THE INABILITY OF WORLD WAR II ATOMIC VETERANS TO OBTAIN DISABILITY BENEFITS: TIME IS RUNNING OUT ON OUR CHANCE TO FIX THE SYSTEM

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In this note, Ms. Podgor discusses the inability of more than eighty-eight percent of American servicemembers who were exposed to atomic radiation to recover benefits for diseases caused by that exposure. The author examines the three statutes that grant compensation to atomic veterans as well as the policies and procedures of the Veterans Benefits Administration (VBA). Ms. Podgor advocates for increased funding and training for personnel within the VBA. Additionally, the author argues for clarification of existing statutes so that atomic veterans' claims can be processed fairly.

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I. Introduction

Forty-five days after the United States dropped the atomic bomb on Nagasaki, Japan, Navy veteran Charles Clark was ordered into the city along with his shipmates.[1] Clark was eighteen years old.[2] During the five days they spent there, Clark and his shipmates were surrounded by the decaying bodies of Japanese victims of the bomb.[3] Without protection, they covered their faces with their shirt sleeves to avoid breathing in the odor.[4]

When Charles was thirty-seven, his teeth started to fall out and his jaw began to lose its structure.[5] Now, at the age of seventy-seven, he has had over 150 cancerous growths removed from his face, many lodged inside his ears and nasal passage.[6] In 1995, Clark filed a claim for disability compensation with the Department of Veterans Affairs (VA).[7] The agency denied his request, stating that reports from Nagasaki show that radiation[8] levels were safe when he was in Nagasaki.[9]

Roughly 195,000 servicemembers participated in the post–World War II occupation of Hiroshima and Nagasaki, Japan.[10] Additionally, 210,000 individuals, most of whom were servicemembers, were victims of U.S. atmospheric nuclear tests conducted between 1945 and 1962 in the United States and the Pacific and Atlantic oceans.[11] Less

1. Tom Schoenberg, *Vets Search for Nuclear Secrets*, LEGAL INTELLIGENCER, Aug. 18, 2004, at 4.
2. *See id.*; The History Place, World War Two in Europe: Timeline with Photos and Text, http://www.historyplace.com/worldwar2/timeline/ww2time.htm (last visited Oct. 19, 2005). The atomic bomb was dropped on Nagasaki on August 9, 1945. If Clark was seventy-seven in 2004, he was eighteen when he entered Nagasaki.
3. Schoenberg, *supra* note 1.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. ENVTL. AGENTS SERV., DEP'T OF VETERANS AFFAIRS, IONIZING RADIATION BRIEF (2004), http://www1.va.gov/irad/docs/IRADBRIEFS2005.doc (referring to ionizing radiation as a type of subatomic particle, electromagnetic wave, or photon that is able to break chemical bonds and create electrically charged particles (ions) when they come into contact with atoms or molecules in the human body, thus affecting the body's health).
9. Schoenberg, *supra* note 1.
10. OFFICE OF PUBLIC AFFAIRS NEWS SERV., DEP'T OF VETERANS AFFAIRS, VA FACT SHEET: VA PROGRAMS FOR VETERANS EXPOSED TO RADIATION (1999), http://www.va.gov/pressrel/99radpgm.htm.
11. *Id.*

than 20,000 of these atomic veterans are still alive.[12] As of October 2004, roughly 18,275 atomic veterans applied for disability compensation,[13] but only 1,875 of these claims were granted.[14] Thus, 88.6% of atomic veterans have been denied disability compensation.[15]

This note will examine the controversy surrounding the inability of atomic veterans to obtain benefits for their radiation-induced diseases. Part II of this note will explain the three statutes that grant compensation to atomic veterans, the limited ability of atomic veterans to recover in tort from the government, and the process by which veterans bring claims for compensation in the VA. Part III will analyze problems with the policies and procedures of the Veterans Benefits Administration (VBA), problems with the VA's interpretations of the statutes providing for compensation, and problems with the courts' interpretations of the statutes providing for compensation. Finally, Part IV will recommend ways in which the VA, Congress, and the courts can help atomic veterans utilize the statutes that grant them disability compensation more effectively.

II. Background

A veteran is defined as someone who "served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable."[16] State statutes define an elder as someone who is over sixty[17] or sixty-five years of age.[18] In 2000, 28% of people aged sixty-five and over were veterans.[19] Fifty-

12. *Marketplace: Profile: Health Problems Atomic Vets Are Facing* (Minn. Pub. Radio, Sept. 29, 2004).

13. Tim Dyhouse, *21 Cancers Linked to Radiation Exposure*, VETERANS OF FOREIGN WARS MAG., Nov. 1, 2004, at 10.

14. *Id.*

15. *Id.*

16. 38 U.S.C.A. § 101(2) (West 2002).

17. 53 AM. JUR. 3D *Proof of Abuse, Neglect or Exploitation of Older Persons* § 3 (2005); *see, e.g.*, CONN. GEN. STAT. § 17b-450(1) (2004); 320 ILL. COMP. STAT. 20/2(e) (2005); LA. REV. STAT. ANN. § 14:93.3(C) (West 2004).

18. 53 AM. JUR. 3D, *supra* note 17; *see, e.g.*, OR. REV. STAT. § 124.005(2) (2004); TEX. HUM. RES. CODE ANN. § 48.002(a)(1) (Vernon 2004).

19. There were 35 million people sixty-five years of age and older. LISA HETZEL & ANNETTA SMITH, U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU, THE 65 YEARS AND OVER POPULATION: 2000, at 1 (2001), *available at* http://www.census.gov/prod/2001pubs/c2kbr01-10.pdf. Of those 35 million, 9.7 million of them were veterans. CHRISTY RICHARDSON & JUDITH WALDROP, U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU, VETERANS: 2000, at 3 (2003), *available at* http://www.va.gov/vetdata/Census2000/c2kbr-22.pdf.

nine percent of these veterans, or 5.7 million people, served in World War II.[20] In addition, the average age of veterans who served in World War II was 76.7.[21]

Congress has implemented three statutes that grant veterans who suffer from diseases as a result of exposure to radiation in World War II the ability to receive disability benefits, free medical care, and in some cases, lump-sum compensation packages.[22] Because the courts have virtually eliminated any ability for veterans to sue the government for torts,[23] these statutes are a veteran's only hope for receiving compensation and care for the harm he or she may have suffered. The majority of veterans' statutory claims are reviewed by the VA and then the courts through a detailed adjudication and appeals process.[24]

A. Statutes

In response to concerns about the possible health effects of exposure to radiation, Congress passed the Radiation Exposed Veterans Compensation Act (REVCA) and the Veterans' Dioxin and Radiation Exposure Compensation Standards Act (VDRECSA).[25] These acts were intended to

> ensure that Veterans' Administration disability compensation is provided to veterans who were exposed during service in the Armed Forces . . . to ionizing radiation in connection with atmospheric nuclear tests or in connection with the American occupation of Hiroshima or Nagasaki, Japan, for all disabilities arising after that service that are connected, based on sound scientific and medical evidence, to such service and that Veterans' Administration dependency and indemnity compensation is provided to

20. RICHARDSON & WALDROP, *supra* note 19, at 3 fig.3.

21. *Id.* at 3 tbl.1.

22. Radiation Exposed Veterans Compensation Act, 38 U.S.C.A. § 1112 (West 2004); Radiation Exposure Compensation Act, Pub. L. No. 101-426, 104 Stat. 920 (1990), *amended by* Pub. L. No. 106-245, 114 Stat. 501 (2000); Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, 98 Stat. 2725 (1984).

23. Feres v. United States, 340 U.S. 135, 146 (1950); Heilman v. United States, 731 F.2d 1104, 1107 (3d Cir. 1984).

24. H.W. Cummins & Thomas J. Fisher, Jr., *Service Accepted, Compensation Denied: The Practice and Proceedings of the DVA Concerning Hanford Atomic Veterans*, 30 GONZ. L. REV. 629, 631–36 (1994–1995).

25. Veterans' Dioxin and Radiation Exposure Compensation Standards Act § (2)(1). This Act was also passed in response to the concerns of Vietnam Veterans who were exposed to herbicides containing dioxin. *Id.*

> survivors of those veterans for all deaths resulting from such disabilities.[26]

These acts are two of three statutes that govern World War II veterans' rights to benefits or compensation for diseases stemming from radiation exposure. The third is the Radiation Exposure Compensation Act (RECA).[27]

REVCA mandates a presumption that service-connected radiation exposure causes twenty-one listed cancers.[28] If a servicemember can prove that he or she was present in certain listed locations during listed time periods,[29] and has one of the listed cancers,[30] he or she will automatically qualify for disability benefits[31] and free medical care for that disability.[32] This medical care includes freedom from copayments for care or services, including outpatient pharmacy services,

26. *Id.* § 3.
27. 38 U.S.C.A. § 2210 (West 2002).
28. *Id.* § 1112(c)(1).
29. This list includes: (1) on-site participation in the testing of an atmospheric nuclear device detonation; (2) the occupation of Hiroshima or Nagasaki, Japan between August 6, 1945, and July 1, 1946; (3) internment as a Prisoner of War in Japan during World War II which resulted in an opportunity for radiation exposure comparable to those who occupied Hiroshima or Nagasaki between August 6, 1945, and July 1, 1946; (4) service at gaseous diffusion plants in Paducah, Kentucky, Portsmouth, Ohio, or the area identified as K25 at Oak Ridge, Tennessee, for at least 250 days before February 1, 1992; (5) exposure to ionizing radiation due to duties related to the Long Shot, Milrow, or Cannikin underground nuclear tests on Amchitka Island, Alaska, before January 1, 1974; and (6) active duty service immediately after internment as a Prisoner of War in Japan which resulted in an opportunity for exposure as mentioned above. 38 C.F.R. § 3.309(d)(3) (2004).
30. This list includes: leukemia (other than chronic lymphocytic leukemia); cancer of the thyroid, breast, pharynx, esophagus, stomach, small intestine, pancreas; multiple myeloma; lymphomas (except Hodgkin's Disease); cancer of the bile ducts, gall bladder; primary liver cancer (except if cirrhosis or hepatitis B is indicated); cancer of the salivary gland, urinary tract (which includes the kidneys, renal, pelvis, ureters, urinary bladder, and urethra); bronchiolo-alveolar carcinoma; and cancer of the bone, brain, colon, lung, and ovary. 38 U.S.C.A. § 1112 (c)(2).
31. *Id.* § 1112(c)(1); *see also id.* §§ 1114–1115.
32. *Id.* § 1710(a)(1)(A); *see also* VETERANS HEALTH ADMIN., VA RADIATION PROGRAMS INFORMATION (2004), *available at* http://www1.va.gov/irad/docs/IRADFACTSHEETS.pdf. This only applies to veterans who "participated in atmospheric nuclear weapons tests; took part in the American occupation of Hiroshima and Nagasaki, Japan (from August 6, 1945 through July 1, 1946) and/or were POWs in Japan during WWII" because they are enrolled in the VA healthcare system at Priority Level 6. *Id.* at 2. However, veterans who served at gaseous diffusion plants in Paducah, Kentucky, Portsmouth, Ohio, or the area identified as K25 at Oak Ridge, Tennessee, for at least 250 days before February 1, 1992, or whose exposure to ionizing radiation came from duties related to the Long Shot, Milrow, or Cannikin underground nuclear tests on Amchitka Island, Alaska, before January 1, 1974, do not have special eligibility for enrollment or health care. *Id.* at 3–4.

provided to treat that disability.[33] Disability benefits for a single veteran with no dependants range from $106 to $3907 a month, depending on the degree to which the veteran is disabled.[34] Furthermore, when the veteran passes away, his or her surviving spouse may qualify for Dependency and Indemnity Compensation (DIC), a monthly payment calculated according to the year the veteran passed away and the number of surviving dependant children.[35]

If a veteran does not have one of the listed cancers, his or her claim falls under VDRECSA.[36] In order to obtain disability benefits and free medical care for the disease, the veteran must prove that he or she was exposed to radiation while in service[37] and that "it is at least as likely as not" that his or her radiation exposure caused the disease.[38] In deciding whether it is at least as likely as not that the exposure caused the disease, the Secretary of Benefits will look to an estimate of the amount of radiation to which the veteran was exposed ("dose estimate"), the sensitivity of the involved tissue to the ionizing radiation, the veteran's gender, the veteran's family history, the veteran's age at time of exposure, the time between exposure and onset, and the extent to which exposure to carcinogens outside of service may have contributed to the development of the disease.[39]

Lastly, RECA provides for a $50,000 or $75,000 lump-sum payment to veterans who qualify.[40] While this statute was created pri-

33. OFFICE OF PUB. HEALTH AND ENVTL. HAZARDS (13), VA RADIATION PROGRAMS INFORMATION FOR VETERANS HEALTH ADMIN. (VHA) ENVTL. HEALTH CLINICIANS/COORDINATORS (2003), *available at* http://www1.va.gov/irad/docs/IRADFACTSHEETS.pdf.

34. 38 U.S.C.A. § 1114 (West 2002).

35. DEP'T OF VETERANS AFFAIRS, DEPENDENCY AND INDEMNITY COMPENSATION (DIC) (2005), *available at* http://www.vba.va.gov/bln/21/Milsvc/Docs/Diceg.doc; VETERANS BENEFITS ADMIN., DEPENDENCY INDEMNITY COMPENSATION (DIC) RATE TABLES (2004), *available at* http://www.vba.va.gov/bln/21/Rates/Comp03.htm.

36. Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, 98 Stat. 2725 (1984). This Act grants benefits to World War II veterans based on radiation exposure and to Vietnam veterans based on dioxin exposure. *Id.*

37. 38 C.F.R. § 3.311(b)(1)(i) (2004). Exposure to radiation must be "as a result of participation in the atmospheric testing of nuclear weapons, the occupation of Hiroshima or Nagasaki, Japan, from September 1945 until July 1946, or other activities as claimed." *Id.*

38. *Id.* § 3.311(c)(1)(i).

39. *Id.* § 3.311(e).

40. Radiation Exposure Compensation Act Amendments of 2000, Pub. L. No. 106-245, §§ 3(a)(1)(B)(i)–(ii), 114 Stat. 501, 502 (2000). A veteran can receive $75,000 if they participated on-site during a nuclear detonation test before the age of

marily for civilians exposed to radiation,[41] it has been interpreted by the courts to apply to veterans as well.[42] However, the statute only applies to individuals whose exposure occurred in specified locations within the United States[43] during specified time periods.[44] Moreover, the claimant must have been diagnosed with at least one of twenty listed cancers within a specified number of years after exposure.[45] As of 2002, 353 of the 1,502 applications from veterans had been approved.[46]

Veterans cannot receive disability benefits for the same disease under REVCA or VDRECSA if they have received a payment under RECA.[47] In other words, payment under RECA for a disease caused by radiation exposure precludes a veteran from receiving disability benefits from the VA for that disease. Therefore, a veteran can only obtain both a lump-sum payment under RECA and disability benefits if the disability was not caused by his or her radiation exposure.

twenty-one and developed leukemia. *Id.* § 3(a)(1)(C)(i), 114 Stat. at 501, 502. They can receive $50,000 if they: (1) were present in an affected area for at least one year between January 21, 1951, and October 31, 1958, before the age of twenty-one and developed leukemia more than two years after their first exposure to fallout; (2) were present in an affected area from June 30, 1962 to July 31, 1962 before the age of twenty-one and developed leukemia more than two years after their first exposure to fallout; (3) were present in certain listed areas for at least two years between January 21, 1951, and October 31, 1958, and contracted certain listed diseases; or (4) were present in certain listed areas from June 30, 1962, to July 31, 1962, and contracted certain listed diseases. *Id.* §§ 4(a)(1)–(2).

41. Congress recognized that the lives and health of uranium miners and of innocent individuals who lived downwind from the Nevada tests were involuntarily subjected to increased risk of injury and disease to serve the national security interests of the United States. *Id.* § 2(a)(5). It was the purpose of the Act to establish a procedure to make partial restitution to these individuals for the burdens they had borne for the nation as a whole. *Id.* Congress apologized on behalf of the nation to these individuals and their families for the hardships they had endured. *Id*.

42. *See* Nat'l Ass'n of Radiation Survivors v. Derwinski, 782 F. Supp. 1392, 1394 n.1 (N.D. Cal. 1992) (noting that veterans benefits may offset a lump-sum payment under the Radiation Exposure Compensation Act).

43. Radiation Exposure Compensation Act Amendments of 2000, Pub. L. No. 106-245, §§ 4(b)(1)(A)–(C), 114 Stat. 501, 502 (amending Pub. L. No. 101-426, § 4(b)(1), 104 Stat. 920, 921 (1990)). These locations include Washington, Iron, Kane, Garfield, Sevier, Beaver, Millard, Wayne, San Juan, and Piute counties in Utah; White Pine, Nye, Lander, Lincoln, and Eureka townships in Clark County in Nevada; Coconino, Yavapa, Navajo, Apache, and Gila counties in Arizona. *Id.*

44. *Id.* § 3(a)(1)(A)(i). The time periods for exposure are between January 21, 1951, and October 31, 1958, and between June 30, 1962, and July 31, 1962.

45. *Id.* § 3(b)(2)(A)–(I) (amending Pub. L. No. 101-426, § 4(b)(2), 104 Stat. 920, 922 (1990)).

46. Keith O'Brien, *Casualties of Cold War*, TIMES-PICAYUNE (New Orleans), July 14, 2002, Living, at 1.

47. 38 C.F.R. § 3.715 (2004).

As RECA claims are processed by the Department of Justice,[48] this note will concentrate primarily on claims filed under REVCA and VDRECSA, which are reviewed by the VA.

B. Tort Claims

Some atomic veterans have attempted to bring tort claims against the government, arguing that the government committed a tort by failing to warn servicemembers of the dangers of radiation exposure.[49] Implicit in these suits is the theory that in passing the Federal Tort Claims Act, Congress explicitly waived traditional sovereign immunity for tortious acts committed by the U.S. government.[50]

However, in *Feres v. United States*,[51] the Supreme Court held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."[52] The courts have uniformly interpreted *Feres* to bar claims based on the failure to warn of radiation dangers while servicemembers were in service[53] as well as claims brought after servicemembers are discharged.[54] The government is immune to liability in these cases because if the government knew of the dangers while the servicemembers were in service, then the government's failure to warn the servicemembers after discharge is merely the continuation of that tort.[55] However, if a servicemember can prove that the government only became aware of the dangers of radiation after that servicemember was discharged, that servicemember may be able to sue the government on a "post-discharge" theory, which posits that because the negligence only occurred after service had ended, the negligence was independent of the service.[56]

However, suing under a post-discharge theory often proves impossible. Radiologists were fully aware of the dangers of radiation

48. *See* 28 C.F.R. § 79.1 (2003).
49. Lombard v. United States, 690 F.2d 215, 222 (D.C. Cir. 1982).
50. *Id.* at 218.
51. 340 U.S. 135 (1950).
52. *Id.* at 146.
53. Heilman v. United States, 731 F.2d 1104, 1107 (3d Cir. 1984).
54. *Id*. at 1108.
55. *Id.*
56. Shipek v. United States, 752 F.2d 1352, 1356 (9th Cir. 1985); *see also* Broudy v. United States, 722 F.2d 566, 570 (9th Cir. 1983).

exposure as early as 1924.[57] Moreover, the government was already conscious of radiation-induced harm to its Manhattan Project researchers by July of 1945,[58] the same month it tested the first atomic bomb.[59] Thus, the vast majority of atomic veterans are left at the mercy of the three aforementioned statutes.

C. The Claims Process

A veteran begins the disability claims process by submitting an application for compensation claim form to one of the fifty-eight VA regional offices (VAROs), which are run by the VBA.[60] At any point during the process, a veteran may request a hearing on any issue in his or her claim.[61] Such hearings are ex parte, with no formal questioning and no cross-examination.[62] Furthermore, the rules of evidence do not apply.[63] The VBA provides the veteran with a counselor who ensures that the claim contains all required paperwork, such as service records, medical records, and a "Statement in Support of Claim."[64] This claim is reviewed by a VARO "rating board," which consists of one medical, one legal, and one occupational specialist.[65] The board evaluates the extent of the disability and decides if it is service related.[66] If the disability is service related, the board assigns a

57. ADVISORY COMM. ON HUMAN RADIATION EXPERIMENTS, BEFORE THE ATOMIC AGE: "SHADOW PICTURES," RADIOISOTOPES, AND THE BEGINNINGS OF HUMAN RADIATION EXPERIMENTATION, http://www.eh.doe.gov/ohre/roadmap/achre/intro_2.html (last visited Oct. 19, 2005). In 1924, radium exposure was identified as the cause of blood disease and disfiguring deterioration of the jaw in a group of women who held jobs painting a radium solution onto watch dials. *Id.* As they painted, they licked their brushes to create sharp points, thus absorbing the radiation into their bodies. *Id.* After a highly publicized investigation and lawsuits, the women received compensation. *Id.*

58. ADVISORY COMM. ON HUMAN RADIATION EXPERIMENTS, THE MANHATTAN PROJECT: A NEW AND SECRET WORLD OF EXPERIMENTATION http://www.eh.doe.gov/ohre/roadmap/achre/intro_3.html (last visited Oct. 19, 2005). In July of 1945, a Manhattan Project memo pondered whether to inform a worker that her kidney disease may have been caused by her work on the Project. The memo went on to note that her illness could be the first of many similar cases, and acknowledged that "[c]laims and litigation will necessarily flow from [these] circumstances." *Id.*

59. The History Place, *supra* note 2.

60. Cummins & Fisher, *supra* note 24, at 631.

61. 38 C.F.R. § 3.103(c)(1) (2004).

62. Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 311 (1985); 38 C.F.R. § 3.103(c)(2).

63. 38 C.F.R. § 3.103(d).

64. Cummins & Fisher, *supra* note 24, at 631.

65. *Walters*, 473 U.S. at 309.

66. *Id.* at 310.

disability rating which is used to calculate monthly benefits.[67] If the disability is not service related, the claim is denied.[68]

If the veteran disagrees with the decision, he or she initiates the appeal by filing a "notice of disagreement" with the VARO within one year.[69] If the board does not change its decision, it must provide the veteran with a "statement of the case," which consists of a written description of the facts and law upon which the decision was based.[70] The veteran must then file his or her appeal with the VARO within sixty days of receiving the statement of the case or within one year of the original denial of the claim, whichever is later.[71] At this point, the jurisdiction of the claim is transferred from the VBA to the Board of Veterans' Appeals (BVA).[72]

There are four ways for a veteran's claim to be reviewed by the BVA. First, it can be based solely on the written record.[73] Second, the veteran can request a field hearing before a regional hearing officer.[74] At this hearing, the decision will only be changed if the officer finds that new and material evidence exists.[75] Otherwise, the record from the hearing is sent to a BVA panel for review.[76] Third, a veteran can request a formal hearing in front of a three-member panel in Washington, D.C.[77] Fourth, a veteran may request a hearing before a traveling panel of three BVA members plus one attorney.[78] All of these reviews are de novo.[79]

If the BVA renders a final decision, a veteran may file an appeal with the Court of Veterans' Appeals (CVA) within 120 days of the

67. *Id.*
68. *Id.*
69. 38 U.S.C.A. § 7105(b)(1) (West 2002); *Walters*, 473 U.S. at 310–11.
70. *Walters*, 473 U.S. at 311.
71. 38 U.S.C.A. § 7105(d)(3); LAWRENCE A. FROLIK & RICHARD L. KAPLAN, ELDER LAW IN A NUTSHELL 347–48 (3d ed. 2003).
72. FROLIK & KAPLAN, *supra* note 71, at 348.
73. *Id.*
74. *Id.*; BD. OF VETERANS' APPEALS, UNDERSTANDING THE APPEAL PROCESS 5 [hereinafter UNDERSTANDING THE APPEAL PROCESS], http://www.va.gov/vbs/bva/page5.htm (last visited Oct. 19, 2005).
75. FROLIK & KAPLAN, *supra* note 71, at 348–49.
76. *Id.* at 349.
77. *Id.*
78. *Id.*
79. *Id.* at 348. De novo review refers to the nondeferential review of an administrative decision, where the court reviews the entire administrative record, along with any additional evidence presented by the parties. BLACK'S LAW DICTIONARY 382 (2d Pocket ed. 2001).

BVA's decision.[80] It is only at this stage that a veteran may pay a lawyer for representation,[81] and the lawyer's fee must be "reasonable" upon review by the BVA.[82] Should the attorney opt to have the fee paid out of the award for past benefits, the fee may not exceed 20% of the total amount of past due benefits.[83]

If the CVA denies the claim, the veteran can appeal to the appropriate federal circuit court within sixty days of the decision.[84] Finally, if the circuit court denies the claim, the veteran may petition the U.S. Supreme Court.[85]

III. Analysis

The inability of atomic veterans to obtain disability benefits stems from a combination of the policies and procedures of the VBA and problems with both the VA's and the courts' interpretations of statutes that govern the processing of veterans' claims. The policies and procedures of the VBA have created a highly inefficient claims process. Problems with the VA's interpretation of statutes center around the documentation requirements it has established. Problems with the courts' interpretation of the statutes center around the courts' reluctance to intrude upon the VA's jurisdiction and the upholding of regulations concerning lawyers' fees.

A. Policies and Procedures of the VBA

1. LACK OF EXPERIENCED STAFF

In addition to the 350,000 backlogged claims from 2003,[86] the VBA received 771,115 new and reopened claims in 2004.[87] Since 2000,

80. UNDERSTANDING THE APPEAL PROCESS, *supra* note 74, at 7.
81. 38 U.S.C.A. § 5904(c)(1) (West 2002).
82. *Id.* § 5904(c)(2).
83. *Id.* § 5904(d).
84. FROLIK & KAPLAN, *supra* note 71, at 350.
85. *Id*.
86. *Legislative Priorities of the American Legion Before a Joint Session of the Veterans Affairs Comms. United States Congress*, 108th Cong. 18 (2004) [hereinafter *Legislative Priorities*] (statement of Thomas P. Cadmus, Nat'l Commander of the American Legion), *available at* http://veterans.house.gov/hearings/schedule108/Sep04/9-21-04/tcadmus.pdf.
87. U.S. GOV'T ACCOUNTABILITY OFFICE, VETERANS' BENEFITS: MORE TRANSPARENCY NEEDED TO IMPROVE OVERSIGHT OF VBA'S COMPENSATION AND PENSION STAFFING LEVELS 10 tbl.1 (2004) [hereinafter OVERSIGHT OF STAFFING LEVELS], *available at* http://www.gao.gov/new.items/d0547.pdf.

the number of claims received per year has increased by an average of 46,387.[88] Furthermore, the rapid retirement of VBA employees with thirty or more years of experience has created a staff comprised mostly of trainees with fewer than five years of experience.[89] The American Federation of Labor-Congress of Industrial Organizations (AFL-CIO) states that it takes at least two years of training before an employee is able to process claims with minimal supervision.[90] However, if a claim involves complicated medical issues, as radiation exposure claims do, employees with the full two years of training will still require assistance.[91] New hires presently undergo only six months of training, in which they learn 70% of the necessary skills before processing claims on their own.[92] In visiting VAROs, the American Legion found that there were not enough supervisors to mentor, train, and assure the quality of work done by trainees.[93] The Legion found that ongoing training for both new and experienced staff was often postponed in order to focus on reviewing claims.[94]

As a result, work quality has plummeted.[95] In 2004, 650 of the highest paid claims adjudicators, all having three to five years of experience, were given an open book job skill certification test.[96] Only 25% of the GS-10[97] level adjudicators and 29% of the GS-11[98] level adjudicators passed.[99] This inability to perform the skills needed for the job not only lengthens the claims process, as many claims are remanded, but also makes it difficult for a veteran to receive a correct judgment.

88. *See* OVERSIGHT OF STAFFING LEVELS, *supra* note 87.
89. *Id*.
90. BENJAMIN CARDENAS & KENNETH REYES, KEEPING OUR PROMISE: ACCESS TO VETERAN BENEFITS 2 (2003), *available at* http://www.chci.org/publications/pdf/Veterans.pdf.
91. *Id.*
92. *Id.*
93. *Legislative Priorities*, *supra* note 86, at 19.
94. *Id.*
95. *See id.*
96. *Id.* at 19.
97. U.S. GOV'T ACCOUNTABILITY OFFICE, VETERANS BENEFITS ADMINISTRATION: BETTER COLLECTION AND ANALYSIS OF ATTRITION DATA NEEDED TO ENHANCE WORKFORCE PLANNING 3 (2003), *available at* http://www.gao.gov/cgi-bin/getrpt?GAO-03-491. GS-10 refers to the level of seniority an employee has attained. *See id.* GS-10 level VBA employees are supposedly among the "best and brightest adjudicators." *Legislative Priorities*, *supra* note 86, at 19.
98. GS-11 level VBA employees are supposedly among the "best and brightest adjudicators." *Legislative Priorities*, *supra* note 86, at 19.
99. *Id.*

2. FOCUS ON SPEED AT THE EXPENSE OF QUALITY

In 2000, Congress passed the Veterans' Claims Assistance Act of 2000[100] (VCAA). This Act shifted the responsibility of producing the medical and other relevant service records necessary to create a claim from the veteran to the VBA.[101] Before this Act was passed, the veteran had to establish "competent evidence [1] of current disability (a medical diagnosis) . . . ; [2] of incurrence or aggravation of a disease or injury in service (lay or medical evidence) . . . ; [3] and of a nexus between the in-service injury or disease and the current disability (medical evidence)."[102] The Act required the VBA to make reasonable efforts to obtain the veteran's service medical records, provide a medical examination or acquire a medical opinion when necessary, and obtain any other relevant records regarding the veteran's service if he or she provided the VBA with sufficient information from which to locate those records.[103]

Meanwhile, the veterans benefits process was in crisis.[104] By 2002, there was a backlog of roughly 460,000 claims in the VBA[105] in addition to the 674,219 new and reopened claims received in 2001.[106] The VBA took an average of 200 days to process a claim, and nearly 100,000 claims remained unresolved for over a year.[107] Roughly 1000 veterans a day were dying before their claims were processed.[108] In response to these issues, then Secretary of Veterans' Affairs Anthony Principi established two goals: (1) that the VBA cut the backlog of claims down from 460,000 to 250,000;[109] and (2) that the VBA take only 100 days to process a claim by the end of 2003.[110]

In order to achieve these goals, the VBA began rewarding those VARO offices that decided the highest number of cases and had the

100. Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, 114 Stat. 2096 (codified as amended in scattered sections of 38 U.S.C.A.).
101. H.R. REP. NO. 106-781, at 2 (2000).
102. *Id.* at 7–8.
103. 38 U.S.C.A. § 5103A (West 2002).
104. *See* Arthur H. Wilson, *Ping Pong Bureaucracy*, DISABLED AM. VETERANS MAG., July–Aug. 2001, at 3, *available at* http://www.dav.org/magazine/magazine_archives/2001-4/From_the_Nationa1772.html.
105. CARDENAS & REYES, *supra* note 90, at 1.
106. OVERSIGHT OF STAFFING LEVELS, *supra* note 87, at 14.
107. CARDENAS & REYES, *supra* note 90, at 1.
108. *Id.*
109. Office of Public Affairs Media Relations, *VA Makes Good on Pledge to Reduce Claims Backlog* (2003), *available at* http://www.pva.org/newsroom/PR2003/pr03081.htm.
110. *Id.*

greatest decreases in backlog.[111] However, in order to increase productivity, some VAROs began "cherry picking," completing the easier and less time-consuming cases first.[112] Under these circumstances, the medical and legal complexity of radiation exposure cases makes them a lower priority.[113]

This focus on speed conflicts with the increased time VBA officers must spend on each case as required by the VCAA's mandate that VBA officers locate each veteran's medical and service records.[114] Under the VBA's newly established goals, there is only incentive to decide the claims quickly, not to find all the necessary evidence or to decide the claims correctly.[115] As a result, many have criticized the VARO offices for deciding cases without having gathered all the evidence required by the VCAA.[116]

The lack of quality decision making in the VBA has made applying for disability benefits an extremely inefficient and time-consuming process.[117] Of the 32,000 decisions issued by the BVA in 2004, only 22.9% of VARO decisions were upheld.[118] The BVA completely overturned 16.9% of the decisions and remanded 58.5% to the VAROs for additional development and readjudication.[119] Furthermore, 50% of the cases that proceeded on to the CVA were remanded to the VAROs.[120] Indeed, roughly 33% of all remanded cases were due to medical examination deficiencies.[121]

It takes each VARO about 170 days to process a claim.[122] If a veteran appeals his or her VARO decision, it takes the VARO over 700 days to process the appeal and forward it to the BVA.[123] The BVA then takes an average of 236 days to process that appeal.[124] If the case is remanded to the VARO, the VARO is not given credit for any addi-

111. CARDENAS & REYES, *supra* note 90, at 2.
112. *Id.*
113. *See id.*
114. 38 U.S.C.A. § 5103A (West 2002); *see also* CARDENAS & REYES, *supra* note 90.
115. *Legislative Priorities*, *supra* note 86, at 21; CARDENAS & REYES, *supra* note 90, at 2.
116. *Legislative Priorities*, *supra* note 86, at 19; WILSON, *supra* note 104.
117. *See Legislative Priorities*, *supra* note 86, at 20.
118. *Id.* at 21.
119. *Id.*
120. *Id.* at 20.
121. CARDENAS & REYES, *supra* note 90, at 3.
122. Reynolds Holding, *Insult to Injury*, LEGAL AFF., Mar.–Apr. 2005, at 30.
123. *Legislative Priorities*, *supra* note 86, at 20.
124. *Id.*

tional time spent on that case because VAROs are only given credit for work done on new claims, not work done on remands.[125] The length of time taken to process an appeal from the VARO decision, combined with the lack of incentive to process a remanded claim[126] has contributed to a backlog of 149,000 appeal cases in the VAROs, up 20,000 from 2003.

B. Problems with the VA's Interpretation of Statutes

1. DOCUMENTING LOCATION

a. Presumptive Diseases In order to qualify for a presumptive service connection under REVCA, a veteran must prove that he or she has one of the twenty-one listed diseases and that he or she participated in a "radiation risk activity."[127] For the purposes of this Act, a radiation risk activity is defined as either: (1) onsite participation in the atmospheric detonation of a nuclear device; (2) the "occupation of Hiroshima or Nagasaki, Japan," between August 6, 1945, and July 1, 1946; (3) internment as a prisoner of war in Japan resulting in an opportunity for exposure to radiation comparable to the aforementioned activities; or (4) service in certain listed locations within the United States during certain time periods.[128]

The regulations further define the "occupation of Hiroshima or Nagasaki, Japan," as "official military duties within [ten] miles of the city limits of either Hiroshima or Nagasaki," such as occupation of territory, population control, and government stabilization.[129] A veteran must present official military records placing him or her within ten miles of either city during that time period.[130] The regulations go on to mandate that former prisoners of war (POWs) will be deemed to have had an equal exposure to radiation compared to veterans who occupied Hiroshima or Nagasaki, provided that they were interned within 75 miles of the city limits of Hiroshima or within 150 miles of the city limits of Nagasaki between August 6, 1945, and July 1, 1946.[131] Thus, the regulations present mixed messages about where the gov-

125. *Id.*
126. *Id.*
127. 38 U.S.C.A. § 1112(c)(3)(B) (West 2002 & Supp. 2005).
128. *Id.*; 38 C.F.R. § 3.309(d)(3)(ii)(D) (2004).
129. 38 C.F.R. § 3.309(d)(3)(vi).
130. *Id.*
131. *Id.* § 3.309(d)(3)(vii).

ernment considers radiation exposure to have occurred. To be considered exposed to radiation, a regular veteran must have been within ten miles of Hiroshima or Nagasaki.[132] But a former POW is assumed to have been exposed to radiation if, during the same time period, he or she was within 75 miles of Hiroshima or 150 miles of Nagasaki.[133] The regulations never explain why a POW would have had more exposure to radiation when located farther from both cities than would a regular veteran.

Moreover, many servicemembers are unable to prove they were in the required locations. First, World War II veterans often do not have records of their service, so they must rely on the government to provide them with records.[134] As mentioned above, the VCAA requires the Secretary of Veterans Affairs to "make reasonable efforts to obtain relevant records," including "active military, naval, or air service [records] that are held or maintained by a governmental entity."[135] However, in 1972, a fire at the National Personnel Records Center destroyed approximately sixteen to eighteen million Official Military Personnel Files.[136] The fire destroyed all personnel files of Army officers who were discharged between 1917 and 1956, Army enlistees who were discharged between 1912 and 1956, and Air Force officers and enlistees who were discharged before 1956.[137] No duplicate or microfilm copies of these records are available, and the Records Center did not create an index prior to the fire.[138] Although there is not a record of what files were destroyed, the fire more than likely destroyed any documentation of servicemembers who were present in Hiroshima or Nagasaki between 1945 and 1946.[139]

For example, Navy veteran Norm Duncan spent three months cleaning debris, burying bodies, and reopening roads in Nagasaki af-

132. *Id*. § 3.309(d)(3)(vi).
133. *Id*. § 3.309(d)(3)(vii)(A).
134. *See, e.g.*, Nancy Hogan, *Shielded from Liability*, 80 A.B.A. J. 56, 60 (1994); O'Brien, *supra* note 46; Emily Phelps, *Veterans of Atomic Weapons Testing to Get Recognition*, PUB. OPINION, July 4, 2004, at A1; Ed Vogel, *Veteran's Cancer Bitter Reminder of War's Horror*, LAS VEGAS REV., Jan. 14, 2002, at 1B.
135. 38 U.S.C.A. § 5103(b)–(c) (West 2002).
136. UNIV. OF MINN. LIBRARIES, LOCATING MILITARY RECORDS, http://wilson.lib.umn.edu/reference/military.html (last visited Oct. 19, 2005).
137. U.S. NAT'L ARCHIVES & RECORDS ADMIN., MILITARY SERVICE RECORDS, http://www.archives.gov/publications/microfilm_catalogs/military_service_records_part01.html (last visited Oct. 19, 2005).
138. UNIV. OF MINN. LIBRARIES, *supra* note 136.
139. *See id.*

ter the atomic bomb was dropped.[140] He later contracted both stomach and lung cancer.[141] His service records were destroyed in the fire, and all he had were his discharge papers.[142] Duncan was fortunate enough to have the help of Representative Jim Gibbons (R-Nevada), who sent three letters to the records center.[143] Three years into Duncan's search, the Defense Threat Reduction Agency looked through its archives and found Duncan's name on a list of people who served in December 1945 in the 31st Naval Construction Battalion in Nagasaki.[144] It also found Duncan's medical files, which indicate that on February 25, 1946, Duncan saw a doctor for a fever, chest pains, and coughing up blood.[145] One year after finding his records, while his claim was being processed, Duncan passed away.[146] His widow vowed to continue his effort to receive compensation.[147]

b. Nonpresumptive Diseases If a veteran has one of the listed diseases but cannot establish the geographic condition required under the presumptive statute, or if he or she does not have one of the listed diseases, the court will consider his or her claim under the nonpresumptive statute.[148] Disabilities that do not fall under the presumptive statute are reviewed under a looser geographic requirement. For these claims, a veteran must only show that he or she participated in either: (1) the atmospheric testing of nuclear weapons; (2) the occupation of Hiroshima or Nagasaki between September 1945 and July 1946; or (3) other activities as claimed.[149] This last option is broad, and thus leaves substantial room for veterans to establish a geographic requirement. Furthermore, the regulations state that "if military records do not establish presence at or absence from a site at which exposure

140. *Id.*
141. Vogel, *supra* note 134.
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. Ed Vogel, *Navy Veteran Duncan Dies in Reno*, LAS VEGAS REV., Apr. 13, 2002, at 4B.
147. *Id.*
148. *E.g.*, Entitlement to Service Connection for Colon Cancer, Including Due to Radiation Exposure, Bd. Veterans Appeals 04-03446, No. 03-25522 (Feb. 6, 2004); Entitlement to Service Connection for Cause of the Veteran's Death, Bd. Veteran's Appeals 02-15891, No. 00-01801 (Nov. 6, 2002).
149. 38 C.F.R. § 3.311(b)(1)(i) (2004).

to radiation is claimed to have occurred, the veteran's presence at the site will be conceded."[150]

However, under this statute, merely proving a geographic connection is not enough to establish a service connection for the disability. The veteran must still establish that, based on an evaluation of listed factors, including the probable dose of radiation received, it is "at least as likely as not" that the radiation caused the disability.[151] Because of the difficulty veterans have obtaining military records as well as the large number of diseases that are not listed, the vast majority of veterans' claims are reviewed under this nonpresumptive statute. As of 1998, only 483 of the 19,885 radiation exposure compensation claims that had been filed were granted as presumptive diseases.[152] Thus, most veterans must prove the probable dose of radiation to which they were exposed.

2. DOCUMENTING EXPOSURE: NONPRESUMPTIVE DISEASES

A "dose estimate" is an assessment of the amount and nature of radiation exposure.[153] Dose estimates for veterans whose claims are based on participation in atmospheric nuclear testing or participation in the occupation of Hiroshima or Nagasaki before July 1, 1946, are prepared by the Department of Defense.[154] All other dose estimates are prepared by the Secretary of Health.[155] These estimates are constructed by using personnel and scientific data, such as: readings from film badges worn by some veterans that measured radiation doses; calculations based on veterans' proximity to radiation sources; airborne concentrations of radiation; duration of exposure to airborne radioactive particles; and analyses of how radiation enters, and is transported through the body.[156] When the estimate is reported as a range of doses, the VA will presume that the veteran was exposed to the highest level reported.[157]

150. *Id.* § 3.311(a)(4)(i).
151. *Id.* §§ 3.311(c)(1)(i), (d)(3)(e)(1).
152. Royce Carter, *VA Offers Help for Radiation Exposure*, ST. PETERSBURG TIMES, Sept. 27, 2000, at 3.
153. 38 C.F.R. § 3.311(a)(1).
154. *Id.* § 3.311(a)(2)(i)–(ii).
155. *Id.* § 3.311(a)(2)(iii).
156. U.S. GEN. ACCOUNTING OFFICE, VETERANS' BENEFITS: INDEPENDENT REVIEW COULD IMPROVE CREDIBILITY OF RADIATION EXPOSURE ESTIMATES 6 (2000) [hereinafter INDEPENDENT REVIEW], http://www.gao.gov/new.items/he00032.pdf.
157. 38 C.F.R. § 3.311(a)(1).

Unfortunately, only about 45% of atmospheric nuclear test participants wore film badges.[158] Furthermore, film badges did not measure all the elements of radiation that compose a dose;[159] rather, film badges only measured external (skin penetrating) gamma and x-rays, leaving out internal (ingested into the body via mouth and nose) and neutron exposure.[160] Finally, many of these badges were only able to record up to two "rems" of exposure.[161] (For the purposes of this note, the terms "rem" and "rad" can be used interchangeably.)[162]

The regulations governing compensation do not state the dose estimate required to receive a service connection.[163] They merely state that there must be at least a 50% chance that the exposure caused the disease,[164] taking into account, as mentioned above, the dose estimate, the sensitivity of the involved tissue, the veteran's gender, family history, age at exposure, time between exposure and onset, and nonservice exposure to carcinogens.[165] The Canadian Centre for Occupational Health and Safety recommends that the general public be exposed to less than one rad per year.[166] Normal residents of Washington, D.C., are exposed to between .08 and .09 rems of exposure per year.[167] A dental x-ray gives off .02 to .03 rems of radiation.[168]

According to the Veterans Health Administration, exposure to seventeen rads of radiation at age twenty or to 33.1 rads at age thirty

158. DEFENSE THREAT REDUCTION AGENCY: DTRA FACT SHEETS, http://www.dtra.mil/press_resources/fact_sheets/display.cfm?fs=ntpr (last visited Oct. 19, 2005).

159. *Id.*; ENVTL. AGENTS SERV., IONIZING RADIATION BRIEF E1 (2004), http://www1.va.gov/irad/docs/IRADBRIEFS2005.doc.

160. DEFENSE THREAT REDUCTION AGENCY, *supra* note 158; ENVTL. AGENTS SERV., *supra* note 159.

161. Hogan, *supra* note 134.

162. RADFORD UNIV. ENVTL. HEALTH & SAFETY COMM., ANALYTICAL X-RAY SAFETY MANUAL 4, http://www.radford.edu/~fac-man/Safety/Xray/chp4.htm (last visited Oct. 19, 2005). Rems and rads are units of measurement used to express the amount of radiation absorbed by an emission of radiation. *Id.* A "rad is used to express the radiation dose absorbed in any medium from any type of radiation." *Id.* A "rem estimates the amount of any radiation that would be necessary to produce the same biological effects in humans as one rad of x[-ray] or gamma radiation." *Id.*

163. 38 C.F.R. § 3.311 (2004).

164. *Id.* § 3.311(c)(1)(i).

165. *Id.* § 3.311(e).

166. CANADIAN CTR. FOR OCCUPATIONAL HEALTH & SAFETY, RADIATION—QUANTITIES AND UNITS OF IONIZING RADIATION (2001), http://www.ccohs.ca/oshanswers/phys_agents/ionizing.html.

167. Hogan, *supra* note 134.

168. *Id.*

yields at least a 1% chance that the radiation would be responsible for causing colon cancer.[169] Furthermore, exposure of 4.3 rads of radiation to a twenty-year-old nonsmoker causes at least a 1% chance that the radiation would be the cause of lung cancer.[170] Finally, the VA has found that if 100,000 males of all ages are exposed to ten rems, 500 to 1200 cancer deaths will be attributable to the exposure.[171] Some World War II veterans' dose estimates prove their exposure during the war to be between 25 and 100 rems.[172]

Nevertheless, only fifty out of the 4000 veterans who have applied for compensation under the nonpresumptive statute have been awarded compensation.[173] In 2003, the National Research Council reviewed ninety-nine dose reconstruction case files for those who had applied under the nonpresumptive statute.[174] The Council found that in some of those cases, the calculations were illegible or unexplained and the possibility of fallout from previous blasts contributing to the radiation in the environment was ignored.[175] One consistent problem included the lack of a standard manual of operating procedures, which caused inconsistency in dose reconstruction procedures.[176]

The Council was disturbed to find that testimony from the veterans about their activities at exposure sites was systematically ignored.[177] By ignoring veterans' recollections, the VA made inaccurate assumptions about veterans' locations during exposure and their duration of exposure. This caused a consistent underestimation of radiation exposure.[178] For example, one major who said he was present at twenty-one detonations was only credited with having been at eleven.[179] The Council also found that veterans were not given the

169. INDEPENDENT REVIEW, *supra* note 156, at 7.
170. *Id.*
171. TIM A. BULLMAN & HAN K. KANG, THE EFFECTS OF MUSTARD GAS, IONIZING RADIATION, HERBICIDES, TRAUMA, AND OIL SMOKE ON U.S. MILITARY PERSONNEL (1994), http://www.va.gov/oaa/pocketcard/gmustard.asp.
172. Hogan, *supra* note 134.
173. Matthew L. Wald, *Veterans' Nuclear Exposure Underestimated, Panel Says*, N.Y. TIMES, May 9, 2003, at A20.
174. BD. ON RADIATION EFFECTS RESEARCH, NAT'L RESEARCH COUNCIL, A REVIEW OF THE DOSE RECONSTRUCTION PROGRAM OF THE DEFENSE THREAT REDUCTION AGENCY 1–2 (2003).
175. *Id.* at 3–4.
176. *Id.* at 4.
177. *Id.* at 260.
178. *Id.* at 3.
179. Wald, *supra* note 173.

benefit of the doubt in reconstructing their dose scenarios.[180] This suggests that the process of dose reconstruction does not comply with the regulations, which require that "[w]hen, after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant."[181]

In light of these findings, the Council made the following recommendations: (1) the development of an external independent advisory board to continually review the dose reconstruction program; (2) a comprehensive reevaluation of the methods used to estimate doses; (3) the development of a comprehensive manual detailing standard operating procedures; (4) the creation of quality assurance and quality control programs; (5) a consistent application of the statutory requirement that veterans be granted the benefit of the doubt with respect to radiation exposure; (6) increased interaction and communication with atomic veterans, such as allowing veterans to review their dose reconstruction scenarios before their assessments are sent to the DVA for claim adjudication; (7) more effective methods of communicating the meaning of radiation risk to atomic veterans, including presenting general information on radiation risk and, for veterans who file claims, the significance of their doses; and (8) advising atomic veterans and their survivors of changes in methods for calculating doses so they can update their dose assessments.[182]

C. Problems with the Courts' Interpretations of Statutes

1. THE COURTS' RELUCTANCE TO INTRUDE UPON VA JURISDICTION

Until October 2002, veterans brought only three kinds of suits to the courts: (1) appealing VA benefits decisions; (2) tort claims against the government for exposing servicemembers to nuclear radiation, which, as mentioned above, are uniformly barred by the *Feres* doctrine;[183] and (3) suits against employees of the VA based on denial of

180. BD. ON RADIATION EFFECTS, NAT'L RESEARCH COUNCIL, *supra* note 174, at 3.

181. 38 CFR § 3.102 (2004).

182. BD. ON RADIATION EFFECTS, NAT'L RESEARCH COUNCIL, *supra* note 174, at 256–66.

183. *See* Lombard v. United States, 690 F.2d 215, 222 (D.C. Cir. 1982); Kelly v. United States, 512 F. Supp. 356, 361 (E.D. Pa. 1981).

benefits, which are barred by *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*.[184]

The Supreme Court, in *Bivens*, held that victims of alleged constitutional wrongs can bring suits against government officials in federal courts and receive damages as long as "there were no special factors counseling hesitation in the absence of affirmative action by Congress."[185] To date, Congress has failed to affirmatively create a remedy against individual VA employees.[186] However, the courts have held that the fact that Congress established an "elaborate" structure, providing for a "comprehensive" review of benefits disputes, indicates that Congress' failure to create such a remedy was a conscious decision.[187] Thus, special factors dictate that the courts should refrain from allowing veterans to recover damages from the VA under *Bivens*.[188]

In October 2002, a class of veterans and their widows representing the 220,000 veterans who participated in atomic weapons testing during World War II sued past and present government officials, employees, and contractors for preventing them from obtaining service-related death and disability veterans benefits for radiation exposure.[189] The plaintiffs claimed that by concealing the "medical records and other pertinent dose information" necessary to obtain death and disability benefits, the defendants prevented the veterans from presenting the necessary evidence to support their compensation claims to the VA. They argued that this violated their First Amendment right to petition and obtain redress for their grievances and their Fifth Amendment right to access the courts.[190]

The complaint alleged that, in 1946, the government ordered the creation of radiological control and safety procedures requiring all military personnel who it believed might be exposed to radiation to wear film badges and undergo special medical tests and physical ex-

184. 403 U.S. 388 (1971).

185. While *Bivens* dealt specifically with federal narcotics agents, the Court uses the term "officers of the government." *Id.* at 395–96. *Bivens* has since been held to apply to Congressmen, Davis v. Passman, 442 U.S. 228 (1979), as well as federal prison officials, Carlson v. Green, 446 U.S. 14 (1980).

186. Zuspann v. Brown, 60 F.3d 1156, 1161 (5th Cir. 1995).

187. *Id.; see also* United States v. Stanley, 483 U.S. 669, 683–84 (1987).

188. *Zuspann*, 60 F.3d at 1161; *see also Stanley*, 483 U.S. at 683–84.

189. Broudy v. Mather, 335 F. Supp. 2d 1, 3 (D.D.C. 2004).

190. *Id.* at 2.

aminations.[191] On August 22, 1951, the Chief of Armed Forces Special Weapons Project ordered a "permanent repository" to be established for records of the exposure of military personnel participating in atomic testing.[192] His reason for doing so was "because of possible litigation initiated by personnel suffering maladies attributed to exposure of radioactivity from atomic weapons tests."[193] On June 21, 1956, the Surgeon of the Armed Forces Special Weapons Project reported that "this headquarters has in its physical possession the sum total of all personal film badges exposed at test operations since and including" the first test in 1946.[194] The plaintiffs alleged that the government had not publicly accounted for the location of this information.[195]

In October 2003, the court granted the defendants' motion to dismiss.[196] First, the court found that the lawsuit lacked subject matter jurisdiction under the U.S. Code, which states that "[t]he Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans."[197] The court found that deciding this claim would require the court to decide whether the plaintiffs should have been awarded benefits but for the concealment of information.[198] This would force the court to rule on the merits of the benefits claims themselves, thus requiring the court to encroach on the Secretary's powers under § 511.[199] Second, the court found that the plaintiffs failed to state a claim under *Bivens* because *Bivens* remedies are not available for suits against VA employees.[200]

Just three days earlier, the same court decided *Vietnam Veterans of America v. McNamara*.[201] Vietnam Veterans of America, Inc., alleged that, for decades, federal officials intentionally concealed evidence of service-related activities so that Vietnam veterans could not prove

191. *Id.* at 3.
192. *Id.*
193. *Id.* (internal quotations omitted).
194. *Id.* (internal quotations omitted).
195. *Id.*
196. *Id.* at 4.
197. 38 U.S.C.A. § 511(a) (West 2002 & Supp. 2005); *Broudy*, 335 F. Supp. 2d at 4.
198. *Broudy*, 335 F. Supp. 2d at 4.
199. 38 U.S.C.A. § 511; *Broudy*, 335 F. Supp. 2d at 4.
200. *Broudy*, 335 F. Supp. 2d at 4.
201. Vietnam Veterans of Am. v. McNamara, No. CIV. A. 02-2123 RMC, 2003 WL 24063631 (D.D.C. Sept. 30, 2003).

service connections for their disabilities and could, therefore, not receive veterans' benefits.[202] The court held that § 511 did not deprive it of jurisdiction because the veterans' suit was not about benefits or benefit determinations.[203] Rather, it was brought to obtain information necessary for veterans to succeed in the VA benefits process.[204] The court found that ruling on whether the plaintiffs should have access to the records does not infringe upon the Secretary's authority.[205]

In light of this decision, Broudy moved the court to reconsider its decision and "to reconcile or distinguish its conclusion."[206] The court granted the motion for reconsideration.[207] First, the court found that to conclude that § 511 barred the plaintiffs' complaint was "clear error" because "the VA benefits program is irrelevant except that it is the venue for the plaintiffs' underlying [constitutional] claims."[208] Because the case involved access to courts, not veterans' benefits, the court did not need to make any findings about eligibility or amounts of benefits.[209] Second, the court found that its determination that the plaintiffs had failed to state a valid claim under *Bivens* was also "clear error."[210] Because the claims involve the constitutional right of access to courts, and do not arise under the veterans' benefits statute, the court found the case to be similar to other circuit decisions holding officials liable for damages when they hide information that prevents access to the courts.[211]

However, on March 4, 2005, the court granted defendants' Motion for a Ruling on the Defense of Qualified Immunity, finding that the defendants were entitled to both absolute and qualified immunity.[212] Absolute immunity protects officials who perform particularly important functions, such as judges or legislatures, from civil liability for conduct within the scope of the governmental function, even if the official is alleged to have acted in bad faith.[213] This is to protect officials from harassment and intimidation when performing the impor-

202. *Id.* at *6.
203. *Id.* at *5.
204. *See id.* *5–6.
205. *Id.*
206. Broudy v. Mather, 335 F. Supp. 2d 1, 4 (D.D.C. 2004).
207. *Id.* at 6.
208. *Id.* at 5 (internal quotations omitted).
209. *Id.*
210. *Id.*
211. *Id.*
212. Broudy v. Mather, 366 F. Supp. 2d 3, 13 (D.D.C. 2005).
213. *Id.* at 9; BLACK'S LAW DICTIONARY 330 (2d Pocket ed. 2001).

tant societal function of resolving disputes between parties.[214] The court found that the judgments of VA and Defense Threat Reduction Agency (DTRA) officials are comparable to those of judges, and are thus particularly important functions; and that these decisions are significant enough to veterans that they might cause veterans to harass or intimidate VA and DTRA officials.[215] The court went on to state that these two factors outweighed the fact that adequate safeguards to control unconstitutional conduct on the part of the VA and DTRA do not appear to exist.[216]

Qualified immunity protects government officials from civil liability as long as their conduct does not violate statutory or constitutional rights so clearly established that a reasonable person would have known that what he or she was doing violated those rights.[217] The court found that the defendants did not deny plaintiffs the constitutional right of access to the courts.[218] This is because the VA and DTRA defendants' alleged actions did not involve any affirmative misrepresentation designed to prevent the plaintiffs from filing claims.[219] The court explained that: (1) the DTRA and VA defendants only became involved after the process had been initiated by the claimants; and (2) even if the defendants knew of records containing better information than is currently used, failure to disclose such information would not amount to an affirmative act of misrepresentation.[220]

On March 10, 2005, the case was dismissed with prejudice.[221] On March 16, 2005, the plaintiffs appealed the dismissal.[222] At this time, the appeal is pending.

Broudy represents the first time a claim has focused on access to information, which, as has been shown above, is the major bar to veterans receiving their benefits. By focusing on access to information, the plaintiffs, instead of suing the government for causing the injury, or for failing to warn of the dangers that caused the injury, are suing

214. *Broudy*, 336 F. Supp. 2d at 9.
215. *Id.* at 10–11.
216. *Id.* at 11.
217. *Id.*
218. *Id.* at 12.
219. *Id.*
220. *Id.* at 12–13.
221. Order Dismissing the Case with Prejudice, No. 1:02-cv-02122-GK (D.D.C. Mar. 10, 2005).
222. Notice of Appeal, No. 1:02-cv-02122-GK (D.D.C. Mar. 16, 2005).

the government for preventing them from obtaining the benefits Congress has allocated for them. In other words, instead of focusing on the harm done to them by the radiation, their complaint focuses on how the system itself does not work.

If the case moves forward, it will no doubt bring to light much information about the location of World War II veterans' records. Aside from the possibility of uncovering a government-run conspiracy of systematically hiding radiation exposure records, continued litigation may also force the government to reveal the location of those records, or, at the very least, explain why the records no longer exist.

If these records are found, they will not only provide the necessary documentation to establish veterans' claims, but they will also provide a fertile source of data for research. As the film badge data is a vital element of the dose reconstruction process,[223] studying the badges will allow for a more complete understanding of the limitations of the dose reconstruction method. If the location of the badges is not discovered, the court may find that the government concealed evidence necessary to establish the claims, and thus infringed upon the due process rights of veterans.

Regardless of whether the location of data is revealed, if the plaintiffs in *Broudy* are successful, it will likely expose the government to numerous similar lawsuits from veterans in similar positions. It would also be the first time the government would be held liable for the harm it caused these veterans when it exposed them to radiation. Because the only realistic avenue a veteran can pursue to recover for exposure to radiation is that of a disability compensation claim, the government has thus far avoided bearing responsibility for taking advantage of its soldiers' trust. It is fair to say that most soldiers realize the risk of bodily harm posed by war. But during World War II, soldiers did not expect to be exposed to chemicals that would cause such slow and painful deaths throughout the course of their lives, with the threat of possible genetic damage to their offspring.[224] Furthermore,

223. 38 C.F.R. § 3.311(a)(1) (2004); INDEPENDENT REVIEW, *supra* note 156, at 7.

224. *See, e.g.*, Michael J. O'Connor, *Bearing True Faith and Allegiance? Allowing Recovery for Soldiers Under Fire in Military Experiments That Violate the Nuremburg Code*, 25 SUFFOLK TRANSNAT'L L. REV. 649, 656 (2002); Glenn Roberts, Jr., *Panel Reviews Vets' Radiation Doses; Carcinogenic Effect of Atomic Weapons Under Review*, TRI-VALLEY HERALD (Pleasanton, Cal.), Mar. 24, 2002, at 1; Ron Simon, *"Atomic Veteran" Awaits Help with Medicl* [sic] *Woes*, MANSFIELD NEWS J., Sept. 17, 2002, at 2; Vogel, *supra* note 134.

many of these exposures occurred on U.S. soil and affected people that were never asked to risk their lives for their country in war.[225]

2. UPHOLDING ATTORNEY FEE LIMITATIONS

Veterans are barred from paying lawyers to represent them until the BVA renders a final decision.[226] This means that a veteran must fill out and submit his or her benefits application to the VA, appear at a hearing (if he or she chooses), appeal to the VARO, and appeal to the BVA, all without a lawyer, unless he or she is able to obtain free representation.[227] Indeed, only 2% of veterans are represented by lawyers during the claims process.[228] As mentioned above, veterans are provided with counselors to help them gather their records and fill out the paperwork,[229] and roughly 86% of veterans use VA-provided counselors.[230] However, these counselors are not lawyers, and thus cannot act as advocates for the veterans.

The aim of the prohibition of attorneys' fees in the VBA and BVA processes is to keep the system as informal and nonadversarial as possible.[231] The courts have speculated that if claimants were allowed to retain compensated attorneys, the mere presence of lawyers would make the system more adversarial and complex, thus making it *necessary* to retain a lawyer in order to file a claim.[232] Furthermore, if the system becomes more complex, administrative costs will increase and less government money will end up in the pockets of the veterans.[233]

While these limitations appear to protect veterans from giving their meager disability payments to lawyers, in practice, they prevent atomic veterans from getting benefits at all. First, atomic veterans claims are highly complex. They require tracking down records, cal-

225. *See, e.g.*, Nancy Cacioppo, *Veterans Affairs Office Updates Cancer List: Changes Will Ease Burden of Proof for Vets, Secretary Says*, J. NEWS (Westchester County, N.Y.), Jan. 30, 2002, at 3B; O'Connor, *supra* note 224; Roberts, *supra* note 224.

226. 38 U.S.C.A. § 5904(c)(1) (West 2002).

227. Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 327 (1985); *see also* Hogan, *supra* note 134, at 57. Some veterans receive free representation from the American Legion, American Red Cross, Disabled American Veterans, Veterans of Foreign Wars, and pro bono attorneys. *Walters*, 473 U.S. at 327–28.

228. *Walters*, 473 U.S. at 312 n.4.

229. Cummins & Fisher, *supra* note 24, at 631.

230. *Walters*, 473 U.S. at 312 n.4.

231. Nat'l Ass'n of Radiation Survivors v. Derwinski, 994 F.2d 583, 589–90 (9th Cir. 1992) (quoting *Walters*, 473 U.S. at 326).

232. *Id.* (quoting *Walters*, 473 U.S. at 326).

233. *Id.* (quoting *Walters*, 473 U.S. at 326).

culating radiation exposure, and navigating the numerous statutes applicable to each veteran's situation.[234] This would be hard for the average person to do, let alone someone who is elderly and ill. Second, because these lawyers are retained so infrequently, no group of lawyers has emerged with an expertise in VA practice.[235] Third, money is not always the main issue for some veterans.[236] Many of them just want an apology, and recognition that even though they did not die on the battlefield, they are still dying for their country.[237]

Finally, and perhaps most significantly, the reasoning that upholds the fee limitation as constitutional is flawed. In 1970, the Supreme Court, in *Goldberg v. Kelly*,[238] held that procedural due process requires that welfare recipients be allowed to retain counsel at pretermination hearings, should they so desire.[239] The Court explained that the requirements of due process vary according to changing circumstances.[240] After balancing the government's interest in continuing its function untouched with the recipient's interest in avoiding losing his or her benefits, the Court found that "for qualified recipients, welfare provides the means to obtain the essential food, clothing, housing, and medical care," and thus "termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits."[241] Because the welfare recipient "lacks independent resources, his situation becomes immediately desperate," and he needs to focus his energy on subsisting, rather than dealing with the welfare bureaucracy.[242] This will hinder his ability to follow the steps for redress.[243]

Six years later, in *Mathews v. Eldridge*,[244] the Court held that the Constitution requires less due process prior to the termination of Social Security disability benefits than it does for welfare benefits.[245] Specifically, the Court held that disability recipients do not have the

234. *See, e.g.*, Nat'l Ass'n of Radiation Survivors v. Derwinski, 782 F. Supp. 1392, 1397 (N.D. Cal. 1992).
235. *Walters*, 473 U.S. at 328.
236. O'Brien, *supra* note 46.
237. *Id.*
238. 397 U.S. 254 (1970).
239. *Id.* at 270.
240. *Id.* at 262.
241. *Id.* at 264.
242. *Id.* at 263–64.
243. *Id.* at 264.
244. 424 U.S. 319 (1976).
245. *Id.* at 340.

right to a pretermination hearing and that a written submission was adequate.[246] Recognizing that the receipt of disability benefits is a property interest protected by the Fifth Amendment,[247] the Court held that an evaluation of what process is due in each circumstance hinges on the balancing of three factors: (1) the private interest that will be affected by the governmental action; (2) the risk of an erroneous deprivation of that interest if the governmental procedure is used along with the probative value of additional procedural safeguards; and (3) the government's interest in the function as well as the financial and administrative burdens that the additional procedural requirement would involve.[248]

The Court found the private interest in disability benefits to be lower than the interest in welfare benefits because disability benefits are not based upon financial need.[249] Because disability benefits are calculated according to the level of incapacity, the worker's income, and support from other sources such as family members, workman's compensation awards or savings have no bearing on disability claims.[250] Furthermore, if disability benefits are terminated and the worker's family falls below the minimum subsistence level, other forms of government assistance become available.[251]

The Court then found that because disability benefits are based on a medical assessment of the worker's mental or physical condition, the decision in most cases will turn upon "routine, standard, and unbiased medical reports by physician specialists" who have personally examined the applicant.[252] These reports are considered highly credible.[253] Such a decision, according to the Court, is "more sharply focused and easily documented" than most welfare determinations.[254] In welfare cases, many types of information may be relevant, and issues of witness credibility are essential to the process.[255] Finally, the Court found that the public interest in avoiding the administrative

246. *Id.* at 349.
247. *Id.* at 332–33.
248. *Id.* at 335.
249. *Id.* at 340.
250. *Id.* at 340–41.
251. *Id.* at 342.
252. *Id.* at 344 (quoting Richardson v. Perales, 402 U.S. 389, 404 (1971)).
253. *Id.*
254. *Id.* at 343.
255. *Id.* at 343–44.

costs of providing hearings outweighed both the individual interest and the risk of error.[256]

Nine years later, in *Walters v. National Association of Radiation Survivors*,[257] the Court upheld the lawyers' fee limitation in VA benefits claims, holding that the fee cap does not violate the due process rights of claimants.[258] Applying the balancing test from *Mathews*, the Court found the individual interest in veterans benefits to be similar to Social Security disability benefits.[259] Because veterans benefits are not granted on the basis of need, they are unlike welfare benefits, which the *Goldberg* recipients "depended [upon] for their daily subsistence."[260]

Continuing with the *Mathews* application, the Court then found the risk of error to be low.[261] It stated that, as with disability claims, "the great majority of [veterans'] claims involve simple questions of fact, or medical questions relating to the degree of a claimant's disability."[262] The court also noted that while "[t]here are undoubtedly complex cases pending before the VA," these are "undoubtedly a tiny fraction of the total cases pending."[263]

On balance, the Court found that the government had an interest in: (1) protecting the veteran from dividing his or her meager check with his lawyer[264] and (2) keeping the cost of the claims process low so as to have more to distribute to the claimants.[265] The court reasoned that if claimants can retain lawyers, then the VA will opt to be represented by counsel as well.[266] This will not only cost more, but will further prolong the claims process.[267]

This analysis is problematic, especially when applied to atomic veterans. First, simply because disability benefits are not granted on the basis of need does not mean that veterans have less of an interest

256. *Id.* at 348.
257. 473 U.S. 305 (1985).
258. *Id.* at 335. Note that in 1989, Congress changed the fee cap from $10 to whatever is found "reasonable" upon review by the BVA. 38 U.S.C.A. § 5904(c)(2) (West 2002). If the fee is paid out of the award for past benefits, the fee may not exceed 20% of the total amount of past due benefits. *Id.* § 5904(d)(1).
259. *Walters*, 473 U.S. at 333.
260. *Id.*
261. *Id.* at 326.
262. *Id.* at 330.
263. *Id.*
264. *Id.* at 321.
265. *Id.* at 325.
266. *Id.* at 324.
267. *Id.* at 325.

in benefits than do welfare recipients. Recently, some courts have held that disabled individuals in general have significant private interests in disability benefits because their physical disability prevents them from working.[268] More specifically, unlike in the *Mathews* situation, veterans cannot obtain anything comparable to workman's compensation for their disabilities incurred in service.[269] While some veterans can obtain pension and medical benefits, the disability system has already accounted for these distributions, as all veterans benefits are disbursed by the VA.[270] Finally, the vast majority of claimants live off tiny incomes which are compounded by crippling medical bills.[271] Roughly 11% of atomic veterans who apply for disability compensation have annual family incomes below $5000, 43% have annual family incomes below $10,000, and 68% have annual family incomes below $20,000.[272] Furthermore, 17% of these veterans have annual family medical expenses over $20,000, 29% have annual family medical expenses over $10,000, and 45% have annual family medical expenses over $5000.[273] Thus, most atomic veterans would rely primarily on disability benefits for their basic needs.[274]

Second, the risk of error is extremely high in the claims of atomic veterans.[275] Their claims do not involve "simple questions of fact,"[276] but are, as mentioned above, highly complex, requiring tracking down lost records, calculating radiation exposure, and navigating the numerous statutes applicable to their situations.[277] While the Court in *Walters* accounted for the fact that a small fraction of claims brought may be complicated,[278] this small fraction should not be disregarded.[279]

268. Gonzales v. Sullivan, 914 F.2d 1197, 1203 (9th Cir. 1990).
269. *See* Department of Veterans Affairs website, http://www.va.gov/ (last visited Oct. 19, 2005).
270. *Id.*
271. Nat'l Ass'n of Radiation Survivors v. Derwinski, 782 F. Supp. 1392, 1396 (N.D. Cal. 1992).
272. *Id.*
273. *Id.*
274. *Id.*
275. *See id.* at 1397.
276. Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 330 (1985).
277. *Derwinski*, 782 F. Supp. at 1397.
278. *Walters*, 473 U.S. at 330.
279. *Id.* at 364 n.12 (Stevens, J., dissenting) (stating that "'[t]he need for counsel at revocation hearings derives, not from the invariable attributes of those hearings, but rather from the peculiarities of particular cases.'" (quoting Gagnon v. Scarpelli, 411 U.S. 778, 789 (1973)).

Third, the government's interest does not outweigh the private interest of veterans in obtaining disability benefits or the great risk of error in radiation claims.[280] The goal of protecting the veteran from sharing his or her check with his lawyer has been criticized by many as paternalistic, preventing veterans from deciding how to spend their own money.[281] Furthermore, allowing veterans to retain counsel need not cost the government more.[282] Merely because veterans are retaining lawyers does not mean that the government must in turn retain lawyers.[283] Additionally, the presence of lawyers will likely speed up the claims process, as claims may be decided correctly the first time around, creating less appeal and remand work for VA employees.[284]

IV. Resolution

Time is running out on our chance to compensate atomic veterans for their sacrifices while serving our country. As mentioned above, it is estimated that out of the 400,000 original atomic veterans, fewer than 20,000 are still alive.[285] The present system is not working, and changes must be made quickly.

A. Policies and Procedures of the VBA

First, the VBA must create and implement a more intensive training system for both claims adjudicators and counselors. As recommended by the AFL-CIO, all counselors and adjudicators should undergo at least two years of training before processing and reviewing claims on their own.[286]

Second, the VBA must switch its top priority from speed to quality. Speed is undoubtedly a necessary priority, as veterans desperately need the disability compensation to meet their daily needs, and many are dying before their claims are even processed. However, as mentioned above, by focusing primarily on speed, the VBA has actually made the process for complicated claims take longer.

280. *Id.* at 359 (Stevens, J., dissenting).
281. Kenneth M. Carpenter, *Why Paternalism in Review of the Denial of Veterans Benefits Claims Is Detrimental to Claimants*, 13 KAN. J.L. & PUB. POL'Y 285, 295 (2004).
282. *Walters*, 473 U.S. at 363 (Stevens, J., dissenting).
283. *Contra id.* at 324.
284. *Id.* at 363 (Stevens, J., dissenting).
285. *Marketplace, supra* note 12.
286. CARDENAS & REYES, *supra* note 90.

In order to prioritize quality decision making, the VBA should give bonuses on a regular basis to the VARO with the lowest percentage of remands and the lowest percentage of appeals. Furthermore, counselors and adjudicators should be given extra work credit for atomic veterans' claims, as these claims are highly complicated and require extra work. This will encourage employees to process these claims. Finally, VAROs should be given credit for work done on remands. If a claim is not processed correctly the first time, there should still be an incentive to do it correctly thereafter, which would help cut down on the amount of time claims spend in the appeals stage.

Third, Congress should allow more funding for VBA staffing. In order to truly focus on both speed and quality, the VBA needs to hire more counselors and adjudicators. To make these new employees' two years of training productive, working on real claims should be part of the training process.

B. Problems with the VA's Interpretation of Statutes

1. PRESUMPTIVE DISEASES

The main problem veterans bringing claims under REVCA face is presenting official military records that place them in the required locations. First, Congress needs to clarify exactly where it deems radiation exposure to have occurred for the purposes of REVCA. By stating drastically different requirements for POWs than for non-POWs, Congress sends an unclear message. Second, in light of the 1972 fire, Congress should amend REVCA to incorporate a rebuttable presumption that veterans were present in the required locations, similar to what is used in VDRECSA.[287] Thus, REVCA could maintain a more strict geographic requirement than does VDRECSA, while giving veterans whose records were destroyed the chance to meet those requirements.

2. NONPRESUMPTIVE DISEASES

The main trouble atomic veterans face when bringing claims under VDRECSA is documenting their exposure to radiation. In order to remedy this problem, the Defense Threat Reduction Agency should

287. 38 C.F.R. § 3.311(a)(4)(i) (2004).

adopt the recommendations of the National Research Council as soon as possible.

C. Problems with the Courts' Interpretations of Statutes

First, the courts should: (1) refuse to grant immunity to those involved with the claims process; and (2) allow veterans to proceed with "access to information" claims. Second, Congress should allow veterans to retain attorneys throughout the claims process with no fee limitation. However, the VBA should continue to train and employ counselors to help veterans who do not wish to retain attorneys.

V. Conclusion

The VA's disability compensation system prevents the vast majority of atomic veterans from obtaining benefits for their radiation-induced diseases. As a result, many atomic veterans are unable to receive necessary medical treatment or to provide for their basic needs. Furthermore, many spend their remaining years battling the VA, only to die before their claims are processed. Finally, these veterans are denied recognition of the physical sacrifices they made for their country. The proposed recommendations to the VA, VBA, Congress, and the courts will allow us to follow the sentiment expressed in the oft-quoted words of Abraham Lincoln: "With malice toward none; with charity for all; with firmness in the right . . . let us strive on . . . to care for him who shall have borne the battle, and for his widow, and his orphan."[288]

288. Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), *in* 8 THE COLLECTED WORKS OF ABRAHAM LINCOLN 333 (Roy P. Basler et al. eds., 1953).