ECONOMICS AND AUSTERITY RELATIVE TO VETERANS' CLAIMS AND THE VETERANS APPEAL PROCESS

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I. Introduction

Providing for veterans who have selflessly served and dearly sacrificed is firmly rooted in our nation's history. Remembering the importance of this concept, lest we forget or overlook the noblest of all sacrifices, we must persevere to further the goals of a grateful nation in a responsible way.

Veterans who served this country in any capacity are a special class of individuals who earned the right to have an appellate system that is efficient and responsive to their appeals for relief. In this regard, the government has continuously modified the veterans' claims and appellate system to promote responsiveness and efficiency in the veterans' claims system. One such modification occurred in 1988 when judicial review was inserted in the veterans' claims process.[1] Despite the noble attempts to improve upon the veterans' claims system, significant delays in claim adjudication persist to this day.[2] The purpose of this article is to illustrate with current empirical data and historical research that increased efficiency in the existing veterans' claims process can be achieved by implementing a reasonable claim time limit to address the delays in claim adjudication. In addition to increased efficiency, this time limit would generate fiscal savings that would be preferable to savings generated from blanket cuts to federal spending and veterans' benefits.

To address the possibility of implementing a time limit in veterans claims, Part II-A discusses the legislative evolution of veterans'

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[1] *See* Veterans Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988) [hereinafter VJRA].

[2] *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 10-213, VETERANS' DISABILITY BENEFITS: FURTHER EVALUATION OF ONGOING INITIATIVES COULD HELP IDENTIFY EFFECTIVE APPROACHES FOR IMPROVING CLAIMS PROCESSING [hereinafter GAO 10-23] (2010); *The Impact of Operation Iraqi Freedom and Operation Enduring Freedom on the United States Department of Veterans Affairs: Hearing before the Subcomm. of the H. Comm. of Veterans Affairs*, 110th Cong. 48 (2007) [hereinafter *Impact of War on VA*] (statement of Professor Linda Bilmes, Harvard Univ.).

disability compensation law in relation to our evolving national economy. Part II-B discusses different legal theories that have evolved to govern the adjudication of veterans' disability compensation appeals. Part II-C connects the legal and legislative evolution by providing a brief structural overview of the current veterans' benefit-appellate system. Part III discusses a few of the appellate and structural changes the Veteran's Administration (VA) has made to address problem areas within its disability and compensation claims system. Part IV briefly describes the demographic characteristics of veterans who appealed their claims to the Court of Appeals for Veterans Claims (CAVC) in fiscal year (FY) 2010. Part V argues for the implementation of a statute of repose in our veterans' disability claim process to address the shortcomings of the current structure. Clearly, any change in the veterans' appellate process could have vast fiscal implications.[3] However, it is our collective obligation as Americans to explore the premises underlying the structure of the veterans' benefits and appellate system in order to promote efficiency, responsibility, and predictability in this unique system.

II: The Legislative Evolution of Veterans' Disability Pensions

In 1781, George Washington wrote, "We ought not to look back, unless it is to derive useful lessons from past errors and for the purpose of profiting by dear bought experience."[4] A system that originally began as a simple, straight-forward approach to administer veterans' disability compensation has since morphed into a complex administrative organism.[5] Consequently, the evolving legislative scheme that governs the current veterans' disability appellate system has had many intricate developments.[6] To address this historical complexity, it is necessary to

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[3] *See, e.g.*, VA PERFORMANCE AND ACCOUNTABILITY REPORT FY 2010, at I-92 [hereinafter VA PAR 2010], *available at* http://www.va.gov/budget/report/archive/FY-2010-VAPerformanceAccountabilityReport.zip (noting the increased net cost of a billion dollars as a result of implementing Agent Orange benefits).

[4] Letter from George Washington, to John Armstrong (Mar. 26, 1781) (The George Washington Papers at the Library of Congress), *available at* http://memory.loc.gov/cgi-bin/query/r?ammem/mgw:@field(DOCID+@lit(gw210400.

[5] Linda Bilmes, *Soldiers Returning from Iraq and Afghanistan: The Long-term Costs of providing Veterans Medical Care and Disability Benefits* 6 (John F. Kennedy Sch. of Gov., Harvard Univ., Working Paper RWP07-001), *available at* http://web.hks.harvard.edu/publications/workingpapers/citation.aspx?PubId=4329 (describing the disability compensation process as lengthy and complicated).

[6] *See* WILLIAM H. GLASSON, THE HISTORY OF MILITARY PENSION LEGISLATION IN THE UNITED STATES 10 (New York: Columbia Univ. Press, 1900). From the founding of the

discuss three areas: the legislative evolution that has led to the modern day VA disability compensation and appellate system; the evolution of various legal theories that govern the adjudication of veterans' claims; and a brief overview of the current disability claims system.

A. The Legislative Evolution of Veterans' Disability Pensions

The roots of the modern day veterans' disability system can be traced back to antiquity, when Greece provided pensions to soldiers who could prove permanent injury.[7] Similar legislation enacted in Elizabethan England provided pensions to veterans who served after March 1588, the year the English defeated the Spanish Armada.[8] In the United States, this tradition dates back to 1636, when Plymouth Colony declared that any soldier maimed in defense of the Colony would be "maintained competently" for life at the expense of the public treasury.[9] In 1776, the Continental Congress continued this commitment to veterans by announcing it would provide disability compensation to soldiers injured in the struggle for American independence.[10] Although benevolent, these pieces of legislation provided little substantive guidance on how to evaluate or adjudicate a veteran's disability claim.[11]

In 1792, Congress began providing substance to this issue by passing the Invalid Pension Act of 1792 (the 1792 Act), which promised lifetime disability compensation payments to veterans injured in the defense of

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nation until the mid-20th century, veterans' disability pensions were divided into service pensions and disability pensions, with the latter being known as "invalid pensions." *See id*. Because the term "invalid pension" is no longer used, this article will refer to such pensions as a "disability compensation" when possible to limit confusion.

[7] Douglass C. McMurtrie, *The Historical Development of Public Provisions for the Disabled Soldier*, 26 INTERSTATE MED. J., Feb. 1919, at 109.

[8] An Acte for the Relief of Souldiours, 35 Eliz., c.4 (1588).

[9] Records of the Colony of New Plymouth in New England, vol. 11 [Laws 1623–1682], 13, 106, 182. *See* Daniel Vickers, *Competency and Competition: Economic Culture in Early America*, 47 WM. & MARY Q., Jan. 1990, at 3, 3–10 (equating the colonial notion of competent maintenance to subsistence).

[10] Worthington C. Ford et al., *Journals of the Continental Congress*, 1774–1789 (1914) (edited from the Original Records in the Library of Congress, vol. 5, at 702–05) (Washington: GPO, 1904–37).

[11] *See* ROBERT MAYO & FERDINAND MOULTON, ARMY AND NAVY PENSION LAWS OF THE UNITED STATES 1–2 (Lucas Brothers, 2d ed. 1854) (detailing the early procedures used to adjudicate colonial claims for disability compensation).

the colonies during the Revolutionary War.[12] However, the benevolence of the 1792 Act was confined by the inclusion of a two-year time frame in which veterans could apply for and receive benefits.[13] The 1792 Act also required veterans who sought disability compensation to appear before a Circuit Court Judge and submit evidence proving their claimed injury occurred during military service.[14] Once a veteran fulfilled this legal requirement, the court, acting pursuant to the 1792 Act, was then required to define the degree of the injury and connect it to a veteran's military service.[15] If a favorable determination resulted, the court informed the Secretary of War who then notified Congress to place the veteran's name on the federal pension list.[16] However, the 1792 Act provided that the Secretary of War could reverse the court's findings if the Secretary concluded that an "imposition or mistake" occurred.[17]

Supreme Court Justices John Jay and William Cushing protested against the 1792 Act on the grounds that it violated the separation of powers doctrine because it permitted an executive official to overturn judicial determinations.[18] In their protest, the Justices, along with New York Circuit Judge James Duane, offered a solution to the problem by proposing that appointed "commissioners" hear these claims instead of federal judges.[19] Future legislation structured in this way, they opined, would be constitutionally permissible because the separation of powers doctrine would not be implicated if an executive branch official

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[12] *See* An Act to Provide for the Settlement of Claims of Widows and Orphans Barred by the Limitations heretofore Established, and to Regulate the Claims of Invalid Pensions, 1 Stat. 243 (1792) [hereinafter 1792 Act], *available at* http://www.constitution.org/uslaw/sal/sal.htm.

[13] *Id.* It should be noted that after America won its independence from Great Britain, the uncertainty of the undeveloped national economy was a central concern as there was no longer a demand for war-time goods and our ability to establish and regulate foreign commerce was shrouded in uncertainty. *See* CHESTER A. WRIGHT, ECONOMIC HISTORY OF THE UNITED STATES 230 (William H. Spencer ed., Univ. of Chicago Press 1941).

[14] *See* 1792 Act, *supra* note 12; Susan L. Bloch & Maeva Marcus, *John Marshall's Selective Use of History in* Marbury v. Madison, WIS. L. REV. 301, 304 (1986) (discussing the procedure for obtaining an invalid pension under the 1792 and 1793 Acts).

[15] *See* 1792 Act, *supra* note 12.

[16] *See id.*; *see* GLASSON, *supra* note 6, at 26.

[17] *See* 1792 Act, *supra* note 12.

[18] GLASSON, *supra* note 6 at 26–27.

[19] *Id.* The protest may have also involved the perceived impact of adding veterans' claims to the burden of the early traveling circuit. *See* CLARE CUSHMAN, COURTWATCHERS: EYEWITNESS ACCOUNTS IN SUPREME COURT HISTORY 31–34 (2011) (detailing the burdens of early "circuit riding").

overturned the legal determination of a commissioner.[20] Although this distinction may seem arbitrary, it contributed to the fundamental questions posed in the landmark legal battle of *Marbury v. Madison*.[21] Despite the arguments raised by Justice Jay and his colleagues, the dispute over the provisions in the 1792 Act ended in a draw,[22] as Congress modified it the following year in the 1793 Act.[23]

The 1793 Act retained the two-year claim limitation period, but required veterans to produce and submit evidence of a service-connected disability, under oath, to a district court judge or a three-person commission.[24] In this way, the district courts acted as gatekeepers for the admission of evidence and forwarded admitted documents to the Secretary of War for authentication.[25] In turn, the Secretary would make a pension recommendation by submitting a statement of the case[26] to Congress for a decision in the first instance.[27] Determinations made by a district court under the 1793 Act were appealable, but only by the Secretary of War.[28] As a result, the Federal Government retained exclusive review of veterans' disability claims as a mechanism to correct an erroneous award.[29] Consequently, the early legislative and appellate paradigm of our veterans' disability compensation system was premised on giving Congress the ultimate authority to correct an erroneous benefit denial.[30] Put another way, a veteran who received an adverse disability compensation decision had to successfully persuade their Congressional representative, and perhaps other members of Congress, that they were

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[20] *See* GLASSON, *supra* note 6, at 27.
[21] 1 Cranch (5 U.S.) 137, 171 (1803).
[22] *Compare* 1792 Act, *supra* note 12, *with* An Act to Regulate the Claims of Invalid Pensions, 1 Stat. 324 (1793), *available at* http://www.constitution.org/uslaw/sal/sal.htm [hereinafter 1793 Act]. Because the 1792 Act was modified by the 1793 Act the following year, it was never officially challenged or sanctioned by the courts . *See In Hayburn's Case*, 2 Dall. 409, 2 U.S. 109 (1792); *In re* Yale Todd, 13 How. 40 (1851); Keith E. Whittington, *Judicial Review of Congress Before the Civil War*, 97 GEO. L. REV. 1257, 1270–73, (2009) (explaining the relationship between *Hayburn's Case* and *Yale Todd* in the historical context of judicial review and the early Invalid Pension Acts).
[23] *See* 1793 Act, *supra* note 22; GLASSON, *supra* note 6, at 59.
[24] *See* 1793 Act, *supra* note 22.
[25] *See id.*
[26] *See id.* As a historical note this seems to be the first use of the term "statement of the case" used today. *See* 38 U.S.C. § 7105(a) (Westlaw 2012).
[27] *See* 1793 Act, *supra* note 22.
[28] *See id.*
[29] *Id.*
[30] *See* James D. Ridgway, *Splendid Isolation Revisited*, 3 VETERANS L. REV. 133, 146–49 (2011).

entitled to relief and secure a spot on the federal pension list through separate legislation.[31]

The substance of the 1792 and 1793 Acts helped establish the modern-day structure of administrative rule making procedures by placing the Secretary of War in a particularly influential position to administer the early veterans' disability pension system.[32] Because Congress typically focused veterans' legislation on a specific class of veteran,[33] and left the qualifying criteria broadly defined, the Secretary of War, Commissioner of Pensions, or any other duly appointed agency had to fill in the legislative gaps with administrative guidance.[34] Although

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[31] *See, e.g.*, An Act Concerning Invalid Pensioners, 2 Stat. 491 (1808) [hereinafter 1808 Act], *available at* http://www.constitution.org/uslaw/sal/sal.htm (illustrating the means in which discrete names were placed on the invalid or disabled pension list via independent legislation).

[32] *See* GLASSON, *supra* note 6, at 95.

[33] *See* GUSTAVUS A. WEBER, THE BUREAU OF PENSIONS: ITS HISTORY, ACTIVITIES, AND ORGANIZATION 9–25 (John Hopkins Press 1923) (illustrating Congress's historical approach to passing disability legislation targeted at veterans of specific wars or battles and the resulting administrative burden). Additionally, Congress continually updated legislation if it wanted to increase pensions or modify the names to the pension list. *See id.*; *see also* 1808 Act, *supra* note 31.

[34] As time passed, Congress frequently shifted the administration of pensions to different agencies, with the responsibility ultimately delegated to VA. For example, after the Revolutionary War, the Founders thought it best to vest the administration of veterans' pensions with the Department of War. *See* An Act to Provide for the Settlement of Claims of Widows and Orphans barred by the limitations heretofore established, and to regulate the Claims to Invalid Pensions, 1 Stat. 233, 244 (1792). At that time, veterans' claims were processed by pension agents who were operating under the authority and at the direction of the Secretary of War. *See, e.g.*, An Act to Authorize the Secretary at War to appoint an additional agent for paying pensioners of the United States, in the state of Tennessee, 3 Stat. 521 (1819). Around 1810, one of the first administrative agencies, the Military Lands and Pension Bureau, was created to help address veterans' disability claims. *See* Ridgeway, *supra* note 30. Although a separate agency, this bureau operated under the discretion of the Department of War. *Id.* As time passed, the Military Bounty Lands and Pension Bureau was divided into two parts, leaving the Pension Bureau as a separate entity. *Id.* In this way, Congress better positioned itself to oversee appropriations regarding veterans' disability claims. *Id.* In 1833, the Pension Bureau was renamed the Bureau of Pensions and the office was given a new head, the Commissioner of Pensions. *See* An Act for making appropriations for the civil and diplomatic expenses of government for the year one thousand eight hundred thirty-three, 4 Stat. 619, 622 (1833). The new Commissioner of Pensions was appointed by the President and operated under the previous rules promulgated by the Department of War. *See id.* Thus, the Bureau and the new Commissioner were still subordinate to the Secretary of War, but could promulgate new rules and regulations to regulate pensions. *See id.* This change was only temporary, however, as Congress reassigned the Bureau of Pensions to the Department of the Navy in 1840, and then to the newly created Department of the Interior in 1849. *See*

these early pieces of legislation provided the early framework used in adjudicating veterans' appeals, the scope of the benefits and the ability to appeal were limited by not providing a formal appeal process, barring claims after a specified time, and leaving qualifying criterion vaguely defined.[35]

One of the first legislative changes that expanded the qualifying criteria for veterans' benefits occurred in 1818, when the Department of the Treasury informed Congress that a tax surplus was expected.[36] Consequently, President Munroe suggested, and Congress approved, expanding the benefits paid to veterans of the Revolutionary War.[37] The resulting law, known as the Service Pension Act of 1818 (the 1818 Act), provided a lifetime pension to all veterans of the Revolutionary War, regardless of disability.[38] In order to qualify for a pension under the 1818

An Act to continue the office of the commissioner of Pensions, and to transfer the pension business, heretofore transacted in the Navy Department, to that office, 5 Stat. 369 (1840); An Act to establish the Home Department, and to provide for the Treasury Department an assistant Secretary of the Treasury and a commissioner of Customs, 9 Stat. 395 (1849).

In 1914, Congress created the Bureau of War Risk Insurance and, in 1917, assigned it as a parallel agency to administer veterans' pensions. *See* 40 Stat. 398 (1917). Because there were multiple agencies administering veterans pensions at this time, Congress abolished the Bureau of War Risk insurance and created the Veterans Bureau in 1921. *See* 42 Stat. 147 (1921); 42 Stat. 202 (1921). Nine years later, in 1930, Congress further streamlined the agencies responsible for administering veterans' disability pensions by abolishing the Bureau of Pensions, incorporating it into the Veterans Bureau. *See* 46 Stat. 1016 (1930). Later that same year, by executive order, President Taft authorized the Creation of the Veterans Administration. *See* Executive Order No. 5398 (1930). It was not until 1989, that the Veterans Administration was elevated to a cabinet-level agency to create the current Department of Veterans Affairs. *See* 102 Stat. 2635 (1989).

[35] *Compare* 1793 Act, 1 Stat. 324 (1793) (giving the Secretary of War the duty to provide Congress with a Statement of the Case to place the veterans on the pension list), *with* An Act to Make Provision for Persons that Have Been Disabled by Known Wounds Received in the Actual Service of the United States, During the Revolutionary War, 2 Stat. 242 (1803) (providing the Secretary of War with the ability to determine if the claim is correct within the meaning of the Act before transmitting the claim to Congress).

[36] GLASSON, *supra* note 6, at 32–36.

[37] An Act to Provide for Certain Persons Engaged in the Land and Naval Service of the United States, in the Revolutionary War, 3 Stat. 410 (1818) [hereinafter 1818 Act].

[38] *Id.* Between 1790 and 1819 the American economy began a period of growth as the French and English relaxed their restrictive trade policies after a series of wars were executed between the two nations. *See* GARY M. WALTON & HUGH ROCKOFF, THE HISTORY OF THE AMERICAN ECONOMY 149 (Thomas O. Gray ed., 9th ed. 2002). Additionally, the occurrence of the French Revolution helped stimulate a strong demand for American products overseas, resulting in a five-fold increase in exports over this time period. *See* WRIGHT, *supra* note 13, at 246–47.

Act, a veteran was only required to provide a sworn statement that they were a Revolutionary War veteran who was suffering from "reduced circumstances."[39] As a result of these low evidentiary standards, one legislator lamented that this piece of pension legislation would "be one that our posterity regrets."[40]

Indeed, the low evidentiary burdens of the 1818 Act proved ripe for fraud and abuse.[41] Specifically, after the 1818 Act was passed, the number of veterans on the federal pension list ballooned from 2,500 to over 18,000 over the next two-years.[42] This increase was so large that annual expenditures on pensions went up nearly ten-fold in one-year.[43] Accordingly, what started out as an altruistic and benevolent endeavor turned into a political nightmare as fellow citizens funneled into town hall meetings to allege that many men of able means were unjustly collecting ensions and abusing taxpayer goodwill.[44]

In response, Congress amended the 1818 Act and required veterans receiving pensions under the Act to submit a notarized statement of income and assets to verify their financial need.[45] If veterans did not comply, then the Secretary of War was empowered to remove such individuals from the pension list.[46] As a result of this amendment, over 6,000 names were removed from the pension list.[47] Despite this move towards increased fiscal responsibility, in 1823 Congress created a

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[39] GLASSON *supra*, note 6, at 33–35. The concept of reduced circumstances was meant to apply broadly as veterans only had to demonstrate a financial need to avert poverty. *Id.*
[40] *Id.* at 35.
[41] *Id.* at 37.
[42] *Id.*
[43] *Id.*
[44] *Id.* at 36.
[45] *See* An Act in Addition to an Act, entitled 'An act to Provide for Certain Persons Engaged in the Land and Naval Service of the United States, in the Revolutionary War, 3 Stat. 569 (1820) [hereinafter 1820 Act], *available at* http://www.constitution.org/uslaw/sal/sal.htm. In economic terms, the Panic of 1819 coincides with this decline in veterans' disability benefits. *See* WRIGHT, *supra* note 13, at 494–95.
[46] *See* 1820 Act, *supra* note 45.
[47] GLASSON, *supra* note 6, at 39. *See also* An Act Regulating Payments to Invalid Pensioners, 3 Stat. 514 (1819) (requiring two affidavits by recognized surgeons describing disability and causation to establish eligibility for a disability pension), *available at* http://www.constitution.org/uslaw/sal/sal.htm.

mechanism for the 6,000 non-compliant veterans to be reinstated on the pension list if they were able to prove financial need.[48]

Despite the disturbing rate of fraud following the passage of the 1818 Act, when the economy began to improve[49] Congress resumed passing legislation that expanded and liberalized veterans' benefits.[50] For example, in 1828, Congress again passed an Act granting all veterans of the Revolutionary War a pension, regardless of need or disability.[51] Similarly, in 1862, the General Pension Act was passed which mandated that diseases, such as tuberculosis contracted during military service, were now compensable service-connected disabilities.[52] In 1873, Congress passed the Consolidation Act, which began to focus on the degree of disability, rather than military rank, as the primary factor for determining the amount paid for a service-connected disability.[53] In 1879, Congress passed the Arrears Act which permitted veterans to receive disability compensation from the date of discharge instead of the date of application.[54] In 1890, Congress passed the Disability Pension

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[48] *See* An Act Supplementary to the Acts to Provide for Certain Persons Engaged in the Land or Naval Service of the United States in the Revolutionary War, 3 Stat. 782 (1823), *available at* http://www.constitution.org/uslaw/sal/sal.htm.

[49] *See* HAROLD M. SOMERS, GROWTH OF THE AMERICAN ECONOMY: PERFORMANCE OF THE AMERICAN ECONOMY 319 (Harold F. Williamson ed., 2d ed., Prentice Hall Pub. 1951).

[50] *See* Theda Skocpol, *America's First Social Security System: The Expansion of Benefits for Civil War Veterans*, 114 POL. SCI. Q. 85, 108 (1993) (describing America's historical approach to veterans' disability as the most liberal in the world).

[51] An Act Supplementary to the Act for the Relief of Certain Surviving Officers and Soldiers of the Revolution, 4 Stat. 529 (1832), *available at* http://www.constitution.org/uslaw/sal/sal.htm. Indeed, pursuant to this Act, widows or orphans could even collect the pension due to the veteran. *Id.*

[52] An Act to Grant Pensions, 12 Stat. 566 (1862), *available at* http://www.constitution.org/uslaw/sal/sal.htm. Although this legislation was passed during the Civil War, the manufacturing, farming, mining, and commerce sectors experienced growth as the Federal Government began to stimulate the economy with spending. *See* SOMERS, *supra* note 49, at 324.

[53] *See* An Act to Revise, Consolidate, and Amend the Laws Relating to Pensions, 17 Stat. 566, 567 (1873), *available at* http://www.constitution.org/uslaw/sal/sal.htm. Throughout 1865-1890 the economy was relatively unstable, but benefited from investment in railroads, domestic land speculation, and a crop failure in Europe. *See* SOMERS, *supra* note 49, at 646–52.

[54] *See* An Act to Provide that All Pensions on Account of Death, or Wounds Received, or Disease Contracted, Shall Commence From the Date of Discharge From the Service of the United States, 20 Stat. 265 (1879), *available at* http://www.constituion.org/uslaw/sal/sal.htm.

Act which permitted veterans to receive a disability compensation for mental conditions connected with active service.[55]

Although the legislation passed between 1828 and 1890 was well intended, Congress lost sight of the cumulative fiscal impact of continually expanding veterans' disability compensation benefits.[56] Indeed, it was not until 1933, in the wake of the Great Depression, that the government again realized it had to readdress the scope of the veterans' disability pension system.[57] To this end, Congress passed the Economy Act of 1933, which reflected an effort to remove judicial review of pension decisions,[58] repeal previous pension laws, review the current pension list to identify reductions, and reduce previously granted pensions by ten-percent.[59]

Despite the pre-World War II move toward reformation, when the economy began to improve, the stage was set for a renewed round of expansions in the veterans' benefits system.[60] During this period, Congress passed the Servicemen's Readjustment Act of 1944, which provided education benefits, home loan guaranties, and a year of unemployment compensation for veterans returning from war.[61] The success of this legislation led to the creation of the Veterans' Readjustment Benefits Act of 1966, which provided these same benefits to veterans without being premised upon war-time service.[62] In 1991, Congress passed the Agent Orange Act, which illustrated a recognition that certain diseases suffered by veterans were caused by exposure to

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[55] *See* An Act Granting Pensions to Soldiers and Sailors Who Are Incapacitated for the performance of Manual Labor, and Providing Pensions to Widows, Minor Children, and Dependent Parents, 26 Stat. 182 (1890).
[56] *See* Skocpol, *supra* note 50.
[57] *See* HISTORY OF THE U.S. SENATE COMMITTEE ON FINANCE (1932–1938) [hereinafter COMMITTEE ON FINANCE], *available at* http://finance.senate.gov/about/history/ (last visited Aug. 5, 2011).
[58] *See* Rory E. Riley, *Simplify, Simplify, Simplify-An Analysis of Two Decades of Judicial Review in the Veterans' Benefits Adjudication System*, 113 W.VA. L. REV. 67, 71–72 (2010).
[59] *See* An Act to Maintain the Credit of the United States, 48 Stat. 8, 12 (1933) [hereinafter Economy Act], *available at* http://www.constitution.org/uslaw/sal/sal.htm. This Act was also part of President Roosevelt's campaign promise to reduce $500 million in federal spending. *See* COMMITTEE ON FINANCE, *supra* note 57.
[60] *See* VA HISTORY IN BRIEF, *available at* http://www.va.gov/opa/publications/archives/docs/history_in_brief.pdf. (last visited Mar. 5, 2012).
[61] *See* Servicemen's Readjustment Act, Pub. L. No. 78-346, 58 Stat. 284 (1944).
[62] *See* Pub. L. No. 89-358, 80 Stat. 12 (1966).

toxic herbicides while in Vietnam.[63] Similarly, in 1994 Congress passed legislation to recognize and compensate veterans for what is known as Gulf War Syndrome.[64] Although this is not an exhaustive list of the legislation passed in the post WWII era, if this historical expansion of benefits is coupled with the current state of the United States' economy,[65] it seems likely that the issue of reducing veterans' benefits through cuts in federal spending will again be addressed by Congress.[66]

B. Legal Evolution of Veterans' Disability Pensions

As veterans' disability claims legislation evolved to recognize a larger range of service-connected disabilities, the legal principles underlying the adjudication of veterans' claims and appeals followed a different trajectory. For greater insight into the modern day veterans' appellate system, it is necessary to discuss the evolution of the legal principles underlying the veterans' claims process.

After ratification of the Constitution, the idea of judicial review, as well as its role in the veterans' claims process, was in its infancy. As a result, early legal battles over veterans' disability claims were more conceptual in scope, focusing on constitutional propriety instead of the merits of a veteran's claim.[67] However, as the agencies that administered veterans' disability pensions developed new regulations to govern the

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[63] Agent Orange Act of 1991, Pub. L. No. 102-4, 105 Stat. 11 (1991). This statute allowed the Secretary of the VA to perform studies of diseases related to the exposure to herbicides, like Agent Orange, to enable compensation to be paid to those who were exposed. Twenty years later, the Secretary finalized a rule to compensate Vietnam veterans who were exposed by expanding the presumptive conditions listed in 38 U.S.C. § 1116 (2006). *See* VA PAR 2010, *supra* note 3.

[64] *See* 38 U.S.C. § 1117 (Westlaw 2012).

[65] Currently the U.S. economy is in a fragile state with unemployment at 8.3 percent, 2011 fourth quarter real gross domestic product growth at 2.8, and a federal budget deficit of $578 billion for the first five months of FY 2012. *See* News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, USDL-12-0163, at 2 (2012), *available at* http://www.bls.gov/news.release/pdf/empsit.pdf; BUREAU OF ECONOMIC ANALYSIS, U.S. DEP'T OF COMMERCE, GDP GROWTH ACCELERATES IN THE FOURTH QUARTER (2012), *available at* http://www.bea.gov/newsreleases/national/gdp/gdphighlights.pdf; CONG. BUDGET OFFICE, MONTHLY BUDGET REVIEW FISCAL YEAR 2012 (2012), *available at* http://www.cbo.gov/sites/default/files/cbofiles/attachments/2012_02%20MBR.pdf.

[66] *See* Economy Act and accompanying text, *supra* note 59.

[67] *Compare In Hayburn's Case*, 2 U.S. 408 n.1 (1792), *with* Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 315–20 (1985) (indicating the distinction between the modern approach to adjudicating a Veteran's appeal versus the early approach).

adjudication of claims, the competing legal theories underlying these claims began to emerge through various opinions issued by the courts.[68]

One of the first cases to question the legislative structure of the veterans' disability system was *Marbury v. Madison*.[69] Although this landmark case is more appropriately remembered for establishing judicial review, it nevertheless framed the discourse on the veterans' disability system by questioning the constitutional and legislative propriety of delegating executive authority over judicial determinations in veterans' claims.[70] Specifically, Chief Justice Marshall, in *Marbury*, openly questioned whether Congress could constitutionally delegate executive authority over judicial determinations via the 1792 Act when he stated:

> If [the Secretary of War] should refuse to [place a veteran's name on the pension list], would the veteran be without remedy? Is it to be contended, that where the law, in precise terms, directs the performance of an act, in which an individual is interested, the law is incapable of securing obedience to its mandate? . . . Whatever the practice on particular occasions may be, the theory of this principle will certainly never be maintained. No act of the legislature confers so extraordinary a privilege, nor can it derive countenance from the doctrines of the common law.[71]

Although the 1792 Act was not the primary issue in *Marbury*, the court intimated that veterans were entitled to some form of review over their disability compensation decisions, but the Court left the degree and scope of review undefined.[72]

After John Jay and his colleagues objected to the structure of the 1792 Act, Congress utilized the 1793 Act to establish itself as the final arbiter of veterans' disability compensation claims.[73] In *United States v. Ferreira*, Chief Justice Taney found it within the ambit of Congress's constitutional authority to delegate evidentiary rulings over veterans'

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[68] *See supra* note 34 (defining the administrative evolution over veterans' pensions).
[69] 5 U.S. (1 Cranch) 137, 164–65 (1803).
[70] *Id.*
[71] *Id.* at 163–66.
[72] *See id.* at 165.
[73] *See* 1793 Act, *supra* note 22.

claims to an independent tribunal.[74] In so doing, Justice Taney resurrected the previously undecided Hayburn's Case[75] and called Congress' decision to modify the 1792 Act "correct,"[76] concluding that Congress had the authority to create and define the powers of a veterans' pension tribunal.[77] Although *Marbury* and *Ferreira* differ factually, their legal findings affirmed the conclusions that (1) some review structure over veterans' appeals was appropriate, but (2) the precise structure of this tribunal was best left to Congressional discretion.

Next, the courts questioned whether an executive official's adjudication of a veteran's appeal constituted either a ministerial or discretionary act.[78] In *Decatur v. Paulding*, the Supreme Court reviewed a pension claim of a veteran's widow, Susan Decatur.[79] Mrs. Decatur was previously awarded a five-year survivor's pension pursuant to an independent legislative act of Congress.[80] After Mrs. Decatur was awarded this five-year pension, Congress passed an act to provide other similarly situated veteran-widows with pensions for life, or until they remarried, for which Mrs. Decatur also applied.[81] Recognizing the redundant nature of Mrs. Decatur's claims, the Secretary of the Navy[82] offered Mrs. Decatur a choice between the two pension awards, but she refused to make a choice and instead petitioned the courts to compel the Secretary of the Navy to place her name on both pension lists.[83]

In dismissing the petition, the Supreme Court found that Congress had expressly delegated discretion to the Secretary of the Navy to administer the pension fund.[84] In so doing, the Court delineated a ministerial act from a discretionary act in veterans' claims.[85] Simply put,

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[74] 54 U.S. 40, 46–48 (1851).
[75] 2 U.S. 109 (1792).
[76] *Ferreira*, 54 U.S. at 50.
[77] *Id*. at 51.
[78] *See* BLACK'S LAW DICTIONARY 534, 1086 (9th ed. 2009) (defining discretionary act as "[a] deed involving an exercise of personal judgment" and a ministerial act as involving "obedience to law instead of discretion").
[79] 39 U.S. 497, 497–98 (1840).
[80] *Id.*
[81] *Id*.
[82] Note the administrative oversight change. *See supra* note 34.
[83] *Decatur*, 39 U.S. at 498–99.
[84] *Id.*
[85] *Id*. at 497. A ministerial act can best be categorized as a command form the legislature, whereas a discretionary act requires the use of reasoning and expertise to carry out the legislative intent. *See* 4 RATHKOPF'S THE LAW OF ZONING AND PLANNING § 64:6 (4th ed. 2011).

the Court held that the previous congressional act, which gave Mrs. Decatur her initial five-year pension, was ministerial in nature because it required compliance from executive officials.[86] However, under the latter act, the Secretary's congressionally delegated use of "judgment" was discretionary in nature, and the use of such delegated discretion could not form the basis of a cognizable legal claim.[87] Consequently, after the Supreme Court dismissed *Decatur* for a want of jurisdiction,[88] the Court began giving deference to an administrator's use of judgment in a claim's denial.[89]

After deciding *Decatur*, the Supreme Court next addressed whether a veteran's claim for disability compensation was either a vested legal right or merely a charitable gratuity.[90] If a veteran's claim was founded upon a vested legal right, then a veteran could invoke the Due Process Clause to have a previously denied claim brought before a court for review. In contrast, if a veteran's claim was classified as a charitable gratuity, then review of the claim could be dismissed on jurisdiction grounds, as in *Decatur*.[91] To resolve the issue of whether all claims for disability compensation were vested legal rights or charitable gratuities, the Supreme Court considered the competing claims of veterans who sought disability pensions under the policies of the Bureau of War Risk Insurance.[92]

Under the act that established the Bureau of War Risk Insurance, all veterans automatically received standard disability-pension insurance; however, this act also permitted veterans to receive greater coverage if they elected to purchase a separate Bureau insurance policy.[93] In this regard, two classes of veterans emerged: those with claims vested in

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[86] *Decatur*, 39 U.S. at 498–99.
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *See* Lynch v. United States, 292 U.S. 571, 577(1934); *see also* United States v. Cook, 257 U.S. 523, 527 (1922); Frisbie v. United States, 157 U.S. 160, 166 (1895); United States v. Teller, 107 U.S. 64, 68 (1883) (discussing the distinction between vested rights and charitable gratuities)
[91] *See Lynch*, 292 U.S. at 577. The idea at this time was that pensions were viewed as gifts given without obligation. *See id.*; *Teller*, 107 U.S. at 68.
[92] *See Lynch*, 292 U.S. at 576–77.
[93] *Id.*; *compare* Article III, *with* Article IV of An Act to Amend and Act Entitled An Act to Authorize the Establishment of a Bureau War Risk Insurance in the Treasury Department, 40 Stat. 398, 405, 409 (1917) (indicating the differing disability policies available to veterans).

contract law and those based on the "gratuity" of the standard policy.[94] The Supreme Court took this opportunity to clarify that veterans who had purchased Bureau insurance policies had cognizable contract claims against the Federal government if their disability claims were denied.[95] Thus, a veteran who purchased a separate insurance policy could have their denied claim reviewed on due process grounds. In contrast, those who did not purchase a separate insurance policy could have their disability claims denied and rendered unreviewable because the standard disability policy was viewed as a gratuitous gift to all veterans.[96] As a result of this holding, if a veteran's claim was not founded upon a ministerial act or a vested legal right, then review of the claim's denial by a court was almost certainly precluded.[97]

Although the U.S. Court of Federal Claims (Court of Claims) was given jurisdiction over veterans' pension litigation in 1855,[98] the legal concept of deference and the distinction between a charitable gratuity and a vested legal right governed many of their early decisions.[99] Eventually, however, veterans' pension litigation was removed from the jurisdiction of the Court of Claims in 1887 when Congress passed the Tucker Act.[100] Consequently, a veteran who wished to pursue a legal claim against the Federal Government at this time could petition the courts for relief only when a contractual or ministerial right permitted such legal action.[101] Framed this way, the ability of veterans to petition the courts for review of adverse pension decisions was extremely

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[94] *Lynch*, 292 U.S. at 576–78.
[95] *Id.*
[96] *Id.*
[97] If a veteran's claim was classified as a gratuity and originated from a statute that provided the agency with discretion to administer the claimed benefit, then review of the claim's denial could be precluded, regardless of the reasoning used. However, the Supreme Court eventually eliminated this possibility when it formalized the arbitrary and capricious standard of review in veterans' claims decisions. *See* Silberschien v. United States, 266 U.S. 211, 225 (1924).
[98] *See* An act to Establish a Court of Claims for the Investigation of Claims against the United States, 10 Stat. 612 (1855).
[99] *See* Daily v. United States, 17 Ct. Cl. 144, 147–48 (1881) (upholding the gratuity concept in the administration of veterans' pensions by dismissing pension claim for lack of jurisdiction).
[100] *See* An Act to Provide for the Bringing of Suits Against the Government, 24 Stat. 505 (1887) (abolishing pensions from the U.S. Court of Claims Jurisdiction); Riley, *supra* note 58, at 71–72 (explaining that the Tucker Act's exclusion of judicial review was carried on by subsequent legislation).
[101] *See* Ridgeway, *supra* note 30.

limited.[102] Indeed, it was not until 1970 that these legal notions were challenged on due process grounds.[103]

The final concept that helped drive the intervention of modern judicial review in veterans' appeals was the modern notion of due process.[104] In *Goldberg v. Kelly*, the Supreme Court questioned if the Constitution permitted the State of New York to terminate welfare payments to state recipients without prior notice or procedure.[105] Although this case did not directly address the veterans' disability claims system, Justice Brennan, writing for the Court, broke down the theoretical distinction between charitable gratuities and vested legal rights by injecting the constitutional notion of due process into the discussion.[106] In *Goldberg*, Justice Brennan wrote:

> From its founding the nation's basic commitment has been to foster the dignity and well being of all persons within its borders. . . . [p]ublic assistance, then, is not a mere charity, but a means to promote the general Welfare, and secure the blessings of liberty to ourselves and our posterity.[107]

As a result of the Court's holding in *Goldberg*, the notion of "gratuitous" veterans' disability benefits that were not afforded constitutional protections was eroded.[108] Consequently, the debate about the paradigm of the veterans' appeals system began to shift from administrator deference to procedural fairness.[109] Recognizing this development, veterans' service organizations began to coalesce and present a unified

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[102] Indeed, it appears that after the passage of the Tucker Act the scheme of adjudicating veterans' disability compensation claims was returned to the colonial scheme.
[103] *See* Goldberg v. Kelly, 397 U.S. 254, 266–69 (1970).
[104] *Id.*
[105] *Id.*
[106] *Id.* at 264–65.
[107] *Id.*
[108] *Compare id.* at 262 (finding that the assertion that welfare benefits were a privilege and not a right was not constitutionally sound), *with* Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 332–34 (1985) (finding that VA benefits "are more akin to social Security benefits."), *and* Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976) (finding that the mailing procedures used to terminate Social Security benefits complied with the constitutional requirement of due process).
[109] In the wake of *Goldberg*, two veteran pension cases were decided by the Supreme Court on constitutional grounds that furthered the movement toward establishing judicial review over veterans' claims. *See* Traynor v. Turnage, 485 U.S. 535 (1988); Johnson v. Robinson, 415 U.S. 361 (1974).

front to Congress to advocate for the presence of judicial review in veterans' disability claims.[110] As a result, in 1988, Congress passed the Veterans Judicial Review Act,[111] which created the modern day U.S. Court of Court of Appeals for Veterans Claims,[112] an independent Article I Court.

C. An Overview of the Current Disability Compensation and Appellate System

In order to clarify terms and provide additional insight into the current VA benefits and appellate process, a brief overview will be given. This section begins with some initial distinctions within VA's system. Next, it will discuss the elements of a veteran's legal claim for disability compensation and define what generally constitutes a compensable disability. This section concludes by providing a brief overview of the procedural and appellate processes for a veteran's disability compensation claim.

Today, disability compensation is distinct from a disability pension.[113] A disability pension is paid to war-time veterans age 65 or older, who have limited income, and are rated permanently and totally disabled.[114] In contrast, disability compensation is paid to any veteran who was either injured or contracted a disease while on active service.[115] While disability pensions are a fundamental part of veterans' benefits, the focus of this article is on veterans' claims for disability compensation and the appellate process that governs the disputes over such claims.

A modern claim for disability compensation includes five legal elements.[116] These elements are as follows: "(1) veteran status; (2) existence of a disability; (3) service connection of the disability; (4) degree of disability, and (5) effective date of the disability."[117] A veteran

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[110] *See* Ridgeway, *supra* note 30 at 194–216; Riley, *supra* note 58, at 75.
[111] *See* VJRA, s*upra* note 1.
[112] *See* Veterans Programs Enhancement Act of 1998, Pub. L. No. 105-368, 112 Stat. 3315 (1998).
[113] *See Compensation and Pension Service*, U.S. DEP'T. OF VETERANS AFFAIRS, *available at* http://www.vba.va.gov/bln/21/ (last visited Mar. 5, 2012).
[114] *Id.*
[115] *Id.*
[116] D'Amico v. West, 209 F.3d 1322, 1326 (Fed. Cir. 2000).
[117] *Id.*

is defined broadly as "a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable."[118] To establish the existence of a disability, the veteran needs either a medical opinion or medical evidence with a medical diagnosis.[119] To be compensable, the claimed disability must be service-connected, and "incurred or aggravated . . . in the line of duty in the active military, naval, or air service."[120] In this regard, a veteran can demonstrate service-connection by establishing that the existing disability was (1) directly connected to military service, (2) aggravated by military service, or (3) presumptively service-connected.[121] Once the disability is established as service-connected, an effective date for compensation is given and the disability is assigned a rating percentage aimed at compensating the veteran for the "average impairment in earning capacity."[122]

A veteran may initiate a VA claim for disability compensation by either a formal or informal written request at any time after separation from service.[123] Once the veteran initiates the claim process, a Veterans' Service Representative (VSR) contacts the veteran to schedule a medical examination and to obtain any relevant documents the veteran may have that are pertinent to the claim.[124] After the veteran receives a medical examination, the information is compiled and a Rating Veterans Service Representative (RVSR), working within a regional office (RO),[125] makes an initial rating decision, ranging from zero to one hundred percent.[126] If the veteran's medical records and medical examination do not support the claim that an existing disability is service-connected, then a zero rating is given for the claimed condition.[127]

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[118] 38 U.S.C. § 101 (Westlaw 2012).
[119] *See* 38 C.F.R. § 3.102 (Westlaw 2012).
[120] 38 U.S.C. § 101.
[121] *See* 38 C.F.R. § 3.304 (defining direct connection); *id.* § 3.305 (defining direct connection in peace-time service before 1947); *id.* § 3.306 (defining aggravation of a pre-service injury); *id.* § 3.307 (defining presumptive service connection).
[122] *Id.* § 4.1.
[123] 38 U.S.C. § 5101 (Westlaw 2012); *id.* § 5102; 38 C.F.R. § 3.1(p) (Westlaw 2012); 38 C.F.R. § 20.201 (Westlaw 2012).
[124] *See* Riley, *supra* note 58, at 455.
[125] This is also referred to as the agency of original jurisdiction (AOJ).
[126] *See* 38 C.F.R. § 4.25 (Westlaw 2012); U.S. DEP'T. OF VETERANS AFFAIRS, VETERANS BENEFITS MANUAL. 843–47 (2010), *available at* http://www.va.gov/opa/publications/benefits_book/federal_benefits.pdf.
[127] 38 C.F.R. § 4.31 (Westlaw 2012).

If the veteran disagrees with the initial disability rating, or if the veteran is denied a rating, he or she may begin the appeal process by filing a Notice of Disagreement (NOD) and request a *de novo* review by a separate Decision Review Officer (DRO).[128] If the finding is affirmed, then a Statement of the Case (SOC) is issued to the veteran detailing the reasoning for the denial.[129] The veteran has one-year from this notification to file an additional NOD to appeal the decision to the Board of Veterans Appeals (BVA), an administrative board within the VA.[130] If the veteran waits beyond this time limit, then the determination is deemed final and will not be reopened unless the veteran brings forth new and material evidence or establishes clear and unmistakable error in the decision process.[131] If the BVA affirms the RO decision, then a copy of the decision and its reasoning is supplied to the veteran, leaving the veteran with 120 days to file a Notice of Appeal (NOA) with the CAVC.[132] From this point, if the veteran receives an adverse determination from the CAVC, then he or she may appeal to the U.S. Court of Appeals for the Federal Circuit, and then up to the Supreme Court if the matter remains unresolved.[133]

If the CAVC remands a claim to the BVA, then the BVA is required by statute to give the claim "expedited" treatment.[134] When reviewing the CAVC decision, the BVA must allow the veteran to submit additional evidence pertinent to the remanded claim and may remand the same claim to the RO for further factual development.[135] Once all relevant facts are before the BVA, it will again issue a decision that is appealable in the manner described above.

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[128] *Id.*
[129] *Id.*; 38 U.S.C. § 7105 (Westlaw 2012); *id.* § 7112.
[130] 38 U.S.C. § 5102(a); *id.* § 5103(b).
[131] *See* 38 C.F.R. § 3.105; *id.* § 3.156.
[132] 38 U.S.C. § 7266.
[133] *Id.* §7252 (2012); *id.* § 7292.
[134] *Id.* § 5109B, *id.* § 7112.
[135] 38 C.F.R. § 19.9(3) (Westlaw 2012). In the context of newly submitted evidence, this distinction is critical because, procedurally, the Board of Veterans Appeals may not make a factual determination in the first instance, which requires a remand to the RO level for a determination in the first instance. *See* Disabled Am. Veterans v. Sec'y of Veterans Affairs, 327 F.3d 1339, 1341–42 (Fed. Cir. 2003).

III: Current Problems and Recent Attempts to Address VA's Appellate Claims System

The VA disability claims and appellate process has been subject to continued scrutiny over the years.[136] This criticism has largely focused on the claim volume, delays in adjudicating claims, and the accuracy of VA's decisions.[137] This section analyzes recent data to illustrate the magnitude of the task faced by VA, and discusses some of VA's most recent efforts to improve its efficiency and responsiveness within its disability compensation claims and appellate system.

As of FY 2010, over 4 million veterans received disability compensation benefits and over 1.1 million veterans filed new claims for benefits during this time period.[138] Of the 1.1 million claims, 150,475 NODs were filed with ROs.[139] Of these NODs, the BVA docketed 52,526 appeals for review in FY 2010.[140] Of the 52,526 appeals processed by the BVA, 96.4% were related to veterans contesting disability compensation rating decisions.[141] Furthermore, the VA projects that within the next year, the number of veterans seeking disability and compensation benefits will only increase.[142] Given the magnitude of this claims system, its efficiency, accuracy, and responsiveness have been chief areas of concern for VA.[143]

To address the efficiency, accuracy, and BVA claim volume in the disability claims process, in 2001 the Veteran's Administration inserted the DRO in the claim review process.[144] The program was designed to

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[136] *See* GAO 10-213, *supra* note 2; *Impact of War on VA*, *supra* note 2.
[137] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 11-812, CLEARER INFORMATION FOR VETERANS AND ADDITIONAL PERFORMANCE MEASURES COULD IMPROVE APPEAL PROCESS 2 (2011) [hereinafter GAO 11-812]; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 11-69, MILITARY AND VETERANS DISABILITY SYSTEM: PILOT HAS ACHIEVED SOME GOALS, BUT FURTHER PLANNING AND MONITORING NEEDED 2 (2010) [hereinafter GAO 11-69]; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-749T, VETERANS' DISABILITY BENEFITS CLAIMS PROCESSING: PROBLEMS PERSIST AND MAJOR PERFORMANCE IMPROVEMENTS MAY BE DIFFICULT (2005).
[138] VA PAR 2010, *supra* note 3, at I-3.
[139] *See* BOARD OF VETERANS APPEALS PERFORMANCE AND ACCOUNTABILITY REPORT 21 (2010), *available at* http://www.bva.va.gov/docs/Chairman_Annual_Rpts/BVA2010PAR.pdf.
[140] *Id*. at 18.
[141] *Id*. at 22.
[142] *Id*. at 21; *see also* Bilmes, *supra* note 5.
[143] *See* GAO 11-812, *supra* note 137.
[144] *See id.* at 2.

reduce the number of appeals before the BVA and reduce the time it takes a veteran to receive appeal relief by inserting an intermediate level of non-deferential review into the appellate process.[145] To date, the impact of inserting the DRO in the review process has not had the full effect that VA sought.[146] In fact, since the DRO was inserted in the disability claims process, the number of claims appealed to the BVA and the average time it takes to resolve such claims has not significantly reduced.[147]

To address the responsiveness of the disability claims system, especially in the context of veterans returning from the wars in Iraq and Afghanistan, VA has recently instituted a pilot program called the Integrated Disability Evaluation System (IDES).[148] The IDES is designed to address the disability claims of wounded veterans who suffer in-service injuries.[149] The goal of IDES is to eliminate the redundant nature of military medical evaluation boards (MEB) and the VA disability claims evaluations.[150] Simply put, the MEB is designed to determine, after a medical examination, whether a service member's in-service injury would interfere with further active service.[151] Prior to the implementation of IDES, if the MEB discharged the service member because of an in-service injury, then the service member was required to undergo a separate medical evaluation for VA disability compensation purposes.[152] IDES streamlines this process by combining the MEB evaluation with the VA disability compensation rating evaluation.[153] This process is designed to ensure that veterans receive VA's prompt attention after separating due to an in-service injury.[154] Recent data indicates that IDES is meeting VA's responsiveness goal of providing benefits within 305 days after a veteran separates from service.[155] However, because

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[145] *Id.*
[146] *Id.* at 23.
[147] *Id.*
[148] *See* GAO 11-69, *supra* note 137, at 2-4.
[149] *Id.* at 1.
[150] *Id.*
[151] *Id.* at 3.
[152] *Id.* at 2–5.
[153] *Id.* at 6.
[154] *Id.*
[155] *Id.*

IDES has not yet been fully implemented, its overall effectiveness at reducing appellate claim volume remains to be seen.[156]

Despite the VA's recent efforts to improve efficiency and accuracy in veterans' claims for disability compensation, the problem of reducing claim volume at the appellate level still persists.[157] When considering changes to a program of this size, one fundamental question must be asked: how can we, as a grateful nation, best respond to those who so selflessly sacrificed for our benefit? In looking toward the future, appropriate solutions may be found in supplementing this debate with data in order to analyze and target specific problem areas in our generous system.

IV: Demographics of Veterans Who Appeal to the CAVC

In order to gain insight into key indicators and demographics of veterans who appeal their disability compensation decisions, an independent study was performed by taking a sample of claims from the population of veterans' appeals adjudicated by the CAVC in FY 2010. The average age of a veteran-appellant in the sample study[158] was 62.26 years old[159] with a standard deviation of 11.89 years. This means that roughly two out of three CAVC appellants are between 51 and 73 years old. The median time a CAVC appellant spent on active duty was 776 days, or just over two years.

The total time between the date of appeal, measured by the filing date of the NOA, and the date of a CAVC decision, averaged 655 days, or almost 1.8 years, with a standard deviation of just over 5 months. This means that 95% of the appeals adjudicated in this time period took between eleven and thrity months to adjudicate. However, of the 655

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[156] *Id.* at 11–17 (finding uncertainty in the effectiveness due to gaps in data and for VA and DOD failing to include a control sample, that is a selection of veterans not participating in IDES, when measuring results).

[157] *See* VA PERFORMANCE AND ACCOUNTABILITY REPORT FY 2011, at II-125, 130 (2012), *available at* http://www.va.gov/budget/report.

[158] This study was an independent sample taken from claims appealed to the CAVC in FY 2010. For clarity and brevity, the methodology is omitted but on file with the author.

[159] Of the forty sample cases, six appeals concerned a deceased veteran's survivor benefits. As a result, these applications were removed from the average age calculation. If all appellants were included and age was calculated using the date of appeal, then the average age would rise slightly to 65.73 with a standard deviation of 12.51.

days mentioned, an appellant's claim spent an average of 523 days with the court clerk, with 236 days being mandated by rule.[160] Additionally, of the 655 days, an average of 160 days were utilized at the request or fault of the parties.[161] A more accurate indicator of the CAVC's efficiency is the number of days the claim spent in chambers, or the time interval from the date the claim was assigned to chambers until the date the decision was issued. This time interval amounted to an average of 132 days, or nearly four months. However, this average was negatively impacted by requests for oral argument, motions for reconsideration, and motions for panel decisions.[162]

V: Implementing a Statute of Repose in Veterans' Claims

This section argues for the implementation of a statute of repose in our veterans' claims system to address the continuing high claim volume. In addition to reducing claim volume, such a statute would also generate fiscal savings, further judicial economy, and promote fairness in a system that is "overburdened" and complex.[163] This section first defines the scope of the suggested statute of repose and recognizes that some exceptions should exist. Second, this section analyzes the justifications for the statute of repose by comparing it to suggested alternatives, likely objections, and by looking at VA's recent efforts to reduce claim volume and improve efficiency.

A. Defining the Statute of Repose and Its Scope

Both a statute of repose and a statute of limitation bar legal claims after the expiration of a predetermined amount of time.[164] A statute of limitation begins when a cause of action accrues, when either the facts of

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[160] *See* U.S. VET. APP. R. OF PRAC. AND PROC. R. 10, 28.1, 31, *available at* http://www.uscourts.cavc.gov/court_procedures/RulesonorafterApril12008.cfm (last visited Mar. 5, 2012).

[161] The number of days that resulted from the parties own motions was not allocated between chamber and the court clerk. This was calculated by summing all motions for extensions with all motions for stays. *See id.*

[162] *See id.*

[163] *Hearing on Review of Veterans Disability Compensation: Hearing Before the Comm. on Veterans' Affairs in the U.S. Senate*, 110th Cong., 2d Sess. 53 (2008) (statement of Steve Smithson, Deputy Dir., Veterans Affairs).

[164] *See id.*

a particular claim theoretically permit recovery, or when the individual knew or should have known that a legal remedy existed.[165] In contrast, a statute of repose "is designed to bar actions after a specified period of time has run from the occurrence of some [objective] event other than the injury which gave rise to the claim."[166]

The proposed statute of repose would bar only new claims for disability compensation after a liberal time period has elapsed subsequent to a veteran's last day of service.[167] This new claim distinction is important because, pursuant to current VA regulations, a veteran may advance a new claim for disability compensation at any time after their military service ends.[168] Similarly, once a veteran is given an initial disability rating, he or she may have this *preexisting* disability rating reevaluated for an increased rating at any time.[169] Moreover, if a veteran's disability claim is denied, he or she may seek to reopen this denial at any time by bringing forth new and material evidence[170] or alleging clear and unmistakable error in the decision process.[171]

To be clear, this article does not suggest that veterans should be barred from attempting to have a preexisting disability rating increased; nor does it suggest that a time bar should apply to veterans seeking

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[165] *See, e.g.*, 28 U.S.C. § 1658 (Westlaw 2012) (utilizing accrual language of a statute of limitations); *Developments in the Law Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185–89 (1950) [hereinafter *Statutes of Limitations*].

[166] *See* Gray v. Daimler Chrysler Corp., 821 N.E.2d 431 (Ind. Ct. App. 2005); Kissel v. Rosenbaum, 579 N.E.2d 1322, 1326 (Ind. Ct. App. 1991).

[167] *Cf.* 38 U.S.C. § 5110(3)(B)(g)-(h) (Westlaw 2012) (establishing no time bar for a veteran to have an existing disability rating reevaluated); Cook v. Principi, 318 F.3d 1334, 1337–42 (Fed. Cir. 2002) (discussing the statutory foundation of allegations regarding clearly erroneous decisions as well as new and material evidence).

The actual definition of a reasonable time period is suggested and left open by this article. However, there appears to be ample objective evidence on hand to make a general assessment of an appropriate time. *See* Nat'l Ctr. for Health Statistics, U.S. Dep't. of Health & Hum. Servs., *Health United States 2010, with a Special Feature on Death and Dying* 12–19 (2010) [hereinafter U.S. Health Report] (delineating the incidence of disease in Americans generally), *available at* http://www.cdc.gov/nchs/data/hus/hus10. Still, because VA is bound by the Administrative Procedure Act, this definition is best left for notice and comment procedures to articulate a more precise definition. *See* 38 U.S.C. § 501(d) (Westlaw 2012).

[168] *See* 38 U.S.C § 1101(1)-(2) (omitting time bar in general definition); *id.* § 1110 (omitting time bar for war time injuries); *id.* § 1131 (omitting time bar for peace time injuries).

[169] *See* 38 C.F.R. § 3.114 (Westlaw 2012).

[170] *See id.* § 5108.

[171] *See id.* § 5109A(a).

reevaluation on the basis of new and material evidence or clear and unmistakable error. Rather, this article's sole focus is to recommend that a liberal statute of repose be calculated and applied to bar claims for disability compensation that have not yet been filed to promote judicial economy and generate fiscal savings in the veterans' claims process.[172]

Of course, exceptions should be included for diseases and conditions that cannot be expected to become self-evident or manifest in this time period and, indeed, some exceptions would seem to be presently defined.[173] Still, the imposition of a statute of repose rests on the premise that most injuries, by nature, are inherently self-evident and the burden should be on the veteran to bring forth a claim for disability compensation in a predefined time period to reduce claim volume and promote judicial economy in the massive system that the VA administers.[174] Because the sample study indicates that the efficiency of the VA's current system is being compromised by the lack of a time limitation to file a claim, it is necessary to analyze the justification for implementing the suggested statute of repose in veterans' claims.

B. The Justification for Implementing a Statute of Repose in Veterans' Claims

Statutes of repose and limitations compel litigants to pursue their legal claims within an objective time frame to ensure that evidence is

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[172] *See* U.S. Health Report, *supra* note 167 (illustrating the available objective medical evidence that can be used to calculate a reasonable time). *See* H.R. REP. NO. 100-963, at 13, *reprinted in* U.S.C.C.A.N. 5782, 5794-95 (1988) [hereinafter H.R. REP. NO. 100-963] (defining the fundamental purpose of the veterans' claims system and its non-adversial nature).

[173] *See* 38 U.S.C. § 1112 (Westlaw 2012); *id.* § 1116; *id.* § 1117; *id.* § 1118 (indicating the presumption of certain diseases deemed to be service-connected); *id.* § 1702 (presumption of psychosis manifesting two years after active duty for WWII and Vietnam veterans).

[174] In terms of size, the VA's budget is almost five times larger than the Social Security Administration. *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FY 2010, at 96, 110 (2009), *available at* http://www.gpoaccess.gov/usbudget/fy10/browse.html (comparing the FY 2010 proposed VA discretionary budget of 55.9 billion with the 11.6 billion proposed for the Social Security Administration). Because the scope and magnitude of the VA disability and compensation system is so massive, the proper duration of a "reasonable time" is left undecided by this article.

available and factual memory loss is mitigated.[175] Because filing delays have the potential to prejudice a party through the loss of memory or evidence, these statutes also promote fairness and insulate against these types of prejudice through the uses of time limits.[176] As an added benefit, a time limit also promotes judicial economy by focusing judicial resources on claims that are most likely to be factually supported.[177] For these reasons, it is unsurprising that such statutes pervade our legal paradigm as a mechanism to promote judicial economy and prevent prejudice by imposing a duty to assert a legal claim with a predefined time period.[178] Despite this purposeful salience, a similar provision in veterans' disability pension law has been curiously absent for some time. Although the current legislative structure that allows veterans to file new disability claims without a time limitation is admittedly inclusive, the problem may be that it is too inclusive. Given this, the immediate question is as follows: what would be the effect if this inclusiveness was circumscribed by a statute of repose?

After analyzing the data taken from the sample study noted above, a few key demographic indicators are revealed. First, the average age of a veteran-appellant before the CAVC during FY 2010 was 62.26 years old.[179] Second, the median time a CAVC appellant spent on active duty was just over two years. Assuming that veterans serve in their early twenties and separate after a median time of two years, these two data points suggest that the average CAVC appellant is waiting thirty or more years before alleging that an existing disability is service-connected. The absence of a time limit to file such a claim forces the VA claims and appellate system to potentially ignore realistic intervening factors, such as the effects of physical aging on the human body when analyzing the service-connection issue.[180] This is not to say that older veterans should

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[175] *See* McDonald v. Sun Oil Co., 548 F.3d 774, 779–81 (9th Cir. 2008). Indeed, inherent in such statutes is the acknowledgement that evidence and memory acuity dissipate with time. *See, e.g.*, Burnett v. New York R.R. Co., 380 U.S. 424, 428 (1968); Order of R.R. Telegraphers v. Ry. Express Agency, 321 U.S. 342 348–49 (1944) (explaining the purpose of statutes of limitations.); *Statute of Limitations*, *supra* note 165.

[176] *See McDonald*, 548 F.3d at 779–81; Ry. Express Agency, 321 U.S. at 348–49.

[177] *See Statute of Limitations*, *supra* note 165, at 1185.

[178] *Id*. at 1200.

[179] Of the forty sample cases, six appeals concerned a deceased veteran's survivor benefits. As a result, these applications were removed from the average age calculation. If all appellants were included and age was calculated using the date of appeal, then the average would rise slightly to 65.73 with a standard deviation of 12.51.

[180] In fact, VA officials are expressly not permitted to use age as a factor in the decision-making process. 38 C.F.R. § 4.19 (Westlaw 2012).

be categorically barred from seeking a disability rating.[181] However, forcing medical and legal officials to evaluate a new claim for disability compensation without utilizing the common understanding that age negatively impacts health contributes unnecessarily to the complexity of VA's disability evaluation system.[182] To this end, imposing a statute of repose would be a simple mechanism that would account for this difficulty, without having the appearance of discriminating based on an appellant's specific age. [183]

To clarify this point, take a hypothetical example. Assume an individual enlists on active duty for four years at the age of twenty-two, injures a knee a short time thereafter, and receives the necessary medical care while in service. Four years later, this individual is honorably discharged and goes about life. Forty years after discharge, at the age of sixty-six, this veteran is now experiencing further knee problems and receives the diagnosis of arthritis. Under the current regulations, the veteran can file a claim for disability compensation, citing the existing disability, and claiming this disability is service-connected due to the knee injury suffered over forty years earlier. In response, VA must schedule a medical examination, assist in producing and procuring the veteran's service and private medical records, and somehow attempt to explain how the veteran's existing disability is unrelated to his or her service, without pointing to the obvious forty year gap or age of the veteran.

In fairness, it should be acknowledged that the sample taken from the CAVC population may suffer from a selection error: that is, a veteran who waits longer to file a claim for disability compensation may have a tougher time establishing the service-connection requirement, thereby increasing the likelihood the claim will be denied by the BVA and appealed to the CAVC. Nevertheless, this argument ignores the fact that judicial and fiscal resources are being expended on claims that are inextricably intertwined with the passage of extensive amounts of time, something that time bars are precisely designed to address.

As to the effects on judicial economy, if the proposed statute of repose is applied to claims taken from the sample study, with a hypothetical termination limit of twenty years after the last day of active

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[181] *Id.*
[182] *Id.*
[183] *Id.*

service, then the number of claims on appeal to CAVC would be reduced by 27%.[184] Admittedly, this reduction percentage may not have a congruent impact at the RO or BVA level, but it nevertheless indicates that substantial results can be achieved by applying a liberal time bar that allows in-service injuries to become manifest, yet directly promotes a reduction in the volume of disability compensation claims. Of course, a consequence of implementing this statute may actually cause veterans to file more claims, out of fear of losing benefits, but such a limit would place the ROs, the BVA, and the CAVC in a better position to efficiently adjudicate non-barred claims by focusing the saved resources on timely submitted claims.[185]

The Veteran's Administration has already inserted an additional level of review in the appeal process and has also started implementing the IDES program to address the high claim volume and responsiveness of VA's disability compensation system.[186] As discussed above, these programs have either had marginal impacts on appellate claim volume or have not yet been fully implemented to enable analysis.[187] As an alternative to creating additional bureaucratic complexities to an already complex system, a statute of repose with a liberal time limit would be a simpler alternative and would directly address the high claim volume and responsiveness areas that VA has sought to improve upon. As a result, if this statute were implemented, the number of appeals would likely decrease over time, thereby relieving pressure on the veterans' appellate system while furthering judicial economy and efficiency in the long term.[188]

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[184] This figure was calculated by using a hypothetical twenty-year limitation period. Appeals were coded as barred only if all elements of a claim on appeal were not raised within twenty years.

[185] Adopting a statute of repose may actually dovetail nicely with programs VA is currently testing to educate separating military members on benefits to address claim volume, thereby enhancing reduction results. *See* VA PAR 2010, *supra* note 3, at I-3 (explaining IDES program, the Benefits Delivery at Discharge program, and Quick Start Programs). Additionally, because VA is engaging veterans at a younger age through these programs and assessing their disabilities at discharge, a sudden flood of claims may not actually occur.

[186] *See* GAO11-812, *supra* note 137.

[187] *Id.*

[188] The implementation of the statute would dovetail with the VA's recent increased efforts to educate separating veterans on their potential disability benefits. *See supra* text accompanying note 185. Nevertheless, the precise implementation should be left within the Secretary's discretion to protect older veterans who have not received such briefings.

Some reactions to implementing a statute of repose in veterans' law are bound to be adverse, but inquiry into its potential effect should not be muted. The first possible objection to this proposal is that imposing the statute would deny benefits to veterans who might otherwise be eligible.[189] This argument is well founded in the current veterans' claims structure, but ignores the fact that the absolute inclusiveness of the present system is contributing to the high claim volume and delays in adjudication. As indicated by the sample study, this inclusiveness is permitting a significant number of veterans to wait an extensive amount of time before pursuing a new claim for disability compensation. The impact of this inclusiveness not only strains fiscal and judicial resources, but it also impacts the claim processing time of newer veterans who are returning home from the wars in Iraq and Afghanistan. Similar to the Great Depression and the 1818 Act that produced reductions to veterans' benefits, we too could benefit from hindsight when thinking about future changes to this system for the benefit of our future posterity.

A second objection might declare that the veterans' disability pension system is designed as uniquely claimant friendly, paternal, and non-adversarial, and the addition of a statute of repose would fundamentally undermine this structure.[190] This position, although benevolent, is no longer tenable because (1) it is inconsistent with the history of veterans benefits legislation; (2) it does not acknowledge that similar time limits are already active within other areas of veterans' benefits; (3) it does not consider that veterans, although a special class, should have a duty, in fairness to VA, to timely report an injury or disability thought to be service-connected; and (4) it does not consider that the impact could generate fiscal savings without resorting to blanket cuts in spending and benefits.

First, time limits that have already functioned much like a statute of repose were frequently included in early veterans' benefits legislation. For example, the 1793 Act provided disability compensation to veterans injured during the Revolutionary War if they applied within two-years after the legislation was passed.[191] Although such restrictions were removed in subsequent legislation, other provisions, such as a time limit

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[189] It should be noted here that there should not be constitutional due process concerns about denying non-need based benefits that have yet to be awarded. *See* Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 333 (1985).
[190] *See* H.R. REP. NO. 100-963, *supra* note 172.
[191] *See* 1793 Act, *supra* note 22.

to claim a survivor's pension,[192] pervade the history of veterans' benefits legislation.[193] Similarly, when the Court of Claims briefly had jurisdiction over veterans' disability compensation claims, there was a six-year claim window.[194] Additionally, when the Bureau of War Risk Insurance was administering disability pensions, Congress instituted a two-year window for disability compensation claims.[195] Although this is not an exhaustive list of statutes that have imposed time bars in veterans' disability compensation claims, such examples do indicate their previous and accepted use.

Second, under the current statutory and regulatory scheme, there are a number of statutory provisions that bar veterans' benefits if they are not asserted in a predefined time period. For example, there is a December 31, 2011 time limit for "symptoms to become manifest" in order to receive a Gulf War syndrome disability compensation;[196] there is a marriage time bar to qualify as a widow for Dependency and Indemnity Compensation (DIC) benefits;[197] and there is a fifteen year time limit to claim or utilize education benefits under the new Post 9/11 GI Bill.[198] As these contemporary examples illustrate, if time limits are present in, and compatible with, other aspects of veterans' benefits legislation, then implementing a statute of repose to govern the adjudication of new claims for disability compensation should not be a viewed as a fundamental change. Rather, this change, if adopted, should be viewed as one that empowers a more fiscally responsible and efficient appellate system that leaves the underlying qualifying criterion for any compensable veterans' benefit untouched.

Third, in terms of fairness, the fundamental purpose for a statute of repose is to place litigants in relative equipoise by defining a time frame which ensures legal rights are asserted in a timely manner.[199] The concept of failing to timely pursue a legal claim is tied to the equitable doctrine of laches, which recognizes that defendants may be prejudiced

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[192] *Id.*
[193] *See* 40 Stat. 610, 610–12 (1918), 1 Stat. 540 (1798) (applying two year claim window), *available at* http://www.constitution.org/uslaw/sal/sal.htm.
[194] *See* 10 Stat. 612 (1855), *available at* http://www.constitution.org/uslaw/sal/sal.htm, *see also* Rev. Stat. § 1069 (1863).
[195] *See* 40 Stat. 102, 104 (1917), *available at* http://www.constitution.org/uslaw/sal/sal.htm.
[196] 38 C.F.R. § 3.317 (Westlaw 2012).
[197] *Id.* § 3.54.
[198] Pub. L. No. 110-252, 122 Stat. 2357 (2008).
[199] *See Statute of Limitations*, *supra* note 165.

by the passage of an extensive amount of time.[200] In the veterans' law context, the VA is mandated by statute to maintain records relevant to veterans' benefits and to provide these documents if a veteran pursues a claim for disability compensation.[201] Because a veteran may pursue a disability compensation claim at any time,[202] the VA bears the burden of production without the benefit of the equitable doctrine of laches.[203] Such a legislative scheme fails to recognize that this burden is unfair as it forces the VA, and the appellate system in general, to consider all claims no matter how old, tenuous, or unsupported.[204] Moreover, this legislative scheme also fails to recognize that veterans are better positioned, as the injured parties, to identify an in-service injury or event relating to disability compensation. Given this, requiring veterans to assert their claims in a timely manner under a statute of repose would place the VA and the appellate system upon a more equitable ground.

Fourth, the fiscal savings generated from implementing a statute of repose could counter the calls to reduce federal spending on veterans' benefits without touching a single dollar veterans currently receive from their existing disability ratings. As the historical analysis above indicates, when federal deficits are high, and the national economy is struggling, the call for reducing federal spending on veterans' benefits tends to be voiced. As a contemporary example, Representative Michelle Bachmann recently submitted a bill to congress that would have cut over four billion dollars from VA funding.[205] Although Representative Bachmann's proposal has been withdrawn, future calls for blanket federal spending reform will likely involve an impact on veterans' benefits. Finally, although the population claims before the CAVC make up less than one

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[200] *Id.*

[201] *See* 38 U.S.C. § 5103A (Westlaw 2012).

[202] *See Statute of Limitations*, *supra* note 165.

[203] Although the defense of laches is typically viewed as only applying to equitable remedies, federal courts (which are courts of law and equity) have recognized it as a defense to legal claims as well, making this defense and discussion relevant. *See* FED. R. CIV. P. 2, 8(c); Chirco v. Crosswinds Comtys., Inc., 474 F.3d 227 (6th Cir. 2007), *cert. denied*, 127 S. Ct. 2975 (2007).

[204] Because the current regulatory scheme permits a claim to be brought at any time, the administrative record keeping burden on the VA is incomprehensibly large. *See* 38 C.F. R. § 1.577 (Westlaw 2012).

[205] Representative Bachmann's proposal, as part of her presidential platform, proposed $400 billion in federal spending cuts with $4.5 billion in cuts to the VA's budget. *See* Richard Sisk, *Vets Rip Bachmann on Cuts to VA*, N.Y. DAILY NEWS, Jan. 28, 2011, a*vailable at* http://www. nydailynews.com/blogs/dc/2011/01/vets-rip-bachman-on-cuts-to-va (last visited June 18, 2012).

percent of the 1.1 million claims VA received for disability compensation in FY 2010, if the statute was adopted and generated a one-percent decrease, then claim volume could be potentially reduced by 11,000 claims. Such fiscal savings are tangible and would be a preferable means to achieve savings, especially when the only alternative is to impose blanket cuts in federal spending and benefits.

VI. Conclusion

When assessing proposed changes to a hallowed and unique American system, our reactions should be measured and deliberate. Although a statute of repose has not been present in the veterans' disability compensation system for nearly a century, the current demands on our federal resources suggest that all potential solutions to reducing this strain should be considered. The simple fact is that the veterans' appellate system is being dominated by veterans who separated from service decades before bringing claims. This is not to suggest that these veterans have no right to petition the Secretary or the courts for relief, but it does suggest that we must recognize and address this component of the veterans' appellate system if efficiency is to be improved. Although the sample study was focused on the appellate population of the CAVC, the implementation of a statute of repose may have more beneficial effects at the BVA or RO level, instead of the CAVC exclusively. For this reason, the Secretary of Veterans' Affairs is in the best position to study and implement this statute in fairness to veterans.

Although implementing a statute of repose is neither comprehensive nor perfect, if we remain open-minded, progress can be made in the veterans' appellate system for the benefit of all veterans. Such a suggestion for change may not be well received, especially among veterans' groups, but it would directly address the claim volume issue within the current veterans' appellate system and promote fiscal savings without undermining the benefits currently provided to veterans. Today's economy is depressed and history shows that the Federal government may respond by introducing cuts to some veterans' benefits. If cuts to veterans' benefits are considered, then they should be evaluated responsibly, so the full measure of our gratitude for those who are now in need.