THE PRO-CLAIMANT PARADOX: HOW THE UNITED STATES DEPARTMENT OF VETERANS AFFAIRS CONTRADICTS ITS OWN MISSION

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I. INTRODUCTION

On December 12, 1994, the United States Supreme Court erased sixty years of history in a single day.[1] Hanging in the balance on that day was the case of Fred P. Gardner, a Korean War veteran who received treatment for a herniated disc at a United States Department of Veterans Affairs (VA) medical facility.[2] Following the surgery, Gardner experienced severe pain and weakness in his left calf, ankle, and foot.[3] Alleging that these conditions resulted from this medical procedure, Gardner filed a claim under a federal statute providing disability compensation benefits to individuals injured "as the result of hospitalization, medical or surgical treatment, or the pursuit of a course of vocational rehabilitation" that the VA administered.[4]

In response, the VA objected to the veteran's claim.[5] Attorneys for the agency pointed to a federal Code of Federal Regulations provision stating that this statute allowed compensation only if the injury "proximately resulted [from] carelessness, negligence, lack of proper skill, error in judgment, or similar instances of indicated fault on the part of the VA, or from the occurrence during treatment or rehabilitation of an 'accident,' defined as an 'unforeseen, untoward' event."[6] Such regulatory language had lasted for sixty years without facing a challenge.[7] According to the VA's lawyers, Gardner's situation provided no basis for reversing tradition and avoiding the causation requirement in the case now facing the Court.[8]

Yet the Court found otherwise.[9] Instead of deferring to the plain language of the regulation, the unanimous bench determined that the regulation violated a central premise for all federal veterans' benefits laws, regulations, and procedures: the concept of a "pro-claimant" administrative review

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[1] *See* Brown v. Gardner, 513 U.S. 115, 120-21 (1994).

[2] *Id.* at 116.

[3] *Id.*

[4] *Id*. The statute governing administrative actions regarding compensation for veterans and their dependents injured while under VA medical care is 38 U.S.C. § 1151 (2012).

[5] *Id.* at 116-17.

[6] *Id.* at 117.

[7] *Brown*, 513 U.S. at 120-21.

[8] *Id.* at 117-18.

[9] *Id.* at 122.

structure.[10] Writing for the Court, Justice David Souter pointed out that the judicial branch had long followed "the rule that interpretive doubt is to be resolved in the veteran's favor."[11] Given that the relevant statute contained no provisions insisting that the veteran prove that the VA was at fault for the injury, the Court refused to permit this regulation to stand, declaring that Congress demonstrated no intent for this statute to include a fault requirement, and that the statute, if considered ambiguous, should be construed in favor of the veteran's interests.[12] By invalidating this regulation, the Court allowed Gardner to proceed with his claim without demonstrating fault on the part of the VA's medical professionals.[13]

In making this decision, the Court added yet another component to the vast federal legal legacy declaring that Congress designed the federal veterans' benefits system to favor the veteran whenever possible.[14] In the eyes of the United States Supreme Court, "[t]he solicitude of Congress for veterans is of long standing."[15] The Supreme Court and the Federal Circuit Court of Appeals "both have long recognized that the character of the veterans' benefits statutes is strongly and uniquely pro-claimant."[16] The Supreme Court construes ambiguous veterans' benefits statutes in favor of "those who left private life to serve their country . . . ."[17] According to the United States Court of Appeals for Veterans Claims (CAVC), the court that Congress created under Article I of the United States Constitution specifically to adjudicate veterans' benefits disputes, "[i]t is well settled that the veterans-benefits system is a pro-claimant system"[18] and that "[t]he VA takes pride in operating a system of processing and adjudicating claims for benefits that is both informal and nonadversarial."[19] In the words of the

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[10] *Brown*, 513 U.S. at 117-18 (citing King v. St. Vincent's Hosp., 502 U.S. 215, 220-21 n.9 (1991)).

[11] *Id.* at 117-18. Souter went on to state that the government's arguments would not stand even without applying the rule of resolving interpretive doubt in the veteran's favor because the statutory context was not ambiguous. *See id.* at 118. However, Souter strongly indicated that even if the Court found ambiguity in this law, the longstanding precedent of construing ambiguous statutes and regulations in favor of the veteran would almost certainly result in the Court finding in favor of the veteran anyway. *See id.*

[12] *Id.* at 117-121.

[13] *Id.* at 121-22.

[14] For one of the United States Supreme Court's earlier applications of this principle, see Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 285 (1946) (citing Boone v. Lightner, 319 U.S. 561, 575 (1943)).

[15] United States v. Oregon, 366 U.S. 643, 647 (1961) (footnote omitted).

[16] Hodge v. West, 155 F.3d 1356, 1362 (Fed. Cir. 1998); *see also* Hayre v. West, 188 F.3d 1327, 1333-34 (Fed. Cir. 1999).

[17] *Fishgold*, 328 U.S. at 285 (citing *Boone*, 319 U.S. at 575); *see also* King v. St. Vincent's Hosp., 502 U.S. 215, 220-21 n.9 (1991); Coffy v. Republic Steel Corp., 447 U.S. 191, 196 (1980).

[18] Majeed v. Principi, 16 Vet. App. 421, 433 (2002) (citing Brown v. Gardner, 513 U.S. 115, 118 (1994)).

[19] Littke v. Derwinski, 1 Vet. App. 90, 91 (1990).

Supreme Court, Congress intended any administrative proceedings under this system to be "as informal and nonadversarial as possible."[20]

Congress, too, has repeatedly reaffirmed its intention to preserve the pro-claimant and non-adversarial nature of the VA's benefits structure.[21] In 2000, as part of its message in enacting the Veterans Claims Assistance Act,[22] Congress unequivocally stated that "[t]he system to provide benefits to veterans was never intended to be adversarial or difficult for the veteran to navigate," determining that the government "should not create technicalities and bureaucratic hoops for them to jump through."[23] During these same discussions, Congress expressly stated that the VA must render "whatever assistance is necessary" to claimants seeking federal veterans' benefits.[24] Even earlier, in creating the CAVC by enacting the Veterans Judicial Review Act, Congress went out of its way to declare that establishing this new and independent court would not disrupt lawmakers' original intentions of

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

[21] *See, e.g.*, *Walters*, 473 U.S. at 311 (affirming that Congress intends for the process of pursuing a claim for VA benefits "to function throughout with a high degree of informality and solicitude for the claimant"); *Hodge*, 155 F.3d at 1362; Trilles v. West, 13 Vet. App. 314, 325-26 (2000); Moore v. West, 13 Vet. App. 69, 73-74 (1999) (Steinberg, J., concurring); *see generally* WILLIAM F. FOX, JR., THE LAW OF VETERANS BENEFITS: JUDICIAL INTERPRETATION 3-5 (Paralyzed Veterans of America, 2002); Victoria Hadfield Moshiashwili, *Ending the Second 'Splendid Isolation'?: Veterans Law at the Federal Circuit in 2013*, 63 AM. U. L. REV. 1437, 1442 (2014) ("One of the most important aspects of VA's claims processing system is that it is not only non-adversarial at the agency level, but it is intentionally designed to be 'claimant-friendly.'"); Rory E. Riley, *The Importance of Preserving the Pro-Claimant Policy Underlying the Veterans' Benefits Scheme: A Comparative Analysis of the Administrative Structure of the Department of Veterans Affairs Disability Benefits System*, 2 VETERANS L. REV. 77, 77-78 (2010).

[22] *See generally* 38 U.S.C. §§ 5100, 5102-5103A, 5106-5107, 5126 (Lexis 2016).

[23] 146 CONG. REC. S9213 (daily ed. Sept. 25, 2000) (statement of Sen. Rockefeller); *see also* 146 Cong. Rec. H6786 (daily ed. July 25, 2000) (statement of Rep. Evans) ("[Veterans] have earned as a result of their service to our country [the right] to have their claims decided fairly and fully . . . .").

[24] 146 CONG. REC. S9213 (daily ed. Sept. 25, 2000) (statement of Sen. Rockefeller). Importantly, the process of applying for federal veterans' benefits and the duties legally imposed upon the VA to assist veterans and their dependents in this process are more than mere symbolic gestures to honor the women and men who served in the armed forces of the United States. Instead, this system of benefits for veterans and their dependents is inexorably intertwined with the fabric of the United States' national defense policy. For instance, in 2007, the then-ranking member of the House Committee on Veterans Affairs described the necessity of proper functioning within this system in this way: "We are involved in a long war against terrorism. For this, the Nation's mothers, fathers and spouses trust their sons and daughters and spouses to the Nation's armed forces. They must be confident that they will be cared for should harm come their way." *Findings of the President's Commission on Care for America's Returning Wounded Warriors Before the H. Comm. on Veterans' Affairs*, 110th Cong. 3 (Sept. 19, 2007) (statement of Rep. Steve Buyer, Ranking Member, H. Comm. on Veterans Affairs).

designing a "beneficial non-adversarial system of veterans benefits" for veterans and their family members.[25]

Indeed, unique attributes of this pro-claimant framework appear throughout provisions in Title 38 of the United States Code that Congress added or elaborated upon in recent decades. For instance, the VA operates under a statutory duty to assist veterans and their dependents to obtain evidence that supports their claims for VA-issued benefits.[26] If the VA denies a claim and new evidence favorable to the claimant later emerges, the VA must reopen the previously rejected claim.[27] When reviewing evidence that a claimant submits, the VA must "give the benefit of the doubt to the claimant"[28] and "sympathetically read [the] veteran's allegations in all benefit claims . . . ."[29] Veterans filing disability compensation claims with the VA receive the advantage of a lighter-than-usual standard of proof, as federal law requires the VA to award the sought-after benefit if the evidence demonstrates that the veteran's claimed disability is "at least as likely as not" connected to the veteran's military service.[30] Furthering the pro-claimant structure of this process, federal law does not impose any statute of

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[25] H.R. REP. NO. 100-963, at 13, *reprinted in* 1988 U.S.C.C.A.N. 5782, 5794-95. Indeed, Congress specifically noted that "[i]mplicit in such a beneficial system has been an evolution of a completely ex-parte system of adjudication in which Congress expects [the] VA to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits." *Id.*

[26] *See* 38 U.S.C. § 5103A (Lexis 2016). The VA expands upon the reasons for this duty in rules contained within Title 38 of the Code of Federal Regulations. *See, e.g.*, 38 C.F.R. § 3.103(a) (2015) ("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 [a] claim and to render a decision which grants every benefit that can be supported in law while protecting the interests of the Government."); *see also* 38 C.F.R. § 20.700(c) (2014) (describing the necessity of maintaining a non-adversarial process for veterans and their dependents seeking benefits). After Congress enacted the Veterans Claims Assistance Act of 2000, the Court of Appeals for Veterans Claims specified that "[within this] new legal framework, there is generally no prerequisite to receiving VA assistance; [the] VA is simply required to assist a claimant at the time that claimant files a claim for benefits." Duenas v. Principi, 18 Vet. App. 512, 516 (2004).

[27] 38 U.S.C. § 5108 (Lexis 2016); *see also* 38 C.F.R. § 3.156 (2006) (defining the terms "new evidence" and "material evidence" for this process of re-opening claims).

[28] 38 U.S.C. § 5107(b) (Lexis 2016); *see also* 38 C.F.R. § 3.102 (2013); Anderson v. Brown, 5 Vet. App. 347, 354 (1993) (discussing the proper application of the benefit of the doubt doctrine); Gilbert v. Derwinski, 1 Vet. App. 49, 53-56 (1990) (stating that the benefit of the doubt doctrine applies when the evidence presented for and against granting a claim is in relative equilibrium).

[29] Szemraj v. Principi, 357 F.3d 1370, 1373 (Fed. Cir. 2004); *see also* Schroeder v. West, 212 F.3d 1265, 1269-70 (Fed. Cir. 2000); EF v. Derwinski, 1 Vet. App. 324, 326 (1991).

[30] Jones v. Shinseki, 23 Vet. App. 382, 388 (2010); *see also* 38 U.S.C. § 5107 (Lexis 2016); *see generally* 38 C.F.R. § 3.102 (2013); Mark D. Worthen & Robert G. Moering, *A Practical Guide to Conducting VA Compensation and Pension Exams for PTSD and Other Mental Disorders*, 4 PSYCHOL. INJ. & L. 187, 211-12 (2011), http://www.cavcbar.net/confpdf/A%20Practical%20Guide%20to%20Conducting%20CP%20Exams%20(Worthen%20Moering).pdf (discussing the "at least as likely as not" parameter for proving that a disability is service-connected).

limitations upon veterans and their dependents filing an initial claim for disability compensation or pension benefits.[31]

Unfortunately, realities do not always echo doctrine. Several recently promulgated regulations, decisions, programs, and policies within the VA weaken, if not directly contradict, the foundational concept of a pro-claimant, non-adversarial system of federal veterans' benefits.[32] Other priorities today seem to overshadow the veteran-friendly structure that Congress intended, flying in the face of decades of caselaw affirming the statutory objective of a system meant to advantage rather than hinder veterans and their dependents in the claims process.[33] In these particular areas, the VA has lost its way, departing from the purposes for which it was created and placing roadblocks in the pathways of the very constituents whom Congress created this agency to serve.[34] It is to these issues, and to some basic recommendations for addressing these problems with an eye toward truly maintaining the VA's pro-claimant purposes, that we now turn.

II. EVISCERATING INFORMAL CLAIMS

Arguably, no recent provision contradicts the notion of a pro-claimant system more than the VA's disembowelment of its longstanding informal claims process.[35] For years, one of the VA's non-adversarial hallmarks was the agency's regulatory flexibility in allowing veterans and their dependents to use virtually any form of written communication to initiate claims for benefits.[36] As long as the text expressed the claimant's intent to apply for

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[31] Riley, *supra* note 21, at 78. As the Supreme Court noted:

> The contrast between ordinary civil litigation . . . and the system that Congress created for the adjudication of veterans' benefits claims could hardly be more dramatic. In ordinary civil litigation, plaintiffs must generally commence their suits within the time specified in a statute of limitations . . . and the litigation is adversarial. . . . By contrast, a veteran seeking benefits need not file an initial claim within any fixed period after the alleged onset of disability or separation from service. When a claim is filed, proceedings before the VA are informal and nonadversarial.

Henderson v. Shinseki, 562 U.S. 428, 440 (2011).

[32] *See infra* Parts I-VII.

[33] *See id.*

[34] *Compare infra* Parts I-VII, *with supra* notes 11-31 and accompanying text.

[35] This negative shift even provoked several veterans' advocacy groups to file a lawsuit against the VA. *See* Heath Druzin, *Veterans Groups Sue to Stop VA's New Informal Claims Process*, STARS & STRIPES (Mar. 27, 2015), http://www.stripes.com/news/veterans/veterans-groups-sue-to-stop-va-s-new-informal-claims-process-1.337144.

[36] *See* Ellington v. Peake, 541 F.3d 1364, 1366 (Fed. Cir. 2008) ("An informal claim is '[a]ny communication or action, indicating an intent to apply for one or more benefits under the laws administered by the Department of Veterans Affairs, from a claimant, his or her duly authorized representative, a Member of Congress, or some person acting as next friend of a

benefits from VA and named the benefits sought, the VA would recognize the date of receiving the document as the starting date for the claim.[37] Even a handwritten, one-sentence note on a plain scrap of paper would qualify as the starting date, as long as the sentence met these basic requirements.[38]

This concept greatly increased claimants' ease of entry into the VA system, allowing them to initiate a claim for benefits even if they did not have immediate access to the VA's official forms for filing claims.[39] As a result, the VA's statutory duty to assist the claimant, including searching for supporting evidence and informing the claimant about all of the steps necessary to finalize his or her claim, attached as soon as the written document reached the applicable VA Regional Office.[40] Furthermore, this "informal claims" concept allowed claimants to establish a considerably earlier effective date—the date from which VA monetary benefits are

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claimant who is not sui juris.'" (citing 38 C.F.R. § 3.155(a) (2007))); *Legion: VA Should Keep Informal Claims*, THE AMERICAN LEGION (Feb. 6, 2014), http://www.legion.org/legislative/218459/legion-va-should-keep-informal-claims. This broad-based informal claims process existed since at least 1961. *See* Standard Claims and Appeals Forms, 79 Fed. Reg. 57,660, 57,660-64 (Sept. 25, 2014) (to be codified at 38 C.F.R. pts. 3, 19, 20).

[37] 38 C.F.R. § 3.1(p) (2014) ("*Claim* means a written communication requesting a determination of entitlement or evidencing a belief in entitlement, to a specific benefit under the laws administered by the Department of Veterans Affairs submitted on an application form prescribed by the Secretary." (emphasis added)); 38 C.F.R. § 3.155(2) (2014). These requirements existed prior to the amendment of these regulations, and remain part of these regulations today.

[38] *See, e.g.*, Akers v. Shinseki, 673 F.3d 1352, 1357 (Fed. Cir. 2012); Tetro v. Principi, 314 F.3d 1310, 1312-13 (Fed. Cir. 2003); Miguel v. Principi, 15 F. App'x. 857, 859 (Fed. Cir. 2001); Rodriguez v. West, 189 F.3d 1351, 1353 (Fed. Cir. 1999); *see also* Sandra Basu, *Veteran Advocates Warn of Unintended Consequences to Digitizing Disability Claims*, U.S. MEDICINE (Mar. 2014), http://www.usmedicine.com/agencies/department-of-defense-dod/veteran-advocates-warn-of-unintended-consequences-to-digitizing-disability-claims/ ("Currently, a veteran can submit an 'informal claim,' such as a hand-written note to VA, to indicate their intent to file a claim. The VA will then send the veteran an application . . . and . . . the effective date can be as early as the date of the informal claim.").

[39] The VA even acknowledged this importance recently in the agency's own internal instruction manual. *See M21-1, Part III, Subpart ii, Chapter 2, Section C - Informal Claims Received Prior to March 24, 2015, Communication of an Intent to File (ITF), and Requests for an Application*, U.S. DEPARTMENT OF VETERANS AFFAIRS, http://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ss/#!portal/554400000001018/article/554400000014115 (last visited Sept. 9, 2016) ("Informal claims were important prior to March 24, 2015, because VA could grant entitlement to benefits from as early as the date of receipt of an informal claim as long as VA received a formal claim within one year of the date VA sent the claimant an application.").

[40] Brittany Ballenstedt, *Paralyzed Veterans of America Opposes VA Disability Filing Changes*, PARALYZED VETERANS OF AMERICA, http://www.pva.org/site/apps/nlnet/content2.aspx?c=ajIRK9NJLcJ2E&b=6350111&ct=13597001 (last visited Sept. 17, 2016) ("The informal claims process often benefits the veteran, as once the informal claim is submitted to the VA, it triggers a statutory duty by the department to inform the claimant of the evidence needed to support the claim and assist with obtaining that evidence.").

payable—than these claimants could establish if the claim could not begin until the VA received a submission on an official form.[41] Overall, this structure helped veterans and their dependents easily initiate claims, augmented the amount of assistance that claimants received from the VA, and increased the amount of tax-free benefits that claimants received by recognizing the date of receiving the written communication as the claim's effective date.[42]

Today, however, the landscape surrounding this "informal claims" process is markedly different. In March 2015, newly promulgated regulatory requirements eliminated the flexibility surrounding the claims filing process.[43] Under the VA's new rules, the handwritten note on a scrap of paper from a veteran or a veteran's dependent no longer initiates a claim.[44] Now, all claims filed with the VA now must arrive in the proper Regional Office on a properly completed standardized, VA-issued form.[45]

If the VA does not receive the correct form containing the required information, the VA will not open a claim for that veteran or dependent.[46] No duty to assist emerges from any request to open a claim not sent on the VA's own prescribed paperwork.[47] No effective date attaches to any request to begin a claim not submitted on the specified VA form.[48] To make matters worse, the new regulation does not even require the VA to send the proper form to a prospective claimant who sends in the wrong paperwork.[49] Instead, merely giving the veteran or veteran's dependent the link for the website to

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[41] 38 U.S.C. § 5110(b)(2)(A) (2012); Servello v. Derwinski, 3 Vet. App. 196, 198-99 (1992); 38 C.F.R. § 3.400(o)(2) (2014).

[42] In addition to the references cited above, a number of appellate cases provide examples of the former informal claims process functioning in a pro-claimant, non-adversarial manner. *See, e.g.*, Howard v. Peake, 2008 U.S. App. Vet. Claims LEXIS 39, at *9-10 (Jan. 17, 2008) ("The [Board of Veterans Appeals] commits remandable error when it fails to consider evidence that may be construed as an earlier application or claim, formal or informal, entitling the claimant to an earlier effective date."); Mingo v. Nicholson, 2007 U.S. App. Vet. Claims LEXIS 1844, at *8-11 (Aug. 29, 2007); Collier v. Derwinski, 2 Vet. App. 247, 251 (1992) (deciding that the claimant had raised an informal claim and preserved an earlier effective date by continually stating that he was unable to work due to his service-connected illness, even though the claimant had not yet filed the specific VA form for individual unemployability).

[43] *See* Standard Claims and Appeals Forms, 79 Fed. Reg. 57,660, 57659-98 (Sept. 25, 2014) (to be codified at 38 C.F.R. pts. 3, 19, 20).

[44] *See id.*

[45] *See id.*; *see also* Ballenstedt, *supra* note 40; Brian Bowling, *New VA Claims Process Called Detrimental to Older Veterans*, TRIBLIVE (Feb. 22, 2015), http://triblive.com/news/allegheny/7784523-74/veterans-claim-claims; Druzin, *supra* note 35; Bryant Jordan, *Veteran Groups Sue VA for Ending Informal Disability Claims Process*, MILITARY.COM (Mar. 27, 2015), http://www.military.com/daily-news/2015/03/27/veteran-groups-sue-va-for-ending-informal-disability-claims.html.

[46] *See* Standard Claims and Appeals Forms, 79 Fed. Reg. at 57,675.

[47] *See id.*; *see also* Ballenstedt, *supra* note 40; Bowling, *supra* note 45.

[48] *See* Standard Claims and Appeals Form, 79 Fed. Reg. at 57,675-76.

[49] *See id.* at 57,666.

download the form or otherwise obtain the necessary paperwork will satisfy the VA's obligations under this regulation.[50]

In justifying this extreme regulatory shift, the VA pointed to its own backlog that had left as many as 600,000 veterans waiting for 125 days or longer for any resolution to their claims.[51] According to the VA, requiring a standardized form for all filings would "streamline" the benefits procedures, allowing the VA Regional Offices to process claims quicker and respond to claimants faster.[52] To the VA, this procedural homogeneity would assist the agency meet its self-imposed deadline for reducing and ultimately eliminating their backlog of pending claims.[53] During a public comment period, many leading veterans' advocacy groups castigated the VA for even proposing such a dramatic procedural shift.[54] Nevertheless, using backlog reduction as a principal rationale, the VA adopted this regulation anyway.[55] As a consequence, the VA today can reject any request to initiate a claim that is not filed on the VA's prescribed form, even if the written request contained every piece of information that the VA's standardized form requires.[56]

This substantial alteration added an undue level of rigidity to an already-bureaucratic process.[57] Such a change is not in any way "pro-claimant" or "non-adversarial." Instead, it imposes new and unnecessary roadblocks for veterans and their dependents trying to navigate the VA's system.[58] With the VA essentially dissolving the concept of an informal claim, veterans will now

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[50] *See* Standard Claims and Appeals Form, 79 Fed. Reg. at 57,676; *see also* Bowling, *supra* note 45.

[51] *See* Michael O'Connell, *VA Reduces Disability Claims Backlog by 44 Percent*, FEDERAL NEWS RADIO (Apr. 1, 2014), http://federalnewsradio.com/congress/2014/04/va-reduces-disability-claims-backlog-by-44-percent/; Ginger Whitaker, *New, Standardized VA Forms Aim to Speed Up Disability Claims Process*, FEDERAL NEWS RADIO (Sept. 24, 2014 3:30, PM), http://federalnewsradio.com/defense/2014/09/new-standardized-va-forms-aim-to-speed-up-disability-claims-process/.

[52] *See* Standard Claims and Appeals Form, 79 Fed. Reg. at 57,661.

[53] *Id.*

[54] In total, the VA received sixty-four public comments, the majority of which opposed the proposed regulation changes in part or in total. *See Standard Claims and Appeals Forms*, REGULATIONS.GOV (Oct. 31, 2013), https://www.regulations.gov/document?D=VA-2013-VBA-0022-0001. To read the public comments that the VA received regarding this proposal, see *A081-Final Rule - Standard Claims and Appeals Forms*, REGULATIONS.GOV, https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&dct=PS&D=VA-2013-VBA-0022 (last visited Sept. 9, 2016).

[55] The VA did provide certain changes to their original proposals based on public comments. *See* Standard Claims and Appeals Forms, 79 Fed. Reg. at 57662-57693. Overall, however, the VA proceeded with weakening the informal claims process. *See id.*

[56] *See* Bowling, *supra* note 45.

[57] For an overview of the procedural challenges that claimants must face when they apply for VA benefits, see Benjamin Pomerance, *Fighting on Too Many Fronts: Concerns Facing Elderly Veterans in Navigating the United States Department of Veterans Affairs Benefits System*, 37 HAMLINE L. REV. 19, 22-25 (2014).

[58] *See supra* notes 43-56 and accompanying text.

face delays in reaching the first stage of the VA claims process.[59] A veteran who does not submit his or her intent to file a claim on the standardized form can wind up waiting months simply to receive the VA's form letter stating that the agency cannot go forward until it receives the submission on the right paperwork.[60] At the very least, this will cause that veteran to receive a much later effective date and lose out on compensation that the veteran would have received under the old informal claims process.[61] Some would-be claimants, frustrated by this rejection or uncertain why this dismissal occurred, may not proceed any further in filing for the federal benefits that they earned through serving our nation.[62]

In particular, this new structure disadvantages veterans and their dependents who are already the most vulnerable members of this population: individuals who are elderly, disabled, and/or lacking access to basic resources.[63] A homeless veteran, for instance, is unlikely to have easy access to the VA's standardized forms. Under the old informal claims system, that veteran could initiate a claim for benefits by writing the simplest of letters to the VA, beginning a process that could give that veteran access to much-needed tax-free financial benefits, health services, employment assistance, and more.[64] Today, however, that same veteran would face only a rejection from the VA because his or her expression of intent to file a claim did not arrive on the VA's prescribed paperwork.[65] The same rejection would occur for the veteran with limited education or cognitive impairments who cannot comprehend how to complete the VA's standardized form, the veteran with post-traumatic stress disorder whose inability to focus induces problems when trying to correctly complete the form, and the elderly veteran who never owned a computer and thus cannot easily access the VA's online forms database. Previously, all of these individuals could have initiated their claim and preserved their effective date by submitting any written correspondence

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[59] *See* Bowling, *supra* note 45; Jordan, *supra* note 45; *see generally* Ballenstedt, *supra* note 40 (describing the pro-claimant nature of the informal claims structure that the VA has since abandoned).

[60] Bowling, *supra* note 45.

[61] Ballenstedt, *supra* note 40 (discussing the disparities in file dates between paper-based claims and electronic claims).

[62] Kelly Kennedy, *VA Ends 'Informal Claims,' Disadvantaging Thousands of Veterans*, 91 OUTCOMES (Mar. 24, 2015), http://www.91outcomes.com/2015/03/va-ends-informal-claims-disadvantaging.html ("We believe the most immediate response to the new regulation will be a sharp reduction in claims filed—potentially hundreds of thousands. . . . The changes also place the burden on the veterans, who don't understand the intricacies of beneficiary law.").

[63] Bowling, *supra* note 45 ("[The change in the regulations] represent[s] a shift that puts more of the burden on veterans for starting a claim and will end up hurting older veterans and those with traumatic brain injuries . . . .").

[64] *See supra* notes 36-42 and accompanying text.

[65] *See supra* notes 43-50 and accompanying text.

to the VA.[66] Today, however, these individuals face barriers established by the very agency that was created to assist them.

Eliminating the VA's backlog is an honorable goal. Improving the efficiency of claims processing within the VA is likewise admirable. However, the VA should not seek to improve either of these objectives at the expense of the constituency whom they are designated by law to serve. The VA's pro-claimant mandates should not vanish in the face of procedures that are more convenient for the agency's claim-processing employees. Yet if the VA truly "takes pride in operating a system of processing and adjudicating claims for benefits that is both informal and non-adversarial," it is difficult to see where the agency fulfilled either of these adjectives through promulgating such an unyielding and detrimental regulation.[67] If the VA wished to remain consistent with this mission, it would restore the informal claims structure immediately to the benefit of veterans and their dependents nationwide.

III. INCENTIVIZING HASTE, CAUSING WASTE

Throughout the past few years, the VA's colossal backlog of unresolved claims received tremendous attention from the mainstream media.[68] Reacting to this deluge of unwanted publicity, the VA implemented multiple measures prioritizing speed and volume of processing claims, including utilizing new computer systems and mandating overtime for employees involved with claims processing functions.[69] As part of this push for greater

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[66] *See* Whitaker, *supra* note 51.

[67] Littke v. Derwinski, 1 Vet. App. 90, 91 (1990). In 2009, the Federal Circuit wrote that "[t]he VA disability compensation system is not meant to be a trap for the unwary, or a stratagem to deny compensation to a veteran who has a valid claim, but who may be unaware of the various forms of compensation available to him." Comer v. Peake, 552 F.3d 1362, 1369 (Fed. Cir. 2009). Weighing this standard, and adding this legal order to avoid unnecessary bureaucratic layers, it is difficult to determine how eliminating the informal claims process fulfills this mission. *See supra* notes 14-31 (discussing the statutes and caselaw that require the VA to maintain a pro-claimant, non-adversarial system).

[68] *See, e.g.*, James Dao, *Veterans Wait for Benefits as Claims Pile Up*, N.Y. TIMES (Sept. 27, 2012), http://www.nytimes.com/2012/09/28/us/veterans-wait-for-us-aid-amid-growing-backlog-of-claims.html?_r=0; Jason Grotto & Tim Jones, *VA Laboring Under Surge of Wounded Veterans*, CHI. TRIBUNE (Apr. 11, 2010), http://articles.chicagotribune.com/2010-04-11/news/ct-met-disabled-veterans-cost-20100409_1_veterans-groups-veterans-for-common-sense-persian-gulf-veteran; Mary Shinn, Daniel Moore & Steven Rich, *Despite Backlogs, VA Disability Claims Processors Get Bonuses*, WASH. POST (Aug. 25, 2013), https://www.washingtonpost.com/world/national-security/despite-backlogs-va-disability-claims-processors-get-bonuses/2013/08/25/1be00a28-0cea-11e3-9941-6711ed662e71_story.html; Editorial Board, *The Veterans Benefits Backlog*, L.A. TIMES (Mar. 31, 2013), http://articles.latimes.com/2013/mar/31/opinion/la-ed-vets-claims-backlog-20130331.

[69] Aaron Glantz, *Overtime, New Computer System Put Sizeable Dent in VA Benefits Backlog*, THE DAILY BEAST (Nov. 11, 2013 5:45, AM), http://www.thedailybeast.com/the-

production, the VA developed an arrangement of incentives known as the Work Credit System, which rewarded VA employees and VA Regional Offices for increasing the pace at which they processed claims.[70]

Such a measure seemed well-intentioned, aimed at providing faster responses to claimants (and, less altruistically, reducing the barrage of negative press aimed at the VA because of the backlog).[71] Ultimately, however, the Work Credit System produced a damaging unintended consequence. While claims processing speeds increased, the error rate in the VA's initial decisions rose to an unacceptable level.[72] Too often, members of the claims processing teams within VA Regional Offices made careless mistakes that seemed to be the product of rushing to push forth a response to the claimant rather than ensuring the accuracy of the response.[73] On some

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hero-project/articles/2013/11/11/overtime-new-computer-system-put-sizable-dent-in-va-benefits-backlog.html; Ben Kesling, *VA's Backlog of Disability Claims Falls to 8-Year Low*, WALL ST. J. (Aug. 24, 2015), http://www.wsj.com/articles/vas-backlog-of-disability-claims-falls-to-below-100-000-1440452705; Steve Vogel, *VA Announces Overtime 'Surge' to Battle Disability Claims Backlog*, WASH. POST (May 15, 2013), https://www.washingtonpost.com/news/federal-eye/wp/2013/05/15/va-announces-overtime-surge-to-battle-disability-claims-backlog/.

[70] *See e.g.*, Shinn, Moore & Rich, *supra* note 68; *Veterans Dilemma: Navigating the Appeals System for Veterans*, THE AMERICAN LEGION (Jan. 22, 2015), http://www.legion.org/legislative/testimony/225774/veterans-dilemna-navigating-appeals-system-veterans; Chuck Volkema, Sr., *Hurt Paychecks to Clear VA Logjam: My Word*, ORLANDO SENTINEL (May 28, 2014), http://articles.orlandosentinel.com/2014-05-28/news/os-ed-veterans-advocates-myword-052814-2-20140527_1_veterans-claims-health-care-veterans-affairs.

[71] *See* CNA ANALYSIS & SOLUTIONS, QUALITATIVE ANALYSIS OF VBA EMPLOYEE WORK CREDIT AND WORK MANAGEMENT SYSTEMS 11-15 (2009), http://www.veteranslawlibrary.com/files/Commission_Reports/CNA_work_credit_analysis_Nov2009.pdf.

[72] *Focusing on People: A Review of VA's Plans for Employee Training, Accountability, and Workload Management to Improve Disability Claims Processing: Hearing Before the H. Comm. on Veterans' Affairs*, 113th Cong. 2 (2013) (opening statement of Jeff Miller, Chairman, Comm. on Veterans Affairs); *Battling the Backlog: Challenges Facing the VA Claims Adjudication and Appeal Process: Hearing Before the S. Comm. on Veterans' Affairs*, 109th Cong. 45-55 (2005) (statement of Rick Surratt, Dep't Nat'l Legislative Director, Disabled American Veterans); Jacqueline Klimas, *Disability Appeals Process Forces Some Vets to Wait Years*, WASH. TIMES (Jan. 22, 2015), http://www.washingtontimes.com/news/2015/jan/22/veterans-wait-years-for-disability-appeals-process/; Steve Vogel, *VA Needs to Improve Accuracy of Claims Decisions, Vets Tell Congress*, WASH. POST (Sept. 10, 2013), https://www.washingtonpost.com/news/federal-eye/wp/2013/09/10/va-needs-to-improve-accuracy-of-claims-decisions-vets-tell-congress/.

[73] *Oversight Hearing on Fiscal Year 2013 Budget of the Veterans Benefit Admin, Nat'l Cemetery Admin., and Related Agencies: Hearing Before the Sub. Comm. on Disability Assistance and Mem'l Affairs of the H. Comm. on Veterans' Affairs*, 112th Cong. 57 (2012) (statement of Jeffrey C. Hall, Asst. Nat'l Legislative Director of Disabled American Veterans) ("Unfortunately, most of the measures that VBA employs today are based primarily on production goals, rather than quality. This bias for speed over accuracy has long been VBA's cultural norm, and it is not surprising that management and employees today continue to feel a tremendous pressure to meet production goals first and foremost."); Aaron Glantz, *Accuracy*

occasions, VA employees even denied claims without gathering all of the evidence necessary for the agency to meet its statutory duty to assist claimants in their applications for benefits.[74]

The worst indictment of the VA's high error rates appears in a new backlog plaguing the agency: a logjam of unresolved appeals from veterans and their dependents whose initial claims were denied.[75] Known among veterans' advocates today as "the hidden backlog,"[76] this rapidly growing accumulation of appeals appears to signify an increase in mistakes by the teams of evaluators at the Regional Offices.[77] These errors produce a domino effect that eventually harms both the claimants and the agency. Claimants wishing to protest the wrongful decision must file an administrative appeal within the VA, a process that often leaves veterans waiting for years before receiving a decision.[78] These delays leave the VA with the same problem that the agency sought to avoid: disgruntled veterans and their dependents waiting far too long for an accurate response to their claim.

In large measure, this continuing dilemma exists because the VA instituted incentives that failed to meet its own pro-claimant standards. By placing such a premium on speed, the VA wound up neglecting the need for

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Isn't Priority as VA Battles Disability Claims Backlog, The CTR. FOR INVESTIGATIVE REPORTING (Nov. 8, 2012), http://cironline.org/reports/accuracy-isnt-priority-va-battles-disability-claims-backlog-3983; Paul Muschick, *Is Uncle Sam Sacrificing Accuracy in Its Quest to Process Veterans Benefits Claims Faster?*, THE MORNING CALL (Sept. 13, 2013, 5:42 PM), http://blogs.mcall.com/watchdog/2013/09/is-uncle-sam-sacrificing-accuracy-in-his-quest-to-process-veterans-benefits-claims-faster.html.

[74] *See, e.g.*, Glantz, *supra* note 73 (stating that the VA failed to meet its duty to assist in nearly 11,000 cases during a three-month period in 2008); Press Release, *Care and Benefits for Veterans Strengthened by $169 Billion VA Budget* (Feb. 2, 2015), https://www.va.gov/opa/pressrel/pressrelease.cfm?id=2675 (stating that the VA too frequently ignores potential "secondary" medical conditions caused or exacerbated by military service, because such evaluations are time consuming and can harm the work credit scores of VA employees) [hereinafter 2016 Budget].

[75] *See* Mary Kaufmann, *U.S. Senators Keep Working to Fix Backlog of VA Appeals*, SITNEWS (Feb. 3, 2016), http://www.sitnews.us/0216News/020316/020316_va_backlog.html; Paul Muschick, *VA Fails to Clear Veterans' Claims Backlog*, THE MORNING CALL (Jan. 20, 2016, 8:18 PM), http://www.mcall.com/news/local/watchdog/mc-va-disability-claims-backlog-watchdog-20160120-column.html; Leo Shane III, *VA: Claims Backlog Is Better, But Is Never Going Away*, MILITARY TIMES (Dec. 29, 2015), http://www.militarytimes.com/story/military/benefits/veterans/2015/12/29/2015-va-backlog-goal-missed/78010282/; Alan Zarembo, *VA Is Buried in a Backlog of Never-Ending Veterans Disability Appeals*, L.A. TIMES (Nov. 23, 2015, 4:00 AM), http://www.latimes.com/nation/la-na-veterans-appeals-backlog-20151123-story.html.

[76] *See* Jonah Bennett, *Top VA Benefits Official Steps Down Two Years After Legislators Call for Resignation*, DAILY CALLER (Oct. 19, 2015, 11:34 AM), http://dailycaller.com/2015/10/19/top-va-benefits-official-steps-down-two-years-after-legislators-call-for-resignation/; Muschick, *supra* note 73.

[77] *See* Muschick, *supra* note 73; *see also* Jonah Bennett, *supra* note 76.

[78] *See* Bennett, *supra* note 76; Kaufman, *supra* note 75.

accuracy. Under the Work Credit System, VA employees can take shortcuts too easily in processing claims.[79] Simply preparing many responses without fulfilling all aspects of the VA's statutory duty to assist should not earn a reward for a VA employee. However, the Work Credit System incentivizes such behavior.[80]

To exist as a legitimately pro-claimant process that fully adheres to its statutory duty to assist claimants, the VA must dramatically revise its Work Credit System. Accuracy should attain a place of importance that is equal to, if not greater than, the speed of processing claims. The VA should discontinue the current system that unintentionally encourages fast but slipshod rating decisions. Without making this change, the agency will continue this problematic cycle of robbing Peter to pay Paul, wasting the time and resources of claimants who appeal wrongful denials, and creating a new variety of backlog about which the agency must create a plan.

IV. KEEPING THE CLAIMS FILE TOO LONG

Every individual who files a claim with the VA has a "claims file" kept in the relevant Regional Office.[81] The claims file, or "c-file," is intended to contain any written record from that veteran's correspondence with the VA.[82] When a claimant decides to object to the VA's original decision, the contents of that claimant's c-file typically provide some of the most important pieces of evidence to substantiate his or her appeal.[83] Given that a claimant possesses the legal right to receive a copy of his or her c-file, any individual

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[79] *Veterans' Dilemma: Navigating the Appeals System for Veterans Claims: Hearing Before the Subcomm. on Disability Assistance and Mem'l Affairs of the H. Comm. on Veterans' Affairs*, 114th Cong. 30-31 (2015) (statement of James R. Vale, Director, Veterans Benefits Program) ("It shouldn't be easier and quicker to deny a claim than to grant one. VA still has to fulfill its statutory duty to assist. There should be no work credit awarded for taking shortcuts. If a claim is denied, no work credits should be awarded until the duty to assist is fulfilled."); *Document Tampering and Mishandling at the U.S. Dep't of Veterans Affairs: Joint Hearing Before the Subcomm. on Disability Assistance and Mem'l Affairs and the Subcomm. on Oversight Investigations of the H. Comm on Veterans' Affairs*, 111th Cong. 50 (2009) (statement of Kathryn A. Witt, Co-Chair, Gold Star Wives of America) ("The VA work credit system tends to create cynical and corrupt VA employees. Some VA adjudicators who are pressured to take shortcuts and to make premature adjudications, may decide that destruction of records or statistical manipulation of dates of claim, are 'not such a big deal'—because these actions promote a temporary reduction of the claims backlog and because unlawfully inflated production statistics support bonuses and promotions for VA adjudicators and managers."); 2016 Budget, *supra* note 74; Glantz, *supra* note 73; Muschick, *supra* note 73.

[80] *See supra* notes 71-74.

[81] Jon Corra, *The C-Files: The Truth Is in There*, VETERAN DISABILITY BLOG (Aug. 6, 2013), http://veterandisabilityblog.com/blog/the-c-files-the-truth-is-in-there/.

[82] *See id.*

[83] *See id.*; *see also* Chris Attig, *The VA C-File is the Most Important Document in Your VA Appeal*, VETERANS LAW BLOG, http://www.veteranslawblog.org/va-c-file/ (last visited Sept. 14, 2016).

seeking to appeal a VA decision should always request a copy of his or her entire c-file before commencing the appeal.[84]

Too often, however, claimants end up waiting for unreasonably long periods of time to receive their c-files from the VA.[85] A conversation with representatives from the VA's Records Management Center (RMC) on February 12, 2016, revealed that veterans routinely are forced to wait at least six months before receiving their c-files from this repository.[86] Waiting a year to receive these documents from the RMC is not out of the question.[87] While some claimants do receive their c-file within a month if the applicable VA Regional Office maintains possession of their file, many of these claimants still face lengthy delays and commonly must make repeated requests before receiving their file.[88]

The VA cannot honestly purport to be a pro-claimant system when it routinely delays access to crucial documentary evidence that claimants are legally entitled to receive. It cannot genuinely proffer itself as providing a non-adversarial process when too many claimants must file repeated Freedom of Information Act requests—and, at times, engage in administrative appeals when these requests are ignored—just to obtain these records.[89] A claimant who does not receive his or her c-file prior to filing an appeal is a claimant disadvantaged.[90] A non-adversarial, pro-claimant system should never harm its constituents' chances of presenting all available evidence in proceedings designed to help them obtain the benefits that they earned.

To improve this process in the claimants' favor, Congress should enact legislation tolling all relevant statutes of limitation in a VA administrative appeal until the VA provides the claimant with requested documentation to which he or she is legally entitled. A claimant cannot fully begin preparing his or her appeal without obtaining the important information contained within that claimant's c-file. Permitting the VA to harm claimants by making them wait untold months to receive their c-files only to force them to file their claim by the statutory deadline cannot continue if this system is honestly

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[84] *See* 38 U.S.C. § 5701(b) (Lexis 2016); 38 U.S.C § 5702 (2006); 38 C.F.R. § 1.525 (2015); 38 C.F.R. § 1.526 (2015); Attig, *supra* note 83 ("The best [advice] that I can ever get a [v]eteran, or his family . . . is contact the Veterans Affairs office by certified mail, and request a full copy of your 'C-file' . . . .").

[85] *See* Attig, *supra* note 83.

[86] Telephone Interview with RMC representative (Feb. 12, 2016) (on file with author).

[87] *Id.*

[88] *See* Attig, *supra* note 83; Benjamin Krause, *Get Your VA Claims File: Know What VA Knows About You*, DISABLEDVETERANS.ORG (Feb. 7, 2014), http://www.disabledveterans.org/2014/02/07/get-va-claims-file-know-va-knows/.

[89] *See Requesting a Copy of Your VA Claims Folder (C-File)*, HADIT.COM, http://www.hadit.com/requesting-your-va-c-file/ (last visited Sept. 14, 2016).

[90] *See, e.g.*, *C-File: A Veteran's "Claim" to Success*, HILL & PONTON (Jan. 17, 2015), https://www.hillandponton.com/c-file-veterans-claim-success/; Attig, *supra* note 83; Krause, *supra* note 88.

a pro-claimant process.[91] Instead, the statutory clock should not begin running until the day when the claimant who requests his or her c-file actually receives the complete c-file from the VA.[92] Such a change will correct a system that currently penalizes veterans and their dependents because of the VA's own administrative delays, a result that cannot exist within a structure that is pro-claimant and non-adversarial.

V. MISLEADING QUESTIONS AND FORMS

As noted above, the VA continues to increase its emphasis on utilizing standardized forms when filing claims and appeals.[93] In addition to the issues created when veterans and their dependents do not have easy access to these standardized forms, the VA burdens claimants when the agency's standardized forms pose questions that are ambiguous or even misleading.[94] Without asking clear questions, the likelihood of a claimant incorrectly completing the standardized form and receiving a denial increases substantially.

For instance, the VA now requires anyone filing a Notice of Disagreement when pursuing an administrative appeal to complete VA Form 21-0958.[95] On this form, the VA asks the veteran or veteran's dependent to list the "Percentage Evaluation Sought (*If Known*)" for every disability about which the claimant disagrees with the VA's original rating.[96] While this question is optional, and a claimant can submit the form without responding, claimants frequently attempt to provide an answer and estimate the rating percentage that they should receive.[97]

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[91] For a discussion of several of the most common VA deadlines, see KEN HUDNALL, THE VETERANS' PRACTICAL PRIMER: GETTING YOUR BENEFITS 169-76 (2005).

[92] Under the current system, a claimant can always file a request to extend a particular statutory deadline. One would hope that an inordinate delay in providing a c-file to a claimant would be reason enough for the VA to extend the deadline. However, this structure still leaves the discretion to grant or deny the extension in the hands of the VA. This system should be changed into a format where a claimant's written c-file request automatically tolls all relevant statutes of limitation regarding that claim until the VA fulfills its legal obligation of providing the c-file to the claimant.

[93] *See supra* Part I.

[94] *Id.*

[95] Andrew Rutz, *VA Use of Standard Forms Goes into Effect on March 24, 2015*, NAT'L ORG. OF VETERANS ADVOCATES, https://vetadvocates.org/va-use-of-standard-forms-goes-into-effect-on-march-24-2015/ (last visited Sept. 14, 2014).

[96] U.S. DEP'T OF VETERANS AFFAIRS, Form 21-0958, Block 11, http://www.vba.va.gov/pubs/forms/VBA-21-0958-ARE.pdf.

[97] *See, e.g.*, *Veterans' Dilemma: Navigating the Appeals System for Veterans Claims: Hearing Before the Subcomm. on Disability Assistance and Mem'l Affairs of the H. Comm. on Veterans' Affairs*, 114th Cong. 93-94 (2015) (statement of James R. Vale, Director, Veterans Benefits Program).

This is problematic. Most claimants do not know the intricacies of Title 38 in the Code of Federal Regulations and the myriad other factors that go into forming a rating decision.[98] Unless they work for the VA or for an organization that represents veterans and their family members in disability compensation claims, or take it upon themselves to immerse themselves in studying the relevant laws, regulations, and agency policies, claimants will not understand how the VA Rating Schedule functions.[99] Therefore, a claimant who lists a specific percentage in this box on VA Form 21-0958 is most likely taking a wild guess. If the claimant guesses too low, then the claimant could set himself or herself up to receive a rating that is lower than the percentage to which he or she is entitled.

Congress never intended for veterans and their family members to become experts in the legal and medical nuances of establishing a VA disability compensation rating. In this purportedly pro-claimant system, the VA should never place the claimant in a position of attempting to figure out the proper rating of his or her service-connected disability. Rather than playing this needless guessing game, the VA should remove this question from Form 21-0958 and base its decision solely on the merits of the evidence presented.

A different type of problem exists regarding VA Form 21-4138. This form, titled "Statement in Support of Claim," is little more than a blank sheet of paper with a heading containing the VA's logo.[100] Without any guidance from the VA regarding the purpose for this form, claimants tend to use VA Form 21-4138 for an astounding range of objectives, including requesting an update on the status of their claim, declaring their disagreement with a statement in a VA rating decision, adding lay evidence in support of their VA claim, and arguing that the VA should assign them an earlier effective date.[101]

Unfortunately, the VA form that seems usable for everything frequently ends up doing nothing.[102] Veterans and their dependents can saturate their c-files with dozens of Form 21-4138 statements without this stack of completed forms serving any beneficial purpose in the case.[103] Rarely do VA rating team employees cite information directly from a Form 21-4138 when handing down their decision regarding a veteran's service-connected

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[98] *Veterans' Dilemma: Navigating the Appeals System for Veterans Claims: Hearing Before the Subcomm. on Disability Assistance and Mem'l Affairs of the H. Comm. on Veterans' Affairs*, 114th Cong. 93-94 (2015) (statement of James R. Vale, Director, Veterans Benefits Program).

[99] *See, e.g.*, *id.* ("Legally, it doesn't matter what the veteran thinks the percentage should be. What matters is what the evidence in the record supports.").

[100] *See* U.S. DEP'T OF VETERANS AFFAIRS, Form 21-4138, http://www.vba.va.gov/pubs/forms/vba-21-4138-are.pdf.

[101] *See* Chris Attig, *Want to Speed Up Your VA Claim? Don't Use VA Form 21-4138....*, VETERANS LAW BLOG (May 29, 2016), http://www.veteranslawblog.org/va-form-21-4138/.

[102] *See id.*

[103] *Id.*

disability rating.[104] In fact, the unlimited deluge of VA Form 21-4138 submissions can delay processing if the VA employees evaluating the claim actually review each Form 21-4138 in depth.[105]

Worse yet, a claimant might inadvertently hinder his or her case by submitting a Form 21-4138 rather than the precise standardized form that the VA designs for the matter at hand. For example, someone seeking to file a Notice of Disagreement to start an administrative appeal would delay the appeal if he or she wrote the rationale for the appeal on a Form 21-4138 rather than the VA's mandated Form 21-0958.[106] A claimant describing his or her household income for a VA non-service-connected pension claim would be better served to complete VA Form 21-527, the document that the agency prescribes for such claims, to ensure that all of the VA's questions are answered.[107] If the claimant wants to add a dependent to his or her claim, then he or she would have better results filling out all of the requisite information in VA Form 21-686c[108] instead of running the risk of incompleteness by writing a statement on a form 21-4138. If a surviving spouse or child believes that he or she is entitled to accrued benefits not paid prior to the intended beneficiary's death, the spouse or child should submit a claim using VA Form 21-601,[109] rather than simply writing out a statement on VA Form 21-4138 asking for accrued benefits, as such a statement could leave out information that the VA requires to decide the claim.

Given the minimal amount of weight that VA rating team employees typically assign to information contained in a Form 21-4138, and considering the substantial potential for a veteran incorrectly using a Form 21-4138 when a specifically prescribed standardized form is available, the VA should remove Form 21-4138 from circulation. Doing so will clearly direct claimants to the VA's required standardized forms for each specified purpose, reducing the opportunity for claimants to miss required information and cause unnecessary delays in claims processing. Today, with the VA's

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[104] *See* Attig, *supra* note 101.

[105] *See id.*; *see also Mr. K's First VA Form 21-4138*, ASKNOD (Sept. 18, 2012), https://asknod.org/2012/09/18/mr-ks-first-va-form-21-4138/ (discussing an interaction with a Veterans Service Officer who wrote only a couple of generic sentences on the Form 21-4138 and filed it with the claims package, an act that does not seem to add anything to the claim and runs the risk of needlessly distracting the VA's rating team members from the truly vital information submitted as part of the claim).

[106] *See supra* notes 92-96 and accompanying text.

[107] U.S. DEP'T OF VETERANS AFFAIRS, Form 21-527, http://www.vba.va.gov/pubs/forms/vba-21-527-are.pdf. Importantly, a claimant could receive faster processing under the VA's "Fully Developed Claims" initiative if the claimant filed all evidence that he or she wished the VA to consider in a single filing using VA Form 21-527EZ.

[108] U.S. DEP'T OF VETERANS AFFAIRS, Form 21-686c, http://www.vba.va.gov/pubs/forms/VBA-21-686c-ARE.pdf.

[109] U.S. DEP'T OF VETERANS AFFAIRS, Form 21-601, http://www.vba.va.gov/pubs/forms/VBA-21-601-ARE.pdf.

insistence on claimants meeting specified bureaucratic requirements before the VA will go forward with processing the claim, VA Form 21-4138 plays no pro-claimant role in the agency's claims structure, serving as a document that is too often more misleading than helpful.

VI. DEVELOPING TO DENY

In 2003, the Court of Appeals for Veterans Claims considered the case of a combat veteran seeking an increased service-connected disability rating for his injured left shoulder.[110] Central to the dispute was a medical examination that the VA conducted with the agency's own doctors after the veteran submitted medical evidence from private doctors that were favorable to his claim.[111] The VA's examination contradicted the private doctor's findings as well as previous VA medical evidence that favored the case for a higher disability rating.[112] In his appeal to the Court of Appeals for Veterans Claims, the veteran focused largely on the fact that the VA seemingly went out of its way to obtain new evidence that disagreed with all of the medical evidence submitted by both the claimant and the agency at the time of the appeal.[113]

Ultimately, for a variety of reasons, the court remanded the matter back to the Board of Veterans' Appeals for further consideration.[114] However, in deciding the case, the Court of Appeals for Veterans Claims issued a clear condemnation of the VA's decision to seek out evidence aimed at disproving a claimant's appeal.[115] "[T]he Court notes that it is not at all clear from the record on appeal . . . why VA concluded, in light of the un-rebutted evidence then of record, that it was necessary to obtain that medical opinion," wrote Chief Judge Kenneth B. Kramer for the court.[116] The court stated that because VA could not "undertake such additional development if a purpose was to obtain evidence against an appellant's case, VA must provide an adequate statement of reasons or bases for its decision to pursue further development where such development reasonably could be construed as obtaining additional evidence for that purpose."[117]

Regrettably, the VA too frequently ignores the plain meaning of these sentences. Too many times, the VA will obtain medical evidence from the claimant and from its own medical professionals, receive evidence that is favorable only to the claimant, and then order another medical examination

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[110] Mariano v. Principi, 17 Vet. App. 305, 306-07 (2003).
[111] *Id.* at 309.
[112] *Id.* at 309, 312.
[113] *Id.* at 309, 311-12.
[114] *Id.* at 318-19.
[115] *See id.* at 312 (citing 38 U.S.C. § 7104(d)(1) (2013)).
[116] *Mariano*, 17 Vet. App. 305 at 312.
[117] *Id.* at 312 (citation omitted).

that abruptly produces new evidence that challenges the claim.[118] Too often, the VA will deny the claim or appeal shortly after receiving the new adverse medical report from their own doctor, rejecting the claim before the claimant has an opportunity to review and respond to the VA's unfavorable evidence.[119] Veterans' advocates call this process "developing to deny," highlighting the VA's extra efforts to acquire an adverse medical report that places new roadblocks in the claimant's path and then deciding the matter before the claimant has the opportunity to respond.[120] Unless the claimant follows the progress of his or her claim so closely that he or she can obtain a copy of the new VA medical exam report and file a rebuttal objecting to the adequacy of the opinion prior to the VA issuing its decision on the matter, the claimant will not receive the opportunity to review and challenge the VA's latest findings.[121]

Congress should enact legislation plainly prohibiting the VA from developing a claim in search of adverse evidence. Once the VA receives adequate proof to meet the legal and regulatory requirements for granting disability compensation for a specific condition, the VA should simply grant the claim rather than request its doctors to submit the veteran to another round of medical examinations and evaluations.[122] Furthermore, Congress should

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[118] *See* Eric A. Gang, *When VA Schedules Unnecessary C&P Exams*, VETERANS DISABILITY INFO (Feb. 9, 2015), http://www.veteransdisabilityinfo.com/blog.php?article=when-va-schedules-unnecessary-cp-exams_266.

[119] The VA does bear "an affirmative duty to gather the evidence necessary to render an informed decision on the claim, even if that means gathering and developing negative evidence . . . ." Douglas v. Shinseki, 23 Vet. App. 19, 26 (2009). Without a doubt, evidence in the record used to develop a veteran's claim can arise from various sources. *See id.* at 23 (citing White v. Principi, 243 F.3d 1378, 1381 (Fed. Cir. 2001)). However, the VA needs to gather only enough evidence to determine whether military service "as likely as not" caused or exacerbated the veteran's disability. *See supra* notes 29-31 and accompanying text. Any development of the claimant's record that occurs after the VA obtains enough evidence to reasonably render such a judgment is unnecessary and unwarranted. 38 C.F.R. § 3.304(c) (Lexis 2016) ("The development of evidence in connection with claims for service connection will be accomplished when deemed necessary but it should not be undertaken when evidence present is sufficient for this determination.").

[120] *Veterans' Dilemma: Navigating the Appeals System for Veterans Claims: Hearing Before the Subcomm. on Disability Assistance and Mem'l Affairs of the H. Comm. on Veterans' Affairs*, 114th Cong. 37 (2015) (statement of Barton F. Stichman, Joint Executive Director, Nat'l Veterans Legal Services Program) ("Veterans advocates call this longstanding VA practice developing to deny. In addition to fostering the hamster wheel phenomenon, this practice is inconsistent with the pro-claimant adjudicatory process and the statutory benefit-of-the-doubt rule.").

[121] *See id.* at 36-37; *see also* Chris Attig, *Getting a VA Medical Opinion Letter to Hurt Veterans—Development to Deny*, VETERANS LAW BLOG (Nov. 4, 2015), http://www.veteranslawblog.org/va-medical-opinion-letter/.

[122] Such an action would be consistent with the caselaw concerning this topic. In addition to *Mariano*, which is described in detail above, see Shaw v. McDonald, 2016 U.S. App. Vet. Claims LEXIS 393, at *13 (Mar. 18, 2016) ("VA may not, however, undertake development

mandate a specific period of time between the date when the VA receives new medical evidence and the date when the VA renders its decision in a veteran's claim, allowing the claimant reasonable time to refute the VA's new medical evidence or even rebut the expertise of the VA's medical authority providing the information. A pro-claimant and non-adversarial system demands nothing less.

VII. KEEPING SURVIVORS IN THE DARK

Considering the amount of time that it takes the VA to produce its opinion regarding a claim, it is unsurprising that a significant number of veterans pass away while waiting for the VA to complete its review and render its judgment regarding benefits.[123] When this unfortunate event occurs, the veteran's survivors frequently hear the time-worn platitude that "the veteran's claim

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if the sole purpose of that development is to obtain evidence against a claim."); Kellogg v. McDonald, 2015 U.S. App. Vet. Claims LEXIS 1011, at *16 (July 28, 2015) ("[I]f VA determines that additional development is necessary to make an informed decision, the Board must provide an adequate statement of reasons or bases for its decision to pursue further development *if* such development reasonably could be construed as obtaining additional evidence against the claim."); Ridens v. McDonald, 2015 U.S. App. Vet. Claims LEXIS 443, at *13-14 (Apr. 10, 2015) (finding a VA-ordered medical examination inadequate because the VA's instructions guided the medical examiner to the conclusion that the veteran's claimed disabilities were not connected to military service); Payne v. McDonald, 2014 U.S. App. Vet. Claims LEXIS 1414, at *1-2 (Aug. 15, 2014) (remanding the case because a regional office failed to address why it sought additional medical opinions for the petitioner's claim); Naulty v. Gibson, 2014 U.S. App. Vet. Claims LEXIS 1151, at *11 (June 30, 2014) ("The Board's conduct raises the possibility that it was improperly developing the record to obtain evidence against the appellant's claim. If nothing else, the Board tread very close to that most reprehensible of actions." (internal quotation marks omitted)); Hart v. Mansfield, 21 Vet. App. 505, 508 (2007) ("VA may not pursue such development if the purpose is to obtain evidence against the claim."); *see also* Austin v. Brown, 6 Vet. App. 547, 552 (1994) ("[B]asic fair play requires that evidence be procured by [the VA] in an impartial, unbiased, and neutral manner."); *but see* Rowe v. McDonald, 2014 U.S. App. Vet. Claims LEXIS 1816, at *10-12 (Oct. 29, 2014) (upholding the validity of an additional VA-requested medical exam solely because the claimant's private medical examination produced results that were too speculative for the VA to determine whether the claimant's conditions were service-connected).

[123] *See* Aaron Glantz, *Number of Veterans Who Die Waiting for Benefits Claims Skyrockets*, THE CTR. FOR INVESTIGATIVE REPORTING (Dec. 20, 2012), http://cironline.org/reports/number-veterans-who-die-waiting-benefits-claims-skyrockets-4074; Paul Muschick, *Veterans Die Waiting to Collect VA Benefits*, THE MORNING CALL (Nov. 12, 2014, 6:00 PM), http://touch.mcall.com/#section/-1/article/p2p-81955195/; Byron Pitts, *Why the VA Frustrates Veterans*, CBS NEWS (Jan. 1, 2010), http://www.cbsnews.com/news/why-the-va-frustrates-veterans/; Amber Smith, *307,000 Veterans May Have Died While Waiting for VA Benefits. The VA Status Quo Must Change*, THE DAILY SIGNAL (Sept. 3, 2015), http://dailysignal.com/2015/09/03/307000-veterans-may-have-died-while-waiting-for-va-benefits-the-va-status-quo-must-change/.

dies with the veteran," leaving the surviving dependents believing that they can do nothing further regarding the undecided claim.[124]

However, this assumption is inaccurate. Instead, a veteran's un-remarried surviving spouse, un-remarried dependent children, and financially dependent parents may be qualified to receive "accrued benefits" from a claim still pending at the VA when the veteran passes away.[125] Eligible survivors may file a claim for accrued benefits, permitting them to receive benefits based on evidence on file with the VA at the time of the veteran's death.[126] Additionally, the eligible survivors of a veteran who passed away after October 10, 2008, may substitute themselves into the veteran's position and advocate for the VA to grant the claim, including providing the VA with new medical and lay evidence.[127] If the VA grants the claim in either of these circumstances, the survivor applying for the benefit will receive not only the tax-free monthly payments from the VA going forward, but also the full amount of money that the VA would have owed the veteran going back to the effective date of the claim.[128]

On paper, one might believe that these benefits would be among the easiest for any claimant to obtain. Surviving spouses, children, and parents use VA Form 21-534 to apply for Death Pension or Dependency and Indemnity Compensation, the two most common VA benefits for survivors.[129] According to the VA's own directives, any survivor submitting a VA Form 21-534 is automatically considered for accrued benefits as

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[124] *See* Muschick, *supra* note 123; Susan Seliger, *The 'Long and Unacceptable' Wait for a Veterans' Benefit*, N.Y. TIMES (May 15, 2013, 6:00 AM), http://newoldage.blogs.nytimes.com/2013/05/15/the-long-and-unacceptable-wait-for-a-veterans-benefit/?_r=0; *Veterans Dying Waiting on Disability Benefits*, CBS NEWS (Nov. 22, 2013, 10:15 PM), http://dfw.cbslocal.com/2013/11/22/veterans-dying-waiting-on-disability-benefits/.

[125] 38 U.S.C. § 5121 (Lexis 2016); 38 U.S.C. § 5121A (2012); 38 C.F.R. § 3.1000 (2015).

[126] 38 U.S.C. § 5121 (Lexis 2016); 38 C.F.R. § 3.1000 (2015). In addition to evidence physically in the veteran's file at the time of his or her death, some documents are considered "constructively" part of the veteran's records. The VA must consider these documents as part of an accrued benefits analysis. *See* Ralston v. West, 13 Vet. App. 108, 113 (1999); Hayes v. Brown, 4 Vet. App. 353, 360-61 (1993). The question of whether a claim was actually "pending" at the time of the veteran's death is a factual question that the VA has discretion to resolve. *See* Mallette v. Peake, 337 F. App'x 871, 872 (Fed. Cir. 2008) (per curiam).

[127] 38 U.S.C. § 5121A (2012); *see also* Breedlove v. Shinseki, 24 Vet. App. 7, 19-20 (2010) (holding that substitution claims do not represent a separate interest, thus permitting eligible survivors to pursue the deceased veteran's claim with virtually all of the fundamental rights that the veteran would have enjoyed if he or she were alive).

[128] 38 U.S.C. § 5121 (Lexis 2016); 38 U.S.C. § 5121A (2012); 38 C.F.R. § 3.1000 (2015). For a summary of survivors who are eligible to file for accrued benefits, see 38 U.S.C. § 5121(a); 38 C.F.R. § 3.1000(a)(1)-(5).

[129] U.S. DEP'T OF VETERANS AFFAIRS, Form 21-534, http://www.vba.va.gov/pubs/forms/VBA-21-534-ARE.pdf. For the version of this form used to file a Fully Developed Claim containing all evidence that the claimant wants the VA to consider when adjudicating the claim, see VA Form 21-534EZ, http://www.vba.va.gov/pubs/forms/VBA-21-534EZ-ARE.pdf.

well.[130] Regrettably, this system does not always function as smoothly as one would hope. Plenty of surviving spouses, children, and parents never learn whether they are eligible to file for accrued benefits or for substitution into the pending claim.[131] Consequently, these individuals never receive the benefits that the veteran earned through his or her military service.[132]

Even when a surviving spouse, child, or parent files a VA Form 21-534 seeking survivors' benefits, the VA will regularly provide a ruling regarding Dependency and Indemnity Compensation or Death Pension without saying a word regarding the survivor's entitlement to accrued benefits.[133] Since the legal right of any eligible survivor to file a claim for accrued benefits expires one year following the veteran's death, this lack of knowledge can prove costly, as survivors may not learn about the accrued benefits and substitution processes until this deadline has expired.[134]

To avoid this problem, Congress should adopt a law insisting that whenever the VA receives notice of a veteran claimant's death, the VA must make certain efforts to notify eligible survivors about their potential rights to accrued benefits. The new legislation should require the VA to immediately review that veteran's claims file, ascertain whether any claims were pending at the time of the veteran's death, and notify in writing any dependents listed in the veteran's claim about the potential for accrued benefits. Additionally, the new statute should direct the VA to offer copies of the veteran's complete claims file to any of the dependents, allowing the dependents to review the claims file and determine whether any claims are still pending with the VA.

The VA's legal duty to provide a pro-claimant, non-adversarial process applies to all claimants, encompassing veterans' dependents and survivors as

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[130] VA Form 21-534; VA Form 21-534EZ. In one particularly egregious example of the VA "developing to deny," a surviving spouse filed a VA Form 21-534 and was ultimately denied in the resulting substitution claim because the VA obtained a new medical opinion asserting that the deceased veteran's disability was not connected to his military service. Reliford v. McDonald, 27 Vet. App. 297, 300 (2015). Thankfully, the court determined that the VA had erred in treating the surviving spouse's Form 21-534 as a substitution claim rather than a claim for accrued benefits. *Id.* at 304. Treating the case as a claim for accrued benefits would prevent either party from adding new evidence to the record, thus invalidating the VA's new medical opinion. *Id.* at 303-05. Since the VA had not given the spouse the choice of whether she wished to proceed with the pending matter as an accrued benefits claim or a substitution claim, the VA's decision was overturned and the matter remanded to the Board of Veterans Appeals to consider without the VA's new negative medical opinion appearing in evidence. *Id.* at 304-05. Of course, adopting this article's recommendation of enacting legislation stopping the VA from "developing to deny" likely would have prevented this scenario from occurring in the first place. *See supra* Part VI.

[131] *See supra* notes 123-28 and accompanying text.

[132] *See supra* notes 123-24 and accompanying text.

[133] *See, e.g.*, Chris Attig, *Are Veterans Survivors Missing out on Accrued VA Benefits?*, VETERANS LAW BLOG (Feb. 1, 2016), http://www.veteranslawblog.org/va-accrued-benefits-2/. The authors of this article know, both first-hand and anecdotally, of too many cases where this has occurred to the eligible survivor's detriment.

[134] 38 U.S.C. § 5121(c) (Lexis 2016).

well as the veterans themselves.[135] Today, too many surviving spouses, children, and parents never pursue a veteran's pending claim because they believe the old bromide about the veteran's claim "dying with the veteran." To clear up this harmful misconception, the VA should take the proactive and pro-claimant measure of informing survivors when they have the right to complete the claim for the benefits that the veteran earned.

VIII. REDUCING DUTY TO ASSIST OBLIGATIONS REGARDING MEDICAL EXAMINATIONS

As part of the VA's statutory duty to assist, the agency must provide a medical examination or obtain an independent expert medical opinion when such evidence "is necessary to decide the claim."[136] To satisfy the VA's duty to assist claimants, the medical report must take into account the claimant's prior medical history, completely describe the claimant's medical conditions in existence at the time of the examination, and provide the reasons for each medical conclusion.[137] If the report does not fulfill these three conditions, the VA must receive clarification for any ambiguities within the report or schedule a new medical examination to obtain the missing evidence.[138]

Evidence obtained in these medical examinations commonly plays a vital role in establishing the claimant's case, as the VA typically affords significant weight to medical opinions from its own "experts."[139] In the VA's Congressional Submission for fiscal year 2017, however, the agency proposed a legislative amendment that would diminish its legal duty to

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[135] 38 U.S.C. § 5103A (Lexis 2016); *see also* Webster v. Shinseki, 428 Fed. App'x 976, 977-78 (Fed. Cir. 2011) (applying "duty to assist" caselaw to a dispute regarding survivors' benefits).

[136] 38 C.F.R. § 3.159(c)(4) (2008); *see also* 38 U.S.C. § 5103A(d)(1) (Lexis 2016); McLendon v. Nicholson, 20 Vet. App. 79, 81 (2006) (defining several scenarios in which the VA must provide a medical examination to the claimant). However, the VA is not obligated to provide a medical exam "if 'no reasonable possibility exists' that such assistance would aid in substantiating a claim." Paralyzed Veterans of Am. v. Sec'y of Veterans Affairs, 345 F.3d 1334, 1355 (Fed. Cir. 2003) (citing 38 U.S.C. § 5103A(a)(2) (2012)).

[137] Stefl v. Nicholson, 21 Vet. App. 120, 123 (2007) (quoting Ardison v. Brown, 6 Vet. App. 405, 407 (1994)); *see also* Sickels v. Shinseki, 643 F.3d 1362, 1366 (Fed. Cir. 2011) (stating that a VA medical examiner receives a legal presumption of professional competency and soundness of judgment); Green v. Derwinski, 1 Vet. App. 121, 124 (1991) (requiring that VA medical experts conduct a "thorough and contemporaneous medical examination" that takes into account past medical records).

[138] *See Stefl*, 21 Vet. App. at 123-24.

[139] *See, e.g.*, Jim Strickland, *How Benefits Are Determined — the Weight of C &P Exams*, STATESIDE LEGAL (Nov. 9, 2010), http://statesidelegal.org/how-benefits-are-determined-weight-cp-exams ("All too often the [VA ratings specialist] may believe that your civilian family doctor may be favoring you out of a desire to keep a good customer happy. The [VA compensation and pension] examiner is often viewed as a less involved, therefore more objective, viewer of the record.").

provide medical examinations.[140] Specifically, the VA would like Congress to require the VA to supply a medical examination only when a veteran first demonstrates "the existence of objective evidence establishing that the [v]eteran experienced an event, injury, or disease during military service."[141] Put another way, the VA does not want to face a duty to provide a medical examination until the veteran's record includes "objective evidence such as medical records, service records, accident reports, etc." indicating that the claimant incurred or exacerbated a disability while in the military.[142] The VA estimates that this amendment will save the agency an estimated $1.4 billion in the upcoming decade by "streamlining" this evidentiary threshold.[143]

Perhaps this alteration would indeed result in substantial VA cost savings during the next ten years. However, this proposal establishes another framework permitting the VA to weaken its level of veterans' services in the name of purported cost savings. If enacted, the VA could deny a medical examination to a veteran seeking to apply for disability compensation if that veteran did not possess objective evidence regarding his or her purportedly service-connected disabilities.[144] Lay evidence would no longer suffice by itself as a reason to require a VA medical examination.[145] This would decrease the utility of documents such as a "buddy letter" from an individual who knew the veteran while serving in the military, a statement from one of the veteran's family members, or any other evidence from a "non-expert" that describes salient facts regarding the disability in question.[146]

This change would impair the pro-claimant nature of the application process for veterans' benefits. In fact, the effects of such an amendment would run contrary to the intentions of a system designed to increase veterans' ease of access to benefits earned.[147] By heightening the evidentiary threshold, a veteran who cannot satisfy the VA with documentation linking his or her disability to events in military service will lose the opportunity to receive a VA medical examination evaluating this same question. In other words, the VA would demand that a veteran obtain objective evidence proving a connection between his or her military service and the claimed disability before the VA would order an examination seeking its own objective evidence on this same issue.

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[140] U.S. DEP'T OF VETERANS AFFAIRS, FY 2017 BUDGET SUBMISSION, Vol. 1, at 20 (2016).

[141] *Id.*

[142] *Id.*

[143] *Id.* at 20-21.

[144] *Id.* at 20.

[145] *See id.*

[146] For a good discussion of the ways that veterans depend on "buddy statements" and other pieces of lay evidence in filing their claims, see Craig M. Kabatchnick, *Obstacles Faced by the Elderly Veteran in the VA Claims Adjudication Process*, 12 MARQ. ELDER'S ADVISOR 185, 208-09 (2010).

[147] *See supra* notes 9-25 and accompanying text.

This could cause a particular disadvantage to veterans who lack the financial resources to afford a medical examination from a private physician. It could also prove problematic for veterans with service-connected disabilities that are harder to identify, such as post-traumatic stress disorder.[148] Military medical records specifically documenting such disabilities are unlikely, as the manifestation of the service-connected symptoms might not occur until years after the veteran's date of discharge.[149] In such a situation, the VA would need to make a difficult judgment call regarding the precise degree of objective evidence necessary to trigger the VA's duty to assist. For instance, the VA could decide that any objective evidence linking the veteran to a bona fide in-service stressor met the veteran's obligation and triggered the VA's duty to provide a medical examination. On the other hand, the VA could establish a far more stringent requirement in which it demanded objective evidence of an actual post-traumatic stress disorder diagnosis before the agency would order its own medical examination. In this proposal to Congress, the VA does not clearly define which of these evidentiary measuring sticks would apply under this new standard.

However, the VA can—and should—easily avoid making this difficult decision by simply leaving the current duty to assist standards intact. Instead of amplifying the challenges that a veteran confronts in putting together a claim for disability compensation, the VA should adopt the non-adversarial stance that the law requires and continue to provide a medical examination when a veteran provides any evidence—even if only lay evidence—indicating that he or she has a disability that is as likely as not connected to military service. Doing so would preserve this process as an example of the

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[148] *See* Nathaniel J. Doan & Barbara C. Morton, *A New Era for Establishing Service Connection for Posttraumatic Stress Disorder (PTSD): A Proposed Amendment to the Stressor Verification Requirement*, 2 VETERANS L. REV. 249, 255, 260 (2010) (discussing the difficulty that many claimants face in obtaining objective evidence to prove that post-traumatic stress disorder was as likely as not due to military service); Sarah K. Mayes, *Unraveling the PTSD Paradox: A Proposal to Simplify the Adjudication of Claims for Service Connection for Posttraumatic Stress Disorder*, 6 VETERANS L. REV. 125, 136-38 (2014) (discussing amendments that the VA made to requirements for post-traumatic stress disorder disability compensation claims because claimants often were unable to produce objective evidence of identifiable stressors).

[149] *See, e.g.*, Mayes, *supra* note 148, at 136-38, 180; Alison Atwater, Comment, *When is a Combat Veteran a Combat Veteran?: The Evidentiary Stumbling Block for Veterans Seeking PTSD Disability Benefits*, 41 ARIZ. ST. L.J. 243, 250-69 (2009) (discussing evidentiary challenges that veterans have historically faced in proving disability compensation claims for post-traumatic stress disorder); *see generally* Bryan A. Liang & Mark S. Boyd, *PTSD in Returning Wounded Warriors: Ensuring Medically Appropriate Evaluation and Legal Representation Through Legislative Reform*, 22 STAN. L. & POL'Y REV. 177, 196-98 (2011) (describing many difficulties that claimants face in gathering objective evidence of service-connected post-traumatic stress disorder, and encouraging liberalization of evidentiary standards in such claims).

VA's pro-claimant, non-adversarial mission to help veterans and their dependents receive the benefits that they earned.

IX. THE ADVERSE IMPACTS OF ALLEGED INCAPACITY

Since as early as 1924, the VA and its predecessor agencies have administered a fiduciary program for veterans who, as a result of injury, disease, the infirmities of advanced age, or being less than 18 years old, cannot manage their own VA benefits.[150] Under this program, VA oversees these veteran-beneficiaries, and appoints and oversees fiduciaries who manage these beneficiaries' monetary benefits. Congress bestowed this authority to the VA Secretary "[w]here it appears to the Secretary that the interest of the beneficiary would be served thereby . . . ."[151] As of 2014, the Veterans Benefits Administration (VBA) reported providing Fiduciary services to more than 172,800 beneficiaries, who received nearly $2.9 billion in VA benefits.[152] Unfortunately, according to VA's Office of Inspector General, "the estates of beneficiaries are historically at risk of misuse by fiduciaries."[153]

On April 26, 2011, the United States Court of Appeals for Veterans Claims (CAVC) returned some semblance of power to the nation's most vulnerable veterans when it reversed a decades-old policy barring veterans from appealing fiduciary-related issues.[154] In its precedent-setting decision of *Freeman v. Shinseki*, the CAVC held that the same statutes and regulations that authorize the VA Secretary to appoint a fiduciary also provide "legally meaningful standards by which to evaluate the appointment of a fiduciary, [such that a beneficiary may] appeal any final adverse Board decision on this matter to the Court."[155] The CAVC premised its holding upon the basic legal tenet that any aspect of the VA's "provision of benefits" is subject to judicial review.[156] No longer are veterans' fiduciary-related questions and disagreements discarded with a terse VA letter asserting that such issues are "vested solely within the discretion of the Secretary."[157]

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[150] Fiduciary Activities of Veteran Affairs for Beneficiaries, 79 Fed. Reg. 430, 430 (Jan. 3, 2014) (to be codified at 38 C.F.R. pts. 3 and 13).

[151] 38 U.S.C. § 5502(a)(1) (2012).

[152] *Exploring VBA's Fiduciary Program: Hearing Before the Subcomm. on Disability Assistance and Mem'l Affairs of the H. Comm. on Veterans' Affairs* 114th Cong. 24 (2015) (statement of David R. McLenachen, Acting Deputy Under Secretary for Disability Assistance).

[153] U.S. DEP'T OF VETERANS AFFAIRS, OFFICE OF INSPECTOR GENERAL, OFFICE OF AUDITS & EVALUATIONS, NO. 13-03922-453, AUDIT OF FIDUCIARY PROGRAM CONTROLS ADDRESSING BENEFICIARY FUND MISUSE 1 (Aug. 27, 2015).

[154] Freeman v. Shinseki, 24 Vet. App. 404, 417 (2011).

[155] *Id*.

[156] 38 U.S.C. § 511(a) (2012); 38 U.S.C. § 5502 (Lexis 2016).

[157] *See* Willis v. Brown, 6 Vet. App. 433, 435 (1994).

However, even with veterans' right to appeal these fiduciary issues restored, the VA's Fiduciary Program can be a quagmire,[158] as it takes years for the VA to appoint the beneficiary's requested individual as a fiduciary, or to be removed from the program altogether.[159] Since the *Freeman* decision, veterans and their family members need to know how best to navigate the VA's Fiduciary Program. The answer depends on several different factors, including whether the veteran genuinely needs assistance with managing his or her financial affairs and whether a trusted family member or friend is ready, willing, and able to serve as the veteran's fiduciary.

*A. Changes to VA's Fiduciary Program Post-*Freeman

Contemporaneous to the CAVC issuing its *Freeman* decision, the VA removed the fiduciary offices that had been part of every VA Regional Office, consolidating them into six regional fiduciary hubs and one foreign fiduciary office at the VA Manila (Philippines) Regional Office.[160] The six hubs are located in Columbia, South Carolina; Indianapolis, Indiana; Lincoln, Nebraska; Louisville, Kentucky; Milwaukee, Wisconsin; and Salt Lake City, Utah.[161] The VA completed this transformation in March 2012.[162]

Veterans receiving benefits from VA are generally oblivious to its Fiduciary Program until they are notified of VA's proposed finding of incompetence. The issue of a veteran's competency typically arises when he or she undergoes an evaluation to assign a rating reflecting the severity of that individual's service-connected disabilities. Indeed, many VA Disability

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[158] *See, e.g.*, Solze v. Shinseki, 26 Vet. App. 118, 126 n.13 (2013) (Lance, J., dissenting) (stating that "[the] growing consensus outside of VA [is] that the fiduciary system is broken").

[159] According to a June 2015 VA OIG audit, as of September 2014, VBA employed one Field Examiner for every 386 beneficiaries supervised under the Fiduciary Program. Yet, field examinations are:

> [T]he primary means for VBA to assess the welfare of these beneficiaries through contact with the beneficiaries. When field examinations are not conducted, or not completed timely, the general health and well-being of beneficiaries, and their estates, are placed at increased risk. . . . Of the 45,500 scheduled field examinations that did not meet timeliness standards in 2013, approximately 18,100 (40 percent) were still pending as of December 31, 2013. According to benefit payment information extracted from VBA's Corporate Database, the 18,100 untimely field examinations placed about $360.7 million in benefit payments and $487.6 in estate values at increased risk.

U.S. DEP'T OF VETERANS AFFAIRS, OFFICE OF INSPECTOR GENERAL, OFFICE OF AUDITS & EVALUATIONS, NO. 14-01883-371, AUDIT OF FIDUCIARY PROGRAM'S MANAGEMENT OF FIELD EXAMINATIONS 2-3 (JUN. 1, 2015).

[160] Fiduciary Activities of Veteran Affairs for Beneficiaries, 79 Fed. Reg. 430, 430 (Jan. 3, 2014) (to be codified at 38 C.F.R. pts. 3 and 13).

[161] Veterans Benefits Administration, *Fiduciary-Contact Us*, U.S. DEP'T OF VETERANS AFFAIRS, http://www.benefits.va.gov/fiduciary/contact-us.asp (last visited Oct. 14, 2016).

[162] *See* 79 Fed. Reg. 430, 430.

Benefit Questionnaires (commonly known as DBQs) ask the examining physician to opine whether the veteran is capable of managing their benefits payments and financial affairs.[163] However, these questions are so vague that an unsuspecting veteran, who answers honestly that he does not recall his monthly utility expenses, may suddenly receive a proposed finding of incompetency by the VA.[164]

The VA's current regulations authorize the agency to make a finding of incompetency based on medical evidence, a court's determination, or if the beneficiary of VA benefits is under the age of 18 years old.[165] Once such evidence exists, the VA moves quickly to propose incompetency and appoint someone else to manage the veteran's financial affairs. Thus, veterans and their family members should never ignore VA's proposal to appoint a fiduciary. Failing to respond to the VA's recommendation of appointing a fiduciary commonly places the VA beneficiary at risk of losing the opportunity to challenge the proposal or actively participate in the appointment of a fiduciary.

The VA must provide notice of the proposed finding of incompetency, and must allow time for the veteran to challenge this finding.[166] There are two ways for a veteran to challenge the VA's proposal: by requesting a hearing within 30 days of the VA's notice, and/or submitting medical evidence contradicting the VA's findings within 60 days of the VA's notice.[167] Since a VA finding of incompetency must be based on medical evidence, the most appropriate evidence for a veteran to submit is a medical statement by the veteran's treating physician(s) that pointedly rebuts the

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[163] Veterans Benefits Administration, *Compensation*, U.S. DEP'T OF VETERANS AFFAIRS, http://www.benefits.va.gov/compensation/dbq_ListByDBQFormName.asp (last visited Oct. 14, 2016).

[164] This is troubling, as a claimant who is not actively involved in intricate facets of his or her household finances can suddenly become an allegedly incapacitated individual in the VA's eyes, placing that person at risk of completely losing control over his or her VA benefits. *See, e.g.*, *Veterans Administration Fiduciary Appointments*, VA WATCHDOG, https://www.vawatchdog.org/fiduciary-appointments.html (last visited Oct. 17, 2016) ("During a routine [VA medical examination to determine eligibility for disability compensation or pension] the examiner may ask you 'How do the bills get paid around the house' or a similar question. There are a lot of us who would innocently reply: 'My spouse writes all the checks.' . . . To most [VA] examiners that means you cannot handle your own finances. They will make a brief note, 'Veteran is not competent to manage his finances.' Once that little remark is in your record, you have a world of problems coming your way.").

[165] *See* 38 C.F.R. § 3.353(b)-(c) (2015). It is worth noting that to date, no evidentiary standards exist regarding what constitutes competent medical evidence, making it difficult for veterans to know precisely how to challenge a proposed incompetency finding.

[166] *See generally* 38 C.F.R. § 3.353(e) (2015) ("Whenever it is proposed to make an incompetency determination, the beneficiary will be notified of the proposed action and of the right to a hearing as provided in § 3.103. Such notice is not necessary if the beneficiary has been declared incompetent by a court of competent jurisdiction or if a guardian has been appointed for the beneficiary based upon a court finding of incompetency.").

[167] *See generally* 38 C.F.R. § 3.353 (2015).

VA's findings. After all, the VA cannot proceed to make a final determination of incompetency "[u]nless the medical evidence is clear, convincing and leaves no doubt as to the person's incompetency . . . ."[168] Moreover, if any reasonable doubt or uncertainty exists after considering all of the evidence of record, the VA must resolve such doubt "in favor of competency."[169] Thus, if the veteran is indeed competent to manage his or her own financial affairs—and a doctor has substantiated said competency—then this veteran must make a concerted effort to avoid the loss of personal autonomy inherent to enrollment in the VA's Fiduciary Program.

Still, there are veterans who require assistance with managing their financial affairs, including their monthly VA compensation. In such a circumstance, the VA will proceed to appoint someone to serve in a fiduciary role.[170] As of this writing, about 80 percent of the beneficiaries in VA's Fiduciary Program have a one-to-one relationship with their fiduciary and approximately 90 percent of fiduciaries perform their duties without cost to the beneficiary.[171]

Under current policy, the VA is supposed to first consider the individual or entity the beneficiary requests to serve as fiduciary.[172] According to the VA's leadership:

> [The] VA considers the beneficiary's family members, friends, and other acquaintances who are willing to serve without charging a fee. Absent such an appointment, [the] VA will appoint an individual or entity that will provide fiduciary services for a fee. [The] VA's policy is to select the least restrictive and most effective method of payment for a beneficiary.[173]

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[168] 38 C.F.R. § 3.353(c) (2015).

[169] 38 C.F.R. § 3.353(d) (2015). This is consistent with the VA's requirement to give claimants the "benefit of the doubt" and resolve deadlocked cases in the claimant's favor. *See supra* notes 28-29 and accompanying text.

[170] 38 C.F.R. § 3.353(b)(2) (2015).

[171] *Exploring VBA's Fiduciary Program: Hearing Before the Subcomm. on Disability Assistance and Mem'l Affairs of the H. Comm. on Veterans' Affairs*, 114th Cong. 26 (2015) (statement of Mr. David R. McLenachen, Acting Deputy Under Secretary for Disability Assistance); *see also* Fiduciary Activities of Veteran Affairs for Beneficiaries, 79 Fed. Reg. 430, 442 (Jan. 3, 2014) (to be codified at 38 C.F.R. pts. 3 and 13).

[172] *See Exploring VBA's Fiduciary Program*, *supra* note 171, at 25 (statement of Mr. David R. McLenachen, Acting Deputy Under Secretary for Disability Assistance).

[173] *Id.* at 25-26.

B. The Veteran's Rights as a Participant in the VA's Fiduciary Program

In January 2014, the VA published proposed rules to amend its Fiduciary Program regulations.[174] If promulgated, these new standards would represent the first major update to the fiduciary regulations since 1975.[175] To date, however, the VA has not finalized and issued these rules. This is unfortunate because, among other changes,[176] these rules would give beneficiaries clear guidelines regarding what they can expect from their VA-appointed fiduciary, including: (a) their fiduciary's contact information; (b) the right to contact their fiduciary and request a disbursement of funds for current or reasonably foreseeable needs (and other similar requests); and (c) the right to obtain from the fiduciary a copy of the fiduciary's VA-approved annual accounting.[177]

As the VA aptly acknowledged, "[t]hese rights are basic to a fiduciary-beneficiary relationship and are necessary to define a fiduciary's role in such a relationship. They are also necessary to clarify that VA is not the beneficiary's fiduciary and is limited to an oversight role."[178]

One key aspect of VA's Fiduciary Program remains in contention: which law is supreme and preempts all others? According to the agency's leadership, the sections of federal law governing the VA's activities serves as the authoritative voice in this matter:

> We interpret "regardless of legal disability" in [38 U.S.C.] section 5502(a)(1) to mean that in creating the fiduciary program, Congress intended to preempt State law regarding guardianships and other matters to the extent necessary to ensure a national standard of practice for payment of benefits to or on behalf of VA beneficiaries who cannot manage their benefits. This proposed rule would establish that national standard of practice and remove the distinction between "Federal" fiduciaries and "court-appointed" fiduciaries.[179]

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[174] Fiduciary Activities of Veteran Affairs for Beneficiaries, 79 Fed. Reg. 430, 430. The proposed rules do not include any planned changes to 38 C.F.R. § 3.353 regarding the initial incompetency determination. Also missing are any proposed guidelines when a veteran seeks to be removed from VA's Fiduciary Program.

[175] *Id.* at 433.

[176] As one example, the proposed rules would set forth the order in which the VA must consider individuals for the role of fiduciary. *See id.* at 453.

[177] *Id.* at 432.

[178] *Id.*

[179] *Id.* at 430.

However, state probate courts and other state government agencies already employ national standards—and have successfully done so for years.[180] Thus, the VA's quest to create its own preemptive "national standards" seems a curious endeavor, especially in light of its repeated inability to meet timeliness standards for field examinations or official reviews of misuse allegations.[181] Certainly, imposing federal law in this area traditionally left to state jurisdictions is not a move in furtherance of a pro-claimant process, as it unnecessarily causes additional complications and delays to a system that is already difficult for veterans and their family members to navigate.

Veterans who are not capable of managing their own VA compensation should consider utilizing the same process as non-veterans do: going to their state court of proper jurisdiction and seeking that court's appointment of a responsible individual to manage the veteran's finances. This can be a trusted and reliable spouse, family member, friend, or colleague. Once vetted through that state court's application process and approved, the veteran will have a court-appointed fiduciary that the VA must honor.[182] At that point, if the VA wishes to appoint someone other than the court-appointed fiduciary, federal law requires that the VA Secretary's attorney appear in said state court and "make proper presentation of such matters."[183] Until the VA convinces Congress to legislate new national standards that preempt all others, the agency is bound by its laws regarding state court-appointed fiduciaries.

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[180] For example, the Uniform Probate Code (UPC) and Durable Power of Attorney Act are now adopted in many states. In addition, the Social Security Administration (SSA) has a "more sophisticated structure for the appointment of a fiduciary," including clear guidelines for the order of preference in selecting a payee, and a list of considerations when selecting one. *See* Freeman v. Shinseki, 24 Vet. App. 404, 418 (2011) (Lance, J., concurring). *See also* Whitney Bosworth Blazek, Note, *Combating Privatization: Modifying the Veterans Administration Fiduciary Program to Protect Incompetent Veterans*, 63 DUKE L.J. 1503, 1539-40 (2014) (discussing the important role that state law can and should play in better regulating the process of appointing and overseeing fiduciaries).

[181] *See generally* U.S. DEP'T OF VETERANS AFFAIRS, OFFICE OF INSPECTOR GENERAL, OFFICE OF AUDITS & EVALUATIONS, NO. 14-01883-371, AUDIT OF FIDUCIARY PROGRAM'S MANAGEMENT OF FIELD EXAMINATIONS 2-3 (Jun. 1, 2015); *see also* U.S. DEP'T OF VETERANS AFFAIRS, OFFICE OF INSPECTOR GENERAL, OFFICE OF AUDITS & EVALUATIONS, NO. 13-03922-453, AUDIT OF FIDUCIARY PROGRAM CONTROLS ADDRESSING BENEFICIARY FUND MISUSE 1-2 (Aug. 27, 2015).

[182] Indeed, the Court of Appeals for Veterans Claims expressed frustration that neither party in *Solze v. Shinseki* sought a protective proceeding in a Maine probate court that would have entitled the court-appointed conservator to an "expedited certification as a VA fiduciary." 26 Vet. App 118, 127 (2013) (Lance, J., dissenting).

[183] *See* 38 U.S.C. § 5502(b) (Lexis 2016).

C. Myths and Misconceptions Concerning the VA's Fiduciary Program

It is understandably overwhelming for a veteran and his or her family to learn that someone else (sometimes a stranger, other times someone familiar to the family) will be managing the veteran's VA compensation.[184] Feeling overwhelmed and scared of the unknown, the veteran and his family often follow the VA's instructions without question or objection.[185] In a practical sense, the VA-appointed fiduciary dictates how—and how much of—the veteran's VA compensation will be spent and/or saved. And while the fiduciary's role may be to protect the veteran-beneficiary's VA compensation from loss or abuse, the reality is that many veterans feel unjustly cut off from their earned VA benefits. The following are a few common myths and misconceptions that, once dispelled, may help veterans better understand their rights:

1. Myth: Any time a veteran is determined to be incompetent to manage his VA benefits, a fiduciary must be appointed.
   Fact: VA law states unambiguously that a fiduciary is not required in every case. In fact, 38 U.S.C. § 5502(a)(1) lists the veteran-beneficiary as the first choice—among several—to whom VA can pay the veteran's monthly benefits. The last choice is a VA-appointed paid fiduciary.[186]

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[184] *See, e.g.*, Jennifer Kraus, *VA Hires Convicted Felon to Manage Veterans' Money*, VETERANS BENEFITS NETWORK (Feb. 22, 2011, 5:16 PM), http://vets.yuku.com/topic/54218/VA-Hires-Convicted-Felon-to-Manage-Veterans-Money#.WHRPolMrLX4; Bill Murphy, Jr., *VA Fiduciary Program Comes Under Fire*, STARS & STRIPES (Apr. 8, 2011), http://www.stripes.com/blogs/stripes-central/stripes-central-1.8040/va-fiduciary-program-comes-under-fire-1.140500; Eric Nalder & Lise Olsen, *Disabled Vets' Families Fight VA over Fiduciaries*, HOUS. CHRON. (June 17, 2012, 11:35 PM), http://www.chron.com/news/houston-texas/article/Disabled-vets-families-fight-VA-over-fiduciaries-3639797.php; John Schwartz, *Instead of Helping, Trustee Program Is Hurting Veterans, Families Say*, N.Y. TIMES (Apr. 7, 2011), http://www.nytimes.com/2011/04/08/us/08vets.html.

[185] Often, veterans and their family members are unaware of their due process rights to challenge the VA's appointment of a fiduciary. *See* Kraus, *supra* note 184; Murphy, *supra* note 184; Nalder, *supra* note 184, Schwartz, *supra* note 184; *see also* Blazek, *supra* note 180, at 1513-16; Benjamin Krause, *VA Fiduciary Abuse: Almost $1 Million in Payments for Veterans Misused*, DISABLEDVETERANS.ORG (May 30, 2014), http://www.disabledveterans.org/2014/05/30/va-fiduciary-abuse-almost-1-million-payments-veterans-misused/.

[186] *See* 38 U.S.C. § 5502(a)(1) (Lexis 2016) ("Where it appears to the Secretary that the interest of the beneficiary would be served thereby, payment of benefits under any law administered by the Secretary *may be made directly to the beneficiary* or to a relative or some other fiduciary for the use and benefit of the beneficiary . . . ." (emphasis added)).

2. Myth: VA Field Examiners have a right to collect information regarding all sources of income and revenue and commit the veteran to a monthly budget that dictates how all income is to be used.[187]
   Fact: VA's competency determination extends only to a veteran's ability to handle VA benefits to which he is entitled.[188] VA has no legal right or authority to meddle in any other of a veteran-beneficiary's financial affairs.[189]
3. Myth: A finding of incompetency means that the veteran is incapable of making any decisions regarding his/her VA benefits.
   Fact: Incompetency is not synonymous with idiocy. VA's authority to determine incompetency "does not extend to [a veteran's] ability to act on his[/her] own behalf in this Court nor in administrative proceedings before VA."[190]

D. Pro-Claimant Improvements to the VA's Fiduciary Program

At first blush, the VA's Fiduciary Program gives the impression of the straightforward, altruistic goal of protecting a veteran's VA compensation for proper use—now and in the future. In some cases, the VA achieves this stated goal. However, even though five years have passed since the Veterans Court issued *Freeman*, and numerous congressional hearings and VA Office of the Inspector General investigations have shed light on the program's shortfalls, many veterans still do not feel as though their interests are best served while being subject to the Fiduciary Program's strict rules and controls. Significantly, these legitimate concerns arise largely because the Fiduciary Program fails to function in a pro-claimant manner.

Notably, though, the VA could greatly improve this system by altering its procedures with its overriding pro-claimant mandate in mind.[191] First, the VA should remove from its DBQs any vague, underdeveloped, or deceptive questions that could easily lead a veteran to provide an answer that sets the

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[187] *See* Veterans Benefits Administration, *Fiduciary*, U.S. DEP'T OF VETERANS AFFAIRS, http://www.benefits.va.gov/fiduciary/beneficiary.asp (last visited Nov. 16, 2016) ("During the field examination, please have the following information available for review by the field examiner: . . . a list of all assets, to include bank accounts, owned property, stocks, bonds, life insurance, burial plans, etc.").

[188] *See* 38 C.F.R. § 3.353(b)(1) (2015); *see generally* Freeman v. Shinseki, 24 Vet. App. 404, 408 (2011).

[189] *See generally Freeman*, 24 Vet. App. at 408.

[190] *Id.*

[191] *See supra* notes 15-31 and accompanying text.

fiduciary process's wheels in motion.[192] Concurrently, the VA should establish a higher threshold of evidence before permitting appointment of a fiduciary to manage that individual's VA benefits. Importantly, the VA's regulations already establish a presumption that the beneficiary is competent.[193] If this presumption carries any weight, the VA needs to demand that its employees conducting compensation and pension examinations obtain evidence far beyond a statement regarding who manages the finances in a household before the examiners put the veteran and his or her family through the many difficulties that arise when the agency proposes a finding of incompetency.[194]

The VA should also expressly allow a beneficiary's validly executed power of attorney to override the VA's fiduciary appointment. If an individual previously appoints someone to manage his or her financial affairs in the event that this individual becomes incompetent, the VA should not override this choice with someone whom the agency chooses.[195] An individual applying for VA benefits deserves to do so with the confidence that any benefits awarded will, in the event of that individual's incapacity, go to another person whom the beneficiary independently selected to manage his or her funds.[196] When an individual provides his or her birth certificate, marriage license, or military discharge paperwork to the VA in support of a claim, the VA accepts these documents as valid on their face.[197] It is difficult to see why the VA would treat an authentic power of attorney differently than it treats these other legally binding instruments.

Lastly, the VA needs to promulgate its long-lingering proposed rules describing the rights of beneficiaries to whom the VA assigns a fiduciary.[198] As discussed above, myths and misconceptions plague multiple aspects of the Fiduciary Program.[199] These regulations would help ensure crucial protections for beneficiaries whom the VA deems incapacitated.[200] Despite improvements through *Freeman* and subsequent changes, the existing system still opens too many holes for assigned fiduciaries to misuse this system.[201] These new rules would go a long way toward closing these needless gaps.

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[192] *See supra* notes 157-59 and accompanying text.

[193] 38 C.F.R. § 3.353(d) (2015) ("Where reasonable doubt arises regarding a beneficiary's mental capacity to contract or to manage his or her own affairs, including the disbursement of funds without limitation, such doubt will be resolved in favor of competency.").

[194] *See supra* notes 154-55, 158-59, and accompanying text.

[195] *See supra* notes 170-74 and accompanying text.

[196] Notably, a claimant possesses a due process property interest in his or her benefits from the VA, including currently received benefits and benefits that are due to be paid or that should be paid in the future. *See* Cushman v. Shinseki, 576 F.3d 1290, 1297 (Fed. Cir. 2009). This reinforces the fact that a claimant should not be deprived of these benefits lightly. *Id.*

[197] Pomerance, *supra* note 57, at 79.

[198] *See supra* notes 174-178 and accompanying text.

[199] *See supra* notes 186-190 and accompanying text.

[200] *Id.*

[201] *See supra* notes 184-85 and accompanying text.

Undoubtedly, the VA needs to protect the proper distribution of the benefits that it provides. However, to exist as a pro-claimant system, the VA must ensure that claimants are not placed at unnecessary risk of losing control over the benefits that they earned. Such a risk exists in a mechanism that allows a couple of unclear and inconclusive questions during a VA medical examination, which opens the door to a proposed finding of incapacity. This undesirable risk likewise exists in a structure that refuses to honor a previously designated power of attorney and that does not demand the highest level of accountability of fiduciaries' actions. To legitimately call itself pro-claimant, the VA needs to ameliorate this risk for claimants. While it serves only a small segment of the nation's total veteran population, the Fiduciary Program must continue prioritizing its promised improvements so beneficiaries feel as protected as their VA benefits.

X. CONCLUSION

For many decades, federal statutes have emphasized the uniquely pro-claimant status of the VA's benefits system. An authoritative body of caselaw from the United States Supreme Court, the Federal Circuit Court of Appeals, and the Court of Appeals for Veterans Claims staunchly reinforces the legal and practical necessities of the federal veterans' benefits structure existing as a non-adversarial mechanism that defers to the veteran whenever it is plausible. Central tenets of this system established by Congress, such as imposing a statutory duty to assist upon the VA and applying a lighter-than-customary burden of proof in evaluating VA claims, helps ensure that the interests of veterans and their family members in obtaining benefits that they earned are the highest priority of this process.

However, this article demonstrated eight exceedingly problematic areas where other competing interests usurped the intended pro-claimant nature of this system. Each of these areas represents a component of the federal veterans' benefits process where today's federal government breaches the original intent of maintaining a non-adversarial process that tips the balance whenever possible in favor of veterans and their family members. Some of the issues discussed in this article disadvantage certain groups of veterans in favor of allegedly improving the ease and speed at which the VA adjudicates claims. Other troubling matters described here fail to provide necessary information to claimants, increasing the likelihood that they will not succeed in their claims and appeals for benefits. Still, other points of concern addressed in this article focus on unnecessarily bureaucratic measures that unduly complicate a system that many veterans and their families already find difficult to navigate.

Based on the longstanding stance of Congress and the courts, however, all of these issues should remain subordinate to maintaining this system as a pro-claimant, non-adversarial apparatus that veterans and their families can easily

and effectively utilize. The good news is that the VA maintains significant control over its operations, and thus could directly address many of these problems through promulgating new pro-claimant regulations. If the VA neglects to do so, then Congress needs to step in by enacting new legislation to safeguard the pro-claimant, non-adversarial system that federal legislators and judges alike recognize as important.

Regardless of the method, these changes—and any other amendments that better emphasize the pro-claimant, non-adversarial nature of this process—are essential. The men and women who served in this nation's armed forces have already confronted many dangers, challenges, and hostilities at varying levels while in uniform. It is imperative that the government for whom they faced these risks and underwent these sacrifices avoids creating a system where these veterans now must battle for the benefits that they already earned.