"A BOY GETS INTO TROUBLE": SERVICE MEMBERS, CIVIL RIGHTS, AND VETERANS’ LAW EXCEPTIONALISM

MICHAEL J. WISHNIE

INTRODUCTION

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


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

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


Other specialized practice areas have profited from the engagement of thoughtful minds not steeped within the field. See, e.g., Steering Comm. of the N.Y. Immigrant Representation
logic requiring that veterans’ law stand apart from other bodies of law with which it analytically coheres, such as administrative, disability, public benefits, and employment law. Nor is it apparent that segregating veterans’ law cases in specialized courts, or serving low-income veterans largely outside the existing network of legal services offices, furthers the interests of veterans. Like other areas of law that are treated as exceptional, veterans’ law is a backwater that generally lags behind developments in constitutional due process, administrative law, and civil rights law.

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

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


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

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

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


\(^{17}\) By “veterans’ law,” I refer to legal regimes to which only former service members (or their family members) are subject, and in particular, claims for VA benefits and applications to the U.S. Department of Defense (the “DoD”) to correct military records, including to upgrade a discharge status.
I. THE JURISPRUDENCE OF EXCEPTIONALISM AND HISTORY OF VETERANS’ LAW

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

A. Doctrines of Legal Exceptionalism

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

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

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

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

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

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

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

21 Caron, Tax Lawyers, supra note 18, at 589.
23 JILL ELAINE HASDAY, FAMILY LAW REIMAGINED 21 (2014) (“The presumption of family law’s localism is central to the Supreme Court’s recent federalism jurisprudence . . . .”).
instance, is explained by the need to allow the executive branch latitude to act swiftly and unconstrained by judicial review. For years, a degree of judicial deference to tax regulations different from the standard rule set forth in *Chevron* was defended based on the indispensability of the revenue-raising function to governance. In immigration, the plenary power doctrine has long held that courts must defer to discriminatory and abusive practices adopted or implemented by the political branches that “would be unacceptable if applied to citizens.” Scholars have condemned any functional justification for this immigration exceptionalism, which has endured as a formal doctrine even as courts have significantly eroded its operation in practice.

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


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

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

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

After the Civil War, the volume of claims increased dramatically. Claims agents and increasingly powerful veterans’ organizations advocated for increased benefits and improved administrative processing.\textsuperscript{37} Politics and patronage also contributed to the expansion of aid programs.\textsuperscript{38} In this era, courts


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

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


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

\textsuperscript{36} Ridgway, supra note 31, at 148 (discussing 1818-1820 reforms at the Pension Bureau, which “restored confidence in the pension program”).

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

\textsuperscript{38} See generally Theda Skocpol, Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States 67-151 (1992).
refused to review agency decisions adverse to veterans.\textsuperscript{39} While veterans’ groups succeeded in winning additional staffing and benefits from Congress,\textsuperscript{40} such that veterans benefits amounted to an extraordinary 30-40\% of the entire federal budget in the late nineteenth century,\textsuperscript{41} the agency adjudicating claims was widely regarded as having deteriorated into a “political patronage system.”\textsuperscript{42}

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

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

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

\textsuperscript{40} See, e.g., Ridgway, supra note 31, at 164-66 (discussing the Arrears Act of 1879 and the Disability Pension Act of 1890).

\textsuperscript{41} Id. at 168-69.

\textsuperscript{42} Id. at 164.

\textsuperscript{43} Id. at 170 (“The legislation further restricted benefits by requiring (1) medical proof that a veteran’s disability was related to service, (2) that the disability manifested within one year of service, and (3) that the claim be filed within five years of service.”).

\textsuperscript{44} Id. at 171 (“The law . . . provided each veteran of World War I a bonus of a dollar for each day of service, plus an additional twenty-five cents for each day served overseas . . . .”).

\textsuperscript{45} Act of July 3, 1930, ch. 863, 46 Stat. 1016 (authorizing the President to consolidate and coordinate various agencies affecting veterans); Ridgway, supra note 31, at 175 (“[T]he Veterans Administration . . . was created [in 1930] by uniting the Veterans’ Bureau with the Bureau of Pensions and the National Homes for Disabled Volunteer Soldiers.”).

\textsuperscript{46} Economy Act of 1933, ch. 3, 48 Stat. 8 (granting the president the power to issue regulations pertaining to veterans benefits system).

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

\textsuperscript{48} Economy Act § 5 (declaring that decisions rendered under the title “shall be final and conclusive” and that “no other official or court of the United States shall have jurisdiction”).
organizations objected.\textsuperscript{49} In 1944, Congress passed what became known as the “G.I. Bill,” providing education and other benefits to facilitate re-adjustment to civilian life.\textsuperscript{50}

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

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

\textsuperscript{49} Ridgway, \textit{supra} note 31, at 183 (“After a nine-month struggle that bridged the Seventy-Seventh and Seventy-Eighth sessions of Congress, veterans prevailed and the Disabled Veterans Rehabilitation Act of 1943 was passed.”).

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

\textsuperscript{51} \textit{Id.} at 190.

\textsuperscript{52} \textit{President’s Comm’n on Veterans’ Pensions, Findings and Recommendations Veterans’ Benefits in the United States} 5, 11 (1956).

\textsuperscript{53} \textit{Id.} at 4-5.

\textsuperscript{54} Ridgway, \textit{supra} note 31, at 192.


\textsuperscript{57} \textit{See} Agent Orange Act of 1991, Pub. L. No. 102-4, 105 Stat. 11 (codified as amended in scattered sections of 38 U.S.C.) (establishing a presumption that certain diseases will be considered service connected, if “associated with exposure to certain herbicide agents”).
The Vietnam veterans had to overcome not only political apathy and budgetary concerns in Congress but also the opposition of older veterans’ groups who disapproved of the Vietnam generation’s anti-war views and regarded legislation benefitting Vietnam veterans as potentially coming at the expense of benefits for older generations. These established organizations also feared incursions into their political power. Nevertheless, the Vietnam generation persevered. Structurally, their legacy was threefold: (1) creation of a network of more than 130 community-based, outpatient counseling centers, known as Vet Centers; (2) elevation of the VA to the U.S. Department of Veterans Affairs; and (3) establishment of the U.S. Court of Appeals for Veterans Claims to review VA benefits decisions, whose opinions are subject to appeal to the U.S. Court of Appeals for the Federal Circuit.

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

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

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

60 Ridgway, supra note 31, at 202 (“By 1981, VA had established 137 ‘Vet Centers’ across the country.”).


64 Id. at 55-65, 719-25, 839-63.
discharge,65 and proof of a service-connected disability.66 More than 4.1 million veterans currently receive disability compensation benefits.67

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


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


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

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

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

71 A veteran may reopen old claims based on new and material evidence. 38 U.S.C. § 5108 (allowing reconsideration of disallowed claims based on new and material evidence). A prior decision is also subject to revision if there was a clear and unmistakable error, or the veteran
network of lay advocates, accredited by the VA, present at all or nearly all
VAROs, available to assist the veteran in completing the application and
developing additional evidence, without charge. Finally, lawyers are rarely
involved in VARO applications. Almost no legal services offices offer
representation to veterans in their VARO proceedings, and federal statutes
prohibit private lawyers from charging a fee for assistance in the initial
applications. The absence of legal representation does not benefit veterans.

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

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

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

NVLSP MANUAL, supra note 63, at 1421-26 (describing the roles and importance of lay
advocates).

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

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

See U.S. DEP’T OF VETERANS AFF., supra note 12.

Veterans Benefits Administration Reports: 2012 Monday Morning Workload Reports,

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

MARK LANCASTER, FIXING THE APPEALS PROCESS AT THE DEPARTMENT OF VETERANS

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

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

Until 1989, there was no further appeal available. Since the Veterans’ Judicial Review Act (the “VJRA”), however, veterans may appeal to the U.S.
Court of Appeals for Veterans Claims (the “CAVC”). Approximately 3000-4500 CAVC appeals have been filed annually in recent years—about 10% of the veterans who appeal to the BVA and 0.5% of those who first apply at the VARO. The CAVC decides nearly all appeals on the papers, holding almost no oral arguments, and acts primarily through single-judge panels. Empowered to “affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate,” the CAVC is precluded from making its own factual determinations. Nearly half the veterans who seek review at the CAVC are pro se upon filing the appeal, but this number declines significantly by the time of decision. The CAVC adjudicates appeals in about eight months, affirming in about one-tenth of its cases, dismissing the appeal in about one-tenth, remanding in about one-quarter, and ordering some combination of a partial affirmance, dismissal, and remand in the rest.

93 ANNUAL REPORT FY2015, supra note 92, at 4 (fourteen oral arguments held); ANNUAL REPORT FY2014, supra note 92, at 4 (twenty oral arguments held); ANNUAL REPORT FY2013, supra note 92, at 4 (nineteen oral arguments held).
94 ANNUAL REPORT FY2015, supra note 92, at 1 (1851 cases were decided by a single judge); ANNUAL REPORT FY2014, supra note 92, at 1 (2036 cases were decided by a single judge); ANNUAL REPORT FY2013, supra note 92, at 1 (1960 cases were decided by a single judge).
96 Id. § 7261(c).
97 At the time of filing between 27% and 38% of all appeals are filed pro se. These numbers drop to between 12% and 21% at the time of disposition. ANNUAL REPORT FY2015, supra note 92, at 1; ANNUAL REPORT FY2014, supra note 92, at 1; ANNUAL REPORT FY2013, supra note 92, at 1. This reduction is due to the work of the Veterans Consortium Pro Bono Program, which screens pro se filings and places many with volunteer counsel. See THE VETERANS CONSORTIUM PRO BONO PROGRAM, http://www.vetsprobono.org/ (last visited Sept. 14, 2017).
98 ANNUAL REPORT FY2015, supra note 92, at 2-3.
Either the veteran or the VA may appeal further, to the U.S. Court of Appeals for the Federal Circuit, on the ground of legal error. In fiscal year 2015, there were eighty appeals to the Federal Circuit—about 2% of cases heard by the CAVC, 0.14% of cases heard by the BVA, and 0.008% of cases filed in the VAROs. Finally, the Supreme Court has granted a handful of petitions for certiorari in veterans benefits cases.

C. Record Correction and Discharge Review Boards

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


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

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

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

103 VETERANS LEGAL CLINIC, LEGAL SERVS. CTR. OF HARVARD LAW SCHOOL, supra note 65, at 2.


105 CONN. VETERANS LEGAL CTR., VETERANS DISCHARGE UPGRADE MANUAL 9-10 (2011).
The discharge process has become more formalized in modern times, but it is still largely a matter of rough justice. Often, service members are hastily discharged in the field. Marginalized populations, such as service members of color106 and those who report sexual harassment or assault,107 are at increased risk of a bad discharge, as were gay and lesbian service members before 2011.108 So too are those struggling with the invisible wounds of PTSD or Traumatic Brain Injury (“TBI”)109 or other mental health injuries.110 During the Vietnam

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

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

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

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

110 See, e.g., U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-1013T, DEFENSE HEALTH CARE: STATUS OF EFFORTS TO ADDRESS LACK OF COMPLIANCE WITH PERSONALITY DISORDER SEPARATION REQUIREMENTS (2010); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-31, DEFENSE HEALTH CARE: ADDITIONAL EFFORTS NEEDED TO ENSURE COMPLIANCE WITH PERSONALITY DISORDER SEPARATION REQUIREMENTS 7 (2008) (“DOD does not have reasonable assurance that its key personality disorder separation requirements have been followed.”); MELISSA ADER ET AL., CASTING TROOPS ASIDE: THE UNITED STATES MILITARY’S
War, 260,000 service members received bad paper,111 fewer than 3% of those who served, but since 2001, approximately 6.5% of service members (over 135,000 persons) have received bad paper.112

Negative administrative discharges began in 1892,113 and legislative petitioning was a veteran’s only recourse until World War II,114 when veterans’ organizations lobbied successfully to establish an administrative review process.115 A provision of the Servicemen’s Readjustment Act of 1944 established a discharge review board (“DRB”) in each service branch,116 and two years later Congress created the boards for correction of military records (“BCMRs”) as well, while also banning private bills.117 The broad purpose of the 1944 Act was to legislate a “bill of rights to facilitate the return of service men and women to civilian life.”118 As Representative Cunningham explained, Congress was especially concerned about young service members who, “scared to death,” mistakenly agreed to a bad paper discharge.
A boy gets into trouble when he is in the service . . . That boy might be scared by his commanding officer or someone over him and sign a statement that he was a deserter or admit that he was a deserter, and be kicked out for that reason, when, as a matter of fact, he was not a deserter . . . If he had not been scared to death or had been properly defended before a court martial, it may have been proven that he was only absent without leave. It was the thought of the committee in approving this that it would open the door for these boys to present any evidence that they could get to clear up their record.\textsuperscript{119}

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

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

\begin{footnotes}
\footnotetext[119]{78 CONG. REC. 4538 (1944).}
\footnotetext[120]{Warren Brown, Bills Would Deny Benefits for Upgraded Discharges, WASH. POST, June 1, 1977, at A6.}
\footnotetext[122]{10 U.S.C. § 1553(a).}
\footnotetext[123]{Id.}
\footnotetext[124]{Id.}
\footnotetext[125]{Fidell, supra note 6, at 500-03.}
\footnotetext[126]{See Complaint at 26, Monk v. Mabus, No. 3:14-cv-00260 (D. Conn. Nov. 18, 2014), ECF No. 1 ("[O]f all veterans who applied to the [Army Board for Correction of Military Records, or] ABCMR (2009, 2010, and 2012) for any reason, or for discharge upgrades to the Army Discharge Review Board . . . (2009, 2010, and 2012) or NDRB (2007-2013), 30.58\% of their records were corrected, according to the National Veterans Legal Services Program.").}
\end{footnotes}
submitted to the board. Vetera\n
BCMRs have broader jurisdiction, but they rarely grant a request for a personal appearance. They also approve applications at a lower rate, and have been widely criticized for their poor quality of adjudication. These boards have a shorter statute of limitations, three years compared to the DRBs' fifteen years, but it is waivable in the interest of justice. BCMRs have sweeping statutory powers to upgrade a discharge when “necessary to correct an error or remove an injustice.”

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

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

127 Kathleen Gilberd, *Upgrading Less-Than-Fully-Honorable Discharges, in The American Veterans and Servicemembers Survival Guide* 346, 348 (2009) (finding that the success rate for upgrade applicants who did not appear before the Air Force Discharge Review Board was only 15% compared to 45% for those who did appear); see also Addlestone et al., *supra* note 113, at 1/3.

128 Addlestone et al., *supra* note 113, at 9/14 & n.64 (reporting on pilot program and finding that “82% of the applicants represented [by an attorney] received an upgrade in discharge”).

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

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


132 *Id.* § 1552(a)(1).

133 See, e.g., Blasingame v. Sec’y of Navy, 811 F.2d 65, 72 (2d Cir. 1987) (holding that courts should apply APA’s arbitrary and capricious standard of review).

134 Giles v. Sec’y of Army, 627 F.2d 554, 556 (D.C. Cir. 1980).


136 Fidell, *supra* note 6, at 506 (describing effort to obtain basic board statistics).
basic notions of procedural due process and administrative law that recall horror stories of an earlier, pre-*Goldberg v. Kelly* era. In just the small number of cases handled by the Veterans Legal Services Clinic at Yale, for instance, BCMRs have relied on secret evidence never shared with the applicant, summarily denied applications with boilerplate language, ignored arguments of counsel, applied a board regulation previously enjoined as unlawful by a federal court, rejected an application for failure to comply with an ultra vires rule not set forth in regulations, and denied relief without a hearing in every case not remanded from the district court.

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

### II. Exceptionalism and VA Benefits

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

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

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


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

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

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

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

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

Discriminating between substantial and non-substantial claims, VA Conducts Nation’s Largest Analysis of Veteran Suicide, U.S. DEP’T OF VETERANS AFF. (July 7, 2016, 9:56 AM), http://www.va.gov/opa/pressrel/pressrelease.cfm?id=2801 (discussing VA finding that twenty veterans died from suicide each day in 2014). The VA wrongfully excludes thousands of veterans with bad paper from medical or disability benefits, see Petition for Rulemaking, supra note 65, at 1, and the VA has failed to police abuse of education benefits by for-profit colleges, see Gardiner Harris, Veterans Groups Seek Crackdown on Deceptive Colleges, N.Y. TIMES, May 22, 2016, at A4.

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

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

in person\textsuperscript{147} and depriving the court of the give-and-take between counsel and the bench that aids other courts in fashioning practical solutions to otherwise paper-bound problems.

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

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

\textsuperscript{147} In recent years, the CAVC has held approximately twenty oral arguments annually, in fewer than 1\% of the appeals docketed. See \textit{Annual Report FY2015}, supra note 92, at 4.

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


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

\textsuperscript{151} \textit{Id.} at 244 (citing 2 \textit{Harvey L. McCormick, Social Security Claims and Procedure} \textsection 563 (3d ed. 1983)); \textit{see also} Harold J. Krent & Scott Morris, \textit{Achieving Greater Consistency in Social Security Disability Adjudication: An Empirical Study and Suggested Reforms} 5-6 (2013).

\textsuperscript{152} O’Reilly, \textit{supra} note 149, at 244.
court in the district where the claimant resides.\footnote{42 U.S.C. § 405(g) (2012); O’Reilly, \emph{supra} note 149, at 244.} Further appeal is available in the regional courts of appeals, rather than to specialized courts like the CAVC or Federal Circuit.

The SSA appeals system is widely regarded as superior to the “VA morass”\footnote{O’Reilly, \emph{supra} note 149, at 243 (portraying the SSA’s use of ALJ as a model) (citing Charles L. Cragin, \emph{The Impact of Judicial Review on the Department of Veterans Affairs’ Claims Adjudication Process: The Changing Role of the Board of Veterans’ Appeals}, 46 ME. L. REV. 23, 40 (1994)).} not only in efficiency but also in fairness. The “national dispersal of the ALJ hearings and of the reviewing district courts bring the adjudications closer to the individual claimant”\footnote{O’Reilly’s proposal was a formal “merger” of the VA claims system with the SSA disability review process,\footnote{Allen, \emph{Twenty Supra}, note 6, at 372-73; see also Ridgway, \emph{supra} note 145, at 265 (“[T]he VJRA brought numerous forms of transparency and accountability to bear upon [VA adjudications], which pushed towards increased complexity.”).} and conveys a “sense of due process observed in person.”\footnote{Allen identifies the CAVC’s “rigorous enforcement of the statutory requirement that the Board provide adequate reasons and bases for its decisions” as especially important in this improvement. Allen, \emph{Twenty Supra}, note 6, at 377.} The importance of procedural justice in earning the respect and acceptance of decisions by claimants has been confirmed by substantial social science research.\footnote{See Tom R. Tyler, \emph{Procedural Justice, Legitimacy, and the Effective Rule of Law}, 30 CRIME & JUST. 283, 297-301 (2003) (examining why society may view a procedure as fair).} O’Reilly’s proposal was a formal “merger” of the VA claims system with the SSA disability review process,\footnote{Allen applauds the establishment of judicial review and credits the CAVC with developing a body of law that has brought a measure of predictability and transparency to the VA system,\footnote{Allen, \emph{Twenty Supra}, note 6, at 406-07, 407 nn.244-45.} as well as with increasing the quality of administrative adjudications.\footnote{Allen, \emph{Twenty Supra}, note 6, at 406-07, 407 nn.244-45.} whereby initial applications for veterans benefits would still begin at a VARO, but appeals would proceed through the SSA system, first to a local SSA ALJ, then to the SSA Appeals Council, and finally to the local district court.\footnote{Allen, \emph{Twenty Supra}, note 6, at 406-07, 407 nn.244-45.}

Less dramatically, Michael P. Allen proposed enactment of a legislative commission to review the work of the CAVC and to consider reforms to improve processing of VA benefits claims.\footnote{Allen, \emph{Twenty Supra}, note 6, at 406-07 & nn.244-45.} Allen applauds the establishment of judicial review and credits the CAVC with developing a body of law that has brought a measure of predictability and transparency to the VA system, as well as with increasing the quality of administrative adjudications.\footnote{Allen, \emph{Twenty Supra}, note 6, at 406-07, 407 nn.244-45.} Nevertheless, Allen has
advocated for a re-examination of the system for judicial review of veterans benefits claims, emphasizing a set of modest potential improvements.\textsuperscript{163}

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

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

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

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

\textsuperscript{165} Richard L. Revesz, Specialized Courts and the Administrative Lawmaking System, 138 U. Pa. L. Rev. 1111, 1117 (1990) (“[T]he creation of the Court of Customs Appeals in 1909 was premised in large part on the special evils of dis-uniformity in the application of customs duties.” (footnote omitted)).

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

\textsuperscript{167} Ellen R. Jordan, Specialized Courts: A Choice?, 76 Nw. U. L. Rev. 745, 747 (1981) (arguing that complex areas of the law may “strain the capacity to understand of even the wisest judge” in a generalist court). But see Jessica M. Bungard, The Fine Line Between Security and Liberty: The “Secret” Court Struggle to Determine the Path of Foreign
complicated areas of the law, such as tax, or where interdisciplinary skills are necessary, such as patent cases, a specialized court may be preferable to burdening general courts with certain cases that would be time-consuming and might be poorly decided.\footnote{168}{Revesz, \textit{supra} note 165, at 1117 (arguing that specialized courts may be more likely to produce correct decisions in complex areas of the law).}

On the other hand, specialized courts have received substantial criticism. First, specialized courts foster “ghettoization” that can stultify and isolate courts, litigants, and the development of the law and generate a kind of “tunnel vision.”\footnote{169}{Richard A. Posner, \textit{Will the Federal Courts of Appeals Survive Until 1984? An Essay on Delegation and Specialization of the Judicial Function}, 56 S. CAL. L. REV. 761, 780 (1983) (discussing whether specialized courts might attract specialized yet less able lawyers).} Critics have faulted the Federal Circuit’s patent law jurisprudence for reflecting these negative traits.\footnote{170}{Dreyfuss, \textit{supra} note 166, at 3 (outlining the arguments against specialized adjudication, including tunnel vision, increased susceptibility to capture, and vulnerability to lobbyists).} A generalist judge who adjudicates cases across multiple subject matter areas will hear arguments from a wide range of legal and social perspectives and may be better able to consider the consequences of a decision\footnote{171}{See generally Stephen Breyer, \textit{Active Liberty: Interpreting Our Democratic Constitution} 5-12 (2005) (arguing that judges should consider real-world consequences of competing legal interpretations, about which they may learn from party and amicus briefing).} and its coherence with developments in related areas of law.\footnote{172}{Richard H. Fallon, Jr., \textit{A Constructivist Coherence Theory of Constitutional Interpretation}, 100 HARV. L. REV. 1189, 1237-51 (1987).} Stephen Legomsky has explained that inter-judicial conflicts are salutary, for “[a]s courts adopt varying approaches to similar problems, new insights emerge and analyses mature.”\footnote{173}{Stephen H. Legomsky, \textit{Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process}, 71 IOWA L. REV. 1297, 1393 (1986); see Richard L. Marcus, \textit{Conflicts Among Circuits and Transfers Within the Federal Judicial System}, 93 YALE L.J. 677, 690 (1984) (“[D]ivergent interpretations of federal law actually help the Supreme Court because they fully air issues before the Court is called upon to decide them.”).}

Relatedly, Judge Richard Posner has warned that the lower prestige of specialized courts may lead to their staffing by less qualified judges, which in turn will undermine respect for the opinions of such courts and prompt parties to pursue litigation strategies that avoid them.\footnote{174}{Posner, \textit{supra} note 169, at 779-80 (positing that specialization may produce underqualified judges and lawyers due to the monotony of the cases and procedure).} Second, there has been substantial concern about the risk of capture and bias in specialized courts. This problem may manifest in appointment and
nomination fights\textsuperscript{175} and in the quality of adjudication. The capture concern is especially acute where one party appears in all cases before a specialized court and thereby develops insider knowledge and other repeat-player advantages. When the court is fixed in one location, proximate to the repeat player, the burden on non-repeat litigants and the risk of capture may be even larger.\textsuperscript{176}

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

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

\begin{quote}
[T]o develop tunnel vision; impose judges’ personal views of policy; reduce incentive for thorough and persuasive opinions; dilute or eliminate regional influence; reduce the number of opinions by generalist judges; possibly dilute the quality of appointments; and be captured by special interest groups.\textsuperscript{180}
\end{quote}

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

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

\textsuperscript{176} \textit{Id.} (noting that repeat litigants “possess natural advantages over occasional participants”).

\textsuperscript{177} Revesz, \textit{supra} note 165, at 1157-58.

\textsuperscript{178} STEPHEN H. LEGOMSKY, SPECIALIZED JUSTICE: COURTS, ADMINISTRATIVE TRIBUNALS, AND A CROSS-NATIONAL THEORY OF SPECIALIZATION 16, 28 (1990) (discussing the possibility of “clannishness” that may arise from having a specialized, closed group of attorneys and judges).


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

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

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

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182 O’Reilly, supra note 149, at 238.

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


186 See James D. Ridgway, *Why So Many Remands?: A Comparative Analysis of Appellate Review by the United States Court of Appeals for Veterans Claims*, 1 VETERANS L. REV. 113, 115-16, 116 n.12 (2009) (reporting that disability compensation claims “represent over 95% of the claims that are appealed to the BVA”).
appears to have improved the quality of agency decisionmaking and fostered greater transparency and consistency in the VA system. The CAVC has established the field of VA benefits law and resolved many foundational legal questions. Indeed, it has survived far longer than one of the earliest experiments with a specialized court, the Commerce Court, formed in 1910 to review decisions of the Interstate Commerce Commission and abolished three years later.

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

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

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

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


190 Dreyfuss, supra note 166, at 3 n.17.

191 See O’Reilly, supra note 149, at 225-27.

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

193 See supra note 174 and accompanying text.

194 See O’Reilly, supra note 149, at 246.

195 See Budget Request for Fiscal Year 2017: Presentation before the H. Comm. on Veterans’ Affairs, 114th Cong. 19-22 (2016) (statement of the Hon. Robert A. McDonald,
In addition to Social Security and veterans benefit cases, the third great system of federal mass-adjudications is the immigration system, which annually adjudicates hundreds of thousands of deportation cases (relabeled “removal” cases in 1996). Like VA benefits cases, removal cases begin with a localized fact-finder, an immigration judge who sits in one of sixty immigration courts around the country. The parties develop the record and the immigration judge decides whether to order removal or grant relief. Removal cases are adversarial, with the government represented before the immigration court by a corps of experienced prosecutors, so they differ in this respect from VA benefits and Social Security cases. But immigration courts are similar to VAROs and SSA ALJs in that the administrative record is developed locally, subject to flexible evidentiary rules, and offers an opportunity for in-person appearances. There is also an administrative appeal in removal cases to the Board of Immigration Appeals (the “BIA”) within the Department of Justice. Like the BVA, the BIA often decides cases in single-judge panels and in opinions that are not binding on other judges or the board as a whole. The BIA does not sit locally but decides cases at its offices in Virginia.

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

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

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


200 Id. § 1003.1(e) (assigning many cases to single Board member for disposition).


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

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

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

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

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

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

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


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


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


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

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

B. Treatment of Military Sexual Assault Claims

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

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


215 See Allen, Twenty, supra note 6, at 375-76 (discussing fairness and due process provided by the VA); Ridgway, supra note 145, at 265-71 (discussing changes in efficiency and accuracy since the passage of the VJRA); cf. Bagley, supra note 145, at 1320 (questioning values served by presumption of judicial review of agency actions).
scrutiny, scrutiny, lawsuit, and direct action have focused public attention on this long-standing feature of military service. Violent sexual attacks by one service member against another “threaten the strength, readiness, and morale of the military, undermine national security, and have devastating personal effects on survivors and their families.” Here too, veterans’ exceptionalism undermines the interests of former service members.

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

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


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


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

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

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

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225 Sadler et al., supra note 221, at 266.

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

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


retaliation. Rape is the trauma “most highly correlated” with development of PTSD.

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

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

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


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

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

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

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

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

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

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237 BATTLE FOR BENEFITS, supra note 220, at 1.
238 Id. at 5 fig.1; see Editorial, Justice for Women Veterans, N.Y. TIMES, Sept. 12, 2011, at A26 (noting the significant gap in grant rates for MST-related PTSD claims and all other PTSD claims, based on SWAN FOIA data). This gap does not appear when considering MST-related claims for major depressive or anxiety disorders, the next most likely diagnoses for a sexual violence survivor with a mental health disorder. BATTLE FOR BENEFITS, supra note 220, at 5-6 figs.2 & 4. MST-related claims for these diagnoses are far less numerous. Id. at 4.
239 BATTLE FOR BENEFITS, supra note 220, at 4 (showing that for 2008-2012, female veterans submitted 66.1% of MST-related PTSD claims but only 4.6% of all PTSD claims); id. at 8 (showing that for 2008-2012, MST-based claims represented 19.2 to 39.9% of all PTSD claims submitted by female veterans). In response to the release of BATTLE FOR BENEFITS, the VA made public data on MST-related claims for fiscal year 2013 alleging a narrowing gap between MST-related PTSD claims and other PTSD claims. See VETERANS BENEFITS ADMIN., FACT SHEET: PTSD DUE TO MILITARY SEXUAL TRAUMA (MST) (2013). This was the very same class of data the VA had fought for years in litigation to withhold from the public. See SWAN II, 888 F. Supp. 2d at 282-83 (requesting records related to sexual assault, sexual harassment, and domestic violence within the military under FOIA); SWAN I, 888 F. Supp. 2d at 237-38 (seeking release of records from the DoD).
240 BATTLE FOR BENEFITS, supra note 220, at 7-8 figs.5 & 6.
241 Id. at 7 fig.5 (demonstrating that the grant rates for MST-related PTSD claims were on average 29.6 percentage points lower than the grant rates for other PTSD claims between fiscal years 2008 and 2012).
87.5% (Los Angeles) to 25.8% (St. Paul).\(^{242}\) There were also broad discrepancies within some VAROs in their treatment of MST-related PTSD claims and all other PTSD claims.\(^{243}\) This geographic distribution suggests that more important than the evidence marshaled by a veteran seeking PTSD based on sexual violence may be the happenstance of where that veteran resides.

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

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

\(^{242}\) Id. at app. at A-12 to A-15.

\(^{243}\) Id. at 9-11 (listing VAROs that had the lowest grant rates for MST-related PTSD disability benefits).

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

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

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

\(^{247}\) See BATTLE FOR BENEFITS, supra note 220, at 12 (“At many offices, . . . the grant rates have risen and fallen according to no discernible patterns over the five years in the dataset.”).
sex or gender, and there is no other general statutory bar on sex discrimination in federal programs. Nor is there any regulation or executive order that independently prohibits discrimination based on sex in federal programs, nor one specific to the VA. Nevertheless, the disparate treatment of female veterans suffering from PTSD, and the discrimination between male and female veterans who seek disability compensation based on sexual violence, cannot be squared with the Constitution’s commitment to equal treatment under law. In a recent rulemaking challenge to the VA’s adjudication of MST claims, the Federal Circuit rejected a constitutional sex discrimination claim for lack of evidence of intentional discrimination. The court’s decision, and the Secretary’s refusal to engage in a rulemaking, may channel legal challenges by MST survivors to the CAVC or to a constitutional challenge in the district court.

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

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249 Title VII of the Civil Rights Act of 1964 prohibits discrimination based on sex in employment. Id. § 2000e-2(a)(1). Title IX bars discrimination based on sex in educational programs. 20 U.S.C. § 1681 (2012). Neither of these statutes, however, reaches general federal programs such as VA benefits.
252 Serv. Women’s Action Network v. Sec’y of Veterans Affairs, 815 F.3d 1369, 1377-78 (finding evidence insufficient to establish the Secretary had a discriminatory motive when denying the petition).
253 The lack of discovery in veterans benefits cases may complicate litigation of a sex discrimination claim before the CAVC. See Veterans for Common Sense v. Shinseki (Veterans for Common Sense II), 678 F.3d 1013, 1035-36 (9th Cir. 2012) (en banc) (holding that procedural due process does not require “the general right of discovery, including the power to subpoena witnesses and documents [or] the ability to examine and cross-examine witnesses”).
254 See Johnson v. Robison, 415 U.S. 361, 366-74 (1974) (holding that statutory preclusion of judicial review of veteran benefits claims cannot bar constitutional challenges), Veterans for Common Sense II, 678 F.3d at 1033-35 (concluding that the district court has jurisdiction over due process challenge to VARO procedures).
255 Ridgway, supra note 31, at 197-200.
the claims and needs of the Vietnam generation, who had to struggle mightily to establish that the signature injuries of the Vietnam War—Agent Orange illnesses and PTSD—were “real” wounds.\textsuperscript{256} Even though the VA now formally accepts PTSD as a legitimate mental health disorder, some VA adjudicators retain a residue of this hostility.

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

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

\textsuperscript{256} Id. at 197-212.

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

\textsuperscript{258} For instance, section 504 prohibits only discrimination based “solely” on disability, and MST-related PTSD is not a disability, as there is no medical diagnosis for this sub-class of PTSD. Id.

\textsuperscript{259} E.g., Michael C. Dorf, Equal Protection Incorporation, 88 VA. L. Rev. 951, 1006-07 (2002) (explaining that disability discrimination is “presumptively invalid” under the Fifth Amendment Due Process Clause).


\textsuperscript{261} Ruth Moore Act of 2013, H.R. 671, 113th Cong. § 2; Ruth Moore Act of 2013, S. 294, 113th Cong. § 2.

\textsuperscript{262} SERV. WOMEN’S ACTION NETWORK & VIET. VETERANS OF AM., PETITION FOR RULEMAKING TO PROMULGATE REGULATIONS GOVERNING SERVICE-CONNECTION FOR MENTAL HEALTH DISABILITIES FROM MILITARY SEXUAL ASSAULT 42-58 (2013).
claims. In particular, advocates have pressed for the recognition of a rebuttable evidentiary presumption in MST-related claims, similar to presumptions already reflected in VA regulations. These include presumptions for prisoners-of-war, combat-related PTSD claims, noncombat PTSD based on “fear of hostile military or terrorist activity,” exposure to Agent Orange and other herbicides, radiation-exposed service members, and service-connection for various illnesses caused by Agent Orange. Indeed, in announcing the promulgation of the new combat-PTSD presumption, President Obama explained that “many veterans with PTSD who have tried to seek benefits . . . have often found themselves stymied. They’ve been required to produce evidence proving that a specific event caused their PTSD . . . Well, I don’t think our troops on the battlefield should have to take notes to keep for a claims application.” Nor, of course, should rape survivors have to take notes to keep for a claims application.

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

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

264 Id. § 3.304(c).

265 Id. § 3.304(f)(2).

266 Id. § 3.304(f)(3).

267 Id. § 3.307(a)(6)(iii)-(iv).


271 Serv. Women’s Action Network v. Sec’y of Veterans Affairs, 815 F.3d 1369, 1375 (Fed. Cir. 2016); see id. at 1379-80 (Wallach, J., dissenting) (concluding that the Secretary’s failure to provide a reasoned explanation for treating PTSD claims differently renders the Secretary’s decision arbitrary).
prohibition on arbitrary and capricious agency action or irrational classifications, notwithstanding the decision in Service Women’s Action Network v. Secretary of Veterans Affairs.

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

C. Collective Actions and the Backlog

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

273 815 F.3d at 1369.
274 See Ogilvie & Tamlyn, supra note 234, at 38 (“[P]roposals to expand presumptions may encourage malingering . . . . [And] VBA is not immune to fraudulent claims.” (footnote omitted)).
276 See, e.g., Bradley A. Fink, Presume Too Much: An Examination of How the Proposed COMBAT PTSD Act Would Alter the Presumption of a Traumatic Stressor’s Occurrence for Veterans, 2 Veterans L. Rev. 221, 241-42 (2010) (“If the system were changed so that veterans could establish the occurrence of a claimed stressor through his or her statements alone, some veterans may fabricate combat experiences to support their [PTSD] claims.”).
277 Serv. Women’s Action Network, 815 F.3d at 1379 (Wallach, J., dissenting).
process, and congressional appropriation of additional resources for the VA, has increased the number of decisions made annually by the VAROs, but the number of claims continues to exceed annual adjudications. The agency still routinely fails to meet its goal of adjudicating new claims within 125 days of submission, and appeals to the BVA drag on for four years on average. With the high rate of remands by both the BVA and CAVC, the churning of claims seems endless. It is unsurprising that veterans and their advocates have repeatedly sought to escape these infuriating delays outside the statutory channels created by Congress. Veterans’ law exceptionalism has frustrated these efforts.

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

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

281 See supra notes 89, 98 and accompanying text (discussing appeal process for benefits decisions).

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


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

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


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

287 Veterans for Common Sense I, 644 F.3d at 859.


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


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

293 Budget Request for Fiscal Year 2007, supra note 195, at 18 (“VBA successfully streamlined a complex and paper-bound compensation claims process and implemented
less busy, providing supplemental training,\textsuperscript{294} precluding veterans from supplementing the evidentiary record on appeal,\textsuperscript{295} and other strategies.\textsuperscript{296} Yet the backlog and the mindless churning remain.

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

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

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\textsuperscript{294} See Villarreal & Buckley, supra note 291, at 9 (discussing failure of 2010 comprehensive retraining initiative in VA).

\textsuperscript{295} See Budget Request for Fiscal Year 2007, supra note 195, at 19-20.


\textsuperscript{298} 1 Vet. App. 438 (1991) (en banc) (per curiam).

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

\textsuperscript{300} Harrison, 1 Vet. App. at 439 (Kramer, J., concurring).

\textsuperscript{301} 21 Vet. App. 1 (2007) (en banc).

\textsuperscript{302} Id. at 4.
declined to adopt associational standing rules, reasoning that “because Congress did not intend for this Court’s jurisdiction to expand beyond addressing appeals filed by individual claimants adversely affected by final Board decisions, we are not permitted to . . . allow for associational standing.” Three judges dissented, arguing the majority had conflated jurisdiction and standing and misread the court’s jurisdictional statutes.

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

The CAVC, in a single-judge ruling, denied the petition on the ground that the second Korean DMZ claimant lacked standing because he himself could continue to appeal and thereby preserve the issue.

Most recently, in 2015, a Vietnam veteran named Conley Monk petitioned the CAVC for a mandamus to decide his long-pending disability claim and proposed to represent all other veterans facing extensive delays in adjudication...
of their administrative appeal.\footnote{Monk v. McDonald, No. 15-1280, 2015 WL 3407451, at *2 (Vet. App. May 27, 2015), rev’d, Monk v. Shulkin, 855 F.3d 1312 (Fed. Cir. 2017).} Recognizing that the CAVC had previously refused to promulgate a judicial rule regarding class actions, Monk nevertheless asked the court to exercise its authority under the All Writs Act or its inherent judicial powers to aggregate claims of veterans facing prolonged VA delays in administrative appeals.\footnote{Id.} Applying its precedent, the CAVC again concluded that it lacked jurisdiction to aggregate claims.\footnote{Id. at *3.}

Before Monk, veterans’ advocates had not appealed the CAVC’s repeated rejection of aggregate litigation strategies to the Federal Circuit. Advocates instead looked outside the court, seeking to persuade district courts or courts of appeals to do what the CAVC would not.\footnote{See, e.g., Natwick, supra note 283, at 746 (urging intervention from courts of general jurisdiction to remedy the serious delays).} The most substantial recent example is Veterans for Common Sense v. Shinseki,\footnote{678 F.3d 1013 (9th Cir. 2012).} a proposed class action to redress delays in the VA provision of mental health care and adjudication of disability compensation claims.\footnote{Id. at 1018 n.7. The Ninth Circuit concluded that the challenge to the lack of a class action procedure at the CAVC was “abandoned . . . on appeal.” Id.} Among other things, the plaintiffs initially challenged “the absence of class action procedures in the [VA’s] adjudication of benefits claims . . . .”\footnote{Id. at 1018.} The district court in large part denied the VA’s motion to dismiss, granted limited discovery, conducted a seven-day bench trial, and then denied all relief to the plaintiffs.\footnote{Id. at 1015-16.} A panel of the Ninth Circuit affirmed the dismissal of the plaintiffs’ APA claims but reversed the dismissal of many of the
due process claims. On rehearing en banc, however, the Ninth Circuit ordered dismissal of the entire action.

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

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

319 Veterans for Common Sense v. Shinseki (Veterans for Common Sense I), 644 F.3d 845, 890 (9th Cir. 2011).
320 Veterans for Common Sense II, 678 F.3d at 1037 (dismissing for lack of jurisdiction).
322 Corrected Amicus Brief and Appendix of 15 Administrative Law, Civil Procedure, and Federal Courts Professors in Support of Appellant and Reversal, Monk, 855 F.3d at 1312 (No. 15-7092).
323 Sant’Ambrogio & Zimmerman, supra note 13, at 2000 (“By adopting aggregate procedures, agencies may produce uniform outcomes more efficiently, provide more fairness for groups that depend upon the administrative state, and offer institutional advantages over aggregation in federal court.”).
324 Brief of Respondent-Appellee at 29, Monk, 855 F.3d at 1312 (Fed. Cir. 2017) (No. 15-7092). The Secretary made additional technical arguments regarding mootness and the Federal Circuit’s appellate jurisdiction. Id. at 10-29.
325 Monk, 855 F.3d at 1318.
326 Id.
327 Id. (internal quotation marks omitted).
requirements of Rule 23, but adapting them to the particulars of the habeas context. The Federal Circuit went on to hold that the CAVC also has the authority to aggregate claims under its organic statute, as argued by the Law Professors Amicus, and pursuant to its inherent judicial powers. Judge Reyna was surely correct that aggregation can promote “efficiency, consistency, and fairness, and improve access to legal and expert assistance by parties with limited resources,” and moreover, that class actions may help the CAVC address longstanding criticism regarding its failure to issue precedential decisions.

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

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

Monk, 855 F.3d at 1319-22.

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

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


Montemayor v. Shulkin, No. 15-1709, 2017 WL 2260125, at *5 (Vet. App. May 24, 2017) (“The Court notes that counsel for the appellant represents numerous veterans alleged to have been involved in fraud at RMTU . . . . [T]he Court does possess class action authority. . . . If the appellant believes that consolidating these matters is still appropriate, he should petition the Court for class certification.” (citations omitted)).
to draw, whether it proceeds by judicial rulemaking, case-by-case adjudication, or as other courts have wisely done, both.

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

III. EXCEPTIONALISM AND “BAD PAPER” DISCHARGES

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

334 See Michael Sant’Ambrogio & Adam Zimmerman, Administrative Conference of the United States: Aggregate Agency Adjudication 67 (2016) (recommending use of aggregation techniques in administrative adjudication of claims); Sant’Ambrogio & Zimmerman, supra note 13, at 2035-66 (discussing how class action or quasi class action can improve access, efficiency, and consistency).

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

336 Monk, 855 F.3d at 1320-21.

337 10 U.S.C. §§ 1552-1553 (2012) (authorizing the Secretary to establish review boards to review discharges or dismissals).
They have received little attention from legal scholars but are now the target of a significant mobilization by veterans’ organizations and their congressional allies.

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

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

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


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


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

A. Contemporary Record Correction Campaigns

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

1. Bad Paper for Veterans with PTSD or TBI

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


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

346 UNDERSERVED, supra note 65, at 2.

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

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

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

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


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

351 The National Veterans Council for Legal Redress (“NVCLR”) and High Ground Veterans Advocacy have played critical roles as well.

352 Izzo, supra note 111, at 1591-92.


354 See Complaint, supra note 126, at 1-3.
all other-than-honorable discharges issued to Vietnam veterans later diagnosed with PTSD.355

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

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

355 Id. at 36-37.


357 Id. (statement of Chuck Hagel, Secretary of Defense).


359 A draft of proposed legislation is on file with author.


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

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


363 HAGEL MEMO, supra note 362, at 1, 3.

364 See S. REP. No. 113-176, at 106-07.

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


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

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

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

371 Id. at 8-9 (criticizing the DoD’s “perfunctory and inadequate” outreach efforts).
review boards and codifying, as ongoing disclosure requirements of data and statistics, the provisions of the settlement in *Vietnam Veterans of America v. Department of Defense.* The 2017 NDAA thus ensures that no future Secretary can repeal the Hagel Memo protections with a stroke of the pen. Other provisions of the 2017 NDAA enhance protections for sexual assault victims in discharge proceedings and for whistleblowers at the BCMRs, but these measures fall short of more protective legislation that had been introduced to grant greater whistleblower protections to service members who report sexual harassment or assault.

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

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

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

2. Illegal Personality Disorder and Adjustment Disorder Discharges

In 2007, a reporter for The Nation reported on a surge in “personality disorder” discharges from the armed forces. “Personality disorders are a class of mental health disorders characterized by individuals’ inflexible, socially inappropriate behaviors across diverse situations.” The existence of a personality disorder is not necessarily inconsistent with military service, but since 2001, the military has discharged tens of thousands of people on this
These discharges are often made under honorable conditions, but recorded as based on an alleged personality disorder. Because many young service members focus only on the discharge status, they may not contest the narrative reason for separation. Yet the VA treats a personality disorder as a pre-existing condition, and many private employers hesitate to hire someone whose discharge paperwork indicates a severe mental health disorder.

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


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

390 See Kors, supra note 110, at 12-13.

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

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

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

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

395 See ADER, supra note 110, at 3 (noting the drop in personality disorder discharge rates following media scrutiny in 2007 and 2008).
separated on this ground since 2001. There is evidence that the numbers of “adjustment disorder” discharges began to increase instead. For instance, after suing the DoD for its refusal to disclose records regarding personality and adjustment disorder discharges, VVA found that more than 31,000 service members were discharged for an alleged personality disorder between fiscal years 2001 and 2010, substantially more than the 26,000 discharges estimated by Government Accountability Office for 2001 to 2007. But, as personality disorder separations declined following media and congressional attention, “the military discharged a substantial number of persons on the alleged ground of an adjustment disorder.” Moreover, internal reviews by the DoD confirmed that nearly all personality disorder discharges were done in violation of military rules and regulations designed to protect service members. “This does not paint a pretty picture,” concluded one DoD reviewer, who calculated that only 8.9% of personality disorder discharges were “processed properly” from 2008 to 2009.

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

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

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


399 Ader, supra note 110, at 3.

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

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

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

403 Boghossian, supra note 110, at 1.

404 Id.

405 Id. at 1-2, 12.
The DoD has resisted efforts to address its illegal personality disorder discharge problem. Legislation requiring medically appropriate review has languished, and agency officials have ignored regulatory reforms proposed by VVA and others. Instead, individual veterans have been left to fend for themselves, trying to explain to employers, the VA, and family members why their discharge paperwork marks them as suffering from a permanent, severe, and pre-existing mental health disorder.

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

Congress established the record correction boards to replace private legislative petitions. The statutes it enacted sought to balance the need to preserve maximum flexibility for the commanding officer on the battlefield with concern for the welfare of the “boy [or girl who] gets into trouble” and should not suffer a lifetime stigma as a result. The refusal of the record correction boards to fairly address the unlawful use of personality and adjustment disorder discharges is inconsistent with this congressional purpose. The mishandling of these cases, with lifetime consequences for thousands of service members and...
their families, reveals not only a sad instance of agency failure but also a fundamental disagreement about the role of these boards.

B. Conceptualizing Record Correction Reform

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

The military appears to believe the boards should function as if subject to the Uniform Code of Military Justice. Speaking broadly, military law reflects a substantial deference to decentralized command decisions, in which post-hoc review rarely results in reversing choices made in the field. The DoD emphasizes that “[the] BCM/NRs are not courts, nor are they investigative agencies.”

Notwithstanding the broad statutory authority to “correct an error or remove an injustice,” the boards proceed from a “presumption of regularity” as to the proceedings that led to a veteran’s discharge. Where a veteran seeks judicial review of an adverse board decision pursuant to the APA, the DoD has argued for “increased deference,” beyond the usual deference due in APA review, in light of the tradition of civilian courts abstaining from close scrutiny of military decisions. If one were to adopt a military law conception of the role of the record correction boards, then the substantive and procedural criticisms leveled by veterans and their advocates would not carry much force. On this view, decisions by commanding officers in the field should rarely be reversed, robust procedural protections are unnecessary, and civilian courts should not intervene.

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

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413 See supra notes 106-12 and accompanying text (discussing the history of discriminatory discharge practices).
414 See supra notes 136-42 and accompanying text (discussing the hostile procedural practices employed by the BCMR).
415 HAGEL MEMO, supra note 362, at 1.
418 See, e.g., Memorandum of Law in Support of Defendant’s Motion to Dismiss & for Summary Judgment, supra note 340, at 8.
419 Tyler, supra note 157, at 283-87.
deference to agency expertise, beyond the usual deference afforded under the APA’s arbitrary and capricious standard. Values of consistency, efficiency, transparency, and fair procedures would be more central to the board adjudications and any judicial review thereof. The boards would be subject not only to hierarchical accountability within the DoD, as under a military law approach; they would also be accountable to individual veterans, enforced via judicial review, and to elected officials, as with other agencies.

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

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

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

424 38 U.S.C. § 5107(b) (2012) (stating that the veteran should receive “the benefit of the doubt” where evidence is in equipoise).

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

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

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

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426 See discussion supra Section I.C.
427 See supra note 119 and accompanying text (discussing the goals behind establishing record correction and discharge review boards as described by Rep. Cunningham).
428 5 U.S.C. § 7513(a) (2012) (forbidding adverse employment action except “for such cause as will promote the efficiency of the service”).
429 Id. § 7513(b) (outlining the procedural protections to which federal employees are entitled, including thirty days written notice, reasonable time to answer orally and in writing, and a written decision).
430 Id. § 7513(d) (granting federal employees the right to appeal to the MSPB).
431 Id. § 7701(c)(1)(B) (establishing a preponderance of the evidence standard for all cases not based on unacceptable performance).
432 See, e.g., Douglas v. Veterans Admin., 5 M.S.P.B. 313, 313 (1981) (holding the MSPB may “modify or reduce a penalty imposed on an employee”).
433 5 U.S.C. § 7703 (establishing the availability of judicial review of MSPB decisions).
435 See, e.g., Robert J. McCarthy, Blowing in the Wind: Answers for Federal Whistleblowers, 3 WM. & MARY POL’Y REV. 184, 184 (2012) (criticizing “ignominious record” of failing to protect whistleblowers in civil service system that is biased, insufficiently independent, and staffed by under-qualified decision-makers); Carten Cordell, How Easy Should It Be to Fire a Fed?, FED. TIMES, Apr. 18, 2016, at A14 (describing debate over proposal to remove senior VA officials from MSPB protection).
boards. For example, civil service protections for federal whistleblowers\footnote{5 U.S.C. § 2302(b)(8) (prohibiting adverse employment actions against someone for disclosing information the employee reasonably believes evidences a violation of law, gross mismanagement, or abuse of authority).} might better safeguard those discharged in retaliation for reporting sexual harassment or assault.\footnote{See HRW, Booted, supra note 107 (describing stories of military personnel being given personality disorder diagnoses in apparent retaliation for reporting sexual assaults and other abuses); see also Human Rights Watch, Embattled: Retaliating Against Sexual Assault Survivors in the US Military 27 (2015) (describing the problem of sexual assault and fear of retaliation for reporting).} Other principles from federal employment law might also guide record correction boards, integrating discharge review cases into the mainstream of wrongful discharge adjudications in the modern era.\footnote{For instance, in “fraudulent enlistment” cases, record correction boards may uphold a bad discharge based on information learned after the discharge that a service member failed to disclose upon enlistment. See, e.g., Acevedo v. United States, 216 F. App’x 977, 979-80 (Fed. Cir. 2007) (upholding a denial of disability retirement due to the applicant’s concealment of his mental condition). By contrast, in employment law, the “after-acquired evidence” doctrine will not generally eliminate an employer’s liability for wrongful discharge, even though damages may be limited prospectively from the moment of discovery. See, e.g., McKennon v. Nashville Banner Publ’g Co., 513 U.S. 352, 352 (1995).}

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

\section*{Conclusion}

Contemporary veterans confront numerous challenges. The systems established by Congress to care for wounded warriors and to provide a meaningful opportunity for veterans with bad paper to “clear up their record”\footnote{78 CONG. REC. 4538 (1944) (statement of Rep. Cunningham).} are broken. This article identifies four current policy debates and attempts to provide an analytical framework for understanding and resolving them. One theme threading through each policy dispute is that of veterans’ law exceptionalism. Past efforts to mainstream veterans programs by FDR, Eisenhower, and General Bradley failed. Ending recurring problems, however, such as the DoD’s blanket rejection of discharge upgrade applications by veterans with PTSD or the discriminatory denial of VA benefits applications by survivors of military sexual assault, might require the fuller integration of veterans’ law with modern approaches to administrative, employment, and other bodies of law.
No body of law is completely divorced from all others, and as such, any legal discipline termed “exceptional” is really so only to a degree. Nevertheless, tax, immigration, and perhaps other fields are fairly characterized as having sufficiently departed from mainstream administrative or constitutional law values as to have earned the label. Veterans’ law has long been ignored, so much so that it is typically left off even this list of legal outcasts. Yet like these other “exceptional” fields, it is a legal backwater, with VA benefits cases segregated in a specialized Article I court; disabled veterans long denied the opportunity to ever aggregate their claims, as nearly all other injured litigants might, thus frustrating efforts to redress extraordinary VA delays; and claims of discrimination based on disability or sex treated largely outside modern anti-discrimination paradigms.

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

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