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From Healthcare to Hiring: Impacts of Social and Public Policy on Disabled Veterans in the United States

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**FROM HEALTHCARE TO HIRING:
IMPACTS OF SOCIAL AND PUBLIC POLICY ON
DISABLED VETERANS IN THE UNITED STATES**

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INTRODUCTION

[M]alice toward none, with charity for all, with firmness in the right as God gives us to see the right, let us strive on to finish the work we are in, to bind up the nation's wounds, to care for him who shall have borne the battle and for his widow and his orphan, to do all which may achieve and cherish a just and lasting peace among ourselves and with all nations.¹

Since the country's founding, disabled veterans'² issues in the United States have been a Gordian Knot within the sphere of public policy. Historically, veterans emerged as a distinct caste within the country's disabled population at large, often being viewed as members of "the deserving disabled"³ whom the federal government and public made a pact—expressly and impliedly—to support.⁴ However, the federal government has frequently been criticized in failing to meet expectations of upholding its promises to disabled veterans, with the lion's share of blame being placed on the United States Department of Veterans Affairs (VA).⁵ Disability and employment law advocates alike have blamed the VA for its incompetent administration of health care,

¹ Abraham Lincoln, *Second Inaugural Address*, YALE. L. SCH. LILLIAN GOLDMAN L. LIBR. (Mar.4,1865), https://avalon.law.yale.edu/19th_century/lincoln2.asp [<https://perma.cc/PK47-338M>].

² The definition of "disabled veteran(s)" in this paper is the one used by the Department of Veterans Affairs: "(A) a veteran who is entitled to compensation (or who but for the receipt of military retired pay would be entitled to compensation) under laws administered by the Secretary, or (B) a person who was discharged or released from active duty because of a service-connected disability. 38 U.S.C. § 4211(3).

³ See Ann Hubbard, Symposium, *A Military-Civilian Coalition For Disability Rights*, 75 Miss. L.J. 975, 992 (2006). ("They acquired their disabilities in the service of their country, and the country owes them a debt of gratitude...")

⁴ *Id*; see also Michael Waterstone, *Returning Veterans and Disability Law*, 85 Notre Dame L. Rev. 1081, 1084 (2010) (discussing the difficulties facing employment-based strategies for disabled veterans).

⁵ Waterstone, *supra* note 4, at 1125-1126.

disability compensation, and job training programs intended to benefit disabled veterans.⁶ Further criticisms levied against the VA have denounced it for failing to notify disabled veterans of the benefits they are entitled to⁷ (after denying them eligibility) while simultaneously directing them towards other federal disability programs.⁸ Even the former United States Secretary of Veterans Affairs, David Shulkin, has expressed frustration with the confusing nature of the VA's disability benefit system, "[t]he VA's disability compensation structure is a patchwork resulting from decades of legislation that has created a system where veterans often become locked in a complicated and adversarial process to obtain benefits they have earned and need."⁹ From within the broader lateral limits of veterans' issues generally, this paper contextualizes and focuses on disabled veterans as a subgroup within American disability and employment policy. Numerous examples show that disabled veterans historically were, and presently are adversely impacted by social and public policies concerning disability care and employment, indicating a need for legislative and social reforms to address current gaps in organizing, funding, and implementing programs in both areas for veterans.

⁶ *Id.* § 1123.

⁷ *Id.* at 1125 (citing Reynolds Holding, Insult to Injury, Legal Aff., Mar.-Apr. 2005, http://www.legalaffairs.org/issues/March-April-2005/feature_holding_marapr05.msp (describing an injured soldier's experiences after being wounded in Iraq) "[J]ohnson overheard a few injured veterans talking at the local V.A. clinic and he learned that he could apply for disability benefits from the Department of Veterans Affairs. 'Nobody told me nothing about it... it hurt me'").

⁸ See Hearing on the Effectiveness of Federal Homeless Veterans Programs Before the Subcomm. on Oversight and Investigations of the H. Comm. on Veterans Affairs, 106th Cong. 110 (1999) (Peter H. Dougherty, Dir., Homeless Veterans Programs describing how outreach efforts conducted in New York City, Brooklyn, Dallas, and Los Angeles almost doubled the percentage of SSI awards made to veterans.)

⁹ David Shulkin, Ten Essential Reforms Needed for VA, THE SHULKIN BLOG (Dec. 7, 2020), <https://shulkinblog.com/f/ten-essential-reforms-needed-in-the-va>.

Part I of this paper considers the historical foundations, motivations, and evolution of veterans' disability and employment legislation in the United States. Utilizing disability and employment as its framework, Part II defines, describes, and critiques contemporary policies for disabled veterans in areas of federal employment protections and uses of Alternative Dispute Resolution (ADR) within the VA's disability decision review process. Part III discusses the roles played by disabled veterans and the federal government in policy reform, finding that both sides act as catalysts and barriers to legislative change. This paper concludes in Part IV, recommending legislation that integrates elements of disability care —currently under the auspices of the VA—into Medicare. Through this newly created insurance component, which this paper will call “Medicare Part V”, disabled veterans will be eligible to access all hospitals and clinics currently accepting Medicare. This is anticipated to increase access to care in local facilities. Second, it is essential that the federal government devotes sufficient resources to conduct more longitudinal data collection studies, enabling a more comprehensive assessment of the transitional and employment resource needs of disabled veterans over time. Achieving a greater understanding of these needs may induce greater veteran participation rates in the labor force, benefiting employers and veterans alike. Finally, this paper calls for modernizing and optimizing the VA's claim appeals process by creating a secure online method of Alternative Dispute Resolution for appeals, specifically in Higher-Level Reviews (HLR's) of disability and compensation requests.

BACKGROUND

I. Historical Blueprints: Disability and Employment Law in America

“War is the most efficient means for creating disabled people.”¹⁰ Throughout history, when there exists a separate and growing class of disabled veterans pursuing the benefits society deems them worthy of, they are likely to persuade policy change.¹¹ Accordingly, this next section discusses how the historical foundations for current disability and employment policy in the United States were laid.

Virtually every country in history has provided some sort of benefit system for war veterans, disabled soldiers, and their dependent survivors. The current form of disability and employment benefits for veterans in Western countries is mainly derived from the creation of modern nation states in sixteenth century Europe.¹² Advancements in technology enabled massive standing armies—not seen since the dominion of Ancient Rome—to fight progressively more ruinous wars.¹³ In turn, the numbers of disabled veterans seeking government compensation increased. Pensions, hospitals, and employment programs were provided to disabled veterans as gratuity for their service.¹⁴ Although quite revolutionary in themselves, these forms of veteran’s compensation trace their roots back thousands of years into history.

¹⁰David A. Gerber & Jonathan Shay, *Disabled Veterans In History* 1-52 (David A. Gerber ed., University of Michigan Press, 2012). (quoting Steven A. Holmes)

¹¹ *Id.*

¹² *See* Ihor Gawdiak et al., *Veterans Benefits and Judicial Review: Historical Antecedents and the Development of the American Systems* 1 (Fed. Rsch. Div. Lib. Cong. ed., 1991)

¹³ *Id.* at 4.

¹⁴ *Id.* at 1.

Since ancient times, societies have acknowledged that those protecting the state from outside threats deserved reward. Examples of this ancient acknowledgement include the Pharaohs of Egypt granting plots of land to their veterans as far back as 3000 B.C.E. In pre-Hellenic Athens, the prominent statesmen Solon ordered wounded veterans to be “maintained” at the public charge, which included providing food subsidies and money to veterans with proven permanent injuries.¹⁵ In Roman antiquity, granting newly conquered land to veterans¹⁶ as a reward for their service became commonplace in the late republic after the Marian reforms,¹⁷ however, in most cases, actual monetary compensation for disabled veterans was uncommon due to policy decisions usually being impulsively decreed by whoever ruled Rome; thus veterans benefit systems were often diluted with corruption and abuse.¹⁸ Medieval Europe’s (500 C.E. to 1500 C.E.) inability to compensate wounded veterans was caused by the use of hiring mercenaries to conduct the majority of combat operations instead of professional armies. However, this began to change around 1190 B.C.E, when King Phillip Augustus of France established a hospital caring for wounded veterans who had participated in the Fifth Crusade.¹⁹ Although this particular act of charity by the French King did not have any long-term effect on national policy, the eventual return of wounded soldiers back into Europe in the subsequent crusades would. Eventually, the French countryside found itself teeming with “a sullen army of beggars and vagabonds threatening to wreck the country’s social order if their demands to be provided with ‘the means to live at ease’ for the rest of their

¹⁵ *Id.* at 2.

¹⁶ *Id.* at 3 (citing poem by Thomas Babington Macauley, *Lays of Ancient Rome*, 1864).

¹⁷ See Christopher Anthony Matthew, *On the Wings of Eagles: The Reforms of Gaius Marius and the Creation of Rome's First Professional Soldiers* 7 (Dr. Lea Beness ed., 2010).

¹⁸ See Ihor Gawdiak et al., *supra* note 12, at 4.

¹⁹ *Id.*

lives were not met” causing the country to develop policies that would placate the demands of its wounded veterans.²⁰

This habit of appeasing, appreciating, and caring for disabled veterans carried over into the New World of pre-colonial America. The first policies involving disabled veterans were primarily influenced by British systems, and can be traced back 150 years prior to the American Revolutionary War, (1775-1783 C.E.). In 1624 C.E. a law was passed (but not ratified) in the British colony of Virginia, promising “[t]hose that shall be hurte upon service to be cured at the publique charge; in any case be lamed to be maintained by the country according to his person and quality.”²¹ Virginia was not alone in this endeavor, as other colonies began to pass disabled veteran’s benefits laws in hopes of increasing the enlistment numbers of soldiers to fight against Native American tribes.²² In 1636 C.E., Plymouth Colony passed and ratified the first substantial law in America promising benefits to disabled veterans which codified, “if any man shall be sent forth as a soldier and shall return maimed, he shall be maintained competently by the Colony during his life.”²³ Pre-Colonial policy decisions regarding disabled veterans left lasting impacts on the Founding Fathers of the American Revolution in their later attempts at solving similar issues.²⁴

During the American Revolution, perhaps in part as an act of desperation on behalf of the

²⁰ See Robinson E. Adkins, *Medical Care of Veterans*, 14 (The Veterans Administration eds., 1967).

²¹ See T. Nelson Collier, *Honor of a Nation: Against The Veterans’ Legal Disability*, 9 Nat’l. Sec. L.J. 43, 58 (2022) (discussing how Great Britain’s veterans’ benefits carried over to the New World.)

²² *Id.* at 59.

²³ *Id.*

²⁴ *Id.* at 60-67.

fledgling American rebels, the Continental Congress passed laws liberally granting disability pensions to American patriots.²⁵ For the first time in history, benefits were authorized for low-ranking privates and non-commissioned officers, granted that they served honorably until the end of the War.²⁶ The promises made by Congress were critical in recruiting and retaining needed soldiers to continue fighting (and winning) the War. Ironically, this was also one of the first times that Congress (in the eyes of American veterans) failed to keep its promises to them, with many members of Congress citing a fear creating a “European-style hereditary, military aristocracy, which would undermine the ideals of the Revolution.” should they choose to fund these pensions.²⁷

Interestingly, a dispute involving the adjudication of benefits for veterans of the American Revolutionary War led to one of the first landmark Supreme Court cases in United States History. In *Marbury v. Madison*, the legal doctrine of judicial review was established by invalidating a veterans’ benefits adjudication system implemented a decade earlier.²⁸ The Invalid Pension Act of 1792 at issue in *Hayburn’s Case* assigned the job of deciding disability pension eligibility to federal courts.²⁹ However, Federal courts rejected the role of pension adjudicators (reserved to the Secretary of War and Congress) on the basis that “neither the legislative nor the executive branch could constitutionally assign to the judiciary any duties but such were properly judicial and to be

²⁵ See James D. Ridgway, *The Splendid Isolation Revisited: Lessons from the History of Veterans’ Benefits Before Judicial Review*, 3 Veterans L.R., 135, 139 (2011) (discussing the role of Veterans’ benefits in a democracy).

²⁶ *Id.*

²⁷ *Id.* at 140.

²⁸ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

²⁹ See *Hayburns’ Case*, 2 U.S. 409 (1792); see also *supra* 5 U.S. 137 at 171-172 (“It must be well recollected that in 1792, an act passed, directing the secretary at war to place on the pension list such disabled officers and soldiers as should be reported to him by the circuit courts, which act, so far as the duty was imposed on the courts, was deemed unconstitutional...”).

performed in a judicial manner”, eventually placing the pension program in the War Department.

Further advancements in veterans’ provisions emerged in the American Civil War (1861-1865 C.E.) Prior to the war, military pension expenditures of the federal government amounted to about \$90,000,000³⁰ which compensated over 10,000 veterans, 2,500 widows, and even 63 wounded veterans remaining from the Revolution.³¹ The hasty and confusing opening of the war left the Bureau of Pensions to suspend payments to “disloyal pensioners”. Muddled by old statutory provisions regarding which soldiers were eligible for benefits, the issue worsened after many militia called up by President Lincoln ended up fighting in the Battle of Bull Run (1861 C.E.), leading the Attorney-General of the United States to emphasize to Congress the need to enact laws dealing with disabled veterans that could be more easily understood.³² The Civil War in America was earthshattering in both the national identity, and in terms of disabled veterans’ benefits. Born was a new national concept of identity, replacing the commonly held mindset of the antebellum period that “the United States are” with the idea that “the United States is.”³³

Along with this shift in national identity, the benefits received by Civil War veterans were unparalleled in history. This dramatic swing led to the rise of Civil War veterans obtaining significant political power.³⁴ This newfound power and influence disabled veterans held as a voters

³⁰ William Henry Glasson Ph.B., *Military Pension Legislation In The United States* 70 (Columbia Univ. Fac. Pol. Sci. 1st ed. 1900) (discussing the historical operation of veteran pensions’ law in the United States before and after the Civil War).

³¹ *Id.*

³² *Id.* at 73.

³³ See Ridgway, *supra* note 25, at 152.

³⁴ *Id.*

shone brightest during the reelection campaign of President Abraham Lincoln in 1864. The final vote distribution within the Army cast for the Republican president went 3-1 in Lincoln's favor, compared to the much closer popular vote among civilians. Realizing the potential potency of veterans as a voting bloc, President Lincoln lobbied Congress for preferential treatment in employment hiring processes be given to Civil War veterans.³⁵ The political power of veterans was further shown in 1866; having recruited much of the Army through varying "bounties", Congress decided to placate the newly organized and politically active veterans of the Civil War instead of pursuing a more radical plan of reconstruction.³⁶

Disabled veterans' legislation then took a backseat during the "relative" peace after the Civil War, until the involvement by the United States in World War I. In the wake of the first World War, three separate agencies managed veterans' benefits: The Veterans Bureau, the Bureau of Pensions, and the National Home for Disabled Volunteer Soldiers.³⁷ In 1930, Congress authorized President Herbert Hoover to consolidate and coordinate government activities involving war veterans. This authorization did not go smoothly as planned; by 1921, the veterans' hospital system could not handle the amount of returning disabled veterans. Stories of poor treatment received at veterans hospitals began circulating in the press, such as humiliating accounts of disabled veterans being sent to "hospitals for feeble-minded children", where they were forced to sit on chairs made for children while awaiting care.³⁸ Scandals involving the Veterans

³⁵ *Id.* at 153.

³⁶ *Id.* at 155 (discussing the up-front monetary payments that varied throughout the war).

³⁷ U.S. Dept. Veterans Aff. VA Hist. Off.: Department of Veterans Affairs History (Apr. 28, 2022), <https://www.va.gov/history/index.asp>

³⁸ *See* Ridgway, *supra* note 25, at 186.

Administration continued even after World War II, as hiring standards for doctors and nurses at veterans hospitals were lowered due to the large numbers of VA personnel who either volunteered for or were drafted into active service during the war.³⁹ The fallout from these scandals led to the removal of Frank Hines from his leadership position within the administration, being replaced by General Omar N. Bradley. Under General Bradley's leadership, the Bradley Commission,⁴⁰ released in 1956, found that in just over 150 years, the accumulation of laws, judicial precedent, and total of number of veterans receiving benefits increased expeditiously to the point of unsustainability.⁴¹ The report recommended focusing on rehabilitating and reintegrating disabled veterans, placing the veteran on a "postwar footing equal to or better than that of those who were not in service, and eliminating any need for treating him throughout the rest of his life as a handicapped or privileged citizen"⁴² Ultimately, the political power of veterans groups would not only win the day, but have veterans' law consolidated and codified in 1958 into Title 38 of the United States Code.⁴³

In general, it can be logically concluded that due to the development of veterans' policies throughout history, disabled veterans in the United States currently possess enough political capital to force the governments hand into providing them with adequate post-service disability care and employment opportunities.

³⁹ *Id.* at 187.

⁴⁰ *Id.* at 191.

⁴¹ *Id.*

⁴² *Id.* at 192

⁴³ *Id.* (citing Veterans' Benefits Act of 1957, enacted by Pub. L. 85-857, § 1, Sept. 2, 1958, 72 Stat. 1105)

a. The Division of America's Disabled Population

Regardless of era or location, people with disabilities have historically been sorted *dejure* and *defacto* into two distinct subgroups: civilians and veterans.⁴⁴ Variances in treatment, societal acceptance, and state policy have had disparate impacts on how both groups are perceived.⁴⁵

A sense of community⁴⁶ or lack thereof—is the primary reason for this disparity. Historically, civilians with disabilities have endured an isolated experience in living with their disabilities. These experiences have been mostly individual and familial based, largely preventing the development of communal identities, institutions, and political power.⁴⁷ In contrast, the historical experiences of disabled veterans has been more collaborative in nature. Generally founded upon shared wartime experiences, disabled veterans have developed an almost tribalistic loyalty (that of a “band of brothers) to one another. These allegiances prompt many disabled veterans to identify more readily with each other than with their civilian counterparts, whom they only share peacetime experiences with.⁴⁸ There are three sources for this development in the disabled veteran community: (1) participation and injury in a war or other service-related tasks,

⁴⁴ See Gerber & Shay, *supra* note 10, at 10.

⁴⁵ *Id.* at 21; see also Waterstone, *supra* note 5, at 1098.

⁴⁶ Kathleen M. MacQueen et al. *What Is Community? An Evidence-Based Definition for Participatory Public Health*, 91, *Am. J. Pub. Health*, 1926, 1929 (2001) (defining “community” as a group of people with diverse characteristics who are linked by social ties, share common perspectives, and engage in joint action in geographical locations or settings).

⁴⁷ See Gerber & Shay, *supra* note 10, at 21. (discussing deaf people as an exception to the lack of communal development normally seen in groups of disabled people throughout history, stating “[t]he outstanding one perhaps being the history of the deaf. The evolution among hearing impaired people of sign languages and the rise in the eighteenth century of schools, at first church supported but increasingly the project of the states, created both cultural and institutional bases for deaf identity and group formation...”)

⁴⁸ See Hubbard, *supra* note 3, at 987.

(2) a material and symbolic relationship to the government, and (3) a shared history of experiencing medical treatment, rehabilitation, and reintegration.⁴⁹ Juxtaposing the historical experiences of each group has shown that disabled veterans' unique relationship to the state⁵⁰ affords them both the opportunity and status needed to effectively organize and advocate for their own interests.

Furthermore, the divergence in perceptions held by society and the state of both groups are due to the dichotomy of media representations of veterans and civilians. Studies imply that the way disabled veterans are currently framed in the media has created a conflicting public image of them.⁵¹ Negative stereotypes pigeonholing disabled veterans as "damaged goods" have been perpetuated since Vietnam, such as "the crazy volatile Rambo" are still prevalent in society.⁵² These media portrayals potentially have negative affects in employment opportunities for veterans, as research shows that the majority of discrimination against disabled veterans in the hiring process is generally due to the stereotypes of PTSD held by concerned employers.⁵³ Other damaging stigmas that are pervasive and generalized within society can be attributed to an overreporting by the media conveying a message that problems facing veterans may be more widespread than what

⁴⁹ See Gerber & Shay, *supra* note 10, at 21. (Comparing historical experiences between disabled civilians and veterans, highlighting "These three sources of the disabled veterans' group history all have a common relationship to the state.")

⁵⁰ The working definition of a "state" for this paper is "A state is a form of political community, association, or polity that has its own independent structure of political authority, and an attachment to separate physical territories." Chandran Kukathas, *A Definition Of The State*, 33(2) Univ. Queensland L.J. 357, 358 (2014).

⁵¹ See Meredith Kleykamp & Crosby Hipes, *Coverage of Veterans of the Wars in Iraq and Afghanistan in the U.S. Media*, 30 Socio. F. 348, 349 (2015) (discussing veterans in the media).

⁵² *Id.*

⁵³ *Id.* at 365. See also Christopher B. Stone et al., *Do Stereotypes of Veterans Affect Chances of Employment?*, 21 Psych. Mgmt. J. 1, 3 (2018) (discussing the media's role it plays in the maintenance of negative stereotypes about veterans, noting that although both positive and negative stereotypes about veterans exist, the negative stories about violent veterans have a major impact on maintaining negative stereotypes, whereas positive stories in the media have little impact in terms of change).

is actually true.⁵⁴

The media also frames veterans as worthy recipients of benefits, recognition, and praise; stories of veterans with disabilities adjusting to life after service have become popular.⁵⁵ While this framing of deservingness may not always be depicted by the media in an article, it is also never challenged publicly.⁵⁶ The positive framing of disabled veterans in media is not an American oddity, it has been used throughout history, even towards nefarious ends.⁵⁷ In Nazi Germany, disabled veterans were central to the dogma and mythos of the fanatically militarized society.⁵⁸ Heroes and role models to their people, disabled veterans in the Third Reich were acclaimed as paragons of Germanic military virtue, ostentatiously celebrated by the regime in its endless ceremonies and rallies. However, for all the pomp and circumstance shown to these disabled veterans by their *Führer und Reichskanzler*, eventually “Men who suffered the same wounds as their fathers had in the First world War found that their benefits were less; widows of soldiers killed in the Second World War received smaller benefits than those received by their counterparts from the First World War.”⁵⁹

However, positive media accounts of disabled veterans in the United States—whom some

⁵⁴ See Kleykamp & Hipes, *supra* note 53, at 360.

⁵⁵ See Waterstone, *supra* note 4, at 1098.

⁵⁶ See Kleykamp & Hipes, *supra* note 53, at 364.

⁵⁷ See James M. Diehl, *Victors of Victims? Disabled Veterans in the Third Reich*, 73 J. Mod. Hist. 703, at 726 (1987) (discussing how a key tenant of National Socialism was the glorification of its disabled veterans).

⁵⁸ *Id.*

⁵⁹ *Id.* at 733.

argue is nothing more than “hero worshiping” propaganda akin to the Nazis⁶⁰—may raise awareness of challenges faced by all disabled people, ultimately improving the outlook for all.⁶¹ Unlike cases involving civilians, the American media is quick to respond in anger whenever social services for disabled veterans are perceived to be improperly applied,⁶² leading to the belief that these outbursts from the media are faux outrage, that the awkwardly forced “thank you for your service” banalities are nothing more than mere slacktivist “mantras of atonements” for the guilt felt by Americans over their past treatment of veterans.⁶³

Comparatively, treatment of disabled civilians by the American media has not been kind to them historically.⁶⁴ Referred to as sickly, vegetable-like, “freaks in a wheelchair” and “supercrips”⁶⁵, disabled civilians are rarely portrayed as being “deserving” of benefits like their veteran counterparts. Rather, they are viewed as members of the “undeserving poor” who are lazy, pity seeking, and even fraudulent. For example, those claiming employment protections under the Americans with Disabilities Act (ADA), even for unseen disabilities, are regarded by the media as wanting to avoid work.⁶⁶

⁶⁰ See Hans Schmidt, “Hero-Worship” or “Manipulative and Oversimplifying”: How America’s Current and Former Military Service Members Perceive Military-Related News Reporting, 6 J. Veterans Stud. (2020).

⁶¹ See Kleykamp and Hipes, *supra* note 53, at 360.

⁶² See Waterstone, *supra* note 4, at 1099.

⁶³ See Kleykamp and Hipes, *supra* note 53, at 359.

⁶⁴ See Waterstone, *supra* note 4, at 1099.

⁶⁵ See Cheryl A. Leighty, *No Pity: People with Disabilities Forging a New Civil Rights Movements*, 92 Univ. Mich. L. Rev., 1953 (1994).

⁶⁶ See Cary LaCheen, *Achy Breaky Pelvis, Lumber Lung and Juggler’s Despair: The Portrayal of the Americans with Disabilities Act on Television and Radio*, 21 Berkely J. Emp. Lab. L., 223 (2000) (describing the Media’s harsh treatment and “lack of understanding” when it comes to disabled people seeking protections under the ADA).

DISCUSSION

II. Contemporary Legal Systems: Disability, Employment, and ADR

In the United States, there are major pieces of federal legislation affording civil rights protections in employment for disabled veterans and civilians alike. This section focuses on how these laws such as the Americans with Disabilities Act of 1990 (most notably Title I and the 2008 Amendment to the ADA), the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), and the Workforce Innovation and Opportunity Act of 2014 (WIOA), apply to disabled veterans. Additionally, the decision review appeals processes for disability claims within the VA will be analyzed and critiqued.

a. Americans with Disabilities Act

The Americans with Disabilities Act of 1990 was a landmark piece of legislation that had a significant impact on the disabled population within the United States. Upon signing the Act, President George H.W. Bush observed that:

[T]he ADA is a dramatic renewal not only for those with disabilities but for all of us, because along with the precious privilege of being an American comes a sacred duty to ensure that every other American's rights are also guaranteed. Together, we must remove the physical barriers we have created and the social barriers that we have accepted. For ours will never be a truly prosperous nation until all within it prosper.⁶⁷

⁶⁷ See transcript: Remarks By The President During Ceremony for the Signing of the Americans with Disabilities Act of 1990, available at <https://www.archives.gov/research/americans-with-disabilities/transcriptions/naid-6037492-remarks-by-the-president-during-ceremony-for-the-signing-of-the-americans-with-disabilities-act-of-1990.html>.

The ADA prohibits discriminations based on disability, affording similar protection from instances of equal opportunity discrimination as did the Civil Rights Act of 1964.⁶⁸ Each year, the rate of veterans leaving active duty service reporting service-connected disabilities⁶⁹—disabilities that were incurred in, or aggravated during, military service—increases.⁷⁰ Title I of the ADA is enforced by the U.S. Equal Opportunity Commission (EEOC), prohibiting state and local government employers with 15 or more employees from discriminating against individuals on the basis of disability.⁷¹ Title I covers virtually all aspects of employment including: hiring, promotions, work assignments, training, retention & termination, and other conditions and terms of employment. A veteran who meets the ADA’s definition⁷² is covered, whether the disability is determined to be service-connected or not.

“Disability” under the ADA means, with respect to an individual, “a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment.” For example, for disabled veterans this means it is illegal for any employer to refuse to hire them because they have a mental health condition, were previously diagnosed with a mental health condition, or because the employer simply assumes they have a mental health condition and regards them as having such a disability. Additionally, an employer may not refuse hiring a veteran that has been

⁶⁸ Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000e-2, (1964)).

⁶⁹ Pub. L. No. 85-857, § 1, 72 Stat. 1105 (codified as amended at 38 U.S.C. § 101(B)(16) (1958)).

⁷⁰ See Bureau of Labor Statistics, Employment Situation of Veterans (2019), available at <https://www.bls.gov/news.release/pdf/vet.pdf>.

⁷¹ 42 U.S.C. § 12111(5)(A).

⁷² 42 U.S.C. § 12102(1).

given a rating of disability from the VA. However, many unseen wounds sustained by disabled veterans—most notably traumatic brain injuries (TBI)—made it difficult for them to prove eligibility under the ADA.

The Americans with Disabilities Act Amendments Act (ADAAA) took a step towards correcting some of these deficiencies, and was signed in 2008 by George H.W. Bush's son, President George W. Bush.⁷³ This was an important addition to the ADA, as the ADA uses different standards than the U.S. Department of Defense (DOD) and the VA in determining disability for veterans. The changes made by the ADA Amendments Act of 2008 made it easier for veterans to establish that they are individuals with disabilities who are entitled to protection. For example, under the ADAAA, the term “major life activities” was amended to include the operation of major bodily functions, such as brain and neurological system functions.⁷⁴ Additionally, impairments do not need to prevent or severely or significantly restrict major life activity to be considered substantially limiting; the determination of whether an impairment substantially limits a major life activity must disregard any mitigating measures—such as medications, assistive devices, and prosthetic limbs—used by an individual to lessen the effects of the impairment.⁷⁵ Furthermore, impairments that are sporadic or in abatement that would be considered substantially limiting to a military member on active duty, are considered to be disabilities.⁷⁶

⁷³ See Bush White House Archives, President Bush Signs S. 3406 Into Law, Off. Press. Sec. (2008), available at <https://georgewbush-whitehouse.archives.gov/news/releases/2008/09/20080925-8.html>.

⁷⁴ 29 C.F.R. § 1630.2 (i)(1)(i)-(ii).

⁷⁵ 29 C.F.R. § 1630.2(j)(1)(ii)-(vii).

⁷⁶ *Id.*

Although the ADA has made many strides in protecting employment civil rights for disabled veterans and civilians, critics have objected to the overall efficacy of the ADA, arguing that the ADA has failed in its fundamental purpose to increase employment opportunities of those with disabilities by reducing discrimination against them.⁷⁷ For example, several studies note the empirical evidence showing a declining employment rate among disabled workers since the early 1990s as proof that the “track record of the Americans with Disabilities Act (ADA) appears dismal for improving the employment opportunities of individuals with disabilities when compared with employment rates of personas without disabilities.”⁷⁸ Proponents of the ADA argue that the main purpose of the ADA is to remove barriers to disabled people within American society, and that increased employment rates are just one of many potential benefits in doing so.

While policy debates regarding the efficacy and merits of the ADA can and will be had, legislatively, the ADA has been a momentous initial step towards providing employment protections for disabled civilians and veterans within the United States.

b. Uniformed Services Employment and Reemployment Rights Act

In addition to the ADA, another landmark piece of legislation that protects the employment rights of disabled veterans is the Uniformed Services Employment and Reemployment Rights Act of 1994. For able bodied and disabled veterans, the USERRA is the principle legislative protection available against illegal employment discrimination, providing that uniformed servicemembers “shall not be denied initial employment, reemployment, retention in employment, promotion, or

⁷⁷ See David C. Stapleton & Richard V. Burhkauser, *The Decline in Employment of People with Disabilities: A Policy Puzzle* 301 (David C. Stapleton, Richard V. Burhkauser eds., 2003)(discussing Peter Blanck et al., in chapter 9 of the book “*Is it Time to Declare the ADA a Failed Law?*”).

⁷⁸ *Id.* at 303.

any benefit of employment by an employer on the basis of their membership in the uniformed services.”⁷⁹ The statute guarantees that the average American citizen may serve their country without fear of their employment (or reemployment) status upon returning from active duty.⁸⁰ Congress enacted USERRA in 1994 in response to both servicemember and employer concerns regarding Gulf War veterans returning home from active military service.⁸¹ Specifically, the concern was a reaction to the new nature of warfare, with reservists in the U.S. military experiencing extensive and diverse training periods throughout the war.⁸² Confusion about the rights of veterans confounded both service members and employers under the previous statute⁸³—the Veterans’ Reemployment Rights Act (VRRA)—abounded in the largest activation of reservists to active duty since the Korean War.⁸⁴ Congress intended to ensure that consistent caselaw from the statutory predecessors would be used in interpreting the USERRA.⁸⁵ A particularly important provision contained within the Act requires that both public and private employers are covered under the law, that they are to “promptly” reemploy any service member

⁷⁹ 38 U.S.C. § 4311(a).

⁸⁰ See Andrew P. Sparks, *From the Desert to the Courtroom: The Uniformed Services Employment and Reemployment Rights Act*, 61 *Hastings L.J.* 772, 773 (2010).

⁸¹ See Pub. L. No. 103-353, § 2(a) 108 Stat. 3150 (1994) (codified as amended at 38 U.S.C. app. §§ 4301-4333).

⁸² See Andrew P. Sparks, *supra* note 80, at 777-778.

⁸³ H.R. Rep. No. 103-65, at 18-19.

⁸⁴ See Andrew P. Sparks, *supra* note 80, at 777.

⁸⁵ See H.R. Rep. No. 103-65, at 19 (“[T]he Committee wishes to stress that the extensive body of case law that has evolved over that period, to the extent that it is consistent with the provisions of this Act, remains in full force and effect in interpreting these provisions. This is particularly true of the basic principle established by the Supreme Court that the Act is to be ‘liberally construed’” (Citing *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946); *Ala. Power Co. v. Davis*, 431 U.S. 581, 584 (1977))).

returning home from active duty, including disabled veterans.⁸⁶

Criticisms of the USERRA revolve around the confusing process required under the Act. Under the USERRA, a service member must notify their employer of their intent to return to a position of employment by submitting an application for reemployment with their former employer no later than 90 days after completion of the period of service.⁸⁷ This has caused many service members—most notably disabled servicemembers—to fear unemployment, reduction in pay, and the loss of other benefits upon their return from active service. Critics also point out that although the Supreme Court has ruled that the USERRA’s application process be liberally constructed, some lower courts have been interpreting these requirements in an overly-technical manner, depriving veterans of their rights.⁸⁸ Although adjusting the application process to the USERRA may be called for, it is nevertheless an important legislative protection for disabled veterans in the United States.

c. Workforce Innovation and Opportunity Act

In addition to the previously mentioned protections for disabled veterans afforded by the ADA and the USERRA, the third piece of legislation this paper will discuss is the Workforce Innovation and Opportunity Act of 2014. Signed into law by President Barack Obama, the WIOA seeks to transform the “workforce system to help job seekers and workers succeed in the labor market and match employers with the skilled workforce they need to compete in the global economy.” The WIOA replaced the Workforce Investment Act of 1998 (WIA) as the primary

⁸⁶ See 38 U.S.C. § 4313(a).

⁸⁷ See 38 U.S.C. § 4301(a)(1)(2006

⁸⁸ See Andrew P. Sparks, *supra* note 80, at 773.

federal workforce development legislation in the United States, increasing coordination between federal workforce development programs. Workforce development programs provide a combination of development programs through education and training services, to prepare individuals for work and help them improve their prospects in the labor market. Activities such as job search assistance, career counseling, occupational skills training, classroom training, and on-the-job training (OTJ) are included. The WIOA includes five titles: (Title I) Workforce Development Activities, (Title II) Adult Education and Literacy, (Title III) Amendments to the Wagner-Peyser Act, (Title IV) Amendments to the Rehabilitation Act of 1973, and (V) General Provisions.

There are three main principles at the core of the WIOA: (1) The needs of business and workers drive workforce solutions, and local workforce boards are accountable to communities in which they are located; (2) American Job Centers (or One-Stop Centers) provide excellent customer service to job seekers and employers and focus on continuous improvement; and (3) the public workforce system supports strong regional economies and plays an active role in community and workforce development.⁸⁹ In keeping with these stated principles of the Act, veterans and their spouses receive priority acceptance in all Department of Labor (DOL) funded employment training programs along with any program under the WIOA. This legislation is noteworthy in its applications for disabled veterans and their spouses because the Act construes both to be considered eligible for “dislocated workers” funding provisions under the Act⁹⁰, which is normally set aside for workers who have already exhausted their entitlements to unemployment

⁸⁹ See Department of Labor, The Workforce Innovation and Opportunity Act, Final Rule Fact Sheet (August 2016) https://www.doleta.gov/wioa/docs/WIOA_Veterans_FactSheet_508.pdf.

⁹⁰ *Id.*

compensation, including unemployment compensation for ex-servicemembers (UCX). Furthermore, under Title I of the Act, additional funds may be used to provide services for job seeking services for disabled veterans to help them navigate the multiple available services and activities under the Act.⁹¹

The WIOA has struggled to be fully implemented, as not enough participants have received skills training for newer, better jobs. Furthermore, the stakeholder engagement within various state business communities has also varied significantly (often uninspiringly), preventing fully coordinated state plans across agencies. The biggest issue threatening the WIOA, however, has been funding. Programs under the Act face constant underfunding challenges relative to demand, as there is no dedicated funding stream to support local partnerships that the Act intended to establish. These challenges uniquely impact disabled veterans, as benefits intending to be afforded to them may be negatively affected by forces outside of the Act's control.

d. Alternative Dispute Resolution

Off-colored and crass jokes are rarely in short supply among military circles. Oftentimes, humor is utilized as a defense mechanism to trauma in complex adaptive processes.⁹² This dark-humor exists within America's disabled veteran culture as well. Referring to the ostensibly infinite process involved in appealing a VA disability decision, popular sayings among veterans include, "Delay, Deny, Wait Till They Die" and "The VA: Giving Veterans A Second Chance To Die For Their Country Since 1930." Although humorous, these sentiments accurately describe truisms

⁹¹ See H.R. Res. 803, 113th Cong. (2014) § 134(d)(1)(A)(iv).

⁹² Tetyana Ye. Khraban, *Military Dark Humor As a Form Of Adaptive Processes And The Individual's Response To Fear Of Death (Psycholinguistic Aspect)*, 1 Military Institute of Telecommunications and Information Technologies 49 (2021. Ukraine).

widely held within the greater disabled veteran community.

Disability ratings received by veterans are perhaps one of the most crucial factors impacting their livelihood. A veteran's final disability rating can (and does) determine the veterans' eligibility for numerous federal programs. The time it takes a veteran to navigate an appeal through the VA's claim decisions process has been criticized harshly. According to the Department of Veterans Affairs, there are currently 244,000 pending disability claims as of March 23, 2022.⁹³ Because of this impact, methods of Alternative Dispute Resolution should be explored and developed.

The reality of the current situation is that the VA is facing a crippling backlog crisis for disability claims appeals.⁹⁴ The VA claims process is complex, much like it has always been. Initially, the entire VA system was structured so that a veteran could make a claim for disability benefits either *pro se*, or through the assistance of a regional Veterans' Service Office or the Board of Veterans' Appeals (VBA).⁹⁵ In order for attorneys to assist veterans with their claims at the VA, accreditation by the VA is required to practice before the agency.⁹⁶ Prior to 2006⁹⁷, lawyers could not charge more than \$10 to represent veterans unless a final BVA decision was issued,

⁹³ See Leo Shane III, *VA claims backlog improves, but still sits far above pre-pandemic levels*, Mar. 2022, <https://www.defensenews.com/veterans/2022/03/23/va-claims-backlog-improves-but-still-sits-far-above-pre-pandemic-levels/>.

⁹⁴ See Bd. Of Veterans' Appeals, *Annual Report: Fiscal Year 2017*, U.S. Dep't of Veterans Affairs 12 (2017), available at https://www.bva.va.gov/Chairman_Annual_Rpts.asp.

⁹⁵ See Kristina Derro, *Health Care Issues For Veterans*, 45 Maine L.R. 9,11 (2016) (discussing the VA disability benefits process long history of being pro-claimant along with its lower burden of proof).

⁹⁶ 38 C.F.R. § 14.629.

⁹⁷ See 38 U.S.C. § 5904(c).

preventing many disabled veterans from obtaining counsel in the appeals process.⁹⁸

In the VA's appeals process, when an initial rating decision is issued by the VA, the veteran should review it to determine what must be appealed. Even favorable decisions of a claim should be reviewed to ensure that the disability rating and the effective date of the award are satisfactory. The Veteran has 90 days to submit additional evidence or legal arguments after the BVA receives the veterans' claim.⁹⁹ Prior to the 90 day deadline, a veteran may submit as much, or as little, evidence in support of their claim as desired. In a case-by-case analysis of VA regional offices—purportedly having a pro-claimant process, whereby each regional office follows the same regulations—findings indicate that these regional offices do not give the same interpretations to statutes, regulations, or case law.¹⁰⁰ In choosing a decisional review option, a veteran has three choices, (1) a supplemental claim, (2) a higher-level review, and (3) a board appeal.¹⁰¹ In a supplemental claim, a reviewer will “decide if new and relevant evidence changes the prior decision”, which takes roughly 125 days to complete.¹⁰² For higher-level reviews, a senior reviewer (Senior Claims Adjudicator) will review the decision using the same evidence the VA considered in the prior decision.¹⁰³ Higher-level reviews do not provide accommodations for reviews to be held online, they are either informally on the phone or in person. For the third type

⁹⁸ See *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 307 (1985).

⁹⁹ See 38 C.F.R. § 20,1304(a)(2015).

¹⁰⁰ See Kristina Derro, *Service-Connected Disability Claims Before the U.S. Department of Veterans Affairs*, Mich. B.J. 26,28 (2015).

¹⁰¹ See Department of Veterans Affairs website, *Choosing a decision review option*, available at <https://www.va.gov/resources/choosing-a-decision-review-option>.

¹⁰² *Id.*

¹⁰³ *Id.*

of review, board appeals, a Veterans Law Judge (VLJ) at the Board of Veterans' appeals will review the decision.¹⁰⁴

There are four features to Alternative Dispute Resolution in contemporary settings, (1) negotiation, where participation is voluntary, with no third party facilitating the processes or imposing a resolution, (2) mediation, where there is a third party who facilitates the resolution process, even proposing resolutions to the dispute, (3) collaborative methods wherein each part has an attorney present to facilitate the resolution process (within previously specified terms), (4) arbitration methods, typically resolved by a private judge imposing a resolution, and (5) transaction, where two or more parties make reciprocal concessions to prevent or end a dispute that might end up in litigation.¹⁰⁵

Currently, the VA utilizes a mix of these methods with haphazard results. The advent of secure online methods of communication shows that the methods of Alternative Dispute Resolution systems within the VA are severely lacking, notably within higher-level reviews. Most importantly, this antiquated system creates foreseeable problems for (potentially) disabled veterans who wish to utilize this method of review. Discussed *infra*, this paper offers a policy solution to modernize higher-level review processes within the VA.

III. Catalysts and Barriers to Reform

Initiating policy reform for veterans benefits and programs is a difficult task because every stake holder—disabled veterans and the federal government—is at times a catalyst for change, and at other times, a barrier.

¹⁰⁴ *Id.*

¹⁰⁵ *Alternative Dispute Resolution*, https://www.law.cornell.edu/wex/alternative_dispute_resolution (Apr. 23, 2022)

a. Disabled Veterans

In acting as catalysts for policy reform, disabled veterans find that their center of gravity¹⁰⁶ lies in their political strength¹⁰⁷ as lobbying groups and voting blocs. The Veterans of Foreign Wars (VFW), Disabled American Veterans (DAV), and the American Legion are notable advocacy groups wielding significant political power in both state and federal legislatures.¹⁰⁸ Veterans have to be mindful of two things, (1) historically, they have been so effective as a political machine—expanding and transforming the pension system into an advocacy model that maintained ongoing relations between the federal government, veterans, and veterans organizations—that they have actually caused public and political backlash¹⁰⁹ and, (2) disabled veteran groups wishing to act as torch bearers for policy reform need to act quickly after their generation’s conflict ends; studies show that “When war ends... and memories of it begin to fade in the general desire to return to normal peacetime existence, the warrior hero gradually loses his luster and is reduced in stature to a beleaguered disabled man, who’s needs may be perceived as an inconvenience.”¹¹⁰ As an exception to this general rule, public perception post-Vietnam was unfavorable to expanding veterans’ benefits. This provided an environment conducive to a new level of activism among veteran groups. These groups were unlike others in American history in

¹⁰⁶ Michael Howard & Peter Paret, *Carl Von Clausewitz On War*, 485 (Michael Howard and Peter Paret eds., Indexed ed., 1989) (“The blow from which the broadest and most favorable repercussions can be expected will be aimed against that area where the greatest concentration of enemy troops can be found; the larger the force with which the blow is struck, the surer its effect will be. This rather obvious sequence leads us to an analogy that will illustrate it more clearly—that is, the nature and effect of a center of gravity”).

¹⁰⁷ See Ridgway, *supra* note 25, at 172

¹⁰⁸ *Id.* (citing Paul C. Light, *Forging Legislation* 5 (1992)).

¹⁰⁹ See Ann Hubbard, *supra* note 3, at 7.

¹¹⁰ See Gerber & Shay, *supra* note 10, at 5.

that they saw their cause as one of self-preservation, demanding the government acknowledge and respond to the unique needs borne out of a rapid change in the nature of warfare they endured.¹¹¹

An example of the reach of disabled veterans' political power is the fact that the massive social welfare system for veterans—the veterans' disability benefits system—maintains broad political support, despite costing the United States over \$22 billion annually.¹¹² Additionally, the single largest integrated healthcare system in the United States is operated by the Veterans Administration Health Care System (VHA).¹¹³ Cultural domain analysis studies indicate that veterans acted as barriers to policy change in five dimensions, (1) worry and concern about how their peers perceive them, (2) private, physical, and financial issues, (4) a lack of confidence in the VA healthcare system, and (5) navigating VA benefits and healthcare services.¹¹⁴ Veterans expressed concern over stigmatizing labels such as “crazy” and being “mental health patients”, as well as military attitudes (e.g., “suck it up”) that foster feelings of inadequacy, weakness, and failure. Veterans also reported that a lack of trust in clinical encounters and interactions with non-military healthcare providers, who are limited in understanding veterans' military experiences, decreased their motivation to remain in care.¹¹⁵ Financial, personal, and physical obstacles—such as poor health care access and financial issues—also represent barriers to policy change.

¹¹¹ *Id.* at 20; *See also* Ridgway, *supra* note 25, at 200.

¹¹² *See* Linda Bilmes, *Soldiers Returning from Iraq and Afghanistan: The Long Term Costs of Providing Veterans Medical Care and Disability Benefits 2* (John F. Kennedy Sch. Gov't Faculty Research Working Paper Series, No, RWP07-001, 2007)(discussing the cost of long-term care for veterans returning from service in Iraq and Afghanistan and the overall costs of that care), available at <https://papers.ssrn.com/sol3/papers.cfm?abstractid=939657>.

¹¹³ *See* Dep't. of Veterans Aff., *Federal Benefits for Veterans' Dependents and Survivors* (2008), available at <http://www1.va.gov/opa/vadocs/fedben.pdf>.

¹¹⁴ *See* Ann M. Cheney et al., *Veteran-Centered Barriers to VA Mental Healthcare Service Use*, 5 (BMC Health Services Research, Jo Gerrard ed. 2018).

¹¹⁵ *Id.*

Additionally, transportation to distant appointments is reported as a major issue for veterans.¹¹⁶ Veterans also cite system-wide problems with the VA's processes of care. Despite the fact that the VA is supposed to be a non-confrontational forum for veterans with disabilities, many veterans believe the relationship is overly adversarial. Veterans indicate that limited or no access to specialized care, long wait times between appointments, a lack available providers, and high provider turnover contributes to an overall lack of confidence in the VA healthcare system. Veterans also reported a knowledge gap which impeded initial enrollment, a lack of awareness of available services, and navigating the VA system.¹¹⁷

Moreover, veterans report a lack of effectiveness in transitional employment readiness training received upon discharge from the military. Lastly, privacy and security concerns about potential security risks concerning their confidential and personally identifiable information remains a major factor in veteran hesitancy to utilizing VA services.¹¹⁸

b. The Federal Government

Federal programs and policies have also acted as catalysts and barriers to public policy change. As previously discussed, public willingness to provide for veterans' benefits—upon completion of a conflict—and the potential political benefits associated with appearing to take a proactive stance on these issues by a politician can be an extremely effective catalyst for public policy proposals. As shown in the past, this period of responsive good will is short lived.

During times of fiscal or social restraint, the federal government becomes a barrier to

¹¹⁶ *Id.* at 10.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

enacting legislative changes. The three main ways the federal government becomes a barrier is, (1) bureaucratic red-tape, (2) data submitted by the VA skewed in support of itself, its programs, and its policies and (3) scandals within the VA. On June 12, 2014, Chairman Jeff Miller's opening statement in a meeting of the United States House of Representatives' Committee on Veterans' Affairs outlined the bureaucratic failings of the VA organization:

[A]s we all well know, during a Committee oversight hearing in early April, we came forward with the results of a Committee investigation that had uncovered evidence suggesting that dozens of veterans died while waiting for care at the Phoenix Department of Veterans Affairs (VA) health care system. Just over two months later, we know now that in addition to twenty-three veteran deaths that the Department linked to delays in care earlier this spring, at least thirty-five more veterans died while awaiting VA care in the Phoenix, Arizona, area. What's more, a VA audit released earlier this week found that over fifty-seven thousand veterans have been waiting ninety days or more for their first VA medical appointment and sixty-four thousand veterans who have enrolled in the VA healthcare system over the last decade never received the appointment they requested. That is one-hundred and twenty-one thousand veterans who have not been provided the care they have earned. That number exceeds the population of several mid-sized U.S. cities like Athens, Georgia, or Abilene, Texas, or Santa Clara, Texas, or Evansville, Indiana. And, I fear that there is more yet to come. Yesterday I spoke to a group of VA providers from across the country at an event for the National Association of VA Physicians and Dentists (NAVAPD). Speaking about the current crisis engulfing the Department, NAVAPD has stated that VA's, "procedures and processes are inconsistent, inconsistently applied, and often prevent efficient use of personnel..." This statement echoes the serious calls for alarm we have heard from many others in recent weeks. During a recent Committee hearing, Dr. Daigh [DAY], VA's Assistant Inspector General for Healthcare Inspections, testified that VA suffers from, "... a lack of focus on health care delivery as priority one," as a result of, "... several organizational issues that impede the efficient and effective operation of [the VA health care system] and place patients at risk of unexpected outcomes."¹¹⁹

Another barrier to policy change that applies to both veteran disability care and employment programs is relevant data that is not collected, not released, or skewed. VA leaders

¹¹⁹ *An Examination of Bureaucratic Barriers To Care For Veterans: Hearing Before H.R. Comm. Veterans' Affairs, 113th Cong. (2014) (opening statement of the chairman of the committee, Jeff Miller).*

were steadfast in arguing that patients reported positive experiences at VA hospitals just two years after a scandal rocked the VA; an audit conducted by the Government Accountability Office (GAO) found that the VA's method for calculating wait times for appointments concealed the actual time—in some cases up to 71 days—that a patient had to wait before seeing a clinician.¹²⁰ These assertions made by the VA relied on polls conducted by the American Consumer Satisfaction Index (ACSI). The problem with these claims made by the VA is that representatives for ACSI have stated that ACSI does not conduct surveys for the VA's healthcare system. In addition to touting apparent medical care surveys of patient satisfaction as evidence of VA success, the VA has failed to produce any evidence to support their claims. During an interview, Special Advisor to the Secretary of the VA, Dr. Peter Almenoff could not positively identify any survey referenced by the VA leadership about patient satisfaction. When asked about methods to compare VA hospitals with non-VA facilities, Dr. Almenoff replied that he “can't answer that.”¹²¹ Furthermore, VA secretary Bob McDonald claimed in 2016 that more than “90% of the VA's medical centers” have had new leadership or leadership teams established since 2014. An investigation into these claims found that the VA simply hired just eight new medical center directors from outside of the agency during that time.¹²² The new leadership teams Secretary McDonald spoke of were a result of simply moving existing managers between jobs and centers. Out of 140 medical center directors, the investigation found that out of 140 medical center

¹²⁰ See Paige Minemyer, *VA's patient satisfaction data raise questions*, Fierce Healthcare (Oct. 24, 2016), available at <https://www.fiercehealthcare.com/healthcare/va-lauds-its-patient-satisfaction-scores-but-data-raises-questions>.

¹²¹ See Dennis Wagner, *VA touts patient satisfaction, but its findings are questionable*, Ariz. Repub. (Oct. 21, 2016), available at <https://www.azcentral.com/story/news/local/arizona-investigations/2016/10/21/va-touts-patient-satisfaction-but-its-findings-questionable/91491528/>.

¹²² See Donovan Slack, *Exclusive: VA shuffles managers, declares 'new leadership'*, USA Today (Oct. 18, 2016), available at <https://www.usatoday.com/story/news/politics/2016/10/18/veterans-affairs-managers-transfer-new-leadership-medical-centers/91965888/>.

directors, 92 were new since McDonald was instated in 2014. Of the 140 medical center directors, only 69 were permanent, while the rest were interim employees, and all but eight had already worked at the VA.¹²³

Furthermore, the low success rate, weak leadership, and limited data analysis on program management of VA job training programs have come under attack in recent years, even admitted to by the Government Accountability Office. “Unfortunately, the VA does not—and should—routinely track vocational rehabilitation participants over time to evaluate program outcomes and identify factors associated with success. As a result, it is impossible to determine which program works best.”¹²⁴ The lack of data collection has led to a limited and ambiguous understanding of employment outcomes for disabled veterans,¹²⁵ as well as significant gaps in understanding the long-term experiences of disabled veterans and employers participating in these programs.¹²⁶

Lastly, recent and numerous scandals that have taken place within the VA have negatively changed public perceptions, and have soured both the political appeal and desire to pursue policy changes. In 1973, the National Personnel Records Center (NPRC) fire occurred at the Military Personnel Records Center in Overland, Missouri. The loss of official military records, the majority of them being official DD-214 discharge papers, is estimated to number between 16-18 million. Due to the failure of the NPRC to create backup copies, millions of veterans were adversely

¹²³ *Id.*

¹²⁴ See Gov’t. Accountability Office, VA Vocational Rehabilitation and Employment Program 26 (2004), available at <http://www.gao.gov/new.items/d0934.pdf>.

¹²⁵ See Caroline Batka & Kimberly Curry Hall, More Research on Veteran Employment Would Show: What’s Good for Business and for Veterans, 2 (Rand. Corp. ed., 2016) (discussing the studies conducted on public and private-sector programs that help veterans translate their military skills into civilian jobs, noting a lack of research on the effectiveness of these programs).

¹²⁶ *Id.*

impacted in applying for and obtaining disability compensation, as well as in seeking employment.¹²⁷ In Tomah Wisconsin, a VA hospital was nicknamed “Candy Land”, as opiate prescriptions quadrupled there between 2005 and 2012. The Tomah VA was placed under national scrutiny after a Marine Corps veteran died of an overdose under the care of hospital staff. Critics accused the hospital of “breeding drug addicts” that resulted in the deaths of numerous disabled veterans.¹²⁸ An investigation into the Tomah VA hospital found that employees faced a workplace “climate of fear and retaliation if they questioned any of the staff decisions regarding opioid prescriptions.”¹²⁹

IV. Public Policy Prescriptions

a. Organizational Integration

[V]A hasn't gotten where it is today due to just bloated and ineffective middle management; or lack of training and professional development for administrative staff; or inefficient or nonexistent productivity and staffing standards; or cumbersome and outdated IT infrastructures. The Department got where it is today due to a perfect storm of settling for the status quo. VA cannot continue business as usual. The status quo is unacceptable. It is time for real change - again, beginning with accountability up to the highest levels of VA bureaucracy.¹³⁰

History has shown a willingness by the public at large to support policies that treat veterans commensurate with the sacrifices they have made. They want these policies to be fair, efficient,

¹²⁷ See Walter W. Stender, Walker Evans, *The National Personnel Records Center Fire: A Study in Disaster*, 37 *American Archivist Soc’y*. 521, 522-525; See also *The 1973 Fire*, National Personnel Records Center (St. Louis, MO), Nat’l Archives website, available at <https://www.archives.gov/personnel-records-center/fire-1973>.

¹²⁸ See Benjamin Pomerance, *Yet Another War: Battling For Reasoned Responses For Veterans Amid The Opioid Crisis*, 11 *Albany Gov’t. L.R.* 143, 151 (2017).

¹²⁹ *Id.* at 152.

¹³⁰ See Jeff Miller, *supra* note 80.

and in accordance with a standard of care meeting or exceeding that what is available in the private sector. This paper recommends policy changes in the following areas, (1) Merging existing healthcare provisions within the VA into the framework of Medicare, (2) allocating sufficient resources to conduct more longitudinal data collection studies regarding the resource needs of transitioning disabled veterans and, (3) creating a secure online method of Alternative Dispute Resolution for VA claim appeals.

Under the present system, eligible service members after exiting service may apply for disability compensation benefits through the VA's application process. After receiving their disability award rating, the veteran is then eligible for federal benefits. The benefits they are entitled to are a function of the rating they receive. Proposed in this paper, is that upon receiving a disability award rating, an eligible veteran becomes entitled to receive Medicare Part A and Part B. In addition, they receive a voucher to purchase a Medicare Part "V" plan that would function similar to a highly specialized Medicare Part C—commonly known as a Medicare Advantage Plan¹³¹—customized to meet the unique needs of disabled veterans, and purchased from the provider of their choice. The options they are eligible for in Medicare Part "V" is determined by the rating they receive. The VA's method used to determine eligibility and benefit ratings would not change for the new system. It would also use the existing procedures utilized to secure Medicare benefits and acquire a Medicare Part C plan. Intended benefits of this plan is expanding access for disabled veterans to hospitals and clinics currently accepting Medicare. This will reduce long wait times, scheduling issues, and improve access to resources.

¹³¹ See Medicare Advantage Plans, *Gov't* website for Medicare, available at <https://www.medicare.gov/sign-up-change-plans/types-of-medicare-health-plans/medicare-advantage-plans>.

b. Longitudinal Data Collection

A myriad of initiatives intent on helping veterans apply their military skills to civilian jobs exist within the public and private-sector. However, neither the effectiveness of these programs, nor the experiences of disabled veterans or their civilian employer counterparts have been studied in depth. As an initial step towards improving employment prospects of disabled veterans, this paper recommends allocating the necessary funds to conduct more longitudinal data collection studies on employment programs over time. These data collection studies should incorporate inputs from disabled veterans on their career path choices over time and outputs from employers who track metrics (such as performance and retention rates) regarding disabled veterans within their employ. Analyzing data collected in both areas may enable researchers to highlight barrier creating issues to policymakers more effectively, resulting in a more complete integration of disabled veterans into the civilian labor force. First, these studies should examine the career path outcomes of more subpopulations of disabled veterans. By increasing the number of subpopulations of disabled veterans studied (such as race, gender, branch of service, and other areas), policymakers would have a clearer understanding of how to customize employment training programs that better align veteran employment goals with employer needs. Although businesses anecdotally find that employing disabled veterans is a positive experience¹³², there is no data that confirms or denies this. Private businesses should be encouraged and funded to track, assess, and report the performance and retention rates overtime between disabled veterans and civilians within their employ. While it may be difficult to track uniform “performance” metrics in various business fields that employ disabled veterans, these studies are worth pursuing. Empirical evidence of

¹³² See Caroline Batka & Kimberly Curry Hall, *supra* note 86, at 6.

employment values within individual organizations could result in an industry wide case in favor of hiring disabled veterans.¹³³

c. Modernizing High Level Reviews

Evidence shows that the dispute resolution processes within the current VA are not working, as evidenced by the astronomically high backlogs and wait times for adjudication. While there are three ways that VA disability claim decisions are reviewed, there is not a modern method of Alternative Dispute Resolution in higher-level reviews. Seeing how the VA already has modern systems of secure messaging—specifically within its “My-Health-E-Vet” website, and its “VA Video Connect” system—it is feasible for the VA to create a secure online method of Alternative Dispute Resolution for higher-level reviews to adjudicate disability claim decision review appeals.

As a positive step towards resolving the current backlogs within the VA, this paper recommends for the VA to fund, develop, and implement a secure online method for higher-level reviews that can be accessed by both stakeholders within the VA system, and those filing appeals within the framework of VA appeals process. During the COVID-19 Pandemic, all facets of life have been migrating over to the virtual world. Business meetings, classrooms, even religious congregations have adapted to the necessities of the times in order to provide for their constituents. Through unfortunate events, the COVID-19 Pandemic has been a fortunate reminder to American society of its ideals in improvising, adapting, and overcoming challenges before it.

Rather than calling for one particular method of Alternative Dispute Resolution method to be used, this paper argues for a quicker method of conducting any of the methods discussed *supra*.

¹³³ *Id.* at 7.

By moving towards updated methods of dispute resolution online modeled after the systems already in place, the VA would create for itself an opportunity to cleanse the horrific backlog of disputed claims and more efficiently adjudicate and anticipate upcoming claims, and have a record of those claims previously decided. A critical factor in moving towards an online system is ensuring that the confidential and personally identifiable information of disabled veterans is protected, so considerations placed towards operational security (OPSEC) by policymakers should be given the upmost priority. Considerations towards this policy proposal should ensure military transition readiness programs (TRP's) classes be provided to transitioning military servicemembers, emphasizing assistance to those considering filing a disability claim. Providing this training to transitioning servicemembers ease the VA's burden in retroactively, reducing the amount of training seminars and other resources that teach veterans about their benefits. Upon discharge from the military, disabled veterans should be aware of processes and methods of dispute resolution at their disposal to access the benefits they need.

CONCLUSION

The U.S. Military is us. There is no truer representation of a country than the people it sends into the field to fight for it. The people who wear our uniform and carry our rifles into combat are our kids, and our job is to support them, because they're protecting us.¹³⁴

Numerous examples show negative policy impacts—historically and currently—experienced by disabled veterans in the United States. Major problems pointed out in this paper are ineffective and inefficient disability care, data collection on employment training, and dispute resolution within the Department of Veterans Affairs' decision review process for disability

¹³⁴ See Press Release, Cision PR Newswire, Tom Clancy, #1 International Bestselling Author, is Spearheading a 'Send a Message to an American Hero' Program That Will Deliver Personal Messages From People Nationwide to Veterans and Active Duty Soldiers Currently Under Care at the Walter Reed Medical Facility (Nov. 8, 2010)

claims. Having borne the battles of the country, disabled veterans are deserving of effective policies that help care for their medical needs and create jobs for them when they complete their service. To this end, there are many difficult challenges, and no simple answers. However, there are opportunities to implement changes in hopes of creating a more perfect union for those who have fought for it.