigration or Social Security cases, let alone the array of difficult criminal, commercial, and other suits on their docket.

Eliminating the CAVC and channeling BVA appeals to the courts of appeals would achieve many of the benefits of de-specialization. It would enhance the legitimacy of VA decisions and help integrate VA cases within the mainstream of U.S. legal developments in due process, administrative law, and disability law. It would ease the burden on veterans or their counsel of traveling to Washington, D.C., to be heard before the CAVC. It would also reduce the risk of capture and bias. Nevertheless, it would not appreciably add to the dockets of

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<sup>203</sup> EXEC. OFFICE FOR IMMIGRATION REVIEW OF U.S. DEP'T OF JUSTICE, FY 2015 STATISTICS YEARBOOK A2, Q2 (2016).

<sup>204</sup> See *U.S. Courts of Appeals—Judicial Business 2015*, U.S. COURTS, <http://www.uscourts.gov/statistics-reports/us-courts-appeals-judicial-business-2015> [<https://perma.cc/LJX7-W7NK>] (last visited Sept. 14, 2017) (stating that 5927 out of 7141 agency appeals, or 83%, were from the BIA).

the courts of appeals. About half of the cases filed with the CAVC are resolved through the court's mediation program,<sup>205</sup> a process capable of incorporation into the existing mediation programs of the regional courts of appeals.<sup>206</sup> Most importantly, it might reduce the churning of veterans benefits appeals, especially if the appellate jurisdiction of the courts of appeals in VA benefits cases were commensurate with the ordinary review of agency adjudications, such that the courts of appeals would more often reach the merits of an appeal.<sup>207</sup>

A recent episode in the history of specialized courts confirms many of these points. In 1999 and 2002, the BIA implemented reforms to address the backlog of immigration appeals. These reforms involved permitting adjudication by single-judge panels, rather than the traditional three-judge panels by which the BIA had previously acted, and also expanded use of summary affirmances.<sup>208</sup> Predictably, these reforms led to a radical decline in the quality of BIA decision-making,<sup>209</sup> and prompted an enormous growth in the number of petitions for review in the U.S. courts of appeals.<sup>210</sup> Concerned that immigration appeals were swamping the dockets of the regional courts of appeal, in late 2005, Arlen Specter, then chair of the Senate Judiciary Committee, proposed to redirect all immigration appeals to the Federal Circuit.<sup>211</sup> Of course, the Chief Judge of the Federal Circuit expressed concern,<sup>212</sup> but more surprisingly, and despite the

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<sup>205</sup> See ANNUAL REPORT FY2013, *supra* note 92, at 1; Jennifer A. Dowd, *A Peek Inside . . . CAVC's Central Legal Staff*, VETERANS L.J., Summer 2013, at 8 ("Since 2008 . . . the [telephone conference and mediation] program has resulted in over 50% of represented cases being disposed of without resorting to judicial resources.").

<sup>206</sup> See, e.g., Robert A. Katzmman, *Mediation (CAMP): A Message from the Chief Judge*, U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT, [http://www.ca2.uscourts.gov/staff\\_attorneys/mediation.html](http://www.ca2.uscourts.gov/staff_attorneys/mediation.html) [<https://perma.cc/LNC9-5TFJ>] (last visited Sept. 14, 2017).

<sup>207</sup> See Allen, *supra* note 62, at 490 (noting that the Federal Circuit may not review factual determinations, even for clear error or substantial evidence).

<sup>208</sup> See Aaron Holland, *Developments in the Judicial Branch: New BIA Rules Lead to Skyrocketing Rate of Appeal*, 19 GEO. IMMIGR. L.J. 615, 615-16 (2005); Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 375 (2006).

<sup>209</sup> See, e.g., Benslimane v. Gonzales, 430 F.3d 828, 829-30 (7th Cir. 2005) (criticizing the poor quality of BIA decisions and observing that the Seventh Circuit has reversed approximately 40% of cases in recent years).

<sup>210</sup> Immigration appeals rose from 3% of U.S. Courts of Appeals cases in 2001 to 15% by 2003, and in the Second and Ninth Circuits, to more than 30% of all appeals. Stanley Mailman & Stephen Yale-Loehr, *Immigration Appeals Overwhelm Federal Courts*, N.Y.L.J. (Dec. 27, 2004), <http://www.newyorklawjournal.com/id=900005420783/Immigration-Law?slreturn=20170513230235> [<https://perma.cc/324J-YP32>].

<sup>211</sup> See S. COMM. ON THE JUDICIARY, ACTIVITIES REPORT, S. REP. NO. 109-369, at 29-31 (2006).

<sup>212</sup> See *Immigration Litigation Reduction: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 132-39 (2006) (statement of Paul R. Michel, C.J., U.S. Court of Appeals for the Federal Circuit).



temptation to reduce their own workload, leading appellate judges such as Judge Posner also opposed the change.<sup>213</sup> The proposal to channel immigration cases to a specialized court received a public hearing, but did not advance.<sup>214</sup>

In short, judicial review has had a beneficial impact on the quality and transparency of adjudications.<sup>215</sup> But the convoluted structure enacted by Congress does not serve veterans. Channeling review to the CAVC and Federal Circuit, twin specialized courts that entrench an unsalutary veterans' exceptionalism, delays claims adjudication and ill serves disabled veterans.

#### B. *Treatment of Military Sexual Assault Claims*

Rape, sexual assault, and sexual harassment are grave problems in the military and one of the most urgent civil rights struggles among veterans. Recent media

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<sup>213</sup> *Id.* at 168 (statement of Richard Posner, Circuit J., U.S. Court of Appeals for the Seventh Circuit); see Rachel L. Swarns, *In Bills' Small Print, Critics See a Threat to Immigration*, N.Y. TIMES, Mar. 25, 2006, at A11 (discussing Posner's opposition to the bill because the Federal Circuit judges would be "overwhelmed" by the higher caseload).

<sup>214</sup> My students and I submitted written testimony in opposition to this proposal. Immigration Litigation Reduction, *supra* note 212, at 115-31 (statement of Doris Meissner, Muzaffar A. Chishti & Michael J. Wishnie, Migration Policy Institute). Of other sources cited in this article, students working under my supervision have litigated the following cases: *Serv. Women's Action Network v. Sec'y of Veterans Affairs*, 815 F.3d 1369 (Fed. Cir. 2016); *The Few, the Proud, the Forgotten v. U.S. Dep't of Veterans Affairs*, No. 3:16-cv-00647, 2017 WL 2312354 (D. Conn. May 26, 2017); *Bradley v. Stackley*, No. 3:17-cv-00495 (D. Conn. filed Mar. 27, 2017); *Kennedy v. Fanning*, No. 3:16-cv-02010 (D. Conn. filed Dec. 8, 2016); *Spires v. James*, No. 3:16-cv-01905 (D. Conn. ordered Jan. 20, 2017); *Dolphin v. McHugh*, No. 3:12-cv-01578 (D. Conn. Nov. 18, 2014); *Monk v. Mabus*, No. 3:14-cv-00260 (D. Conn. Nov. 18, 2014); *Cowles v. McHugh*, No. 3:13-cv-01741, U.S. Dist. LEXIS 138927 (D. Conn. Sept. 30, 2014); *Shepherd v. McHugh*, No. 3:11-cv-00641 (D. Conn. dismissed Nov. 7, 2013); *Viet. Veterans of Am. Conn. Greater Hartford Chapter 120 v. Dep't of Homeland Sec.*, 8 F. Supp. 3d 188 (D. Conn. 2014); *Viet. Veterans of Am. Conn. Greater Hartford Chapter 120 v. U.S. Dep't of Def.*, 10 F. Supp. 3d 245 (D. Conn. 2014); *Serv. Women's Action Network v. Dep't of Def. (SWAN II)*, 888 F. Supp. 2d 282 (D. Conn. 2012); *Serv. Women's Action Network v. Dep't of Def. (SWAN I)*, 888 F. Supp. 2d 231 (D. Conn. 2012); and *Monk v. Shulkin*, 855 F.3d 1312 (Fed. Cir. 2017). Students under my supervision have also authored the following petition, reports, and manual: Ader et al., *supra* note 110; Boghossian et al., *supra* note 110; Conn. Veterans Legal Ctr., *supra* note 105; Sidibe & Unger, *infra* note 370; *Serv. Women's Action Network & ACLU*, *infra* note 220; and *Serv. Women's Action Network & Viet. Veterans of Am.*, *infra* note 262.

<sup>215</sup> See Allen, *Twenty*, *supra* note 6, at 375-76 (discussing fairness and due process provided by the VA); Ridgway, *supra* note 145, at 265-71 (discussing changes in efficiency and accuracy since the passage of the VJRA); cf. Bagley, *supra* note 145, at 1320 (questioning values served by presumption of judicial review of agency actions).

scrutiny,<sup>216</sup> lawsuits,<sup>217</sup> congressional hearings,<sup>218</sup> and direct action<sup>219</sup> have focused public attention on this long-standing feature of military service. Violent sexual attacks by one service member against another “threaten the strength, readiness, and morale of the military, undermine national security, and have devastating personal effects on survivors and their families.”<sup>220</sup> Here too, veterans’ exceptionalism undermines the interests of former service members.

Military sexual violence is pervasive. One study estimated that one in three service women is raped during military service,<sup>221</sup> and another found that 43% of women in the military suffered either a rape or an attempted rape.<sup>222</sup> Of veterans who seek VA health care, one in four women and one in a hundred men

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<sup>216</sup> See, e.g., Ed O’Keefe, *Could Congress Have Changed the Outcome of Two High Profile Cases of Military Sexual Assault? Maybe*, WASH. POST: THE FIX (Mar. 24, 2014, 11:12 AM), [https://www.washingtonpost.com/news/the-fix/wp/2014/03/24/could-congress-have-changed-the-outcome-of-two-high-profile-cases-of-military-sexual-assault-maybe/?utm\\_term=.61074332355d](https://www.washingtonpost.com/news/the-fix/wp/2014/03/24/could-congress-have-changed-the-outcome-of-two-high-profile-cases-of-military-sexual-assault-maybe/?utm_term=.61074332355d) [<https://perma.cc/85P3-2PFB>] (discussing changes to how the military handles sexual assault cases); Jennifer Steinhauer, *Reports of Military Sexual Assault Rise Sharply*, N.Y. TIMES, Nov. 7, 2013, at A24 (reporting on the rapid increase of sexual assault in the military).

<sup>217</sup> See *Klay v. Panetta*, 758 F.3d 369 (D.C. Cir. 2014) (dismissing tort suit by survivors of military sexual violence); *Cioca v. Rumsfeld*, 720 F.3d 505, 506 (4th Cir. 2013) (same); *Serv. Women’s Action Network v. Dep’t of Def. (SWAN I)*, 888 F. Supp. 2d 231 (D. Conn. 2012) (denying in substantial part government motion for summary judgment in Freedom of Information Act litigation for MST records); Complaint at 1, *Bradley v. Stackley*, No. 3:17-cv-00495 (D. Conn. filed Mar. 27, 2017), ECF No. 1 (alleging retaliation against a Navy veteran who reported sexual harassment).

<sup>218</sup> See, e.g., *The Relationships Between Military Sexual Assault, Post-Traumatic Stress Disorder and Suicide, and on Department of Defense and Department of Veterans Affairs Medical Treatment and Management of Victims of Sexual Trauma: Hearing Before Subcomm. on Pers. of the S. Comm. on Armed Serv.*, 113th Cong. (2014).

<sup>219</sup> See, e.g., Greg Jacob, *Telling the Truth and Demanding Justice*, HUFFINGTON POST: THE BLOG (May 5, 2012, 12:10 PM), [http://www.huffingtonpost.com/greg-jacob/telling-the-truth-and-demanding-justice\\_b\\_1498680.html](http://www.huffingtonpost.com/greg-jacob/telling-the-truth-and-demanding-justice_b_1498680.html) [<https://perma.cc/2JTY-FJ3V>] (reporting on the Truth and Justice Summit); TRUTH & JUST. SUMMIT, <http://truthandjusticesummit.org/> [<https://perma.cc/V57C-4LTV>] (last visited Sept. 14, 2017) (describing a meeting that provides MST survivors and their families with “the opportunity to share their experiences with congress members, policy experts and one another”).

<sup>220</sup> SERV. WOMEN’S ACTION NETWORK & ACLU, *BATTLE FOR BENEFITS: VA DISCRIMINATION AGAINST SURVIVORS OF MILITARY SEXUAL TRAUMA 1* (2013) [hereinafter *BATTLE FOR BENEFITS*].

<sup>221</sup> Anne G. Sadler et al., *Factors Associated with Women’s Risk of Rape in the Military Environment*, 43 AM. J. INDUS. MED. 262, 266 (2003), as amended by 44 AM. J. INDUS. MED. 110 (2003).

<sup>222</sup> Alan Fontana & Robert Rosenheck, *Focus on Women: Duty-Related and Sexual Stress in the Etiology of PTSD Among Women Veterans Who Seek Treatment*, 49 PSYCHIATRIC SERVS. 658, 658 (1998).

self-report an experience of military sexual trauma.<sup>223</sup> Of all veterans, more than half a million have survived MST.<sup>224</sup> And many suffer repeated attacks—37% of female veterans who were raped in service reported at least two rapes, and 14% reported a gang rape.<sup>225</sup> MST is vastly under-reported, but the United States Department of Defense (the “DoD”) estimates that there were approximately 20,300 sexual assaults in service during fiscal year 2014.<sup>226</sup>

Military sexual violence is also highly gendered. The number of total MST victims is approximately equally balanced between men and women,<sup>227</sup> but because men vastly outnumber women in service,<sup>228</sup> this reflects a disproportionate number of sexual attacks against women. Female service members who experience MST are at a higher risk of developing a mental health condition than veterans overall, and are more likely to do so than men who experience MST.<sup>229</sup>

Sexual violence in the military is often especially devastating. Survivors stationed abroad or on bases far from home are isolated from family and friends who, in a civilian setting, may provide critical support and aid. In addition, many survivors experience an attack as multiple betrayals, in light of the military’s stated concern for command hierarchy and unit cohesion, and they are discouraged from filing formal reports for fear of professional and personal

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<sup>223</sup> U.S. DEP’T OF VETERANS’ AFFAIRS, MILITARY SEXUAL TRAUMA 1 (2015), [http://www.mentalhealth.va.gov/docs/mst\\_general\\_factsheet.pdf](http://www.mentalhealth.va.gov/docs/mst_general_factsheet.pdf) [https://perma.cc/8RJA-2D3V].

<sup>224</sup> *Invisible Wounds: Examining the Disability Compensation Benefits Process for Victims of Military Sexual Trauma: Hearing Before the Subcomm. on Disability Assistance and Mem’l Affairs of the H. Comm. on Veterans’ Affairs*, 112th Cong. 44 (2012) (statement of Hon. Jon Runyan, Chairman, Subcomm. on Disability Assistance and Mem’l Affairs).

<sup>225</sup> Sadler et al., *supra* note 221, at 266.

<sup>226</sup> RAND CORP., SEXUAL ASSAULT AND SEXUAL HARASSMENT IN THE U.S. MILITARY: VOLUME 2. ESTIMATES FOR DEPARTMENT OF DEFENSE SERVICE MEMBERS FROM THE 2014 RAND MILITARY WORKPLACE STUDY 9 (Andrew R. Morral, Kristie L. Gore & Terry L. Schell eds., 2015) (“Our best estimate in this range is that 20,300 active-component service members were sexually assaulted in the past year, out of 1,317,561 active-component members.” (footnote omitted)).

<sup>227</sup> *Id.* (“The estimated rate of sexual assault varied significantly by gender: fewer than 1 in 100 men but approximately 1 in 20 women, resulting in an estimated 10,600 servicemen and 9,600 servicewomen who experienced a sexual assault in the past year.”).

<sup>228</sup> Approximately 10% of veterans are women. U.S. DEP’T OF VETERANS AFFAIRS, FACT SHEET: WOMEN VETERANS POPULATION (2016), <http://www.va.gov/womenvet/docs/WomenVeteransPopulationFactSheet.pdf> [https://perma.cc/XWC5-YX4Z].

<sup>229</sup> U.S. Dep’t of Veterans Affairs, *VA Screenings Yield Data on Military Sexual Trauma*, VA RES. CURRENTS, Nov.-Dec. 2008, at 5, [http://www.research.va.gov/resources/pubs/docs/va\\_research\\_currents\\_nov-dec\\_08.pdf](http://www.research.va.gov/resources/pubs/docs/va_research_currents_nov-dec_08.pdf) [https://perma.cc/CW4L-6QPT].

retaliation.<sup>230</sup> Rape is the trauma “most highly correlated” with development of PTSD.<sup>231</sup>

In response, survivors of military sexual violence have led one of the most important veterans’ mobilizations of recent years. Individual veterans and new organizations have demanded reforms to the military justice systems<sup>232</sup> and to the VA process of adjudicating MST-based claims.<sup>233</sup> The campaign by former service members for recognition by VA of their in-service injuries presents the second set of emerging civil rights concerns for veterans today.<sup>234</sup>

While some of the public debate has centered on efforts to ensure more vigorous investigation, prosecution, and punishment of service members who commit sexual violence, the recent scrutiny of MST poses a set of challenges for the VA as well.<sup>235</sup> VA data disclosed in settlements of Freedom of Information Act (“FOIA”) litigation<sup>236</sup> reveals multiple forms of discrimination in benefits claims premised on

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<sup>230</sup> Alina Surís et al., *Mental Health, Quality of Life, and Health Functioning in Women Veterans: Differential Outcomes Associated with Military and Civilian Sexual Assault*, 22 J. INTERPERSONAL VIOLENCE 179, 193 (2007) (explaining that “the unit cohesion that usually provides a protective barrier in the military setting may not be available to a woman who has been assaulted by another member of the unit”); see also HRW, *Booted*, *supra* note 107 (discussing the ramifications of sexual assault in the military).

<sup>231</sup> Deborah Yaeger et al., *DSM-IV Diagnosed Posttraumatic Stress Disorder in Women Veterans With and Without Military Sexual Trauma*, 21 J. GEN. INTERNAL MED. S65, S65 (2006).

<sup>232</sup> See, e.g., Anu Bhagwati & John Rowan, Letter to the Editor, *Sexual Abuse in the Military*, N.Y. TIMES, Nov. 6, 2013, at A32.

<sup>233</sup> The VA defines MST as “psychological trauma, which . . . resulted from a physical assault of a sexual nature, battery of a sexual nature, or sexual harassment which occurred while the veteran was serving on active duty, active duty for training, or inactive duty training.” 38 U.S.C. § 1720D(a)(1) (Supp. II 2015).

<sup>234</sup> There has been almost no attention paid to these issues in legal scholarship. *But see* Kaylee R. Gum, *Military Sexual Trauma and Department of Veterans Affairs Disability Compensation for PTSD: Barriers, Evidentiary Burdens and Potential Remedies*, 22 WM. & MARY J. WOMEN & L. 689, 689-90 (2016) (“Reforms to reporting and disciplinary procedures in the military could increase the number of individuals who choose to report MST incidents, and make it easier for survivors to obtain benefits for PTSD and other mental disabilities associated with MST.”); Brianne Ogilvie & Emily Tamlyn, *Coming Full Circle: How VBA Can Complement Recent Changes in DoD and VHA Policy Regarding Military Sexual Trauma*, 4 VETERANS L. REV. 1, 1 (2012) (discussing the “unique ‘double traumas’ of war and sexual assault” that can lead to PTSD in female veterans).

<sup>235</sup> Ogilvie & Tamlyn, *supra* note 234, at 2 (“[V]eterans applying compensation benefits for posttraumatic stress disorder (PTSD) based on military sexual trauma (MST) have and will continue to confront a looming evidentiary problem when establishing their stressors.” (footnotes omitted)).

<sup>236</sup> *Serv. Women’s Action Network v. Dep’t of Def. (SWAN II)*, 888 F. Supp. 2d 282 (D. Conn. 2012); *Serv. Women’s Action Network v. Dep’t of Def. (SWAN I)*, 888 F. Supp. 2d 231 (D. Conn. 2012).

MST. First, the VA denies PTSD claims in which the veteran alleges that the stressor was military sexual violence at a far greater rate than it denies PTSD claims in which the veteran alleges any other stressor.<sup>237</sup> In each year from 2008 to 2012, the VA grant rate for MST-related PTSD claims was 16.5 to 29.6 percentage points lower than the non-MST-related PTSD grant rate.<sup>238</sup> Because the PTSD claims of women veterans are much more likely to be attributable to MST than the PTSD claims of male veterans, the low grant rates for MST-related PTSD claims disproportionately impact women.<sup>239</sup>

Second, within the population of MST-related PTSD claims, the VA is far more likely to grant benefits for female veterans than for male veterans. From 2008 to 2012, there was a substantial gap between male and female veterans in the grant rate for MST-related PTSD claims,<sup>240</sup> and there was also a significantly lower grant rate for male veterans seeking benefits for MST-related PTSD than for PTSD based on other stressors.<sup>241</sup> In other words, while the VA's reluctance to grant benefits to veterans seeking help for MST-related PTSD has a disparate impact on female veterans within the population of sexual violence survivors, the VA also appears to discriminate against male veterans by denying their claims at a higher rate than it denies those submitted by women.

Third, VA treatment of MST-related PTSD claims varies wildly according to which local office is making the determination. In 2012, of the VAROs that decided forty or more MST-related PTSD claims, the treatment rate ranged from

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<sup>237</sup> BATTLE FOR BENEFITS, *supra* note 220, at 1.

<sup>238</sup> *Id.* at 5 fig.1; see Editorial, *Justice for Women Veterans*, N.Y. TIMES, Sept. 12, 2011, at A26 (noting the significant gap in grant rates for MST-related PTSD claims and all other PTSD claims, based on SWAN FOIA data). This gap does not appear when considering MST-related claims for major depressive or anxiety disorders, the next most likely diagnoses for a sexual violence survivor with a mental health disorder. BATTLE FOR BENEFITS, *supra* note 220, at 5-6 figs.2 & 4. MST-related claims for these diagnoses are far less numerous. *Id.* at 4.

<sup>239</sup> BATTLE FOR BENEFITS, *supra* note 220, at 4 (showing that for 2008-2012, female veterans submitted 66.1% of MST-related PTSD claims but only 4.6% of all PTSD claims); *id.* at 8 (showing that for 2008-2012, MST-based claims represented 19.2 to 39.9% of all PTSD claims submitted by female veterans). In response to the release of BATTLE FOR BENEFITS, the VA made public data on MST-related claims for fiscal year 2013 alleging a narrowing gap between MST-related PTSD claims and other PTSD claims. See VETERANS BENEFITS ADMIN., FACT SHEET: PTSD DUE TO MILITARY SEXUAL TRAUMA (MST) (2013). This was the very same class of data the VA had fought for years in litigation to withhold from the public. See *SWAN II*, 888 F. Supp. 2d at 282-83 (requesting records related to sexual assault, sexual harassment, and domestic violence within the military under FOIA); *SWAN I*, 888 F. Supp. 2d at 237-38 (seeking release of records from the DoD).

<sup>240</sup> BATTLE FOR BENEFITS, *supra* note 220, at 7-8 figs.5 & 6.

<sup>241</sup> *Id.* at 7 fig.5 (demonstrating that the grant rates for MST-related PTSD claims were on average 29.6 percentage points lower than the grant rates for other PTSD claims between fiscal years 2008 and 2012).

87.5% (Los Angeles) to 25.8% (St. Paul).<sup>242</sup> There were also broad discrepancies within some VAROs in their treatment of MST-related PTSD claims and all other PTSD claims.<sup>243</sup> This geographic distribution suggests that more important than the evidence marshaled by a veteran seeking PTSD based on sexual violence may be the happenstance of where that veteran resides.

The VA has responded to these discrepancies by revamping its training programs and its internal management of MST claims.<sup>244</sup> These internal agency measures have failed to eliminate the disparate treatment of MST-related PTSD claims, however,<sup>245</sup> and the plain language of the VA regulations continues to discriminate in the evidentiary burden imposed on veterans with MST caused PTSD and veterans disabled by PTSD arising from other stressors.<sup>246</sup> As a result, it remains the case that veterans who survive military sexual violence confront significant barriers to accessing VA benefits. There is also substantial evidence of arbitrariness in outcomes based on geography.<sup>247</sup> Overall, the VA's mistreatment of sexual assault survivors raises legal issues that are likely to engage the agency, advocates, and courts in the coming years, and pressure the continuing veterans' law exceptionalism.

The first issue concerns gender discrimination. As noted, the VA's low grant rate for MST-related PTSD has a disparate impact on female veterans, and within the population of MST claimants, also reflects discrimination against male veterans. Title VI of the Civil Rights Act of 1964 prohibits discrimination based on race, color, and national origin in federal programs, but not based on

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<sup>242</sup> *Id.* at app. at A-12 to A-15.

<sup>243</sup> *Id.* at 9-11 (listing VAROs that had the lowest grant rates for MST-related PTSD disability benefits).

<sup>244</sup> *Serv. Women's Action Network v. Sec'y of Veterans Affairs*, 815 F.3d 1369, 1375-76 (Fed. Cir. 2016) (observing that VA retraining programs and designation of MST specialist in VAROs have narrowed disparity in approval rates of MST-related PTSD claims and all PTSD claims).

<sup>245</sup> *Id.* (noting a grant rate of 49% of MST-based PTSD claims as opposed to 55% for all PTSD claims); *see id.* at 1379 (Wallach, J., dissenting) (concluding that the VA's improved training and outreach do not justify or remedy the different evidentiary standards required to receive benefits for MST-based PTSD and other forms of PTSD).

<sup>246</sup> *See id.* at 1379 (Wallach, J., dissenting) (concluding that the Secretary failed to provide a reasoned explanation for "maintenance of *different evidentiary standards* for PTSD claims resulting from MST, and PTSD claims resulting from other stressors"). *Compare* 38 C.F.R. § 3.304(f)(1)-(4) (2016) (stating that veteran's lay testimony is sufficient to establish occurrence of in-service stressor for PTSD based on combat and in other specified circumstances), *with id.* § 3.304(f)(5) (stating that veteran's lay testimony is not sufficient to establish occurrence of in-service stressor for PTSD based on "personal assault," which includes MST).

<sup>247</sup> *See* BATTLE FOR BENEFITS, *supra* note 220, at 12 ("At many offices, . . . the grant rates have risen and fallen according to no discernible patterns over the five years in the dataset.").

sex or gender,<sup>248</sup> and there is no other general statutory bar on sex discrimination in federal programs.<sup>249</sup> Nor is there any regulation or executive order that independently prohibits discrimination based on sex in federal programs,<sup>250</sup> nor one specific to the VA. Nevertheless, the disparate treatment of female veterans suffering from PTSD, and the discrimination between male and female veterans who seek disability compensation based on sexual violence, cannot be squared with the Constitution's commitment to equal treatment under law.<sup>251</sup> In a recent rulemaking challenge to the VA's adjudication of MST claims, the Federal Circuit rejected a constitutional sex discrimination claim for lack of evidence of intentional discrimination.<sup>252</sup> The court's decision, and the Secretary's refusal to engage in a rulemaking, may channel legal challenges by MST survivors to the CAVC<sup>253</sup> or to a constitutional challenge in the district court.<sup>254</sup>

Second, the longstanding refusal of the VA to recognize MST-related PTSD claims may reflect a form of disability discrimination—discrimination against the sub-class of veterans suffering PTSD whose injury is attributable to military sexual violence. Historically, the VA has been skeptical of, and even hostile to, PTSD as a medical diagnosis, and for years rejected disability benefits claims on this basis.<sup>255</sup> Some of this attitude, no doubt, reflected the antagonism toward

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<sup>248</sup> 42 U.S.C. § 2000d (2012).

<sup>249</sup> Title VII of the Civil Rights Act of 1964 prohibits discrimination based on sex in employment. *Id.* § 2000e-2(a)(1). Title IX bars discrimination based on sex in educational programs. 20 U.S.C. § 1681 (2012). Neither of these statutes, however, reaches general federal programs such as VA benefits.

<sup>250</sup> See Exec. Order No. 12731 § 101(m), 55 Fed. Reg. 42547, 42548 (Oct. 19, 1990) (requiring federal employees to comply with existing anti-discrimination statutes, including those prohibiting sex discrimination), *reprinted as amended in* 5 C.F.R. § 2635.101 (2016).

<sup>251</sup> See *United States v. Virginia*, 518 U.S. 515, 555 (1996) (holding discrimination based on sex in state military academy subject to heightened scrutiny under equal protection principles). *But see* *Washington v. Davis*, 426 U.S. 229, 239 (1976) (requiring proof of discriminatory intent as element of equal protection claim).

<sup>252</sup> *Serv. Women's Action Network v. Sec'y of Veterans Affairs*, 815 F.3d 1369, 1377-78 (finding evidence insufficient to establish the Secretary had a discriminatory motive when denying the petition).

<sup>253</sup> The lack of discovery in veterans benefits cases may complicate litigation of a sex discrimination claim before the CAVC. See *Veterans for Common Sense v. Shinseki* (*Veterans for Common Sense II*), 678 F.3d 1013, 1035-36 (9th Cir. 2012) (en banc) (holding that procedural due process does not require "the general right of discovery, including the power to subpoena witnesses and documents [or] the ability to examine and cross-examine witnesses").

<sup>254</sup> See *Johnson v. Robison*, 415 U.S. 361, 366-74 (1974) (holding that statutory preclusion of judicial review of veteran benefits claims cannot bar constitutional challenges); *Veterans for Common Sense II*, 678 F.3d at 1033-35 (concluding that the district court has jurisdiction over due process challenge to VARO procedures).

<sup>255</sup> Ridgway, *supra* note 31, at 197-200.

the claims and needs of the Vietnam generation, who had to struggle mightily to establish that the signature injuries of the Vietnam War—Agent Orange illnesses and PTSD—were “real” wounds.<sup>256</sup> Even though the VA now formally accepts PTSD as a legitimate mental health disorder, some VA adjudicators retain a residue of this hostility.

The origins of VA antagonism to PTSD aside, unlike sex discrimination, there is a broad statutory prohibition on disability discrimination in federal programs, pursuant to section 504 of the Rehabilitation Act.<sup>257</sup> Litigation under the Rehabilitation Act may test the lawfulness of VA discrimination against a sub-class of veterans with PTSD, and, while such a suit would face some doctrinal obstacles,<sup>258</sup> these are not insurmountable. The equal protection component of the Fifth Amendment Due Process Clause also prohibits federal discrimination based on disability.<sup>259</sup> Thus, the VA is likely to be called upon to justify its disparate treatment of MST-related PTSD claimants, both in practice and on the face of its regulations, in light of statutory and constitutional prohibitions on disability discrimination.

Third, veterans and their advocates have mobilized to seek specific VA procedural reforms to redress the disparate treatment of MST claimants relative to other former service members suffering from PTSD. In congressional hearings,<sup>260</sup> proposed legislation,<sup>261</sup> and a formal rulemaking petition submitted to the VA in 2013,<sup>262</sup> advocates have sought to revise the evidentiary standards and case-handling procedures used by the VA in adjudicating MST-related

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<sup>256</sup> *Id.* at 197-212.

<sup>257</sup> 29 U.S.C. § 794(a) (2012) (“No otherwise qualified individuals with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . .”).

<sup>258</sup> For instance, section 504 prohibits only discrimination based “solely” on disability, and MST-related PTSD is not a disability, as there is no medical diagnosis for this sub-class of PTSD. *Id.*

<sup>259</sup> *E.g.*, Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 1006-07 (2002) (explaining that disability discrimination is “presumptively invalid” under the Fifth Amendment Due Process Clause).

<sup>260</sup> *Legislative Hearing on H.R. 569, H.R. 570, H.R. 602, H.R. 671, H.R. 679, H.R. 733, H.R. 894 and H.R. 1405 Before the Subcomm. on Disability Assistance and Mem'l Affairs of the H. Comm. on Veterans' Affairs*, 113th Cong. 69-70 (2013) (statement of National Organization of Veterans' Advocates).

<sup>261</sup> Ruth Moore Act of 2013, H.R. 671, 113th Cong. § 2; Ruth Moore Act of 2013, S. 294, 113th Cong. § 2.

<sup>262</sup> SERV. WOMEN'S ACTION NETWORK & VIET. VETERANS OF AM., PETITION FOR RULEMAKING TO PROMULGATE REGULATIONS GOVERNING SERVICE-CONNECTION FOR MENTAL HEALTH DISABILITIES FROM MILITARY SEXUAL ASSAULT 42-58 (2013).



claims.<sup>263</sup> In particular, advocates have pressed for the recognition of a rebuttable evidentiary presumption in MST-related claims, similar to presumptions already reflected in VA regulations. These include presumptions for prisoners-of-war,<sup>264</sup> combat-related PTSD claims,<sup>265</sup> noncombat PTSD based on “fear of hostile military or terrorist activity,”<sup>266</sup> exposure to Agent Orange and other herbicides,<sup>267</sup> radiation-exposed service members,<sup>268</sup> and service-connection for various illnesses caused by Agent Orange.<sup>269</sup> Indeed, in announcing the promulgation of the new combat-PTSD presumption, President Obama explained that “many veterans with PTSD who have tried to seek benefits . . . have often found themselves stymied. They’ve been required to produce evidence proving that a specific event caused their PTSD . . . Well, I don’t think our troops on the battlefield should have to take notes to keep for a claims application.”<sup>270</sup> Nor, of course, should rape survivors have to take notes to keep for a claims application.

The efforts to reform VA adjudications of MST claims raise thorny questions of evidence and administrative procedure, and challenge the exceptional treatment of such claims by veterans. Secretary Robert McDonald rejected the 2013 rulemaking petition submitted by the Service Women’s Action Network and Vietnam Veterans of America (“VVA”), and a divided panel of the Federal Circuit affirmed his decision, emphasizing its “extremely limited and highly deferential standard of review.”<sup>271</sup> Like any administrative agency, the VA has broad discretion to implement its authorizing statutes. The willingness of the agency to promulgate regulations creating presumptions for some common forms of PTSD, however, but not for others, may be inconsistent with the

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<sup>263</sup> See Ogilvie & Tamlyn, *supra* note 234, at 36-39 (recommending that the VA “liberalize[] the evidentiary standard” for MST-based PTSD claims). VA regulations permit veterans to demonstrate that PTSD is related to an in-service assault using corroborating evidence, but do not establish any presumption of service connection. 38 C.F.R. § 3.304(f)(5) (2016).

<sup>264</sup> 38 C.F.R. § 3.304(e).

<sup>265</sup> *Id.* § 3.304(f)(2).

<sup>266</sup> *Id.* § 3.304(f)(3).

<sup>267</sup> *Id.* § 3.307(a)(6)(iii)-(iv).

<sup>268</sup> 38 U.S.C. § 1112(c) (2012).

<sup>269</sup> 38 C.F.R. §§ 3.307(a), 3.309.

<sup>270</sup> President Barack Obama, *Weekly Address: President Obama Announces Change to Help Veterans with PTSD Receive the Benefits They Need*, PRESIDENT BARACK OBAMA WHITE HOUSE (July 10, 2010), <https://obamawhitehouse.archives.gov/the-press-office/weekly-address-president-obama-announces-changes-help-veterans-with-ptsd-receive-be> [https://perma.cc/6BMU-69SP].

<sup>271</sup> *Serv. Women’s Action Network v. Sec’y of Veterans Affairs*, 815 F.3d 1369, 1375 (Fed. Cir. 2016); *see id.* at 1379-80 (Wallach, J., dissenting) (concluding that the Secretary’s failure to provide a reasoned explanation for treating PTSD claims differently renders the Secretary’s decision arbitrary).

prohibition on arbitrary and capricious agency action or irrational classifications,<sup>272</sup> notwithstanding the decision in *Service Women's Action Network v. Secretary of Veterans Affairs*.<sup>273</sup>

A distinct objection to the proposed evidentiary presumption for MST claimants is that its establishment would likely lead the VA to approve more claims, pay out more funds, and perhaps permit a degree of fraud.<sup>274</sup> But the resource-based objection is no defense to the argument that regulatory reform is warranted to remedy sex or disability discrimination.<sup>275</sup> Past proposals for VA evidentiary presumptions have similarly met initial objections that their adoption would increase fraud.<sup>276</sup> Yet in the past, in the face of substantial evidence that VA procedures resulted in the denial of benefits to a class of disabled veterans, the agency has established an evidentiary presumption. Vague concerns for fraud, and temporary programs for the enhanced training of VA adjudicators, cannot justify the agency's "maintenance of *different evidentiary standards* for PTSD claims resulting from MST, and PTSD claims resulting from other stressors."<sup>277</sup> Nor can these concerns justify excepting MST claims from mainstream constitutional and administrative law commitments to sex equality and against disability discrimination.

### C. *Collective Actions and the Backlog*

One cannot write about contemporary issues in VA claims adjudication without examining the most notorious problem vexing the system: its baffling, enduring, outrageous delays. Agency delay is a classic civil rights and poverty law issue, but as with the structure of judicial review and treatment of MST claims, its resolution is undermined by veterans' law exceptionalism. Recent procedural initiatives, such as the implementation of the "fully developed claim"

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<sup>272</sup> 5 U.S.C. § 706(2)(A) (2012).

<sup>273</sup> 815 F.3d at 1369.

<sup>274</sup> See Ogilvie & Tamlyn, *supra* note 234, at 38 ("[P]roposals to expand presumptions may encourage malingering . . . [And] VBA is not immune to fraudulent claims." (footnote omitted)).

<sup>275</sup> See, e.g., Plyler v. Doe, 457 U.S. 202, 227 (1982) ("[A] concern for the preservation of resources standing alone can hardly justify the [discriminatory] classification used in allocating those resources.").

<sup>276</sup> See, e.g., Bradley A. Fink, *Presume Too Much: An Examination of How the Proposed COMBAT PTSD Act Would Alter the Presumption of a Traumatic Stressor's Occurrence for Veterans*, 2 VETERANS L. REV. 221, 241-42 (2010) ("If the system were changed so that veterans could establish the occurrence of a claimed stressor through his or her statements alone, some veterans may fabricate combat experiences to support their [PTSD] claims.").

<sup>277</sup> *Serv. Women's Action Network*, 815 F.3d at 1379 (Wallach, J., dissenting).

process,<sup>278</sup> and congressional appropriation of additional resources for the VA, has increased the number of decisions made annually by the VAROs, but the number of claims continues to exceed annual adjudications.<sup>279</sup> The agency still routinely fails to meet its goal of adjudicating new claims within 125 days of submission, and appeals to the BVA drag on for four years on average.<sup>280</sup> With the high rate of remands by both the BVA and CAVC,<sup>281</sup> the churning of claims seems endless.<sup>282</sup> It is unsurprising that veterans and their advocates have repeatedly sought to escape these infuriating delays outside the statutory channels created by Congress.<sup>283</sup> Veterans' law exceptionalism has frustrated these efforts.

Many studies have yielded appalling figures on the VA backlog and delays. The VA had 376,114 claims pending before it as of April 15, 2017, with 98,127 claims that were at least 125 days old.<sup>284</sup> "In the last four years, the number of claims pending for over a year has grown by over 2000%, despite a 40% increase in the VA's budget."<sup>285</sup> As the Ninth Circuit noted, it "takes approximately 4.4

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<sup>278</sup> *Fully Developed Claims*, U.S. DEP'T OF VETERANS AFF., <http://www.benefits.va.gov/fdc> [<https://perma.cc/AD6A-D7CN>] (last visited Sept. 14, 2017); see NVLSP MANUAL, *supra* note 63, at 895-98.

<sup>279</sup> *2013 Monday Morning Workload Reports*, U.S. DEP'T OF VETERANS AFF., <http://www.benefits.va.gov/REPORTS/mmwr/2011/index.asp> [<https://perma.cc/D6N9-LQHK>] (last visited Sept. 14, 2017) ("While VA completed a record-breaking 1 million claims per year in fiscal years 2010, 2011, and 2012, the number of claims received continues to exceed the number processed.").

<sup>280</sup> See *supra* notes 77, 84, 86-87 and accompanying text (describing lengthy process of initial application for benefits).

<sup>281</sup> See *supra* notes 89, 98 and accompanying text (discussing appeal process for benefits decisions).

<sup>282</sup> O'Reilly, *supra* note 149, at 229 ("Right now, [the veterans benefits decisional process] is only a carousel consisting of remand, mishandling, rehearing, remand, and so on."). But see Gary E. O'Connor, *Rendering to Caesar: A Response to Professor O'Reilly*, 53 ADMIN. L. REV. 343, 382-84 (2001) (arguing that remand is preferable to denial as it preserves "effective date" of application and permits veteran, on remand, to fill gaps in evidentiary record).

<sup>283</sup> See *Veterans for Common Sense v. Shinseki (Veterans for Common Sense II)*, 678 F.3d 1013, 1016 (9th Cir. 2012) (en banc) (dismissing for lack of jurisdiction challenge to extraordinary delays in VA mental health programs); Jacob B. Natwick, Note, *Unreasonable Delay at the VA: Why Federal District Courts Should Intervene and Remedy Five-Year Delays in Veterans' Mental-Health Benefits Appeals*, 95 IOWA L. REV. 723, 737-44 (2010) (discussing the courts' failure to remedy the severe delay in veterans benefits decisions).

<sup>284</sup> *Veterans Benefits Administration Reports: Detailed Claims Data*, U.S. DEP'T OF VETERANS AFF., [http://benefits.va.gov/reports/detailed\\_claims\\_data.asp](http://benefits.va.gov/reports/detailed_claims_data.asp) [<https://perma.cc/663P-SBW6>] (last visited Sept. 14, 2017).

<sup>285</sup> Press Release, John McCain et al., Senators, Letters Urging Obama Administration to End Backlog of VA Disability Claims (Apr. 29, 2013), available at

years from the date of the veteran's initial filing of a service-connected death and disability compensation claim to the final decision" by the BVA,<sup>286</sup> exclusive of further appeals or "any time that may have elapsed between the Regional Office's initial rating decision and the veteran's filing of his Notice of Disagreement, which may be up to one year."<sup>287</sup> A more recent study found that an administrative appeal alone can delay adjudication for approximately four-and-a-half years.<sup>288</sup> The VA's frequent misplacement of applications (at a rate of 10% according to a recent study) further aggravates the problem.<sup>289</sup> There is a high error rate, including what the VA considers "avoidable remands,"<sup>290</sup> and the disability ratings system is also severely flawed.<sup>291</sup>

Congress has held hearings for years on the VA backlog,<sup>292</sup> but no legislation has been passed that effectively addresses the problem. The VA has tried streamlining some cases,<sup>293</sup> shifting cases from overwhelmed VAROs to those

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<http://www.mccain.senate.gov/public/index.cfm/press-releases?ID=56ede455-a7fc-661e-736d-6109e1e1dc59> [https://perma.cc/9PQ9-DVMG].

<sup>286</sup> *Veterans for Common Sense v. Shinseki* (*Veterans for Common Sense I*), 644 F.3d 845, 859 (9th Cir. 2011); see also U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-453T, *VETERANS' DISABILITY BENEFITS: CHALLENGES TO TIMELY PROCESSING PERSIST* (2013) (identifying internal and external factors contributing to growth of benefits final decision backlog).

<sup>287</sup> *Veterans for Common Sense I*, 644 F.3d at 859.

<sup>288</sup> JACQUELINE MAFFUCCI, *IRAQ & AFG. VETERANS OF AM., THE BATTLE TO END THE VA BACKLOG* 10 (2014) (citing U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-213, *VETERANS' DISABILITY BENEFITS: FURTHER EVALUATION OF ONGOING INITIATIVES COULD HELP IDENTIFY EFFECTIVE APPROACHES FOR IMPROVING CLAIMS PROCESSING* (2010)) (attributing the length of the appeals process to the complexity of the system).

<sup>289</sup> *An Examination of Poorly Performing U.S. Department of Veterans Affairs Regional Offices: Hearing Before the Subcomm. on Disability Assistance and Mem'l Affairs of the H. Comm. on Veterans' Affairs*, 112th Cong. 41 (2011) (statement of Belinda J. Finn, Assistant Inspector General for Audits and Evaluations, U.S. Dep't of Veterans Affairs).

<sup>290</sup> See, e.g., *Veterans for Common Sense I*, 644 F.3d at 859-60 (summarizing trial evidence); DEP'T OF VETERANS AFFAIRS OFFICE OF INSPECTOR GEN., *ISSUE 75, SEMIANNUAL REPORT TO CONGRESS* 27 (2015-2016).

<sup>291</sup> See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-846, *VA DISABILITY COMPENSATION: ACTIONS NEEDED TO ADDRESS HURDLES FACING PROGRAM MODERNIZATION* i (2012) (reporting that the disability ratings system resulted in "lower disability compensation payment levels for some"); PAMELA VILLARREAL & KYLE BUCKLEY, NAT'L CTR. FOR POLICY ANALYSIS, *THE VETERANS DISABILITY SYSTEM: PROBLEMS AND SOLUTIONS* 3 (2012) (describing the disability ratings system as out-of-date).

<sup>292</sup> See, e.g., *An Examination of Poorly Performing U.S. Department of Veterans Affairs Regional Offices*, *supra* note 289, at 41 (holding hearings for failure of VAROs to issue final decisions on veterans benefits claims).

<sup>293</sup> *Budget Request for Fiscal Year 2007*, *supra* note 195, at 18 ("VBA successfully streamlined a complex and paper-bound compensation claims process and implemented

less busy, providing supplemental training,<sup>294</sup> precluding veterans from supplementing the evidentiary record on appeal,<sup>295</sup> and other strategies.<sup>296</sup> Yet the backlog and the mindless churning remain.

Public benefits lawyers outside the VA system have long struggled to address systemic delays.<sup>297</sup> In the VA benefits area, any such effort has been further complicated by a unique threshold difficulty: for nearly thirty years, the CAVC rejected efforts to fashion class-action or other aggregate claim rules, insisting instead that each veteran litigate his own case, one at a time. In one of the court's earliest en banc decisions, *Harrison v. Derwinski*,<sup>298</sup> the CAVC held that it lacked jurisdiction to adopt a class-action rule, which the court worried would be "unmanageable" and which was, in the court's view, also unnecessary, because its decisions are binding on the VA.<sup>299</sup> One concurring judge noted that "under the All Writs Act, 28 U.S.C. § 1651(a) (1988), the Court may have the power to entertain class actions in appropriate situations."<sup>300</sup>

In subsequent years, veterans' advocates sought to seize on the invitation to develop aggregate litigation approaches under the All Writs Act, but the CAVC resisted. In *American Legion v. Nicholson*,<sup>301</sup> for instance, in a 4-3 decision, the court held that the American Legion lacks standing to seek mandamus relief when challenging the BVA Chairman's decision to stay a large class of cases, including those of many American Legion members.<sup>302</sup> The CAVC majority

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people, process, and technology initiatives necessary to optimize productivity and efficiency.").

<sup>294</sup> See VILLARREAL & BUCKLEY, *supra* note 291, at 9 (discussing failure of 2010 comprehensive retraining initiative in VA).

<sup>295</sup> See *Budget Request for Fiscal Year 2007*, *supra* note 195, at 19-20.

<sup>296</sup> On August 1, 2017, Congress enacted another set of VA reforms intended to reduce the administrative appeals backlog. See Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115-55, 131 Stat. 1105. The VA estimates it will take eighteen months to implement the new legislation. Nikki Wentling, *Senate Passes VA Appeals Reform Bill*, STARS & STRIPES (Aug. 1, 2017), <https://www.stripes.com/news/us/senate-passes-va-appeals-reform-bill-1.481029#.WbqtU8h942w> [<https://perma.cc/9Q43-FMX9>].

<sup>297</sup> See, e.g., *Exley v. Burwell*, No. 3:14-cv-01230, 2015 WL 3649632, at \*6 (D. Conn. June 10, 2015) (challenging delays in Medicare appeals); *Booth v. McManaman*, 830 F. Supp. 2d 1037, 1040 (D. Haw. 2011) (challenging delays in determining food stamp eligibility).

<sup>298</sup> 1 Vet. App. 438 (1991) (en banc) (per curiam).

<sup>299</sup> *Id.*; see also *Lefkowitz v. Derwinski*, 1 Vet. App. 439, 440 (1991) (en banc) (per curiam) (holding that the court lacked jurisdiction to adopt rule for class actions). Congress authorized the CAVC to develop its own rules for practice before the court, 38 U.S.C. § 7264(a) (2012), but the majority declined to exercise this statutory power to fashion a collective action rule. But see *Ridgway, Stichman & Riley*, *supra* note 146, at 16-18 (explaining that the CAVC rarely issues panel or precedential decisions).

<sup>300</sup> *Harrison*, 1 Vet. App. at 439 (Kramer, J., concurring).

<sup>301</sup> 21 Vet. App. 1 (2007) (en banc).

<sup>302</sup> *Id.* at 4.

declined to adopt associational standing rules, reasoning that “because Congress did not intend for this Court’s jurisdiction to expand beyond addressing appeals filed by individual claimants adversely affected by final Board decisions, we are not permitted to . . . allow for associational standing.”<sup>303</sup> Three judges dissented, arguing the majority had conflated jurisdiction and standing and misread the court’s jurisdictional statutes.<sup>304</sup>

In 2013, the CAVC rejected another effort to develop aggregate litigation rules. A VA regulation had expanded the period of service in the Korean Demilitarized Zone for which exposure to Agent Orange would be presumed,<sup>305</sup> but a dispute arose regarding the effective date for the VA benefits claims of the veterans who might be aided by this new regulation. When the “effective date” dispute reached the CAVC,<sup>306</sup> veterans’ advocates attempted to preserve the issue in other pending cases, recognizing that a precedential decision of the CAVC would not apply to any claims that had become administratively final.<sup>307</sup> Accordingly, veterans’ advocates representing a second Korean DMZ claimant sought to intervene in the lead case pending at the CAVC, and, when denied, sought a writ of mandamus on behalf of the second claimant and others similarly situated.<sup>308</sup> The requested writ would have compelled the VA to identify VA claimants who might benefit from a future decision on the “effective date” issue, toll the period for filing appeals for such claimants (so that no such claim would become administratively final before the CAVC decided the lead case), and notify other claimants of the lead case and the tolling of their appeal deadlines.<sup>309</sup> The CAVC, in a single-judge ruling, denied the petition on the ground that the second Korean DMZ claimant lacked standing because he himself could continue to appeal and thereby preserve the issue.<sup>310</sup>

Most recently, in 2015, a Vietnam veteran named Conley Monk petitioned the CAVC for a mandamus to decide his long-pending disability claim and proposed to represent all other veterans facing extensive delays in adjudication

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<sup>303</sup> *Id.*

<sup>304</sup> *Id.* at 10-12 (Hagel, Kasold & Schoelen, JJ., dissenting).

<sup>305</sup> 38 C.F.R. §§ 3.307(a)(6)(iv), 3.814(c)(2) (2016).

<sup>306</sup> See *Mallory v. Shinseki*, No. 11-401, 2012 WL 4466676, at \*1 (Vet. App. Sept. 28, 2012), *order withdrawn*, No. 11-401, 2013 WL 3578118 (Vet. App. July 12, 2013).

<sup>307</sup> See *Tobler v. Derwinski*, 2 Vet. App. 8, 14 (1991) (“[A]ny rulings, interpretations, or conclusions of law contained in such a decision are authoritative and binding as of the date the decision is issued . . .”).

<sup>308</sup> *McKinney v. Shinseki*, No. 12-3639, 2013 WL 2902799, at \*2-3 (Vet. App. June 14, 2013).

<sup>309</sup> *Id.*

<sup>310</sup> *Id.* at \*2-4. The court went on to state that even if the second claimant had standing, the court would deny the application on the merits on the ground that he “has not shown a clear and indisputable right to the writ . . . because he has failed to allege that the Secretary committed an unlawful act or neglected a mandatory duty.” *Id.* at \*4.

of their administrative appeal.<sup>311</sup> Recognizing that the CAVC had previously refused to promulgate a judicial rule regarding class actions, Monk nevertheless asked the court to exercise its authority under the All Writs Act or its inherent judicial powers to aggregate claims of veterans facing prolonged VA delays in administrative appeals.<sup>312</sup> Applying its precedent, the CAVC again concluded that it lacked jurisdiction to aggregate claims.<sup>313</sup>

Before *Monk*, veterans' advocates had not appealed the CAVC's repeated rejection of aggregate litigation strategies to the Federal Circuit. Advocates instead looked outside the court, seeking to persuade district courts or courts of appeals to do what the CAVC would not.<sup>314</sup> The most substantial recent example is *Veterans for Common Sense v. Shinseki*,<sup>315</sup> a proposed class action to redress delays in the VA provision of mental health care and adjudication of disability compensation claims.<sup>316</sup> Among other things, the plaintiffs initially challenged "the absence of class action procedures in the [VA's] adjudication of benefits claims . . . ."<sup>317</sup> The district court in large part denied the VA's motion to dismiss, granted limited discovery, conducted a seven-day bench trial, and then denied all relief to the plaintiffs.<sup>318</sup> A panel of the Ninth Circuit affirmed the dismissal of the plaintiffs' APA claims but reversed the dismissal of many of the

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<sup>311</sup> *Monk v. McDonald*, No. 15-1280, 2015 WL 3407451, at \*2 (Vet. App. May 27, 2015), *rev'd*, *Monk v. Shulkin*, 855 F.3d 1312 (Fed. Cir. 2017).

<sup>312</sup> *Id.*

<sup>313</sup> *Id.* at \*3. When the VA Secretary requests it, the CAVC has shown a more flexible approach to aggregate litigation. *See Ribaudo v. Nicholson*, 21 Vet. App. 137, 137 (2007); *Ribaudo v. Nicholson*, 20 Vet. App. 552, 552 (2007). In these decisions, the VA sought an order staying a class of cases so as to avoid paying out benefits while the VA appealed an adverse ruling to the Federal Circuit. *See Haas v. Nicholson*, 20 Vet. App. 257, 257 (2006) (involving extension of presumption of herbicide exposure to sailors who served in waters offshore of Vietnam). The VA sought the stay order in the case of a single veteran, *Ribaudo*, 21 Vet. App. at 146-47 (denying petitioner's motion to dismiss the Secretary's stay motion). In this case, the CAVC recognized that one veteran had standing of a sort to represent the interests of thousands of other veterans. *Id.* at 145 ("[T]he Court must accept its role in balancing competing interests where it is not always possible to process some veterans' claims without prejudicing the interests of other veterans.").

<sup>314</sup> *See, e.g., Natwick, supra* note 283, at 746 (urging intervention from courts of general jurisdiction to remedy the serious delays).

<sup>315</sup> 678 F.3d 1013 (9th Cir. 2012).

<sup>316</sup> *Id.* at 1015-16.

<sup>317</sup> *Id.* at 1018 n.7. The Ninth Circuit concluded that the challenge to the lack of a class action procedure at the CAVC was "abandoned . . . on appeal." *Id.*

<sup>318</sup> *Id.* at 1018.

due process claims.<sup>319</sup> On rehearing en banc, however, the Ninth Circuit ordered dismissal of the entire action.<sup>320</sup>

By contrast, Monk pressed his appeal to the Federal Circuit, contending that the CAVC has the power to aggregate claims in an appropriate case, pursuant either to the All Writs Act or the court's inherent powers.<sup>321</sup> A law professors' amicus brief offered a third source for the power to aggregate, namely pursuant to the court's organic statute.<sup>322</sup> Monk and his amici also explained that aggregate actions, even in unusual circumstances, advance important management functions, ensure fairness for litigants (especially for those without the means to retain individual counsel), and foster healthy inter-branch dialogue.<sup>323</sup> Curiously, in its own briefing, the Secretary never explicitly disagreed that the CAVC possesses the power to aggregate. Instead, the VA contended that aggregation in Monk's particular case was "not merited."<sup>324</sup>

In a significant decision, the Federal Circuit unanimously reversed, holding that the CAVC has the authority to certify class actions "under the All Writs Act, other statutory authority, and the Veterans Court's inherent powers."<sup>325</sup> The court began its analysis by observing that, in his briefing, the Secretary did not dispute the power of the CAVC to aggregate claims, and further, that, at oral argument, the Department of Justice had "concede[d]" the point.<sup>326</sup> Beginning with the All Writs Act, Judge Reyna explained that this statute unquestionably applied to the CAVC and supplied the court with the power to fashion "procedural instruments designed to achieve the rational ends of law."<sup>327</sup> The court also observed that in the context of petitions for a writ of habeas corpus, the Second Circuit had used its All Writs Act authority to develop a rule for "representative" habeas actions, incorporating many of the substantive

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<sup>319</sup> *Veterans for Common Sense v. Shinseki* (*Veterans for Common Sense I*), 644 F.3d 845, 890 (9th Cir. 2011).

<sup>320</sup> *Veterans for Common Sense II*, 678 F.3d at 1037 (dismissing for lack of jurisdiction).

<sup>321</sup> Opening Brief of Claimant-Appellant, *Monk v. Shulkin*, 855 F.3d 1312 (Fed. Cir. 2017) (No. 15-7092).

<sup>322</sup> Corrected Amicus Brief and Appendix of 15 Administrative Law, Civil Procedure, and Federal Courts Professors in Support of Appellant and Reversal, *Monk*, 855 F.3d at 1312 (No. 15-7092).

<sup>323</sup> Sant'Ambrogio & Zimmerman, *supra* note 13, at 2000 ("By adopting aggregate procedures, agencies may produce uniform outcomes more efficiently, provide more fairness for groups that depend upon the administrative state, and offer institutional advantages over aggregation in federal court.").

<sup>324</sup> Brief of Respondent-Appellee at 29, *Monk*, 855 F.3d at 1312 (Fed. Cir. 2017) (No. 15-7092). The Secretary made additional technical arguments regarding mootness and the Federal Circuit's appellate jurisdiction. *Id.* at 10-29.

<sup>325</sup> *Monk*, 855 F.3d at 1318.

<sup>326</sup> *Id.*

<sup>327</sup> *Id.* (internal quotation marks omitted).



requirements of Rule 23, but adapting them to the particulars of the habeas context.<sup>328</sup> The Federal Circuit went on to hold that the CAVC also has the authority to aggregate claims under its organic statute, as argued by the Law Professors Amicus, and pursuant to its inherent judicial powers.<sup>329</sup> Judge Reyna was surely correct that aggregation can promote “efficiency, consistency, and fairness, and improv[e] access to legal and expert assistance by parties with limited resources,”<sup>330</sup> and moreover, that class actions may help the CAVC address longstanding criticism regarding its failure to issue precedential decisions.<sup>331</sup>

The *Monk* decision is an important opinion in veterans’ law. Within one day of the decision, the first attorney requested aggregation before the CAVC,<sup>332</sup> and within one month, the court itself had invited an application for class treatment in another case.<sup>333</sup> The CAVC is now grappling with consequential second-order questions, such as the appropriate standard for aggregation, the means for judicial management of discovery and motion practice, and the scope and nature of remedies that may be ordered. The CAVC has a wealth of models on which

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<sup>328</sup> *Id.* at 1318-19 (discussing *United States ex rel. Sero v. Preiser*, 506 F.2d 1115, 1115 (2d Cir. 1974) (holding that collective habeas action is permissible, even though Rule 23 does not apply)). Other courts have also agreed that implementing a collective action rule in the habeas context, pursuant to the All Writs Act, is sensible, manageable, and just. *See, e.g., United States ex rel. Morgan v. Sielaff*, 546 F.2d 218, 220-22 (7th Cir. 1976) (authorizing representative habeas action by state prisoners); *Napier v. Gertrude*, 542 F.2d 825, 827 n.2 (10th Cir. 1976) (noting Rule 23 is “technically inapplicable to habeas corpus proceedings,” but holding “court may . . . apply an analogous procedure by reference to Rule 23 in proper circumstances”).

<sup>329</sup> *Monk*, 855 F.3d at 1319-22.

<sup>330</sup> *Id.* at 1320. An amicus brief submitted by former VA General Counsels made this same point. Corrected Brief of Amici Curiae Former General Counsels of the Department of Veterans Affairs (VA), Will A. Gunn and Mary Lou Keener at 11-18, *Monk*, 855 F.3d at 1312 (Nos. 15-7092, 15-7106).

<sup>331</sup> *Monk*, 855 F.3d at 1321 & n.6 (noting that in 2014, the CAVC decided 1615 appeals in single-judge non-precedential decisions, and only thirty-five appeals were decided by a precedential multi-judge panel or the full court); *cf. Ridgway, Stichman & Riley*, *supra* note 146, at 11-20 (criticizing CAVC for infrequent publication of panel or precedential decisions).

<sup>332</sup> Motion for Aggregate Action, *Rosinski v. Shulkin*, No. 17-1117, 2017 WL 3033614 (Vet. App. July 18, 2017). The CAVC panel subsequently invited submission of amicus briefs by interested parties, a step rarely taken by that court. *Rosinski*, 2017 WL 3033614.

<sup>333</sup> *Montemayor v. Shulkin*, No. 15-1709, 2017 WL 2260125, at \*5 (Vet. App. May 24, 2017) (“The Court notes that counsel for the appellant represents numerous veterans alleged to have been involved in fraud at RMTU . . . . [T]he Court does possess class action authority. . . . If the appellant believes that consolidating these matters is still appropriate, he should petition the Court for class certification.” (citations omitted)).

to draw,<sup>334</sup> whether it proceeds by judicial rulemaking, case-by-case adjudication, or as other courts have wisely done, both.<sup>335</sup>

From the perspective of veterans' law exceptionalism, it will be a profoundly positive development for the CAVC to move beyond the sort of formalistic analysis of *Harrison*, *American Legion*, and *McKinney* so as to implement class action rules and deploy them in appropriate cases. As Judge Reyna observed in *Monk*, the CAVC's denial of any aggregation power abetted the VA in evading review of the backlog of claims, "because the VA usually acts promptly to resolve mandamus petitions."<sup>336</sup> The exceptional treatment of disabled veterans as singularly incapable of aggregating like claims has ill served former service members and stands out as exceptional in an era of judicial and agency adaptation to the demands of modern mass adjudication.

### III. EXCEPTIONALISM AND "BAD PAPER" DISCHARGES

The final civil rights issue of veterans examined here does not concern the VA, but rather the record correction and discharge review boards of the DoD. Veterans who seek to upgrade a bad paper discharge or otherwise need to correct an improper or stigmatizing reason for discharge must apply to these boards.<sup>337</sup>

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<sup>334</sup> See MICHAEL SANT'AMBROGIO & ADAM ZIMMERMAN, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES: AGGREGATE AGENCY ADJUDICATION 67 (2016) (recommending use of aggregation techniques in administrative adjudication of claims); Sant'Ambrogio & Zimmerman, *supra* note 13, at 2035-66 (discussing how class action or quasi class action can improve access, efficiency, and consistency).

<sup>335</sup> For instance, in *Quinault Allottee Ass'n & Individual Allottees v. United States*, 453 F.2d 1272 (Ct. Cl. 1972), the Court of Claims approved representative actions, though the court lacked a Rule 23 equivalent. *Id.* at 1274-76. After addressing questions such as the standard for aggregation in case-by-case decisions, the Court eventually promulgated a rule that "adopts the criteria for certifying and maintaining a class action as set forth in [*Quinault*]." FED. CL. R. 23 rules committee's note to 2002 revision. The Court of Federal Claims has done the same, *Snyder ex rel. Snyder v. Sec'y of the Dep't of Health & Human Servs.*, No. 01-162V, 2009 WL 332044, at \*3 (Fed. Cl. Feb. 12, 2009) ("[A]pplying evidence developed in the context of one or more individual cases to other cases involving the same vaccine and the same or similar injury."). Article I courts such as the bankruptcy and tax courts have also recognized that they possess inherent judicial powers which may be deployed to fashion procedural rules appropriate for the cases before them. *Bessette v. Avco Fin. Servs., Inc.*, 230 F.3d 439, 444-45 (1st Cir. 2000) (concluding that a bankruptcy court has the authority to exercise its equitable powers, where necessary or appropriate, to facilitate the implementation of the Bankruptcy Code); *Bokum v. Comm'r*, 992 F.2d 1136, 1140 (11th Cir. 1993) (concluding that a tax court has the power to consider an equitable estoppel claim). See generally Sant'Ambrogio & Zimmerman, *supra* note 13, at 2041-48 (discussing aggregation strategies in administrative courts and other proceedings outside Rule 23).

<sup>336</sup> *Monk*, 855 F.3d at 1320-21.

<sup>337</sup> 10 U.S.C. §§ 1552-1553 (2012) (authorizing the Secretary to establish review boards to review discharges or dismissals).

They have received little attention from legal scholars<sup>338</sup> but are now the target of a significant mobilization by veterans' organizations and their congressional allies.<sup>339</sup>

Current campaigns by veterans with bad paper and their allies present important challenges to the procedural rules and substantive standards by which these military boards adjudicate cases. These initiatives also raise fundamental conceptual questions about how courts and Congress should regard these boards. The DoD has frequently argued for a *military law approach*, in which deference to a commanding officer's decisions is nearly inviolate, the military boards apply a "presumption of regularity," and civilian courts should rarely displace them.<sup>340</sup> By contrast, judicial precedent adopts an *administrative law approach*, in which internal agency review is not toothless and courts reviewing agency decisions apply respectful but less deferential APA standards of review.<sup>341</sup> Many current proposals would make record correction practices conform more closely to a *veterans' law approach*, in which administrative review boards give former service members the benefit of the doubt and reviewing courts apply canons of construction in favor of veterans.<sup>342</sup> Finally, one might consider the utility of a *civil service approach*, in which record correction applications are evaluated more like wrongful termination claims brought by federal employees before the Merit Systems Protection Board (the "MSPB").<sup>343</sup>

In the following Part A, I consider important contemporary campaigns to reform the record correction process, arising from struggles over PTSD upgrades and illegal personality and adjustment disorder discharges, and the impact of

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<sup>338</sup> Legal scholarship examining the military boards is thinner even than that considering adjudication of VA benefits. *But see generally* Fidell, *supra* note 6; Field, *supra* note 6; Izzo, *supra* note 111; Jeffrey M. Glosser & Keith A. Rosenberg, *Military Correction Boards: Administrative Process and Review by the United States Court of Claims*, 23 AM. U. L. REV. 391 (1973); John A. Wickham, *Federal Court Developments in Military Personnel Law: Protecting Service Members*, 55 NAVAL L. REV. 337 (2008).

<sup>339</sup> *See, e.g.*, John Rowan, Opinion, *A Less Than Honorable Policy*, N.Y. TIMES, Dec. 30, 2016, at A23 (reporting that Vietnam veterans urged President Obama and President-Elect Trump to pardon post-9/11 veterans who received less-than-honorable discharges).

<sup>340</sup> *See, e.g.*, Memorandum of Law in Support of Defendant's Motion to Dismiss & for Summary Judgment at 2-4, *Cowles v. McHugh*, No. 3:13-cv-01741, U.S. Dist. LEXIS 138927 (D. Conn. Sept. 30, 2014) (arguing for greater judicial deference to military board decisions than ordinary APA review).

<sup>341</sup> *See, e.g.*, *Blassingame v. Sec'y of Navy*, 811 F.2d 65, 71-72 (2d Cir. 1987) (mirroring the standard of review approximately to the arbitrary and capricious standard of the APA).

<sup>342</sup> Fairness for Veterans Act of 2016, H.R. 4683, 114th Cong. § 2 (creating a rebuttable presumption in favor of the former member); S. 1567, 114th Cong. § 2 (2015); *see also* National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 535, 130 Stat. 2000, 2123 (2016) (requiring that discharge review boards give "liberal consideration" to PTSD-based upgrade applications).

<sup>343</sup> *See* 5 U.S.C. §§ 1214-1215 (2012).

veterans' law exceptionalism on these efforts. In Part B, I conclude with some thoughts regarding the strengths and weaknesses of the potential frameworks for review of bad discharges.

A. *Contemporary Record Correction Campaigns*

Poor staffing, little training, lack of transparency, and neglect by senior DoD officials have likely contributed to the diminished quality of board adjudications in recent years. It also appears that lingering skepticism about mental health disorders and hostility towards the Vietnam generation and those who complain of sexual assault and other forms of bias have made successful upgrade applications quite rare. Of course, the armed forces have long struggled to diagnose, treat, and fairly take account of mental health disorders and injuries.<sup>344</sup> In the current era, however, campaigns by veterans and their advocates to improve the quality of military board adjudications have exposed the failings of these boards and put at issue the underlying conceptual framework in which they operate. In so doing, these campaigns highlight the ways in which veterans' law exceptionalism can frustrate reforms to modernize military administrative agencies.

1. *Bad Paper for Veterans with PTSD or TBI*

More than 250,000 Vietnam veterans received bad paper discharges,<sup>345</sup> and over 125,000 service members have received bad paper since 2001.<sup>346</sup> As the military continues to downsize in the aftermath of combat operations in Afghanistan and Iraq, the number of bad paper discharges will likely increase. Many of these veterans received a bad discharge based on misconduct attributable to PTSD or TBI that was undiagnosed at the time of separation.<sup>347</sup> This is true especially, but not only, for Vietnam veterans, because PTSD did not exist as a medical diagnosis until 1980.<sup>348</sup> PTSD was widespread during the

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<sup>344</sup> See Mark C. Russell, Bonnie Zinn & Charles R. Figley, *Exploring Options Including Class Action to Transform Military Mental Healthcare and End the Generational Cycle of Preventable Wartime Behavioral Health Crises*, 9 PSYCHOL. INJ. & L. 166, 167 (2016) (describing "a clear pattern of self-inflicted or preventable crises caused primarily by the military's repetitive neglect and failure to learn from its own documented lessons of war trauma").

<sup>345</sup> NICOSIA, *supra* note 55, at 299-300 (describing the quantity of bad paper discharges resulting from the Vietnam War); Phillip Carter, Opinion, *The Vets We Reject and Ignore*, N.Y. TIMES, Nov. 11, 2013, at A25 ("Approximately 260,000 of the 8.7 million Vietnam-era veterans were pushed out of the service with bad paper.").

<sup>346</sup> UNDERSERVED, *supra* note 65, at 2.

<sup>347</sup> *Id.* at 13 (describing how PTSD and TBI can be incorrectly perceived as bad behavior by military commanders).

<sup>348</sup> AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-III-R 236-38 (3d ed. 1980).

Vietnam War, injuring nearly one-third of those who served,<sup>349</sup> and even today the military often fails to diagnose it among service members. Undiagnosed, untreated PTSD has frequently impaired the ability of a service member to perform his duties, eventually leading to a bad paper discharge, which in turn makes the veteran ineligible for VA care and benefits for the very wound that prompted the bad discharge.

When Vietnam veterans applied to the record correction boards for an upgrade, explaining that a post-1980 diagnosis of PTSD provided good cause for their in-service misconduct, they met near-categorical denials. From 2003 to 2014, for instance, the Army denied 98% of all applications from Vietnam veterans alleging service-connected PTSD and seeking to upgrade an other-than-honorable discharge.<sup>350</sup> This denial rate far exceeded the rates of denial for other applications to the Army Board for Correction of Military Records (the "ABCMR") and other boards.

The contemporary campaign to correct bad paper discharges for Vietnam veterans with undiagnosed PTSD has been led by VVA, which has pursued litigation, legislation, and regulatory change.<sup>351</sup> In 2012, VVA sought to intervene in the lawsuit of John Shepherd, a Vietnam veteran with PTSD who sought judicial review of the Army's denial of his upgrade application and proposed to bring a nationwide class action on behalf of Vietnam veterans with undiagnosed PTSD and an other-than-honorable discharge.<sup>352</sup> The Army settled with Shepherd before VVA's motion to intervene was decided or a class was certified,<sup>353</sup> but VVA refiled the action in early 2014, together with five individual veterans and the National Veterans Council for Legal Redress ("NVCLR").<sup>354</sup> The proposed nationwide class action raised claims under the APA, Due Process Clause, and Rehabilitation Act, and it sought to compel the record correction boards to review, pursuant to medically appropriate standards,

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<sup>349</sup> RICHARD A. KULKA ET AL., CONTRACTUAL REPORT OF FINDINGS FROM THE NATIONAL VIETNAM VETERANS READJUSTMENT STUDY VOLUME I: EXECUTIVE SUMMARY, DESCRIPTION OF FINDINGS, AND TECHNICAL APPENDICES 2 (1988), available at <http://www.ptsd.va.gov/professional/research-bio/research/nvvrs-docs.asp> [<https://perma.cc/28RL-XRBW>] (finding that 30.6% of men and 26.9% of women who served in Vietnam thereafter suffered from PTSD at some point in their lives).

<sup>350</sup> Izzo, *supra* note 111, at 1591-92 (finding Army board approved two applications out of approximately 145).

<sup>351</sup> The National Veterans Council for Legal Redress ("NVCLR") and High Ground Veterans Advocacy have played critical roles as well.

<sup>352</sup> Izzo, *supra* note 111, at 1591-92.

<sup>353</sup> John Christoffersen, *Vietnam Vet Wins Discharge Upgrade in PTSD Lawsuit*, ASSOCIATED PRESS, Nov. 4, 2013; Thomas MacMillan, *John Shepherd is Honorable*, NEW HAVEN INDEP. (Nov. 4, 2013, 3:27 PM), [http://www.newhavenindependent.org/index.php/archives/entry/john\\_shepherd\\_is\\_honorable/](http://www.newhavenindependent.org/index.php/archives/entry/john_shepherd_is_honorable/) [<https://perma.cc/8WD6-94CH>].

<sup>354</sup> See Complaint, *supra* note 126, at 1-3.

all other-than-honorable discharges issued to Vietnam veterans later diagnosed with PTSD.<sup>355</sup>

In addition to litigation, VVA pursued public education and legislative and regulatory reform. At his confirmation hearing before the Senate Armed Services Committee, Chuck Hagel, later the Secretary of Defense, was questioned by Senator Richard Blumenthal about Vietnam veterans with PTSD and bad discharges.<sup>356</sup> Nominee Hagel pledged to review the problem and address it.<sup>357</sup> In 2014, the day after VVA refiled its proposed class action, Secretary Hagel again appeared before the Senate Armed Services Committee, where he acknowledged he had already discussed the new suit with DoD General Counsel and reaffirmed his commitment to Senator Blumenthal to address the problem.<sup>358</sup> In addition, VVA pursued legislative amendments to the National Defense Authorization Act ("NDAA") and omnibus veterans bills, seeking to remedy the record correction boards' failure to recognize and properly adjudicate the discharge upgrade applications of Vietnam veterans with PTSD.<sup>359</sup> In 2014, Senator Blumenthal succeeded in adding a provision to the Senate Armed Services Committee NDAA report requiring the DoD to address procedural reforms to the boards.<sup>360</sup> VVA and its allies also worked to bring public attention to the circumstance of Vietnam veterans with PTSD and their efforts to secure the benefits and care that their service has earned.<sup>361</sup>

In September 2014, in response to the efforts of Senator Blumenthal, the *Monk v. Mabus* suit, advocacy by VVA, the NVCLR, and other veterans' groups, and increasing media scrutiny, Secretary Hagel instructed the record correction boards to give "liberal consideration" to discharge upgrade applications by veterans with PTSD, as well as "special consideration" to any

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<sup>355</sup> *Id.* at 36-37.

<sup>356</sup> *Nominations Before the Senate Armed Services Committee, First Session, 113th Congress: Hearings Before the S. Comm. on Armed Servs.*, 113th Cong. 89-90 (2013) (statement of Sen. Richard Blumenthal).

<sup>357</sup> *Id.* (statement of Chuck Hagel, Secretary of Defense).

<sup>358</sup> *Department of Defense Authorization for Appropriations for Fiscal Year 2015 and the Future Years Defense Program: Hearing Before the S. Comm. on Armed Servs.*, 113th Cong. 120 (2014) (statement of Chuck Hagel, Secretary of Defense).

<sup>359</sup> A draft of proposed legislation is on file with author.

<sup>360</sup> *See* S. REP. NO. 113-176, at 106-07 (2014) (requiring DoD report); DEP'T OF DEF., REPORT: DEPARTMENT OF DEFENSE REVIEW OF VIETNAM VETERAN POST TRAUMATIC STRESS DISORDER CASES 1 (2014) (detailing the new required procedures).

<sup>361</sup> *See, e.g., The Daily Show with Jon Stewart: PTSD & Vietnam* (Comedy Central television broadcast Jan. 21, 2014), <http://www.cc.com/video-clips/ng47v2/the-daily-show-with-jon-stewart-ptsd---vietnam> [<https://perma.cc/QAS4-58WK>] (featuring two *Monk v. Mabus* plaintiffs and two law students).

VA diagnosis of service-connected PTSD.<sup>362</sup> The instruction, known as the “Hagel Memo,” also directed the boards to be generous in waiving any applicable statutes of limitations, and ordered the DoD to conduct a “public messaging campaign . . . throughout 2014 and 2015.”<sup>363</sup>

The Hagel Memo was necessarily predicated on a recognition that the boards, in denying nearly all PTSD applications, had failed the veterans they were established to serve. And while the Hagel Memo expressly addressed only one category of veterans—Vietnam veterans with PTSD—it made plain that board procedures and the overall quality of adjudications were unsatisfactory. The memo did not impose any of the procedural reforms described in the NDAA Senate Committee report<sup>364</sup> or that had begun to appear in various bills proposed in Congress.<sup>365</sup>

Upon issuance of the Hagel Memo, the district court dismissed *Monk v. Mabus* without prejudice, giving the boards an opportunity to redo their PTSD cases.<sup>366</sup> Following the dismissal, all five individual plaintiffs received an upgrade from their respective boards.<sup>367</sup> In 2015, VVA and NVCLR submitted and then litigated FOIA requests to monitor board compliance with the Hagel Memo,<sup>368</sup> and the Senate Armed Services Committee also required further DoD reporting on adjudication of PTSD cases.<sup>369</sup>

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<sup>362</sup> SEC’Y OF DEF., MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS: SUPPLEMENTAL GUIDANCE TO MILITARY BOARDS FOR CORRECTION OF MILITARY/NAVAL RECORDS CONSIDERING DISCHARGE UPGRADE REQUESTS BY VETERANS CLAIMING POST TRAUMATIC STRESS DISORDER (2014) [hereinafter HAGEL MEMO]; Dave Philipps, *New Rules May Aid Veterans of Vietnam*, N.Y. TIMES, Sept. 4, 2014, at A15.

<sup>363</sup> HAGEL MEMO, *supra* note 362, at 1, 3.

<sup>364</sup> See S. REP. NO. 113-176, at 106-07.

<sup>365</sup> See, e.g., Martin C. Evans, *Gillibrand Bill—Backed by a Soldier from LI Who Survived a Suicide Try—Aims to Give Veterans with Mental Health Issues a Fighting Chance*, NEWSDAY, Apr. 17, 2014, at A14.

<sup>366</sup> Order on Motion for a Voluntary Remand at 3, *Monk v. Mabus*, No. 3:14-cv-00260 (D. Conn. Nov. 18, 2014), ECF No. 48.

<sup>367</sup> Peggy McCarthy, *Vietnam Veterans Declared Eligible to Receive Long-Denied Benefits*, HARTFORD COURANT (June 22, 2015), <http://www.courant.com/news/connecticut/hc-vietnam-vets-benefits-yale-law-clinic-20150622-story.html> [https://perma.cc/S68N-RNET] (reporting the upgrades of five plaintiffs).

<sup>368</sup> Complaint for Declaratory & Injunctive Relief at 1, *Viet. Veterans of Am. v. Dep’t of Def.*, No. 3:15-cv-00658 (D. Conn. filed May 4, 2015) (alleging that the DoD failed to disclose records regarding Hagel Memo compliance, in violation of FOIA).

<sup>369</sup> See S. REP. NO. 114-49, at 136-37 (2015) (requiring DoD report); DEP’T OF DEF., REPORT: DEPARTMENT OF DEFENSE REVIEW OF PETITIONS FOR REVIEW OF DISCHARGE OR DISMISSAL FROM THE ARMED FORCES OF VETERANS WITH MENTAL HEALTH ISSUES CONNECTED WITH POST-TRAUMATIC STRESS DISORDER OR TRAUMATIC BRAIN INJURY 2 (2015) (reporting on the progress of the cases).

An analysis of the first year of board adjudications under the Hagel Memo from the data obtained in VVA and NVCLR FOIA suit showed dramatic improvement. Prior to 2014 the Army, the largest service branch, had granted only 4.6% of applications from Vietnam veterans based on PTSD; during the first year after the Memo's issuance, the Army approved 67% of applications that were accompanied by at least some evidence of PTSD.<sup>370</sup> Unfortunately, the same analysis concluded the DoD had failed to conduct a meaningful outreach campaign, leaving tens of thousands of disabled, often elderly veterans unaware that they might benefit from the Hagel Memo.<sup>371</sup> Subsequent DoD disclosures suggest board approval rates may already be backsliding.<sup>372</sup>

Crucially, Iraq and Afghanistan veterans have also begun to mobilize for fairer treatment of PTSD-based claims before the discharge review boards.<sup>373</sup> These younger veterans achieved the introduction of bipartisan legislation to reform the DRBs, which included establishing a rebuttable presumption in favor of a service member seeking a PTSD-based upgrade.<sup>374</sup> Congress failed to enact the Fairness for Veterans Act in 2015, but VVA and younger veteran leaders achieved a major victory by winning enactment of several key provisions in the 2017 NDAA.<sup>375</sup> These include codifying the Hagel Memo requirement that PTSD-based upgrade requests receive "liberal consideration" at the discharge

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<sup>370</sup> SUNDIATA SIDIBE & FRANCISCO UNGER, UNFINISHED BUSINESS: CORRECTING "BAD PAPER" FOR VETERANS WITH PTSD 2 (2015).

<sup>371</sup> *Id.* at 8-9 (criticizing the DoD's "perfunctory and inadequate" outreach efforts).

<sup>372</sup> The DoD started to disclose statistics regarding PTSD upgrade applications on a quarterly basis following the settlement of the FOIA suit, and the statistics indicated a diminished approval rate. *See* Letter from Mark H. Herrington, Assoc. Deputy Gen. Counsel, Dep't of Def., to Michael Wishnie, Dir., Jerome N. Frank Legal Servs. Org. (Apr. 28, 2016), [https://law.yale.edu/system/files/area/clinic/vlsc\\_vva\\_v\\_dod\\_first\\_quarter\\_2016.pdf](https://law.yale.edu/system/files/area/clinic/vlsc_vva_v_dod_first_quarter_2016.pdf) [<https://perma.cc/NB5A-B3PT>] (showing approximately 20% grant rate); Letter from Mark H. Herrington, Assoc. Deputy Gen. Counsel, Dep't of Def., to Michael Wishnie, Dir., Jerome N. Frank Legal Servs. Org. (July 27, 2016), [https://law.yale.edu/system/files/area/clinic/document/vva\\_v\\_dod\\_second\\_quarter\\_2016.pdf](https://law.yale.edu/system/files/area/clinic/document/vva_v_dod_second_quarter_2016.pdf) [<https://perma.cc/X3T5-XSC8>] (showing approximately 23% grant rate); Letter from Mark H. Herrington, Assoc. Deputy Gen. Counsel, Dep't of Def., to Michael Wishnie, Dir., Jerome N. Frank Legal Servs. Org. (Oct. 26, 2016), [https://law.yale.edu/system/files/area/clinic/vva\\_v\\_dod\\_third\\_quarter\\_2016.pdf](https://law.yale.edu/system/files/area/clinic/vva_v_dod_third_quarter_2016.pdf) [<https://perma.cc/7CCQ-NBFT>] (showing approximately 31% grant rate).

<sup>373</sup> *See, e.g.,* Liz Fields, *After Being Punished for His Suicide Attempt, a US Veteran Is Fighting for Others with PTSD*, VICE NEWS (Feb. 10, 2016), <https://news.vice.com/article/after-being-punished-for-his-suicide-attempt-a-us-veteran-is-fighting-for-others-with-ptsd> [<https://perma.cc/2XS6-Q6N3>] (describing campaign led by Iraq veteran Kris Goldsmith to reform discharge review process); Philipps, *supra* note 109.

<sup>374</sup> Fairness for Veterans Act of 2016, H.R. 4683, 114th Cong. § 2; S. 1567, 114th Cong. § 2 (2015).

<sup>375</sup> National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).



review boards<sup>376</sup> and codifying, as ongoing disclosure requirements of data and statistics, the provisions of the settlement in *Vietnam Veterans of America v. Department of Defense*.<sup>377</sup> The 2017 NDAA thus ensures that no future Secretary can repeal the Hagel Memo protections with a stroke of the pen.<sup>378</sup> Other provisions of the 2017 NDAA enhance protections for sexual assault victims in discharge proceedings and for whistleblowers at the BCMRs,<sup>379</sup> but these measures fall short of more protective legislation that had been introduced to grant greater whistleblower protections to service members who report sexual harassment or assault.<sup>380</sup>

The 2016 congressional reforms are important, but the DoD continues to refuse to provide individual notice to veterans who might benefit from the new “liberal consideration,” prompting at least one state to undertake its own effort to reach its residents with bad paper,<sup>381</sup> and leading VVA to launch a campaign

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<sup>376</sup> *Id.* § 535, 130 Stat. at 2123-24 (amending 10 U.S.C. § 1553).

<sup>377</sup> Compare Stipulation of Settlement & Proposed Order at 2-3, *Viet. Veterans of Am. v. Dep’t of Def.*, No. 3:15-cv-00658 (D. Conn. dismissed Jan. 6, 2016) (requiring quarterly reporting of PTSD applications received, granted, and denied by each service board), with National Defense Authorization Act for Fiscal Year 2017, 130 Stat. at 2121-22, (amending 10 U.S.C. §§ 1552-1553) (adding nearly identical public disclosure requirements and procedures).

<sup>378</sup> In addition, in February 2016, acting Principal Under-Secretary of Defense for Personnel Brad Carson directed the DRBs and BCMRs to apply the Hagel Memo beyond Vietnam cases, waive statutes of limitations, and grant de novo review to those previously denied an upgrade. Leo Shane III, *Legislation Would Halt Bad Military Discharges Due to PTSD or TBI*, MIL. TIMES (Mar. 7, 2016), <http://www.militarytimes.com/story/military/2016/03/07/bad-paper-discharges-ptsd-tbi/81445920/> [<https://perma.cc/C9ZJ-69TA>] (“The new memo would expand [the *Hagel Memo*’s coverage] to all veterans, and waive statutes of limitations for those appeals.”). In June 2016, Secretary of the Navy Ray Mabus barred administrative separations for sailors and Marines with PTSD or TBI unless they received a disability evaluation. Lance M. Bacon, *New Policy Protects Marines, Sailors Facing Separation for Mental Health Issues*, MARINE CORPS TIMES (June 8, 2016), <http://www.marinecorpstimes.com/story/military/2016/06/08/new-policy-protects-marines-sailors-facing-separation-mental-health-issues/85609534/> [<https://perma.cc/6J5A-AJZ8>].

<sup>379</sup> National Defense Authorization Act for Fiscal Year 2017, §§ 524, 531 (adding language to cover consideration of sexual assault victim in connection with administrative separation procedures and improving whistleblower protection procedures).

<sup>380</sup> See National Defense Authorization Act for Fiscal Year 2017, S. 2943, 114th Cong. §§ 543-49 (2016) (providing whistleblower protection for persons who report sexual harassment or assault); HRW, *Booted*, *supra* note 107 (describing an erroneous mental health discharge as the “ultimate retaliation” because of its stigma and devastating consequences).

<sup>381</sup> Peggy McCarthy, *Connecticut to Help PTSD Vets Upgrade ‘Bad Paper’ Discharges*, HARTFORD COURANT (Nov. 16, 2016), <http://www.courant.com/news/connecticut/hc-vets-discharges-ptsd-20161116-story.html> [<https://perma.cc/U7RU-MTLH>] (describing the efforts of the State of Connecticut and local groups to inform veterans with bad paper of opportunity to apply for discharge upgrade under the Hagel Memo).

calling on the president to issue a mass pardon to veterans with PTSD, similar to the programs ordered by Presidents Ford and Carter.<sup>382</sup> In early 2017, Iraq and Afghanistan veterans followed in the footsteps of Conley Monk and the Vietnam generation, filing suit in an effort to compel full implementation of the Hagel Memo and 2017 NDAA on behalf of nearly 60,000 Army veterans with PTSD and bad paper.<sup>383</sup>

The effort to make the record correction boards more responsive to the situation of veterans with PTSD and bad paper has led to significant changes. The most important legacy of these campaigns, however, may be to make visible the suffering of bad paper veterans<sup>384</sup> and the longstanding structural deficits of the boards, in both their procedural rules and substantive adjudications. A second, less successful campaign, however, demonstrates that the administrative separation process and board failures are not limited to hostility towards veterans with PTSD.

## 2. Illegal Personality Disorder and Adjustment Disorder Discharges

In 2007, a reporter for *The Nation* reported on a surge in “personality disorder” discharges from the armed forces.<sup>385</sup> “Personality disorders are a class of mental health disorders characterized by individuals’ inflexible, socially inappropriate behaviors across diverse situations.”<sup>386</sup> The existence of a personality disorder is not necessarily inconsistent with military service,<sup>387</sup> but since 2001, the military has discharged tens of thousands of people on this

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<sup>382</sup> Rowan, *supra* note 339 (calling for mass pardon for veterans with OTH); Leo Shane III, *Advocates Want Obama, Trump to Pardon ‘Bad Paper’ Dismissals*, MIL. TIMES (Nov. 30, 2016), <http://www.militarytimes.com/articles/vva-letter-trump-obama-bad-paper> [<https://perma.cc/L9G7-HZCS>] (describing VVA request to Presidents Barack Obama and Donald Trump urging pardons for service members discharged for mental health-related infractions).

<sup>383</sup> Meghann Myers, *Veterans with PTSD Are Suing the Army to Have Their Discharges Upgraded*, ARMY TIMES (Apr. 17, 2017), <https://www.armytimes.com/articles/veterans-with-ptsd-are-suing-the-army-to-have-their-discharges-upgraded> [<https://perma.cc/NWK3-28PA>] (reporting on *Kennedy v. Speer*, a proposed federal class-action filed by Army veterans of Iraq and Afghanistan seeking fair adjudication of PTSD-based discharge upgrade applications).

<sup>384</sup> See, e.g., ALI R. TAYYEB & JENNIFER GREENBURG, WATSON INST. ON INT’L & PUB. AFFAIRS, “BAD PAPERS”: THE INVISIBLE AND INCREASING COSTS OF WAR FOR EXCLUDED VETERANS 6-10 (2017) (summarizing effects of bad paper).

<sup>385</sup> Kors, *supra* note 110, at 12.

<sup>386</sup> ADER, *supra* note 110, at 2.

<sup>387</sup> DEP’T OF DEF., INSTRUCTION NO. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS 12 (Jan. 27, 2014) (enumerating the narrow set of circumstances in which separation on the basis of a personality disorder is authorized, including a requirement that “the disorder [be] so severe that the member’s ability to function effectively in the military environment is significantly impaired”).

basis.<sup>388</sup> These discharges are often made under honorable conditions, but recorded as based on an alleged personality disorder.<sup>389</sup> Because many young service members focus only on the discharge status, they may not contest the narrative reason for separation.<sup>390</sup> Yet the VA treats a personality disorder as a pre-existing condition, and many private employers hesitate to hire someone whose discharge paperwork indicates a severe mental health disorder.<sup>391</sup>

In fact, as congressional hearings as well as government and private analyses confirmed, nearly all of the post-2001 personality disorder discharges have been unlawful.<sup>392</sup> Many involved a medical misdiagnosis—service members suffering from PTSD, TBI, or nothing at all have been diagnosed with personality disorder and discharged.<sup>393</sup> And nearly *all* involve violations of various DoD regulations and instructions to protect service members from hasty or wrongful discharges.<sup>394</sup> Moreover, after public attention to unlawful personality disorders, the service branches began to reduce the practice<sup>395</sup>—but declined to review the discharge status of tens of thousands of service members

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<sup>388</sup> Kelly Kennedy, *Changes Sought for Vets' Psych Disorder Discharges*, USA TODAY (Nov. 28, 2012, 1:05 PM), <http://www.usatoday.com/story/news/nation/2012/11/28/psych-disorder-discharges/1729145/> [<https://perma.cc/T3HH-VE47>] (noting that nearly 30,000 people have been discharged on the basis of having a personality disorder).

<sup>389</sup> See GAO-09-31, *supra* note 110, at 11 n.20 (“[E]nlisted servicemembers who are separated because of a personality disorder receive either an ‘honorable’ or ‘general under honorable’ characterization of service that is given at the time of separation.”).

<sup>390</sup> See Kors, *supra* note 110, at 12-13.

<sup>391</sup> See GAO-09-31, *supra* note 110, at 11 (reporting that employers may take into consideration the veteran’s discharge for a personality disorder).

<sup>392</sup> See *Personality Disorder Discharges: Impact on Veterans’ Benefits: Hearing Before the H. Comm. on Veterans’ Affairs*, 111th Cong. 1-2 (2010) (statement of Rep. Bob Filner, Chairman, H. Comm. on Veterans’ Affairs) (describing accounts that the DoD is continuing to employ wrongful personality disorder discharges despite the committee’s previous work to expose the problem); GAO-10-1013T, *supra* note 110, at 8 (concluding that the military services did not fully comply with the DoD’s personality disorder separation requirements); GAO-09-31, *supra* note 110, at 2 (concluding that the DoD had “low rates of compliance”); ADER, *supra* note 110, at 2 (finding that only 8.9% of personality disorder discharges were properly handled in 2008-09); BOGHOSSIAN, *supra* note 110, at 1 (finding that the Coast Guard has routinely violated its regulations regarding personality disorder discharges).

<sup>393</sup> See ADER, *supra* note 110, at 2 (claiming that a substantial number of discharges may be based on a substantive misdiagnosis); BOGHOSSIAN, *supra* note 110, at 1 (discussing the concern first emerging in 2007 that “the military may purposely misdiagnose soldiers in order to cheat them out of a lifetime of benefits, thereby saving billions in expenses”).

<sup>394</sup> See ADER, *supra* note 110, at 2 (discussing the GAO’s findings of systematic noncompliance with requirements for discharges based on personality disorder); BOGHOSSIAN, *supra* note 110, at 1.

<sup>395</sup> See ADER, *supra* note 110, at 3 (noting the drop in personality disorder discharge rates following media scrutiny in 2007 and 2008).

separated on this ground since 2001.<sup>396</sup> There is evidence that the numbers of “adjustment disorder” discharges began to increase instead.<sup>397</sup>

For instance, after suing the DoD for its refusal to disclose records regarding personality and adjustment disorder discharges,<sup>398</sup> VVA found that more than 31,000 service members were discharged for an alleged personality disorder between fiscal years 2001 and 2010, substantially more than the 26,000 discharges estimated by Government Accountability Office for 2001 to 2007.<sup>399</sup> But, as personality disorder separations declined following media and congressional attention, “the military discharged a substantial number of persons on the alleged ground of an adjustment disorder.”<sup>400</sup> Moreover, internal reviews by the DoD confirmed that nearly all personality disorder discharges were done in violation of military rules and regulations designed to protect service members.<sup>401</sup> “This does not paint a pretty picture,” concluded one DoD reviewer, who calculated that only 8.9% of personality disorder discharges were “processed properly” from 2008 to 2009.<sup>402</sup>

A subsequent analysis confirmed that one service branch, the Coast Guard, “routinely violated procedures intended to protect service members from erroneous discharges for personality disorder . . . and adjustment disorder.”<sup>403</sup> Coast Guard data revealed that 96% (255/265) of a random sample of personality and adjustment disorder discharges “failed to comply with Coast Guard regulations.”<sup>404</sup> Since 2009, personality disorder discharges have declined and adjustment disorder discharges in the Coast Guard have soared.<sup>405</sup>

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<sup>396</sup> See *id.* at 10 (“To date, the military has taken no meaningful steps to redress the illegal discharge of tens of thousands of service members from FY01 to FY07.”).

<sup>397</sup> See *id.* at 14 (discussing the simultaneous rise in adjustment disorder discharges during the period in which personality disorder discharges decreased); BOGHOSSIAN, *supra* note 110, at 2 (discussing the concern that the DoD increased adjustment disorder discharges in order to compensate for a decrease in personality disorder discharges).

<sup>398</sup> Viet. Veterans of Am. Conn. Greater Hartford Chapter 120 v. Dep’t of Homeland Sec., 8 F. Supp. 3d 188 (D. Conn. 2014) (denying government motion for summary judgment in substantial part, in suit to compel the release of records regarding personality disorder discharges); Viet. Veterans of Am. Conn. Greater Hartford Chapter 120 v. U.S. Dep’t of Def., 10 F. Supp. 3d 245 (D. Conn. 2014) (denying government motion to dismiss suit to compel disclosure of records regarding personality disorder discharges).

<sup>399</sup> ADER, *supra* note 110, at 3.

<sup>400</sup> *Id.*; *id.* at 13-14 & tbl.3 (describing the quantitative rise in adjustment disorder discharges among the service branches).

<sup>401</sup> See *id.* at 3 (“Internal reviews by the DoD services for FY08-10 found hundreds of illegal [personality disorder] discharges.”).

<sup>402</sup> *Id.* at 2 (quoting Memorandum from CAPT Falardeau, L.O., to Chief of Naval Pers. (undated) (on file with authors)).

<sup>403</sup> BOGHOSSIAN, *supra* note 110, at 1.

<sup>404</sup> *Id.*

<sup>405</sup> *Id.* at 1-2, 12.

The DoD has resisted efforts to address its illegal personality disorder discharge problem. Legislation requiring medically appropriate review has languished,<sup>406</sup> and agency officials have ignored regulatory reforms proposed by VVA and others.<sup>407</sup> Instead, individual veterans have been left to fend for themselves, trying to explain to employers, the VA, and family members why their discharge paperwork marks them as suffering from a permanent, severe, and pre-existing mental health disorder.<sup>408</sup>

In these cases as well, the record correction boards have often failed veterans. Accustomed to routine denials of mental health-based applications, without scrutiny from the media or courts, the ABCMR has rejected record correction applications with the same boilerplate decisions familiar to veterans with PTSD.<sup>409</sup> One analysis concluded that the ABCMR had denied 100% of applications from recently-separated veterans discharged for an alleged adjustment disorder who then sought to correct the narrative reason for discharge based on a subsequent diagnosis of PTSD.<sup>410</sup> And in a case challenging an illegal adjustment disorder discharge, the U.S. District Court for the District of Connecticut held that, under Army regulations, it was unlawful to discharge a service member “without allowing up to six months to determine if he in fact had [adjustment disorder]” rather than PTSD.<sup>411</sup>

Congress established the record correction boards to replace private legislative petitions. The statutes it enacted sought to balance the need to preserve maximum flexibility for the commanding officer on the battlefield with concern for the welfare of the “boy [or girl who] gets into trouble”<sup>412</sup> and should not suffer a lifetime stigma as a result. The refusal of the record correction boards to fairly address the unlawful use of personality and adjustment disorder discharges is inconsistent with this congressional purpose. The mishandling of these cases, with lifetime consequences for thousands of service members and

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<sup>406</sup> See, e.g., Servicemember Mental Health Review Act, H.R. 6574, 112th Cong. § 1554b (2012) (requiring that previous separations based on personality disorder or adjustment disorder be reviewed).

<sup>407</sup> See ADER, *supra* note 110, at 15 (recommending appointment of a panel of senior officers to review personality and adjustment disorder discharges since 2001).

<sup>408</sup> See James Dao, *Branding a Soldier with ‘Personality Disorder,’* N.Y. TIMES, Feb. 25, 2012, at A1 (reporting on a veteran’s fight to remove her personality disorder diagnosis as part of her final discharge process).

<sup>409</sup> Complaint at 8-9, Cowles v. McHugh, No. 3:13-cv-01741, 2014 U.S. Dist. LEXIS 138927 (D. Conn. Sept. 30, 2014) (alleging, inter alia, that the ABCMR’s decision included only “boilerplate language” and failed to provide a soldier with the opportunity to improve his performance).

<sup>410</sup> *Id.* at 10.

<sup>411</sup> Cowles v. McHugh, No. 3:13-cv-01741, 2014 U.S. Dist. LEXIS 138927, at \*31 (D. Conn. Sept. 30, 2014).

<sup>412</sup> 78 CONG. REC. 4538 (1944) (statement of Rep. Cunningham).

their families, reveals not only a sad instance of agency failure but also a fundamental disagreement about the role of these boards.

B. *Conceptualizing Record Correction Reform*

The armed forces have issued hundreds of thousands of bad paper discharges, many in haste, based on racial animus, in retaliation for reports of sexual harassment or assault, based on now-unlawful grounds such as homosexuality or misconduct attributable to undiagnosed PTSD, and in violation of legal rules or best medical practices.<sup>413</sup> When veterans have sought redress, they have faced hostile boards that summarily deny applications, refuse to permit them to appear in person, rely on secret evidence, and dispense a sort of third-rate “justice” that would be unacceptable in nearly any other administrative law setting.<sup>414</sup>

The military appears to believe the boards should function as if subject to the Uniform Code of Military Justice. Speaking broadly, military law reflects a substantial deference to decentralized command decisions, in which post-hoc review rarely results in reversing choices made in the field. The DoD emphasizes that “[the] BCM/NRs are not courts, nor are they investigative agencies.”<sup>415</sup> Notwithstanding the broad statutory authority to “correct an error or remove an injustice,”<sup>416</sup> the boards proceed from a “presumption of regularity”<sup>417</sup> as to the proceedings that led to a veteran’s discharge. Where a veteran seeks judicial review of an adverse board decision pursuant to the APA, the DoD has argued for “increased deference,” beyond the usual deference due in APA review, in light of the tradition of civilian courts abstaining from close scrutiny of military decisions.<sup>418</sup> If one were to adopt a military law conception of the role of the record correction boards, then the substantive and procedural criticisms leveled by veterans and their advocates would not carry much force. On this view, decisions by commanding officers in the field should rarely be reversed, robust procedural protections are unnecessary, and civilian courts should not intervene.

An administrative law conception of the boards, by contrast, would take the criticisms more seriously. A system of internal review that merely rubber-stamps past decisions in boiler-plate denials of applications is of little utility; the absence of procedural fairness undermines faith in the system and acceptance of the outcomes;<sup>419</sup> and reviewing courts should not grant special or heightened

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<sup>413</sup> See *supra* notes 106-12 and accompanying text (discussing the history of discriminatory discharge practices).

<sup>414</sup> See *supra* notes 136-42 and accompanying text (discussing the hostile procedural practices employed by the BCMR).

<sup>415</sup> HAGEL MEMO, *supra* note 362, at 1.

<sup>416</sup> 10 U.S.C. § 1552(a)(1) (2012).

<sup>417</sup> 32 C.F.R. § 70.8(b)(12)(vi) (2016).

<sup>418</sup> See, e.g., Memorandum of Law in Support of Defendant’s Motion to Dismiss & for Summary Judgment, *supra* note 340, at 8.

<sup>419</sup> Tyler, *supra* note 157, at 283-87.

deference to agency expertise, beyond the usual deference afforded under the APA's arbitrary and capricious standard.<sup>420</sup> Values of consistency, efficiency, transparency, and fair procedures would be more central to the board adjudications and any judicial review thereof. The boards would be subject not only to hierarchical accountability within the DoD, as under a military law approach; they would also be accountable to individual veterans, enforced via judicial review, and to elected officials, as with other agencies.<sup>421</sup>

A third possible conception of the boards might be termed a "veterans' law" framework. Under this view—urged by contemporary advocates and reflected in part in legislative proposals like the Fairness for Veterans Act and the Hagel Memo—veterans applying for a discharge upgrade should receive more generous treatment. Statutory ambiguities would be construed in favor of the veteran;<sup>422</sup> the "presumption of regularity" would be eliminated, and evidentiary presumptions in favor of the veteran would substitute instead;<sup>423</sup> where no presumption applies, the burden of proof would be merely equipoise;<sup>424</sup> and civilian courts might grant even less deference than under ordinary APA review. The Hagel Memo's directive that the boards afford "liberal consideration" to certain PTSD-based upgrade applications, codified in the 2017 NDAA, is consonant with this approach, as are recent bills proposing to establish presumptions before the boards similar to those applied often by the VA to disability benefits applications.<sup>425</sup>

One might object that adopting a veterans' law framework in record correction proceedings would entrench the very veterans' exceptionalism criticized in this paper, but that objection would miss the mark. Commanding officers should retain wide discretion in the field to swiftly remove an underperforming unit member. To ensure that such decisions—often made by young officers under stress, with little time for reflection or detailed medical input—do not work a lifetime injustice against a young service member, Congress tempered this discretion with a robust set of post-hoc protections at the

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<sup>420</sup> See, e.g., *Blassingame v. Sec'y of the Navy*, 811 F.2d 65, 69 (2d Cir. 1987) (holding record correction board decisions subject to APA review); *Remmie v. Mabus*, 898 F. Supp. 2d 108, 118 (D.D.C. 2012) (applying APA standard of review to BCNR decision).

<sup>421</sup> See Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362, 1378 (2010) (explaining "overlapping accountability regimes").

<sup>422</sup> *Brown v. Gardner*, 513 U.S. 115, 117-18 (1994) (construing ambiguous statutory terms in favor of veterans).

<sup>423</sup> See, e.g., 38 C.F.R. § 3.304(f) (2016) (establishing presumption of service connection when PTSD is attributable to specified stressors).

<sup>424</sup> 38 U.S.C. § 5107(b) (2012) (stating that the veteran should receive "the benefit of the doubt" where evidence is in equipoise).

<sup>425</sup> See Fairness for Veterans Act of 2016, H.R. 4683, 114th Cong.; S. 1567, 114th Cong. (2015).

boards.<sup>426</sup> The goal was to protect “the boy [and girl] in trouble”<sup>427</sup> without constraining the commanding officers’ discretion in the field. To strengthen those protections, as the Hagel Memo and the 2017 NDAA have done, is to recalibrate the balance between field decisions and a post-hoc safety net, rather than to embrace a veterans’ law exceptionalism.

Finally, one could imagine a civil service conception of the boards, one that incorporated principles and practices developed over the past 130 years to adjudicate disputes of other public employees. For instance, federal employees other than those in the military typically enjoy “just cause” protection against termination<sup>428</sup> as well as procedural safeguards, including notice of a proposed adverse action, an opportunity to “answer,” representation, and a written decision.<sup>429</sup> Adverse actions are subject to later review before an administrative judge of the MSPB,<sup>430</sup> at which time the agency bears the burden to support its action by a “preponderance of evidence.”<sup>431</sup> The MSPB can overturn an adverse action or mitigate a punishment,<sup>432</sup> generally subject to judicial review in the Federal Circuit.<sup>433</sup> Overall, the civil service system reflects the inherent tension between the dual objectives of protecting worker rights and management flexibility,<sup>434</sup> a tension present in the military as well.

While the civil service system is not free from criticism,<sup>435</sup> it would not be anomalous to incorporate its practices more fully into the record correction

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<sup>426</sup> See discussion *supra* Section I.C.

<sup>427</sup> See *supra* note 119 and accompanying text (discussing the goals behind establishing record correction and discharge review boards as described by Rep. Cunningham).

<sup>428</sup> 5 U.S.C. § 7513(a) (2012) (forbidding adverse employment action except “for such cause as will promote the efficiency of the service”).

<sup>429</sup> *Id.* § 7513(b) (outlining the procedural protections to which federal employees are entitled, including thirty days written notice, reasonable time to answer orally and in writing, and a written decision).

<sup>430</sup> *Id.* § 7513(d) (granting federal employees the right to appeal to the MSPB).

<sup>431</sup> *Id.* § 7701(c)(1)(B) (establishing a preponderance of the evidence standard for all cases not based on unacceptable performance).

<sup>432</sup> See, e.g., *Douglas v. Veterans Admin.*, 5 M.S.P.B. 313, 313 (1981) (holding the MSPB may “modify or reduce a penalty imposed on an employee”).

<sup>433</sup> 5 U.S.C. § 7703 (establishing the availability of judicial review of MSPB decisions).

<sup>434</sup> See, e.g., Donald P. Moynihan, *Protection Versus Flexibility: The Civil Service Reform Act, Competing Administrative Doctrines, and the Roots of Contemporary Public Management Debate*, 16 J. POL’Y HIST. 1, 1 (2004).

<sup>435</sup> See, e.g., Robert J. McCarthy, *Blowing in the Wind: Answers for Federal Whistleblowers*, 3 WM. & MARY POL’Y REV. 184, 184 (2012) (criticizing “ignominious record” of failing to protect whistleblowers in civil service system that is biased, insufficiently independent, and staffed by under-qualified decision-makers); Carten Cordell, *How Easy Should It Be to Fire a Fed?*, FED. TIMES, Apr. 18, 2016, at A14 (describing debate over proposal to remove senior VA officials from MSPB protection).



boards. For example, civil service protections for federal whistleblowers<sup>436</sup> might better safeguard those discharged in retaliation for reporting sexual harassment or assault.<sup>437</sup> Other principles from federal employment law might also guide record correction boards, integrating discharge review cases into the mainstream of wrongful discharge adjudications in the modern era.<sup>438</sup>

For years, the DoD has embraced a military law approach to record correction adjudications. Courts have tended to favor a more traditional administrative law approach, though judicial opinions have been rare in recent years. There is much to commend in current reform efforts, which may appear to reflect a veterans' law framework but which are better understood as managing the tension between a need for decentralized command flexibility in the field and strong post-hoc worker protections for veterans.

#### CONCLUSION

Contemporary veterans confront numerous challenges. The systems established by Congress to care for wounded warriors and to provide a meaningful opportunity for veterans with bad paper to "clear up their record"<sup>439</sup> are broken. This article identifies four current policy debates and attempts to provide an analytical framework for understanding and resolving them. One theme threading through each policy dispute is that of veterans' law exceptionalism. Past efforts to mainstream veterans programs by FDR, Eisenhower, and General Bradley failed. Ending recurring problems, however, such as the DoD's blanket rejection of discharge upgrade applications by veterans with PTSD or the discriminatory denial of VA benefits applications by survivors of military sexual assault, might require the fuller integration of veterans' law with modern approaches to administrative, employment, and other bodies of law.

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<sup>436</sup> 5 U.S.C. § 2302(b)(8) (prohibiting adverse employment actions against someone for disclosing information the employee reasonably believes evidences a violation of law, gross mismanagement, or abuse of authority).

<sup>437</sup> See HRW, *Booted*, *supra* note 107 (describing stories of military personnel being given personality disorder diagnoses in apparent retaliation for reporting sexual assaults and other abuses); see also HUMAN RIGHTS WATCH, EMBATTLED: RETALIATING AGAINST SEXUAL ASSAULT SURVIVORS IN THE US MILITARY 27 (2015) (describing the problem of sexual assault and fear of retaliation for reporting).

<sup>438</sup> For instance, in "fraudulent enlistment" cases, record correction boards may uphold a bad discharge based on information learned after the discharge that a service member failed to disclose upon enlistment. See, e.g., *Acevedo v. United States*, 216 F. App'x 977, 979-80 (Fed. Cir. 2007) (upholding a denial of disability retirement due to the applicant's concealment of his mental condition). By contrast, in employment law, the "after-acquired evidence" doctrine will not generally eliminate an employer's liability for wrongful discharge, even though damages may be limited prospectively from the moment of discovery. See, e.g., *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 352 (1995).

<sup>439</sup> 78 CONG. REC. 4538 (1944) (statement of Rep. Cunningham).

No body of law is completely divorced from all others, and as such, any legal discipline termed “exceptional” is really so only to a degree. Nevertheless, tax, immigration, and perhaps other fields are fairly characterized as having sufficiently departed from mainstream administrative or constitutional law values as to have earned the label. Veterans’ law has long been ignored, so much so that it is typically left off even this list of legal outcasts. Yet like these other “exceptional” fields, it is a legal backwater, with VA benefits cases segregated in a specialized Article I court; disabled veterans long denied the opportunity to ever aggregate their claims, as nearly all other injured litigants might, thus frustrating efforts to redress extraordinary VA delays; and claims of discrimination based on disability or sex treated largely outside modern anti-discrimination paradigms.

So too with record correction cases, the second major category of veterans’ law. Appallingly dysfunctional administrative boards, rarely called to justify their decisions in court, engage in poor adjudications while systematically discriminating against certain classes of veterans with bad paper. These low-quality adjudications are not merely the result of under-resourced boards and neglect by senior DoD officials, but appear to reflect an insistence on exceptional deference to military affairs, eschewing modern principles of public employment or administrative law.

The paradox of veterans’ law, however, is that despite the pernicious effects of its status as a legal backwater, service members (at least those without bad paper) are eligible for generous disability, housing, health care, education, and other benefits—far more generous than is available to the general public. But there is no inherent reason that generous benefits must be combined with retrograde legal structures and procedures. The benefits are more generous because they reflect respect for the sacrifice of military service and the special responsibility of the entire nation to care for those wounded in war. Applying administrative, constitutional, employment, and anti-discrimination principles from outside the narrow realm of veterans’ law need not threaten these benefits, nor the appropriately special regard for those “who shall have borne the battle”<sup>440</sup> and the “boy [or girl who] gets into trouble.”

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<sup>440</sup> Abraham Lincoln, *Second Inaugural Address*, YALE L. SCH. LILLIAN GOLDMAN L. LIBR. (Mar. 4, 1865), [http://avalon.law.yale.edu/19th\\_century/lincoln2.asp](http://avalon.law.yale.edu/19th_century/lincoln2.asp) [<https://perma.cc/39X6-F8US>].