

# **LEARNING FROM AN ALLY: CAN AMERICAN VETERANS BENEFIT FROM LUMP SUM PAYMENTS AND A CLAIM SUBMISSION DEADLINE?**

Rachael T. Brant<sup>1</sup>

## **INTRODUCTION**

The United States (U.S.) and the United Kingdom (U.K.) share a common political and military history relating back to the first North American settlements in the early seventeenth century and the American Revolutionary War in the late eighteenth century. Allies in World Wars I and II, the U.S. and U.K. again joined forces in the Iraq and Afghanistan wars. This shared history, coupled with legal systems of common heritage, make U.K. veterans' law a natural point of comparison. In addition, the U.K. overhauled its veterans' disability compensation scheme in 2005 and continues to assess and revise that new scheme. These ongoing efforts by the U.K. make their system a potential source of insight into ways in which the U.S. can better provide disability compensation to American veterans. This article examines how two unique aspects of the U.K. compensation scheme—a claim submission time limit and lump sum payments—could be employed in the U.S. to improve the accuracy and efficiency of compensation decisions at both the administrative and judicial levels.

Part I of this Article provides an overview of the primary features of both the U.S. and U.K. veterans' disability compensation schemes. Included in this overview is a detailed description of the two significant differences between the schemes

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<sup>1</sup> Staff Attorney, Department of Veterans Affairs (DVA) Office of the General Counsel (OGC); Captain, U.S. Army Reserve, Judge Advocate General's Corps. The views and opinions expressed in this Article are solely those of the author and should not be attributed to DVA, DVA's OGC, or the U.S. Army.

that are the focus of this article: the claim filing time limit and the type of payments. Part II proposes adding a claim filing time limit and lump sum payments to the U.S. veterans' compensation system. In particular, Part II explains the rationale for these proposed changes and describes how they would operate within the existing U.S. system. Finally, Part III examines how the proposed claim filing time limit and lump sum payment provisions could work in conjunction to improve administrative adjudication and judicial review in the U.S. system.

## I. OVERVIEW OF THE U.S. AND U.K. VETERANS' DISABILITY COMPENSATION SCHEMES

Throughout history, governments have sought to care for those harmed in the course of armed conflict on behalf of their countries.<sup>2</sup> From the earliest days of British and American history, both nations have paid pensions in some form to the veterans of war.<sup>3</sup> Today, both the American and British governments continue this legacy by providing compensation when the health of the men and women of their militaries has been impacted by their service. However, both nations have also faced challenges in their efforts to efficiently and fairly adjudicate claims for disability compensation. The veterans' disability compensation laws and operations of both the U.S. and U.K. systems have been the subject of commentary, criticism, review, and reform efforts. While historically the subject of political discourse,<sup>4</sup> the U.S. veterans' disability compensation scheme has recently been the focus of widespread

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<sup>2</sup> See EDWARD T. DEVINE, *PRELIMINARY ECONOMIC STUDIES OF THE WAR: DISABLED SOLDIERS AND SAILORS PENSIONS AND TRAINING 19-49* (David Kinley ed., 1919) (describing the history of veterans' benefits systems in Europe and the United States (U.S.)); see also Douglas C. McMurtrie, *The Historical Development of Public Provision for the Disabled Soldier*, 26 *INTERSTATE MED. J.* 109, 109-17 (1919).

<sup>3</sup> See, e.g., INST. OF MEDICINE, *A 21ST CENTURY SYSTEM FOR EVALUATING VETERANS FOR DISABILITY BENEFITS 92-102* (2007) [hereinafter IOM REPORT] (providing a history of veterans' benefits legislation and Executive Orders in the U.S.).

<sup>4</sup> See, e.g., David Kimball Stephenson, *Economics and Austerity Relative to Veterans' Claims and the Veterans Appeal Process*, 211 *MIL. L. REV.* 179, 185-86 (2012) (discussing the passage and consequences of the Service Pension Act of 1818).

criticism.<sup>5</sup> Critics have focused largely on the lack of efficiency in claim processing.<sup>6</sup> Media reports in both the U.S. and U.K. have questioned the efficiency and accuracy of adjudications as well as the adequacy of compensation provided.<sup>7</sup> Both nations have responded with various efforts to improve the system by which their governments deliver benefits.<sup>8</sup>

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<sup>5</sup> See, e.g., *Taking Care of Our Veterans: What is the Department of Veterans Affairs Doing to Eliminate the Claims Backlog?* Hearing Before the Subcomm. on Nat'l Sec., Homeland Def. & Foreign Operations of the H. Comm. on Oversight & Gov't Reform, 112th Cong. 2 (2012) (statement of Rep. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov't Reform) (stating that the veterans' benefits system has been broken since the Vietnam War and has never been fixed); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-453T, VETERANS' DISABILITY BENEFITS: CHALLENGES TO TIMELY PROCESSING PERSIST 16 (2013) [hereinafter U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-453T] (describing the "considerable attention" DVA's claims and appeals process has received); *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013, 1017 (9th Cir. 2012) (alleging due process violations caused by systemic delays in the DVA claim adjudication process).

<sup>6</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-453T, *supra* note 5, at 16 (discussing DVA's challenges with timely processing of claims); *Veterans for Common Sense*, 678 F.3d at 1015-16 (requesting that the Ninth Circuit remedy delays in the adjudication of disability compensation claims).

<sup>7</sup> See, e.g., James Dao, *Veterans Wait for Benefits as Claims Pile Up*, N.Y. TIMES, Sept. 27, 2012, at A1, available at [http://www.nytimes.com/2012/09/28/us/veterans-wait-for-us-aid-amid-growing-backlog-of-claims.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/09/28/us/veterans-wait-for-us-aid-amid-growing-backlog-of-claims.html?pagewanted=all&_r=0); Sean Rayment, *Bureaucrats Tell 'Worst Wounded' Soldier He Cannot Have Full Compensation*, THE TELEGRAPH (U.K.), Apr. 2, 2011, available at <http://www.telegraph.co.uk/news/uknews/defence/8423502/Bureaucrats-tell-worst-wounded-soldier-he-cannot-have-full-compensation.html>; Matthew Taylor & Haroon Siddique, *Higher Payouts for British Troops Wounded on Duty*, THE GUARDIAN (U.K.), Feb. 10, 2010, available at <http://www.guardian.co.uk/uk/2010/feb/10/more-compensation-for-wounded-soldiers/print>; Richard Norton-Taylor, *Court Blocks MoD Attempt to Cut Compensation for Wounded Soldiers*, THE GUARDIAN (U.K.), Oct. 12, 2009, available at <http://www.guardian.co.uk/uk/2009/oct/12/uk-court-soldiers-compensation>; James Kirkup et al., *2,500 Wounded British Soldiers Waiting for Compensation, Figures Show*, THE TELEGRAPH (U.K.), Jul. 29, 2009, available at [http://www.telegraph.co.uk/news/uknews/defence/5926558/2500-wounded-British-soldiers-waiting-for-compensation-figures-show.html#mm\\_hash](http://www.telegraph.co.uk/news/uknews/defence/5926558/2500-wounded-British-soldiers-waiting-for-compensation-figures-show.html#mm_hash).

<sup>8</sup> See, e.g., DEP'T. OF VETERANS AFFAIRS, VA STRATEGIC PLAN TO ELIMINATE THE COMPENSATION CLAIMS BACKLOG (2013), [http://benefits.va.gov/transformation/docs/VA\\_Strategic\\_Plan\\_to\\_Eliminate\\_the\\_Compensation\\_Claims\\_Backlog.pdf](http://benefits.va.gov/transformation/docs/VA_Strategic_Plan_to_Eliminate_the_Compensation_Claims_Backlog.pdf) [hereinafter VA STRATEGIC PLAN]; MINISTRY OF DEFENCE, THE REVIEW OF THE ARMED FORCES COMPENSATION SCHEME (2010), <http://www.official-documents.gov.uk/document/cm77/7798/7798.pdf> [hereinafter MoD 2010 REVIEW].

Given the similarities between the two nations, those seeking to improve the U.S. scheme may find the U.K. scheme a useful comparison. The U.K. scheme may be particularly useful for comparison given that the U.K. overhauled its veterans' disability compensation system in 2005 with the passage of the Armed Forces (Pensions and Compensation) Act 2004 and the resulting Armed Forces and Reserve Forces Compensation Scheme ("AFCS").<sup>9</sup> The AFCS was the culmination of a review started in 1998, which involved a range of stakeholders including government officials and veterans' advocates.<sup>10</sup> The review began as a joint effort between the U.K.'s Ministry of Defence and the U.K.'s social security agency to examine the pensions and compensation arrangements for military personnel, in particular for "those who are injured, made ill or die as a result of their military service."<sup>11</sup> An early report from the joint review set forth the case for reforming the compensation system, stating:

[The existing laws] are unnecessarily complicated and confusing to the servicemen and servicewomen and their families whom the schemes are intended to help. Processing of claims can also take a long time. Most importantly, the complexity creates anomalies which can mean that servicemen or servicewomen, or their families, may not be eligible for compensation, even where people have been injured because of their

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<sup>9</sup> Armed Forces (Pensions and Compensation) Act, 2004, c. 32 (Eng.) [hereinafter AFPCA 2004]; Armed Forces and Reserve Forces (Compensation Scheme) Order, 2005, S.I. 2005/439 [hereinafter AFCS Order]. The AFPCA 2004 is the equivalent of U.S. legislation and the AFCS Order is the equivalent of U.S. agency regulation. The Ministry of Defence has amended the AFCS Order multiple times. This Article references the original order when the content remains substantially the same and the appropriate amending order if the content has been substantially revised.

<sup>10</sup> See SELECT COMM. ON DEF., THE MINISTRY OF DEFENCE REVIEWS OF ARMED FORCES' PENSION AND COMPENSATION ARRANGEMENTS, THIRD REPORT OF SESSION 2001-2002, paras. 8-18, available at <http://www.parliament.the-stationery-office.co.uk/pa/cm200102/cmselect/cmdfence/666/66602.htm> (describing and assessing the review process).

<sup>11</sup> MoD 2010 REVIEW, *supra* note 8, at 21.

work; the form or level of compensation may at other times be disproportionate to the circumstances.<sup>12</sup>

Because of its relatively recent enactment, the AFCS was developed in the context of modern day realities including the wars in Iraq and Afghanistan,<sup>13</sup> and an aging veteran population from prior conflicts.<sup>14</sup> In addition, the AFCS was enacted in a time of more advanced medical science and policies regarding those with disabilities in society.<sup>15</sup> Finally, British officials performed a

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<sup>12</sup> U.K. HOUSE OF COMMONS LIBRARY, RESEARCH PAPER 04/05, ARMED FORCES (PENSION AND COMPENSATION) BILL 36 (Jan. 8, 2004), [http://www.parliament.uk/briefing-papers/RP04-05/armed-forces-\(pensions-and-compensation\)-bill-\(bill-10-2003-04\)](http://www.parliament.uk/briefing-papers/RP04-05/armed-forces-(pensions-and-compensation)-bill-(bill-10-2003-04)).

<sup>13</sup> See Office of the Press Secretary, THE WHITE HOUSE, *Presidential Address to the Nation* (Oct. 7, 2001), <http://georgewbush-whitehouse.archives.gov/news/releases/2001/10/20011007-8.html> (announcing the start of military strikes in Afghanistan); Office of the Press Secretary, THE WHITE HOUSE, *President Bush Addresses the Nation* (Mar. 19, 2003), <http://georgewbush-whitehouse.archives.gov/news/releases/2003/03/20030319-17.html> (announcing the start of military strikes in Iraq); Tom Vanden Brook, *U.S. Formally Declares End of Iraq War*, USA TODAY, Dec. 15, 2011, <http://usatoday30.usatoday.com/news/world/iraq/story/2011-12-15/Iraq-war/51945028/1> (describing the U.S. Department of Defense ceremony held in Baghdad, Iraq to mark the official end of the Iraq War).

<sup>14</sup> DEP'T OF VETERANS AFFAIRS, *2001 National Survey of Veterans: Final Report*, ch. 3, [http://www1.va.gov/VETDATA/docs/SurveysAndStudies/NSV\\_Final\\_Report.pdf](http://www1.va.gov/VETDATA/docs/SurveysAndStudies/NSV_Final_Report.pdf) (finding that as of 2000, the average age of a veteran was 58 years old, with the largest group of veterans between the ages of 45 and 64).

<sup>15</sup> See MoD 2010 REVIEW, *supra* note 8, at 55 (“As a modern scheme, [the AFCS] was introduced at a time when [injury or illness] were capable of being treated to much improved function and sometimes entirely cured.”). In contrast, the DVA system has been criticized as out-of-step with modern medical improvements. See, e.g., IOM REPORT, *supra* note 3, at 83, 114 (noting as of 2007 that the DVA compensation approach “assumes the impairment is permanent, an assumption at odds with current thinking on rehabilitation” and that “medical knowledge used in the [DVA] Rating Schedule is inadequate, often because the information is obsolete or there has been inadequate integration of current and accepted diagnostic procedures”). Since the 1990s, both nations have had in place comprehensive anti-discrimination laws protecting individuals with disabilities from discrimination in employment, among other forms of discrimination. See, e.g., Disability Discrimination Act 1995, ch. 50, pt. II (U.K. legislation prohibiting discrimination against persons with disabilities, including discrimination in employment); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (U.S. legislation “to establish a clear and comprehensive prohibition of discrimination on the basis of disability,” including a prohibition on disability discrimination in employment).

comprehensive review of the AFCS in 2010.<sup>16</sup> This review resulted in observations and revisions to the U.K. system that can help to inform improvement efforts related to the U.S. scheme.

### **A. Key Similarities Between the U.S. and U.K. Systems**

As an initial matter, the comparative size of the U.S. and the U.K. in terms of general population, military strength, and budget are relevant considerations. Although the U.S. is significantly larger than the U.K. in terms of total population and military size, the two nations are roughly proportional on these accounts. As of the 2010 census, the U.S. had an overall population of 308.7 million,<sup>17</sup> with 1.43 million active duty members,<sup>18</sup> and 1.1 million reserve members,<sup>19</sup> or .82% of the population in military service. As of the U.K.'s 2011 census, the overall population of England and Wales was 56.1 million.<sup>20</sup> In 2012, the U.K. had 179,800 active duty members,<sup>21</sup> and 29,960 reserve members,<sup>22</sup> or .37% of the population in military service. The veteran populations of both countries are substantially proportional, with 22.68 million U.S. veterans as of 2011,<sup>23</sup> or

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<sup>16</sup> See generally MoD 2010 REVIEW, *supra* note 8 (describing the review and the changes to be implemented).

<sup>17</sup> U.S. CENSUS BUREAU, 2010 U.S. CENSUS BRIEFS: POPULATION DISTRIBUTION AND CHANGE: 2000-2010 (2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf>.

<sup>18</sup> U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012, TABLE 511: MILITARY PERSONNEL ON ACTIVE DUTY BY RANK OR GRADE: 1990-2010 (2012), <http://www.census.gov/compendia/statab/2012/tables/12s0511.pdf>.

<sup>19</sup> U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012, TABLE 513: MILITARY RESERVE PERSONNEL 1995-2010 (2012), <http://www.census.gov/compendia/statab/2012/tables/12s0513.pdf>.

<sup>20</sup> U.K. OFFICE FOR NAT'L STATISTICS, 2011 CENSUS DATA & WHERE YOU CAN FIND IT (2011), <http://www.ons.gov.uk/ons/guide-method/census/2011/census-data/census-data-factsheets/census-awareness-factsheet--interactive.pdf>.

<sup>21</sup> U.K. HOUSE OF COMMONS LIBRARY: DEFENCE PERSONNEL STATISTICS 7 (2012), <http://www.parliament.uk/briefing-papers/sn02183.pdf>.

<sup>22</sup> U.K. MINISTRY OF DEFENCE, U.K. RESERVE FORCES AND MOD SPONSORED CADET FORCES: STATISTICAL RELEASE (2012), <http://www.dasa.mod.uk/index.php/publications/personnel/military/reserves-and-cadets-strengths/2012-04-01>.

<sup>23</sup> U.S. DEP'T OF VETERANS AFFAIRS, PROFILE OF VETERANS: 2011, at 2 (2013), [http://www.va.gov/vetdata/docs/SpecialReports/Profile\\_of\\_Veterans\\_2011.pdf](http://www.va.gov/vetdata/docs/SpecialReports/Profile_of_Veterans_2011.pdf).

7.4% of the population, and approximately 3.8 million veterans in England as of 2007, or 6.8% of the population.<sup>24</sup> Certainly any analysis of the two systems should take into account the relevant populations and corresponding budget numbers. However, given the essential proportionality between the two nations, the size difference does not undermine the usefulness of the comparison.

The current U.S. veterans' disability compensation scheme is similar in many ways to the current U.K. system. Although variations exist in the precise wording of the applicable laws, the basic tenets and approaches of the two systems are the same. In both systems, an individual is entitled to tax-free compensation for injury or illness caused or aggravated by military service.<sup>25</sup> In order to obtain benefits, both schemes require an individual to submit a claim to an administrative, non-judicial body for adjudication.<sup>26</sup> This adjudication is designed to be informal and non-adversarial.<sup>27</sup> In the U.S., claims are adjudicated by the Department of Veterans Affairs (DVA), a stand-alone agency in the executive branch empowered by the legislative branch through

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<sup>24</sup> See Charlotte Woodhead et al., *An Estimate of the Veteran Population in England: Based on Data from the 2007 Adult Psychiatric Morbidity Survey*, 138 *POPULATION TRENDS* 50-54 (Winter 2009), <http://www.palgrave-journals.com/pt/journal/v138/n1/pdf/pt200947a.pdf>. The statistics in this study do not provide data for Wales and, therefore, do not represent exact figures. This article concluded that the estimated veteran population in England was between 3 and 5 million. *Id.* at 50. The study underlying the article found that the estimated veteran population in England was 3.8 million. *Id.* at 54. The article also noted that in 2005 the Royal British Legion estimated the veteran population in the U.K. (Great Britain and Northern Ireland) at 4.8 million. *Id.* at 50.

<sup>25</sup> 38 U.S.C. § 1110 (2006) (wartime basic eligibility for disability benefits); *id.* § 1131 (peacetime basic eligibility for disability benefits); AFCS Order, arts. 7-8.

<sup>26</sup> 38 C.F.R. § 3.151(a) (2012); AFCS Order, art. 36.

<sup>27</sup> See *Henderson v. Shinseki*, 131 S. Ct. 1197, 1200-01 (2011) (describing the informal, non-adversarial nature of the veterans' adjudicatory system); MINISTRY OF DEFENCE, JSP 765, ARMED FORCES COMPENSATION SCHEME STATEMENT OF POLICY 3 (2012), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/28038/974\\_AFCS\\_Statementofpolicy4.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/28038/974_AFCS_Statementofpolicy4.pdf) [hereinafter *MOD POLICY STATEMENT*] ("The process of determining a claim is inquisitorial and not adversarial, with SPVA undertaking the vast majority of evidence gathering on the individual's behalf.").

statutes to administer veterans' benefits.<sup>28</sup> In the U.K., claims are adjudicated by the Service Personnel and Veterans Agency (SPVA), an agency within the Ministry of Defence, the U.K.'s equivalent of the Department of Defense.<sup>29</sup>

Although the standards differ to an extent, both schemes place the burden of persuasion on the claimant.<sup>30</sup> In the U.S., the DVA applies a "benefit of the doubt" standard, which is more favorable than the "preponderance of the evidence" standard typically applied in most civil contexts.<sup>31</sup> The DVA affords a claimant the "benefit of the doubt" when evidence on a material issue is approximately balanced.<sup>32</sup> In the U.K., the SPVA applies a "balance of probabilities" standard.<sup>33</sup> This standard is the same as the "preponderance of the evidence" standard and requires the claimant to demonstrate that his or her injury or illness was more likely than not, i.e., greater than a fifty percent likelihood, caused or aggravated by military service.<sup>34</sup>

Generally, under both compensation schemes, a claimant who disagrees with the decision of the adjudicating agency may request reconsideration by the agency.<sup>35</sup> The agency will

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<sup>28</sup> See 38 U.S.C. § 301 (establishing the Department of Veterans Affairs).

<sup>29</sup> AFPCA 2004, §1 (authorizing the Secretary of State to establish schemes to provide benefits in respect of a person's service in the armed forces); AFCS Order, art. 2 (establishing that the "Veterans Agency" means "an office designated by the Secretary of State for the purpose of receiving and determining applications for benefit").

<sup>30</sup> 38 U.S.C. § 5107(a) (placing burden on claimant to present and support a claim for benefits); MoD POLICY STATEMENT, *supra* note 27, at 3.

<sup>31</sup> 38 U.S.C. § 5107(b) ("When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant.").

<sup>32</sup> *Id.*; Ferguson v. Principi, 273 F.3d 1072, 1076 (Fed. Cir. 2001) (explaining that the doctrine only applies when there is "an approximate balance of positive and negative evidence" (internal quotation marks omitted)).

<sup>33</sup> AFCS Order, art. 51.

<sup>34</sup> See, e.g., Sec'y of State for Def. v. M MCG (AFCS) [2013] UKUT 069 (AAC) [19] ("In plain English, [the claimant] had to show that it was more probable than not that his [condition] had been caused by the exposure concerned.").

<sup>35</sup> See 38 C.F.R. § 19.26 (2012) (requiring the adjudicating agency to reexamine a claim after the claimant files a notice of disagreement); AFCS Order, art. 45.



reconsider its decision and issue a new decision either confirming the original decision or altering its previous decision.<sup>36</sup> If after reconsideration the claimant still disagrees with the determination of the agency, the individual may pursue an appeal.<sup>37</sup> In the U.S., the next level of appeal is to the Board of Veterans' Appeals (BVA), an administrative body within the DVA.<sup>38</sup> This stage of the process is still considered informal and non-adversarial.<sup>39</sup> In the U.K., the next level of appeal is to an independent tribunal outside of the SPVA.<sup>40</sup> In the U.K., independent tribunals are specialist judicial bodies that generally consider appeals against a decision made by a government department or agency.<sup>41</sup> In both the U.S. and U.K., if the individual disagrees with the decision of the appellate body, further appeal can be made to the appropriate courts including up to the highest courts.<sup>42</sup>

## **B. Differences in Claim Submission Time Limit**

### *i. The U.K.: Seven-Year Time Limit on Claim Filing*

Under the AFCS, an individual must submit a claim for compensation for an injury (to include illnesses) within 7 years from the earlier of: the date that injury occurred, the day an injury

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<sup>36</sup> See 38 C.F.R. §§ 19.26, 19.29; AFCS Order, art. 45.

<sup>37</sup> 38 U.S.C. § 7105(a) (explaining the requirements to complete an appeal); AFCS Order, art. 43(3)(b).

<sup>38</sup> 38 U.S.C. §§ 7101, 7104(a) (establishing jurisdiction of the Board of Veterans' Appeals (BVA)).

<sup>39</sup> See *Stanley v. Gober*, No. 97-7056, 135 F.3d 774, 1997 WL 791633, at \*1 (Fed. Cir. Dec. 29, 1997) ("The law treats the veterans' claim process as nonadversarial, until the Board issues a final decision on a particular claim for benefits.").

<sup>40</sup> See First-tier Tribunal and Upper Tribunal (Chambers) Order, 2008, S.I. 2008/2684, art. 4 (assigning appeals previously heard by the Pension Appeals Tribunal to the War Pensions and Armed Forces Compensation Chamber). Originally, appeals were heard by the Pension Appeals Tribunal. See AFPCA 2004, § 5, sched. 1, para 4.

<sup>41</sup> See *About Tribunals*, MINISTRY OF JUSTICE, <http://www.justice.gov.uk/about/hmcts/tribunals> (last visited Sept. 28, 2013).

<sup>42</sup> See Veterans' Judicial Review Act, Pub. L. No. 100-687, § 301, 102 Stat. 4105, 4113 (1988); see also First-tier Tribunal and Upper Tribunal (Chambers) Order, 2008, S.I. 2008/2684, art. 6.

not caused by service worsened, the day on which service ended, or the day an individual first sought medical advice in relation to the illness.<sup>43</sup> When creating the AFCS, those involved in the process originally contemplated making this period 3 years.<sup>44</sup> However, the final version of the AFCS passed in 2005 provided for a 5-year period.<sup>45</sup> Following the 2010 AFCS review, the Ministry of Defence extended this period to the current 7 years.<sup>46</sup> An individual may make a disability compensation claim while still serving in the military.<sup>47</sup> Regarding the 7-year time limit, the Ministry of Defence's statement of policy explains:

[The 7-year time limit for making claims] provides sufficient time for an individual to make a claim. If a relatively minor injury is sustained as a result of service, it might be that the individual wants to make the claim immediately and move on. However, if the injuries are of a more serious nature and continued medical treatment is required they may wish to delay their claim until their injuries are more settled and they have established their rehabilitative process. It is important to recognise that while an individual remains in service they will continue to receive their salary and appropriate support from the Services. An individual should feel under no pressure to make a claim immediately, should higher personal priorities exist and awaiting injury prognosis before claiming can, in some cases, be helpful.<sup>48</sup>

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<sup>43</sup> AFCS Order, art. 39; The Armed Forces and Reserve Forces (Compensation Scheme) (Amendment) Order, 2010, S.I. 2010/1723, art. 3(2) [hereinafter AFCS Order 2010].

<sup>44</sup> HOUSE OF COMMONS DEF. COMM., ARMED FORCES PENSIONS AND COMPENSATION: FIRST REPORT OF SESSION 2003-2004, at 24, <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmdfence/96/96.pdf>.

<sup>45</sup> See AFCS Order, art. 39.

<sup>46</sup> AFCS Order 2010, art. 3(2).

<sup>47</sup> See AFCS Order, art. 7(1) ("Benefit is payable in accordance with this Order to or in respect of a member or former member of the forces . . .").

<sup>48</sup> MOD POLICY STATEMENT, *supra* note 27, at 31.

The AFCS contains an explicit exception to the 7-year time limit for a “late onset illness.”<sup>49</sup> A claim may be submitted outside the 7-year window for a “late onset illness,” which the AFCS generally defines to include malignancies and other physical disorders and mental disorders capable of being caused more than 7 years before onset.<sup>50</sup> In addition, the 2010 review report announced that an individual would be allowed to request review of an original award after 10 years when additional significant and unexpected problems occur.<sup>51</sup> The 2010 review report provides as an example of this exception a situation where a pilot suffers a below-the-knee amputation due to an accident and then years later must undergo an above-the-knee amputation due to deterioration of the leg condition.<sup>52</sup>

*ii. The U.S.: No Time Limit on Claim Filing*

In the U.S., a veteran may submit a claim for disability compensation at any time after discharge from service.<sup>53</sup> The effective date of the payment of any benefit award is typically the date of claim.<sup>54</sup> Therefore, the sooner an American veteran submits a claim, the sooner the veteran will begin to receive payment. In some circumstances, the effective date of award may be up to one year prior to the date of claim. For example, an award of benefits based on a claim received within one year of discharge will be effective as of the date of discharge.<sup>55</sup>

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<sup>49</sup> AFCS Order, art. 40.

<sup>50</sup> *Id.*, art. 3; AFCS Order 2010, art. 3(1); MoD 2010 REVIEW, *supra* note 8, at 11 (increasing the time to make a claim for a “late onset illness” from one year to three years after the disorder develops).

<sup>51</sup> See MoD 2010 REVIEW, *supra* note 8, at 11.

<sup>52</sup> *Id.*

<sup>53</sup> See 38 U.S.C. § 5101(a)(1) (2006) (omitting time limit for claim filing); *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 311 (1985) (noting in reference to the veterans' disability adjudication process that “[t]here is no statute of limitations”).

<sup>54</sup> 38 U.S.C. § 5110(a); 38 C.F.R. § 3.400 (2012).

<sup>55</sup> 38 U.S.C. § 5110(b)(1).

Like the U.K., in the U.S. system a servicemember may apply for benefits while still in service.<sup>56</sup> While the U.K. allows a servicemember to apply anytime while in service, the U.S. system provides a smaller window of between 60 and 180 days prior to separation.<sup>57</sup>

### **C. Full and Final Ratings in the U.K. v. Increased Rating Claims in the U.S.**

The U.K.'s emphasis on timely claim filing is complimented by the U.K. policy of providing a full and final rating, which is subject to revision only in special circumstances. In the U.K., the SPVA assigns an evaluation intended to be full and final.<sup>58</sup> The 2010 Review examined this feature of the scheme and opted to keep it in place, stating:

[The Review] accepts the advantages in providing a full and final award: it gives the injured person certainty and the chance to move on with their life, as well as making gathering the evidence easier. The Review also recognises that the Scheme already allows for awards to be reconsidered, appealed, and even exceptionally reviewed in some cases.<sup>59</sup>

The DVA regulations contain provisions that encourage stability of ratings including limitations on reexaminations.<sup>60</sup> However, the U.S. system does not attempt to provide a full and

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<sup>56</sup> See, e.g., *Benefits Delivery at Discharge*, DEP'T OF VETERANS AFFAIRS, <http://benefits.va.gov/PREDISCHARGE/claims-pre-discharge-benefits-delivery-at-discharge.asp> (last updated Mar. 7, 2013).

<sup>57</sup> *Id.*

<sup>58</sup> See MoD 2010 REVIEW, *supra* note 8, at 11.

<sup>59</sup> *Id.*

<sup>60</sup> See, e.g., 38 C.F.R. § 3.327(b)(2) (2012) (describing circumstances where no periodic reexaminations will be scheduled); *id.* § 3.344(a) (“Rating agencies will handle cases affected by change of medical findings or diagnosis, so as to produce the greatest degree of stability of disability evaluations consistent with the laws and Department of Veterans Affairs regulations governing disability compensation and pension.”).

final rating evaluation and veterans may apply for an increased rating at any time.<sup>61</sup>

#### **D. Differences in Payment Form and Rationale**

##### *i. The U.K. Tariff System and Lump Sum and Guaranteed Income Payments*

Under the AFCS, all compensable injuries receive a lump sum payment, which varies in amount based on the severity of the injury.<sup>62</sup> The AFCS defines “injury” to include “illness.”<sup>63</sup> Injuries that are more severe will also receive lifetime periodic payments called a guaranteed income payment (GIP), in addition to the applicable lump sum amount.<sup>64</sup>

To assess an injury for compensation, the SPVA uses tables of “descriptors,” which describe an injury and its effects.<sup>65</sup> The AFCS contains provisions for the review and update of these descriptors to account for medical advances or other needed clarifications.<sup>66</sup> For each descriptor, the tables list a corresponding tariff level of 1 through 15.<sup>67</sup> Level 1 injuries are the most serious and level 15 injuries are the least serious.<sup>68</sup> All tariff levels have a corresponding lump sum payment ranging from £570,000 for tariff level 1 to £1,155 for tariff level 15.<sup>69</sup> Injuries assigned a tariff level of 12 through 15 receive only a lump sum payment.<sup>70</sup> The most severe injuries, those assigned a tariff level of 1 through 11,

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<sup>61</sup> See 38 U.S.C. § 5110(a) (setting effective date for all claims including “claims for increase” as of no earlier than the date of receipt of the claim, except where provided otherwise).

<sup>62</sup> AFCS Order, art. 14 & sched. 4, tbl. 10.

<sup>63</sup> *Id.*, art. 2.

<sup>64</sup> *Id.*, art. 14(1)(b), (4).

<sup>65</sup> *Id.*, sched. 4.

<sup>66</sup> *Id.*, art. 20.

<sup>67</sup> *Id.*, sched. 4.

<sup>68</sup> See *id.*, sched. 4, tbl. 10; MoD POLICY STATEMENT, *supra* note 27, at 13.

<sup>69</sup> See MoD 2010 REVIEW, *supra* note 8, at 8.

<sup>70</sup> AFCS Order, art. 14(4); MoD POLICY STATEMENT, *supra* note 27, at 13.

also receive a GIP for life.<sup>71</sup> The GIP amount is a percentage of the “base figure,” which the SPVA calculates based on a formula using the individual’s age and salary at the time that he or she left the service.<sup>72</sup> For example, an individual with an injury assigned a tariff level 1, 2, 3, or 4 will receive 100% of the base figure, while an individual with an injury assigned a tariff level of 9, 10, or 11 will receive 30% of the base figure.<sup>73</sup> The following two examples illustrate how the scheme operates:

Example 1: “L[ieutenant]t Jones is injured on operations and has to have her left leg amputated below the knee. The injury is assessed as level 6.” Lieutenant Jones will receive a lump sum payment and a GIP calculated based on her age and salary when she was discharged.<sup>74</sup>

Example 2: “P[riva]te Smith is injured in training and fractures the patella on one knee, causing significant functional limitation which is expected to last for more than 26 weeks. The injury is assessed as level 13.” P[riva]te Smith will receive a lump sum payment, but no GIP.<sup>75</sup>

The GIP is intended to compensate for the impact of the injury on the individual’s ability to earn future income.<sup>76</sup> The lump sum payment is made in consideration of “pain and suffering.”<sup>77</sup> The pain and suffering payment amount is designed to be commensurate with the non-pecuniary damages paid in the context of U.K. civil negligence awards.<sup>78</sup> However, the

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<sup>71</sup> MoD POLICY STATEMENT, *supra* note 27, at 13.

<sup>72</sup> AFCS Order, art. 16(1), (5).

<sup>73</sup> *Id.*, art. 16(3)(a)(i) and (iv).

<sup>74</sup> See MoD 2010 REVIEW, *supra* note 8, at 9.

<sup>75</sup> *Id.*

<sup>76</sup> See MoD POLICY STATEMENT, *supra* note 27, at 11-13.

<sup>77</sup> *Id.* at 11-12.

<sup>78</sup> See MoD 2010 REVIEW, *supra* note 8, at 21.

Ministry of Defence increased the lump sum amount for the most severe injuries in 2008, bringing these amounts higher than the corresponding amounts in civil cases.<sup>79</sup> Although the lump sum payment tracks the pain and suffering awards paid in civil negligence cases, the U.K. scheme does not compensate for non-pecuniary damages related to loss of enjoyment of life.<sup>80</sup>

*ii. The U.S. Rating Schedule and Monthly Payments*

Under the U.S. system, injuries and conditions are assigned a disability rating from 0% to 100%.<sup>81</sup> The criteria for rating a particular injury or condition are found in the DVA Schedule for Rating Disabilities (“Rating Schedule”), which lists medical conditions divided by type and corresponding percentage ratings based on the severity of the condition.<sup>82</sup> The Rating Schedule percentages “represent as far as can practicably be determined the average impairment in earning capacity resulting from such diseases and injuries and their residual conditions in civil occupations.”<sup>83</sup> The only consideration is impact on earning capacity.<sup>84</sup> The U.S. system does not compensate for “pain and

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<sup>79</sup> Armed Forces and Reserve Forces (Compensation Scheme) (Amendment No. 3) Order, 2008, S.I. 2008/2942 [hereinafter AFCS Order 2008]; see MoD 2010 REVIEW, *supra* note 8, at 28.

<sup>80</sup> See MoD 2010 REVIEW, *supra* note 8, at 28-30 (considering such an assessment too subjective and likely to result in inconsistent awards among individuals with the same level of physical impairment).

<sup>81</sup> 38 U.S.C. § 1155 (2006) (directing the DVA Secretary to adopt a schedule of ratings of ten grades of disability from 10% to 100%); 38 C.F.R. pt. 4 (2012).

<sup>82</sup> 38 C.F.R. pt. 4; see 38 U.S.C. § 1155.

<sup>83</sup> 38 C.F.R. § 4.1.

<sup>84</sup> See *Vazquez-Flores v. Shinseki*, 580 F.3d 1270, 1279 (Fed. Cir. 2009) (holding that “the statute unambiguously makes it clear that earning capacity is the *only* relevant consideration”); *Davis v. Principi*, 276 F.3d 1341, 1344 (Fed. Cir. 2002) (“The Secretary has defined ‘disability’ as ‘impairment in earning capacity resulting from such diseases and injuries and their residual conditions.’” (citing 38 C.F.R. § 4.1)); *Hunt v. Derwinski*, 1 Vet. App. 292, 296 (1991) (“Such a definition of ‘disability’ follows the overall statutory and regulatory purpose of the veterans compensation law. This purpose is reflected in the ratings system, which rates different mental and physical maladies based upon diminished earning capacity.”). The focus is not on actual loss of earning capacity but on the average loss of earning capacity. 38 U.S.C. § 1155. Therefore, even where

suffering,” or any other non-economic loss.<sup>85</sup>

Like in the U.K., the U.S. law states that the DVA shall adjust the Rating Schedule from time to time based on experience.<sup>86</sup> In addition, Congress established the Advisory Committee on Disability Compensation to provide advice to VA on the maintenance and periodic readjustment of the rating schedule.<sup>87</sup> Nevertheless, the last full update to the Rating Schedule occurred in 1945.<sup>88</sup> A comprehensive update of the Rating Schedule began in 2009, but has experienced delays.<sup>89</sup>

In the case of multiple rated disabilities, the DVA determines the overall disability rating for purposes of compensation using a combined ratings table established by regulation.<sup>90</sup> The amount of compensation that corresponds to an assigned combined disability rating is codified in statute and paid on a monthly basis.<sup>91</sup> For example, an American veteran with one disability rated at 20% and another disability rated at 40% according to the Rating Schedule, will be entitled to a combined disability rating of 50% pursuant to the combined rating table and will receive a tax-free payment of \$770 per month.<sup>92</sup> Although an American veteran with certain types of injuries may

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a veteran suffers no actual economic impact of a disability, the law is based on a determination that the particular condition would have that level of economic impact on average.

<sup>85</sup> See *Bagwell v. Brown*, 9 Vet. App. 337, 338 (1996) (finding that the United States Court of Appeals for Veterans Claims (Veterans Court) lacked authority to adjust the schedule of ratings in individual cases to award damages for “pain and suffering”).

<sup>86</sup> 38 U.S.C. § 1155 (“The Secretary shall from time to time readjust this schedule of ratings in accordance with experience.”).

<sup>87</sup> 38 U.S.C. § 546.

<sup>88</sup> See IOM REPORT, *supra* note 3, at 102. For a history of the Rating Schedule, see *id.* at 93-102.

<sup>89</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-846, VA DISABILITY COMPENSATION: ACTIONS NEEDED TO ADDRESS HURDLES FACING PROGRAM MODERNIZATION 7-15 (2012) [hereinafter U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-846].

<sup>90</sup> 38 C.F.R. § 4.25 (2012); see *Amberman v. Shinseki*, 570 F.3d 1377, 1380 (Fed. Cir. 2009).

<sup>91</sup> 38 U.S.C. § 1114.

<sup>92</sup> See 38 C.F.R. § 4.25, Table I; 38 U.S.C. § 1114(e) (Supp. 2012).



be entitled to additional allowances and monthly compensation, the U.S. laws do not contain any provisions for *per se* lump sum compensation payments.<sup>93</sup>

## II. PROPOSED CHANGES TO CURRENT LAW: ESTABLISHMENT OF A CLAIM FILING TIME LIMIT AND LUMP SUM PAYMENTS

The body of law in the U.S. governing veterans' disability benefits is intricate and complex. As observed by one legal author, the system is made more complex by the fact that Congress overlaid judicial review on what was for over 200 years an informal, non-adversarial system.<sup>94</sup> Certainly, any significant changes to the current law must be mindful of the existing scheme. This part describes the contours of why and how the two proposed changes could be implemented in the U.S. scheme.

### A. Proposal 1: Establishment of a Claim Filing Time Limit

This section explains how and why the U.S. might establish a claim filing time limit in the veterans' disability compensation system.<sup>95</sup> Common sense suggests that when a claim is submitted

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<sup>93</sup> See, e.g., 38 U.S.C. § 1114(k)-(t) (providing special monthly compensation for certain severe disabilities).

<sup>94</sup> 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, 251-53 (2010).

<sup>95</sup> In the article *Economics and Austerity Relative to Veterans' Claims and the Veterans Appeal Process* ("*Economics and Austerity*"), author David Kimball Stephenson also proposed a claim filing time limit in the veterans' claim system. See Stephenson, *supra* note 4. Some aspects of *Economics and Austerity* are consistent with the proposals in this Article. However, the time limit proposed in that article differs in some important respects. First, the time limit in that article would apply only to original claims for disability benefits. *Id.* at 202. The claim filing time limit proposed by this Article would apply to original claims; however, this Article does not dismiss examination of the feasibility and desirability of a "full and final award" approach like that used in the U.K. See *infra* Part II.B. Second, *Economics and Austerity* proposes a liberal "statute of repose," and discusses a "hypothetical termination limit of twenty years after the last day of active service." Stephenson, *supra* note 4, at 201-06. This Article argues for a period of time closer to the U.K.'s seven-year limit. See *infra* Part II.A. In addition,

closer to the occurrence of an injury or onset of an illness, the easier it will be to obtain relevant information about the circumstances and nature of that injury or disease. Likewise, the longer the amount of time between the occurrence of an injury or onset of an illness, the more difficult it will be to obtain such information. In addition, it is more likely that other intervening causes or circumstances may obscure the answers to the questions of why and how the injury occurred or illness manifested.<sup>96</sup>

Timeliness is a key principle of the U.S. legal system.<sup>97</sup> For example, statutes of limitations encourage individuals and institutions to pursue legal actions in a timely and diligent manner.<sup>98</sup> In addition, the equitable defense of laches allows a

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*Economics and Austerity* argues for a “statute of repose” on the basis that “[i]n addition to reducing claim volume, such a statute would also generate fiscal savings, further judicial economy, and promote fairness in a system that is ‘overburdened’ and complex.” Stephenson, *supra* note 4, at 201. *Economics and Austerity* notes that “with a hypothetical termination limit of twenty years after the last day of active service, then the number of claims on appeal to [the Veterans Court] would be reduced by 27%.” *Id.* at 205-06. As a point of clarification, this Article does not propose a claim filing time limit for the purpose of reducing dollar or claim numbers. Rather, this Article proposes a time limit for the purpose of increasing accuracy and efficiency. Decisions made closer to the date of discharge are more likely to be accurate, and more accurate decisions will lead to systemic efficiencies like fewer appeals. Perhaps the same number, more, or less claims will be submitted within the proposed time limit. While the number of appeals and costs could decrease, the driving motivation behind the time limit proposed in this Article is systemic accuracy and efficiency, not pure reduction in numbers. See *infra* Part II.A. In addition, this Article’s proposal for lump sum payments in conjunction with a time limit may be inconsistent with the cost-saving rationale put forth in *Economics and Austerity*. Although the cost effects of a lump sum payment feature would depend upon the design of those payments.

<sup>96</sup> See Stephenson, *supra* note 4, at 204 (observing that “[t]he absence of a time limit to file such a claim forces the VA claims and appellate system to potentially ignore realistic intervening factors”).

<sup>97</sup> See *Developments in the Law--Statutes of Limitations*, 63 HARV. L. REV. 1177, 1178-81 (1950) (providing a historical overview of statutes of limitations in the world and the United States).

<sup>98</sup> See *id.* at 1185-86; *Wood v. Carpenter*, 101 U.S. 135, 139 (1879) (“Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders

defendant to successfully defend against a lawsuit that was brought in an unreasonably delayed manner when such delay caused prejudice to the defendant.<sup>99</sup> Both statutes of limitations and the doctrine of laches are based on considerations of the negative effects of the passage of time and the public policy considerations of diligent enforcement of rights and laws.<sup>100</sup> In the U.S. system, no time limit applies to the initial filing of a claim for disability compensation following discharge.<sup>101</sup> Regarding laches, the Veterans Court has determined that this doctrine is not applicable in the veterans' claim context.<sup>102</sup>

Implementation of an initial claim filing time limit would require new legislation, and such a change would undoubtedly be met with opposition.<sup>103</sup> As it did in the U.K. during the formulation of the AFCS, a claim submission time limit may cause concern among veterans and veteran advocacy groups. During the development of the AFCS, the Royal British Legion, an ex-servicemember organization, stated:

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proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and antidote go together.”)

<sup>99</sup> See *Costello v. United States*, 365 U.S. 265, 282 (1961) (stating that the defense of laches requires proof of both delay and prejudice); *Cornetta v. United States*, 851 F.2d 1372, 1377-80 (Fed. Cir. 1988) (discussing the defense's elements of delay and prejudice).

<sup>100</sup> See, e.g., *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 348-49 (1944) (“Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.”).

<sup>101</sup> See 38 U.S.C. § 5101(a) (2006) (omitting time limit for claim filing); *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 311 (1985) (noting that “[t]here is no statute of limitations” in the veterans' disability adjudication process).

<sup>102</sup> See *Browder v. Derwinski*, 1 Vet. App. 204, 208 (1991) (noting that “the VA benefits system as well as the Veterans' Judicial Review Act both militate against the application of the [laches] doctrine to cases before this Court” (citing *Manio v. Derwinski*, 1 Vet. App. 140 (1991))).

<sup>103</sup> See Stephenson, *supra* note 4, at 207 (observing that “[s]ome reactions to implementing a statute of repose in veterans' law are bound to be adverse” and describing some possible objections).

We do not agree with introducing a period of three years from the time when the illness is diagnosed . . . because so many of those who become unwell due to their service . . . either do not know that they can make a claim or choose not to make a claim . . . [.] We would strongly disagree with the three-year rule.<sup>104</sup>

In addition, opponents of a time limit in the U.K. pointed out that, at that time, 70% of claims were filed later than three years from the claimant's discharge from service.<sup>105</sup> In the early days of U.S. judicial review, when confronted by the question of whether the government could assert the defense of laches in a case involving a veteran's claim, the Veterans Court observed "[i]n many instances disabilities incurred in service to this country may not become disabling until years later. The debt this nation owes to its disabled veterans lasts for a lifetime and should not be limited to those veterans who are prompt in asserting their right to compensation."<sup>106</sup> These examples illustrate valid concerns regarding the potential negative effects of a claim filing time limit.

However, the individual and systemic gains from imposition of a claim filing time limit could outweigh the advantages of an endless period in which to file claims. As an initial matter, timeliness currently plays a central role in all aspects of the veterans' claim process after the initial filing. Thus, a time limit at the beginning of the claim process would not be the drastic measure it may first appear to some. Further, prospective implementation and well-reasoned exceptions to the time limit would operate to minimize the potential negative impact of the proposed claim filing time limit.

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<sup>104</sup> SELECT COMM. ON DEF., THE MINISTRY OF DEFENCE REVIEWS OF ARMED FORCES' PENSION AND COMPENSATION ARRANGEMENTS, THIRD REPORT OF SESSION 2001-2002, para. 89 (ellipses in original), available at <http://www.parliament.the-stationery-office.co.uk/pa/cm200102/cmselect/cmdfence/666/66602.htm>.

<sup>105</sup> See *id.* para. 90, tbl. 3 (listing data provided by the Ministry of Defence regarding time between discharge and claim filing for claims filed in 2001).

<sup>106</sup> *Manio*, 1 Vet. App. at 144.

The current U.S. disability compensation system imposes many time limits. The law ties the effective date of any award of benefits directly to the date of claim submission.<sup>107</sup> Congress mandated that, with very limited exceptions, the effective date of award “shall not be earlier than the date of receipt of application therefor.”<sup>108</sup> In addition, failure to complete a claim application within one year following notification from the DVA of information or evidence necessary to complete the application effectively voids that application.<sup>109</sup> Failure to initiate an appeal within one year of receiving notice of a decision will make a DVA decision final.<sup>110</sup> If a claimant initiates an appeal within one year, that claimant then has 60 days from the date of notice of DVA’s readjudication of the claim to perfect an appeal to the BVA.<sup>111</sup> If the claimant does not appeal to the BVA within that 60-day window, the agency of original jurisdiction can close the case.<sup>112</sup> A final agency of original jurisdiction or BVA decision is subject to revision only on the basis of clear and unmistakable error or if new and material evidence is submitted to reopen the claim.<sup>113</sup> The date of any award granted on the basis of new and material evidence is generally tied to the date of receipt of the petition to reopen the claim, not the date of the original claim.<sup>114</sup> A DVA regulation entitled “Computation of time limit” describes the method for computing the time limit for any action required during the claim process.<sup>115</sup> Finally, although not disability compensation, claimants

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<sup>107</sup> 38 U.S.C. § 5110(a) (2006).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* § 5103(b)(1); 38 C.F.R. § 3.109(a) (2012).

<sup>110</sup> 38 U.S.C. § 7105(b)(1) (providing that the “notice of disagreement shall be filed within one year from the date of mailing of notice of the result of initial review or determination”); *id.* § 7105(c) (“If no notice of disagreement is filed in accordance with this chapter within the prescribed period, the action or determination shall become final . . . .” (citation omitted)).

<sup>111</sup> *Id.* § 7105(d)(3) (“The claimant will be afforded a period of sixty days from the date the statement of the case is mailed to file the formal appeal.”).

<sup>112</sup> *Id.* (“The agency of original jurisdiction may close the case for failure to respond after receipt of the statement of the case . . . .”).

<sup>113</sup> *See* 38 C.F.R. §§ 3.105, 3.156, 20.1400.

<sup>114</sup> *Id.* § 3.400(q).

<sup>115</sup> *Id.* § 3.110.

must file for “G.I. bill” education benefits within 15 years from the date of eligibility,<sup>116</sup> and the DVA Vocational Rehabilitation Program requires a claimant to file within 12 years from the date of the claimant’s discharge from service.<sup>117</sup>

In addition to these longstanding statutory and regulatory time periods, a time limit would be consistent with existing initiatives that start the disability rating process while an individual is still in service. The Benefits Delivery at Discharge (BDD) and Quick Start programs are designed to solicit and process claims from servicemembers near their discharge date.<sup>118</sup> Also, the Integrated Disability Evaluation System (IDES), a collaborative effort between the DVA and the Department of Defense, assigns a disability rating to a servicemember at the time of discharge when the military discharges the servicemember on medical grounds.<sup>119</sup> Thus, establishment of a claim filing time limit would be consistent with the current practice of delivering benefits as close as possible to the date of discharge.

To minimize the possible negative impact, the proposed time limit would apply prospectively. The time limit would only apply to individuals discharged after the effective date of the law containing the time limit provision. Veterans discharged prior to the effective date of the new time limit would continue to operate under the existing law. Prospective application of a time limit would help ensure that veterans of earlier generations, who for many reasons may not have already filed a claim, can still do so and receive compensation for injuries or illness related to their service. The specific time limit for filing should be thoughtfully determined, although, relying upon the U.K.’s work in this area,

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<sup>116</sup> 38 U.S.C. § 3321(a).

<sup>117</sup> *Id.* § 3103(a).

<sup>118</sup> *Pre-Discharge Programs*, DEP’T OF VETERANS AFFAIRS, <http://benefits.va.gov/predischarge/index.asp?expandable=0&subexpandable=0> (last visited Oct. 6, 2013).

<sup>119</sup> DEP’T OF DEF., *Directive-Type Memorandum (DTM) 11-015: Integrated Disability Evaluation System (IDES)*, att. 3, para. 1 (2011), <http://www.dtic.mil/whs/directives/corres/pdf/DTM-11-015.pdf>.

7 years seems a reasonable starting point. Using 7 years as an example, this proposal envisions that all individuals currently serving in the U.S. military would get 7 years from the date of discharge in which to file a claim.

Another measure to minimize the possible negative impact of a time limit would be to ensure that the proposed time limit would not operate alone. First, the claim submission deadline would be accompanied by exceptions designed to acknowledge conditions with a naturally late onset. The U.K. scheme currently provides a time limit exception for “late onset” illnesses.<sup>120</sup> These are conditions that would naturally manifest after the 7-year time period.<sup>121</sup> In the U.S., an added statutory safeguard for “late onset” injuries and diseases would avoid cutting off claims for conditions that can inherently manifest outside the 7-year filing window.

Second, an exception to the claim filing time limit would exist for all conditions that are or become the subject of a presumption of service connection. One concern regarding a deadline would be that the system would unfairly time-bar meritorious claims when the scientific and medical evidence identifies a link between aspects of service and a particular condition only many years after service. For example, U.S. law presumes that certain diseases are to some degree associated with exposure to dioxin, a chemical found in the substance known as Agent Orange, an herbicide used during the Vietnam War.<sup>122</sup> Under this law, veterans who served in Vietnam and later suffer from certain diseases receive a presumption that their ailments are connected to their exposure to herbicides used in Vietnam.<sup>123</sup> Through periodic review of existing medical literature, the DVA

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<sup>120</sup> AFCS Order, art. 40.

<sup>121</sup> *Id.*, art. 3 (amended to seven years by AFCS Order 2010, art. 3).

<sup>122</sup> See Agent Orange Act of 1991, Pub. L. No. 102-4, 105 Stat. 11 (codified in relevant part at 38 U.S.C. § 1116); see also *Haas v. Peake*, 525 F.3d 1168, 1175-83 (Fed. Cir. 2008) (reviewing the complex history of the legislative and regulatory measures regarding herbicide exposure in Vietnam).

<sup>123</sup> 38 U.S.C. § 1116(a) (2006).

continues to identify diseases that have a positive association with exposure to Agent Orange.<sup>124</sup> A time limit exception for all conditions for which the DVA has established a presumption of service connection would be an additional safeguard to ease concerns about prematurely cutting off meritorious claims. Such an exception would be based on the principle that medical science has and will continue to evolve to discover links between certain military occupational exposures and medical conditions.

Importantly, the proposed claim filing time limit would also be accompanied by entitlement to the proposed lump sum payment. When coupled with lump sum payments, the incentive for timely filing increases. In addition, the advantages of a lump sum payment can overcome actual or perceived disadvantages of a claim submission time limit. The lump sum payment proposal is discussed in greater detail in Part II.B.

### **B. Proposal 2: Creation of Lump Sum Payments**

As described in Part I, the U.S. has long compensated veterans via monthly payments tied to a percentage disability rating. The creation of a lump sum payment feature, like that used in the U.K., could incentivize timely filing of claims, which in turn could increase accuracy and efficiency in processing claims. In addition, lump sum payments can enhance policy objectives such as promoting the successful transition from military to civilian life. Finally, depending on the way in which they are structured, lump sum payments can achieve additional policy goals that the current monthly payments cannot.

While perhaps the less controversial of the two proposals in this article, a lump sum payment feature would be the most complex to implement. Creation of a lump sum payment is administratively feasible, but would require thoughtful

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<sup>124</sup> See *id.* § 1116(b).



development. Congress would need to determine the basis for the lump sum payment and the lump sum payment amounts. In addition, the DVA would need to reevaluate the existing Rating Schedule in consideration of lump sum payments. How to compensate for the various consequences of a medical condition including disability, impairment, loss of earning capacity, and loss of quality of life are subjects of extensive study.<sup>125</sup> While lump sum payments could be designed in different ways, it bears noting that the lump sum payment proposal is not a proposal to simply pay the amount of compensation an individual would receive under the current system for loss of earning capacity in a one-time, upfront sum.<sup>126</sup> Rather, the proposal is to offer a lump sum payment representing compensation on a basis other than loss of earning capacity.

The first step in creating a lump sum payment feature is to define the underlying purpose for the lump sum payment. The U.S. system currently only compensates on the basis of lost earning capacity. Compensating veterans on a basis other than lost earning capacity can have several advantages. First, lump sum payments could have the effect of encouraging earlier claim filing. Second, the lump sum payments can operate to address needs for which no current mechanism of compensation exists. For example, lump sum payments can provide resources to compensate for additional costs experienced by the veteran during the acute phase of the injury or illness. Also, lump sum payments not tied to loss of earning capacity can compensate for those injuries that

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<sup>125</sup> *E.g.*, IOM REPORT, *supra* note 3, at 69-87.

<sup>126</sup> A 2007 report examined possible use of this type of a lump sum payment for veterans. THE CNA CORP., FINAL REPORT FOR THE VETERANS' DISABILITY BENEFITS COMMISSION: COMPENSATION, SURVEY RESULTS, AND SELECTED TOPICS 147-57 (2007) [hereinafter CNA REPORT]. The report noted that Canada, the U.K., and Australia offer some form of lump sum payment to veterans. *Id.* at 149. The report determined that such a lump sum option in the U.S. could result in net cost savings but would be difficult to design and implement. *Id.* at 14. This report was made at the direction of the Veterans' Disability Benefits Commission, which was established by the National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, §§ 1501-1507, 117 Stat. 1676, 1676-79 (2003).

cause hardship in the short term, but which ultimately cause no lasting impact on earning capacity. Further, lump sum payments can provide resources to help the condition improve, or avoid the development of other conditions somehow related to the original condition. For instance, a veteran could use the lump sum funds to cover additional child care or transportation costs related to medical and physical therapy appointments he or she otherwise might not attend. Greater adherence to a medical treatment plan can minimize the lasting effects of the injury or illness.

The idea of providing benefits earlier and at the time of greatest need is not new. A “transitional cash assistance” approach has been recommended to aid veterans earlier in the process.<sup>127</sup> In 2007, the Dole-Shalala Commission recommended that the goal of the DVA’s disability program should be to return veterans to normal activities, if feasible, as quickly as possible.<sup>128</sup> Thus, the commission recommended integrating vocational rehabilitation with transition payments into the VA disability compensation system.<sup>129</sup> As discussed in Part II.A, several programs facilitate the filing of claims prior to discharge with the goal of delivering benefits as soon as possible after discharge.<sup>130</sup>

The proposed lump sum payment could also be based in some part on the pain and suffering incurred by the individual veteran. This would recognize instances where a servicemember suffers a serious injury, but recovers fully prior to discharge. For example, under current U.S. law, an infantryman who suffers a gunshot wound in combat, but who fully recovers, may be entitled to no compensation because that wound has completely healed. In contrast, another soldier who suffers from a relatively minor

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<sup>127</sup> See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-846, *supra* note 89, at 19.

<sup>128</sup> See DOLE-SHALALA COMM’N, SERVE, SUPPORT, SIMPLIFY: REPORT OF THE PRESIDENT’S COMMISSION ON CARE FOR AMERICA’S RETURNING WOUNDED WARRIORS 23 (2007), [http://www.veteranslawlibrary.com/files/Commission\\_Reports/Dole\\_Shalala\\_July\\_30\\_2007report.pdf](http://www.veteranslawlibrary.com/files/Commission_Reports/Dole_Shalala_July_30_2007report.pdf).

<sup>129</sup> *Id.* at 7-8.

<sup>130</sup> See *supra* notes 118-19 and accompanying text.

condition rated at 10% will receive a tax-free payment of \$123 per month, likely for life.<sup>131</sup> This is because under U.S. law, a veteran with a minimum rating for a condition will not be scheduled to be reevaluated.<sup>132</sup> In the U.K., an infantryman who suffers a gunshot wound that is expected to have “substantial recovery” could nevertheless receive £13,750 as a lump sum payment (but no GIP).<sup>133</sup> Therefore, while such a change might be considered a departure from the current system of compensating for lost “earning capacity,” it would also be in line with the country’s longstanding policy of caring for those who have suffered as a result of defending the nation.

However, establishing appropriate amounts for non-economic pain and suffering would be challenging. While the lump sum payment feature of the U.K. is helpful by comparison, the pain and suffering basis of that payment would be difficult to translate to the U.S. The AFCS derives the lump sum amount from an analogous body of U.K. law, civil tort negligence awards.<sup>134</sup> This approach would not be practical in the U.S. for several reasons. The analogous legal areas of civil negligence and workers’ compensation would not provide helpful payment amounts. First, the issue of tort award amounts and particularly pain and suffering awards in the U.S. has been a complex and contentious one.<sup>135</sup> Thus, any lump sum payment amount tied to comparative civil tort awards would be unduly complex, controversial, and expensive, and thus undermine the potential gains from a lump sum payment. Second, U.S. workers’ compensation laws generally do not permit payment for non-pecuniary loss, so that body of law offers

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<sup>131</sup> 38 U.S.C. § 1114(a) (2006 & Supp. 2012).

<sup>132</sup> See 38 C.F.R. § 3.327(b)(2)(v) (2012) (providing that no periodic future examinations will be requested when a rating is a prescribed scheduled minimum rating).

<sup>133</sup> AFCS Order, tbl. 4; AFCS Order 2008, art. 19 (amending the AFCS lump sum award amounts).

<sup>134</sup> See MoD 2010 REVIEW, *supra* note 8, at 21.

<sup>135</sup> See generally Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling “Pain and Suffering,”* 83 Nw. U. L. REV. 908 (1989) (discussing the nature of and problems inherent to the U.S. tort claims system).

no direct comparison.<sup>136</sup>

Because the introduction of a lump sum payment feature in the U.S. system would require compatibility with the Rating Schedule, a brief discussion of the current status of the Rating Schedule is required. The DVA is currently in the process of updating the Rating Schedule.<sup>137</sup> This undertaking is inherently difficult and has encountered delays.<sup>138</sup> Various commissions and expert panels have long raised concerns about the soundness of the Rating Schedule and the overall benefit structure.<sup>139</sup> Among these concerns is that the Rating Schedule is out-of-date and therefore does not reflect advances in technology and medicine.<sup>140</sup> Another criticism has been that the system should be evaluated and updated to reflect modern economic considerations, including the shift to a service and knowledge-based economy.<sup>141</sup> An additional concern is that the U.S. veterans' disability scheme overemphasizes disability compensation without adequate focus on veteran rehabilitation and reintegration into the civilian workforce.<sup>142</sup> Ideally, a lump sum payment feature would be considered in conjunction with the development of the new Rating Schedule.

Whether the Rating Schedule accurately captures the impact on earning capacity is the subject of ongoing examination. In 2007, the Institute of Medicine explained how the Rating Schedule currently compensates for conditions that do not impact

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<sup>136</sup> See 100 C.J.S. *Workers' Compensation* § 579 (2013) (explaining that the workers' compensation regime does not compensate for non-pecuniary losses).

<sup>137</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-846, *supra* note 89, at 7.

<sup>138</sup> *Id.* at 13-15.

<sup>139</sup> *Id.* at 5-6.

<sup>140</sup> *Id.* at 5.

<sup>141</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-597, *SSA AND VA DISABILITY PROGRAMS: RE-EXAMINATION OF DISABILITY CRITERIA NEEDED TO HELP ENSURE PROGRAM INTEGRITY 2-4* (2002) (finding that federal disability programs including the DVA disability program need to be updated to account for medical innovations and labor market changes).

<sup>142</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-846, *supra* note 89, at 6.

earning capacity.<sup>143</sup> Other reports have found that the Rating Schedule under compensates for mental disorders.<sup>144</sup> Regardless of how accurately the Rating Schedule currently captures that impact on earning capacity, the fact remains that the legal purpose of compensation is limited to impact on employment.<sup>145</sup> With respect to conditions for which the Rating Schedule is determined to overcompensate given the lack of an impact on earning capacity, lump sum payments could provide a mechanism for compensating for these injuries on other public policy grounds such as short-term economic impact during the acute phase of the injury or illness, or pain and suffering related to the injury or illness.

Significantly, nearly sixty years ago, a presidential commission reviewing the U.S. veterans' disability system considered a lump sum payment approach and compensation on bases other than loss of earning capacity. In 1955, President Dwight D. Eisenhower appointed the President's Commission on Veterans' Pensions.<sup>146</sup> Chaired by General Omar N. Bradley, the "Bradley Commission" produced a lengthy report, totaling more than 415 pages, evaluating the existing veterans' disability system.<sup>147</sup> Notably, in 1956, the Bradley Commission considered the 1945 Rating Schedule to be out-of-date and recommended that the Rating Schedule "should be revised thoroughly so that it will reflect up-to-date medical, economic, and social thinking with respect to rating and compensation of disability."<sup>148</sup>

Regarding lump sum payments, the Bradley Commission report questioned the practice of providing continuing monthly

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<sup>143</sup> IOM REPORT, *supra* note 3, at 83-85.

<sup>144</sup> See, e.g., CNA REPORT, *supra* note 126, at 88.

<sup>145</sup> 38 U.S.C. § 1155 (2006); 38 C.F.R. § 4.1 (2012).

<sup>146</sup> Exec. Order No. 10,588, 20 Fed. Reg. 361 (Jan. 15, 1955).

<sup>147</sup> *Id.* at 362; THE PRESIDENT'S COMM'N ON VETERANS' PENSIONS, VETERANS' BENEFITS IN THE UNITED STATES 175-77 (1956) [hereinafter BRADLEY REPORT], [http://www.veteranslawlibrary.com/files/Commission\\_Reports/Bradley\\_Commission\\_Report1956.pdf](http://www.veteranslawlibrary.com/files/Commission_Reports/Bradley_Commission_Report1956.pdf).

<sup>148</sup> BRADLEY REPORT, *supra* note 147, at 168.

payments for relatively minor disabilities such as those rated at 10% and 20%.<sup>149</sup> The report stated “[t]here is a serious question as to the desirability of, or necessity for, retaining a very substantial segment of the 10- and 20-percent cases on the [DVA] disability compensation roll.”<sup>150</sup> The Bradley Commission observed that “[t]he large number of awards in the minor disabilities may be due in part to the fact that there is a [DVA] requirement that no future examinations are scheduled once the disability reaches the prescribed minimum rating for that condition in the Schedule for Rating Disabilities.”<sup>151</sup> The Commission also noted that “[t]he payment of monthly benefits to persons who are disabled only slightly, if such benefits are not justified in terms of medical criteria, actuarial data, or material loss of earning capacity, presents an important area for possible improvement.”<sup>152</sup> The Bradley Commission’s report recommended “making a reasonable lump-sum settlement” reflecting “a realistic assessment of the actual extent of disability,” and noted that “[p]recedent for this approach is to be found in countries like Canada and Great Britain.”<sup>153</sup> Noting concerns regarding potential misuse of large up-front settlement amounts, the report recommended that the lump sum approach only extend to lower-rated disabilities.<sup>154</sup>

While the Bradley Commission’s report seems to focus on an up-front payment of what would otherwise be paid over the course of a veterans’ lifetime under the traditional “average impairments of earning capacity” compensation basis,<sup>155</sup> elements of the commission’s observations echo the rationale for the lump sum payments proposed here. With respect to lump sum payments on bases other than loss of earning capacity, the Bradley Commission recommended updating the Rating Schedule to

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<sup>149</sup> *Id.* at 175.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 176.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 177.

<sup>155</sup> 38 U.S.C. § 1155 (2006).

include other considerations.<sup>156</sup> While the commission concluded that the primary purposes of disability compensation should remain loss of earning capacity, it recommended that the Rating Schedule should “make allowance for purely physical impairment even though it is not manifested in economic impairment.”<sup>157</sup> To the extent that lesser disabilities result in no loss of earning capacity in the modern economy, the U.S. may still choose to compensate those injuries on a different basis. As in the U.K., some injuries may warrant only a lump sum payment for the pain and suffering caused by the injury.

In an already complex scheme, the lump sum payment scale should be streamlined and efficient to apply. The simplest way to create a lump sum payment scale would be to assign a particular lump sum amount to the percentage awards ultimately assigned to a veteran under the Rating Schedule. For example, veterans with a combined disability rating of 50% would receive a certain lump sum amount. However, if some injuries are only to receive a lump sum payment — the approach taken in the U.K. for the injuries deemed less serious — then a separate scale would need to be created for these injuries. Again, the lump sum payments would need to be developed to be consistent and compatible with the updated Rating Schedule.

### **III. THE POTENTIAL IMPACT OF LUMP SUM PAYMENTS AND CLAIM SUBMISSION DEADLINES ON ADMINISTRATIVE AND JUDICIAL ASPECTS OF THE U.S. SYSTEM**

The following sections discuss select issues at the administrative and judicial review levels and how a filing deadline and lump sum payments can aid in addressing these issues.

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<sup>156</sup> BRADLEY REPORT, *supra* note 147, at 169.

<sup>157</sup> *Id.*

### A. Impact on Administrative Accuracy and Efficiency

If the DVA can decide claims closer to the date of discharge, this will simplify many aspects of front-line adjudication. The closer a claim is filed to the occurrence of an injury or illness, the higher the likelihood for accuracy of the adjudication of that claim. Following an injury or illness, some period of time must elapse so that the prognosis for the condition can be determined with greater accuracy. However, after this initial period, the sooner that a claim for the condition is submitted the better the access to the documentation and the individuals knowledgeable about that condition.<sup>158</sup> Improved accuracy from the beginning of the claim process would reduce the need for appeals. Fewer appealed claims would mean fewer remands,<sup>159</sup> which would free up time and resources for the adjudication of original claims. Finally, the less time between discharge and filing, the less likely the evidentiary picture will become clouded by intervening factors such as the effects of civilian occupations or post-service injuries.<sup>160</sup>

In 2001, the DVA began permitting servicemembers to apply for disability compensation while still in service. To date, information about the BDD program suggests that it helps to reduce claim processing time.<sup>161</sup> The BDD program began as a relatively small pilot program in 1995, a review of which documented improved claim processing timeliness.<sup>162</sup> In 2010, the Government Accountability Office (GAO) stated “[t]he BDD program appears to

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<sup>158</sup> See Stephenson, *supra* note 4, at 203-04.

<sup>159</sup> For a discussion of the frequency of remands in the veterans system, see generally 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 (2009).

<sup>160</sup> Cf. Stephenson, *supra* note 4, at 204 (noting an intervening factor of the effect of “physical aging on the human body”).

<sup>161</sup> See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-901, VETERANS’ DISABILITY BENEFITS: BETTER ACCOUNTABILITY AND ACCESS WOULD IMPROVE THE BENEFITS DELIVERY AT DISCHARGE PROGRAM 5 (2008).

<sup>162</sup> *Id.*



be an effective means for thousands of separating servicemembers to receive their disability benefits faster than if they had filed a claim under VA's traditional process."<sup>163</sup> According to the DVA, current "[p]rocessing times tend to be much shorter for claims submitted pre-discharge than after discharge."<sup>164</sup>

Claim data from the DVA from 2013 reveals useful information about the composition of the DVA claim inventory and backlog. This information in turn illustrates the way in which a claim filing time limit may improve claim processing accuracy and efficiency. First, the data shows that many veterans continue to file claims for either new disabilities or for increased ratings for current disabilities after receiving some level of compensation award.<sup>165</sup> Of the claims pending before VA as of December 31, 2012, 60% were supplemental claims, or claims for additional benefits by veterans who had already filed a claim with the DVA in the past.<sup>166</sup> Of these, 77% were receiving some level of monetary benefit from VA.<sup>167</sup> This means that the newly filed claims were for different disabilities or for increases of currently rated disabilities. It is this author's opinion that filing within a time limit, when evidence is more likely to be available and fresh, would reduce the need for multiple claim filings. Regarding claims for an increased rating, the more current the information at the outset, the more likely that the original rating will be accurate, thus reducing the need for increases. This author believes that this will result in less burden to the DVA's adjudication resources allowing adjudicators to consider claims for conditions that have deteriorated in a timelier manner. Thus, the analysis of the changed severity of the condition

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<sup>163</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-450T, VETERANS' DISABILITY BENEFITS: OPPORTUNITIES REMAIN FOR IMPROVING ACCOUNTABILITY FOR AND ACCESS TO BENEFITS DELIVERY AT DISCHARGE PROGRAM 12 (2010).

<sup>164</sup> *Pre-Discharge Programs*, DEP'T OF VETERANS AFFAIRS, <http://benefits.va.gov/predischarge/index.asp?expandable=0&subexpandable=0> (last visited Oct. 13, 2013).

<sup>165</sup> See VA STRATEGIC PLAN, *supra* note 8, at 17; *Veterans Benefits Administration Performance and Transparency*, DEP'T OF VETERANS AFFAIRS, <http://www.vba.va.gov/reports/aspiremap.asp> (last updated Oct. 7, 2013).

<sup>166</sup> VA STRATEGIC PLAN, *supra* note 8, at 17.

<sup>167</sup> *Veterans Benefits Administration Performance and Transparency*, *supra* note 165.

will be better informed. Finally, to the extent Congress and the DVA may ultimately move to a “full and final” rating approach like that used in the U.K., the occurrence of, and ideally need for, increased rating claims will be reduced.

Another trend revealed by the data is that the vast majority of pending claims are from veterans whose period of service ended well prior to the Iraq and Afghanistan conflicts. As of December 31, 2012, 79% of pending claims were from veterans who served during an era prior to the Iraq and Afghanistan wars.<sup>168</sup> Specifically, 37% of pending claims were from veterans who served during the Vietnam Era, 23% were from veterans who served during the Gulf War era, 11% were from veterans who served during peacetime between the Vietnam War and Gulf War, and 8% were from veterans of other eras.<sup>169</sup> Only 21% of the pending claims were from veterans with service after September 11, 2001.<sup>170</sup> Thus, the current DVA case load consists largely of claims related to events that occurred many years prior to the date of adjudication. The system and the veterans it serves would benefit from laws that encourage timely filing so that these numbers begin to reflect provision of benefits closer to the time of discharge.

## **B. Impact on Judicial Review**

### *i. The Role of Judicial Review*

Generally speaking, in the course of reviewing individual decisions of lower tribunals, appellate courts correct error and develop legal precedent. In general, appellate courts review findings of fact for clear error and conduct *de novo* review of questions of law.<sup>171</sup> The appellate tribunals in the veterans’ benefits

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<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *See, e.g., Ornelas v. U.S.*, 517 U.S. 690, 701 (1996) (Scalia, J., dissenting) (“[I]t is well

system, the Veterans Court and the Federal Circuit, apply these same standards of review in the context of veterans' benefits decisions.<sup>172</sup> Presumably, no matter how accurate DVA disability adjudications are, questions of legal interpretation will arise as the facts and circumstances of individual veterans' cases meet the established statutory and regulatory scheme. Ideally, judicial review will be needed less to correct adjudicative error, and more to illuminate the path forward for adjudicators and claimants in future cases when genuine questions of legal interpretation exist. Judges in both the U.S. and U.K. systems have remarked upon the clarifying function of judicial review.<sup>173</sup> In a 2011 case, a Veterans Court judge observed:

There is an unfortunate—and not entirely unfounded—belief that veterans law is becoming too complex for the thousands of [DVA] regional office adjudicators that must apply the rules on the front lines in over a million cases per year. Whatever the merits of such arguments may be, clear guidance from the courts is a virtue for any system struggling

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settled that appellate courts 'accep[t] findings of fact that are not "clearly erroneous" but decid[e] questions of law *de novo*'" (alteration in original) (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 948 (1995)); *Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985) ("[R]eview of factual findings under the clearly-erroneous standard—with its deference to the trier of fact—is the rule, not the exception.").

<sup>172</sup> See *Garrison v. Nicholson*, 494 F.3d 1366, 1368 (Fed. Cir. 2007) (noting that the Veterans Court reviews "questions of law *de novo* [and] questions of fact for clear error" (citing 38 U.S.C. § 7261(a))); *Prenzler v. Derwinski*, 928 F.2d 392, 393 (Fed. Cir. 1991) ("[The Federal Circuit] may review the Veterans Court's legal determinations under a *de novo* standard. . . . However, [the Federal Circuit] may not review challenges to factual findings nor may it review 'a challenge to a law or regulation as applied to the facts of a particular case.'" (quoting 38 U.S.C. § 4092(d)(2))).

<sup>173</sup> A discussion of the consequences and merits of judicial review in the veterans' disability compensation system is beyond the scope of this article. For an analysis of the impact of judicial review on the veterans' claim system, see James T. O'Reilly, *Burying Caesar: Replacement of the Veterans Appeals Process is Needed to Provide Fairness to Claimants*, 53 ADMIN. L. REV. 223 (2001) and Ridgway, *supra* note 94. For an analysis of the role of the United States Court of Appeals for the Federal Circuit (Federal Circuit) in reviewing veterans' appeals, see Paul R. Gugliuzza, *Rethinking Federal Circuit Jurisdiction*, 100 GEO. L.J. 1437, 1478-86 (2012).

to accurately decide a huge volume of cases.<sup>174</sup>

In a 2009 case before the High Court of Justice in the Court of Appeal (Civil Division), U.K. justices addressed multiple questions concerning the proper construction of the AFCS.<sup>175</sup> The case reached the court following appeal by the Secretary of State of the tribunal decision below.<sup>176</sup> In the decision, one of the justices provided the following remarks:

Although some adverse publicity accompanied the beginning of this case . . . the Secretary of State was in my view entirely justified in bringing the appeal, at least from a legal point of view. It seeks to clarify some important and difficult issues relating to the construction of the scheme. This is a new scheme intended to approach these sensitive matters in a new and improved way. Not surprisingly there are some imperfections.<sup>177</sup>

At the end of his opinion, another judge observed, “[i]f this interpretation of the scheme does not reflect the actual intention of those who drafted it, then they will have the opportunity of clarifying the position in the planned review.”<sup>178</sup> These comments describe the constructive role that judicial review can play in the veterans’ disability claim system. Steps that maximize the advantages of judicial review can result in gains for the entire system.

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<sup>174</sup> *Delisio v. Shinseki*, 25 Vet. App. 45, 63 (2011) (Lance, J., concurring).

<sup>175</sup> *Sec’y of State for Defence v. Duncan*, [2009] EWCA (Civ) 1043 (appeal taken from Eng.).

<sup>176</sup> *Id.* at [39].

<sup>177</sup> *Id.* at [116] (Carnwath, L.J.).

<sup>178</sup> *Id.* at [113] (Elias, L.J.).

*ii. Evidentiary Issues on Appeal*

The limitless period within which to file claims can create multiple evidentiary issues. With regularity, the Veterans Court and U.S. Court of Appeals for the Federal Circuit (Federal Circuit) consider appeals in which the underlying facts involve a long period between the date of discharge from service and the filing of a claim.<sup>179</sup> The following discussion examines a few of the problems that manifest when disability compensation claims are filed years and even decades after discharge from service.

The Veterans Court and Federal Circuit have had to address the issue of whether and how silence in the record during a long period of time can be used by the DVA to support a decision on a claim. The primary case addressing the significance of a period of evidentiary silence regarding a particular medical condition is *Maxson v. Gober*.<sup>180</sup> In that case, the Federal Circuit held that the “evidence of a prolonged period without medical complaint can be considered, along with other factors concerning the veteran’s health and medical treatment during and after military service, as evidence of whether a pre-existing condition was aggravated by military service.”<sup>181</sup> Given *Maxson*, one might presume that the fundamental issue of the meaning of silence in the record is settled. However, even after *Maxson*, the significance of years of silence in the record regarding a condition remains a point of contention. In *Darlington v. Shinseki*,<sup>182</sup> the appellant argued that the BVA was not entitled to consider the lack of symptoms for many years after service when deciding whether to order a medical examination pursuant to the statutory provision regarding when an examination is necessary.<sup>183</sup> The Federal Circuit disagreed, citing *Maxson*:

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<sup>179</sup> According to a statistical sample, the average age of an appellant before the Veterans Court in Fiscal Year 2010 was 62.26 years old. See Stephenson, *supra* note 4, at 200. The median time the appellant spent on active duty was just over two years. *Id.*

<sup>180</sup> 230 F.3d 1330 (Fed. Cir. 2000).

<sup>181</sup> *Id.* at 1333.

<sup>182</sup> No. 2010-7076, 415 Fed. Appx. 253, 2011 WL 601555 (Fed. Cir. Feb. 22, 2011).

<sup>183</sup> *Id.* at \*256, 2011 WL 601555 at \*\*3.

“[t]his court has acknowledged that such evidence can be considered by the Board.”<sup>184</sup> The Federal Circuit then dismissed the appeal, finding no error of law in the decisions below and noting its lack of jurisdiction to consider the BVA’s factual determinations regarding the Veteran’s condition.<sup>185</sup>

Yet, in the single judge non-precedential decision of *Ramsey v. Shinseki*,<sup>186</sup> the Veterans Court raised doubt about the scope of the principle of law established by *Maxson*.<sup>187</sup> *Ramsey* provides a helpful example of the issues raised by a limitless claim filing period. First, *Ramsey* demonstrates the legal issues that arise related to the open-ended claim filing time period. Second, the underlying facts demonstrate the evidentiary problems that arise when deciding a claim for service connection many years after service, regardless of the strength of the merits of the Veteran’s claim.

*Ramsey* involved an appeal of the DVA’s 2006 denial of a Veteran’s claims for service connection—one of which was for a knee disability.<sup>188</sup> The Veteran had served on active duty from 1954 to 1957.<sup>189</sup> He first filed a claim for knee disabilities in 2006, almost 50 years after discharge from service.<sup>190</sup> In the intervening time, he had worked for 20 years as a “sheet metallist.”<sup>191</sup> The Veteran had received treatment during service for a knee injury

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<sup>184</sup> *Id.*, 2011 WL 601555 at \*\*4.

<sup>185</sup> *Id.* at \*257, 2011 WL 601555 at \*\*4.

<sup>186</sup> No. 11-0010, 2012 WL 1511702 (Vet. App. Apr. 30, 2012).

<sup>187</sup> *Id.* at \*6. Single-judge decisions constitute approximately half of Veterans Court decisions and thus constitute a large part of veterans’ case law. See generally U.S. COURT OF APPEALS FOR VETERANS CLAIMS, ANN. REP.: FISCAL YEAR 2012, at 2 (2013), available at <http://www.uscourts.cavc.gov/documents/FY2012AnnualReport.pdf> (providing statistics summarizing the workload of the Veterans Court). For a criticism of the use of single-judge decisions by the Veterans Court, see Sarah M. Haley, Note, *Single-Judge Adjudication in the Court of Appeals for Veterans Claims and the Devaluation of Stare Decisis*, 56 ADMIN. L. REV. 535 (2004).

<sup>188</sup> No. 07-14 578, 2010 WL 4707889, at \*1 (BVA Sept. 8, 2010).

<sup>189</sup> *Id.*

<sup>190</sup> See *id.*

<sup>191</sup> *Id.* at \*4.

following a parachute jump in 1955.<sup>192</sup> However, his discharge examination revealed no knee problems.<sup>193</sup> The record was subsequently silent regarding any knee conditions until 1989, when he was injured on-the-job and paid worker's compensation.<sup>194</sup> In a 2009 hearing, the Veteran's spouse testified that the Veteran had knee symptoms "a long time before he retired."<sup>195</sup> After assessing the evidence of record, including the 31-year gap between separation from service and treatment for a knee condition, the BVA found that the evidence did not show that the Veteran had a knee disability related to his service and denied his claim for compensation.<sup>196</sup> The BVA specifically cited *Maxson* in its decision.<sup>197</sup>

On appeal, the Veterans Court stated that "[t]he *Maxson* case is a[n] oft-cited and much-abused precedent."<sup>198</sup> The Veterans Court went on to explain that the holding in *Maxson* related specifically to whether silence could be considered specifically to rebut the statutory presumption of aggravation and stated the following:

The Court does not read the case as setting forth any general principle that a gap in medical records, regardless of the factual context of a case, weighs against a service-connection claim. Thus, the mere absence of medical records, without more, does not support an inference that a veteran had no health problems in the intervening years.<sup>199</sup>

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<sup>192</sup> *Id.* at \*2.

<sup>193</sup> *Id.* The BVA noted that the service treatment records were damaged in a fire and that some reports were partially burned, while the Veterans Court stated that the first page of the separation examination was missing. *Id.* at \*3; *Ramsey*, 2012 WL 1511702, at \*3.

<sup>194</sup> 2010 WL 4707889, at \*2, 4.

<sup>195</sup> *Id.* at \*1.

<sup>196</sup> *Id.* at \*4.

<sup>197</sup> *Id.*

<sup>198</sup> *Ramsey*, 2012 WL 1511702, at \*6.

<sup>199</sup> *Id.*

The Veterans Court further opined that:

[T]here are many reasons that the record may not contain medical documentation for a period of years. Among these reasons is the possibility that a veteran's life situation may be such that he cannot afford frequent visits to physicians or that he may be more inclined to bear up under progressively worsening symptoms until they become unbearable. The Board should have considered the lay evidence indicating that such explanatory factors may have been operative in this case.<sup>200</sup>

Thus, the Veterans Court remanded the claim for the BVA to consider these issues.<sup>201</sup>

As of the date of the Veterans Court decision in *Ramsey*, over 55 years had passed since the Veteran left service and over 6 years had passed since he filed his claim, and he still had no final decision on his claim for compensation for a knee disability.<sup>202</sup> The reasons that the Veterans Court speculated may have caused the Veteran to delay treatment following service are understandable. The Veterans Court sympathetically observed that a Veteran may not have sufficient funds for doctor visits, or may have delayed getting treatment until the condition became unbearable.<sup>203</sup> But a claim filing time limit and lump sum payments could alleviate such causes for delay, and the benefit would inure both to the veteran individually and to the system as a whole. It is reasonable to assume that the complex and time-consuming issues raised in this case could have been minimized or avoided altogether had the system required filing in the several years following discharge.

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<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at \*7.

<sup>202</sup> *See id.* at \*1; 2010 WL 4707889, at \*1.

<sup>203</sup> *Ramsey*, 2012 WL 1511702, at \*6.



*iii. Procedural Issues on Appeal*

Apart from the evidentiary questions, cases involving a lengthy period between discharge and filing often create a path littered with technical or procedural issues.<sup>204</sup> Often, these issues are divorced from the underlying merits of the claim, leading the courts to decide an issue that is not directly determinative of whether the DVA will award benefits to a veteran.<sup>205</sup> In other cases, the large gaps of time between discharge and filing require complex legal analyses involving multiple versions of applicable law.<sup>206</sup> In these cases, the courts may decide an issue based on a law extant many years earlier but now obsolete.<sup>207</sup> Such decisions are not as useful as those that can be applied prospectively to clarify current law. In this way, a claim filing time limit would enhance the judicial review function by increasing the instances in which court decisions illuminate the law for future application.

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<sup>204</sup> See *Carpenter v. Nicholson*, 452 F.3d 1379, 1384 (Fed. Cir. 2006) (describing the average veteran's case as involving "often lengthy and complex proceedings"); *Examining the Backlog and the U.S. Department of Veterans Affairs' Claims Processing System: Hearing Before the Subcomm. on Disability Assistance and Mem'l Affairs of the H. Comm. on Veterans' Affairs*, 110th Cong. 101 (2008) (statement of Gerald T. Manar, Deputy Director, National Veterans Service, Veterans of Foreign Wars of the United States) (testifying that "as we have seen, increased complexity extends the time it takes to resolve claims and increases the opportunity for error").

<sup>205</sup> For example, a remand by the Veterans Court for a "reasons and bases error" requires only that the BVA provide additional explanation for its denial. See Hillary Bunker et al., Note, *Reforming the Equal Access to Justice Act (EAJA) to Maximize Veterans' Receipt of Benefits and Increase Efficiency of the Claims Process*, 4 VETERANS L. REV. 206, 224-26 (2012) (criticizing the award of attorney fees in veterans' cases where the relief obtained is a remand due to a "reasons and bases" error when such a remand does not ultimately result in additional benefits being granted to a veteran).

<sup>206</sup> See, e.g., *Glover v. West*, 185 F.3d 1328, 1330 n.2 (Fed. Cir. 1999) (noting that both the Veterans Court and the appellant cited to the 1998 version of a regulation when the 1979 version was applicable to the case).

<sup>207</sup> See, e.g., *Hall v. Nicholson*, No. 04-1118, 2006 WL 3006717, at \*3-4 (Vet. App. Oct. 20, 2006) (rejecting appellant's argument based on a 2001 change in law given that the applicable regulation was that in effect in 1957). However, many cases addressing obsolete provisions of law involve collateral attacks based on clear and unmistakable error, which often requires an examination of the laws extant at the time of the original decision. See 38 C.F.R. § 3.105(a) (2012). Still, the need for such collateral attacks could be reduced if the quality of evidence at the time of claim filing is higher.

The Federal Circuit case of *Gambill v. Shinseki*<sup>208</sup> provides an example of how the long procedural history of a case increases the opportunity for legal questions to develop along the way. In *Gambill*, a Veteran filed a claim for compensation for cataracts 29 years after service.<sup>209</sup> The Veteran had served in the U.S. Army from 1969 to 1971, during which time “a trash barrel fell on his head, resulting in a one to two centimeter laceration on his scalp and an abrasion on his forehead.”<sup>210</sup> Upon his discharge from service, his separation examination was normal.<sup>211</sup> During treatment for bilateral cataracts in 1994 and 1995, “his physician told him it is possible for a blow to the head to cause cataracts.”<sup>212</sup> In 2000, the Veteran filed a claim for disability benefits with the DVA.<sup>213</sup> The DVA denied his claim in 2001.<sup>214</sup>

On appeal, the BVA ordered a medical opinion by an ophthalmologist who found that the Veteran’s cataracts were not caused by the trash barrel injury.<sup>215</sup> Upon receipt of this medical opinion, the BVA complied with the regulatory requirement to provide the Veteran notice of the opinion and provide him the opportunity to review the opinion and submit additional evidence, which he did.<sup>216</sup> The BVA ultimately denied the claim.<sup>217</sup> The Veteran appealed to the Veterans Court, which affirmed the BVA’s decision.<sup>218</sup>

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<sup>208</sup> 576 F.3d 1307 (Fed. Cir. 2009) (per curiam).

<sup>209</sup> *Gambill v. Peake*, No. 06-1943, 2008 WL 1883915, at \*1 (Vet. App. Apr. 28, 2008).

<sup>210</sup> *Gambill*, 576 F.3d at 1308.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Gambill*, 2008 WL 1883915, at \*1.

<sup>214</sup> *Id.*

<sup>215</sup> *Gambill*, 576 F.3d at 1309. Earlier, the Regional Office had obtained a medical opinion but the BVA concluded that the examiner who had conducted the examination did not adequately address the etiological question of whether the Veteran’s bilateral cataracts were caused by the in-service injury. *Id.* at 1308-09.

<sup>216</sup> *Id.* at 1309; see 38 C.F.R. § 20.903(a) (2012).

<sup>217</sup> *Gambill*, 576 F.3d at 1309-10.

<sup>218</sup> *Id.* at 1310.

On appeal to the Federal Circuit, the Veteran argued that the BVA violated his due process rights when it failed to provide him an opportunity to submit written interrogatories to the medical provider who gave the opinion.<sup>219</sup> The Federal Circuit concluded that the absence of confrontation had no prejudicial effect on the Veteran, and therefore the court need not address his argument that the BVA “is obligated not only to provide claimants with the right to serve interrogatories on [DVA] physicians and independent medical experts, but also to advise the claimants of their right to do so.”<sup>220</sup> Likewise, the Federal Circuit also found that it need not address whether the Veteran waived whatever due process right he may have to confront the ophthalmologist by failing to request the submission of interrogatories.<sup>221</sup> The lack of prejudice was based on the fact that “even if he had succeeded in completely undermining the ophthalmologist’s opinion and had obtained her agreement that the medical literature showed that head trauma is a possible cause of cataracts, that evidence would still not show that [the Veteran’s] in-service blow to the head caused cataracts in his case.”<sup>222</sup> Finding no prejudice to the Veteran, the Federal Circuit therefore affirmed the Veterans Court’s decision.<sup>223</sup>

Notably, in a lengthy concurring opinion, one judge agreed that the Veteran was not prejudiced, but asserted his opinion that due process does not require that claimants in the veterans’ disability compensation system be given the right to confront physicians who provide opinions.<sup>224</sup> In another lengthy concurring opinion, another judge agreed that the Veteran suffered no prejudice, but asserted her belief that “due process requires that claimants of veterans’ benefits be provided with the opportunity to confront the doctors whose opinions DVA relies upon to decide

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<sup>219</sup> *Id.*

<sup>220</sup> *Id.* at 1313.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 1312.

<sup>223</sup> *Id.* at 1313.

<sup>224</sup> *Id.* at 1313 (Bryson, J., concurring).

whether veterans are entitled to benefits.”<sup>225</sup>

In short, a claim filed 29 years after service, in 2000, culminated in a Federal Circuit decision almost a decade later, in 2009. That decision, *Gambill v. Shinseki*, determined only that the Veteran had suffered no prejudice due to the lack of written interrogatories submitted to the DVA medical expert.<sup>226</sup> The Federal Circuit did not therefore need to address the underlying due process questions. Even if the Federal Circuit had found that the Veteran had a due process right to submit written interrogatories to a medical expert, this finding would not definitively resolve the question of entitlement to disability compensation for cataracts. The likelihood of future cases of this sort could be reduced if evidentiary problems are minimized from the outset, thus shortening the lifespan of the claim or appeal and minimizing the opportunity for procedural issues.

### C. Impact on Policy Objectives

From a broad policy perspective, a filing time limit and providing lump sum payments would aid veterans in the successful transition from military to civilian life. In America, the goal of successful transition from the military to civilian life is long-standing. For example, in 1944, Congress enacted the G.I. Bill to fund the education of returning World War II veterans in order to facilitate the transition to civilian life.<sup>227</sup> Notably, Part III of the United States Code pertaining to veterans’ benefits, Title 38, contains twelve chapters of statutes dedicated to “Readjustment and Related Benefits.”<sup>228</sup> A lump sum payment nearest to the time of the injury would provide individual veterans with increased resources at the time when they are arguably most needed.

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<sup>225</sup> *Id.* at 1324 (Moore, J., concurring).

<sup>226</sup> *Id.* at 1313.

<sup>227</sup> Servicemen’s Readjustment Act of 1944, Pub. L. No. 78-346, 58 Stat. 284 (codified as amended in scattered sections of 38 U.S.C.) (“An Act to provide Federal Government aid for the readjustment in civilian life of returning World War II veterans.”).

<sup>228</sup> 38 U.S.C. Pt. III (2006).

Similarly, the proposed time limit would also be consistent with modern rehabilitation principles and changed attitudes about the potential for disabled individuals in society. The Institute of Medicine has observed that “[t]he VA approach assumes the impairment is permanent, an assumption at odds with current thinking on rehabilitation.”<sup>229</sup> By placing the emphasis on adjudicating and paying claims as close to the date of discharge as possible, a claim filing deadline and lump sum payments can enable the important policy objectives of compensating veterans for their injuries while helping to enable them to achieve the highest level of function possible in the civilian world.

## CONCLUSION

Providing just and timely disability compensation to veterans is an inherently complex undertaking. Yet, governments are accountable to those citizens whose health suffers as a consequence of their military service. The premise of this article is that lawmakers and policymakers can learn from the experience of the U.K., and perhaps other nations, because the current challenges are not unique to the U.S. Nor are the current challenges altogether new. The report by the Bradley Commission in 1956 evidences the complexity, and unfortunate consistency, of the issues facing the veterans’ disability compensation system.<sup>230</sup> Establishment of a claim filing deadline and lump sum payments are two ways in which the U.S. system might better function to meet its laudable purpose.

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<sup>229</sup> IOM REPORT, *supra* note 3, at 83.

<sup>230</sup> See generally BRADLEY REPORT, *supra* note 147 (examining the veterans’ disability system in 1956).