

## A Benefits System for the Information Age

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*Any intelligent fool can make things bigger [and] more complex . . . . It takes a touch of genius — and a lot of courage to move in the opposite direction.*

*Attributed to Albert Einstein<sup>2=</sup>*

The veterans benefits system that we have today is, with modest changes, the same one that was created in 1917 for the veterans of World War I.<sup>3</sup> We have advanced since then, however, from the Industrial Age to today's Information Age, which has ushered in huge changes for the fields of law, medicine, government, and information technology. Nevertheless, the veterans benefits system remains trapped at the start of the previous century.

Today's challenge for the system is two-fold. First, we must recognize the many ways in which the system is outdated. Second, we must make conscious, strategic decisions as to how to structure the system among all the new possibilities. Everyone agrees that the overarching goal of the benefits system is to be veteran-friendly.<sup>4</sup> However, we have yet to have a frank conversation as to what that phrase exactly means for today's veterans.

This conversation should proceed in several stages. First, we should focus on the essence of veterans benefits and the ultimate goals of the system, regardless of form. Next, we must examine the origins of the system to identify the pieces that exist because of historical inertia, rather than because they contribute to those goals. Then, we must consider the changes to the underlying disciplines of law, medicine, and information technology to provide a clear frame of reference as to how the system is outdated. At that point, we can then analyze the current structure and problems of the system to determine the ways in which the process simply does not produce the desired results. Finally, we can conclude with the possibilities for a twenty-first century benefits system.

There is no definitive way in which a modern veterans benefits system must be structured. However, the current outdated process is certainly not the solution that best handles today's challenges and opportunities.

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<sup>2</sup> See Albert Einstein Quotes, available at <http://www.alberteinsteinsteinsite.com/>.

<sup>3</sup> See James D. Ridgway, *Recovering an Institutional Memory: The Origins of the Modern Veterans' Benefits System from 1914 to 1958*, 5 VETERANS L. REV. 1 (2013) [hereinafter Ridgway, *Recovering an Institutional Memory*].

<sup>4</sup> Many of the veteran-friendly rules that animate the system have long been part of the system. See *id.* at 40-54.

## I. THE ESSENCE OF VETERANS BENEFITS

Rebuilding the veterans benefits system begins by identifying the touchstones of the claims process. Path dependency is a strong and often pernicious force that can lead one far astray. To escape the inertia of how the process presently works, it is vital to first strip the goal down to its most fundamental components. Only then can we resist the distractions that emerge from too much familiarity with “the way it has always been done.”

There are many different benefits provided to veterans, and most are handled in a satisfactory manner. Ninety-five percent of disputed claims are of one particular type, claims for disability compensation.<sup>5</sup> These are the claims that must be examined in detail for our analysis, because all of the delays and frustrations stem from these claims.

The compensation benefits claims process has two essential dimensions: one is substantive and the other is procedural. The substantive dimension defines when compensation is provided. Currently, veterans benefits provide compensation for disabilities caused by service. This issue has two halves: The first concerns the nature of disability, and the second concerns the problem of identifying a corresponding medical cause. What benefits exist and when they are awarded turn on these substantive issues: what is a disability and whether it was caused by service.

The second dimension, the procedural one, focuses on the process for making determinations once the benefits and applicable medical standards are defined. This dimension also has two components: the information used to make decisions and the rules that are used to process this information. In more concrete terms, these are the laws defining the system and the evidence it considers.

Understanding the current veterans benefits process and finding a better one both turn on how these fundamental substantive and procedural issues are addressed. We must think about the precise goal of benefits, how those benefits should be linked to service, what evidence we want considered, and the animating principles of the rules for gathering and weighing that evidence.

Ultimately, a *system* for administering veterans benefits would be built around conscious and coherent choices about these fundamental substantive and procedural issues. Currently, we do not have a *system* for handling benefits claims, we merely have a *process* that has accumulated over time. As a result, no one should be surprised that the pieces are often misunderstood and fail to produce the results desired.

## II. THE BIRTH OF THE MODERN VETERANS BENEFITS PROCESS

To understand the process we have, we must consider its origins. This means more than looking at how it began. It also means considering the environment in which it was created.

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<sup>5</sup> See James D. Ridgway, *Why So Many Remands?: A Comparative Analysis of Appellate Review by the United States Court of Appeals for Veterans Claims*, 1 VETERANS L. REV. 113, 115-16 (2009) [hereinafter Ridgway, *Why so Many Remands?*]. In the most recent year for which data is available, 96.1% of appeals were compensation claims. BD. OF VETERANS' APPEALS, DEP'T OF VETERANS AFFAIRS, REP. OF THE CHAIRMAN, FISCAL YEAR 2012, at 22 (2013), available at [http://www.bva.va.gov/docs/Chairmans\\_Annual\\_Rpts/BVA2012AR.pdf](http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2012AR.pdf) [hereinafter BVA FY 2012 REP.].

### A. The World War I Origins of the Benefits System

For as long as there has been civilization, there have been veterans benefits.<sup>6</sup> Similarly, our nation has always provided some benefits to veterans.<sup>7</sup> For a majority of our history, those benefits were created on an ad hoc basis with veterans of different conflicts receiving substantially different benefits based upon the economic and political climate at the time.

Initially, the benefits for World War I veterans were no different. They began as the product of the times. The staggering cost of providing extremely generous benefits to Civil War veterans peaked just before the outbreak of the first world war, and the political climate was generally hostile to veterans benefits in 1917 when the current system was designed.<sup>8</sup> In particular, Congress made a conscious choice to describe the benefits as “compensation.”<sup>9</sup> The theory of this decision was that “pension” implied generosity, which was not subject to any limiting principle. However, the drafters believed that compensation for a loss could be measured and controlled, in order to avoid the excesses of the Civil War system.

The World War I system was not intended to be universal, but it happened to be the prevailing system fifteen years later when the Economy Act of 1933<sup>10</sup> gave Franklin Roosevelt the power to create a permanent system through executive orders. As a result, that process became the model for the one that we currently have, and most major features of it can be traced back to the laws created for the first World War.

The process for applying for benefits that was created was quite simple. Veterans disabled by service would be awarded a rating based upon diagnostic codes that categorized their injuries. Claims were decided by panels of local adjudicators.<sup>11</sup> Only disabilities that manifested during or immediately after service were expected to receive compensation. Therefore, it was originally planned that the adjudicative bodies would be temporary and would be abolished once all claims had been handled.

For complicated historical reasons, benefits decisions were not subject to judicial review.<sup>12</sup> Instead, a few different types of internal agency appeals were tried, and in 1933, the centralized Board of Veterans’ Appeals was established as the second and final level of agency review.

Because it was expected that claims would be resolved shortly after service, the only issue in most claims was the veteran’s current condition. There was little need to prove any connection between a disability and service, because the connection was obvious due to the lack of time for intervening causes. Furthermore, the focus of disabilities was physical injuries that could be observed by the adjudicators. Little evidence was needed. Accordingly, the simplicity of the process and of the determinations being made allowed for claims to be resolved expeditiously.

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<sup>6</sup> See James D. Ridgway, *The Splendid Isolation Revisited: Lessons from the History of Veterans Benefits Before Judicial Review*, 3 VETERANS L. REV. 135, 137-39 (2011) [hereinafter Ridgway, *The Splendid Isolation*].

<sup>7</sup> See *id.*

<sup>8</sup> See *id.* at 168-72.

<sup>9</sup> See *id.* at 170.

<sup>10</sup> Pub. L. No. 73-2, 48 Stat. 8.

<sup>11</sup> See Ridgway, *Recovering an Institutional Memory*, *supra* note 2, at 37.

<sup>12</sup> See Ridgway, *The Splendid Isolation Revisited*, *supra* note 5, at 143-45, 161-64, 213-17.

## B. Context

At first blush, it is not obvious why the process established after World War I has not held up well over time. To understand why this is so, it is important to look at the context in which the system was designed and operated.

### *i. Medicine*

Few of the characteristics of modern medical practice are recognizable in the practice of medicine a century ago. Hospital treatment was rare. Few specialists existed, and most doctors were general practitioners who visited patients at their homes.<sup>13</sup> The doctor's tools and medicines were limited to those that could be conveniently carried from place to place. If doctors kept records, they were personal and not available to patients or the government.

More importantly, the nature of medical training and thinking was vastly different. The rigorous, scientifically oriented medical school we know today did not emerge until after the Great Depression. Medical education at the time of World War I was inconsistent and often of dubious value. During the Great Depression, approximately half of all medical schools went out of business, and it was only then that the science-based model emerged to combat the public skepticism that bankrupted half the industry.<sup>14</sup> Diagnostic testing was rare. Indeed, it was only at the beginning of World War II that x-rays became common.<sup>15</sup>

Accordingly, at the time the system was created, doctors offered only limited expertise about medicine compared to what was known by the average lay person. There was simply no need to consider medical evidence in most cases, as it rarely existed and ordinary experience and common sense were considered sufficient to resolve routine cases without expert assistance.

### *ii. Disability*

The concept of disability in the early twentieth century was also different. The economy was overwhelmingly driven by physical labor. When the benefits system was established, half of Americans lived in rural areas and a third of the population was engaged in farming.<sup>16</sup> Higher education was relatively rare and non-farm labor was also predominantly physical. Disabled veterans were almost exclusively male and their ability to support themselves and their families was largely determined by their ability to use tools, operate machinery, and otherwise engage in physical labor.<sup>17</sup> As a result, the focus of the benefits process was on how a disability affected a veteran's ability to find and maintain various types of labor-intensive employment.<sup>18</sup>

<sup>13</sup> See Edward Shorter, *Primary Care*, in *CAMBRIDGE ILLUSTRATED HISTORY OF MEDICINE* 145 (Roy Porter ed., 1996).

<sup>14</sup> See DAVID DARY, *FRONTIER MEDICINE: FROM THE ATLANTIC TO THE PACIFIC 1492-1941*, 305-06 (2008).

<sup>15</sup> See Arne Hessenbruch, *A Brief History of X-Rays*, 26 *ENDEAVOUR* 137, 138, 141 (2002).

<sup>16</sup> See U.S. Bureau of the Census, *AGRICULTURE: GENERAL REPORT AND ANALYSIS FOR 1900-1910*, available at [http://www.agcensus.usda.gov/Publications/Historical\\_Publications/1910/General%20Reports/41033898v5.pdf](http://www.agcensus.usda.gov/Publications/Historical_Publications/1910/General%20Reports/41033898v5.pdf).

<sup>17</sup> See U.S. Gov't Accountability Office, Report to the Congress of the United States by the Comptroller General: Review of Compensation and Pension Program, Washington Offices, Veterans Administration 28 (1954), available at <http://www.gao.gov/assets/280/275266.pdf>.

<sup>18</sup> See *id.*

*iii. Law*

The disability process must also be considered in light of the general legal landscape at the time. The American legal system today bears only a passing resemblance to its early twentieth-century form.

At the time the foundation of the current veterans benefits was laid at the end of World War I, attorneys were far rarer than today, because that time preceded the Supreme Court's decisions in *Gideon v. Wainwright*, 372 U.S. 335 (1963), which required that counsel be provided to indigent criminal defendants, and *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), which held that attorneys have a constitutional right to advertise. Law schools were far fewer and lawyers were commonly trained through apprenticeships. Bar associations to enforce professionalism were in their infancy. Legal research was laborious, and cases were often resolved with only oral argument or hand-written submissions.

Many of the substantive legal features we take for granted would have been unrecognizable. The first ten amendments of the Constitution were not even yet known as the Bill of Rights.<sup>19</sup> Tort law — the benefits system's older cousin — had limited notions of causation and did not recognize many of the non-economic damages that are commonly awarded today. Use of expert evidence was difficult and rare. The administrative state had not yet been created by the New Deal.<sup>20</sup> In short, the legal system was far less formal and less pervasive than it is today.

*iv. Information*

As much as medicine, law, and disability have changed, perhaps no field as changed as much as the one that gives its name to the current period, the Information Age. At the time of World War I, information technology was still based upon the medieval technologies of paper and the printing press. Typewriters were just becoming widely available for commercial use.<sup>21</sup> Newspapers and libraries were the primary sources of information. Only a fraction of American homes had telephones.<sup>22</sup> Televisions and computers were at best science fiction concepts.

Information that was not immediately at hand was unlikely to be obtained without substantial — and often prohibitive — effort and cost. As a result, decision making was driven largely by what information was available, rather than what information might be desired. In the absence of information, decision makers were forced to rely on judgment and intuition. Determinations were commonly based upon subjective standards rather than objective rules. Even though objectivity was often valued and desired, it simply was not possible.<sup>23</sup>

<sup>19</sup> See Gerard N. Magliocca, *Becoming the Bill of Rights* 1-2 (Ind. Univ. Robert H. McKinney Sch. of Law, No. 2013-16, 2013), available at <http://ssrn.com/abstract=2236457>.

<sup>20</sup> See Ridgway, *The Splendid Isolation Revisited*, *supra* note 5, 180 & n.301.

<sup>21</sup> See IBM Office Prods. Div., *The Typewriter: An Informal History* (Aug. 1977), available at [http://www-03.ibm.com/ibm/history/exhibits/modelb/modelb\\_informal.html](http://www-03.ibm.com/ibm/history/exhibits/modelb/modelb_informal.html).

<sup>22</sup> See U.S. BUREAU OF THE CENSUS, *HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970* 775, 783 (Bicentennial ed. 1975), available at <http://www2.census.gov/prod2/statcomp/documents/CT1970p2-05.pdf>.

<sup>23</sup> For an in-depth discussion of the rules-versus-standards debate, see Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992) (considering both cost of creation by rulemaking/standard-setting bodies and expense to individuals in determining application to their contemplated acts); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) (addressing the rules-versus-standards debate in the context of individualism versus altruism); Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23 (2000) (revisiting the debate from the law and behavioral sciences perspective); Dale A. Nance, *Rules, Standards, and the Internal Point of View*, 75 FORDHAM L. REV. 1287 (2006) (arguing for the employment of rules over standards to provide citizens with the maximum practicable definiteness in laws regulating their nonlitigation conduct); Pierre Schlag, *Rules and*

### III. THE TWENTY-FIRST CENTURY LANDSCAPE

The world in which we live today is vastly different than it was when the current veterans benefits process was created. Noting the key differences can assist us in evaluating what changes need to be made to the system to enable it to move forward.

#### A. Medicine

A century of medical progress has completely changed our understandings of disease, injury, and medical causation. Diagnosis and treatment have been revolutionized. Our understanding of causation has completely changed. Countless journals now exist to explore specialties so diverse that no one person could follow them all. Conditions that were previously considered bad luck or a sign of constitutional defects are now viewed as having identifiable causes. The roles of genetics, epigenetics, diet, environmental exposures, and countless other factors have broadened our notions of medical causation. Yet, there is still so much we do not understand.

The practice of medicine is now vastly more objective and data driven. Instead of doctors being able to carry all of their equipment from house to house, massive state-of-the-art hospital complexes must decide which devices to use among overwhelming possibilities. Diagnostic testing is routine and medical records are voluminous.

The result of the progress has profoundly affected ordinary life. People seek professional treatment for routine fevers. Life expectancy has risen dramatically along with expectations for quality of life. A tremendous amount of life's imperfections have been medicalized and labeled as diseases. Complex treatments have been created, previously chronic conditions may now be cured, and many other conditions lead to widespread use of prescription medications on a daily basis. Mental health has become a pervasive medical issue that affects a large portion of the population. Health care now constitutes a sixth of the nation's economic activity.<sup>24</sup>

Perhaps the most important change has been the profound cultural shift in how physicians and scientists are perceived. They have come to be revered, particularly in their portrayals in popular media. This has led to common perceptions that experts know more than they really do, and that science can solve any problem before the end of a 60-minute primetime episode. This so-called "CSI effect"<sup>25</sup> produced by the eponymous show and countless others threatens public perceptions of the veterans benefits system by creating a belief that very hard medical problems can be resolved with confidence if only the right questions were asked of the appropriate experts.

Accordingly, modern medicine has been something of a double-edged sword. It has dramatically improved our understanding of the effects of service on veterans, while perhaps creating unrealistic expectations of what may be resolved without resorting to speculation and guesswork.

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*Standards*, 33 UCLA L. REV. 379 (1985) (arguing that even if the rules-versus-standards debates were stereotyped there may be substance to such arguments about form); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992) (exploring the way in which the rules/standards debate divided the Court on constitutional issues); Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 956–57 (1995) (contrasting guidelines, principles, and analogies to rules and standards).

<sup>24</sup> Christopher J. Truffer et al., *Health Spending Projections Through 2019: The Recession's Impact Continues*, 29 HEALTH AFFAIRS 522, 523 (2010), available at <http://content.healthaffairs.org/content/29/3/522.abstract>.

<sup>25</sup> The "CSI Effect," THE ECONOMIST, Apr. 22, 2010, available at <http://www.economist.com/node/15949089>.

## B. Disability

The concept of disability has also transformed. The relationship between in-service disease or injury and earning potential looks vastly different than it did one hundred years ago, when physical labor was the heart of the economy. A world of service and information employment presents a very different set of prospects than a world of farm and factory work. Many physical injuries have little effect on a veteran's ability to operate a computer. Conversely, cognitive injuries may loom larger than the current compensation structure fully recognizes. (This is certainly suggested by the large number of veterans with PTSD who have been found totally disabled based upon individual unemployability.<sup>26</sup>)

Not only is the economy different, but the economic realities of disability have changed. The Americans with Disabilities Act of 1990<sup>27</sup> and the Rehabilitation Act of 1973<sup>28</sup> have done much to eliminate employment barriers for those with physical or mental limitations. Public perceptions of disability have radically changed. Wheelchairs and other adaptive devices are now unremarkable features of real life and popular culture. Accordingly, social attitudes as to what constitutes a disability and what is expected from and for those with disabilities have substantially improved the economic prospects of the disabled.

Moreover, the fortunes of the disabled have been improved in other ways. Rehabilitative medicine has made dramatic breakthroughs, particularly in the twenty-first century. Is a veteran whose disease is fully controlled by medication or other treatment disabled? Is an amputee entitled to no compensation if a prosthetic is available that is as good as (or better) than the lost appendage? Many significant residuals of service no longer cause major employment limitations.

The current veterans benefits system has already started to drift away from the original concept of economic disability. For example, there are now benefits for the loss of use of a reproductive organ<sup>29</sup> and other problems that cannot plausibly be regarded as impacting a veteran's ability to maintain gainful employment. However, the system has yet to embrace a coherent new vision of what is to be compensated.

## C. Law

The legal profession has changed as much as the medical profession. Lawyers are more prevalent, legal education has become much more formal and demanding, and the role of law in ordinary life is much more prominent. The practice of law involves extensive computerized research. Courtroom argument has largely been replaced by drafting prolific briefs and motions.<sup>30</sup>

Modern tort law has substantially increased the scope of recovery. Courts now routinely award compensation for lost quality of life and emotional damages.<sup>31</sup> Furthermore, tort law has become sophisticated in other ways, including the development of class action mechanisms, toxic exposure

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<sup>26</sup> See INST. OF MED. OF THE NAT'L ACADS., A 21ST CENTURY SYSTEM FOR EVALUATING VETERANS FOR DISABILITY BENEFITS 240 (Michael McGeary et al. eds., 2007).

<sup>27</sup> 42 U.S.C. §§ 12101-12213 (2012).

<sup>28</sup> 29 U.S.C. §§ 701-796 (2012).

<sup>29</sup> See 38 U.S.C. § 1114(k) (2012).

<sup>30</sup> See generally BUREAU OF INT'L INFORMATION PROGRAMS, U.S. DEP'T OF STATE, OUTLINE OF THE U.S. LEGAL SYSTEM 18-56 (2004)

<sup>31</sup> For an in-depth discussion of this trend, see POSER, S., BORNSTEIN, B. H. & MCGORTY, E. K., MEASURING DAMAGES FOR LOST ENJOYMENT OF LIFE: THE VIEW FROM THE BENCH AND THE JURY BOX. LAW AND HUMAN BEHAVIOR (2003).

claims, and expert epidemiological evidence.<sup>32</sup> Whereas trials a century ago were usually relatively quick and decisive affairs, complex cases involving numerous victims now drag on for years and are often resolved by a settlement that leaves unanswered the underlying questions of what happened and who was responsible. In other words, complex legal problems encompassing many types of factual uncertainty are resolved based upon probabilistic evaluations, without any pretense of definitively resolving what happened or why.<sup>33</sup>

As for agency processes, they have been transformed by the 1946 Administrative Procedures Act<sup>34</sup> and the rise of modern notions of due process stemming from the Supreme Court's 1970 decision in *Goldberg v. Kelly*.<sup>35</sup> Indeed, many current claimants were fighting in Vietnam when the due process revolution truly started. The courts are now dramatically more involved in policing how agencies make policy and operate in practice. As a result, modern administrative agencies are now required to explain their policies and avoid arbitrary and inconsistent outcomes.

The current veterans benefits system pre-existed the New Deal and the rise of the administrative state. It was effectively exempted from the Administrative Procedure Act.<sup>36</sup> The advent of judicial review in 1988 has focused more on preserving the uniqueness of the system than bringing it in line with modern norms.<sup>37</sup> Yet, the efforts to keep the system informal have been difficult to reconcile with modern public sentiments about administrative justice. Veterans whose claims have been denied now tend to think that some rule was broken, especially when they perceive similarly situated claimants receiving different outcomes.<sup>38</sup>

#### D. Information

The final crucial aspect of the modern world that must be acknowledged is the role of information technology. Today, we can scarcely imagine a world in which the internet cannot provide nearly instantaneous answers to questions that would have once been unfathomable. Indeed, this massive shift in our relationship with information has transformed both law and medicine.

Professionals in both areas now find it impossible to keep current with emerging developments not just in their general field, but within their specialty. Medical researchers often struggle with the problem of how to process vast amounts of data to find correlations. Practicing physicians cannot possibly read all potentially relevant case studies when treating an unusual patient. Attorneys and courts struggle to keep disputes manageable when warehouses of documents and huge networks of computers may contain relevant evidence.

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<sup>32</sup> *See id.*

<sup>33</sup> For a federal trial judge's views on the development of such litigation, see JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* (1995).

<sup>34</sup> 5 U.S.C. §§ 500-596 (2012).

<sup>35</sup> 397 U.S. 254 (1970) (holding that procedural due process requires that recipients of public benefits be provided adequate notice of proposed termination of benefits and an opportunity to be heard).

<sup>36</sup> Section 10 of the APA made it inapplicable when statutes explicitly precluded judicial review. The Veterans Administration had previously been made immune to judicial review by section 5 of the Economy Act of 1933. Ridgway, *Recovering an Institutional Memory*, *supra* note 2, at 21.

<sup>37</sup> See James D. Ridgway, *The Veterans' Judicial Review Act Twenty Years Later: Confronting the New Complexities of the Veterans Benefits System*, 66 N.Y.U. ANN. SURV. AM. L. 251, 252 (2010).

<sup>38</sup> For a critical analysis of this procedural revolution and its impact on the veterans benefits process, particularly vis-à-vis the Veterans' Judicial Review Act (VJRA), see Lawrence B. Hagel & Michael P. Horan, *Five Years Under the Veterans' Judicial Review Act: The VA is Brought Kicking and Screaming into the World of Meaningful Due Process*, 46 ME. L. REV. 43 (1994).



For individuals and professionals, the information problem has completely reversed in the last century. The amount of information that is available with reasonable effort has grown so enormous that the challenge is to control how much is gathered and considered. Theoretically, massive amounts of data should allow for objectively correct decisions. However, the inability to process this data often means that decisions must still be subjective. Intuition and judgment remain key to making decisions, but now they must be applied to the problem of how much information to obtain before acting.

This poses a profound problem for structuring a mass adjudication system, such as the veterans benefits claims process. The process must be based upon an amount of information that can be managed on the scale of millions of claims. However, there will always be more information available to a claimant with the time and motivation to seek it. As a result, maintaining public confidence in the system is very challenging, because of the frequency of cases in which it appears upon closer inspection that something was overlooked.

Unfortunately, there is a common perception in the Information Age that questions—particularly medical and legal ones—have an objectively correct answer if only enough effort were expended. Nevertheless, there remains an enormous subjectivity that must be handled without producing arbitrary and capricious results.

#### IV. THE CLAIMS PROCESS TODAY

The above overview of the landscape helps illuminate why the World War I benefits process used today produces such unsatisfactory results. However, a closer inspection is warranted.

##### A. Complaints

The problems with the process are easy to identify. It takes too long to make initial decisions on claims and an intolerable amount of time to resolve an appeal.<sup>39</sup> Every independent metric and review of decisions shows substantial problems with decision quality.<sup>40</sup> Inconsistent outcomes for similarly situated veterans are not uncommon, and advocates sometimes cite these situations to the courts despite rules saying that such outcomes are not persuasive.<sup>41</sup>

In fairness, some of the problems are overstated. Issues with development and procedures are far more common than outright failures to reach the correct result based upon the available evidence. The cases in which a determination is changed on appeal are often based upon new evidence submitted by the veteran after the initial decision.<sup>42</sup> Although the Court of Appeals for Veterans Claims commonly remands cases to the Department of Veterans Affairs (VA) to better explain a

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<sup>39</sup> See, e.g., *Why Are Veterans Waiting Years on Appeal?: A Review of the Post-Decision Process for Appealed Veterans' Disability Benefits Claims: Hearing Before the Subcomm. on Disability Assistance & Mem'l Affairs of the H. Comm. on Veterans' Affairs*, 113th Cong. (2013), available at <http://veterans.house.gov/hearing/why-are-veterans-waiting-years-on-appeal-a-review-of-the-post-decision-process-for-appealed>; BVA FY 2012 REP., *supra* note 4, at 19.

<sup>40</sup> See, e.g., *Adjudicating VA's Most Complex Disability Claims: Ensuring Quality, Accuracy and Consistency on Complicated Issues: Hearing Before the Subcomm. on Disability Assistance & Mem'l Affairs of the H. Comm. on Veterans' Affairs*, 113th Cong. (2013) (statement of Zach Hearn, Deputy Director for Claims, The American Legion), available at <http://veterans.house.gov/hearing/%E2%80%99Adjudicating-va%E2%80%99s-most-complex-disability-claims-ensuring-quality-accuracy-and-consistency>; Ridgway, *The Veterans' Judicial Review Act Twenty Years Later*, *supra* note 28, at 270.

<sup>41</sup> See, e.g., *Haas v. Peake*, 525 F.3d 1168, 1189 (Fed. Cir. 2008).

<sup>42</sup> See *Why Are Veterans Waiting Years on Appeal?*, *supra* note 29 (statement of Laura Eskenazi, Principal Deputy Vice Chairman, Board of Veterans' Appeals) (testifying that nearly two-thirds of remands were not due to regional office error).

decision or have an expert consider an additional theory of the case, it is extremely rare that the court concludes that the agency clearly erred in denying benefits.<sup>43</sup>

The more fundamental issue is that the process has become one that is so complex that it is extremely difficult even for trained and well-meaning adjudicators to successfully recognize every legal issue that must be addressed and to navigate every procedure that applies.<sup>44</sup> The National Veterans Legal Services Program publishes the most popular compilation of applicable laws and a companion volume of court interpretations. Each large volume exceeds 2,200 pages of small type.<sup>45</sup> Accordingly, it should not be terribly surprising that issues and procedures are overlooked when the rules covered in these tomes are applied to a claims file that may itself easily exceed a thousand pages of evidence.

In fact, modern complexity theory suggests that these problems are practically inevitable.<sup>46</sup> As the number of rules governing a system grows, the potential interactions between those rules grow exponentially.<sup>47</sup> The fuzzier the rules are themselves, the more likely that interactions will arise unexpectedly and be difficult to resolve when they do. Because of this complexity, one veterans service organization leader recently testified that adjudicating claims is not like summing “three plus two,” but “like adding two irrational numbers, pi . . . plus the square root of two.”<sup>48</sup> As a result of the challenges of this complexity, cases churn repeatedly through various stages of redevelopment and readjudication, in a vain attempt to consider every possible medical and legal theory of entitlement. But exactly how did the system arrive where it is today?

## B. The Rube Goldberg Process<sup>49</sup>

The story of how this complexity emerged begins at the founding of our country, when a political power struggle between Congress and the courts led to the outcome that veterans claims would not be subject to judicial review.<sup>50</sup> This “splendid isolation” allowed the system to evolve in ways unshaped by the evolutionary forces affecting other areas of the law. As discussed above, the current process stems from World War I, but it was in 1962 that Congress began to add additional layers to the process as an alternative to calls for judicial review.<sup>51</sup> Subsequently, VA also added additional procedural regulations to combat growing criticism and calls for judicial review.<sup>52</sup> However, the pressure for review could only

<sup>43</sup> See Ridgway, *Why So Many Remands?*, *supra* note 4, at 165.

<sup>44</sup> See Ridgway, *The Veterans’ Judicial Review Act Twenty Years Later*, *supra* note 28, at 295.

<sup>45</sup> See VETERANS BENEFITS MANUAL (Barton F. Stichman et al. eds., 2013) (2204 pages), NAT’L VETERANS LEGAL SERV. PROGRAM, FEDERAL VETERANS LAWS, RULES AND REGULATIONS (2013 ed.) (2205 pages).

<sup>46</sup> See J.B. Ruhl & James Salzman, *Mozart and the Red Queen: The Problem of Regulatory Accretion in the Administrative State*, 91 GEO. L.J 757 (2003).

<sup>47</sup> A system of rules is essentially a network in which each rule is a node (n). Therefore, the number of interactions (x) is defined by  $x = n(n-1)/2$ . Consequently, a system with just 10,000 rules will have nearly 50 million potential interactions to understand.

<sup>48</sup> See *Adjudicating VA’s Most Complex Disability Claims: Ensuring Quality, Accuracy and Consistency on Complicated Issues: Hearing Before the Subcomm. on Disability & Mem’l Affairs of the H. Comm. on Veterans’ Affairs*, 113th Cong. (2013) (statement of Sherman Gillums, Associate Executive Director for Veterans Benefits, Paralyzed Veterans of America), available at <http://veterans.house.gov/hearing/%E2%80%9CAdjudicating-va%E2%80%99s-most-complex-disability-claims-ensuring-quality-accuracy-and-consistency>.

<sup>49</sup> Reuben Lucius Goldberg (July 4, 1883 - December 7, 1970) was an American cartoonist, sculptor, author, engineer and inventor. Goldberg is best known for a series of popular cartoons he created depicting complex devices that perform simple tasks in indirect, convoluted ways - now known as Rube Goldberg processes. See generally A. Morgan Cloud, *Rube Goldberg Meets the Constitution: The Supreme Court, Technology and the Fourth Amendment*, 72 MISS L.J. 5 (2002).

<sup>50</sup> See Ridgway, *The Splendid Isolation Revisited*, *supra* note 5, at 143-45.

<sup>51</sup> See Act of September 19, 1962, Pub. L. No. 87-666, 76 Stat. 553.

<sup>52</sup> See Due Process and Appellate Rights, 37 Fed. Reg. 14780 (July 25, 1972) (creating 38 C.F.R. § 3.103 “Due process—procedural and appellate rights with regard to disability and death benefits and related relief”).

be diverted for so long, and in 1988, not one, but two layers of judicial review were added anyway.<sup>53</sup> As a result, five levels of review are now commonly available.

Judicial review profoundly affected how the statutory and regulatory procedures were executed. Broad rules that were previously treated as discretionary became mandatory. However, the most immediate and unanticipated consequence was that the agency's core adjudicative processes were invalidated in 1991 by *Colvin v. Derwinski*.<sup>54</sup> Prior to that case, agency decisions were made by panels of legal and medical experts sitting together to discuss cases. These conversations were highly efficient at resolving claims. However, this process was impossible to maintain with judicial review because there was no separation of evidence gathering and decision making, and therefore much of what the medical experts were contributing occurred off the record.

VA's subsequent development of mechanisms for gathering independent medical evidence was ad hoc and inefficient. Attempts to obtain complete and coherent medical opinions through written requests have been beset by problems. As a result, inadequate medical evidence has long been the leading cause of problems and delay. Accordingly, the five-layer adjudication process was even further prolonged in those cases in which those procedures had to be repeated to address inadequate evidence.

These administrative problems were then greatly magnified in 2000 by the Veterans Claims Assistance Act. By dramatically lowering the threshold required to trigger the agency's duty to obtain medical evidence, the problems created in the aftermath of *Colvin* a few years before became much more widespread. The proportion of cases subject to the fragmented process of gathering medical evidence grew dramatically, placing further pressure on an already inefficient design.

Accordingly, much of VA's current struggles revolve around determinations of medical causation. On review, these decisions are frequently found to be based upon inadequate evidence, because the written opinion does not fully address all of the relevant evidence in a voluminous claims file or fails to consider a theory suggested by the record. This is not a problem that is easily solved by form opinions, because the key information that is overlooked is usually not the universal standards in the law, but the particularized facts in the claims file.

This information is not necessarily overlooked because of carelessness, but rather because there are so many potential theories of entitlement that may be in play in a given claim —different potential causes that may need to be considered on the basis of direct service connection, presumptive service connection on multiple bases, secondary service connection, or aggravation — as well as so much potentially relevant information in the file, that imagining and addressing every theory reasonably raised by the record can be incredibly difficult. Moreover, the ultimate responsibility for fact finding lies with the adjudicator, not the doctor.<sup>55</sup> Therefore, when it is ambiguous as to what happened in the past, it can be nearly impossible to address every variation of, "If the adjudicator determines that A happened in service, but not B, and C happened after service, but not D, then . . . ."

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<sup>53</sup> Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988) [hereinafter VJRA]. For a deep analysis of the effects of the VJRA, see Ridgway, *The Veterans' Judicial Review Act Twenty Years Later*, *supra* note 28, at 253-60.

<sup>54</sup> 1 Vet. App. 171 (1991). See Ridgway, *The Veterans' Judicial Review Act Twenty Years Later*, *supra* note 28, at 272-73.

<sup>55</sup> See e.g. *Guerrieri v. Brown*, 4 Vet. App. 467, 473 (1993) (holding that "the probative value of medical opinion evidence is based on the medical expert's personal examination of the patient, the physician's knowledge and skill in analyzing the data, and the medical conclusion the physician reaches. . . . As is true with any piece of evidence, the credibility and weight to be attached to these opinions [are] within the province of the [Board as] adjudicators.").

As a result, it is not surprising that inadequate medical opinions are the primary reason that claims are remanded for readjudication.<sup>56</sup> In fact, claims are frequently remanded multiple times because the additional opinion did not precisely answer the additional questions raised, or resulted in yet more theories being suggested that require further development and consideration. It is also common for veterans to submit further evidence during this process, which can also alter the nature of the opinion needed.<sup>57</sup>

In summary, the flawed system was not adopted wholesale. Instead, it has been driven much more by path dependence. At each step, the existing process was largely preserved, and incremental changes were made that usually involved adding procedures to address specific issues. Few, if any, of the individual changes could be challenged as obviously wrong or misguided. Nevertheless, the net result has been a process that has staggered towards less satisfactory results even as it has been showered with resources and the number of pro-veteran rules has increased. Without any ill intent, the system has become too complex to work and is in need not of repair, but rather of either rebuilding or a complete replacement.

## V. TOWARD A MODERN SYSTEM

With this in mind, it is possible to imagine new approaches based upon those new realities. A benefits system for the Information Age has a myriad of potential shapes.

### A. An Updated Conception of Compensation and Disability

The ideal place to start in building a system for the information is choosing an explicit vision of the role of veterans benefits. The vision could be an update to the current foundation: compensating for a reduced ability to earn an income. This alone would be a tremendous challenge. The labor market has become incredibly diverse. As a result, it is much harder to determine the average impact across a much broader spectrum of potential jobs. More importantly, the incredible range of possibilities substantially increases the variance in outcomes. Even if a reliable average impact could be determined, the chances are much greater now that an individual's personal impact may be far from average, leading to dissatisfaction and perceptions of unfairness.

The rapid pace of change on all relevant fronts begs the question of whether an even more radical approach should be considered. Perhaps the goal of benefits should make a profound shift toward focusing on the individual. An important criticism of most American disability benefits systems, including both veterans benefits and Social Security, is that they prevent the disabled from realizing their potential and leading the most fulfilling lives possible. Linking benefits to the severity of a condition in effect both pays veterans to grow worse and punishes them for getting better. Although there is no obvious solution, there is a strong critique that we must restructure benefits so that veterans are not financially penalized for overcoming their disabilities.<sup>58</sup>

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<sup>56</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-910T, PRELIMINARY FINDINGS ON CLAIMS PROCESSING TRENDS AND IMPROVEMENT EFFORTS 7 (2009)

<sup>57</sup> See Ridgway, *Why So Many Remands?*, *supra* note 4, at 125-26.

<sup>58</sup> See Motoko Rich, *Moving From Disability Benefits to Jobs*, N.Y. TIMES (Apr. 7, 2011, 11:17 AM), [http://economix.blogs.nytimes.com/2011/04/07/moving-from-disability-benefits-to-jobs/?\\_r=0](http://economix.blogs.nytimes.com/2011/04/07/moving-from-disability-benefits-to-jobs/?_r=0) ("But some economists and policy analysts argue that many beneficiaries who might work are discouraged from doing so because of the so-called 'cash cliff,'" which cuts off all their benefits if they begin to earn a small amount of income); see also Michael Waterstone, *Returning Veterans and Disability Law*, 85 NOTRE DAME L. REV. 1081, 1087-88 (2010) (noting that benefits systems "contain significant work disincentives or require some distance and detachment from the labor market to obtain entry into the system").

One approach would be to change from defined monthly payments to minimum income guarantees. This would give veterans a similar type of financial security, but would be vastly easier to administer, as objective income verification would be the only data to track. On the upside, veterans would have an incentive to overcome their limitations and find work that paid significantly more than the guaranteed minimum. On the downside, veterans working in marginal employment may be tempted to give up working altogether and live as passive benefits recipients. The structural issues would be difficult, but perhaps less so than other options.

Another approach would be one similar to that adopted by Britain in 2005.<sup>59</sup> Under the new British system, most minor to moderate injuries are handled with lump sum payments in service. Only the most severe injuries result in ongoing monthly payments and administrative involvement by the government. This compensates service members and avoids the trap of benefits that pay them to grow worse after service, while vastly reducing the government's long-term administrative costs.

Furthermore, given the breadth of modern tort law and the availability of non-economic damages, should not veterans also receive compensation for lost quality of life? Need there be any impact on employment to award benefits? Of course, this would be a difficult vision to define, as these issues are so much more subjective than economic loss. The relationship between injury and quality of life is even murkier in a world in which someone with two artificial legs can be an Olympic sprinter. Moreover, some modern research into happiness suggests that the vicissitudes of fortune — whether good or bad — do little to impact our long-term emotional well-being.<sup>60</sup> Eventually, most people return to their baseline level of happiness. As a result, non-economic compensation may be a Pandora's box. These questions of what losses to compensate and how to measure those losses are not unique to veterans law. There is no perfect answer, but some clear answer is needed to guide the rethinking of the system.

Ultimately, there is room for much innovative thinking. Growing bodies of scholarship indicate that maintaining employment provides profound psychological benefits by fostering social relationships and a sense of self worth. Therefore, both veterans and taxpayers may be better served by a system that is completely realigned to focus on rehabilitation and employment, rather than trying to find a coherent yardstick for measuring disabilities. Whatever approach is taken, it must be taken explicitly and with the support of veterans. Change will be difficult, but dissatisfaction with the status quo may yet lead to sufficient pressure.

### **B. The Beginnings of a Better Process**

Ideally, one would redesign the substance of veterans benefits before turning to the problem of administering them. However, that is a luxury that veterans can ill afford. The most realistic scenario is that current system of benefits will not change drastically. Complex systems tend to move to the

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<sup>59</sup> See The Armed Forces and Reserve Forces (Compensation Scheme) Order, 2005, S.I. 2005/249, available at <http://www.legislation.gov.uk/uksi/2005/439/made>.

<sup>60</sup> See, e.g., NAT'L RESEARCH COUNCIL, SUBJECTIVE WELL-BEING: MEASURING HAPPINESS, SUFFERING, AND OTHER DIMENSIONS OF EXPERIENCE 77 (2013) ("[S]et-point theory . . . posits that people initially react to events, but then return to some baseline that is determined by personality factors."); Laura Blue, *Is Our Happiness Preordained?*, TIME, Mar. 12, 2008, available at <http://content.time.com/time/health/article/0,8599,1721954,00.html> ("Most people, it seems, revert back to some kind of baseline happiness level within a couple years of even the most devastating events, like the death of a spouse or loss of limbs."). But cf. Jennifer Nou, *Happiness Institutions*, 62 DUKE L.J. 1701, 1701 (2013) (cautioning that "happiness measures necessarily implicate issues of deep disagreement that must be resolved by legitimate actors" before being incorporated in policy).

adjacent possible rather than radically new forms. Given that the veterans benefits system of the near future is likely to continue to be one focused on issues of medical causation, how can we best administer such a system?

To be ambitious, we should abandon any loyalty to the current way of doing things. As discussed above, today's benefits are not handled by a coherent system, but by a process that has accumulated over many decades of tinkering and oversight. Each spring, rope, bucket, lever, and pulley in the current Rube Goldberg contraption had a veteran-friendly purpose when it was enacted. Therefore, conversations about eliminating one or more pieces tend to go nowhere. Each piece has its defenders, and there is much truth to the view that removing a given piece of the contraption could cause it to fail rather than become more efficient.

The problem of complex systems is not that the pieces are inherently flawed, but that a critical mass is reached in which unexpected — and often undesired — emergent properties arise that frustrate the intentions of the individual parts.<sup>61</sup> Therefore, reinventing the system should begin with a design constraint to limit the number of pieces. At first, adopting such a constraint will be frustrating, however, good designers understand that restrictions breed creativity. What first seems impossible eventually takes shape when we force ourselves to challenge our preconceived notions about how something works.

The obvious restriction to impose on redesigning the adjudication process is time. Instead of beginning with all the pieces we *think* should be part of the process, we should instead focus on what matters most to veterans: how long the process takes. For example, in 2010, the Department of Veterans Affairs Secretary Eric Shinseki pledged by 2015, no claim would wait more than 125 days for an initial decision.<sup>62</sup> This restriction has forced the agency to starkly confront the question of how those days should be allocated to the various tasks that go into developing and deciding a claim.

However, even once the agency reaches that goal, there will remain the much more difficult question of how to handle appeals. The current process has four additional reviews as of right (at the regional office level, the Board of Veterans' Appeals, the Court of Appeals for Veterans Claims, and the Court of Appeals for the Federal Circuit), each with its own procedures. How long the appeals process should take is currently undefined. Accordingly, it should be no surprise that the delays in this area have continued to worsen.<sup>63</sup>

Deciding on a maximum number of days that an appeal should take would provoke a difficult but useful conversation as to the priorities that should be accommodated. Are four levels of review still warranted? Certainly, the basic administrative burdens of maintaining this many levels of appeal puts tremendous constraints on what may be accomplished at each level. Currently, the first two layers both operate with open records and an ongoing duty to assist (in addition to the case development that occurs before the initial decision). The courts above operate with the full trappings of the adversarial process, designed to fully test the decisions below. All of these procedures are defensible, yet they result in appeals that take several years under even the best circumstances. What

<sup>61</sup> See Ruhl & Salzman, *supra* note 36.

<sup>62</sup> See, e.g., Eric K. Shinseki, Sec'y of Veteran's Affairs, Remarks at the American Legion Annual Convention (Aug. 31, 2010), *available at* [http://www.va.gov/opa/speeches/2010/08\\_31\\_2010.asp](http://www.va.gov/opa/speeches/2010/08_31_2010.asp).

<sup>63</sup> Compare BVA FY 2012 REP., *supra* note 4, at 19 (reporting that the average length of time to decide an appeal was 1,040 days), with Bd. OF VETERANS' APPEALS, DEP'T OF VETERANS AFFAIRS, REP. OF THE CHAIRMAN, FISCAL YEAR 2011, at 18 (2012) [hereinafter BVA FY 2011 REP.], *available at* [http://www.bva.va.gov/docs/Chairmans\\_Annual\\_Rpts/BVA2011AR.pdf](http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2011AR.pdf) (reporting that the average time was 883 days).

would an appeals system look like if you began with a set number of days and filled it with the procedures that veterans most desire? In all likelihood, the differences would be considered fairly radical at first, until the inevitable realization that achieving the desired timeframe cannot happen with the current structure.

Accordingly, the ultimate shape that a future system should take is not clear. Reaching that future state is a challenge unto itself. Nevertheless, a truly effective process must be a reinvention, not just another attempt at evolution.

### **C. Elements of a Twenty-First Century System for Adjudicating Claims**

Reinventing the system will require the wisdom and support of all the stakeholders. An independent attempt to try to design each nut and bolt would be folly. However, we can identify many potential areas to address, which could help fill out the calendar of however many days that veterans, Congress, and VA all deem acceptable to complete the processing of a claim.

#### *i Objective Rules*

The first element of a modern system would be a move toward objective rules. Such objective rules define the parts of the benefits system that work best, such as educational benefits and home loans. However, the compensation system is currently flooded with subjective determinations in the subset of more difficult cases that lead to appeals.<sup>64</sup> This subjectivity leads to inconsistency and dissatisfaction. These subjective standards made sense a century ago when limited information required gaps to be filled by judgment and inconsistent applications were hard to monitor and unlikely to cause discontent. However, the current degree of subjectivity no longer escapes notice, and instead causes significant problems.

Objective rules offer a host of benefits. They are much easier to administer. In particular, they are much more amenable to automation, which allows the system to improve accuracy, while also saving time and money. Trying to automate a system built on subjective rules is the equivalent of building an electric Model-T. For this reason, modern disaster funds use these types of rules to distribute billions of dollars to thousands or hundreds of thousands of claimants.<sup>65</sup> However, automation of *subjective* rules raises very serious concerns of oversight and due process. It is possible to automate most processing of tax returns precisely because the rules are objective and any taxpayer can easily check results independently if he or she so desires. A computer that has to input reams of medical reports and then spit out disability ratings of “mild,” “moderate,” or “severe” is not only very hard to build, but can easily lead to skepticism and mistrust as to whether the intended rules are being faithfully executed by the program, as well as concerns about whether judicial review of computer code is feasible.<sup>66</sup> Therefore, objective rules are an essential precondition for automation.

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<sup>64</sup> As Pierre Schlag has observed, “disputes that pit a rule against a standard are extremely common in legal discourse.” Schlag, *supra* note 22, at 380.

<sup>65</sup> See KENNETH R. FEINBERG, WHO GETS WHAT: FAIR COMPENSATION AFTER TRAGEDY AND FINANCIAL UPHEAVAL (2012).

<sup>66</sup> See Danielle Keats Citron, *Technological Due Process*, 85 WASH. U. L. REV. 1249, 1249 (2007).

Objective rules also eliminate inconsistent outcomes for similar veterans. One of the hallmarks of modern law is a decreasing tolerance for unfairness of similar claims having different outcomes. The internet and the rise of big data have made it vastly more likely that such outcomes will be highlighted and cause discontent. Accordingly, moving toward objective rules would help improve both the actual and perceived fairness of the system. A twenty-first century benefits system sorely needs such legitimacy.

Finally, objective rules control evidence gathering costs. It is much easier to control and predict the costs of gathering the information needed to adjudicate a claim when that information is clear and objective. It makes it easier to build an electronic system that fully integrates with external information sources, such as the emerging network of private electronic medical records. It also substantially reduces costs by making it much easier for veterans to understand what evidence to submit and for veterans' representatives to provide assistance that obviates the need for the agency to undertake further development of claims. When it is clear precisely what information is needed to decide a claim, it not only helps regular advocates, but also makes it possible for pro bono advocates, who are less familiar with the nuances of the system, to provide useful assistance with a reasonable amount of training. As a result, more claims will be decided quickly based upon the original evidence submitted with the application.

#### *ii. Streamlined Process*

The next major feature of a twenty-first century system should be a streamlined process. There have been no shortage of proposals,<sup>67</sup> but “streamlining” often has negative connotations when discussing reform of the claims process. Service organizations often hear it as a code word for reducing veterans' rights. However, that should be neither the aim nor the result if it is done correctly. Certainly, reducing the number of steps in the process can reduce the processing time, as well, but that should not be the primary goal. Simpler can truly be more effective, too.

The focus of streamlining instead should be examining whether procedures continue to have value, and reallocating resources so that VA does a better job at each of its duties. Initially, there are some aspects of the current process that perform no useful function. For example, the new-and-material-evidence standard in 38 U.S.C. § 5108 has outlived any usefulness it may have had. Countless resources have been wasted over arcane determinations of whether a claim should be reopened. However, the borderline determinations have no value to veterans. What matters to veterans is whether the claim is granted or the agency at least undertakes to develop further evidence based upon the submission. A “reopening” of a claim that is denied in the same decision without further action is no different to a veteran than a refusal to reopen. Accordingly, the concept of reopening should be eliminated entirely. Instead, when VA receives new evidence, it should focus on what actually matters to veterans. It should determine whether the new evidence changes the factual picture and, if so, whether that requires further development or a change in the outcome.

<sup>67</sup> See Michael P. Allen, *The United States Court of Appeals for Veterans Claims at Twenty: A Proposal for a Legislative Commission to Consider Its Future*, 58 CATH. U. L. REV. 361 (2009); William F. Fox, Jr., *Deconstructing and Reconstructing the Veterans Benefits System*, 13 KAN. J.L. & PUB. POL'Y 339 (2004); James T. O'Reilly, *Burying Caesar: Replacement of the Veterans Appeals Process is Needed to Provide Fairness to Claimants*, 53 ADMIN. L. REV. 223 (2001); Rory E. Riley, *Simplify, Simplify, Simplify—An Analysis of Two Decades of Judicial Review in the Veterans' Benefits Adjudication System*, 113 W. VA. L. REV. 67 (2010).



Another example of a procedure that could be eliminated by streamlining is the statement of the case required by 38 U.S.C. § 7105. In the current process, when a veteran disputes a denial by filing a notice of disagreement, the agency responds with a statement of the case that sets forth all the applicable law and how it was applied to the evidence. The claimant then has to file a substantive appeal listing his or her arguments to have the appeal continue on to the Board of Veterans' Appeals.

When the statement of the case was added to the process in 1962, original decisions on claims contained little information except the outcome. The theory of adding the statement of the case was that it would give claimants the information necessary to decide whether to pursue the appeal further and to prepare the evidence and argument needed for an effective appeal.<sup>68</sup> However, in 1989, another statute was added<sup>69</sup> that requires initial decisions to state the evidence considered and give reasons for the outcome. As a result, the purpose of the statement of the case procedure became moot, and now it exists primarily to prolong the process and defeat the claims of veterans who fail for whatever reason to jump this extra hurdle.

It is true that a significant number of veterans who file notices of disagreement do not perfect their appeals after receiving the statement of the case.<sup>70</sup> Perhaps this is because the statement of the case does a better job of explaining the denial than the original decision. Nevertheless, if that were true, then the more logical approach would be to use that format to explain the initial decisions and save veterans the trouble of appealing confusing decisions in the first place.

The duplicative nature of the decision/statement of the case procedures highlights what streamlining should be about. Currently, the misnamed claims "appeal" process actually functions like an open-ended trial in which cycles of discovery, argument, and verdict repeat ad nauseam.<sup>71</sup> The number of steps in this process could be reduced by having each of VA's duties more focused on a specific step in the process. Doing something once to a high standard is more efficient and effective than stretching the same resources merely to repeat less effective procedures and reviews again and again.

Reducing the number of steps has other benefits as well. It not only saves time and allows more focused attention on assisting the veteran, but it is also easier to automate, as discussed above. Furthermore, even if the process were not automated, a streamlined process would reduce the chances of procedural error. The fewer the touches, the fewer the opportunities for procedural error. The net result is a faster, more efficient, more accurate, and more legitimate process.

### *iii. Improved Integration of Medical Knowledge*

#### **A. Eliminating the Evidence Telephone Game**

The final major element of a twenty-first century system would be a vastly improved integration of medical knowledge. For the foreseeable future, the heart of the claims process will be making complex and difficult determinations of medical causation. As discussed above, the medical foundations of the system are out of date and the procedures for gathering medical evidence are terrible. As a

<sup>68</sup> S. Rep. No. 87-1843 (1962), reprinted in 1962 U.S.C.C.A.N. 2576, 2578.

<sup>69</sup> 38 U.S.C. § 5104 (2012).

<sup>70</sup> See Ridgway, *Why So Many Remands?*, supra note 4, at 149.

<sup>71</sup> See *Why Are Veterans Waiting Years on Appeal?*, supra note 29, at 25 (statement of Laura Eskenazi, Principal Deputy Vice Chairman, Board of Veterans' Appeals) (testifying that much of the delay in the system is due to "the pro-claimant open record, which allows development of new evidence up until the point that a final decision is signed and mailed to the Veteran").

result, the process is slow, and it is not difficult for similarly situated veterans to receive very different outcomes to their claims.

The first element of better integration of medical knowledge is to reduce the barriers that make it difficult for adjudicators to obtain the medical evidence they need.<sup>72</sup> VA has started to move in this direction with Disability Benefits Questionnaires.<sup>73</sup> These are primarily useful for rating the disabilities that are based upon objective criteria, which are easily reduced to check boxes on forms. Standardized forms vastly increase the chances that a private physician will provide VA with the information necessary to rate a claim, and dramatically reduce the chances that a VA examiner will omit information that would necessitate a follow-up examination.

However, as discussed above, a large portion of the issues that VA handles are not easily reduced to information that can be conveyed by forms. The fundamental problem with the current process is that it is very hard to properly develop and fully explore these complex issues through what amounts to a game of telephone, in which questions are transmitted to doctors from the court or the Board of Veterans' Appeals through non-attorney adjudicators at the local level and then back up the chain over the course of months or years. It is very difficult for a written request to fully and accurately capture every aspect of a problem; the appellate body may misunderstand the situation all together because the original medical opinion was ambiguous, and the evidence in the file may change repeatedly before a cycle of clarification is complete. Moreover, even when requests are clear and complete, medical professionals often struggle to understand all the necessary elements of a legally adequate opinion because the requirements are so demanding.<sup>74</sup> Therefore, tens of thousands of medical opinions are found to be inadequate each year, even though their conclusions may well be correct.<sup>75</sup>

The solution to the problem is direct communication between doctors and adjudicators, particularly at the Board of Veterans' Appeals level. This is essentially the way the process was structured before *Colvin* fragmented the process. However, the basis of *Colvin* was not that doctors and adjudicators should never speak to each other, but that evidence must be gathered on the record to enable judicial review. Not every appeal involves difficult medical issues, but, for at least a subset of cases, there should be a mechanism that allows for a hearing in which the expert, the adjudicator, and the veteran's representative can discuss the claim directly. The value and efficiency of back-and-forth questioning at trial in fully exploring issues is well established. VA's process would be dramatically helped by utilizing a similar procedure in appropriate cases.<sup>76</sup>

There are a few barriers that would have to be addressed, but they are not insurmountable. First, the veterans benefits process is non-adversarial and would need to remain so when incorporating such a mechanism. Nevertheless, non-adversarial, inquisitorial-style hearings are not unknown to the law, and there is already substantial case law detailing how VA should ask questions of examiners to raise issues without suggesting to the examiner that a particular answer is desired.<sup>77</sup>

<sup>72</sup> See James D. Ridgway, *Lessons the Veterans Benefits System Must Learn on Gathering Expert Witness Evidence*, 18 FED. CIR. B.J. 405 (2009).

<sup>73</sup> See *Disability Benefits Questionnaires (DBQs)*, U.S. DEP'T OF VETERANS AFFAIRS, <http://benefits.va.gov/disabilityexams/> (last visited Dec. 9, 2013).

<sup>74</sup> See James D. Ridgway, *Mind Reading and the Art of Drafting Medical Opinions in Veterans Benefits Claims*, 5 PSYCHOL. INJ. & L. 72 (2012).

<sup>75</sup> See Ridgway, *supra* note 57, at 416-17.

<sup>76</sup> See *id.* at 426-28.

<sup>77</sup> See, e.g., *Kahana v. Shinseki*, 24 Vet. App. 428, 436 (2011); *Austin v. Brown*, 6 Vet. App. 547, 552 (1994).

Second, veterans have the right to have all new evidence reviewed at the regional-office level, which ordinarily prevents the Board of Veterans' Appeals from directly obtaining medical opinions. However, some statutory provisions already exist that allow the Board to address new evidence in the first instance and to directly obtain medical evidence in certain cases.<sup>78</sup> Therefore, creating such a mechanism would not be inconsistent with current practices. Furthermore, if there are strong concerns about preserving the default, two-tier adjudication process, such a program could also be limited to only those veterans who consent.<sup>79</sup>

Finally, the logistics would have to be addressed. VA already uses high-definition videoconferencing technology to hold hearings with veterans across the country.<sup>80</sup> There is no technical reason why these hearings could not simply add VA doctors by deploying the same technology to VA hospitals that is already used at the regional offices. (In theory, private physicians are already free to accompany veterans to be witnesses at a hearing, but this does not happen at any meaningful rate in practice.) Although there would certainly be concerns that such hearings would be time consuming for doctors, it is more likely that having a direct conversation to discuss all the issues would be less time consuming than repetitive reviews of the record and drafting extensive medical opinions to fully address all issues. Furthermore, direct conversations between doctors, adjudicators, and veterans' representatives would rapidly improve each party's understanding of the thought processes and concerns of the others. This would improve both the quality of written opinions by doctors and written requests for opinions in routine cases, as familiarity improved communication.

### **B. Dynamic Incorporation of Medical Knowledge**

Direct communication with physicians in complex cases would be only a modest improvement. What is needed to truly transform the system is a continuous process for assessing and incorporating advances in medical knowledge. The system currently obtains more than a million medical opinions each year to help resolve benefits claims. A well designed system would radically reduce its need for individualized (and frequently inconsistent) opinions, and instead would use a portion of the saved physician time to regularly study and update the medical criteria for claims.

For example, VA currently obtains countless medical opinions in claims for benefits for hearing loss. Many — if not most — of both the favorable and unfavorable opinions look very similar. There are a small number of relevant facts (such as in-service noise exposure, post-service exposure, and date of onset of hearing loss compared to discharge from service) that determine the outcome of most cases. Instead of hundreds of audiologists generating tens of thousands of opinions on general hearing loss issues each year, a panel of experts could meet annually to consider the latest research and propose appropriate findings as to the current state of medical knowledge that would govern all similarly situated claims. Perhaps they could produce a simple matrix, whereby adjudicators could plug in the answers to three or four questions and determine whether the claim should be granted, denied, or referred for a personalized opinion because it actually represents a close case.

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<sup>78</sup> See 38 U.S.C. § 7109 (2012).

<sup>79</sup> Recently, section 501 of Honoring America's Veterans and Caring for Camp Lejeune Families Act, Pub. L. No. 112-154, 126 Stat. 1165 (2012), demonstrates that there is support for allowing the BVA to consider new evidence in the first instance when it is the most efficient way to resolve a claim quickly and accurately.

<sup>80</sup> See BVA FY 2011 REP., *supra* note 49, at 9 (noting that the Board had expanded to thirteen video hearing rooms and that it "also is working with VBA and VHA to allow video hearings to be held from more locations in the field (beyond ROs)").

There are certainly other types of claims that would also be amenable to the matrix approach. Perhaps cancers that are not subject to presumptive awards could be handled with a matrix that considers known risk factors (both personal and military), the stage at which the cancer was diagnosed, and the length of time since the veteran's service. Other types of claims may not benefit from a matrix, but could be aided by global findings of fact. Returning to the hearing loss example, there could be a global finding that particular military occupational specialties would involve exposure to a certain minimum amount of acoustic trauma.

The legal tools to do this already exist. Section 501 of Title 38 empowers the Secretary to make rules appropriate to carrying out the department's mission. More than twenty-five years ago, in *Heckler v. Campbell*,<sup>81</sup> the Supreme Court held in the context of Social Security claims that it was permissible for an agency to promulgate binding findings of fact through the Federal Register on issues common to large numbers of claims. In fact, the matrix system described above is currently used by Social Security to make disability determinations.<sup>82</sup>

The true challenge will be to establish a system that is much faster than the current process of promulgating rules by regulation. The above approaches could be implemented by regulations, but *Heckler* demonstrates that this is not required. Ideally, the process would be driven by a permanent or semi-permanent panel of experts. VA already has a relationship with the National Academy of Sciences to obtain expert advice on a number of specific issues, such the effects of Agent Orange.<sup>83</sup> This might be expanded into a more global role, for which panels of experts would consider current research and publish findings binding on VA that would help ensure that the latest medical knowledge is considered and similar veterans are treated similarly. To help guide it, perhaps the veterans service organizations could be empowered to present specific issues and research for consideration to help focus the energy of the bodies on the matters most important to veterans. However structured, the essential goal would be to minimize the layers between the experts and the final promulgation of their findings, so that they could quickly respond to emerging issues and research.

## VI. CONCLUSION

Law, medicine, disability, and the law have all changed radically from the Industrial Age to the Information Age. However, the veterans benefits system has been extremely sluggish in reacting to these changes, much less synthesizing all of them to create an efficient, modern system. In the realm of law, VA's former exemption from judicial review and the APA allowed the twentieth-century due process revolution to bypass the agency. In the realm of medicine, VA's schedule of rating disabilities has not been comprehensively revised since the end of World War II, and its system for determining medical causation has a primitive core with a variety of inconsistent, ad hoc adornments. In the realm of benefits management, the legal and medical halves of its process have become increasingly fragmented, instead of integrated. While the underlying professions have become increasingly sophisticated and data driven, veterans law has reduced the direct participation of medical and legal professionals, and has become reliant on lay adjudicators to apply subjective standards to increasingly complex medical claims.

As a result of these issues, the veterans benefits system as it is currently constructed is simply

<sup>81</sup> 461 U.S. 458. 467-68 (1983).

<sup>82</sup> See Soc. Sec. Admin. Medical-Vocational Guidelines, 20 C.F.R. § 404, subpt.P, appx.2, § 201.00 (2012) (listing "Residual Functional Capacity: Maximum Sustained Work Capability Limited to Sedentary Work as a Result of Severe Medically Determinable Impairment(s)").

<sup>83</sup> See 38 U.S.C. §§ 1116(c)(1)(A) (Agent Orange), 1118(c)(1) (Persian Gulf syndrome) (2012).

not in synch with the Information Age. It should come as no surprise that VA has experienced great problems in taking advantage of twenty-first century technology to streamline the adjudication process. Fundamentally, the underlying system has not been rebuilt in a way that makes it amenable to making gains through automation or information sharing. In other words, digitizing an early twentieth-century approach to law, medicine, and administrative decision making makes as much sense as trying to build a twenty-first century horse and buggy.

Developing a benefits system for the twenty-first century will require confronting the ways in which the landscape has changed in the past one hundred years and making choices about how to handle the new realities. The choices are neither easy nor obvious, but the longer they are delayed, the more outdated the process will become, and the more veterans will be rightfully frustrated by its sluggish, inconsistent, and inaccurate outcomes. They deserve better.