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Thirty Years After Walters the Mission Is Clear, The Execution Is Muddled: A Fresh Look at the Supreme Court's Decision to Deny Veterans the Due Process Right to Hire Attorneys in the VA Benefits Process

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THIRTY YEARS AFTER *WALTERS* THE MISSION IS CLEAR,
THE EXECUTION IS MUDDLED:
A FRESH LOOK AT THE SUPREME COURT'S DECISION TO
DENY VETERANS THE DUE PROCESS RIGHT TO HIRE
ATTORNEYS IN THE VA BENEFITS PROCESS

*Stacey-Rae Simcox**

*"Your assumptions are your windows on the world. Scrub them off every once in a while, or the light won't come in."*¹

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1. Isaac Asimov, *Quotable Quote*, GOODREADS, <http://www.goodreads.com/quotes/667214-your-assumptions-are-your-windows-on-the-world-scrub-them> (last visited Feb. 14, 2016).

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I. INTRODUCTION

“[T]o care for him who shall have borne the battle”—these words from President Lincoln reverberate throughout history as America’s promise to care for her wounded veterans.² Because it is our moral obligation to care for our veterans, Congress has determined that the process for them to apply for benefits due to injury in service should be as informal and easy as possible, with every benefit of the doubt going to the veteran.³ Indeed, one of the core tenets of the Department of Veterans Affairs (VA) is that it provides a “veteran-friendly,” non-adversarial environment in which the agency helps a veteran apply for disability benefits.⁴ Thirty years ago, in the case of *Walters v. National Association of Radiation Survivors*, the Supreme Court relied on this non-adversarial nature of the VA to limit a veteran’s Fifth Amendment due process rights. The Court held in *Walters* that Congress is permitted to statutorily limit a veteran’s ability to hire an attorney during the VA benefits process.⁵ The Supreme Court specifically found that the constitutionally valid limitation on attorneys is hinged on the coexisting condition that the VA’s system is sufficiently non-adversarial that no attorney should be necessary.⁶ Fifteen years after that decision, Congress codified historical practices of this non-adversarial system, specifically enumerating the VA’s duties to veterans.⁷ In the past thirty years, Congress has twice altered the limitation on hiring attorneys, but continues to prohibit veterans from hiring lawyers at certain stages in

2. President Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), <http://www.bartleby.com/124/pres32.html>.

3. *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 329 (1985).

4. *Hodge v. West*, 155 F.3d 1356, 1362-63 (Fed. Cir. 1998).

5. *See Walters*, 473 U.S. at 333-34.

6. *Id.*

7. *See Veterans Claims Assistance Act of 2000*, Pub. L. No. 106-475, 114 Stat. 2096 (2000).

the adjudication process.⁸ Also in the past thirty years, the Supreme Court's finding in *Walters* that the VA is a non-adversarial process has been relied upon in other court decisions when determining a veteran's rights and benefits.⁹

Despite the findings of the Court in *Walters* and the codification of a non-adversarial benefits system, this Article contends that a court reviewing the limitation of a veteran's ability to hire an attorney today should come to the opposite conclusion of the *Walters* Court. The circumstances in the veterans benefits system now clearly demonstrate that the Supreme Court's finding that the VA employs a veteran-friendly, non-adversarial system is no longer a valid assumption. For decades, arguments have been made that the VA is trending away from a system that helps the veteran at every step and truly gives the veteran the benefit of the doubt. After a review of the current landscape of veterans benefits, it appears the time has come to admit that the VA's disability compensation system has become de facto adversarial at all levels of the adjudication process. The fact that the VA benefits system is no longer purely non-adversarial changes the circumstances in which the *Walters* Court decided that Congress' limitation on attorneys did not violate veterans' Fifth Amendment due process rights.¹⁰ It also leads to the conclusion that due process now demands that veterans rights no longer be limited.

This Article does not intend to argue that Congress should terminate the veteran-friendly system that it has tried to create for over a century and move to a purely adversarial system. The term adversarial is one that should be viewed on a continuum and this Article does not suggest that the VA is currently or should in the future engage in a trial process at the VA's adjudication level. However, the VA has slipped away from a system that deals reasonably with veterans and adjudicates their claims in a manner providing veterans the benefit of the doubt. The veteran compensation system should continue to strive for a system that honors veterans for their service and gives veterans the benefit of the doubt, but the reality is that the VA alone cannot ensure this

8. See 38 U.S.C. § 5904(c)(2) (2012).

9. See *Henderson v. Shinseki*, 562 U.S. 428, 431 (2011) (quoting *Walters*, 473 U.S. at 311) ("The VA's adjudicatory process is designed to function throughout with a high degree of informality and solicitude for the claimant."); *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013, 1036 (9th Cir. 2012) (citing *Walters*, 473 U.S. at 323-24) ("We emphasize, as the district court did, that Congress purposefully designed a non-adversarial system of benefits administration . . . This is particularly true as it pertains to the retention of counsel during the initial claim phase, which the Supreme Court found would seriously frustrate the oft-repeated congressional purpose to maintain the non-adversarial bent of benefits administration.").

10. *Walters*, 473 U.S. at 323.

environment. Veterans are entitled to our best efforts to administer their benefits to them in as veteran-friendly and non-adversarial a manner as we can. Thus, by denying veterans certain safeguards that the VA cannot provide, we are doing our veterans a disservice and violating their Constitutional rights. Guaranteeing that veterans have access to all manner of advocates at all levels of the process will ensure that the veteran-friendly procedures are being properly implemented at the lowest levels of the VA. Proper adjudication at the lowest levels will eliminate needless appeals that clog up the system and cause veterans to wait years for new decisions.

Part II of this Article will discuss the historical beginnings of the VA's mission and the current process for a veteran to receive benefits from the VA. Part III will consider the historical underpinnings of the VA's non-adversarial system and review the history of attorney representatives in the VA process. It will also discuss the Supreme Court decision in *Walters* and the changes in the law that brought judicial review to VA decisions and codified the VA's duties to a veteran. Part IV will analyze the current state of the non-adversarial system of the VA and the problems the VA has recently had in implementing a non-adversarial, veteran-friendly system. Part V will propose that the current state of affairs at the VA requires a new evaluation of a veteran's due process right to an attorney under the *Mathews* test. It will also propose that the best way to preserve the veteran-friendly nature of the VA's system is to allow attorneys to help veterans in this process and alleviate the burden on the VA.

II. THE PURPOSE OF THE VA

A. *Historical Beginnings of the VA*

To understand why the VA is ordered by Congress to be a non-adversarial, "veteran friendly" system requires an appreciation of the long history of the VA and veterans in the United States. While the entire historical relationship of America with her veterans is an interesting story,¹¹ for purposes of this Article the analysis of the "non-adversarial" character of the VA begins at the conclusion of America's Civil War.

11. For more information on this historical relationship, see Dennis Whelan, *William Henry Glasson and the First Hundred Years of Federal Compensation for Service Connected Disability in America* 45-46 (2013) (Working Paper, Aug. 31, 2013), http://papers.ssm.com/sol3/papers.cfm?abstract_id=2344337; James D. Ridgway, *The Splendid Isolation Revisited: Lessons from the History of Veterans' Benefits Before Judicial Review*, 3 VETERANS L. REV. 135, 135-39, 154-57 (2011).

Toward the end of the Civil War, the United States was in disarray.¹² President Lincoln in his second inaugural address, just weeks before his own death, reminded Americans that, despite the pain and suffering they had been through, there was a purpose in the misery and the American people could persevere.¹³ The President urged that, while Americans should pray for a swift end to the war, the end would come in God's time at His will.¹⁴ In light of the fact that President Lincoln believed the end of the war would not be brought about by man's actions, the President charged Americans with the only duty they could carry out in the face of this reality:

With malice toward none, with charity for all, with firmness in the right as God gives us to see the right, let us strive on to finish the work we are in, to bind up the nation's wounds, to care for him who shall have borne the battle and for his widow and his orphan, to do all which may achieve and cherish a just and lasting peace among ourselves and with all nations.¹⁵

This passionate prayer for Americans to work together to "bind up the nation's wounds" and to care for her servicemen was made in America's darkest hour.¹⁶ Tensions and emotions were understandably high and a call for renewed patriotism was necessary to reform the country's two distinct parts as one.¹⁷ To rally America around her wounded military veterans was the best and most non-contentious cause to heal the nation's divisions.¹⁸ In acknowledgement of the charge laid at the feet of the nation, the phrase "to care for him who shall have borne the battle and for his widow and orphan" was adopted by the emerging arm of the Pension Bureau, the precursor to the VA.¹⁹

It would be a mistake to underestimate the importance of the patriotism and sense of moral obligation invoked by President Lincoln and echoed throughout America's history.²⁰ Many

12. See generally Paul F. Paskoff, *Measures of War: A Quantitative Examination of the Civil War's Destructiveness in the Confederacy*, in 54 *CIVIL WAR HISTORY* 35 (2008).

13. See Lincoln, *supra* note 2.

14. See *id.*

15. *Id.*

16. President Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), <http://www.bartleby.com/124/pres32.html>.

17. *The Origin of the VA Motto: Lincoln's Second Inaugural Address*, U.S. DEP'T OF VETERANS AFF., <http://www.va.gov/opa/publications/celebrate/vamotto.pdf> (last visited Feb. 14, 2016) [hereinafter *The Origin of the VA Motto*].

18. See *id.*

19. See *id.*

20. WILLIAM H. GLASSON, *FEDERAL MILITARY PENSIONS IN THE UNITED STATES 207-08* (1918). For instance, twenty years after President Lincoln's words, President Grover Cleveland

Americans, and indeed Congress throughout the decades, believe this calling created a moral and ethical obligation on behalf of America to care for the wounded military veterans sent into her service. America's government, through most of its history, has not treated the words "to care for him who shall have borne the battle" as merely a slogan—this promise and the moral obligations that flow from it are at the heart of the VA's historically non-adversarial system.²¹ President Lincoln's promise still influences modern political and policy decisions concerning the administration of the veterans benefits system. The Veterans Disability Benefits Commission, tasked in 2007 to propose suggestions to battle inefficiencies and errors in the VA system, remarked:

The Commission wrestled with philosophical and moral questions about how a Nation cares for disabled veterans and their survivors and how it expresses its gratitude for their sacrifices. The Commission agreed that the United States has a solemn obligation, expressed so eloquently by President Lincoln, ". . . to care for him who shall have borne the battle, and for his widow, and his orphan"²²

It is this moral obligation to our veterans upon which the entire veterans disability compensation process is built.

B. The Organization of the VA and the Disability Compensation System

The Department of Veterans Affairs (VA) is a department of the United States Government with a cabinet-level secretary who answers directly to the President.²³ The VA itself has three distinct parts: the Veterans Benefits Administration (VBA), the Veterans Health Administration (VHA), and the National Cemetery Administration.²⁴

remarked on our country's obligation to care for our veterans that "I cannot rid myself of the conviction that if these ex-soldiers are to be relieved, they and their cause are entitled to the benefit . . . and that such relief should be granted under the sanction of law, not in evasion of it; nor should such worthy objects of care, all equally entitled, be remitted to the unequal operation of sympathy, or the tender mercies of social and political influence with their unjust discriminations."

21. See *The Origin of the VA Motto*, *supra* note 17.

22. *Finding of the Veterans' Disability Benefits Commission: Hearing Before the H. Comm. On Veterans' Affairs*, 110th Cong. 38 (2007) (statement of Lieutenant General James Terry Scott, USA (Ret.) Chairman, Veterans' Disability Benefits Commission: Executive Summary).

23. Press Release, U.S. Dep't of Veterans Aff., Off. of Pub. & Intergovernmental Aff., VA Observes 10th Anniversary as a Cabinet Department (Mar. 15, 1999), <http://www1.va.gov/opa/pressrel/pressrelease.cfm?id=145>.

24. *Dept. of Veterans Affairs Organizational Chart*, U.S. DEP'T OF VETERANS AFF. (June 2009), <http://www.va.gov/ofcadmin/docs/vaorgchart.pdf>.

The VBA is responsible for determining and administering veterans' benefits.²⁵ These benefits include pensions, education funds, disability compensation, guaranteed home loans, and more.²⁶ This Article focuses exclusively on disability compensation benefits and their adjudication. The lowest level (agency of original jurisdiction) of the VBA is the Regional Office, or VARO.²⁷ The VARO has employees known as "Rating Veterans Service Representatives" (RVSRs) who decide a veteran's claim for benefits.²⁸ These RVSRs are not normally lawyers or doctors.²⁹ The RVSR employee is usually a lower level federal employee who has been on the job less than five years.³⁰ VBA employees with more experience, referred to as Decision Review Officers (DROs), are often assigned to review claims upon request of the veteran after appealing an initial decision.³¹

Veterans who have been wounded or suffered some other disability in service to the nation may file a claim for disability benefits with the VA.³² These disability compensation benefits normally come to veterans in the form of a non-taxable monthly check.³³ To be eligible for any VA benefits, the veteran must first prove that he³⁴ is indeed a veteran with a discharge that is "other than

25. *About VBA, Veterans Benefits Administration*, U.S. DEP'T OF VETERANS AFF., <http://www.benefits.va.gov/benefits/about.asp> (last visited June 27, 2015).

26. *See id.*

27. *See Hensley v. West*, 212 F.3d 1255, 1259 (Fed. Cir. 2000); *How to Apply, Compensation*, U.S. DEP'T OF VETERANS AFF., <http://www.benefits.va.gov/compensation/apply.asp> (last visited June 27, 2015).

28. *See Rating Veterans Service Representative*, U.S. DEP'T OF VETERANS AFF., <http://mycareeratva.va.gov/careers/career/099604> (last visited June 27, 2015).

29. *See id.*

30. *See Adjudicating VA's Most Complex Disability Claims: Ensuring Quality, Accuracy and Consistency on Complicated Issues: Hearing Before the H. Subcomm. On Disability Assistance and Memorial Affairs of the Comm. On Veterans' Affairs*, 113th Cong. 44 (2013) (statement of Zach Hearn, Deputy Director for Claims of the American Legion); *see also Addressing the Backlog: Can the U.S. Department of Veterans Affairs Manage One Million Claims?: Hearing Before the H. Subcomm. On Disability Assistance and Memorial Affairs of the Comm. On Veterans' Affairs*, 111th Cong. 52 (2009) (statement of Ian de Planque, Assistant Director of Veterans Affairs and Rehabilitation Commission for the American Legion).

31. *See* 38 C.F.R. § 3.2600 (2014); *see* U.S. DEP'T OF VETERANS AFF., M21-1, ADJUDICATION PROCEDURE MANUAL, PT. I, CH. 5, § C(2)(a) (2015).

32. *See* 38 U.S.C. § 5301(a) (2003); 38 U.S.C. § 1110 (2012).

33. *See Veterans Compensation Benefits Rate Tables, Compensation*, U.S. DEP'T OF VETERANS AFF., http://www.benefits.va.gov/COMPENSATION/resources_comp01.asp (last visited Aug. 17, 2016); 38 U.S.C. § 5301(a) (2003).

34. The pronoun "he" will be used throughout this Article to refer to the veteran. This is not to discount the service of our women in uniform. However, because men make approximately ninety-one percent of living veterans and for the purposes of simplicity, the pronoun "he" will be used. *See* NAT'L CTR. FOR VETERANS ANALYSIS & STAT., U.S. DEP'T OF VETERANS AFF., VETERAN POPULATION, http://www.va.gov/vetdata/veteran_population.asp (last visited Nov. 17, 2014).

dishonorable.”³⁵ After this step has been met, the veteran may prove entitlement to disability compensation if he can show that he meets a three-pronged test: (1) he suffers from a current disability; (2) an event that occurred during his or her active service caused that disability; (3) and that the two are causally connected, often referred to as the “nexus.”³⁶ Proving a causal connection often requires medical evidence in the form of an opinion from a qualified medical professional.³⁷

The standard of proof a veteran must meet to connect these disabilities to his or her service is “as likely as not.”³⁸ In general, the standard provides that “a veteran need only demonstrate that there is ‘an approximate balance of positive and negative evidence’ in order to prevail . . . [i]n other words . . . the preponderance of the evidence must be against the claim for benefits to be denied.”³⁹ In the eyes of the law, this standard of proof is not terribly burdensome and is less than even the civil litigation “preponderance of the evidence” standard. This benefit of the doubt requirement is one of the aspects of the veterans benefits system that has earned the system its non-adversarial characterization.⁴⁰

In addition to a low standard of proof, the VA is statutorily required to assist the veteran through the process of filing a claim.⁴¹ These requirements are often referred to as the VA’s duties.⁴² These duties will be discussed in more detail further in this Article. It is enough to say here that the VA is required to help a veteran find evidence to support his claims, provide medical examinations in most instances, and otherwise treat the claims of a veteran sympathetically.⁴³

To begin the disability compensation process, the veteran must file a claim with the nearest VARO.⁴⁴ The claims process at the VARO

35. 38 U.S.C. § 101(2) (2008); 38 C.F.R. § 3.1(d) (2014). The requirements for veteran status could fill an article length analysis themselves. This Article assumes the veterans discussed herein have met these threshold requirements and are indeed eligible veterans.

36. *Caluza v. Brown*, 7 Vet. App. 498, 506 (Vet. App. 1995), *aff’d*, 78 F.3d 604 (Fed. Cir. 1996).

37. *See id.* An exception to the need for medical evidence occurs in cases where lay testimony is sufficient to satisfy these requirements, such as cases where a layperson could make an obvious medical diagnosis. *See Jandreau v. Nicholson*, 492 F.3d 1372, 1377 (Fed. Cir. 2007).

38. *See Gilbert v. Derwinski*, 1 Vet. App. 49, 54 (Ct. Vet. App. 1990); 38 U.S.C. § 5107 (2000); 38 C.F.R. § 3.102 (2013).

39. *Gilbert*, 1 Vet. App. at 54.

40. *Hodge v. West*, 155 F.3d 1356, 1363 (Fed. Cir. 1998).

41. *See* 38 U.S.C. § 5103A (2012).

42. *See id.*

43. *See id.* §§ 5103A, 5107, 5109; *see also* *McGee v. Peake*, 511 F.3d 1352, 1357 (Fed. Cir. 2008); *see also* *Cook v. Principi*, 318 F.3d 1334, 1338 n.4 (Fed. Cir. 2002).

44. *See* 38 U.S.C. §§ 5107, 5110(a). While this is a codified requirement, the VBA has recently altered this requirement by creating two processing centers for claims across the United States, one in

is considered non-adversarial, discussed in more detail below.⁴⁵ Since March 2015, veterans are required to use a specific form to give the VA information concerning the disability for which he or she is claiming benefits.⁴⁶ After the veteran files a claim, the VA will interpret the veteran's claim and begin collecting evidence regarding the claim. This step in the process is crucial because the beginning of fact investigation is done at this stage in the process. After investigation, the RVSR will adjudicate the veteran's claim and issue a decision, formally referred to as a "rating decision."⁴⁷ This rating decision will tell the veteran the evidence considered, the legal theory of connection under which the disability was viewed,⁴⁸ and the decision of the VA. If the veteran is not satisfied with the rating decision, the veteran has one year to file an appeal referred to as the "Notice of Disagreement" (NOD).⁴⁹ When a veteran files a NOD, the VARO is required to issue a "statement of the case" (SOC) to the veteran explaining in more detail why that particular decision was made on the veteran's claim.⁵⁰ The veteran then must file a VA Form 9 to begin his substantive appeal to the next appellate level, the Board of Veterans' Appeals (BVA or Board).⁵¹ The Board is a part of the VA and is bound by the VA Secretary's rules and regulations and the legal advice and determinations of the VA Office of General Counsel.⁵² The Board is staffed with attorneys and Veterans Law Judges who review and render decisions on the claims.⁵³ Proceedings before the Board are also considered non-adversarial.⁵⁴ There is no representative of the VA advocating against the veteran at these hearings.⁵⁵ However, the Veterans Law Judges deciding a veteran's claim are employees of the VA.⁵⁶ Veterans may hire

Georgia and one in Wisconsin. The VBA now requests that all claims be sent to one of these two offices. See also *Mailing Addresses for Disability Compensation Claims*, U.S. DEP'T OF VETERANS AFF., <http://www.benefits.va.gov/compensation/maillingaddresses.asp> (last visited Aug. 16, 2016).

45. See *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 323-24 (1985).

46. See Department of Veteran Affairs Standard Claim and Appeals Forms, 79 Fed. Reg. 57,695 (Sept. 25, 2014) (codified at 38 C.F.R. § 3.155(a) (2014)).

47. 38 U.S.C. § 7104 (a)-(b) (2012).

48. Legal theories of connection include a direct service connection, a secondary-service connection, and presumptive service connection among others. See 38 C.F.R. §§ 3.303-318 (1961).

49. See 38 U.S.C. § 7105(b)(1).

50. 38 C.F.R. § 19.26 (2016). Similar to the claims filing process, the VBA now requires veterans to send NODs to one of the two central processing centers in Georgia or Wisconsin. However, this process is not codified or implemented by rule.

51. See 38 U.S.C. § 7105 (2012).

52. 38 U.S.C. § 7104(c).

53. See 38 U.S.C. § 7101(a); see *Gateway to VA Appeals, Bd. of Veterans' Appeals*, U.S. DEP'T OF VETERANS AFFAIRS, <http://www.bva.va.gov> (last visited Nov. 17, 2014).

54. *Jaquay v. Principi*, 304 F.3d 1276, 1282 (Fed. Cir. 2002).

55. 38 C.F.R. § 20.700(c) (1996).

56. See 38 U.S.C. §§ 7101, 7101A(a).

attorneys to represent them at this stage of the proceedings.⁵⁷

If a veteran is not happy with the decision of the Board, the veteran may appeal to the first level of federal court appellate review, the Court of Appeals for Veterans Claims (CAVC).⁵⁸ The CAVC was created in 1988 and is an Article I appellate court.⁵⁹ Before the creation of the CAVC (or Court of Veterans Appeals as it was originally known) there was no real possibility of appellate review of Board decisions.⁶⁰ The CAVC is authorized to have seven full-time judges who are appointed by the President and serve for terms of fifteen years each.⁶¹ Proceedings at the CAVC are considered to be adversarial, and the VA's interests are represented by attorneys from the VA's own Office of General Counsel who argue the VA's position.⁶² Obviously, this is a notable departure from the system the veteran experienced prior to this level of proceedings.⁶³ Veterans or the VA may appeal decisions of the CAVC to the Court of Appeals for the Federal Circuit.⁶⁴ The Federal Circuit only has jurisdiction to hear appeals that involve "the validity of any statute or regulation or any interpretation thereof . . . and to interpret constitutional and statutory provisions."⁶⁵ From the Federal Circuit, a veteran may attempt to seek review from the Supreme Court of the United States.⁶⁶

Veterans may seek representation during the claims process or can pursue their claims *pro se*.⁶⁷ There are two types of veterans advocates in the VA system, non-attorney and attorney. The Veterans Service Organizations (VSOs) provide non-attorney representatives at no cost to the veteran to help them through the VA system and may also help at the CAVC. VSOs are approved by Congress and have a special status with the VA, including an allotment of space in VA facilities where VSOs can meet with veterans.⁶⁸ VSOs can represent a veteran at any point in the

57. *See id.* §§ 5904(c), 7105.

58. 38 U.S.C. § 7252(a) (1998).

59. *See* Veterans' Admin. Adjudication Procedure and Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988); *see* 38 U.S.C. § 7251.

60. *See* Veterans' Admin. Adjudication Procedure and Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988).

61. 38 U.S.C. § 7253(a)-(c) (2008).

62. 38 U.S.C. § 7263(a) (1998); *see* Forshey v. Principi, 284 F.3d 1335, 1355 (Fed. Cir. 2002).

63. *See* 38 U.S.C. § 7263; *see* Forshey, 284 F.3d at 1355.

64. 38 U.S.C. § 7292(c) (2002).

65. *Id.*

66. 28 U.S.C. § 1254 (1988).

67. *See generally* Moody v. Principi, 360 F.3d 1306 (Fed. Cir. 2004) (treating as *pro se* a veteran represented by a veterans service organization); Roberson v. Principi, 251 F.3d 1378 (Fed. Cir. 2001) (same). *See also* 38 C.F.R. § 14.628(d)(2) (2016).

68. 38 C.F.R. § 14.628 (2016); *see also* Veterans Service Organizations, HOUSE COMM. ON

administrative process.⁶⁹

While attorneys may help veterans pro bono at all levels of the process, veterans are prohibited by statute from hiring an attorney to pursue their claims until after the VARO has made a decision and the veteran has affirmatively appealed that decision by filing a NOD.⁷⁰ Attorneys who help veterans pursue benefits from the VA must be accredited annually by the VA and receive special training in the form of continuing legal education every two years.⁷¹ Attorneys' fees are also capped at "reasonable fees."⁷²

III. THE NON-ADVERSARIAL AND PATERNALISTIC NATURE OF THE VA

A. The Historical Underpinnings of Paternalism at the VA: Politics, Money, and Attorneys

It is impossible to discuss the evolution of the veteran-friendly, non-adversarial character of the VA without discussing the history of attorneys and other paid agents in the VA system. Were it not for this group of advocates, Congress' expansion of paternalistic protection of veterans would likely not be so pervasive and cemented into the foundation of the VA benefits process.

Again, the most appropriate place to begin this discussion is the end of the Civil War. After this war, Americans did take the call to care for veterans seriously.⁷³ However, by 1866 veterans were yet another constituency that politicians desired to court and the manner of doing so was through veterans' benefits.⁷⁴ In his treatise of 1918, one eminent historian in the area of military pension benefits, Dr. William Glasson, presented numerous examples of concerns that the pension system of the time was being held hostage by potentially

VETERANS' AFFAIRS, <http://veterans.house.gov/citizens/resources> (last visited Nov. 17, 2014); 38 C.F.R. § 14.628 (2003); see generally *The Role of National, State, and County Veterans Service Officers in Claims Development: Hearing Before the H. Subcomm. on Disability Assistance and Memorial Affairs of the Comm. on Veterans' Affairs*, 109th Cong. (2006).

69. See generally *The Role of National, State, and County Veterans Service Officers in Claims Development*, *supra* note 71.

70. 38 U.S.C. § 5904(c)(2) (2006).

71. See 38 C.F.R. § 14.629(a); VSOs are defined by the VA as "non-profit groups [which] advocate on behalf of [v]eterans." These groups are normally made up of a large number of volunteer veterans and some paid staff. *Glossary*, NAT'L CTR FOR VETERANS ANALYSIS & STATISTICS, U.S. DEP'T OF VETERANS AFFAIRS, <http://www.va.gov/vetdata/glossary.asp> (last visited Nov. 17, 2014); see generally *The Role of National, State, and County Veterans Service Officers in Claims Development*, *supra* note 71.

72. 38 U.S.C. § 5904(a)(5) (2006); 38 C.F.R. § 14.637(d) (2015).

73. See Whelan, *supra* note 11, at 45-46; see Ridgway, *supra* note 11, at 154-57.

74. See Ridgway, *supra* note 11, at 155.

fraudulent claims perpetuated by claims agents and attorneys looking to make a fast dollar helping veterans file claims, regardless of their validity.⁷⁵ The Commissioner of Pensions, in charge of the Pension Bureau—the federal government office charged with administering these payments—complained to Congress that attorneys’ false advertising to veterans and political pressure on politicians for more veteran benefits was exacerbating the problem of an already difficult-to-manage system.⁷⁶ It appears that Congress was also convinced that agents and attorneys pushing for pro-veteran compensation legislation were not to be relied upon as trustworthy actors.⁷⁷

To claim that Congress had a disdain for attorneys in the 1860s to 1890s is an understatement. In one debate on the passage of a widow pension in 1886, Senator Edward Bragg of Wisconsin invoked the specter of attorney machinations for generating fees for new applications as being the impetus for the legislation.⁷⁸ Senator Bragg referred to these fees as “blood taken from the soldiers whom they pretend to love.”⁷⁹

Why, Mr. Speaker, these (attorneys) that pretend to be “friends of soldiers” are the friends of soldiers as vultures are the friends of dead bodies—because they feed and fatten them. [Applause.] . . . They file the application; they draw their \$10; they give notice then that the papers are complete and that the applicant need only send them to his member of Congress and his case will be attended to promptly. Those are the men who are the professed “friends of soldiers.” They have the voice of Jacob, but their hand has the clutch of Esau.⁸⁰

In 1862, in response to early complaints from the head of the Pension Bureau concerning attorney misconduct, Congress passed the first legislation limiting the amount of an attorney’s fee to a \$5 limit that only extended to the initial application of the veteran.⁸¹ A year and a half later, in 1864, the fee limit was raised to \$10.⁸²

Complaints about the veterans compensation system were not limited to protesting attorney involvement. Throughout the late 1800s, claims agents and attorneys were also accusing the Pension

75. See GLASSON, *supra* note 20, at 157-58.

76. See *id.* at 149-50.

77. See *id.* at 158-59.

78. *Id.*

79. *Id.* at 214.

80. *Id.*

81. See Whelan, *supra* note 11, at 46.

82. See *id.* at 48, 50.

Bureau of ineffectually administering the pension system and allowing the process to be marked by “arbitrary rulings and unnecessary delays in the adjudication of pension claims.”⁸³ There were also charges that the Pension Bureau itself was corrupt and being used as a political tool to gain votes in some districts.⁸⁴ During a Congressional investigation in 1880, a “whistleblower” from the Bureau testified that the Commissioner refrained from paying out pensions during a time when the Secretary of the Treasury was concerned about the appearance of the government’s financial report during an election year.⁸⁵

The moral obligation to veterans began to be diluted by concerns over money and political wrangling.⁸⁶ Politicians wanted to buy the loyalty of veterans, but did not want to be seen as bankrupting the nation to do so.⁸⁷ Attorneys cashing in on the process of helping veterans and receiving some of the benefit payment looked unseemly in the eyes of the Congress, which was already being hounded to balance taking care of veterans with the United States treasury deficit.⁸⁸ Attorneys were also encouraging veterans, for better or worse, to apply for pensions the veterans may not have otherwise considered seeking.⁸⁹ Scorn was heaped upon these attorneys for advertising the benefits due to veterans from the legislation that Congress was passing in order to continue to secure the veteran voting bloc.⁹⁰ Additionally, contempt of those who advocated more benefits for veterans, and likely made some money from the applications for the benefits, diverted attention from the fact that Congress is the body that ultimately decided to pass these bills with their enormous price tags.⁹¹ Veterans for their part were a divided group.⁹² Many veterans held the position that they never wanted to become pensioners and did not begrudge those who must, but did despise those who unjustly sucked money from the government’s

83. GLASSON, *supra* note 20, at 179.

84. *See id.* at 179-80, 199 (Commissioner of Pensions Black, in his 1885 congressional report, noted that the Pension Bureau had become “all but avowedly a political machine . . .”).

85. *See id.* at 179-80.

86. *See id.* at 192-95.

87. *See id.* at 194 (Senator Saulsbury stated that “the soldiers have votes and we are all human beings and controlled somewhat by motives of self-interest . . . but behind us there is another power greater than ourselves controlling our action if not our judgment . . . the Senators of the United States, great and mighty as they may be, bow to the behests of the pension agents and vote the money that they require . . .”)

88. *See* GLASSON, *supra* note 20, at 192-95.

89. *See id.* at 185-187.

90. *See id.* at 159-160.

91. *See id.* at 184-85.

92. *See id.* at 184.

coffers.⁹³ However, other veterans were encouraged to apply for benefits because the nation could never be too grateful to its soldiers who saved the Republic.⁹⁴ According to Glasson, those veterans with “honorable protests against extravagance and fraud in the pension system were too often without avail in the face of the clamor of the organized claimants and the wiles of their attorneys.”⁹⁵

Meanwhile, the public truly did support the call to “care for him who shall have borne the battle”⁹⁶ while the nation’s treasury was flush with cash in the late 1800s. During this time, very little grumbling from the public was heard over these expenditures.⁹⁷ This generosity is remarkable considering that by the late 1800s veterans who had any injury, no matter how or when it was caused, were entitled to some disability benefit and the American taxpayer was footing the bill.⁹⁸ In 1890, this bill “exceeded the entire German military budget.”⁹⁹ As time went on however, even the American public became tired of paying exorbitant amounts for military veterans benefits. Attorneys and claims agents were viewed as being at least partially responsible for this predicament.¹⁰⁰

By the end of World War I, Congress was still operating under the shadow cast by dealings with attorneys and claims agents of the Civil War era.¹⁰¹ Congressional debate on a war-risk insurance bill designed to pay the survivors of servicemen killed in action is enlightening in this regard.¹⁰² The war-risk insurance bill was put up for amendment in 1918 particularly to regulate attorney involvement in the administration of the benefit. The bill as proposed would prevent attorneys from doing little more than filing claim paperwork for the beneficiary.¹⁰³ In arguing for a limitation of attorneys in this process, one Congressman went to great lengths to describe the manner in which attorneys advertised their services to potential beneficiaries:

During the period when casualty lists were published and the names of the next of kin of those injured or killed in the service were printed with the address,

93. See GLASSON, *supra* note 20, at 184.

94. See *id.* at 185.

95. *Id.* at 185-86.

96. See *id.* at 265.

97. See *id.* at 212, 265-66.

98. See Ridgway, *supra* note 11, at 166.

99. *Id.*

100. See *id.* at 158-59.

101. 65 Cong. Rec. 1, 5221 (1918).

102. See *id.*

103. See *id.*

these so-called claims agents took those addresses and at once communicated with the beneficiaries under the law . . . (The Congressman refers to a letter in his hand written by an attorney to the mother of one of the fallen soldiers) This is the sentence to which I desire to call the particular attention of the House: "Of course, you understand that in a claim of any sort against the Government, no officer or agent of the Government can render the claimant the aid and counsel an attorney can"—and so forth. In other words, the claim-agent concern here says that it can do better service for the beneficiaries under the war-risk insurance act than can any officer or agent of the Government. Was there ever a more deceiving communication?¹⁰⁴

One Congressman brought up a common concern asking, "Suppose the claimant is tired out by departmental delay. He goes to an attorney and seeks redress. The attorney is absolutely prohibited from negotiating with him for any fee?"¹⁰⁵ In response, one of the supporters of the bill retorted that "the case will be entirely taken care of by the Government, and there will be no reason for an attorney at all, because the Government will investigate the question and it will be decided without the need for an attorney."¹⁰⁶ This premise that attorneys were unnecessary and unhelpful because the government itself would help the veteran through the process remained basically unchanged until 1988.

B. *Walters v. National Association of Radiation Survivors*

It was with this attitude concerning attorneys and government assistance in the compensation process that was cemented in place when the Supreme Court heard a constitutional challenge to the attorney fee limitation of \$10 in 1985.¹⁰⁷ The case, *Walters v. National Association of Radiation Survivors*, was brought on behalf of veterans and survivors who claimed that the fee limitation violated their due process rights by preventing them from being able to hire the attorney of their choice.¹⁰⁸

To determine what due process was owed to the *Walters* veterans,

104. *See id.*

105. *See id.*

106. 65 Cong. Rec. at 5221.

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

108. *Id.* at 307-08.

the Court used the familiar balancing test found in *Mathews v. Eldridge* requiring them to weigh:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.¹⁰⁹

Chief Justice Rehnquist, writing for the Court, delivered a scathing rebuke of the district court's finding that the limitation on hiring an attorney was unconstitutional and a violation of the Fifth and First Amendments. The Court took the most issue with the district court's weighing of the second and third prongs of the *Mathews* test.¹¹⁰ The district court found that, due to the complexity of the VA system, it was more likely that a veteran may not be aware of their rights or may fail to engage in factual and evidentiary development without attorney representation.¹¹¹ The district court also pointed to the VA's lack of resources to spend time on developing a veteran's case and the inability of the VSOs and VA to provide all of the services that an attorney might to demonstrate that the safeguards in place were not terribly valuable.¹¹² The district court cited to complex cases that required significant development as an example of claims that were inadequately treated under this system.¹¹³ As to the governmental interest in maintaining the limitation on attorneys, the district court found that the government failed to demonstrate any harm that may come from lifting the ban, which was in place only because of the government's paternalistic desire to save veterans from supposed unscrupulous attorneys.¹¹⁴

In a six to three decision, the Supreme Court disagreed entirely with the lower court and reversed the decision.¹¹⁵ For purposes of this Article, it is instructive to look at the Court's opinion and understand the assumptions the Court made about the VA system when deciding that due process did not require the right to an attorney. The Court, in reviewing the governmental interest, did not

109. *Id.* at 313 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

110. *Id.* at 321-23.

111. *Id.*

112. *Walters*, 473 U.S. at 314.

113. *See id.* at 314.

114. *See id.* at 315.

115. *Id.* at 335.

disagree that the government's desire to protect veterans led to Congress' creation of the fee limitation.¹¹⁶ The Court also asserted that it was the assumption of Congress and the Court that attorney integration would take away the non-adversarial nature of the VA process.¹¹⁷ Indeed, the Court pointed to the fact that the law had been in effect, in more or less the same form, for 120 years as a reason why even more deference than usual should be given to the prohibition.¹¹⁸ The Court made very clear that in this matter "[a] necessary concomitant of Congress' desire that a veteran not need a representative to assist him in making his claim was that the system should be as informal and non-adversarial as possible."¹¹⁹ The Court noted that it was not possible to tell from the record how many claimants' matters were wrongly decided at the VARO or BVA levels because at the time of the Court's decision no further review of claims was possible.¹²⁰ Thus it was impossible to determine if any erroneous deprivation of property interests was occurring at all.¹²¹ The Court held that there was no evidence that the VA's system was "procedurally, factually, or legally complex" or that the VA system does not work as designed.¹²² Thus, there was no evidence of erroneous deprivation of property rights, and the procedures in place appeared to safeguard against any possible deprivation.¹²³ Finally, the Court found that the vast majority of the disability claims in the system involve simple questions of fact or medicine which are readily handled by the system in place.¹²⁴ The Court found specifically that "[t]here are undoubtedly 'complex' cases pending before the VA, and they are undoubtedly a tiny fraction of the total cases pending."¹²⁵

The Court noted that while due process in some types of cases may permit a petitioner to hire an attorney, the VA's non-adversarial process marginalizes the importance of those cases when considering a veteran's due process rights to hire an attorney.¹²⁶

[W]here, as here, no such adversary appears, and in addition a claimant or recipient is provided with

116. *See id.* at 321.

117. *See Walters*, 473 U.S. at 323-24.

118. *See id.* at 319-20.

119. *Walters*, 473 U.S. at 323.

120. Court oversight of BVA decisions was not permitted until the Veterans Judicial Review Act of 1988, 38 U.S.C. §§ 4051-4091 (1988).

121. *See Walters*, 473 U.S. at 327.

122. *See id.* at 328-29.

123. *See id.*

124. *Id.* at 329-30.

125. *Id.* at 330.

126. *See Walters*, 473 U.S. at 332.

substitute safeguards such as a competent representative, a decisionmaker whose duty it is to aid the claimant, and significant concessions with respect to the claimant's burden of proof, the need for counsel is considerably diminished.¹²⁷

The members of the Court who joined in the majority opinion took seriously the VA's assertion that the process regarding veterans compensation is non-adversarial. As an indication of this, the concurrence written by Justice O'Connor notes that the non-adversarial process and the ability of veterans to have non-attorney representation render the limitation of a veteran's ability to hire an attorney not "*per se* unconstitutional."¹²⁸ However, she goes on to say that in cases where it appears that the non-adversarial process was not employed, courts can and should review the limitation of a veteran's due process rights in light of that failure.¹²⁹

The dissent, written by Justice Stevens, relied on the concept of individual liberty as the purpose for finding the limitation on attorneys unconstitutional.¹³⁰ While Justice Stevens recognized the government interest in maintaining an informal and non-adversarial environment, he noted that there did not appear to be any rational reason that attorneys could not participate in such an environment:

But there is no reason to assume that lawyers would add confusion rather than clarity to the proceedings. As a profession, lawyers are skilled communicators dedicated to the service of their clients. Only if it is assumed that the average lawyer is incompetent or unscrupulous can one rationally conclude that the efficiency of the agency's work would be undermined by allowing counsel to participate whenever a veteran is willing to pay for his services. I categorically reject any such assumption.¹³¹

In this case, Justice Stevens believed that the age of the statute cut against it because the assumptions about unscrupulous attorneys made in the past are no longer true.¹³² Justice Stevens noted that veterans who do not want or need to hire an attorney for very simple claims have a well-trained cadre of VSO service officers to rely on for help in prosecuting their claims, so no veteran will be forced to

127. *Id.* at 333-34.

128. *See id.* at 338.

129. *Id.*

130. *See id.* at 358.

131. *Walters*, 473 U.S. at 363.

132. *See id.* at 362.

hire a lawyer.¹³³ Based upon these considerations, “the kind of paternalism reflected in this statute as it operates today is irrational. It purports to protect the veteran who has little or no need for protection, and it actually denies him assistance in cases in which the help of his own lawyer may be of critical importance.”¹³⁴

When addressing the majority’s finding that the constitutional requirement for due process is satisfied by the VA because there is no proof that there is a high probability of error in the system, Justice Stevens sums it up this way: “In short, if 80 or 90 percent of the cases are correctly decided, why worry about those individuals whose claims have been erroneously rejected and who might have prevailed if they had been represented by counsel?”¹³⁵ The dissent asserted that just because all veterans may not need an attorney to help them does not mean that those who do should be denied this right to representation.¹³⁶

C. The Non-Adversarial System Today

Three years after the Supreme Court’s ruling in *Walters*, the issue of attorneys in the non-adversarial system was turned upside down when President Ronald Reagan signed into law the Veterans Judicial Review Act (VJRA) in 1988.¹³⁷ The passage of the VJRA represented a substantial shift in the attitudes of Congress towards attorneys in the veterans benefits process. It also saw Congress and modern Veterans Service Organizations (VSOs) locking horns over the issue of injecting attorneys (judges or otherwise) into the process. VSOs presented themselves to Congress as the alternative to judicial review, with the VSO legislative arms offering a “check and balance” to the VA system in what was presented to Congress as the VSO’s “quasi-governmental” role.¹³⁸ The VA itself also bucked the constraints of judicial review. The Vietnam Veterans of America accused the VA of threatening to take away the free space and telephone service VSOs were offered if judicial review was enacted.¹³⁹ The VA and others offered many reasons to justify

133. See *id.* at 366.

134. *Id.* at 367.

135. *Id.* at 368.

136. *Walters*, 473 U.S. at 368-70.

137. 38 U.S.C. §§ 4051-4092 (1988).

138. See S. 11, *The Proposed Veterans' Administration Adjudication Procedure and Judicial Review Act*, and S. 2292, *Veterans' Judicial Review Act: Hearing Before the S. Comm. on Veterans' Affairs*, 100th Cong. 279-80 (1988) (statement of John F. Heilman, Nat'l Legislative Dir., Disabled American Veterans).

139. See *id.* at 218 (statements of Richard E. O'Dell, Vice President and Chairman of Comm. on Advocacy, Vietnam Veterans of Am., and Paul S. Egan, Legislative Dir., Vietnam Veterans of Am.).

denying veterans judicial review in the disability compensation process to include increased costs to the VA;¹⁴⁰ the fear that the entire veterans benefits process would move to an adversarial system;¹⁴¹ and a fear of attorneys bilking veterans out of their earned benefits which was rooted in the post-Civil War era.¹⁴² While acknowledging that some “suggest that the current system is adversarial and rigid,” the American Legion adamantly defended the veteran-friendly nature of the system and testified that judicial review would mandate a transformation of the VA’s claims process from an informal and non-adversarial administrative system.”¹⁴³

However, many VSOs and other stakeholders in the disability system believed that judicial review of the VA’s determinations was necessary for a number of reasons. During Congressional hearings on the subject, testimony from the BVA was offered as proof that there was too often an inequity in the awarding of benefits because there could be “equal cases, identical, where one will get more than the others.”¹⁴⁴ Testimony from VSOs concerned about erroneous denials of benefits made by the VARO and confirmed by the BVA with no further review were also offered as reasons for judicial review of BVA decisions.¹⁴⁵ But perhaps the most compelling reason offered for judicial review, the right of all Americans to seek redress in the judicial system, was summed up by testimony from Sen. John Kerry:

Mr. Chairman, one of the most fundamental principles of American democracy is the right of all citizens to have equal access to our judicial system.

Unfortunately, there is still one group of Americans for whom the guarantee of access to our legal system does not apply. I am referring to our Nation’s veterans.

Veterans, unlike all other Americans, are denied by

140. *See id.* at 175 (statement of Sen. John Kerry).

141. *See id.* 188-89 (statement of E. Philip Riggan, Dir. of The American Legion’s Nat’l Legis. Comm’n).

142. *See id.* at 175 (statement of Sen. John Kerry).

143. *The Proposed Veterans’ Administration Adjudication Procedure*, *supra* note 138, at 188-89 (statement of E. Philip Riggan, Dir. Nat’l Legis. Comm’n, The American Legion).

144. *Id.* at 229 (statements of Richard E. O’Dell, Vice President and Chairman of Comm. on Advocacy, Vietnam Veterans of Am., and Paul S. Egan, Legislative Dir., Vietnam Veterans of Am.).

145. *See id.* at 229-230 (statement of Richard E. O’Dell, Vice President and Chairman of Comm. on Advocacy, Vietnam Veterans of Am., and Paul S. Egan, Legislative Director, Vietnam Veterans of Am.).

law the fundamental right of access to the American judicial system. Illegal aliens, prisoners, the mentally ill and disabled, and Social Security pensioners all enjoy the right to appeal to the Federal courts. Veterans do not.

The fact that veterans are denied this basic right is an archaic, anachronistic result left over from a paternalistic era in American history. These limitations, along with a limit of \$10 on attorneys' fees in veterans' cases, were imposed during the Civil War era, for the purpose of "protecting" veterans from legal exploitation. Such "protections" are no longer needed, or indeed desired, by the vast majority of veterans today.¹⁴⁶

The larger question of whether the introduction of attorneys into the VA process has eroded the veteran-friendly system or merely magnified already existing problems will be discussed in Part IV of this Article.

The VJRA instituted for the first time a formal appellate route through the federal court system for veterans to challenge VA determinations.¹⁴⁷ The VJRA created the Court of Veterans Appeals, later known as the United States Court of Appeals for Veterans Claims (CAVC).¹⁴⁸ With the creation of this court, veterans could now appeal the determinations of the BVA for judicial review.¹⁴⁹ However, with the addition of the CAVC, the Federal Circuit noted that the non-adversarial nature of the entire benefits process was altered significantly: "It appears the system has changed from 'a non-adversarial, *ex parte*, paternalistic system for adjudicating veterans' claims,' to one in which veterans . . . must satisfy formal legal requirements, often without the benefit of legal counsel, before they are entitled to administrative and judicial review."¹⁵⁰ Veterans appealing to the court step out of a system where the veteran is assured that assistance and benefit of the doubt will be rendered to them and into a court-environment that is as adversarial as any courtroom proceeding, where the VA is represented by attorneys from the VA's Office of General Counsel.¹⁵¹

146. *Id.* at 170 (statement of Sen. John Kerry).

147. *See* 38 U.S.C. § 7252 (2012).

148. *See id.* § 7252(a).

149. *See id.*

150. *Bailey v. West*, 160 F.3d 1360, 1365 (Fed. Cir. 1998) (quoting *Collaro v. West*, 136 F.3d 1304, 1309-10 (Fed. Cir. 1998)).

151. 38 U.S.C. § 7263(a) (1998).

The VJRA also changed the limitation on attorney involvement prohibiting veterans from hiring an attorney until a final decision by the BVA—a point at which the evidentiary record is already closed.¹⁵² However, the VJRA did recognize that the fee allowed to be charged for such representation must be adjusted.¹⁵³ During congressional hearings, it was made clear that the VJRA would not be a boon for lawyers to get rich quick by helping veterans: “The truth is that S. 11 carefully limits the amounts that attorneys would be allowed to receive. Veterans, rather than their attorneys, would be the winners with judicial review.”¹⁵⁴

With the creation of the court inevitably came case law binding on not only the attorneys at the VA’s Office of General Counsel and the Board of Veterans’ Appeals, but also on the first line RVSR who has no legal training and had difficulty implementing the CAVC’s decisions.¹⁵⁵ The Veterans Claims Adjudication Commission reported in 1996 that with the passage of the VJRA and the decisions of the CAVC, the disability benefits process had “become more formal, and the tone of official communications is somewhat more adversarial.”¹⁵⁶ The commission cited to the fact that the VA is represented by lawyers at the court and the increase in complex rating decisions to support this finding.¹⁵⁷ Attempting to mesh the growing adversarial nature of the system with the non-adversarial desires of Congress, the Committee referred to the new system as “adversarial paternalism.”¹⁵⁸

The CAVC quickly realized that a century of discouraging attorney intervention in veteran disability cases had left a dearth of interested and competent attorneys to litigate these cases.¹⁵⁹ In 1991, the Chief Judge of the court wrote to the Attorney General querying the ethical propriety of having Department of Justice attorneys help

152. Kenneth Carpenter, *Why Paternalism In Review of the Denial of Veterans Benefits Claims Is Detrimental to Claimants*, 13-SPG KAN. J.L. & PUB. POL’Y 285, 285 (2004).

153. See 38 U.S.C. § 7263(c)-(d).

154. *The Proposed Veterans’ Administration Adjudication Procedure*, *supra* note 138, at 175 (statement of Sen. John Kerry).

155. *Oversight on the Veterans Benefits Administration: Hearing Before the H. Subcomm. on Benefits of the Comm. On Veterans’ Affairs*, 106th Cong. 77 (1999) (statement of Bill Russo, Esq., Director, Veterans Benefits Program, Vietnam Veterans of America).

156. THE VETERAN. VA’S CUSTOMER: WHO CLAIMS BENEFITS AND WHY?, VETERANS’ CLAIMS ADJUDICATION COMM’N 1, 114 (1996), http://www.cnas.org/sites/default/files/Melidosian_Commission_Report_Dec_1996.pdf [hereinafter WHO CLAIMS BENEFITS?].

157. See *id.*

158. See *id.* at 118 n.96.

159. See Victoria L. Collier & Drew Early, *Cracks in the Armor: Due Process, Attorney’s Fees, and The Department of Veterans Affairs*, 18 ELDER L.J. 1, 14 (2010).

present the legal issues before the CAVC as “master amici.”¹⁶⁰ The court asked the executive branch to consider allowing its attorneys to “advise the Court of any non-frivolous issue capable of being raised by the [veteran] appellant and assist the Court in understanding the Record and such issue(s).”¹⁶¹ The Office of Legal Counsel ultimately decided that this type of help would be prohibited by law because “[w]hatever the nature of the prior proceedings . . . the Court of Veterans Appeals uses an adversary process.”¹⁶² The type of “master amici” help contemplated by the CAVC would require the government attorney to actually prosecute a claim on behalf of the veteran, an act at odds with the adversarial system.¹⁶³ In response to the lack of attorneys at the CAVC, in 1992, four VSOs proposed a consortium that would train attorneys to take cases at the CAVC level on a pro bono basis.¹⁶⁴ Thus, the stage was set for another look at attorney representation in the veterans benefits system.

1. The Veterans Claims Assistance Act

In 1999, the CAVC decided the case of *Morton v. West* and affirmed that the VA’s duty to assist only begins when a veteran files a “well-grounded” claim.¹⁶⁵

[T]his Court has discerned a Congressional intent to create a chronological process whereby appellants who have met the requisite burden, and only those appellants, are entitled to the benefit of VA’s duty to assist.

[This] unequivocally places an initial burden on a claimant to produce evidence that the claim is well grounded or, as we have held, is plausible. This statutory prerequisite reflects a policy that implausible claims should not consume the limited resources of the VA and force into even greater backlog and delay

160. See OFF. OF LEGAL COUNSEL, U.S. DEP’T OF JUST., OPINIONS OF LEGAL COUNSEL: CONSISTING OF SELECTED MEMORANDUM OPINIONS, ADVISING THE PRESIDENT OF THE UNITED STATES, THE ATTORNEY GENERAL AND OTHER EXECUTIVE OFFICERS OF THE FEDERAL GOVERNMENT IN RELATION TO THEIR OFFICIAL DUTIES 68 (1992), <https://www.ncjrs.gov/pdffiles1/Digitization/141890NCJRS.pdf>.

161. See *id.* at 68.

162. WHO CLAIMS BENEFITS, *supra* note 156.

163. See *id.* at 70.

164. See *About Us*, THE VETERANS CONSORTIUM: PRO BONO PROGRAM, <http://www.vetsprobono.org/about-us/> (last visited July 4, 2015).

165. See *Morton v. West*, 12 Vet. App. 477, 485 (Ct. Vet. App. 1999) (interpreting the language of 38 U.S.C. § 5107 (2012)).

those claims which—as well grounded—require adjudication.¹⁶⁶

In direct response to this holding, the VA ordered every VARO to begin searching initial claims to determine if they were “well-grounded” and to withhold assistance if they were not and deny the claim.¹⁶⁷ Congress went into action relatively quickly and by November 2000 had codified the Veterans Claims Assistance Act (VCAA).¹⁶⁸ With the creation of the VCAA, there is no doubt that Congress’ intent was to make the veterans benefits delivery system as non-adversarial and pro-veteran as possible. While regulating the use of attorneys in the system as one aspect of attempting to control adversarial conduct, Congress also codified the long-standing assumption that the VA’s interaction with the veteran is non-adversarial as well.¹⁶⁹ Passage of the VCAA corrected some misapprehensions of how Congress wanted the process to work and codified other principles of the system that had been assumed by the federal courts for several decades.¹⁷⁰ Congress took out the well-grounded language and was careful to note that before the CAVC began interpreting this provision, it had a different meaning to the VAROs and they had helped any veteran who filed a claim. It was not until the CAVC began questioning the language that the VARO began turning veterans away and denying them benefits without well-grounded claims.¹⁷¹ Congress reiterated that all veterans who fill out the appropriate biographical information on the VA form are entitled to help “as a matter of right.”¹⁷²

While the motive behind the VCAA was to ensure a veteran-friendly system in which the veteran would have very little barrier to entry, the burdens this new law placed on the VA are enormous. A 2002 GAO report on the implementation of the VCAA found that many VAROs were failing to implement the statute’s requirements and that these errors affected as many as fifty percent of the claims

166. See *id.* at 480 (quoting *Grivois v. Brown*, 6 Vet. App. 136, 139 (Ct. Vet. App. 1994)) (internal citation omitted).

167. See S. REP. NO. 106-397, at 21 (2000).

168. See Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, 114 Stat. 2096 (2000) (codified as amended at 38 U.S.C. §§ 5100-5107 (2012)).

169. See, e.g., 38 U.S.C. § 5103A(a)(1).

170. See *id.*; see also S. REP. NO. 106-397, at 23 (2000) (“The above delineation of VA—and claimant—obligations captures the Committee’s understanding of the assistance VA had . . . historically provided to claimants seeking disability compensation.”).

171. See S. REP. NO. 106-397, at 22 (2000) (“Irrespective of—and prior to—the Court’s interpretation of the language of section 5107, VA had traditionally assisted claimants ‘up front.’ In *Morton*, the Court ruled that VA is not free to do so—although the Court did note in *Morton* that Congress could specify a different rule by statute. The Committee here chooses to do so”).

172. See *id.*

processed.¹⁷³ Testifying before the Veterans Disability Benefits Commission in 2005, then VBA Undersecretary for Benefits, Daniel L. Cooper stated:

In my opinion, this was a proper and well-conceived law that addressed a deficient process under which VA had been adjudicating claims. It made our adjudicators absolutely responsible for helping each individual veteran know what to do, what is needed to substantiate his or her claim, how to respond, and what we will do to assist him or her. It is also an example of a law which . . . has been inordinately difficult to properly execute.¹⁷⁴

2. Expanding the Role of Attorneys in the Process

Contemporaneous to the VCAA legislation, some VSOs and the CAVC itself recognized that attorney representation while claims were in the agency adjudication process would be beneficial. In congressional testimony, the Vietnam Veterans of America argued that attorney intervention at the lowest levels of the VARO would be beneficial for a number of reasons including the attorney's expertise in analyzing and applying regulation and a much needed relief valve for the immense caseload of the VSOs.¹⁷⁵ Similarly, former CAVC Chief Judge Frank Q. Nebeker posited that involvement of attorneys at levels below the court would fix many simple errors that occur at the BVA, causing veterans unnecessary appeals and additional years of waiting.¹⁷⁶ Chief Judge Nebeker noted that "restricting realistic access to counsel until after a final BVA decision can cause *years* of delay both in adjudication before VA and in discovering the error through appellate litigation, only to have the matter returned to VA for readjudication. This happens in many appeals."¹⁷⁷ Indeed, Chief Judge Nebeker also testified before Congress that he believed that attorney involvement "at the administrative level . . . would certainly make for a more just system, and I think, ultimately a more rapidly

173. U.S. GOV'T ACCOUNTABILITY OFF., GAO-02-412, VETERANS' BENEFITS: VBA'S EFFORTS TO IMPLEMENT THE VETERANS CLAIMS ASSISTANCE ACT NEED FURTHER MONITORING 3, 9, 11 (2002).

174. VETERANS DISABILITY BENEFITS COMM'N, HONORING THE CALL TO DUTY: VETERANS' DISABILITY BENEFITS IN THE 21ST CENTURY 336 (2007).

175. See *Oversight on the Veterans Benefits Administration*, *supra* note 155, at 78 (statement of Bill Russo, Esq., Director, Veterans Benefits Program, Vietnam Veterans of Am.).

176. *In re Mason*, 12 Vet. App. 135, 137 (Ct. Vet. App. 1999).

177. *Id.* (emphasis added).

developing system.”¹⁷⁸ This point of view has been echoed by subsequent judges of the court.¹⁷⁹

The court’s weighing in on the issue of attorney representation at the lower levels of the VA did not go unnoticed. One VSO responded:

Permitting attorneys to represent veterans for a fee is inconsistent with Congress’ desire that the system work for veterans in such a way as to avoid that expense for them. The principle that veterans benefits should go to veterans and not third parties is the long standing public policy underlying Congress’ refusal to allow attorneys to involve themselves in the process for purposes of obtaining fees. By reason of its apparent lack of understanding of this public policy and its own desire to review a record like that produced in litigation rather than an informal claims record, the Chief Judge of the Court of Appeals for Veterans Claims has taken the extraordinary step of attempting to influence the policy by suggesting in an opinion that the law should be changed to permit attorneys to charge fees for representing veterans in the VA’s administrative process.¹⁸⁰

Nonetheless, in 2006, Congress passed further legislation to allow attorneys to represent veterans in their claims during the adjudication process.¹⁸¹ This legislation permitted attorneys to begin helping a veteran after the veteran had received a rating decision from the VARO and the veteran had affirmatively appealed the decision by filing a Notice of Disagreement.¹⁸² The VCAA also provided that this fee be “reasonable” and that the attorney be accredited by the

178. Department of Veterans Affairs Budget Request for Fiscal year 1999: *Hearing Before the Comm. On Veterans’ Affairs*, 105th Cong. 45 (1998) (colloquy between Chief Judge Frank Q. Nebeker, Court of Veterans Appeals and Hon. Lane Evans, U.S. House of Representatives).

179. James C. McKay, *Who Can Fight For The Soldiers?*, WASH. POST (Jan. 22, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/01/21/AR2006012100100_2.html. Chief Judge Donald Ivers, “who is also a former VA general counsel, stated that ‘The Court has historically taken a position recognizing that involvement of lawyers before the VA could be very helpful, and I concur.’” Retired Judge Ronald Holdaway, at the 2004 Eighth Judicial Conference of the veterans appellate court, stated his view that veterans should have the right to counsel at the administrative level: “I think you would get better records, you would narrow the issues, there would be screening . . . But the fundamental reason: Why should veterans be treated differently from anyone else?”

180. *Oversight on the Veterans Benefits Administration*, *supra* note 155, at 66-67 (statement of Rick Surratt, Deputy Nat’l Legislative Dir. for the Disabled American Veterans).

181. The Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, § 101, 120 Stat. 3403, 3406-3409 (2006) (codified at 38 U.S.C. § 5904 (2012)).

182. 38 U.S.C. § 5904(c)(2) (2012).

VA.¹⁸³ This legislation was the first formal acknowledgment in over 100 years that veterans may not need such a paternalistic hand when it comes to hiring an attorney.

3. Duties of the VA – Claim Development and Adjudication

As part of the paternalistic administration of veterans benefits, the VA has many duties to veterans who are filing disability claims.¹⁸⁴ Congress codified many of the VA's historical duties under the VCAA.¹⁸⁵ The codification makes clear that the VA must “make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant’s claim” unless there is no reasonable possibility that the claim is a viable one.¹⁸⁶

The VA is required to assist the veteran in proving his or her claim by obtaining the veteran’s service records, service medical records, VHA medical records, and any other records held by a federal agency, including records created by the Social Security Administration, that may support the veterans claims.¹⁸⁷ The VA also has a duty to provide the veteran with a medical examination when there is evidence that the veteran has a disability or symptoms of a disability that may be associated with his service.¹⁸⁸ When there is not sufficient medical evidence for the VA to make a decision on the claim, the VA must refer the veteran to a VA medical provider or a contracted provider who will administer a “compensation and pension (C&P) examination.”¹⁸⁹

If a veteran has been treated by a private physician, the VA has a duty to attempt to gather these records by requesting them no less than twice from the provider.¹⁹⁰ If the records are not obtainable, the VA must notify the veteran of the records the VA was unable to obtain and advise the veteran that a decision will be made without this medical evidence unless the veteran can provide the records himself.¹⁹¹

The VA has other duties based upon the nature of its non-adversarial process as interpreted by the courts. The Federal Circuit has held that “[i]mplicit *in such a beneficial system has been an*

183. *See id.* § 5904.

184. *See id.* § 5103A.

185. *See id.*

186. *Id.* § 5103A(a)(1)-(2).

187. *See* 38 U.S.C. § 5103A(e) (2012).

188. *Id.* § 5103A(d).

189. *See* 38 U.S.C. § 1703(a)(8) (2011).

190. *Id.* § 5103A(b)(1)-(2).

191. *See id.* § 5103A(b)(2).

evolution of a completely ex-parte system of adjudication” and in this system the VA is expected to “*fully and sympathetically develop the veteran’s claim to its optimum before deciding it on the merits.*”¹⁹² The CAVC has found that the VA’s duty under 38 U.S.C. § 5107(a) to assist a claimant “in developing the facts pertinent to the claim” is a separate duty from that of fully developing the veteran’s claims.¹⁹³ Additionally, the VA also has the duty to give a veteran the benefit of the doubt when the evidence regarding any material issue in a veteran’s claim is balanced between the “positive and negative.”¹⁹⁴ While these are the statutorily required duties of the VA to a veteran, Congress also reminded the VA that any other help offered to a veteran to substantiate his claim is not precluded.¹⁹⁵

Congress has also created numerous safeguards in the VA system to ensure that a veteran has as many opportunities as possible to get a full and fair review of his claim.¹⁹⁶ The VA is unique in administrative law because the veteran has many bites at the apple to receive his benefits. When the veteran gets a decision from the VARO, the veteran can ask for a more seasoned ratings officer to perform a de novo review of his claim.¹⁹⁷ When the veteran appeals to the Board, the Board does an entirely de novo review of the claim and is not bound by the VARO’s decision.¹⁹⁸ Additionally, at any point in this process, up until appeal to the CAVC, the veteran can submit new evidence for consideration.¹⁹⁹

4. Veteran-Friendly Standards of Legal Review

In addition to procedural safeguards of the non-adversarial process, the benefit of the doubt to the veteran can be seen in interpretation of regulations as well. In the case of *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, a well-known case in administrative law, the Supreme Court held that when considering an ambiguous statute, the courts should defer to a reasonable agency interpretation of the statutes if (1) Congress did not provide clear

192. *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998) (quoting H.R. REP. NO. 100-963, at 13 (1988) reprinted in 1988 U.S.C.C.A.N. 5782, 5794-95 (emphasis added)).

193. *Roberson v. Principi*, 251 F.3d 1378, 1384 (Fed. Cir. 2001) (quoting 38 U.S.C. § 5107(a)).

194. 38 U.S.C. § 5107(b) (2012).

195. *Id.* § 5103A(g).

196. For a concise explanation of the entire appellate process see CONGRESSIONAL RES. SERV., OVERVIEW OF THE APPEAL PROCESS FOR VETERANS’ CLAIMS 1-4 (Apr. 29, 2013), <https://www.fas.org/sgp/crs/misc/R42609.pdf>.

197. 38 C.F.R. 3.2600 (2014).

198. 38 U.S.C. 7104(a) (1996).

199. See 38 C.F.R. § 20.800 (2008); 38 C.F.R. § 19.37(a) (2008).

direction on how the statute should be interpreted and (2) Congress granted the agency the authority to interpret the statute.²⁰⁰ While for other federal government agencies this principle holds true, it does not for the veterans compensation system. The Supreme Court made this clear in the case of *Brown v. Gardner*. *Gardner* involved a federal statute granting benefits to veterans who were injured while receiving medical treatment at a VA medical facility.²⁰¹ The VA had implemented a regulation requiring that a finding of fault on the VA's part must be made before the veteran could be granted benefits for the injury.²⁰² In upholding a challenge to this regulation, the Supreme Court did not refer to the two-part test in *Chevron*. Instead the Court looked to the language of the statute and found it was not ambiguous and did not require a finding of fault before a veteran could be compensated.²⁰³ However, in dismissing the VA's arguments, the Court went even further to previous case law dating back to 1940s, well before the *Chevron* decision, that "interpretive doubt is to be resolved in the veteran's favor."²⁰⁴ The standard obviously operates to the benefit of the veteran, but it does not appear to be predicated on the VA's non-adversarial system. Rather, it stems from the expression of "nation's gratitude for veterans' sacrifice" and in order to "help veterans overcome the adverse effects of service and reenter society more readily."²⁰⁵

For years the Federal Circuit struggled with reconciling the deference to the agency in *Chevron* and in resolving ambiguity in the veteran's favor standard of *Gardner*.²⁰⁶ Recently this confusion was noted in a concurrence written by Judge O'Malley: "Where there is a conflict between an agency's reasonable interpretation of an ambiguous regulation and a more *veteran*-friendly interpretation, it is unclear which interpretation controls."²⁰⁷ In another recent case, *Burden v. Shinseki*, the Federal Circuit seemed to assert that the *Gardner* presumption emanates from the "veteran-friendly," non-adversarial system not contemplated by the Supreme Court when

200. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984).

201. *See generally Brown v. Gardner*, 513 U.S. 115 (1994).

202. *Id.* at 116.

203. *Id.* at 117-18.

204. *Id.* at 118 (citing *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220-21 (1991)).

205. Linda D. Jellum, *Heads I Win, Tails You Lose: Reconciling Brown v. Gardner's Presumption That Interpretive Doubt be Resolved in the Veteran's Favor with Chevron*, 61 AM. U. L. REV. 59, 68 (2011).

206. *See id.*

207. *Johnson v. McDonald*, 762 F.3d 1362, 1367 (Fed. Cir. 2014) (O'Malley, J., concurring) (emphasis added).

Gardner was decided.²⁰⁸ Over the past decade, the Federal Circuit has ultimately retired *Gardner* to an interesting footnote in history.

However, recently the Court of Appeals for Veterans Claims has attempted to reconcile the two standards in *Trafter v. Shinseki* by holding that:

Within the complex veterans benefits scheme, if VA's interpretation of the statutes is reasonable, the courts are precluded from substituting their judgment for that of VA, unless the Secretary has exceeded his authority; the Secretary's action was clearly wrong; or the Secretary's interpretation is unfavorable to veterans, such that it conflicts with the beneficence underpinning VA's veterans benefits scheme, and a more liberal construction is available that affords a harmonious interplay between provisions.²⁰⁹

This standard appears to rely on the "beneficence" or paternalism of the VA system in finding that the Secretary's reasonable interpretation of a statute must also not be "unfavorable to veterans."²¹⁰ While the *Gardner* presumption's future is not as sound as the doctrine of other precedents, the current opinion of the CAVC does give veterans a benefit if the veteran can demonstrate that the Secretary's interpretation of a decision is unfavorable to veterans and a more liberal veteran-friendly construction is available. This breathes new life into the *Gardner* decision and "levels the field a great deal" in a way that does not exist in other regulatory decisions.²¹¹

IV. RECONSIDERING *WALTERS*

In light of the current framework of the non-adversarial process just described, a review of how this system actually works seems prudent. The Supreme Court in *Walters* relied on the VA's non-adversarial and veteran-friendly process to determine that a veteran's due process rights do not include hiring an attorney.²¹² The Court's view of this beneficent VA process influenced every factor of the *Mathews v. Eldridge* balancing test and led the court to determine that attorneys were not needed in the VA system to ensure due

208. *Burden v. Shinseki*, 727 F.3d 1161, 1169 (Fed. Cir. 2013) (citing *Brown*, 513 U.S. at 118).

209. *Trafter v. Shinseki*, 26 Vet. App. 267, 272 (Ct. Vet. App. 2013).

210. *Id.* See also 38 U.S.C. § 5107(b) (2012).

211. See Prof. Michael P. Allen, Nat'l Ass'n of Veterans Advocates (Sept. 2014) (transcript on file with author).

212. *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 323 (1985).

process for a veteran—the government itself ensures due process for the veteran.²¹³ However, as will be discussed below, the developments in the VA process over the thirty years since *Walters* was decided have called into question the Court's assumption that the VA is non-adversarial. If the VA system is no longer non-adversarial and working properly, as Chief Justice Rehnquist assumed it was, the analysis of the *Mathews* balancing test would be turned on its head. Additionally, with the Federal Circuit's 2009 decision in *Cushman* holding a veteran's property interest requiring due process under the Fifth Amendment begins at his application for benefits,²¹⁴ the issue of attorney representation at the beginning of a veteran's application seems ripe to reconsider.

As has been demonstrated, the non-adversarial and paternalistic nature of the VA is a slanting and weaving path through the agency's history. It has been assumed that the government would review evidence and grant valid claims for benefits as required by law. Delay, inefficiency, and the use of the benefits system as a sacrificial cow for political purposes appear to have surprised a number of members in Congress. To be sure, the utopian vision of a veterans disability benefits system that is truly non-adversarial is something to aspire to. There are obviously provisions built into the system, through history, culture, and now statutorily and through case law that are meant to ensure this desirable "benefit of the doubt" to the veteran is retained in the system. That all deserving veterans are taken care of is the goal of such a system. It now seems appropriate to explore the question of whether the VA process in practice is truly non-adversarial.

Considering the importance of the non-adversarial characterization of the VA, it is fair to ask what adversarial and non-adversarial mean in this type of system. It has been noted that veterans will view any decision made in their favor as being "veteran friendly," while "the Secretary's perspective on what it means to administer the system in a 'veteran-friendly' manner, however, requires more exploration."²¹⁵ It has also been suggested that the true meaning of "veteran friendly" to the VA is that the claims filed by veterans be decided quickly and with consistency, and that the funds available for veterans' be distributed in a way that supports all of the VA's programs.²¹⁶ To be

213. *Id.* at 333-34.

214. *See Cushman v. Shinseki*, 576 F.3d 1290, 1298 (Fed. Cir. 2009).

215. James D. Ridgway, *Changing Voices in a Familiar Conversation About Rules vs. Standards: Veterans Law at The Federal Courts*, 61 AM. U.L. REV. 1175, 1186-87 (2012) [hereinafter *Changing Voices*].

216. *See id.* at 1187-89.

sure, the federal courts have long recognized that the veterans benefits process is different from other administrative adjudications. The Federal Circuit since the mid-1990s, after the VJRA established the CAVC, often refers to this non-adversarial nature when determining questions regarding the VA's benefits system. The Federal Circuit has referred to the system as "uniquely pro-claimant"²¹⁷ and "a non-adversarial, *ex parte*, paternalistic system for adjudicating veterans' claims."²¹⁸ In 2012, the only other court to consider the question of whether a veteran's due process rights were violated by limiting their ability to hire an attorney heavily relied on the non-adversarial nature of the VA's system. Denying that due process requires an attorney and other changes in VA procedure, the Ninth Circuit reiterated almost exactly the reasoning in *Walters* and heavily relied on the non-adversarial nature of the VA process.²¹⁹

While the courts and the VA continue to believe the process is non-adversarial, there is a lot of evidence that veterans themselves do not believe the system is veteran-friendly. To reconcile these two points of view, it is important to explore when the VA entered this period of "adversarial paternalism," a condition the Veterans Claims Adjudication Commission regards as being brought about by the creation of the CAVC.

A. The Challenges of Being Non-Adversarial

To determine when the VA system began to creep towards a more adversarial nature is akin to determining which came first, the chicken or the egg? There are two possibilities. The first possibility is that the VA was entirely non-adversarial and veteran-friendly before the creation of judicial review. This would also assume that the VA was competently helping veterans to file claims for benefits while giving them the benefit of the doubt. The VA employees could do their jobs better without the meddling of attorneys in the process making things complicated. Then, with the creation of the CAVC lawyers began to contaminate the pure non-adversarial system. This led to VAROs having to comply with more and more complicated rulings and getting so confused they were unable to do their jobs properly or efficiently.

In the second scenario, the VA has been steadily creating an environment where preserving the VA's efficiency is in direct tension with thoroughly developing claims and resolving any doubt

217. See *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998).

218. See *Collaro v. West*, 136 F.3d 1304, 1309-10 (Fed. Cir. 1998).

219. See *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013, 1035-36 (9th Cir. 2012).

in favor of the veteran. The situation requiring the VA employee to advocate for a veteran and protect the Government's interest is a difficult dichotomy to reconcile. The court's creation was an attempt to provide oversight as the system began tilting away from its purpose without any real method to enforce the non-adversarial expectations of Congress. Bringing lawyers in to the system brought problems bubbling beneath to the surface. The fact that the system was not quite the utopian non-adversarial process that Congress had ordered meant more pressure and methods that begin to resemble those found in an adversarial process had to be put in place to fix the problem.

The evidence from witnesses, advocates, veterans, Congress, and the VA itself appears to point to the legitimacy of version two: the VA was not quite so non-adversarial when judges entered the process, and the judges' appearance brought this reality to the surface.

It is not difficult to understand how a system meant to be non-adversarial could go awry. Much of the tension in the VA's mission to be non-adversarial is demonstrated in a rule issued by the Secretary of the VA regarding due process and appeal rights for veterans:

Proceedings before VA are *ex parte* in nature, and it is the obligation of VA to assist a claimant in developing the facts pertinent to the claim and to render a decision which grants every benefit that can be supported in law while protecting the interests of the Government.²²⁰

The VA employee here is admonished to assist claimants and render decisions granting benefits for veterans while protecting the interests of the Government, which is much like asking an attorney to engage in a zealous representation of both sides of an issue.²²¹ James Ridgway, the Board's Chief Counsel for Policy and Procedure, explains that this system asks a government employee to be both an adjudicator and an advocate for the veteran.²²²

Balancing the rights of the veteran and the needs of the Government is extremely difficult to do in the real world. Ronald Abrams, a nationally recognized expert in veterans law, discussed the

220. 38 C.F.R. § 3.103(a) (2012).

221. Kristi A. Estrada, *Welcome Home: Our Nation's Shameful History of Caring for Combat Veterans and How Expanding Presumptions for Service Connection Can Help*, 26 T.M. COOLEY L. REV. 113, 128 (2009).

222. 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, 126-27 (2009) [hereinafter *Why So Many Remands?*].

conundrum in an interview:

ABRAMS: After the veteran files a claim, the VA has a strange and almost Kafkaesque adjudication process Because the VA has a huge backlog of unresolved, unadjudicated claims, it sometimes skips crucial steps in the processing of these claims. These errors often adversely affect the fairness of the adjudication process Often, by the time a claim comes up for a final adjudication before a regional office, the adjudicators are pressured to finalize the claim, rather than send it back for additional development. This is because the regional offices are evaluated by how many claims they process and how quickly they process claims. And the VA regional offices obtain the same work credit for a fast and inaccurate denial as for a grant of benefits that took many more hours to adjudicate.

TRIAL: So despite its statutory duty, the government has little motivation to make sure claims are developed and adjudicated properly and that the veterans get their benefits?

ABRAMS: That's right.²²³

Mr. Abrams goes on to note that often when the VA fulfills its duties to the veteran, it does so in a half-hearted way.²²⁴ For instance, the VA may deny a claim the same day it attempts to fulfill the duty to notify by sending a letter to the veteran letting the veteran know what evidence is missing in his claim application.²²⁵ In other instances, the VA may technically fulfill its duties, but in a way so meaningless to the veteran the duty may as well not exist. An example of this includes the Statement of the Case (SOC) that is sent to veterans after a veteran formally disagrees with the VA's rating decision and before a veteran may appeal to the Board of Veterans' Appeals.²²⁶ Federal regulation requires that "(t)he Statement of the Case must be complete enough to allow the appellant to present written and/or oral arguments before the Board of Veterans'

223. Ronald B. Abrams, *Representing Veterans in the Battle for Benefits*, 42 TRIAL 30, 31-32 (2006).

224. *See id.* at 32.

225. *Id.*

226. *See* 38 C.F.R. § 19.26(d) (2006).

Appeals.”²²⁷ To accomplish this goal, the SOC must summarize the evidence, summarize the applicable laws and regulations, and discuss how these laws affect the determination, and convey the decision of the VA and the reasons for the decision.²²⁸ In order to fulfill the mandated requirements for an SOC the VA often copies thirty to fifty pages of the Code of Federal Regulations, pastes the same language that the rating decision presents with no appreciable changes, and sends the package to the veteran.²²⁹ Veterans who are representing themselves in this process often find themselves slogging through the Code of Federal Regulations trying to understand why the VA is sending this information and what to do with it.

Federal Circuit Judge Arthur J. Gajarsa, writing in dissent, crystalized his concerns when the non-adversarial system fails:

[i]n most cases before the RO the veteran is not represented by counsel or a veterans service organization and representation at the Board of Veterans' Appeals (“Board”) is discouraged. As a result, a veteran's ability to ensure that a fair and procedurally correct decision has been reached on his or her claim is limited; so too is his or her ability to make a well-informed choice whether to accept or appeal a decision. Thus, VA decisions on records that are less than thoroughly and adequately prepared may go unchallenged and the veteran will lose years of earned benefits that, but for the VA's breach of its duty to assist, he or she would have collected [I]n a paternalistic system, where a claimant is led to believe that his or her claim is being fairly and accurately decided to afford him or her the fullest compensation he or she is due, it is readily apparent why a decision may not be promptly challenged. The VA is charged with the development of the merits of a claim and acts as final adjudicator as well; there must be a remedy when it fails in its responsibility. To allow the organization to default in its development of a claim and then to adjudicate it without the possibility of challenge is an injustice.²³⁰

The tension between helping the veteran and self-preservation

227. *Id.* § 19.29.

228. *Id.* § 19.29(a)-(c).

229. This information is on file with the author.

230. See *Cook v. Principi*, 318 F.3d 1334, 1350 (Fed. Cir. 2002) (Gajarsa, J., dissenting) (internal citation omitted).

discussed earlier exists at the managerial levels of the VA as well. Mr. Abrams notes that because

VA managers are evaluated in part on how many claims their offices adjudicate and how fast the claims are adjudicated, it was in the best interest of the VA managers to improperly deny claims quickly. This need to adjudicate claims quickly often puts the VA regional office at odds with the needs of the veteran.²³¹

During congressional testimony delivered during the consideration of the 1988 VJRA, one law professor made clear to Congress that this tension in the system makes giving the benefit of the doubt to the veteran difficult. She also noted that oftentimes the VA seems to have trouble understanding what this legal standard means:

The only guiding principle for the selection of evidence seems to be that, when an approximate balance of positive and negative evidence exists, the BVA will choose that evidence which allows it to decide the claim against the veteran. The reasonable doubt doctrine . . . is only applied it seems when the overwhelming weight of evidence, in fact, supports the veteran's claim. This is clearly not the intent behind the current formulation of the doctrine in the regulations²³²

Additionally, Professor Bennett goes on to explain that the VA's adjudication system after the regional office level is a particularly unlevelled playing field for the veteran: "[d]espite professions of informality and nonadversariality, the VA system is highly adversarial. It is loaded with lawyers on one side, and it is filled with pitfalls for the unrepresented claimant on the other side."²³³

The DOJ also recognized the eternal struggle inherent in this system when the Office of Legal Counsel was asked by the CAVC to allow DOJ attorneys to help veterans in the prosecution of claims before the VA: "Although the United States has an interest in the just compensation of veterans, it also has an interest in ensuring that benefits go only to veterans who have valid claims."²³⁴

These examples demonstrate the unenviable position of the VA

231. See Abrams, *supra* note 223, at 32-33.

232. *The Proposed Veterans' Administration Adjudication Procedure*, *supra* note 138, at 6 (statement of Susan D. Bennett, Esq., Assistant Prof. of Law and Director, Pub. Int. L. Clinic, Washington College of Law, Am. Univ.).

233. *Id.*

234. U.S. DEP'T OF JUSTICE, *supra* note 160, at 69.

employee adjudicating a veteran's benefit in a system that many believe is much less inclined to be veteran-friendly than it is assumed to be. There are, however, many more concrete and concerning examples of the VA process running afoul of its non-adversarial roots, which are discussed below.

B. Concerns With The System

1. Delay In The System

For the past several years the VA has been bludgeoned in Congress and the media over the length of time that veterans must wait to get a first decision on their claims.²³⁵ Many Americans may be surprised to find out that our most current conflicts did not create a new issue in delayed decision making for the VA—backlogs have been familiar to the VA for quite some time. In 1882, amidst complaints from veterans that the veterans' pension system was slow in responding to applications, then Commissioner of Pensions Dudley noted in a report for Congress that 253,648 applications for veterans' pension had been pending for at least two years.²³⁶

Delay for our current veterans in receiving compensation decisions is not much better.²³⁷ In March of 2013, the number of claims that had been waiting over 125 days for a decision was over 600,000.²³⁸ That same year, the VA vowed to reduce these claims, often referred to as the "backlog," by the year 2015.²³⁹ As of July 2015, those claims waiting over 125 days numbered 127,916.²⁴⁰ While the

235. See generally Jacqueline Maffucci, *The Battle to End the VA Backlog, Iraq and Afghanistan Veterans of America*, IAVA (2014), http://media.iava.org/2014BattleToEndtheVABacklog_PRINT.pdf; see also *Addressing the Backlog: Can the U.S. Department of Veterans Affairs Manage One Million Claims?*, *supra* note 30, at 10; *Expediting Claims or Exploiting Statistics?: An Examination of VA's Special Initiative to Process Rating Claims Pending Over Two Years: Hearing Before the H. Comm. on Veterans' Affairs*, 113th Cong. (2013).

236. See GLASSON, *supra* note 20, at 182.

237. For more discussion on delay in the VA compensation process, see 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 (2015); see also Daniel Nagin, *Goals vs. Deadlines: Notes on the VA Disability Claims Backlog*, 10 U. MASS L. REV. 50 (2014).

238. Maffucci, *supra* note 235, at 12, 15.

239. VETERANS BENEFITS ADMIN., U.S. DEP'T OF VETERANS AFF., STRATEGIC PLAN TO ELIMINATE THE COMPENSATION CLAIMS BACKLOG (Jan. 25, 2013), http://benefits.va.gov/transformation/docs/VA_Strategic_Plan_to_Eliminate_the_Compensation_Claims_Backlog.pdf.

240. See U.S. DEP'T OF VETERANS AFF., MONDAY MORNING WORKLOAD REPORT: COMPENSATION AND PENSION RATING BUNDLE TOTALS, http://benefits.va.gov/REPORTS/detailed_claims_data.asp#Reports (last visited July 6, 2015) [hereinafter MONDAY MORNING WORKLOAD REPORT].

backlog numbers are reducing for those claims awaiting a first decision, many advocates believe that these claims are being moved quickly through the system at the cost of accuracy in the final decision of the regional office, a topic discussed below. Additionally, the number of new claims filed for 2015 has been estimated to be approximately twenty percent above those of 2014, a burden on the already stressed VA adjudication system.²⁴¹

For those who disagree with the VARO's decision, the wait times are even longer for an appeal to be heard by the BVA. And the amount of time appears to be ever increasing, while the VA claims the backlog is decreasing. The BVA Chairman's most recently published report to Congress from 2013 accounts that from the time a veteran files a Notice of Disagreement to the time the BVA issues a decision averages 1,295 days.²⁴² The wait time has not yet been reported officially for Fiscal Year (FY) 2014. While it takes a little over three and a half years for a veteran's case to be reviewed by a government attorney and Veterans Law Judge for the first time, the amount of time the veteran waits if his case is remanded is equally agonizing. For FY 2013, the BVA remanded approximately 19,115 veterans' cases,²⁴³ which took 348 days on average to complete.²⁴⁴ In FY 2014, the BVA remanded 37,162 veterans' cases, a hugely increased number.²⁴⁵ Because the BVA has held steady in its number of remands which hover between forty-two percent and forty-five percent for the last four fiscal years, this increase in remands would appear to support that the number of cases at the BVA, and thus veterans waiting for adjudication, has swelled.²⁴⁶ When these latest remands were sent back to the VARO for more development, it took over a year and a half, 581 days on average, for the VARO to complete the work.²⁴⁷

In addition to remands to remedy incomplete decisions of the VARO, the number of claims the BVA has granted a veteran after the VARO has denied the benefit erroneously is also quite large. The BVA in FY 2013 granted approximately twenty-six percent of the

241. Jacob W. Sotak, *What's in Veterans Affairs' \$164 Billion Budget?*, N.Y. TIMES (Mar. 20, 2014), <http://atwar.blogs.nytimes.com/2014/03/20/whats-in-veterans-affairs-164-billion-budget>.

242. See BD. OF VETERANS APPEALS, U.S. DEP'T OF VETERANS AFF., ANNUAL REPORT, FISCAL YEAR 2013 21 (2013), http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2013AR.pdf [hereinafter ANNUAL REP., FISCAL YEAR 2013].

243. See *id.* at 24.

244. See *id.* at 21.

245. DEP'T OF VETERANS AFF., BD. OF VETERANS' APPEALS, RESPONSE TO FREEDOM OF INFORMATION ACT REQUEST, Apr. 29, 2015 (on file with author) [hereinafter RESPONSE TO FOIA REQUEST].

246. ANNUAL REP., FISCAL YEAR 2013, *supra* note 242, at 25.

247. RESPONSE TO FOIA REQUEST, *supra* note 245.

claims that it reviewed on appeal by a veteran.²⁴⁸ This means that a veteran with a valid claim for benefits waited on average 1,295 days in addition to the average of 347 days that it took the VARO to complete the veteran's claim initially in FY 2013, for a total of 1,642 days, almost four and a half years!²⁴⁹

One commentator notes that the real problem with remands is that Congress has created so many potential theories for a veteran to obtain service-connection that cases are more complex than they need be, leading to more difficulty in deciding them at the VARO.²⁵⁰ While this is likely an accurate statement, it does not alter the fact that remands and delays are here to stay if the system continues in its current state. The issue of the increasing complexity of the disability process would also affect any review of the safeguards in place to ensure that veterans are not being erroneously deprived of their rights under *Mathews*.

The argument that long delays in the VA's award of is a violation of due process is highly persuasive.²⁵¹ However, it is reasonable to draw the conclusion that in a non-adversarial, veteran-friendly system, this delay will be tolerated by the courts in the absence of some type of willful misconduct on the part of the VA in order to preserve the non-adversarial environment of the VA.²⁵² While no federal appellate court has specifically ruled on the due process implications of delay at the VA, the CAVC has found in numerous unpublished dispositions that delays of up to ten years did not require any extraordinary relief on behalf of the veteran.²⁵³

248. See ANNUAL REP., FISCAL YEAR 2013, *supra* note 242, at 24.

249. See MONDAY MORNING WORKLOAD REPORT, *supra* note 240. See ANNUAL REP., FISCAL YEAR 2013, *supra* note 242, at 24. See BD. OF VETERANS APPEALS, REP. OF THE CHAIRMAN, FISCAL YEAR 2013 21 (2013), http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2013AR.pdf (adding the amount of time on average the VARO's took to complete a claim with the amount of time on average the BVA reports veterans wait from the filing of a Notice of Disagreement to the Decision of the BVA) [hereinafter REP. OF THE CHAIRMAN].

250. See Ridgway, *Why So Many Remands?*, *supra* note 222, at 120.

251. See generally Michael Serota & Michelle Singer, *Veterans Benefits and Due Process*, 90 NEB. L. REV. 388 (2011).

252. See *Veterans for Common Sense v. Peake*, 563 F. Supp. 2d 1049, 1085-86 (N.D. Cal. 2008) (holding that delays resulting in 183 days for initial adjudication and 1,419 days for appeal were not unreasonable because only four percent of all claims filed are subject to the protracted appellate delays. The District Court also held that the while the delay in veterans' determinations is significant, "in light of many of the factors creating these delays, [the court] cannot conclude that the due process rights of veterans are being violated." The court then went on to discuss the facets of the non-adversarial nature of the system).

253. See, e.g., *Erspamer v. Derwinski*, 1 Vet. App. 3 (Ct. Vet. App. 1990) (holding that a ten year delay was unreasonable, but did not entitle veteran's widow to extraordinary relief and granted the VA another six months to render a decision on the claim); see *Bonner v. Shinseki*, No. 12-0874, 2012 WL 1130267, at *1 (Ct. Vet. App. Apr. 5, 2012) (the court held that the VA's failure to process the veteran's claim through the regional office for seven years was remedied by the VA sending the veteran

While delay itself might never be held as a violation of due process in a non-adversarial system, these delays, in addition to other changes in the VA system over the last thirty years, have pierced the veteran-friendly, non-adversarial veil. Indeed, the VA's continuous adoption of measures that appear to be harmful to a non-adversarial system have eroded the "veteran friendly" nature of the VA's procedures to the point that the beneficence of the process is often obscured or worse, unrecognizable. Without the protection of the non-adversarial presumption, delays and other types of actions within the VA should be looked at for what they are—denials of the right to due process for our veterans.

2. Equal Access to Justice Act Awards and Remands

The number of cases that are heard by the Court of Appeals for Veterans Claims each year and remanded with Equal Access to Justice (EAJA) fees ordered is alarming. EAJA is a federal statute that allows a prevailing plaintiff's attorney to collect fees and other expenses in a suit against the federal government if the court finds that the government's position in the case was not "substantially justified."²⁵⁴ The Supreme Court has explained that the term "substantially justified" means "justified to a degree that could satisfy a reasonable person."²⁵⁵

In 2010, the Supreme Court expressed concern about the number of veterans cases that were awarded EAJA fees. Chief Justice Roberts remarked:

CHIEF JUSTICE ROBERTS:—70 percent of the time the government's position is substantially unjustified?

MR. YANG: In cases—in the VA context, the number is not quite that large, but there's a substantial number of cases at the court of appeals—

CHIEF JUSTICE ROBERTS: What number would you accept?

MR. YANG: It was, I believe, in the order of either 50 or maybe slightly more than 50 percent. It might be 60.

a letter indicating that the VA was now working on the claims but that it had a backlog of claims and it would take another four to six months: "Assuming arguendo that the Secretary unreasonably has *delayed* adjudicating the petitioner's claims in the past, the March 12 correspondence indicates that his claims are being processed now, and not being *delayed* arbitrarily") (emphasis added).

254. See Equal Access to Justice Act, 28 U.S.C. §§ 2412(d)(1), (d)(2)(F) (2012).

255. *Pierce v. Underwood*, 487 U.S. 552, 565 (1988).

But the number is substantial that you get a reversal, and in almost all of those cases, EAJA—

CHIEF JUSTICE ROBERTS: Well, that's really startling, isn't it? In litigating with veterans, the government more often than not takes a position that is substantially unjustified?

MR. YANG: It is an unfortunate number, Your Honor. And it is—it's accurate.²⁵⁶

Chief Justice Roberts may be just as concerned to learn in the past few years the VA's position against a veteran's claim has become no more reasonable. For instance, in 2014, the CAVC found that the government's decision regarding a veteran's claim was not substantially justified in sixty-seven percent of the appeals and petitions it decided.²⁵⁷

The amount of cases being awarded EAJA fees is extraordinary for a number of reasons. First, these EAJA awards are not merely cases where the VARO and the Board were in error in their decision of a veteran's claims. These awards represent a lack of reasonableness when approaching a veteran's contentions in over two-thirds of the cases that make their way up to the court. This by itself seems to be indicative of a process that is anything but "veteran-friendly" and non-adversarial.

The second reason the number of EAJA awards should cause Congress and the courts to take a harder look at the presumed non-adversarial nature of the VA is because of the small number of veteran appeals actually heard at the court. It has been said that "[c]ourts don't create adversarial situations; they resolve them."²⁵⁸ It is hard to argue that the adversarial situation requiring the granting of EAJA fees began with the court's review. This situation must have started at the VARO and been perpetuated at the BVA and the VA's Office of General Counsel. It is quite often noted that most veterans do not appeal the decisions of the VARO to the BVA.²⁵⁹ Of those

256. Transcript of Oral Argument at 52, *Astrue v. Ratliff*, 560 U.S. 586 (2010) (No. 08-1322).

257. U.S. CT. OF APPEALS FOR VETERANS CLAIMS, ANN. REP. 2 (2014), ANNUAL REPORT <http://www.uscourts.cavc.gov/documents/FY2014AnnualReport06MAR15FINAL.pdf> (of the 3524 appeals and petitions decided by the CAVC in 2014, 2356 were awarded EAJA fees—a sixty-seven percent rate of award. This statistic does not include cases that were dismissed without decision by the court or the appellant) [hereinafter 2014 ANNUAL REPORT].

258. *The Proposed Veterans' Administration Adjudication Procedure*, *supra* note 138, at 117 (statement of Sen. Alan Cranston, Chairman Comm. on Veterans' Aff.).

259. *See, e.g., Veterans for Common Sense v. Peake*, 563 F. Supp. 2d 1049, 1083, 1085 (N.D. Cal. 2008).

who do, very few veterans then appeal the decision of the BVA to the CAVC.²⁶⁰ This lack of appeals of decisions has led courts to believe that very few veterans are affected by delay and other problems within the VA system.²⁶¹ However, Bart Stichman, a noted veterans advocate, recently noted in testimony before Congress:

The VA often tries to diminish how damning these statistics are by arguing that only a relatively small percentage of VA claimants appeal to the BVA and only a relatively small percentage of those receiving a BVA decision appeal to the CAVC. But this argument fails to take into account the fact that there are a large percentage of errors in the decisions that are not appealed.²⁶²

Perhaps, the lack of appeals from the VARO may be explained by understanding that veterans who have endured the delay in the first steps of the VA process often choose not to participate after the VARO decision because they are either beaten down by the delay and bureaucracy or they believe that the VA must have made the right decision on their claims because the VA is supposed to be veteran-friendly. Unfortunately, these veterans who drop out of the system do not have the benefit of seeking out an attorney to review their claims and advise them on the possibility of appeal because these veterans at the VARO level are not permitted to hire a lawyer for this purpose until these veterans appeal the decision on their own. There are no numbers captured to determine why veterans drop out of the claims process when they receive a denial of benefits from the VA. Looking at the remand rate from the BVA and the CAVC is instructive.

The VA's failure to comply with its non-adversarial nature is often a surprise to Congress and other commentators outside the system. For instance, in testimony before Congress regarding the 1988 VJRA and the implementation of judicial oversight of the VA's decisions, one commentator on potential remands from the court assumed the number would be low because the VA was adjudicating claims as it should.

In five years or so, this committee could usefully have another hearing and look at the statistics and see just how many cases get reversed. I suggest to you, based on the available evidence, that the federal courts are not going to be overturning the BVA right and left.

260. See Transcript of Oral Arguments, *supra* note 256; 2014 ANNUAL REPORT, *supra* note 257.

261. See *Veterans for Common Sense v. Shineski*, 678 F.3d 1013, 1035-37 (9th Cir. 2012).

262. *Hearing Before the H. Subcomm. On Disability Assistance and Memorial Affairs of the Comm. On Veterans' Affairs*, 114th Cong. 4-5 (2015) (statement of Barton F. Stichman, Joint Exec. Dir., Nat'l Veterans Legal Serv. Program).

There is a substantial degree of deference to official agency decisionmaking.²⁶³

Indeed, in the *Walters* case, the Supreme Court relied heavily on the duties of the VA to assist veterans and the ability of the system to appropriately handle those duties in “simple” cases.²⁶⁴ The Court did acknowledge that “[t]he availability of particular lawyers’ services in so-called ‘complex’ cases might be more of a factor in preventing error in such cases.”²⁶⁵ At the time of the opinion, the Court posited that the number of complex cases pending at the VA “are undoubtedly a tiny fraction of the total cases pending” with the rare case turning “on a question of law.”²⁶⁶ Today, however, that is simply no longer the case.

The BVA reports that it receives appeals from approximately four to five percent of the claims that the VBA decides in a year.²⁶⁷ In FY 2013, this meant that only 41,162 veterans chose to have a Veterans Law Judge at the BVA review the decision of the VARO.²⁶⁸ This is truly a shame; the likelihood is very high that the VARO made the wrong decision—for the past several years the BVA has remanded for further development or reversed the decision of the VARO altogether in over seventy percent of the cases it hears.²⁶⁹

While the BVA remand and reversal rate may seem extreme, the rate of remands from the CAVC back to the Board is even more so. In FY 2013, the BVA issued 41,910 decisions.²⁷⁰ The same year, the CAVC received 3,531 appeals.²⁷¹ While this number represents about eight percent of BVA decisions being appealed, this number is only less than one half of one percent of the 1.17 million claims filed

263. See *The Proposed Veterans' Administration Adjudication Procedure*, *supra* note 138, at 13 (statement of Eugene Fidell, Esq., Partner at Klores, Feldesman, & Tucker).

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

265. *Id.*

266. *Id.*

267. See *Veterans for Common Sense v. Peake*, 563 F. Supp. 2d 1049, 1085-86 (N.D. Cal. 2008); VETERANS BENEFITS ADMIN., DEPARTMENT OF VETERANS AFFAIRS (VA) STRATEGIC PLAN TO TRANSFORM THE APPEAL PROCESS 11 (2014), http://www.seankendalllaw.net/library/SVAC_Appeals_Report_140226.pdf [hereinafter STRATEGIC PLAN].

268. See STRATEGIC PLAN, *supra* note 267, at 11 (other sources report up to four to five percent).

269. See ANNUAL REP., FISCAL YEAR 2013, *supra* note 242, at 24; see BD. OF VETERANS APPEALS, REP. OF THE CHAIRMAN, FISCAL YEAR 2012 22 (2012), http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2012AR.pdf (remanding or granting compensation in 74.2% of cases); see BD. OF VETERANS APPEALS, REP. OF THE CHAIRMAN, FISCAL YEAR 2011 22 (2011), http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2011AR.pdf (remanding or granting compensation in 72.7% of cases).

270. ANNUAL REP., FISCAL YEAR 2013, *supra* note 242, at 24.

271. U.S. COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORT 1 (2013), <http://www.uscourts.cavc.gov/documents/FY2013AnnualReport.pdf>.

with the VA in FY 2013.²⁷² At the same time, since 1995, the CAVC has remanded over seventy-six percent of the appeals it has decided back to the Board.²⁷³ In FY 2014, that number was even higher at almost eighty-two percent of cases heard on appeal from the Board.²⁷⁴

While numbers are interesting, what can be learned from all of these statistics? First, for veterans, it is in their best interest to appeal denials from the VARO and the Board. The likelihood of success is extremely high. Second, the high number of remands coming back to the VARO and Board is indicative of a large percentage of failures on the VA's part to comply with one of their duties in this non-adversarial system. The benefit of the doubt doctrine at the least should save many of these cases from these protracted appellate processes in the first place. Third, the high number of EAJA awards indicates that quite often the VA takes a position against a veteran that is not reasonable. All of these practical conclusions from the evidence detract from the characterization of the current VA processes as non-adversarial and veteran friendly.

3. Inadequate Medical Examinations and Challenging the Underlying Opinion

The manner in which the VA fulfills its statutory duties to gather medical evidence on the veteran's behalf must also be analyzed carefully. The VARO is required by law to help the veteran attain medical evidence of the disability and the nexus if the veteran meets certain criteria.²⁷⁵ These medical examinations are referred to as compensation and pension (C&P) examinations and are completed by medical personnel who are either under contract to the VA or employed at a VA medical center.²⁷⁶ The medical examiner is required to do a number of things when the VARO sends a veteran's claim to receive a medical C&P to determine if there is a nexus between the claimed condition and the veteran's service.

First, the examiner must review the records in a veteran's claims

272. STRATEGIC PLAN, *supra* note 267, at 12.

273. *Hearing Before the H. Subcomm. On Disability Assistance and Memorial Affairs of the Comm. On Veterans' Affairs*, *supra* note 262, at 5 (statement of Barton F. Stichman, Joint Exec. Dir., Nat'l Veterans Legal Serv. Program).

274. See ANNUAL REPORT, *supra* note 257, at 1.

275. See *McClendon v. Nicholson*, 20 Vet. App. 79, 81 (Ct. Vet. App. 2006).

276. OFF. OF THE INSPECTOR GENERAL, U.S. DEP'T OF VETERANS AFF., AUDIT OF VA'S EFFORTS TO PROVIDE TIMELY COMPENSATION AND PENSION MEDICAL EXAMS 1 (2010), <https://www.va.gov/oig/52/reports/2010/VAOIG-09-02135-107.pdf>; VA ADJUDICATION PROCEDURE MANUAL, *supra* note 31.

file—a file that can be several thousand pages long.²⁷⁷ Second, the examiner must interpret the question sent to them by the VARO rating specialist—this question changes based upon the facts of the case.²⁷⁸ Third, the medical examiner must determine a legal standard that is foreign to many doctors, “as likely as not.”²⁷⁹ The doctor must decide if there is a 50/50 chance that the veteran’s service caused his current condition.²⁸⁰ This is not necessarily something that VA examiners are comfortable doing.

Concerns about the medical examination process abound. One investigation into the quality of medical examinations revealed that

[Q]uality review staff in one office noted that medical examiners vary in how thoroughly they sift through the claim files to identify markers. Seven of the nine medical examiners we spoke with also noted that their colleagues vary in their level of thoroughness in reviewing claims related to [military sexual trauma]. For example, one medical examiner cited examples of examiners who complete exams in 15 minutes whereas she said it should take multiple hours, if done correctly. The medical examiner noted that less thorough reviews might lead to less informed assessments.²⁸¹

Despite changes to the training of medical examiners in recent years, inaccurate and inadequate medical examinations are often the subject of investigations by the GAO and VA Inspector General.²⁸²

VARO employees notice the inadequacy of medical examinations as well, and it makes their jobs harder.²⁸³

We receive exams from VHA not properly filled out, missing medical opinions, with conflicting opinions and diagnosis, and incomplete. W[e] complained to our managers but get no address to this problem. We also receive complaints from Veterans on being

277. C&P SERVICE CLINICIAN’S GUIDE 10 (March 2002), www.ngwrc.org/docs/Help%20for%20your%20Claims/cliniciansguide-1.doc.

278. *Id.*

279. *Id.* at 14.

280. *Id.*

281. U.S. GOV’T ACCOUNTABILITY OFF., GAO-14-477, REPORT TO CONGRESSIONAL REQUESTERS, MILITARY SEXUAL TRAUMA: IMPROVEMENTS MADE, BUT VA CAN DO MORE TO TRACK AND IMPROVE THE CONSISTENCY OF DISABILITY CLAIM DECISIONS 18 (2014), <http://www.gao.gov/assets/670/663964.pdf>.

282. See e.g., OFF. OF INSPECTOR GEN., OFF. OF AUDITS & EVALUATIONS, U.S. DEP’T OF VETERANS AFF., and INSPECTION OF VA REGIONAL OFFICE PROVIDENCE, RHODE ISLAND (Nov. 13, 2014), <http://www.va.gov/oig/pubs/VAOIG-13-03221-08.pdf>.

283. See VA Adjudication Procedure Manual, *supra* note 31, at § A(1)(d).

evaluated for complex conditions in “five minutes.”
Exams are a critical part of the rating process.²⁸⁴

Despite training, C&P examiners are having a difficult time administering competent medical examinations and translating those diagnoses to writing with a “reasoned medical explanation” for any conclusions reached.²⁸⁵ Part of this could be a lack of time to spend doing each examination. Dr. Mark Whorten, a C&P examiner for the VA who runs the PTSDExam.com blog, notes a discrepancy between what the VA expects of C&P examiners in terms of production versus quality.²⁸⁶ For instance, the VA’s Best Practice Manual for Posttraumatic Stress Disorder (PTSD) Compensation and Pension Examinations recommends that clinicians should spend three hours for an average C&P exam and longer for more complicated cases.²⁸⁷ However, the VA’s recent advertisement for a C&P psychologist position noted that the job required the psychologist to do at least six examinations a day.²⁸⁸ If the best practices for PTSD C&P examinations were followed, this new job would require the psychologist to work for eighteen hours a day, assuming that only simple cases walked in the door. As Dr. Whorten notes: “shall we work together to stop sacrificing *quality* to achieve greater *productivity* with C&P exams for posttraumatic stress disorder and other mental disorders? Do we not owe as much to Veterans and the American public?”²⁸⁹

4. Formalizing the Compensation Process

Another example of the VA’s slide away from a veteran-friendly process in an attempt to increase efficiency occurred in March of 2015 when the VA implemented a new rule requiring claimants to

284. *Evaluation of the Process to Achieve VBA Goals: Hearing Before the H. Comm. on Veterans’ Affairs*, 113th Cong. 124 (2014) (statement of Javier Soto, Esq., Former Rating Veterans Service Rep., Exec. Vice President, Local AFGE 1594, St. Petersburg Reg’l Office, VBA, U.S. Dep’t of Veterans Aff.).

285. See *Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 300-01 (Ct. Vet. App. 2008) (stating that VA must provide an adequate examination with a reasoned medical explanation for any determinations made).

286. Mark Whorten, *Six C&P Exams Per Day*, PTSDXAMS.COM (June 9, 2015), <http://www.ptsdexams.com/six-cp-exams-per-day/>.

287. Patricia Watson et al., *Best Practice Manual for Posttraumatic Stress Disorder (PTSD) Compensation and Pension Examinations*, U.S. DEP’T OF VETERAN AFF., at 22, <http://www.avapl.org/pub/PTSD%20Manual%20final%206.pdf>.

288. See Whorten, *supra* note 286. *Job Details: Psychologist Compensation and Pension, Vacancy No. BH-15-JL-1320141*, http://www.gocenterjobs.com/view.php?job_id=53013&type=search&auth_sess=fa88dc9babacf0decf71c5380f96b818&ref=4c440293b61a0e03820758df8%201/4 (last visited Aug. 17, 2016).

289. Whorten, *supra* note 286.

use specific forms to file new claims and to submit Notice of Disagreements to appeal decisions.²⁹⁰ Immediately there was an uproar amongst veterans advocates, VSOs, and attorneys alike.

In keeping with the veteran friendly characterization of the VA, Congress' statutory guidance on the form and effective date of a veteran's award are skewed in the veteran's favor. Congress mandated that a veteran must file an application to receive benefits from the VA and the date those benefits become effective can be no earlier than the date the application is received at the VA.²⁹¹ The VA is required to help the veteran through the benefits application process by letting the veteran know when a claim is incomplete and how to remedy the issue.²⁹² Once the veteran is notified of an incomplete claim, the veteran has one year from the date of notice to submit the necessary information to complete the claim.²⁹³

Before March 2014, the VA regulation complied with the spirit of the law and considered any communication from a veteran that indicated intent to file for benefits an "informal claim."²⁹⁴ The only requirement beyond some indication of intent was that the benefit sought must be noted in the communication.²⁹⁵ These communications to the VA could be as simple as "handwritten letters and simple one-line notes."²⁹⁶ Once the VA received an informal claim, an application form would be sent to the veteran and the veteran had one year after that form was sent to complete his claim.²⁹⁷ This application form was considered a "formal claim" and required a veteran's service history and biographical information, income verification, and dependent information, among other things. A veteran was only required to fill this form out the first time he applied for benefits with the VA. Any subsequent claims could be informal claims.

The new version of the VA's claim regulation refers to a

290. Catherine Trombley, *VA taking guesswork out of filing for benefits by requiring forms*, VANTAGE POINT (Mar. 18, 2015), <http://www.blogs.va.gov/Vantage/18183/va-taking-guesswork-out-of-filing-for-benefits-by-requiring-forms/>; Form 21-526EZ, Notice to Veteran/Service Member of Evidence Necessary to Substantiate a Claim for Veterans Disability Compensation and Related Compensation Benefits, Dep't of Veteran Affairs (2015), <http://www.vba.va.gov/pubs/forms/VBA-21-526EZ-ARE.pdf>; Form 21-0958, Notice of Disagreement, Dep't of Veteran Aff. (2015), <http://www.vba.va.gov/pubs/forms/VBA-21-0958-ARE.pdf>.

291. 38 U.S.C. §§ 5101(a)(1), 5110(a) (2012).

292. *Id.* § 5102(b).

293. *Id.* § 5102(c).

294. 38 C.F.R. § 3.155(a) (2013).

295. *See id.*

296. Leo Shane III, *New VA Benefits Forms Prompt Anger, Legal Challenge*, MILITARY TIMES (Mar. 31, 2015), <http://www.militarytimes.com/story/military/benefits/veterans/2015/03/31/va-benefits-changes-lawsuit/70723730/>.

297. 38 C.F.R. § 3.155(a) (2014).

“completed claim”—a concept that appears to be a 180-degree turn from the VA’s previous acceptance of “any communication indicating an intent to file.”²⁹⁸ The new process allows a veteran to indicate that he has an intent to file for later benefits by using the appropriate form.²⁹⁹ Once the veteran files their intent, the VA will send a standardized form to the veteran that must be filled out.³⁰⁰ However, the veteran has to file a “complete claim” within one year of sending in the “intent to file” paperwork—note that the old system allowed the veteran one year from the date the VA sent the appropriate paperwork out to the veteran.³⁰¹ Currently, the “complete claim” system requires a veteran to fill out the equivalent of a “formal claim” in the previous system each and every time a veteran wishes to file a new claim for benefits. The claim form is ten pages long, and the VA estimates that each time a veteran fills the form out it will take approximately an hour.³⁰²

The VA makes no bones that the purpose of standardizing the VA’s forms in this manner is to benefit the VA. For instance, regarding the “complete claim” requirement, the VA commented:

VA believes this final rule is less apt to cause confusion than the alternative, which . . . would encourage fragmented presentation of claims which further complicates and delays the development and disposition of already pending claims by causing duplicative VA processing actions or creating confusion regarding the development actions that must be taken for each claim. Although claimants may submit new claims at any time, it is far more efficient to submit all issues under the same benefit in a single unified claim.³⁰³

However, in order to attempt to drive their efficiency, the VA appears to have stepped sideways of at least one statutory provision granting the veteran one year from the date the VA mails the appropriate forms to him. In addition to this, the VA’s new rules concern many who see this as yet another erosion of the non-adversarial system. There is more to the tumult over the VA’s new standardized form process than just changing how things have been

298. *Id.* See also 38 C.F.R. § 3.155(a) (2013).

299. 79 Fed. Reg. 57,695.

300. *See id.*

301. *See id.*; see 38 C.F.R. § 3.155(a).

302. *VA Form 21-256, Information and Instructions for Completing the Veteran’s Application for Compensation and/or Pension*, U.S. DEP’T OF VETERANS AFF., at 4 (Nov. 2014), <http://www.vba.va.gov/pubs/forms/VBA-21-526-ARE.pdf>.

303. 79 Fed. Reg. 57,660, 57,669 (Sept. 25, 2014).

in the past. There are many concerns that this is yet one more instance where the VA will be unable to comply with a burden placed upon them. For instance, Ronald Abrams,³⁰⁴ the executive director for the National Veterans Legal Services Program commented that the “VA’s track record on things like this [is] terrible . . . When they say they’ll make sure all veterans have access, it may take four months for them to send out the forms to some folks. Nothing ever happens as neat or clean as VA says.”³⁰⁴ Mr. Abrams was also concerned that “many veterans filing informal claims are individuals unfamiliar with VA resources, and the policy change shifts the extra burden on them to learn the system before starting their claims process.”³⁰⁵

It is easy to see why VA delay, already discussed in this Article, is so worrisome under this new system. With the changes, if the veteran sends a handwritten note to the VA asking for benefits, the note does not preserve an effective date for the veteran because he never used the official “intent to file” form. The VA is required to send the veteran a “complete claims” form to fill out, but the veteran’s effective date will not begin until he completes the application form and mails it in. The effect of VA delay in sending the veteran the appropriate forms could result in months or years of lost benefits for veterans who get befuddled in this process. While the VA claims that this new process takes the “ambiguity out of the system,” the American Legion’s National Commander referred to the change as “a cold-hearted decision that betrays VA’s mission.”³⁰⁶

Additionally, the VA’s new rules relieve the VA from another of its long-standing obligations within the non-adversarial system to give “a sympathetic reading to the veteran’s filings by ‘determining *all* potential claims raised by the evidence, applying all relevant laws and regulations.’”³⁰⁷ This duty of the VA requires the VA to look at evidence in a veteran’s claims file and identify any other possible claims the veteran may be entitled to under the law.³⁰⁸ Under the new version of the VA’s regulation, the VA is not required to view the evidence with a sympathetic eye towards unclaimed benefits, but will only focus on the benefit claimed by the veteran.³⁰⁹

304. Shane, *supra* note 296 (quoting Ron Abrams).

305. *Id.* (quoting Ron Abrams).

306. *See id.* (quoting American Legion Nat’l Commander Michael Helm).

307. *Szemraj v. Principi*, 357 F.3d 1370, 1373 (Fed. Cir. 2004) (quoting *Roberson v. Principi*, 251 F.3d 1378, 1384 (Fed. Cir. 2001) (holding that although the veteran did not explicitly claim Total Disability due to unemployability, the evidence in the veterans file indicated that he was unemployed and the VA had a duty to develop this claim)).

308. *Id.* (quoting *Roberson*, 251 F.3d at 1384).

309. 79 Fed. Reg. 57,696 (Sept. 25, 2014) (codified at 38 C.F.R. § 3.155(d)(2)) (“VA will also consider all lay and medical evidence of record in order to adjudicate entitlement to benefits for the

Similarly, the changes the VA is making to the first level of appeal for a veteran, the Notice of Disagreement, is a substantial shift from an extremely pro-veteran regulation to one that puts a much higher burden on a veteran. By statute, a veteran is required to submit notice in writing to the VA that the veteran disagrees with the VA's decision.³¹⁰ The former version of the VA's regulations interpreting this law merely required a written communication "expressing dissatisfaction or disagreement" and a "desire to contest" for the communication to be considered an appeal.³¹¹ The veteran was also required to list the determination he disagreed with in the communication.³¹² "For example, if service connection was denied for two disabilities and the claimant wishes to appeal the denial of service connection with respect to only one of the disabilities, the Notice of Disagreement must make that clear."³¹³

The current changes to the rule require a veteran to submit the appropriate form to disagree with the VARO's decision and also to list much more than the condition the veteran is appealing. "With respect to the nature of disagreement, the form directs claimants to indicate, for each appealed condition, whether they disagree with the AOJ's decision on the question of service connection, disability evaluation, effective date, and/or any other question."³¹⁴ The VA has again emphasized that this change is being made for the VA's benefit: "(i)t is not VA's intention to be overly technical The purpose of this final rule is the orderly and efficient processing of veterans' claims and appeals." The VA also comments that it will review these forms so as not to prevent legitimate claims from being processed. However, veterans and advocates have had reason in the past to be concerned about particular requirements for the wording and form of appeals precluding veterans who had legitimate claims from receiving benefits.³¹⁵

The tension between the VA's new promulgated rules and the non-adversarial system is well summed up by an appellant brief in one of

claimed condition as well as entitlement to any additional benefits for complications of the claimed condition."), <https://www.federalregister.gov/articles/2014/09/25/2014-22633/standard-claims-and-appeals-forms#h-3>.

310. 38 U.S.C. § 7105(a) (2012).

311. 38 C.F.R. § 20.201 (2013).

312. *See id.*

313. *Id.*

314. 79 Fed. Reg. 57,684 (Sept. 25, 2014).

315. *See The Proposed Veterans' Administration Adjudication Procedure*, *supra* note 138, at 6 (statement of Susan D. Bennett, Esq., Assistant Prof. of Law and Director, Pub. Int. Law Clinic, Washington College of Law, Am. Univ.) ("We have, for example, had several clients who were unrepresented at the local level and whose claims have been dismissed by the Board of Veterans' Appeals for the clients' failures to use particular forms or certain magic words or forms of pleading.").

the many lawsuits filed regarding this change to the VA's process.

Significantly, the Secretary assumed, without discussing, that Congress intended administrative "efficiency" to be *the* priority in the "non-adversarial" adjudicatory veterans benefits process. To the contrary, Congress has never expressed concern with VA "efficiency" to the detriment of veterans' right to a fair, non-adversarial adjudication. Indeed, despite a continuously growing claims "backlog" over the past two decades, Congress has significantly *added* to the Secretary's "duty to assist" and authorize paid representation after an initial claim denial, while maintaining the unique multi-step VA appeal process and uniquely lengthy appeal periods, as well as the unfettered opportunity to submit additional evidence at any time. All of these Congressional actions made the VA adjudicatory process *less* "efficient" as that term appears to be defined by the Secretary. Indeed, it was the "efficiency" of an unaccountable VA which issued arbitrary, opaque, and unreviewable—yet undeniably quick—decisions that prompted such Congressional action.³¹⁶

Here we see the historical tension between the VA and Congress. Congress has built a system that is truly non-adversarial and veteran friendly and has enacted laws to make the system operate as uniquely pro-claimant. However, in implementation, the VA is full of employees who happen to be people—people who do not like to be pulled in front of Congress and bashed for inefficiencies in the system;³¹⁷ who do not like to look like they are doing an inadequate job;³¹⁸ and who are constantly threatened with more work if the situation does not improve.³¹⁹ In light of these realities, it appears that the truly non-adversarial system Congress envisions is a utopia that cannot exist. It can only be a glimmer of what Congress hopes it will be, and even then the glimmer threatens to fade in the face of

316. Brief for Petitioner at 15-16, *Veterans Just. Group, LLC v. Sec. of Veterans Aff.*, (Fed. Cir. Mar. 20, 2015) (No. 2015-7021), 2015 WL 1383046. Other appellant and amicus briefs on this subject outline the issues very well and include The American Legion, AMVETS, The Military Order of the Purple Heart, and Vietnam Veterans of America. See Brief for Petitioners, *Nat'l Veterans Legal Servs. Program v. McDonald*, (Fed. Cir. May 14, 2015) (No. 15-7061); Corrected Claimant-Appellant Brief, *Nat'l Org. of Veterans Advocates v. Sec. of Veterans Aff.*, (Fed. Cir. Mar. 25, 2015) (No. 2015-7025); Brief of Amici Curiae, *Veterans Justice Group, LLC v. Sec. of Veterans Aff.*, (Mar. 26, 2015) (No. 2015-7021).

317. See, e.g., *Expediting Claims or Exploiting Statistics?*, *supra* note 235.

318. Bill Spencer, *Houston VA Employee Manipulated Claims*, CLICK2HOUSTON.COM (Sept. 30, 2014, 7:15 PM); Abrams, *supra* note 223, at 33.

319. See *Evaluation of the Process to Achieve VBA Goals*, *supra* note 284, at 5 (statements of Javier Soto, Esq., Former Rating Veterans Service Rep., Exec. Vice President, Local AFGE 1594, St. Petersburg Reg'l Office, VBA, U.S. Dep't of Veterans Aff.; Ronald Robinson, USA Ret., Senior Veterans Serv. Rep., AFGE Local 520, Columbia Reg'l Office, VBA, U.S. Dep't of Veterans Aff.).

encroachment.

5. Changing the Language

It is not only the VA that struggles with the implementation of a non-adversarial system. The courts also wrestle with the historically non-adversarial nature of the VA while implementing procedures that appear to be more and more adversarial. One example of this struggle is seen in the Federal Circuit's 2013 decision in *Parks v. Shinseki*, which made clear that veterans waive the right to challenge medical practitioners if the challenge is not brought up in the adjudicative, non-adversarial stages of the compensation process.³²⁰ In *Parks*, the veteran had filed claims for disabilities that he believed stemmed from his exposure to certain chemicals in service.³²¹ The VA denied his claims and the veteran appealed with the help of a non-attorney VSO representative to the BVA.³²² The BVA denied the veteran's appeal and the veteran then hired an attorney to represent him at the CAVC.³²³ The attorney argued, for the first time in the veteran's case, that the medical opinion of the nurse practitioner hired by the VA was not "competent medical evidence."³²⁴ The CAVC affirmed the BVA's decision and the case was then heard at the Federal Circuit.³²⁵ The Federal Circuit found that because the VA has the right to a rebuttable presumption that the medical professional chosen to provide an opinion was properly chosen, the veteran's argument failed.³²⁶ The court found that the veteran had waived any rights he had to rebut the presumption because he failed to raise the "objection" that the nurse practitioner's opinion was not "competent medical evidence" either at the VARO, where the veteran was *pro se*, or at the BVA, where he was represented by a non-attorney VSO representative.³²⁷ The dichotomy of the Federal Circuit's opinion here and the court's insistence in other cases that the VA is a non-adversarial process at the VARO and BVA levels is striking. The Federal Circuit in this instance is requiring a veteran to make an objection, which smacks of the adversarial process, at levels of the VA where the veteran is not

320. See *Parks v. Shinseki*, 716 F.3d 581 (Fed. Cir. 2013).

321. *Id.* at 582.

322. *Id.* at 583.

323. *Id.*

324. *Id.*

325. *Parks*, 716 F.3d at 583-84.

326. *Id.* at 585.

327. *Id.* at 586.

permitted to hire an attorney.³²⁸ If the veteran fails to raise this adversarial objection at the non-adversarial stages of the process, his case is impacted in the following adversarial stages of the federal courts.

To add to confusion of mixing seemingly adversarial steps into a non-adversarial process, in 2014 the CAVC decided the case of *Nohr v. McDonald*, which held that veterans may request information from the VA in order to challenge a medical examiner.³²⁹ While the court did not like referring to these questions as “interrogatories,”³³⁰ for all intents and purposes the device described by the court is similar to the discovery device used at the commencement of litigation.³³¹ Consideration of this case is extremely instructive when reviewing the tension between acknowledging that the VA’s goals do not always align with the veterans and trying to preserve the appearance of a non-adversarial system.

During a C&P medical examination for Mr. Nohr’s claim of dysthymic disorder, the examiner noted that “[t]here is obvious and manifest evidence that [Mr. Nohr’s] preexisting dysthymic disorder was not aggravated by service.”³³² On remand from the CAVC, the C&P examiner was asked to provide adequate rationale to support her conclusion regarding aggravation.³³³ In response to this addendum opinion, Mr. Nohr submitted eleven questions and requests for documents for the examiner to answer regarding the medical opinion.³³⁴ The questions the veteran submitted were labeled “interrogatories.”³³⁵ The veteran also asked that, in the alternative, the doctor be subpoenaed by the Board to appear at his hearing.³³⁶ The Board denied the veteran’s claim and his requests of the C&P examiner, noting that “[t]here is no VA regulatory authority for interrogatories, and it is stressed that the benefits system is non-adversarial.”³³⁷ On appeal to the CAVC (for the third time in this case), Mr. Nohr argued that the Board violated his Fifth Amendment rights to procedural due process when it denied him the ability to question the medical examiner concerning her opinion.³³⁸ The

328. For a discussion on this issue see Allen, *supra* note 237.

329. See *Nohr v. McDonald*, 27 Vet. App. 124 (Ct. Vet. App. 2014).

330. *Id.* at 131, 133.

331. FED. R. CIV. P. 33.

332. *Nohr*, 27 Vet. App. at 127.

333. *Id.*

334. *Id.* at 131.

335. *Id.* at 127-28.

336. *Id.* at 128.

337. *Nohr*, 27 Vet. App. at 128.

338. *Id.* at 129.

Secretary argued that, in this process, veterans have no procedural due process right to submit interrogatories to the C&P examiners or to confront them at a hearing.³³⁹ The court in dicta suggested that

the Board's refusal to send Mr. Nohr's questions and request for documents to Dr. Feng and its corresponding statement stressing the nonadversarial nature of the VA benefits system looks like a knee-jerk reaction based upon Mr. Nohr's characterization of his questions as "interrogatories." With the increasing involvement of attorneys at the administrative level and the corresponding complexity that attorney involvement can generate, the veterans bar and VA must proceed with caution so as not to unravel Congress's desire to preserve and maintain the unique character and structure of the paternalistic, nonadversarial veterans' benefits system.³⁴⁰

The court noted that a claimant in the veterans benefits system must provide particularized reasons challenging the competency of a medical expert providing an opinion.³⁴¹ In this case, Mr. Nohr had no way of laying out his particular challenges without answers to his questions.³⁴²

The court went on to hold that Mr. Nohr's questions to determine the competency of the examiner and requests for documents held by a VHA employee were reasonable.³⁴³ The VA's duty to assist the veteran extended to providing him with the information and federally held documents to sufficiently aid in the development of his case or provide him with the reasons and basis for a refusal.³⁴⁴ The court declined to address the Constitutional issue regarding a violation of Mr. Nohr's Fifth Amendment due process rights, because the regulatory duty to assist and the Board's failure to provide the reasons and basis for their decision to deny Mr. Nohr this information were sufficient to answer the questions before the court.³⁴⁵

The *Nohr* case breaks new ground in the arena of veterans' benefits, because it acknowledges that veterans have the right to ask reasonable questions during the adjudicative stage of the process in order to obtain evidence to question the competency of the examiner. This type of evidence is extremely similar to the interrogatory

339. *Id.* at 130.

340. *Id.* at 131.

341. *Id.* at 132.

342. *Nohr*, 27 Vet. App. at 133.

343. *See id.*

344. *See id.* at 133-34.

345. *See id.* at 134.

process found in the Federal Rules of Civil Procedure.³⁴⁶ Despite the court's dislike of the use of the term "interrogatory," the purpose is the same—to compel an opposing party to disclose information in order to challenge that party's position.³⁴⁷

Both the *Parks* and the *Nohr* cases exemplify the contradiction of the non-adversarial system that is required to employ variations of adversarial procedures to ensure equity. These cases are both indicative of an acknowledgement by the courts that the VA's process is not purely non-adversarial.

6. Scandals

In the last two years, the VA in both the Veterans Benefits Administration and the Veterans Health Administration has been rocked by scandal and embarrassment. According to Congressman Jeff Miller, chairman of the House Committee on Veterans' Affairs, "[o]ne of the biggest oversight challenges we've encountered is just getting VA to engage in an honest conversation."³⁴⁸ "The agency's biggest problem, he said, is a 'culture of complacency.'"³⁴⁹

In April of 2014, news broke that the VA Medical Center in Phoenix had been covering up a rather long list of veterans waiting for medical appointments to make their statistics on accessibility look better in reports.³⁵⁰ Unfortunately, this practice resulted in a number of extremely ill veterans dying while on the waiting list at Phoenix for approximately five times longer than officially reported.³⁵¹ As the Phoenix scandal broke, whistleblowers at other VA medical facilities came forward to expose more waiting list discrepancies.³⁵² In the wake

346. See FED. R. CIV. P. 33.

347. *Nohr*, 27 Vet. App. at 131, 133.

348. Aaron Glantz, *VA's ability to quickly provide benefits plummets under Obama*, CTR. FOR INVESTIGATIVE REPORTING (Mar. 11, 2013), <http://cironline.org/reports/vas-ability-quickly-provide-benefits-plummets-under-obama-4241>.

349. *Id.*

350. See Scott Bronstein & Drew Griffin, *A fatal wait: Veterans languish and die on a VA hospital's secret list*, CNN (Apr. 23, 2014), <http://www.cnn.com/2014/04/23/health/veterans-dying-health-care-delays/>.

351. Matthew Daly & Terry Tang, *VA Chief: 18 Vets Left Off Waiting List Have Died*, ASSOCIATED PRESS (June 6, 2014, 5:35 AM), <http://bigstory.ap.org/article/senate-moves-toward-vote-va-health-care>; see also Richard A. Opiel, Jr. & Michael Shear, *Severe Report Finds V.A. Hid Waiting Lists at Hospitals*, N.Y. TIMES (May 28, 2014), http://www.nytimes.com/2014/05/29/us/va-report-confirms-improper-waiting-lists-at-phoenix-center.html?_r=0.

352. See Scott Neuman, *Report Finds Evidence of Secret Wait Lists at VA Hospitals*, NPR.ORG (May 28, 2014) <http://www.npr.org/sections/thetwo-way/2014/05/28/316712039/report-finds-evidence-of-secret-wait-lists-at-va-hospital>; see also Melissa Blasius, *VA Admits to 'Unauthorized' Waiting List at Denver Hospital*, 9NEWS.COM (Apr. 30, 2014, 11:35 AM), <http://www.9news.com/story/news/investigations/casualties-of-care/2015/01/29/denver-va>

of these discoveries, Secretary of the VA, Eric Shinseki, resigned in May 2014, admitting that this fraudulent manipulation of information and veterans had occurred due to “systemic” problems inside the VA.³⁵³

On the benefits side, revelations that occurred in early 2015 were just as damaging. Whistleblowers in the Oakland, California VARO reported that the VARO had hidden over 13,000 veterans claims filed between 1996 and 2009 in a filing cabinet.³⁵⁴ The files were unearthed in 2012, but by that time half of the veterans had already passed away.³⁵⁵ The whistleblowers reported that they were ordered to mark each file “no action necessary,” whether that assessment was accurate or not.³⁵⁶ The whistleblowers stories were confirmed by the VA’s Inspector General who reported that “‘poor record keeping’ in Oakland” prevented his office from determining how many veterans were affected and did not receive benefits, citing the fact that “‘thousands of records were missing when inspectors arrived.’”³⁵⁷ The whistleblowers voiced concern that these 13,000 files were indicative of a bigger problem at the VA—a misrepresentation of how many claims are actually pending for decision.³⁵⁸

The Oakland VARO scandal was not the only hidden or misplaced claims issue the VA had in the past two years. In 2014, the Baltimore VARO was cited by the VA’s Inspector General for having 9,500 veterans files unaccounted for and lying around on employee’s desks.³⁵⁹ A VARO employee in Houston was found to have altered digital information for 136 veterans’ claims files to make the files appear completed when they were not.³⁶⁰ The employee admitted that the purpose of altering the files was to make his production numbers look better than they were.³⁶¹ In Philadelphia, the Inspector General found that over 16,000 pieces of mail had not been scanned into the claims system and 31,000 inquiries had not been responded to.³⁶² The

whistleblower/22535211/.

353. Greg Jaffe & Ed O’Keefe, *Obama accepts resignation of VA Secretary Shinseki*, WASH. POST (May 30, 2014), https://www.washingtonpost.com/politics/shinseki-apologizes-for-va-health-care-scandal/2014/05/30/e605885a-e7f0-11e3-8f90-73e071f3d637_story.html.

354. *Whistleblowers: Veterans Cheated Out of Benefits*, CBS NEWS (Feb. 25, 2015, 7:49 AM), <http://www.cbsnews.com/news/veteran-benefits-administration-mismanagement-uncovered-in-investigation/>.

355. *Id.*

356. *See id.*

357. *Id.*

358. *Id.*

359. OFF. OF THE INSPECTOR GENERAL, OFF. OF AUDITS & EVALUATIONS, U.S. DEP’T OF VETERANS AFF, REVIEW OF ALLEGED MAIL MISMANAGEMENT AT THE BALTIMORE VA REGIONAL OFFICE (July 14, 2014), <http://www.va.gov/oig/pubs/VAOIG-14-03644-225.pdf>.

360. Spencer, *supra* note 318.

361. *Id.*

362. Ben Kesling, *Philadelphia VA Benefits Center Investigation Uncovers Problems*,

investigation also found that wait times on claims and quality reviews had been manipulated in order to report fraudulent statistics on claims.³⁶³ Again, in each of these instances, one can see the tension for a VA employee who is asked to adjudicate claims to the benefit of the veteran, but who also has personal desires to appear successful in one's job.

The toll that these scandals have taken on veterans is immeasurable. However, some information on veterans' overall perspective of the system can be gleaned from polling. For instance, in a 2013 Washington Post/Kaiser Family Foundation poll, over fifty percent of the veterans polled rated the VA as doing a "fair or poor" job at taking care of veterans' needs.³⁶⁴ Interestingly, this poll was taken about four months before the fact that dozens of veterans may have died while lingering for years on secret waiting lists for care at the Phoenix VA Medical Center scandal was revealed in the press.³⁶⁵ No polling after this scandal is available. The town hall meetings that the VA has introduced to repair relationships between veterans and the VA after the Phoenix scandal revealed veterans nationwide who are discouraged by the VA process.³⁶⁶ The oft repeated comment on the VA's attitude towards veterans "delay, deny, until I die" is heard echoed by veterans at many of these town halls.³⁶⁷

WALL ST. J. (Apr. 15, 2015, 4:35 PM), <http://www.wsj.com/articles/philadelphia-va-benefits-center-investigation-uncovers-problems-1429130142>.

363. *Id.*

364. *After the Wars - Post-Kaiser survey of Afghanistan and Iraq war veterans*, WASH. POST (Oct. 20, 2015), http://www.washingtonpost.com/politics/polling/wars-postkaiser-survey-afghanistan-iraq-war/2014/11/12/3e8f2380-b7a6-11e3-9eb3-c254bdb4414d_page.html.

365. *See After the Wars - Post-Kaiser survey and Iraq war veterans - Results and methodology*, <http://apps.washingtonpost.com/g/page/national/after-the-wars-post-kaiser-survey-of-afghanistan-and-iraq-war-veterans-results-and-survey-methodology/901/> (last visited Aug. 17, 2016); Rajiv Chandrasekaran, *A legacy of pain and pride*, WASH. POST (Mar. 29, 2014), <http://www.washingtonpost.com/sf/national/2014/03/29/a-legacy-of-pride-and-pain/>; *Timeline: The Story Behind the VA Scandal*, USA TODAY (May 22, 2014), <http://www.usatoday.com/story/news/politics/2014/05/21/veterans-healthcare-scandal-shinseki-timeline/9373227/>.

366. *See* Shane, *supra* note 296; *see also* Regina Dennis, *Frustrated Veterans Sound Off at Waco VA Office Town Hall*, WACO TRIBUNE (Sept. 17, 2014, 8:01 PM), http://www.wacotrib.com/news/military/frustrated-veterans-sound-off-at-waco-va-office-town-hall/article_9bb81eda-7c3e-5a61-9a86-d4bbf3ee6bde.html; *see also* Minneapolis veterans: 'The VA should be ashamed', FOX9.COM (Sept. 12, 2014, 8:19 PM), <http://www.myfoxtwincities.com/story/26515834/veterans-have-a-voice-at-minneapolis-va-town-hall-meeting>.

367. *See* Mike Ricci, *Delay, Deny, Until You Die*, SPEAKER.GOV (Apr. 25, 2014), <http://www.speaker.gov/general/delay-deny-until-you-die> (quoting one veteran in Missouri as commenting "Delay, deny, until you die. That's what the veterans are saying now"); *see also* Joey Holleman, *Columbia VA town hall meeting turns into claims gripe session*, THE STATE, (Aug. 14, 2014), <http://www.thestate.com/news/local/military/article13876091.html> (quoting one veteran as commenting

7. Crumbling VA Regional Office Environments

While much may be said about problems at all levels of the claims process, the best place to focus Congress' attention to fix the delay and erroneous decision concerns is at ground level, the VARO. The evidence appears to indicate that the environment of the VARO and senior VA leadership's attitude towards this major component of VA success or failure has been poorly thought-out and executed on both personnel and procedural levels.

The VARO employees have become the whipping boy for the delays and errors that senior leaders of the VA are often called before Congress to explain. Congressman Jeff Miller, chairman of the House Veterans Affairs Committee is quoted as saying, "The vast majority of the 300,000 employees at VA are dedicated and are hard-working. They deserve better than to have the reputation of their organization dragged through the mud by a bunch of executives too busy patting themselves on the back to take responsibility."³⁶⁸ A number of whistleblowers from VAROs across the country have come forward to expose what otherwise would have been internal practices of the VAROs. One employee notes that many of the problems at the VARO level have emanated from the senior leadership of the VA planning large-scale solutions to problems and giving the VAROs no clear plan of how to achieve the expectations.³⁶⁹

Several whistleblowers shared concerns with Congress that instead of investing in training and experienced on-the-ground leadership across the VARO system, the quality of supervisors managing VARO employees is haphazard at best. For instance, one whistleblower reports that "[t]he VBA call their supervisors in the Veterans Service Center coaches. A coach for a team is required to know claims development, rating, and adjudication. However, few have the technical skills to instruct employees in more than one area."³⁷⁰ Another employee testified about concerns that employees were being pressured to rate

at the Columbia, SC town hall that "a lot of veterans are saying the VA is just waiting for us to die or to quit trying").

368. *Evaluation of the Process to Achieve VBA Goals*, *supra* note 284, at 114 (statement of Ronald Robinson, USA Ret., Senior Veterans Serv. Rep., AFGE Local 520, Columbia Reg'l Office, VBA, U.S. Dep't of Veterans Aff.) (quoting Press Release, Legion Convention: Chairman of House Committee on Veterans' Affairs Vows to Keep the Pressure on VA to Reduce Claims Backlog (Aug. 28, 2013), <http://www.legion.org/pressrelease/217033/chairman-house-committee-veterans%E2%80%99-affairs-vows-keep-pressure-va-reduce-claims>)).

369. *See id.* at 120 (statement of Ronald Robinson, USA Ret., Senior Veterans Service Rep., AFGE Local 520, Columbia Reg'l Office, VBA, U.S. Dep't of Veterans Aff.).

370. *Id.* at 116 (statement of Ronald Robinson, USA Ret., Senior Veterans Service Rep., AFGE Local 520, Columbia Reg'l Office, VBA, U.S. Dep't of Veterans Aff.).

claims without adequate information or in violation of law to clear the backlog.

“Changing the Game” rules have resulted in exams denied to veterans during increase claims by pressure to rate on available evidence that may not meet legal requirements A great concern in training and development of raters is that claims are not assigned for processing based on complexity of claim and tenure and experience of the employee. Tied to the push for “production,” is a disregard for position description procedural guidance for new raters. This leads to needless quality issues and delays in claims processing Because of changes seemingly appearing to conflict training and law, some raters refused to follow the new rules without written directives. The claims were reassigned to others willing to perform them as requested.³⁷¹

Add to these pressures on VARO employees the mandatory overtime that the VA has required, totaling \$153,297,189 in taxpayer dollars from 2012 through 2014,³⁷² and you have a working environment in which employees feel pressure to hurry through claims and fraudulently enter information or hide files to hide mistakes, a problem already discussed in this Article.

Many of the other problems for the VARO appear to be due to a lack of planning on VA's part to meet the ambitious goals set to wipe out the backlog by 2015.³⁷³ For instance, the VA announced in January 2013, that the VA was beginning a transition to a paperless claims system.³⁷⁴ The VA began promoting online claims through the E-Benefits software system as the easiest way for a veteran to do his claim himself.³⁷⁵ However, it appears that no thought was given to the consequences of veterans filing claims themselves on the VA's E-Benefits website, leaving hundreds of thousands of veterans'

371. *Id.* at 123-24 ((statement of Javier Soto, Esq., Former Rating Veterans Serv. Rep., Exec. Vice President, Local AFGE 1594, St. Petersburg Reg'l Office, VBA, U.S. Dep't of Veterans Aff.).

372. *See id.* at 115 (statement of Ronald Robinson, USA Ret., Senior Veterans Serv. Rep., AFGE Local 520, Columbia Reg'l Office, VBA, U.S. Dep't of Veterans Aff.).

373. *See Evaluation of the Process to Achieve VBA Goals, supra* note 284, at 118 (statement of Ronald Robinson, USA Ret., Senior Veterans Serv. Rep., AFGE Local 520, Columbia Reg'l Office, VBA, U.S. Dep't of Veterans Aff.).

374. News Release, Dep't of Veterans Affairs, Office of Public Aff. Media Relations, National Deployment of Paperless Claims Processing System Underway, (Jan 14, 2013), <http://www.va.gov/opa/pressrel/pressrelease.cfm?id=2418>.

375. *VA Claims System: Review of VA's Transformation Progress: Hearing Before the S. Comm. on Veterans' Affairs*, 113th Cong. 16-17 (2013) (statement of Allison A. Hickey, Under Secretary for Benefits, Veterans Benefits Administration (VBA), U.S. Dep't of Veterans Aff.),

claims unprocessed:³⁷⁶

VA spokeswoman Meagan Lutz said since February 2013, just over 445,000 online applications have been initiated. Of those, approximately 70,000 compensation claims have been submitted and another 70,000 nonrating (add a dependent, etc.) have been submitted, leaving a total of 300,000 incomplete claims. Because a number of claims started are more than 365 days old, they have now expired, totaling an estimated 230,000 unprocessed claims.³⁷⁶

Additionally, a project to scan veterans' claims files at the VA ran into snags when the contractor hired advised the VA "it would take approximately 4000 employees to scan the required 600 million pages a month for rollout."³⁷⁷ The VA has hired two new contractors to attempt to meet this ambitious goal and has set a centralized mail processing center where all veterans and veteran advocates are required to fax all information relating to a veteran's claim if a digital VA system is not used to file the claim.³⁷⁸ However, the details of the new centralized scanning are murky, a search for the program online yields little result, and the VA sprung the news about this project on veterans and advocates alike with no warning or preparation.³⁷⁹ Interestingly, requiring veterans and advocates to fax all documents to the central scanning facility and discouraging mail directly to the VARO runs afoul of the law on specific communications with the VA that require they be sent directly to the "agency of original jurisdiction"—(the VARO).³⁸⁰

376. Bob Brewin, *Hundreds of Thousands of VA Electronic Disability Claims Not Processed*, NEXTGOV.COM, (July 3, 2014), <https://healthcarereimagined.wordpress.com/2014/07/11/hundreds-of-thousands-of-va-electronic-disability-claims-not-processed-nextgov/>.

377. *Evaluation of the Process to Achieve VBA Goals*, *supra* note 284, at 118 (statement of Ronald Robinson, USA Ret., Senior Veterans Service Rep., AFGE Local 520, Columbia Reg'l Office, VBA, U.S. Dep't of Veterans Aff.).

378. *See id.* at 119 (statement of Ronald Robinson, USA Ret., Senior Veterans Service Rep., AFGE Local 520, Columbia Reg'l Office, VBA, U.S. Dep't of Veterans Aff.).

379. *See e.g., Veterans Benefits Network*, YUKU.COM, <http://vets.yuku.com/topic/127515/CENTRALIZED-MAIL-PROCESSING-CMP#.VaAmUk3bJLM> (last visited Jan. 21, 2016).

380. *See, e.g.*, 38 U.S.C. § 7105(b)(1) (2012) ("Such notice [of disagreement], and appeals, must be in writing and be filed with the activity which entered the determination with which disagreement is expressed (hereinafter referred to as the 'agency of original jurisdiction.').").

V. REEXAMINING A VETERAN'S DUE PROCESS

A. Applying the Mathews v. Eldridge Test in Light of New Evidence: Challenging the Non-Adversarial Presumption

The review above of just some of the concerns of the VA benefits compensation process calls into serious question the contention that the VA is an entirely non-adversarial, veteran-friendly process. In the *Walters* case, the Supreme Court determined that veterans have property interests in their disability benefits that trigger Fifth Amendment due process rights and protections.³⁸¹ While this Article does not argue that the *Walters* decision was improperly decided at the time, at the thirty year anniversary of the *Walters* decision, it seems fair to reevaluate the possibility of the erroneous deprivation of a veteran's property interests and the basic presumption of a non-adversarial system that led to a limitation of veterans' constitutional rights.

When evaluating what due process was required for veterans in the compensation process, the Supreme Court weighed the *Mathews* factors previously discussed.³⁸² When determining the first factor, if a private interest will be affected, the Court assumed that this factor was met and veterans have an interest in their benefits.³⁸³ This is still true today and has not changed.

The Court then turned to the second factor, the risk of erroneous deprivation of these benefits and the probative value of governmental safeguards to prevent that risk.³⁸⁴ In evaluating this factor, the Court made many assumptions that are no longer true today.

First, the Court assumed that most claims filed by veterans are simple.³⁸⁵ The Court also believed that there was no evidence that the VA system was "procedurally, factually, or legally complex."³⁸⁶ These assumptions are obviously no longer true. There have been numerous commentators already cited who have discussed the ever increasing complexity of the claims process.³⁸⁷ Complexity is one of the factors blamed for the amount of remands from the BVA and the Court.³⁸⁸

381. *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 332 (1985).

382. *See id.* at 321-34.

383. *See id.* at 321-22.

384. *See id.* at 327-34.

385. *See id.* at 330.

386. *Walters*, 473 U.S. at 328-30.

387. *See, e.g.,* *Trafter v. Shinseki*, 26 Vet. App. 267, 272 (Ct. Vet. App. 2013); *see* VETERANS' CLAIMS ADJUDICATION COMM'N, *supra* note 156, at 114.

388. *See* Ridgway, *Why So Many Remands?*, *supra* note 222, at 119.

Second, the Court relied on the assumption that very few veterans would be affected by errors in the system that an attorney might help to remedy.³⁸⁹ This assumption was based on the very few number of claims that are appealed in the system.³⁹⁰ As previously discussed, the fact that a small percentage of veterans appeal claims does not correlate to the true number of potentially erroneous decisions.³⁹¹ The remand rate also contradicts the assumption that most claims are being decided appropriately.³⁹²

Third, the Court chastised the lower court for assuming that the system was not working properly in the absence of concrete evidence.³⁹³ The number of scandals involving hidden claims files and fraudulently changed files combined with poor medical evaluations and monstrous delays in delivering these benefits bely the assumption that the system is working as it should.³⁹⁴ The environment at the VAROs charged with processing these claims is also preventing the system from working as it was meant to do.³⁹⁵

Fourth, the Court relied heavily on the fact that veterans benefits are administered in a veteran-friendly environment with “a decision-maker whose duty it is to aid the claimant . . . , significant concessions with respect to the claimant’s burden of proof,” and other procedural safeguards.³⁹⁶ While the VA’s duties were not codified at the time of the *Walters* opinion, it is obvious that the Court assumed the VA was helping a veteran through the process.³⁹⁷ The advent of newly required forms to file and appeal claims that eat away at advantages to the veteran and the attempt to shift burdens to the veteran to “speed things up” are examples of the needle moving towards a less veteran-friendly environment than was envisioned by the Court.³⁹⁸ Additionally, the enormous number of cases where the CAVC finds the VA has taken a position against a veteran that is not “reasonable” demonstrates the reality that the system is failing to work in a non-adversarial manner.³⁹⁹

Finally, the Court weighed the third factor of the *Mathews* test, the

389. *Walters*, 473 U.S. at 330.

390. *See id.* at 327-28.

391. *Hearing Before the H. Subcomm. On Disability Assistance and Memorial Affairs of the Comm. On Veterans’ Affairs*, *supra* note 262, at 4-5 (statement of Barton F. Stichman, Joint Exec. Dir., Nat’l Veterans Legal Services Program).

392. *See* ANNUAL REPORT, *supra* note 242, at 1.

393. *See Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 329 (1985).

394. *See supra* Part II.B.

395. *See supra* Part II.B.7.

396. *See Walters*, 473 U.S. at 333-43.

397. *See id.* at 329, 333-34.

398. *See supra* Part II.B.

399. *See supra* Part II.B.2.

Government's interest in preventing veterans from hiring attorneys.⁴⁰⁰ The Court succinctly summed up the Government's interest in this case as preserving the non-adversarial system.⁴⁰¹ If one agrees with the previous discussion, that the non-adversarial system is being steadily eroded without attorneys being involved at the earliest first-level adjudications of the VA, it is hard to see how attorneys could do much more harm. Social Security claims provide an example of attorneys successfully helping clients navigate a complex and non-adversarial system.⁴⁰² Claimants in the Social Security system are permitted to hire an attorney to help them at any point in the process.⁴⁰³ Hearings before Administrative Law Judges occur without an adversarial attorney representing Social Security's interests.⁴⁰⁴ The mere presence of an attorney at the beginning of the Social Security disability process is not enough to render the process itself "adversarial." It is important to add here that the "adversarial" quality that the Supreme Court anticipated in *Walters* when evaluating Congress' concern was an environment where the attorney for a veteran would "cause delay and sow confusion" in order to zealously represent his or her clients.⁴⁰⁵ Attorneys involved in the VA disability process would have a duty to curb this type of behavior in order to facilitate the non-adversarial, veteran-friendly process to proceed, just as they do in the Social Security process.

When the *Mathews* factors are weighed in light of the changes seen in the last thirty years, it is obvious that the situation today is not the same as it was when the *Walters* decision was made. The VA's system becomes less veteran-friendly and non-adversarial as time goes on. This should not be the case. Despite Congress' intervention a number of times, through investigations, hearings, and even legislation to ensure the VA system is non-adversarial, the system is continuing to break down. The VA itself seems powerless to fix the problems. It is time to look at this problem through a new perspective, scrubbing the dust off of our assumptions about the VA's system so the light can come in.⁴⁰⁶ To preserve the due process rights of our veterans and the veteran-friendly mission of a system

400. See *Walters*, 473 U.S. at 321-27.

401. See *id.* at 323-24.

402. See Carpenter, *supra* note 152, at 288-89.

403. See *id.* at 290. This Article provides for a thorough comparison of attorney representation in the VA and Social Security Systems.

404. See *The Appeals Process*, SOC. SEC. ADMIN. (Mar. 2015), <http://www.ssa.gov/pubs/EN-05-10041.pdf>.

405. See *Walters*, 473 U.S. at 324-325.

406. See Isaac Asimov, *Quotable Quote*, GOODREADS, <http://www.goodreads.com/quotes/667214-your-assumptions-are-your-windows-on-the-world-scrub-them> (last visited Feb. 22, 2016).

that is going awry, it is time to allow attorneys to help veterans at all stages in the claims process.

B. Hiring an Attorney: Providing Due Process for the Veteran and Helping Congress Preserve the VA's Veteran-Friendly Process

This Article has illustrated in detail the historical reasoning for limiting a veteran's Constitutional rights when hiring attorneys in the initial filing of their claims with the VARO; the importance of the non-adversarial nature of VA adjudication when determining a veteran's due process rights; and why the assumption that the VA is purely non-adversarial is no longer a valid presumption on which to base this Constitutional limitation. The logical outcome of lifting the limitation on a veteran's due process rights is to allow veterans to hire attorneys to file and pursue their claims at all levels of adjudication, including the initial filing of a claim.

While the benefit of attorneys in the initial stages of the VA's process is not the scope of this Article, there are many cogent and compelling reasons to allow attorney intervention that would satisfy the historical concerns of Congress, protect the VA from frivolous claims, and ensure a veteran receives due process in the VA disability system.⁴⁰⁷ First, attorneys are trained to counsel clients and advise them of the validity of their claims and the likelihood of the client's desired outcome.⁴⁰⁸ Attorneys are under a professional obligation to refrain from filing frivolous claims with the VA.⁴⁰⁹ If a veteran uses an attorney to file claims, the likelihood of non-compensable claims will be lessened.

Second, attorneys have a professional responsibility to be competent in the areas of law in which they practice.⁴¹⁰ This competency requirement is increased beyond state licensing requirements, because the VA requires attorneys to have annual accreditation by the VA and take biannual continuing legal education on veterans benefits.⁴¹¹ This competency means the attorney is knowledgeable in the process of filing a proper claim on adjudication, which inures to the client's benefit because they now

407. For more discussion on the benefit of attorneys in the VA process see Allen, *supra* note 237.

408. See, e.g., MODEL RULES OF PROF'L CONDUCT r. 2.1 (AM. BAR ASS'N 2013). Over forty states have adopted the American Bar Association's Model Rules. See CPR Policy Implementation Committee, *State Adoption of the ABA Model Rules of Professional Conduct and Comments*, AM. BAR. ASS'N, 1 (May 23, 2011), <http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/comments.authcheckdam.pdf>.

409. See, e.g., MODEL RULES OF PROF'L CONDUCT r. 3.1.

410. *Id.* at r. 1.1.

411. 38 C.F.R. § 14.629(b) (2008).

have a legally trained subject-matter expert on the procedural and substantive aspects of their claim. One judge at the CAVC has noted that the VA system has become so complex that adjudicators are unable to understand the rules.⁴¹² Attorneys helping in these complex cases can only help the process along.

Third, attorneys are expected to represent their clients diligently and to be skilled in communication.⁴¹³ Diligence requires that the attorney examine and develop documentation in support of the client's claim. This may mean reviewing stacks of paperwork and medical records, coordinating private medical examinations, requesting private medical records, and other work that is standard in developing any client's case. It also will require an attorney to remind the VA adjudicators of the complex set of rules which may apply in the veteran's situation and to make certain the VA is complying with all of its duties. When the attorney has enough information to present with the claim, he or she is trained to present evidence in a manner that is easiest for their audience—in this case the adjudicator—to understand and act upon.

In these ways, only briefly illustrated above, which are natural to the representation of any client, attorneys can help to ensure that the VA's adjudication process maintains the veteran friendly character that Congress desires, while ensuring that the process affords veterans the due process to which they are entitled. Not all veterans may wish to hire an attorney to help them through the claims process. Indeed, some claims may be simple enough so as not require the help of an attorney at all and some veterans may not wish to pay for the services of an attorney. However, veterans' rights to due process should allow them to make the decision to hire or forgo an attorney's help for themselves.

VI. CONCLUSION

Veterans' due process rights to hire attorneys in the compensation process have been limited for centuries because Congress has presumed and then legislated that the veteran compensation process be veteran-friendly. While Congress has attempted several times, and in many ways, over the past thirty years to ensure that veterans' claims for benefits are adjudicated in a non-adversarial system, the current state of affairs demonstrates that Congress and the VA alone are not able to achieve this goal. Congress' desire to keep attorneys

412. See *DeLisio v. Shinseki*, 25 Vet. App. 45, 63 (Ct. Vet. App. 2011) (Lance, J., concurring).

413. See, e.g., MODEL RULES OF PROF'L CONDUCT r. 1.3.

out of the VA process has allowed the VA to erode the veteran-friendly, non-adversarial process at its lowest levels without check. Most will agree that the VA process should remain as informal and veteran-friendly as possible in order to fulfill our nation's moral obligation to our wounded veterans. And, it is easy to understand how, historically, Congress came to view attorneys helping veterans with a skeptical eye. However, the current state of affairs at the VA is not what it was when the Supreme Court found that Congress' limitation on a veteran's due process was constitutional. Reexamining *Walters's* pivotal assumption that the VA is non-adversarial causes a complete reevaluation of the *Mathews* balancing test. Particularly when one looks at the possibility that the VA may erroneously deprive a veteran of benefits and reviews the adequacy of the safeguards currently in place, it becomes obvious that the limitation on veterans' rights to hire attorney representation to secure their benefits is no longer a valid restraint. It appears that the best way to currently guarantee a veteran-friendly state of affairs at the VA, particularly when the veteran's claim is complex and requires legal expertise, is to relieve this limitation on veterans' rights and allow them to employ attorney representation at every stage of the process.

General Colin Powell is quoted as saying, "Always focus on the front windshield and not the rearview mirror."⁴¹⁴ In the case of veterans' benefits, this could not be closer to the truth of how to fix some of the VA's problems. Limiting veterans' due process rights on assumptions made about attorneys over a century ago is not working. It is time to look forward and determine how everyone can work together for our nation's heroes.

414. Colin Powell, *Quotable Quotes*, GOODREADS, <http://www.goodreads.com/quotes/33951-always-focus-on-the-front-windshield-and-not-the-review> (last visited Sep. 17, 2016).