

The Splendid Isolation Revisited: Lessons from the History of Veterans' Benefits Before Judicial Review

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INTRODUCTION

The difference between our service and that of the Enemy, is very striking. With us, from the peculiar, unhappy situation of things, the Officer, a few instances excepted, must break in upon his private fortune for present support, without a prospect of future relief. . . . Men may speculate as they will; they may talk of patriotism; they may draw a few examples from ancient story, of great achievements [sic] performed by its influence; but whoever builds upon it, as a sufficient Basis for conducting a long and [bloody] War, will find themselves deceived in the end. George Washington, 1788²

An often overlooked feature of veterans' law is the lack of institutional memory available to most of its practitioners. The United States Court of Appeals for Veterans Claims (CAVC) is the nation's youngest federal court, having issued its first case in 1990.³ There was no judicial review of veterans' benefits claims

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² GEORGE WASHINGTON, To John Bannister, in *GEORGE WASHINGTON: A COLLECTION* (W.B. Allen, ed. 1988), available at <http://oll.libertyfund.org/title/848/101760>.

³ *In re Quigley*, 1 Vet. App. 1 (1989). Although *Quigley* was decided on December 19, 1989, it was not issued until January 22, 1990.

prior to that time. Nonetheless, the Veterans Judicial Review Act of 1988 (VJRA) did not create a new veterans' benefits system; it merely added a court to provide oversight to an adjudication process that had evolved during more than two centuries of "splendid isolation" from the legal system.⁴ However, because attorneys were rarely involved in that system for generations,⁵ few veterans' law practitioners have experience with the system as it existed before judicial review, or even access to someone with such experience. Regardless of the changes brought about by judicial review,⁶ a full understanding of the veterans' benefits system requires a deep exploration into its history. As has recently been observed, legal doctrine is frequently based upon unstated factual beliefs and assumptions about the underlying system.⁷ Accordingly, a full understanding of veterans' law requires an appreciation of the history that produced the system we currently have. A look into the past reveals many of the forces that continue to shape veterans' law today.

The lessons of the past are numerous. To explore them, this article proceeds chronologically from before the nation was founded up through the passage of the VJRA in 1988. Part I of the article covers the period before the Civil War, when the nation was first wrestling with the role of the citizen-soldier in the world's first major democracy. Part II considers the Civil War and its aftermath, when veterans first found themselves numerous enough to be a forceful political interest group. Part III looks at World War I and how it radically reversed America's relationship with its veterans. Part IV examines the World War II era and how the

⁴ *Brown v. Gardner*, 513 U.S. 115, 122 (1994) (quoting H.R. REP. NO. 100-963, pt. 1, at 10 (1988), as reprinted in 1988 U.S.C.C.A.N. 5782).

⁵ See *infra* notes 165-66, 530-34 and accompanying text.

⁶ See generally James D. Ridgway, *The Veterans' Judicial Review Act Twenty Years Later: Confronting the New Complexities of the Veterans Benefits System*, 66 N.Y.U. ANN. SURV. AM. L. (forthcoming 2010) (examining the increasing tension between complexity and informality in the VA adjudication system as a result of the Veterans' Judicial Review Act (VJRA)).

⁷ Suzanna Sherry, *Foundational Facts and Doctrinal Change*, 2011 U. ILL. L. REV. (forthcoming January 2011) (Working Paper No. 10-13), available at http://ssrn.com/abstract_id=1577247.

nation's relationship with its veterans evolved yet again, as the modern administrative state emerged from the New Deal. Part V focuses on the needs of Vietnam veterans and how they exposed a new set of challenges raised by modern science and modern warfare. Finally, Part VI briefly concludes with some thoughts about the major currents that flow through the history of veterans' benefits in America, of which modern scholars and practitioners should be mindful when debating the past, present, and future of veterans' benefits in America.

I. THE UNITED STATES' FIRST VETERANS: THE REVOLUTIONARY WAR TO 1861

A. Veterans' Benefits Before America

Veterans' benefits are as old as civilization itself. The empires of Egypt,⁸ Babylon,⁹ Greece,¹⁰ and Rome¹¹ all had some organized form of benefits for veterans. In fact, the first bureaucracy devoted to veterans' claims was the Roman Aerarium Militare.¹² The earliest veterans' benefits often took the form of plunder and grants of land from defeated enemies. This served to placate an armed constituency that could threaten the stability of the empires it helped create. Not all ancient benefits, however, went to able-bodied soldiers. At least as early as the Greek city states, benefits were extended to disabled soldiers and to the orphans of those killed in battle.¹³ Of course, even these indirect benefits helped placate soldiers by insuring them against the worst misfortunes of battle.

⁸ ROBINSON E. ATKINS, MEDICAL CARE OF VETERANS 11 (1967).

⁹ *Id.*

¹⁰ A.F. SISSON, HISTORY OF VETERANS' PENSIONS AND RELATED BENEFITS 1 (1946).

¹¹ MICHAEL GRANT, THE ARMY OF THE CAESARS 81 (1974).

¹² PAUL DICKSON & THOMAS B. ALLEN, THE BONUS ARMY: AN AMERICAN EPIC 2 (2004).

The word "pension" comes from the Latin "*pensio*," which translates as "payment." LLEWELLYN J. LLEWELLYN & A. BASSETT JONES, PENSIONS AND THE PRINCIPLES OF THEIR EVALUATION 1 (1919); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED 1434 (2d ed. 1987).

¹³ SISSON, *supra* note 10, at 1.

The Western tradition of veterans' benefits dates to the decline of the feudal system and the rise of modern nations.¹⁴ As modern nation states replaced feudal organizations, the feudal system of personal loyalty needed to be replaced with a tool adequate for national armies. Government-sponsored hospices for veterans of the Crusades were established as early as the thirteenth century.¹⁵ The first English veterans' benefits law was passed in the parliamentary session of 1592-1593.¹⁶ At approximately the same time, France created the first European state agency to certify veteran status and administer payments of benefits.¹⁷ Similarly, as Prussia and Russia emerged as European powers, they also developed systems for compensating their veterans.¹⁸ Accordingly, veterans' benefits were already established as a component of the modern nation state long before the United States was founded.

The essence of these European models was two-fold. Provisions were made to care for soldiers disabled by service during wartime and for the widows and orphans of soldiers who were killed.¹⁹ Second, officers received lifetime monetary benefits that helped guarantee their loyalty during war and their availability in the future should they be needed for active service at any time.²⁰ Prior to the Revolutionary War, each of the American colonies had a history of providing veterans' benefits in accordance with this basic model.²¹

¹⁴ GUSTAVUS A. WEBER & LAURENCE F. SCHMECKEBIER, *THE VETERANS' ADMINISTRATION: ITS HISTORY, ACTIVITIES AND ORGANIZATION* 3 (1934).

¹⁵ ATKINS, *supra* note 8, at 13.

¹⁶ WEBER & SCHMECKEBIER, *supra* note 14, at 3.

¹⁷ ATKINS, *supra* note 8, at 14-16.

¹⁸ Natalia Danilova, *The Development of an Exclusive Veterans' Policy: The Case of Russia*, XX(X) *ARMED FORCES & SOC'Y* 1, 8 (2009) (on file with author); Jean-Pierre Bois & John Childs, *Invalids*, in *A DICTIONARY OF MILITARY HISTORY AND THE ART OF WAR* 400 (Andre Corvisier & John Childs eds., Chris Turner trans., Blackwell Publishers 1994).

¹⁹ LIBRARY OF CONG., *VETERANS BENEFITS AND JUDICIAL REVIEW: HISTORICAL ANTECEDENTS AND THE DEVELOPMENT OF THE AMERICAN SYSTEM* 14-16 (1992).

²⁰ RICHARD SEVERO & LEWIS MILFORD, *THE WAGES OF WAR: WHEN AMERICA'S SOLDIERS CAME HOME – FROM VALLEY FORGE TO VIETNAM* 32-33 (Touchstone 1990) (1989).

²¹ WEBER & SCHMECKEBIER, *supra* note 14, at 2-4; WILLIAM HENRY GLASSON, *FEDERAL MILITARY PENSIONS IN THE UNITED STATES* 9-18 (1918).

LESSON 1: Throughout history, veterans' benefits have been tied to the existence of governments for large societies. At their core, such benefits are utilitarian. They have helped meet the needs of the state for external and internal security by making it possible to have a large, organized, and content fighting force to support the existence and expansion of the government. This practical aspect of veterans' benefits should never be forgotten. As with any other area, the costs and benefits are important considerations that shape veterans' law.

B. The Revolutionary War: Questioning the Role of Veterans' Benefits in a Democracy

Although often overlooked, veterans' benefits were crucial to winning the Revolutionary War. The first U.S. pension proposal, considered a month after the issuance of the Declaration of Independence, was directly copied from the British system.²² Eventually, the Continental Congress passed generous pension legislation, but conditioned the benefits on serving to the conclusion of the War.²³ The benefits authorized were historic because it was the first time that a government extended pensions to privates and noncommissioned officers.²⁴ It is not clear whether this largess was motivated by egalitarian ideals of the emerging democracy or desperation by a rebel government that had little to offer but promises.²⁵ Regardless, these promises offered crucial

²² GLASSON, *supra* note 21, at 20.

²³ WEBER & SCHMECKEBIER, *supra* note 14, at 5; *see* GLASSON, *supra* note 21, at 26-27 (discussing the correspondence between Washington and Congress prior to the law regarding desertion rates). Virginia and Pennsylvania also passed laws providing pensions for soldiers both in their militias and in the regular army. GLASSON, *supra* note 21, at 18; LIBRARY OF CONG., *supra* note 19, at 35-39.

²⁴ Sung Won Kang & Hugh Rockoff, *After Johnny Came Marching Home: The Political Economy of Veterans' Benefits in the Nineteenth Century* 13 (Nat'l Bureau of Econ. Research, Working Paper No. 13223, 2007), available at <http://www.nber.org/papers/w13223>.

²⁵ At first, Washington was not an advocate of service pensions. SEVERO & MILFORD, *supra* note 20, at 32. However, as the Revolutionary War dragged on and his Continental Army began to experience mass resignations of officers, he quickly reversed course and became a very strong voice in support of such benefits in order to keep his forces from disintegrating. *Id.*; LIBRARY OF CONG., *supra* note 19, at 46.

incentives to those patriots whose resolve may have been wavering during the bleakest months of the conflict, and established a baseline expectation that veterans of future American wars would be treated similarly.²⁶

Unfortunately, the generous promises initially made to the quarter-million Revolutionary War veterans by the largely powerless Continental Congress were not easily kept.²⁷ During the war and the confederation period, many in Congress were opposed to providing veterans benefits based upon the theory that every citizen in a democracy owed service to the government and should not expect compensation for it.²⁸ They feared that government-funded pensions would lead to the creation of a European-style hereditary, military aristocracy, which would undermine the ideals of the Revolution.²⁹ However, George Washington intervened in the debates to argue that the provision of veterans' benefits was absolutely necessary to preserve the ability of the military to recruit and retain officers.³⁰

Washington's position was difficult because public support for veterans' service pensions was weak.³¹ There were several reasons for this. First, many felt that special benefits for members of the Continental Army were unjustified when the War had touched so much of the country and so many who were not

²⁶ Kang & Rockoff, *supra* note 24, at 5; see GLASSON, *supra* note 21, at 66-67 (noting that the case of Revolutionary soldiers in 1818 set the precedent for service pensions).

²⁷ See WEBER & SCHMECKEBIER, *supra* note 14, at 5. The promises of the Continental Congress were left to the states to keep, as the Continental Congress had no authority to raise revenue to fund them. *Id.* It was not until 1808 that the federal government assumed responsibility for all veterans' benefits that were then being funded by the states. *Id.* at 10.

²⁸ JOHN RESCH, *SUFFERING SOLDIERS* 2 (1999). Washington himself accepted no pay for his service during the war. SEVERO & MILFORD, *supra* note 20, at 88. He was not alone. Other figures, including Baron von Steuben, were motivated by patriotism and volunteered to serve without pay. *Id.* at 97.

²⁹ See RESCH, *supra* note 28, at 5. Contrary to the eighteenth-century view of an aristocratic standing army, "[m]ost historians conclude that Continental soldiers came largely from society's poor, propertyless, transient, and marginalized." *Id.* at 9.

³⁰ See *supra* note 2 and accompanying text.

³¹ See GLASSON, *supra* note 21, at 25-45.

veterans.³² Second, many felt that such pensions were unfair to those who had fought in state militias and other units outside the Continental Army.³³ Third, many remembered that a significant reason for the British taxes that led to the rebellion was King George's need to pay his officers' lifetime benefits.³⁴ Finally, Washington's army fought few major engagements against the British.³⁵ Despite guerrilla tactics adopted elsewhere, he firmly believed that Europe would never respect America unless its primary army abided by the laws of war recognized at that time.³⁶ However, he also understood that his army was severely outclassed by the British, and adopted a strategy of exhausting the British by delay and avoidance, except for those few occasions when necessity required or opportunity allowed.³⁷

At first, Congress essentially left it to the states to keep these promises, as the central government lacked the authority and the funds to make good on them.³⁸ However, the states were inconsistent in their execution of this scheme, in part because many disagreed with providing pensions.³⁹ As a result, at one point during the Articles of Confederation period, "impoverished, angry soldiers surrounded and occupied" the nation's capitol in Philadelphia, seeking unpaid back pay and pension payments.⁴⁰ The militant veterans were eventually captured and two leaders were sentenced to death, but their sentences were commuted to avoid embarrassment to the government over its inability to pay its

³² RESCH, *supra* note 28, at 2.

³³ SEVERO & MILFORD, *supra* note 20, at 90. This was particularly true in the South. *Id.*

³⁴ *Id.* at 33.

³⁵ Russell F. Weigley, *American Strategy from Its Beginnings through the First World War*, in *MAKERS OF MODERN STRATEGY: FROM MACHIAVELLI TO THE NUCLEAR AGE* 411 (Peter Paret ed., 1986).

³⁶ *Id.* at 412.

³⁷ *Id.* at 411-12.

³⁸ LIBRARY OF CONG., *supra* note 19, at 35-36, 40. Under the Articles of Confederation, Congress passed a law allowing states to deduct pension payments from the amount owed annually to support the federal government. GLASSON, *supra* note 21, at 22.

³⁹ GLASSON, *supra* note 21, at 23.

⁴⁰ EDWARD HUMES, *OVER HERE: HOW THE G.I. BILL TRANSFORMED THE AMERICAN DREAM* 12 (2006).

debts.⁴¹ Although Washington's utilitarian argument prevailed, the federal government reneged on the promise made by the Continental Congress, and instead in 1783 issued certificates for five year's pay.⁴²

After the Constitution was adopted, a bill was passed in the first session of the first Congress providing disability compensation for wounded veterans.⁴³ However, the pay certificates issued in 1783 were not funded until 1790, by which time many had been sold to speculators for a fraction of their potential value.⁴⁴ It was not until 1818 — after public sentiment regarding the War had been burnished by the passage of nearly forty years⁴⁵ — that Congress finally enacted a general service pension for Revolutionary War veterans.⁴⁶ Furthermore, it was another decade before Congress finally passed a general service pension act, at the urging of John Quincy Adams, fully honoring the promises made by the Continental Congress.⁴⁷ Ultimately, only 850 survivors actually received those pensions.⁴⁸

⁴¹ DICKSON & ALLEN, *supra* note 12, at 3.

⁴² RESCH, *supra* note 28, at 1-2; GLASSON, *supra* note 21, at 41.

⁴³ Act of Sept. 29, 1789, Ch. 24, 1 Stat. 95. In fact, Revolutionary War veterans were among the strongest supporters of the new Constitution because they perceived that a stronger central government was necessary to raise the money to make good on the promises that had been made to them. LIBRARY OF CONG., *supra* note 19, at 40.

⁴⁴ RESCH, *supra* note 28, at 2; GLASSON, *supra* note 21, at 50.

⁴⁵ This shift in sentiment was nicely captured by the *Federal Republican* newspaper, which wrote in 1818: "If a patriot when dead deserves a marble monument at the expense of his country, how much more does he deserve during life, a subsistence from his country?" RESCH, *supra* note 28, at 101.

⁴⁶ GLENN C. ALTSCHULER & STUART M. BLUMIN, THE GI BILL: A NEW DEAL FOR VETERANS 16 (2009); see RESCH, *supra* note 28, at 4; SEVERO & MILFORD, *supra* note 20, at 87-90. Officers were granted \$240 per year, while ordinary soldiers received \$96. ALTSCHULER & BLUMIN, *supra*, at 16. In the meantime, care of impoverished veterans became a matter for state and local governments. For example, in 1816, the town of Peterborough, New Hampshire, auctioned the care of veteran Benjamin Alld to the lowest bidder, 96 cents per week. RESCH, *supra* note 28, at 9.

⁴⁷ GLASSON, *supra* note 21, at 51. However, this program was entrusted to the Secretary of the Treasury, rather than the Secretary of War. *Id.* It was transferred to the War Department in 1835. *Id.*

⁴⁸ *Id.* But cf. ALTSCHULER & BLUMIN, *supra* note 46, at 17 (stating that the 1832 law resulted in the filing of 24,260 applications). The last Revolutionary War survivor did not die until 1867, and the last dependent beneficiary did not die until 1906 — 131 years after the war began. LIBRARY OF CONG., *supra* note 19, at 49.

LESSON 2: The evolution of veterans' benefits is difficult to achieve without a positive theory to support a new paradigm. Even though the United States established a new relationship between citizens and government, that did not immediately translate into a new theory of veterans' benefits. As a result, the unprecedented promises made to the Revolutionary War veterans went largely unkept due to a lack of political willpower. Thus, the American ideal of veterans' benefits for all soldiers regardless of rank or disability was slow to develop in practice.

C. The "Splendid Isolation" Begins

It was not just the substance of the first veterans' benefits law that was controversial. The first veterans' benefits adjudication process was also the subject of much dispute. Although *Marbury v. Madison*⁴⁹ is remembered as the case that established the authority of Article III courts to declare acts of Congress unconstitutional, it was not the first Supreme Court of the United States (Supreme Court) decision to do so. In fact, the *Marbury* opinion refers to the Supreme Court's invalidation of the first veterans' benefits adjudication system more than a decade earlier in *Hayburn's Case*⁵⁰ as precedent for the outcome in *Marbury*.⁵¹

As background, a major issue with the first pension law was that it did not include an adjudication process.⁵² It was not until three years later that Congress passed a law for processing

⁴⁹ 5 U.S. (1 Cranch) 137 (1803).

⁵⁰ 2 U.S. (2 Dall.) 408, 409 (1792).

⁵¹ 5 U.S. at 171-72 ("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 . . ."). In the earliest years of the nation, veterans' benefits law was a crucial battleground in establishing the separation of powers. See generally Richard E. Levy, *Of Two Minds: Charitable and Social Insurance Models in the Veterans Benefits System*, 13 KAN. J.L. & PUB. POL'Y 303, 308-10 (2004) (discussing some early cases and statutes addressing veterans' benefits); GLASSON, *supra* note 21, at 56-61.

⁵² LIBRARY OF CONG., *supra* note 19, at 41.

veterans' claims.⁵³ The Invalid Pension Act of 1792 assigned the job of deciding disability pension eligibility to the federal courts.⁵⁴ However, the Act reserved to the Secretary of War and Congress the power to deny a pension approved by the courts.⁵⁵ Federal courts rejected the role of pension adjudicators on the basis "that neither the legislative nor the executive branch could constitutionally assign to the judicial any duties but such were properly judicial and to be performed in a judicial manner."⁵⁶ The courts concluded that the Act did not establish a proper judicial function because the other branches reserved the power to ignore any award made by the courts, and the Supreme Court ultimately agreed.

In *Hayburn's Case*, William Hayburn sought a writ of mandamus to command the federal court for the district of Pennsylvania to decide his pension claim.⁵⁷ The opinion of the panel, which included Chief Justice John Jay sitting as a circuit judge, was that the writ must be denied because the Act had not properly assigned the duty to Congress. The circuit panel wrote that, "by the constitution, neither the secretary at war, nor any other executive officer, nor even the legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court."⁵⁸ In 1792, the Supreme Court agreed, although the surviving opinion only restated the opinion below without a clear conclusion.⁵⁹

After the Supreme Court invalidated the Invalid Pension Act of 1792, Congress attempted to finesse the decision with a new law in 1793 that required federal district judges to take evidence

⁵³ *Id.* (citing the Invalid Pension Act of 1792, ch. 11, 1 Stat. 243).

⁵⁴ Invalid Pension Act of 1792, §§ 2, 3, 1 Stat. at 244.

⁵⁵ Specifically, the statute granted the Secretary of War and Congress the authority to reject decisions of the courts if either suspected "imposition or mistake." *Id.* §§ 2, 4, 1 Stat. at 244; see GLASSON, *supra* note 21, at 56-57.

⁵⁶ GLASSON, *supra* note 21, at 56.

⁵⁷ *Hayburn's Case*, 2 U.S. (2 Dall.) 408, 408 (1792).

⁵⁸ *Id.* at 410 n.*. This circuit opinion was rendered on April 5, 1792 — a mere nine days after the Act was signed. LIBRARY OF CONG., *supra* note 19, at 43.

⁵⁹ *Hayburn*, 2 U.S. at 410.

on claims and forward it to the Secretary of War for decision.⁶⁰ Any doubt about Congress' ability to assign non-judicial roles to the federal courts was resolved two years later in *United States v. Yale Todd*.⁶¹ *Yale Todd* noted that no merits opinion in *Hayburn's Case* had been produced but, nonetheless, a subsequent opinion by the Supreme Court summarized the holdings of *Hayburn's Case* and *Yale Todd* as signifying that "the power proposed to be conferred on the Circuit Courts of the United States by the act of 1792 was not judicial power within the meaning of the Constitution, and was, therefore, unconstitutional, and could not lawfully be exercised by the courts."⁶² After *Yale Todd*, Congress allowed the replacement 1793 act to expire.⁶³ For eight years, no new replacement system was enacted.⁶⁴ Eventually, in 1803, a new system was authorized that fully vested the authority to decide claims with the Secretary of War.⁶⁵ Thus began two centuries during which the claims of American veterans for benefits would not be subject to judicial review.

LESSON 3: The "splendid isolation" that defined veterans' law for most of the nation's history was a historical accident. Although post hoc rationalizations⁶⁶ and ratifications⁶⁷ would occur, the origins of this important characteristic had no connection to the developing policies of veterans' law. Similarly, it should not be assumed that historical artifacts of veterans' law — no matter how entrenched — exist to benefit veterans. Rather, every piece must be examined in a historical context.

⁶⁰ GLASSON, *supra* note 21, at 60.

⁶¹ *United States v. Ferreira*, 54 U.S. (13 How.) 40, 52 (1851) (stating the substance of *United States v. Yale Todd*, which was decided in 1794 and not printed in an official reporter).

⁶² *Id.* at 53. Perhaps not by coincidence, less than five months after the Invalid Pension Act had attempted to assign veterans' cases to the federal courts, the justices of the Supreme Court of the United States (Supreme Court) submitted a "memorial" to Congress stating that the tasks assigned to the judiciary were "too burdensome" for "the small number of judges." LIBRARY OF CONG., *supra* note 19, at 42 n.152.

⁶³ GLASSON, *supra* note 21, at 62.

⁶⁴ *Id.*

⁶⁵ LIBRARY OF CONG., *supra* note 19, at 45; GLASSON, *supra* note 21, at 62.

⁶⁶ See *infra* Parts II.D, V.D.

⁶⁷ See *infra* notes 297-99 and accompanying text.

**D. From Law to Practice: The Initial
Adjudication System in Action**

The first Pension Office was established by the Continental Congress in 1778, and consisted of a commissioner and three clerks operating out of two rented rooms near the capitol building in Philadelphia.⁶⁸ After the pension program was eventually placed in the War Department in the wake of *Hayburn's Case*, questionable claims were referred to pension agents, local sheriffs, and federal attorneys for investigation and prosecution.⁶⁹ Disappointed veterans would press their cases to Congress.⁷⁰ Periodically, Congress would pass special legislation adding to the rolls those veterans who managed to find a favorable ear in Washington.⁷¹ As a result, veterans' benefits developed a reputation as a political favor rather than a purely objective benefit.

After the Revolutionary War Pension Act passed in 1818,⁷² the then-named Pension Bureau's staff added twelve clerks to handle the 1,000 applications being received each week.⁷³ Unfortunately, the novice clerks were not up to the work, and granted numerous applications unsupported by evidence of service.⁷⁴ Under the 1818 law, state judges could declare a claimant eligible, and judges varied wildly in their application of the requirement that a veteran be "in reduced circumstances" to be eligible.⁷⁵ Although a few judges restricted awards to veterans who had been reduced to begging,

⁶⁸ GLASSON, *supra* note 21, at 25; RESCH, *supra* note 28, at 121-22.

⁶⁹ RESCH, *supra* note 28, at 123.

⁷⁰ DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801*, at 155 (1997).

⁷¹ *Id.*

⁷² See *supra* notes 45-46 and accompanying text.

⁷³ RESCH, *supra* note 28, at 124. After the Act, the number of pensioners quickly rose from 2,200 to 19,930. LIBRARY OF CONG., *supra* note 19, at 48. The deluge of applications was primarily from New England. See GLASSON, *supra* note 21, at 70. Somewhat curiously, despite its size and central role, Virginia was not among the top seven states in producing pension claims. *Id.*

⁷⁴ RESCH, *supra* note 28, at 124.

⁷⁵ *Id.* at 125 (internal quotation marks omitted).

others — backed by the broad popular sentiment at the time — felt that all veterans should be awarded pensions, and granted them liberally regardless of the language of the statute.⁷⁶ Moreover, many state judges were corrupt, and outright sold pensions to any person who mustered a sufficient cash payment.⁷⁷ On the other hand, a few state courts began to follow the lead of the Supreme Court and declare that they also would not act as adjudicators for the War Department.⁷⁸

In 1819, the economy collapsed, and by 1820, pension payments had risen from 1.5 percent of the federal budget to sixteen percent.⁷⁹ As conditions soured and costs soared, legislation was passed requiring that persons receiving a disability pension based on a condition subject to improvement be examined every two years by two surgeons or physicians to determine whether they had recovered sufficiently to be removed from the rolls.⁸⁰

Secretary of War John C. Calhoun appointed James L. Edwards to take over the Pension Bureau in late 1818 in the wake of a wave of scandals. Edwards ruthlessly purged the corrupted Bureau, created the first standardized pension application form, and established uniform procedures for applying for benefits that were published in local papers throughout the country.⁸¹ He also dramatically increased the evidentiary requirements for applicants who could not present their service papers.⁸²

⁷⁶ *Id.*

⁷⁷ *Id.* at 124-25.

⁷⁸ *Id.* at 128-29.

⁷⁹ *Id.* at 142-43.

⁸⁰ GLASSON, *supra* note 21, at 75. In 1793, Congress had already added the requirement that a veteran be examined by two doctors before being initially added to the pension rolls. LIBRARY OF CONG., *supra* note 19, at 44 & n.157 (citing An Act to Regulate the Claims to Invalid Pensions, ch. 17, 1 Stat. 324 (1793)).

⁸¹ RESCH, *supra* note 28, at 124-25, 152.

⁸² *Id.* at 125-26. In 1800 and 1804 fires destroyed many federal service records. *Id.* at 126. A similar problem has plagued millions of World War II veterans. See Walter W. Stender & Evans Walker, *The National Personnel Records Center Fire: A Study in Disaster*, 37 THE AM. ARCHIVIST 521 (1974), available at <http://www.archives.gov/st-louis/military-personnel/nprc-fire.pdf>.

Nonetheless, “[i]n less than two years after the act’s passage, the program enrolled nearly six times more than Congress had estimated. It was nearly seven times more costly than projected and was nearly ruined by scandal.”⁸³ By 1820, reports involving fraudulent claims and rich veterans receiving pensions intended for the indigent prompted Congress to abolish the current rolls and force all veterans to reapply for benefits.⁸⁴ In the summer of 1820, the government convened special pensioners’ courts throughout the country for the purpose of re-enrolling Revolutionary War veterans, who reformed their old units and marched en masse — many on the Fourth of July — to present their claims and provide mutual testimony in support of their service.⁸⁵ The spectacle of aged and infirm veterans celebrating the birth of the nation by lining up to take an “oath of poverty” in order to receive pensions helped restore public support for the program and build momentum for general service pensions.⁸⁶

By 1823, Edwards had restored confidence in the pension program through vigorous oversight, transparent rulemaking, and publicly resisting political pressure in the cases of well connected veterans.⁸⁷ However, he was hampered in a few of his reform efforts because Congress had not given him the authority to establish uniform standards for determining what constituted reduced circumstances.⁸⁸

As of the passage of the 1832 law fully honoring the promises to Revolutionary War veterans,⁸⁹ the pension system had grown beyond the ability of the Secretary of War to supervise

⁸³ RESCH, *supra* note 28, at 135; *see* GLASSON, *supra* note 21, at 68-69.

⁸⁴ Kang & Rockoff, *supra* note 24, at 14. Congressional opponents of this action unsuccessfully argued that it was immoral and unlawful because veterans had a vested right in a pension once awarded. RESCH, *supra* note 28, at 138-41.

⁸⁵ RESCH, *supra* note 28, at 148.

⁸⁶ *Id.* at 148-49 (internal quotation marks omitted).

⁸⁷ *Id.* at 175.

⁸⁸ *Id.* at 135. The 1820 Act that wiped the pension rolls also reduced local officials to taking evidence and committed the evaluation of that evidence to the Pension Office. *Id.* at 141.

⁸⁹ *See supra* note 47 and accompanying text.

personally.⁹⁰ Congress created the Pension Office within the Department of War to replace the Pension Bureau, and created the position of Commissioner of Pensions to oversee the system.⁹¹ Edwards assumed the title of the first commissioner, and continued to run the office until 1850, a total of thirty-two years as the head of the veterans' benefits system.⁹²

LESSON 4: Administering a large-scale benefits program is far from a trivial task. How veterans' benefits programs are administered profoundly affects both the cost of the program and the level of public support for the system. However the system is designed, those interested in the policy and substance of veterans' law should not overlook the profound impact of the procedural aspects of administering a large benefits program.

E. Land for Service

In the pre-Civil War era, non-monetary benefits were arguably more important than pensions, as the nation was "long on land and short on money."⁹³ All of the original states with significant frontiers used land grants as a recruitment incentive during the Revolutionary War.⁹⁴ Furthermore, most pre-Civil War veterans — particularly those on the frontier engaged in conflicts with Native Americans — were eligible for land grants of some type, depending on the length and nature of their service. During this time, primary responsibility for the veterans' benefits system was moved to the Department of the Interior.⁹⁵ However, the key era for such programs began in 1847

⁹⁰ GLASSON, *supra* note 21, at 86.

⁹¹ *Id.*; RESCH, *supra* note 28, at 124-25.

⁹² RESCH, *supra* note 28, at 124-25.

⁹³ PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 249 (1968). There also may have been darker motives behind rewarding veterans with land instead of money. After the War of 1812, service in the Army was held in very low regard. SEVERO & MILFORD, *supra* note 20, at 108-09. During this period, most service members were highly disfavored Irish and German Catholic immigrants. *Id.* As a result, there was little popular support from the predominantly Protestant country to treat such veterans well. *Id.* at 109-16.

⁹⁴ ALTSCHULER & BLUMIN, *supra* note 46, at 14.

⁹⁵ LIBRARY OF CONG., *supra* note 19, at 49.

during the Mexican-American War, when volunteers were offered 160 acres as a recruitment incentive.⁹⁶ By 1855, the government had issued warrants for over 60 million acres of land to over five hundred thousand veterans, widows, and heirs.⁹⁷ These programs were successful but controversial.

Most land grants were transferable.⁹⁸ As a result, only a tiny fraction of land warrants were actually used by the veterans or widows to whom they were issued.⁹⁹ Frequently, the recipients had little interest in relocating to frontier areas where the warrants could be redeemed.¹⁰⁰ In most cases, the warrants were sold to third parties who traveled west to claim land.¹⁰¹ The prevalence of this phenomenon divided politicians. On the one hand, Whigs argued that the transfers were irrelevant; the purpose of the warrants was to attract recruits, and it did not matter whether recruits were interested in the land itself or just the value of the warrants, so long as it served to attract soldiers.¹⁰² On the other hand, Democrats were concerned that agents and speculators were taking advantage of veterans and widows, which was undermining public support for the program.¹⁰³

⁹⁶ JAMES W. OBERLY, *SIXTY MILLION ACRES: AMERICAN VETERANS AND THE PUBLIC LANDS BEFORE THE CIVIL WAR* 3 (1990). The Mexican War from 1846 to 1848 was perhaps the most dangerous conflict in American history, resulting in service member deaths at a rate more than fifty percent greater than in the Civil War. SEVERO & MILFORD, *supra* note 20, at 117.

⁹⁷ OBERLY, *supra* note 96, at 3; WEBER & SCHMECKEBIER, *supra* note 14, at 30. Sixty million acres is nearly 94,000 square miles, or slightly less than the land area of Oregon. See National Atlas, Profile of the People and Land of the United States (2009), http://www.nationalatlas.gov/articles/mapping/a_general.html.

⁹⁸ See OBERLY, *supra* note 96, at 12. The grants provided to the veterans of the War of 1812 were not transferable, which became an extremely sore point for those veterans, especially because they were not provided until 1850, after most recipients were too elderly or established to relocate. Kang & Rockoff, *supra* note 24, at 24. The last survivor of the War of 1812 died in 1905, and the last dependent beneficiary passed away in 1946. LIBRARY OF CONG., *supra* note 19, at 49.

⁹⁹ OBERLY, *supra* note 96, at 92. In a sample of 2,761 warrants issued under four different laws, only 122 were ultimately used by the person to whom the warrant was issued. *Id.*

¹⁰⁰ *Id.* at 82-105.

¹⁰¹ *Id.* at 92 (estimating that ninety-five percent of warrants issued under one major act were sold for cash).

¹⁰² *Id.* at 12.

¹⁰³ *Id.* Despite this perception, a modern analysis concluded that most recipients of warrants received a fair return. *Id.* at 166. This dispute between Democrats was merely

The Democrats' position was not without basis. The distribution of land pursuant to warrants was often disorganized, and dubious surveyors would take a quarter or half the land as a fee for their work.¹⁰⁴ Furthermore, speculators accumulated huge tracts of land and developed reputations as absentee owners who failed to pay taxes.¹⁰⁵ As a result, the political support for land warrants eventually evaporated. After the Civil War, agents lobbied Congress to create a land-grant program for veterans.¹⁰⁶ However, there was little veteran interest in or public support for assignable land warrants despite intense lobbying by agents.¹⁰⁷ As a result, Civil War veterans were merely granted more favorable terms than non-veterans for claiming land through homesteading.¹⁰⁸ Nonetheless, many Civil War veterans moved west based upon the law.¹⁰⁹

LESSON 5: Veterans' benefits cannot be understood by looking at them solely from the perspective of veterans. Historically, the benefits provided at any given time are influenced by other pressures and opportunities facing the federal government.¹¹⁰ Despite their importance to claimants, veterans' benefits are but one issue with which Congress is wrestling at any given time. As a result, veterans' benefits are often influenced by outside realities.

one facet of a larger dispute as to whether federal lands should be distributed freely to encourage Western settlement or sold only for fair market value so as to reap the maximum revenues for the government. *Id.* at 1.

¹⁰⁴ GATES, *supra* note 93, at 255-56.

¹⁰⁵ *Id.* at 267.

¹⁰⁶ MARY R. DEARING, *VETERANS IN POLITICS: THE STORY OF THE G.A.R. 195-96* (1952).

¹⁰⁷ *Id.* at 194-99.

¹⁰⁸ *Id.* at 195-98.

¹⁰⁹ *Id.* at 198.

¹¹⁰ The land dispute was but one aspect of the disagreement between Democrats and Whigs over veterans' benefits. Perhaps more interestingly, the Whigs backed the 1832 pension bill in large part to create an expense for the federal government that would justify maintaining the tariffs that protected Northern industry from foreign competition. ALTSCHULER & BLUMIN, *supra* note 46, at 17. On the opposite side, Southern Democrats opposed the pensions because they wanted to lower American tariffs so foreign markets would be more welcoming to American cotton. *Id.*

II. THE CIVIL WAR

The Civil War was a profoundly transformative event in American history. As the historian Shelby Foote famously remarked, prior to the Civil War it was grammatically correct to say “the United States are,” but the war so changed the nation’s concept of itself that, afterward, it became grammatically correct to say “the United States *is*.”¹¹¹ Not surprisingly, the benefits provided to Civil War veterans were also unprecedented and remade the nation’s relationship with its veterans.

A. The Soldier-Voter

The political power of veterans after the Civil War was foreshadowed by the political importance of soldiers during the war. Abraham Lincoln had secured the presidency with only 40 percent of the popular vote because the Democrats had split their votes among two candidates.¹¹² However, Democrats remained a solid majority in the Union in 1861, and Lincoln felt compelled to give the officer corps of the Army over to the Democrats in order to reach recruitment goals.¹¹³ As a result, four-fifths of the major and brigadier generals initially appointed to the Union Army by Abraham Lincoln were Democrats.¹¹⁴

Republicans so feared the Democrats’ hold on the Army that they actively discouraged state laws that would allow soldiers to vote absentee. However, after losing ground in the 1862 elections, Republicans concluded that it was imperative to convert and expand the Army vote.¹¹⁵ The administration seized control of the military mail system, and replaced all the Democrat-leaning newspapers with Republican-leaning ones that railed against the

¹¹¹ *Online Newshour: Remembering Shelby Foote* (PBS television broadcast June 29, 2005), http://www.pbs.org/newshour/bb/remember/jan-june05/foote_6-29.html (emphasis added) (highlighting excerpts from a 1990 interview by Ken Burns with historian Shelby Foote).

¹¹² DEARING, *supra* note 106, at 2.

¹¹³ *Id.* at 3-4.

¹¹⁴ *Id.* at 3; see SEVERO & MILFORD, *supra* note 20, at 143.

¹¹⁵ DEARING, *supra* note 106, at 17; see SEVERO & MILFORD, *supra* note 20, at 144-45.

dove-wing of the Democratic Party.¹¹⁶ The Democrats failed so miserably at combating this tactic that they soon assumed the mantle of suppressing the military vote at the state level.¹¹⁷ This only added ammunition to the Republicans' defeatist allegations.

When Lincoln sought reelection in 1864, the Army vote went Republican by a 3 to 1 margin.¹¹⁸ In those states where Democrats had defeated absentee voting for the military, tens of thousands of furloughed soldiers were shipped home to sway the outcome.¹¹⁹ Although Lincoln trounced the former-Army-general George McClellan in the Electoral College by 212 to 21,¹²⁰ the popular vote among civilians was much closer, and several key states were carried by Lincoln by only a few thousand votes.¹²¹

LESSON 6: Veterans are voters. As a result, politicians pay the most attention to them when they are most politically powerful. Developments in veterans' law frequently correspond to the aftermath of large conflicts, when veterans are most numerous and cohesive as voters.

B. The First Great Demobilization

Well before the end of the Civil War, Abraham Lincoln observed the need to appeal to the economic interests of veterans and urged that veterans be given preference in federal hiring.¹²² This

¹¹⁶ DEARING, *supra* note 106, at 14-15.

¹¹⁷ *Id.* at 18-20; SEVERO & MILFORD, *supra* note 20, at 146-47. A similar drama played out during World War II when Republicans defeated a federal voting law that Roosevelt had put forth to enable deployed soldiers to vote. DAVIS R.B. ROSS, *PREPARING FOR ULYSSES: POLITICS AND VETERANS DURING WORLD WAR II* 90-91 (1969).

¹¹⁸ DEARING, *supra* note 106, at 45; SEVERO & MILFORD, *supra* note 20, at 149.

¹¹⁹ DEARING, *supra* note 106, at 37-40; SEVERO & MILFORD, *supra* note 20, at 147-48.

¹²⁰ SEVERO & MILFORD, *supra* note 20, at 149.

¹²¹ For example, Lincoln carried Pennsylvania by fewer than 6,000 votes after over 10,000 Union soldiers were furloughed to vote. DEARING, *supra* note 106, at 37. Similarly, New York was carried by fewer than 7,000 votes, which were largely from furloughed soldiers. *Id.* at 46.

¹²² *Id.* at 16.

was notable because, at the time, “the federal government assumed no responsibility for the rehabilitation of...[soldiers]...loosed upon the civilian economy. It was assumed to be the personal problem of each to find his niche and re-establish himself as best he could.”¹²³ However, it was the demobilization of the bulk of the Union Army in 1865 that created a true employment crisis. The population of the United States at the end of the war was thirty-five million, and the war produced approximately two million Union veterans.¹²⁴ As a result, the demobilization amounted to a large percentage of the population being suddenly let go by their employer.¹²⁵ Although many were able to reintegrate to their former lives, hundreds of thousands of returning soldiers were unable to find work, and there were soon demands that “stay-at-homes” be turned out of their jobs to make work available for veterans.¹²⁶ As seasonal work disappeared in the early winter of 1865 after farms completed their harvests, destitute veterans began to organize into political groups to advance a financial agenda.¹²⁷

As luck would have it, the moderate-Republican president, Andrew Johnson—who favored a benevolent reconstruction and healing the North’s relationship with the South—was locked in an extremely bitter fight with the Radical Republican Congress, which was proposing a punitive and intrusive reconstruction plan designed to remake the South in the North’s image.¹²⁸ In the meantime, the Democratic Party, which still laid claim to a substantial part of the Union officer corps, was anxious to find issues that could wrest a large block of voters from the Republicans.¹²⁹

¹²³ *Id.* at 51.

¹²⁴ HUMES, *supra* note 40, at 13.

¹²⁵ See DEARING, *supra* note 106, at 52-53. Overall, about thirty-seven percent of men between the ages of fifteen and forty-four in Union states served. THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES 103 (1992).

¹²⁶ DEARING, *supra* note 106, at 52-53.

¹²⁷ *Id.* at 58-61; SEVERO & MILFORD, *supra* note 20, at 129. Homelessness also became a major issue for urban veterans. SEVERO & MILFORD, *supra* note 20, at 130.

¹²⁸ See SEVERO & MILFORD, *supra* note 20, at 152.

¹²⁹ ALTSCHULER & BLUMIN, *supra* note 46, at 22.

Johnson wielded the power of appointment. Desperate to win veterans' support, in late 1865 he ordered the Treasury Department to discharge employees to make positions available for veterans.¹³⁰ In April of 1867, he issued a formal circular to several departments to institute a veterans' preference in all future appointments and promotions.¹³¹ Unfortunately for Johnson, this attracted vastly more veterans to Washington, D.C. than there were positions available, and veterans' groups ended up condemning the president for failing to keep his promises.¹³²

Congress wielded the power of the purse. Aside from employment, the other priority of veterans' groups was "bounty equalization." Much of the Union Army had been recruited with up-front monetary payments—"bounties"—that varied throughout the war. Although there were never any promises to treat all recruits equally, the idea of bounty equalization payments quickly emerged as a basis for financially strapped veterans to demand immediate financial assistance from the government.¹³³

At first, bounty equalization met strong resistance in the Radical Republican Congress because Congress' initial budget priority was funding its reconstruction plans.¹³⁴ However, as the midterm elections of 1866 approached and veterans' groups became more organized and politically active, the House Radicals concluded that they would be turned out en masse if they did not placate veterans.¹³⁵ At first, the then-un-elected Senate strongly resisted diverting money from reconstruction programs.¹³⁶ However, the House communicated the dire nature of the electoral situation by attaching a partial bounty equalization provision to extremely high-priority legislation: a congressional pay

¹³⁰ DEARING, *supra* note 106, at 75.

¹³¹ *Id.*

¹³² *Id.* at 75-76.

¹³³ SEVERO & MILFORD, *supra* note 20, at 162.

¹³⁴ DEARING, *supra* note 106, at 76-77.

¹³⁵ *Id.* at 78.

¹³⁶ *Id.* Direct election of senators was enacted in 1913. U.S. CONST. amend. XVII.

raise.¹³⁷ The Senate gave in to the House's demands and doubled congressional salaries after agreeing to an amendment providing \$70 million for bounty payments.¹³⁸ Although this legislation saved the Radical majority, it did not remedy the fundamental employment problems faced by most veterans. Over the next two years, demands for further bounty equalization payments were pressed, and veterans' employment continued to be a rallying cry for increasingly influential veterans' organizations such as the Grand Army of the Republic ("GAR"), the Soldiers' and Sailors' National Union League, and the Boys in Blue.¹³⁹

The other common unifying thread for the major veterans' groups in the initial years after the Civil War is that they were effectively controlled by the Radicals.¹⁴⁰ Although the Radicals had been slow to embrace veterans, they quickly and consciously organized veterans' groups behind their agenda. Although the veterans' groups were ostensibly non-partisan, anti-Radical newspapers were quick to point out the Radical nature of these groups' leadership and agendas outside of the employment and bounty issues.¹⁴¹ Perhaps the most telling indicator of Radical control came during the impeachment of President Johnson. The focus of the showdown was Johnson's attempt to replace Radical Edwin M. Stanton as Secretary of War in the face of Radical legislation denying the President the ability to remove major executive branch officers without Senate approval.¹⁴² As Stanton barricaded himself in his office, rumors swirled that Johnson would call out the Army to seize Congress, and that the Radical Congress

¹³⁷ DEARING, *supra* note 106, at 78.

¹³⁸ *Id.* at 78-79. One of the originally introduced bills would have provided \$500 million. *Id.* at 76.

¹³⁹ SEVERO & MILFORD, *supra* note 20, at 154. The concept behind these organizations was not new. The nation's first organization of veterans was the Society of Cincinnati, founded in 1783 for Revolutionary War veterans. *Id.* at 46. George Washington was the organization's first president. *Id.*

¹⁴⁰ DEARING, *supra* note 106, at 95-101.

¹⁴¹ *Id.* at 123-24.

¹⁴² *Id.* at 134.

was mobilizing armed units of veterans to seize the President.¹⁴³ In fact, Johnson's attempts to mobilize troops for his own protection failed, while armed GAR units organized for the defense of Congress and the War Department.¹⁴⁴

It was not until the election of Union General Ulysses S. Grant to the presidency in 1868—solidifying the Radicals' hold on the federal government—that the political ardor of Civil War veterans' groups began to cool, as they felt they had finally achieved a fully favorable government.¹⁴⁵ In fact, Grant joined the GAR, and was the first of five American presidents who were also fellow members.¹⁴⁶

LESSON 7: Readjustment to civilian life is an acute need for every generation of veterans that should not be overlooked. The degree to which the acute needs of demobilizing veterans are met has a strong influence on the development of veterans' political consciousness. Although the long-term needs of veterans often dominate the landscape of veterans' law, one can rely upon every new conflict to thrust the readjustment issue once again into the foreground.

C. The Fall of Claims Agents

The development of veterans' law is not just about veterans and their dependents. Just as the land benefits provided to pre-Civil War veterans had attracted agents, speculators, and profiteers,¹⁴⁷ the ever-increasing monetary benefits provided to Civil War veterans attracted opportunists who in turn helped to shape the system that supported them. The effects of claims agents were three-fold.

¹⁴³ *Id.* at 135-39.

¹⁴⁴ *Id.* at 136-47.

¹⁴⁵ SEVERO & MILFORD, *supra* note 20, at 157.

¹⁴⁶ *See id.*; *see also* ARNIE BERNSTEIN, *THE HOOF AND GUNS OF THE STORM: CHICAGO'S CIVIL WAR CONNECTIONS* 92 (2003); DEARING, *supra* note 106, at 122-23.

¹⁴⁷ *See supra* notes 104-05 and accompanying text.

First, claims agents undermined the integrity of the system and public faith in it. Unable to profit by dealing in land speculation,¹⁴⁸ many agents turned to outright fraud. Some agents were caught arranging “three-way conspiracies,” in which they worked with corrupt doctors to coordinate the filing of fraudulent claims.¹⁴⁹ In another instance, an agent succeeded in placing personnel as employees with the Pension Bureau so they could automatically grant any claim by the agent without scrutiny.¹⁵⁰ In 1872, the Secretary of the Interior estimated that a quarter of all pension payments were based upon fraudulent claims.¹⁵¹ In 1879, the Commissioner of Pensions declared that the system was not only “cumbersome and expensive” but also rife with fraud.¹⁵² In 1881, he estimated that not less than ten percent of pension expenditures were still being paid to fraudulent claims.¹⁵³

The claims agents did not take such attacks on their profession meekly. The severe criticism by Republican Commissioner John A. Bentley led the major veterans’ claims attorneys to orchestrate an investigation of the Pension Office by the Democratic House of Representatives in 1880.¹⁵⁴ The hearings were confrontational and contrasted the attorneys’ claims of delay, arbitrariness, and insufficient processing clerks against the Commissioner’s complaints that claims agents operated “machines” for soliciting and submitting large volumes of claims from across the country with no concern for the quality of the evidence presented.¹⁵⁵ The result of the hearings was a recommendation that an independent specialized court or board of appeals be created to review decisions of the Commissioner.¹⁵⁶

¹⁴⁸ See *supra* notes 106-08 and accompanying text.

¹⁴⁹ DEARING, *supra* note 106, at 199.

¹⁵⁰ GLASSON, *supra* note 21, at 198-99.

¹⁵¹ DEARING, *supra* note 106, at 199.

¹⁵² GLASSON, *supra* note 21, at 175-76 (quoting *Report of the Commissioner of Pensions* for 1879).

¹⁵³ *Id.* at 176.

¹⁵⁴ *Id.* at 178-79.

¹⁵⁵ *Id.* at 179.

¹⁵⁶ *Id.* at 180.

Although the appeals process recommended by the hearing did not materialize, these reports and hearings led to a popular backlash against agents. As a result, “there were more than a few [members of the public] who, in short order, ranked lawyers a wee mite lower than horse thieves and bounty jumpers.”¹⁵⁷ Moreover, in 1879 when legislation was pending to make all Civil War pensions retroactive to the date of a veteran’s separation from service, one leading newspaper predicted that it would lead to “a grand scramble by a horde of hungry claims agents to get their hands upon vast unearned portions of the national treasury.”¹⁵⁸ This perception would continue into the twentieth century.¹⁵⁹

The second effect of claims agents was their lobbying for increased benefits. Perhaps the most influential single person in the development of veterans’ law in the post-Civil War era was George Lemon, a lawyer and claims agent.¹⁶⁰ In 1877, he established the *National Tribune*, a newspaper dedicated to advancing veterans’ issues, advocating benefits legislation, and promoting Lemon as an agent.¹⁶¹ The *National Tribune* quickly became the official newspaper of the GAR.¹⁶² As a result, Lemon’s constant advocacy of ever-more generous pension laws found a wide audience, and helped fuel the tremendous expansion of Civil War pension laws in the latter part of the nineteenth century.¹⁶³

¹⁵⁷ SEVERO & MILFORD, *supra* note 20, at 170.

¹⁵⁸ *Id.* (internal quotation marks omitted). In fact, the number of applications filed at the Pension Bureau tripled in the year after the Act’s passage. LIBRARY OF CONG., *supra* note 19, at 54.

¹⁵⁹ GLASSON, *supra* note 21, at vii-viii.

As is usual under all governments when money is to be paid out to numerous individuals in the community, a class of people fastened themselves as parasites on the beneficiaries. The pension claim agent appeared early on the scene. Under pretense of assisting prospective pensioners, he soon reached a stage where he absorbed a large part of the benefit of the country’s generosity. He was in very truth a blood-sucker on the pensioner, although posing as his friend.

Id.

¹⁶⁰ DEARING, *supra* note 106, at 268.

¹⁶¹ *Id.*

¹⁶² SEVERO & MILFORD, *supra* note 20, at 172. The Grand Army of the Republic (GAR) also prospered from this partnership. Shortly after the newspaper was founded, GAR membership stood at 61,000 in 1881. *Id.* Four years later, it had exploded to 270,000. *Id.* at 174-75.

¹⁶³ See *infra* Part II.E.

This development also did not go unobserved. Only a year after the *National Tribune* was founded, the Commissioner of Pensions devoted the bulk of his annual report to Congress in 1878 to detailing the methods by which claims agents drummed up business, including publishing advertisements in the form of faux newspapers complete with columns and editorials to play on veterans' anxieties and encourage the expansion of pension laws.¹⁶⁴

The result of these first two developments was the third—and longest surviving—change in veterans' law brought about by the claims agents. The complaints against attorneys emerged shortly after the Civil War began, and, in 1862, Congress reacted to the public sentiment against claims agents by passing a law limiting the fee that could be charged by an agent to five dollars.¹⁶⁵ This restriction—which still exists in part today¹⁶⁶—sought to control claims instigation by profit-seeking agents and attorneys.

Despite the intent of Congress, the law failed to drain the swamp. If anything, the change may have promoted consolidation in the industry by putting a premium on efficiently handling large volumes of claims.¹⁶⁷ Lemon ran a massive claims adjudication enterprise, and, in 1884, succeeded in advancing legislation to raise the fee limit from ten to twenty-five dollars.¹⁶⁸ In fact, Lemon

¹⁶⁴ GLASSON, *supra* note 21, at 149-50.

¹⁶⁵ Act of July 14, 1862, ch. 166, § 6, 12 Stat. 566, 568. Two years later the amount was raised to ten dollars. Act of July 4, 1864, ch. 247, § 12, 13 Stat. 387, 389.

¹⁶⁶ When the CAVC was established in 1988, the law allowed attorneys to be compensated for work before the CAVC and to continue paid representation if the matter were remanded. 38 U.S.C. § 5904(c) (1994). Recently, Congress liberalized the law to allow attorneys to be compensated for assisting with administrative appeals within VA. See Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, § 101, 120 Stat. 3403, 3406. However, a claimant still may not pay an attorney to assist during the initial adjudication process. 38 U.S.C. § 5904(c)(1) (2006).

¹⁶⁷ See SEVERO & MILFORD, *supra* note 20, at 171. One observer in 1880 estimated that about eighty-five percent of all pending pension claims filed were controlled by fewer than one hundred lawyers. *Id.*

¹⁶⁸ DEARING, *supra* note 106, at 287. Lemon's influence on the system may also have had a nefarious side. In 1890, Pension Commissioner Green B. Raum was accused of having an inappropriate financial relationship with Lemon. SEVERO & MILFORD, *supra* note 20, at 182.

was able to use his advance knowledge of the legislative change he orchestrated to produce a massive profit by buying out a rival agency that was handling 40,000 claims just prior to the law's enactment.¹⁶⁹ Even so, that transaction provided just a fraction of the more than \$5 million Lemon profited from the change.¹⁷⁰ By 1887, the cost of the Arrears Act¹⁷¹ prompted Commissioner Bentley to lock horns with the claims agents again over additional reform efforts.¹⁷² Nonetheless, the passage of time, inflation, and the rise of new veterans' groups after World War I would eventually displace lawyers for an extended period from any significant presence in the veterans' benefits system due to the fee limitation.¹⁷³

LESSON 8: Large amounts of money will always attract interest. Such interest may or may not be viewed positively by veterans and the public. The historic limits on representation for veterans were based upon the (not unfounded) perception that representatives took much more from the system than they earned. As a result, anyone concerned with veterans' law must also be concerned with transaction costs and the degree to which funds actually reach beneficiaries.

D. The Splendid Isolation Revisited

Although the splendid isolation of veterans' benefits outside the realm of judicial review continued through the nineteenth century, it did not go unchallenged. In 1840, the Supreme Court ruled that federal courts could not use their mandamus power to compel the Commissioner of Pensions to pay claims.¹⁷⁴ Subsequently, the United States Court of Claims (Court of Claims) was established in 1855 to hear "all claims founded upon any law

¹⁶⁹ DEARING, *supra* note 106, at 287.

¹⁷⁰ *Id.*

¹⁷¹ See *infra* note 202 and accompanying text.

¹⁷² DEARING, *supra* note 106, at 250.

¹⁷³ See *infra* notes 530-34 and accompanying text.

¹⁷⁴ *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497, 516-17 (1840).

of Congress, or upon any regulation of an executive department.”¹⁷⁵ After the Civil War, a handful of veterans began pressing their claims in the new court.¹⁷⁶ At first, it appeared that the Court of Claims would entertain at least some types of veterans’ claims.¹⁷⁷

However, access to this court was short lived. In 1881, a widow attempted to press her survivor’s claim at the court.¹⁷⁸ She believed that her husband’s death was related to a disease he had contracted in service, but the Commissioner of Pensions denied the claim.¹⁷⁹ The Court of Claims concluded that it had no jurisdiction to review the matter, as veterans’ benefits were “a mere gratuity proffered by the government, imposing no legal obligation upon the government.”¹⁸⁰ It ruled that “[n]o right to a pension is fixed until [the Commissioner of Pensions] declare[s] it so,” and that “there is no appeal from that decision, except to Congress.”¹⁸¹

A year later, the Supreme Court affirmed the essential logic of this holding in an unrelated case, *United States ex rel. Burnett v. Teller*.¹⁸² The petitioner, Ward Burnett, was a Veteran who had succeeded in 1879 in obtaining a special pension from Congress in excess of the normal amount awarded.¹⁸³ However, Congress subsequently increased the monthly pension rate above what had been awarded to the Veteran.¹⁸⁴ Burnett applied for the higher rate,

¹⁷⁵ An Act to Establish a Court for the Investigation of Claims Against the United States, ch. 122, § 1, 10 Stat. 612 (1855).

¹⁷⁶ LIBRARY OF CONG., *supra* note 19, at 52 (stating that the United States Court of Claims (Court of Claims) decided eight claims involving veterans’ benefits).

¹⁷⁷ In *Mays v. United States*, 4 Ct. Cl. 218, 218-19 (1868), *rev’d sub nom. United States v. Alexander*, 79 U.S. (12 Wall.) 177 (1870), the Court of Claims granted a Revolutionary War widow’s claim that she was entitled to more money than the amount calculated by the Bureau of Pensions. Although the Supreme Court rejected the Court of Claim’s interpretation of the law, it did not question its jurisdiction. *Alexander*, 79 U.S. at 178-79.

¹⁷⁸ *Daily v. United States*, 17 Ct. Cl. 144 (1881).

¹⁷⁹ *Id.* at 146.

¹⁸⁰ *Id.* at 148.

¹⁸¹ *Id.*

¹⁸² 107 U.S. 64 (1883).

¹⁸³ *Id.* at 64-65.

¹⁸⁴ *Id.*

and for three years received both his special award and a general pension payment, until he voluntarily returned his special pension certificate out of fear that it might cause him to be deprived of the new, general pension.¹⁸⁵ However, he subsequently changed his mind and demanded that the certificate be returned, which the Secretary of the Interior refused to do.¹⁸⁶

The Supreme Court refused to issue a writ of mandamus.¹⁸⁷ However, instead of narrowly holding that the Veteran had no right to collect two simultaneous pensions, it concluded that “[n]o pensioner has a vested legal right to his pension. Pensions are the bounties of the government, which [C]ongress has the right to give, withhold, distribute, or recall, at its discretion.”¹⁸⁸

The Supreme Court’s characterization of pensions as gratuities was not without justification. As noted above, Congress had abolished the pension rolls in 1820.¹⁸⁹ Moreover, Congress was deeply involved in the pension system. In 1880, the Bureau of Pensions received 40,000 inquiries from Congress regarding the status of pension claims.¹⁹⁰ Not only were inquiries common, the petitioner in *Burnett* was not exceptional in receiving a pension by special action. The tradition of private bills in Congress to add disappointed claimants to the pension rolls continued through the post-Civil War era. For example, during the first session of the forty-ninth Congress, 4,500 special pension acts were introduced in Congress.¹⁹¹ In the late 1880s, Grover Cleveland signed 1,453 such bills passed by Congress.¹⁹²

¹⁸⁵ *Id.* at 65.

¹⁸⁶ *Id.* at 65-66.

¹⁸⁷ *Id.* at 68.

¹⁸⁸ *Id.* (citing *Walton v. Cotton*, 60 U.S. (19 How.) 355 (1856)).

¹⁸⁹ See *supra* notes 83-84 and accompanying text.

¹⁹⁰ LIBRARY OF CONG., *supra* note 19, at 54.

¹⁹¹ *Id.* at 55. During that Congress, such acts constituted forty percent of legislation introduced in the House and fifty-five percent of legislation introduced in the Senate. *Id.*

¹⁹² SEVERO & MILFORD, *supra* note 20, at 175. Even this was not sufficient to endear the Democrat to veteran voters, who were a major force in Grover Cleveland’s defeat in 1888 after he vetoed a bill to extend pension benefits to all disabled veterans, regardless of the cause of their disability. *Id.*

Perhaps more importantly, the system had been tainted by allegations of widespread political manipulation. There were allegations that the Commissioner granted numerous claims from Ohio and Indiana in October 1880 in an effort to sway the presidential election.¹⁹³ Even more-pervasive manipulation of the pension system was alleged in the wake of the 1884 election.¹⁹⁴ Legions of “special examiners” operating throughout the country had been converted into a political machine to sway the vote.¹⁹⁵ As a result, the Pension Office had to be purged by newly appointed Commissioner John C. Black in 1885.¹⁹⁶ Therefore, veterans’ benefits in the late-nineteenth century resembled a political patronage system as much as they did a public benefit system.¹⁹⁷

LESSON 9: The entitlement model of veterans’ benefits is a recent invention. For much of the nation’s history, veterans’ benefits existed in a complicated grey area in which they had a strong political element focused on swaying veterans’ votes rather than providing for veterans’ needs. As a result, courts were loathe to tread into an area with such deep political undertones.

E. Power and Excess

During most of Ulysses S. Grant’s presidency, the GAR declined to vigorously support major veterans’ benefits legislation, and devoted significant efforts to sponsoring charitable events to burnish its image as a non-partisan group.¹⁹⁸ In 1875, a \$30 million benefits bill was passed after widespread Democratic victories frightened a previously complacent Congress into responding to

¹⁹³ GLASSON, *supra* note 21, at 180.

¹⁹⁴ *Id.* at 197. In particular, Colonel W.W. Dudley, the head of the Pension Bureau spent two months in Ohio with a staff of clerks and examiners not only campaigning for Republicans, but specifically working to defeat William Warner, the Democratic chairman of the House Committee on Pensions, Bounty, and Back Pay, who had resisted some demands of the GAR. SEVERO & MILFORD, *supra* note 20, at 174.

¹⁹⁵ GLASSON, *supra* note 21, at 198-99.

¹⁹⁶ *Id.*

¹⁹⁷ LIBRARY OF CONG., *supra* note 19, at 59-62.

¹⁹⁸ DEARING, *supra* note 106, at 208-13.

veterans' growing demands.¹⁹⁹ In the run up to the 1880 elections, both parties had concluded that they needed to court the veteran vote.²⁰⁰ By 1880, Democrats had developed a significant presence in the GAR and were even winning some local leadership elections.²⁰¹ The competition between the parties manifested in the passage of an "arrears" bill supported by claims agents. The Arrears Act made all pensions effective as of the date of the soldier's discharge rather than the date of application, and paid current pensioners the difference in a lump sum.²⁰² The net result was a huge influx of new claims, many of dubious merit.²⁰³ By 1885, the Act had already cost \$179 million.²⁰⁴

The competition between the parties to meet the demands fanned by the agents coincided with the maturing of the GAR. In 1882, the organization began to flex its political muscle, resulting in 1,200 additional clerks being authorized for the Pension Bureau, in order to handle the backlog of 275,000 new pension claims and almost 80,000 petitions to reopen rejected claims with "material new evidence."²⁰⁵ The GAR also spurred the construction of the first building solely dedicated to the administration of veterans' pensions.²⁰⁶ The GAR fully came into its own in 1883 when it created its permanent five-member Committee on Pensions to lobby Congress on veterans' issues.²⁰⁷

¹⁹⁹ *Id.* at 219. One academic analysis estimated that as of 1875 only forty-three percent of Union veterans who were injured during the Civil War and only twenty-five percent of survivors had applied for benefits. SKOCPOL, *supra* note 125, at 108-09.

²⁰⁰ DEARING, *supra* note 106, at 243.

²⁰¹ *Id.* at 244-45.

²⁰² *Id.* at 248. The actual passage was the unintended result of a game of chicken between the Democratic House and the Republican Senate, in which both sides expected the other to defeat the legislation because of its budget-busting cost. *See id.* at 248-49.

²⁰³ *Id.* at 249.

²⁰⁴ *Id.*

²⁰⁵ GLASSON, *supra* note 21, at 181-82. Before the increase, "the bureau's workforce had consisted of 741 overworked clerks, servicing a pension roll of 285,697." LIBRARY OF CONG., *supra* note 19, at 59.

²⁰⁶ SEVERO & MILFORD, *supra* note 20, at 172-74. That building was used until 1926 and still stands in Washington, D.C. as the National Building Museum, just three blocks from the CAVC. LINDA BRODY LYONS, BUILDING A LANDMARK: A GUIDE TO THE HISTORIC HOME OF THE NATIONAL BUILDING MUSEUM 11 (3d ed. 1999).

²⁰⁷ GLASSON, *supra* note 21, at 186.

Once fully engaged, the political activities of the GAR were not limited to direct advocacy of additional pension benefits. Veterans opposed the Pendleton Act of 1883, enacted to reform federal hiring, because veterans viewed civil service qualification exams as a threat to their employment preferences.²⁰⁸ They also opposed tariff reform on the grounds that reducing protectionism would deprive the government of the income needed to expand benefits.²⁰⁹

By 1882, the general press had turned against further expansion of veterans' benefits.²¹⁰ Nonetheless, a decade after the Arrears Act, the Disability Pension Act of 1890 further liberalized pensions by eliminating the requirement that the claimant's disability be related to service.²¹¹ The GAR Pension Committee characterized it as calculated to place upon the pension rolls "all of the survivors of the [Civil War] whose conditions of health are not practically perfect."²¹² That same year, the Pension Bureau was turned over to James Tanner, commander of the GAR's New York Department and a Veteran who had lost both legs in the Civil War.²¹³ In that year, the cost of veterans' pensions already exceeded the entire German military budget.²¹⁴ Nonetheless, Tanner quickly promised to "drive a six-mule team through the Treasury."²¹⁵ Tanner began a program of *sua sponte* reviewing and re-rating pension applications.²¹⁶ He was even so bold as to review the pension of a sitting U.S. Senator without application; he sent him a check for \$4,300 — more than twice the annual salary

²⁰⁸ DEARING, *supra* note 106, at 284.

²⁰⁹ *Id.* at 287.

²¹⁰ *Id.* at 286.

²¹¹ SKOCPOL, *supra* note 125, at 110-11; SEVERO & MILFORD, *supra* note 20, at 182-83.

²¹² GLASSON, *supra* note 21, at 237 (internal quotation marks omitted). It also set the attorney fee limit to ten dollars per claim. *Id.* at 235.

²¹³ SEVERO & MILFORD, *supra* note 20, at 176-77.

²¹⁴ *Id.* at 179.

²¹⁵ *Id.* at 178; GLASSON, *supra* note 21, at 226.

²¹⁶ GLASSON, *supra* note 21, at 227. "Rating" a claim refers to determining the severity of a veteran's disability and, thus, the level of compensation paid.

of a pension examiner.²¹⁷ Although the Secretary of the Interior eventually intervened,²¹⁸ in just a few months the program brought condemnation upon both the Pension Bureau and the GAR, before resulting in the resignation of Tanner and several other employees.²¹⁹ Even after Tanner's removal, the system continued to swell. By 1891, the Bureau of Pensions had grown to 6,241 employees, and by 1900 the pension rolls had exploded to nearly a million veterans and dependants.²²⁰

The turn of the new century saw the GAR battling against the Pension Bureau's fiscally reserved interpretations of the highly liberal laws.²²¹ Regardless of the battles over fine points of interpretation, the GAR succeeded in 1906 in passing legislation that allowed old age to substitute for the disability requirement.²²² "As a result, . . . of the 429,354 Civil War veterans on pension rolls in 1914, only 52,572 qualified on grounds of disability."²²³ Furthermore, the GAR succeeded in gaining increases in the pension rates for nearly 450,000 veterans in 1907 and 1908.²²⁴ Thus, despite their readjustment woes, Civil War veterans and their dependants ultimately enjoyed an extraordinarily generous pension program due to their tremendous political influence.

²¹⁷ *Id.* at 227 n.2.

²¹⁸ *Id.* at 227.

²¹⁹ SEVERO & MILFORD, *supra* note 20, at 181-82; GLASSON, *supra* note 21, at 228. In fairness to Tanner, he was never accused of corruption as were many other holders of that office. SEVERO & MILFORD, *supra* note 20, at 181-82. Rather, one newspaper characterized him as someone who could not "understand that the party's promises in its platforms and on the stump are not at all which the party intends to carry out." *Id.* at 182 (internal quotation marks omitted).

²²⁰ LIBRARY OF CONG., *supra* note 19, at 59. One New York chapter of the GAR thought the national organization was going too far, and had its charter annulled after passing a series of resolutions condemning the excessive benefits advocated. SEVERO & MILFORD, *supra* note 20, at 185.

²²¹ GLASSON, *supra* note 21, at 244-49.

²²² SKOCPOL, *supra* note 125, at 111.

²²³ DEP'T OF VETERANS AFFAIRS, VA HISTORY IN BRIEF 6, http://www1.va.gov/opa/publications/archives/docs/history_in_brief.pdf [hereinafter VA HISTORY IN BRIEF].

²²⁴ GLASSON, *supra* note 21, at 250-51.

LESSON 10: The level of veterans' benefits at any given time is correlated to the political power of veterans within the electorate. Historical highs and lows frequently have less to do with policy and doctrine than with simple political influence. Accordingly, any veterans' program must be understood by first looking at the political environment in which it was created.

III. WORLD WAR I: THE PENDULUM SWINGS

Just as the unsatisfactory resolution of World War I led to another world war a generation later, the disastrous treatment of World War I veterans in America led directly to a reinvention of veterans' benefits for the succeeding generation. Together, the two wars represent the greatest disaster and the greatest triumph in the history of veterans' benefits in America.

A. Excessive Cost and the Collapse of Public Support

World War I produced 4.7 million veterans at a time when the nation's population was just over 100 million.²²⁵ Not only were World War I veterans a smaller portion of the population than Civil War veterans,²²⁶ but their voting strength was considerably diluted by the passage of the Twentieth Amendment in 1920 allowing women to vote in the first post-war, national elections.²²⁷

More importantly, by the time of World War I, the massive burden of Civil War veterans' benefits, combined with a poor record of administration, had again turned public sentiment against veterans' benefits.²²⁸ In the late nineteenth century, veterans' benefits consumed between thirty and forty percent of the federal

²²⁵ VA HISTORY IN BRIEF, *supra* note 223, at 7; U.S. Census Bureau, Historical National Population Estimates: July 1, 1900 to July 1, 1999 (2000), <http://www.census.gov/popest/archives/1990s/popclockest.txt>.

²²⁶ See *supra* note 124 and accompanying text.

²²⁷ U.S. CONST. amend. XIX.

²²⁸ ALTSCHULER & BLUMIN, *supra* note 46, at 23.

budget.²²⁹ As a result of the relentless efforts of the GAR, Civil War pension costs did not peak until 1913, forty-eight years after the end of the war.²³⁰ Notably, 1913 was also the year in which the Sixteenth Amendment passed, authorizing the federal government to impose an income tax to raise revenue.²³¹

A leading academic authority, William H. Glasson, described the situation in dire terms. Decrying the political pandering to veterans and the loss of moral and patriotic character to pensions he wrote:

The moral degeneration caused in time by the changing view of the true character of pensions led also to the evil of extending them to men whose service was brief and resulted in no injury to them. Moreover, pensions were taken without compunction by some men who, while technically entitled to them, had other means of adequate support and, indeed, were sometimes rich; to say nothing of young widows of old soldiers. For such people to take pensions is to throw a shadow of graft on the whole system.

As a result of these and other evil influences, the pension administration, and indeed the whole pension system, became gradually discredited. Nobody begrudged the deserving pensioner his pittance from

²²⁹ Compare MICHAEL J. BENNETT, *WHEN DREAMS CAME TRUE: THE GI BILL AND THE MAKING OF MODERN AMERICA* 40-41 (1996) (indicating that by the end of 1893, veterans were receiving \$150 million in pension benefits, while the federal budget was \$385.6 million), with HUMES, *supra* note 40, at 13 (noting that veterans' pensions absorbed 40 percent of the federal budget).

²³⁰ GLASSON, *supra* note 21, at 123. One hundred and forty five years after the end of the war, the federal government is still paying Civil War benefits. In 2010, there are still two surviving dependants of Civil War veterans collecting benefits. Eric K. Shinseki, Sec'y, Dep't of Veterans Affairs, Address at the Meeting of the Bar Association of the U.S. Court of Appeals for Veterans Claims 49 (Mar. 5, 2010) (transcript on file with author).

²³¹ U.S. CONST. amend. XVI.

the public treasury, but the developing rottenness of the system led the public at last to look with more or less suspicion on applications for pensions, even when they were meritorious.²³²

This sentiment led to a philosophical shift in the nation's view of veterans' benefits as expressed in the legislative nomenclature for the benefits for World War I veterans. Whereas prior legislation had generally referred to payments to veterans as "pensions," in 1919 Congress began using the word "compensation" instead.²³³ This change was a deliberate attempt to categorize benefits as an objective "indemnity for loss" rather than a subjective "gratuity."²³⁴ The legislation further restricted benefits by requiring (1) medical proof that a veteran's disability was related to service, (2) that the disability manifested within one year of service, and (3) that the claim be filed within five years of service.²³⁵

In addition to these limits on disability benefits, there was little support for readjustment benefits. Much like Civil War veterans, those returning from World War I faced serious readjustment issues. Rather than bounty equalization, veterans co-opted the compensation theory to justify readjustment payments. Salaries had skyrocketed for those who had not gone to war, as the sudden production demand combined with the artificial labor shortage to make wages rise.²³⁶ Returning veterans noticed

²³² GLASSON, *supra* note 21, at viii. Glasson had previously written HISTORY OF MILITARY PENSION LEGISLATION in 1900.

²³³ ROSS, *supra* note 117, at 21 (discussing Pub. L. No. 66-104 (1919)). In 1933, when the Economy Act gave Roosevelt the power to remake the veterans' benefits system, he discarded "compensation" and returned to the term "pension." *Id.* at 26. In the current statute, "compensation" refers to benefits for disabilities related to service, 38 U.S.C. ch. 11 (2006), while "pension" refers to benefits based upon disabilities that are not linked to service, 38 U.S.C. ch. 15.

²³⁴ ROSS, *supra* note 117, at 21.

²³⁵ *See id.* at 21 & n.52.

²³⁶ Compared to soldiers' pay of a dollar a day, government arsenal employees received six to twelve dollars a day. *Id.* at 12.

the opportunity cost of serving and demanded fairness. In 1919, veterans began lobbying for “bonus” payments for nearly three and a half million World War I veterans equal to the entire federal budget.²³⁷

Despite veterans’ claims for fairness, public support was lacking.²³⁸ Congress had some interest in appealing to the veterans’ vote. However, it took years to successfully pass bonus legislation. When it did pass, bonus payment legislation was vetoed by Warren Harding in 1922 and Calvin Coolidge in 1924.²³⁹ The bonus was finally enacted over Coolidge’s veto in 1924, when an unexpected budget surplus helped weaken congressional opposition.²⁴⁰ The law that passed nearly six years after the end of the war provided each veteran of World War I a bonus of a dollar for each day of service, plus an additional twenty-five cents for each day served overseas²⁴¹ — not an especially generous amount compared to the opportunity cost of service.²⁴² Even more disappointingly, any bonus over fifty dollars was not paid immediately, but rather with certificates that could not be redeemed until 1945.²⁴³ Accordingly, even the modest bonus that was eventually passed was non-existent in practice for most veterans.

²³⁷ PAUL C. LIGHT, *FORGING LEGISLATION* 5 (1992); see ROSS, *supra* note 117, at 13. “In 1919 alone, fifty-five bills were introduced in Congress to ‘adjust’ the rates of pay servicemen had received during the war up to the levels they might have received had they stayed at home and profited from the boom in wartime industry.” Rosemary Stevens, *Can the Government Govern? Lessons from the Formation of the Veterans Administration*, 16 J. HEALTH POL. POL’Y & L. 281, 291 (1991).

²³⁸ One manifestation of public indifference to World War I veterans was that no World War I veteran was elected president until Harry S. Truman narrowly squeaked out a victory as an incumbent after taking office upon Franklin Roosevelt’s death. DICKSON & ALLEN, *supra* note 12, at 268 n. *. Compare *supra* note 146 and accompanying text.

²³⁹ ROSS, *supra* note 117, at 14.

²⁴⁰ ALTSCHULER & BLUMIN, *supra* note 46, at 27; DICKSON & ALLEN, *supra* note 12, at 5; see generally Anne Alstott and Benjamin Novick, *War, Taxes, and Income Redistribution in the Twenties: the 1924 Veterans’ Bonus and the Defeat of the Mellon Plan* (Yale Law Sch. Pub. Law & Legal Theory Research Paper Series, Paper No. 109, 2006), available at http://papers.ssm.com/sol3/papers.cfm?abstract_id=877397 (providing a deeper analysis of the 1924 Bonus legislation and its relationship with the budget policy issues of the time).

²⁴¹ DICKSON & ALLEN, *supra* note 12, at 5.

²⁴² See *supra* note 236 and accompanying text.

²⁴³ DICKSON & ALLEN, *supra* note 12, at 5.

LESSON 11: Public support for veterans' benefits is undermined by the perception that benefits are not merited. Ultimately, future veterans will suffer if this perception takes root. Regardless, the most enduring legacy of the Civil War was the re-imagining of benefits as a form of compensation earned rather than a sign of generosity from a grateful nation.

B. The Rise of Veterans' Service Organizations and the Creation of VA

Just as readjustment issues galvanized veterans politically after the Civil War, they also helped drive the organization of veterans in the twentieth century. However, unlike the GAR—which was devoted exclusively to veterans of the Civil War—the veterans' organizations that developed after World War I were intended to be permanent organizations to represent veterans of all conflicts.²⁴⁴

The first of the major modern veterans groups, Veterans of Foreign Wars (VFW), was formed in 1913 by the merger of two Spanish-American War veterans groups.²⁴⁵ Disabled American Veterans (DAV) was founded shortly after World War I in 1920.²⁴⁶ However, due to more restrictive membership criteria, VFW and DAV both remained smaller than the American Legion.²⁴⁷ The American Legion was founded a few months after the end of World War I by soldiers stationed in Paris.²⁴⁸ One of the organization's distinguishing features was that it did not maintain a narrow focus on legislation affecting veterans' benefits. Rather, it promoted child welfare, "Americanism," and other broad causes.²⁴⁹ The American Legion also developed an expertise in advising claimants

²⁴⁴ ALTSCHULER & BLUMIN, *supra* note 46, at 37.

²⁴⁵ ROSS, *supra* note 117, at 11.

²⁴⁶ *Id.* at 12.

²⁴⁷ Together, the American Legion, Disabled American Veterans (DAV), and Veterans of Foreign Wars (VFW) comprise the "big three" of veterans' service organizations. LIGHT, *supra* note 237, at 5.

²⁴⁸ ROSS, *supra* note 117, at 7-9.

²⁴⁹ *Id.* at 11.

for benefits (regardless of membership) that gave it broad appeal among veterans.²⁵⁰ Despite the differences in their membership, they generally cooperated in presenting a veterans' agenda to Congress.²⁵¹ The groups unified around two basic principles: (1) increasing and broadening veterans' benefits, and (2) maintaining veteran status as a special political identity.²⁵²

Within a year of its founding, almost twenty percent of World War I veterans were members of the American Legion.²⁵³ With this size, it was able to flex its political muscle. One of its early successes was having monthly payments for totally disabled veterans raised from \$30 to \$80.²⁵⁴ It also quickly became a driving force behind the bonus legislation.²⁵⁵ Although this goal remained out of reach, the American Legion quickly became a political force with which to be reckoned. As one observer at the time concluded, "[t]he feeling is that opposing a Legion measure is like poking one's political head out of a train window. Maybe nothing would happen; but still it isn't wise."²⁵⁶

Although monetary benefits were difficult to pass, veterans' groups succeeded in achieving another top priority. One of the side effects of the historical development of veterans' law was that programs had been scattered across various agencies including the Pension Bureau, the Department of the Treasury, the Public Health

²⁵⁰ *Id.* at 10-11; WILLIAM PYRLE DILLINGHAM, *FEDERAL AID TO VETERANS 1917-1941*, at 6 (1952). There are currently fifty-four veterans' service organizations chartered by Congress to provide assistance to veterans in filing claims for benefits. *See* Dep't of Veterans Affairs, *Organizations Chartered by Congress and/or Recognized by VA for Claim Representation*, <http://www1.va.gov/vso/index.cfm?template=view>.

²⁵¹ ROSS, *supra* note 117, at 12.

²⁵² *Id.* at 42.

²⁵³ *Id.* at 9.

²⁵⁴ *Id.* at 20; DILLINGHAM, *supra* note 250, at 42.

²⁵⁵ LIGHT, *supra* note 237, at 5; *see* ROSS, *supra* note 117, at 13; DICKSON & ALLEN, *supra* note 12, at 4-5; SEVERO & MILFORD, *supra* note 20, at 265.

²⁵⁶ ROSS, *supra* note 117, at 10 (alteration in original) (quoting KNOWLTON DURHAM, *BILLIONS FOR VETERANS: AN ANALYSIS OF BONUS PROBLEMS – YESTERDAY, TODAY AND TOMORROW* 58 (1932)).

Service, and the Bureau of War Risk Insurance.²⁵⁷ As a result of having veterans' programs within these larger agencies, there was no guarantee that they would be a priority for any high-ranking official, and there were numerous resulting problems. Veterans' groups hoped to unify all veterans' programs within a single, autonomous entity in order to make them more efficient and responsive to political pressure from veterans.²⁵⁸

The immediate catalyst for unifying veterans' programs was the disastrously inefficient and inept vocational rehabilitation program for World War I veterans that required veterans to apply for eligibility with the Bureau of War Risk Insurance and then apply to the Federal Board of Vocational Education for approval for a specific training program.²⁵⁹ Pressure from veterans' groups led Congress to consolidate the Bureau of War Risk Insurance, Public Health Service, and the Federal Board of Vocational Education into the Veterans' Bureau in 1921.²⁶⁰ Unfortunately, "[t]he first director of the Veterans['] Bureau was [one] of the president's cronies, Charles R. Forbes, who soon became the focus of a major scandal."²⁶¹ During his two-year tenure, approximately one-quarter of the Veterans' Bureau's budget was stolen or wasted.²⁶² "[He] was indicted for bribery and fraud in the administration of the hospital program of the Veterans['] Bureau, and sent to prison at Leavenworth, Kansas."²⁶³

Fortunately, Forbes was succeeded by Brigadier General Frank T. Hines, who turned the Veterans' Bureau into an efficient and transparently honest organization.²⁶⁴ Hines served for twenty-two

²⁵⁷ DILLINGHAM, *supra* note 250, at 62.

²⁵⁸ ROSS, *supra* note 117, at 29.

²⁵⁹ *Id.* at 29-30.

²⁶⁰ VA HISTORY IN BRIEF, *supra* note 223, at 8; DILLINGHAM, *supra* note 250, at 43-44.

²⁶¹ Stevens, *supra* note 237, at 294; *see* VA HISTORY IN BRIEF, *supra* note 223, at 8.

²⁶² ROSS, *supra* note 117, at 30-31.

²⁶³ Stevens, *supra* note 237, at 295; *see* ROSS, *supra* note 117, at 31; VA HISTORY IN BRIEF, *supra* note 223, at 8.

²⁶⁴ ROSS, *supra* note 117, at 31.

years, and departed with a reputation as an extraordinarily hard-working, frugal, and trustworthy leader who succeeded in avoiding any public scandals that undermined public support for the system.²⁶⁵ This feat is even more exceptional when considered in the context of the growth of the Veterans' Bureau during his tenure: "[B]y the end of 1930, one-fifth of the federal budget was earmarked for veterans, whether disabled in combat or not, while one-third of all federal employees worked at the [Veterans Administration]," even though "veterans represented only 4 percent of the population."²⁶⁶

The consolidation of veterans' programs was completed in 1930. In that year, the Veterans Administration (VA) was created by uniting the Veterans' Bureau with the Bureau of Pensions and the National Homes for Disabled Volunteer Soldiers.²⁶⁷ Hines was appointed as the agency's first administrator.²⁶⁸

Another legacy of Hines was VA's reputation of neutrality. Although the veterans' system in the past had been used as both a tool of partisan politics and as an aggressive advocate of benefits expansion, Hines strictly avoided involvement in any legislative matters except those dealing directly with the administration of the system.²⁶⁹ Furthermore, he earned a sterling reputation as a nonpartisan "fact giver," who studiously avoided any opinion on what policies should flow from the information he provided.²⁷⁰ Thus, by the outbreak of World War II, the modern system had largely taken form, built on a foundation designed to combat the political vulnerabilities and criticisms exposed by the backlash against the expense of Civil War benefits.

²⁶⁵ See *id.* at 31-32.

²⁶⁶ LIGHT, *supra* note 237, at 4. "Expenditures for veterans rose 62 percent from 1924 to 1932, the result of increases in disability compensation and increases in pensions for veterans of the Civil War and the Spanish-American War." VA HISTORY IN BRIEF, *supra* note 223, at 8.

²⁶⁷ An Act to Authorize the President to Consolidate and Coordinate Governmental Activities Affecting War Veterans, Pub. L. No. 71-536, 46 Stat. 1016 (1930).

²⁶⁸ VA HISTORY IN BRIEF, *supra* note 223, at 12.

²⁶⁹ See ROSS, *supra* note 117, at 32-33.

²⁷⁰ *Id.*

LESSON 12: It is easy to recognize the interest of veterans' groups in expanding benefits for veterans. However, those unfamiliar with the system often overlook the corresponding commitment to defending veterans' status as a special political identity. Although veterans' groups may criticize VA,²⁷¹ it does not follow that they are not supportive of VA in principle. Observers from outside the system occasionally propose divorcing the veterans' benefits system from VA.²⁷² Yet these proposals have a very steep political climb because they do not address how such radical change can avoid threatening the modern political identity of veterans, which was built to protect their long-term interests.

C. The Bonus Army

Once the Great Depression set in, the veterans' bonus passed in 1924 became known as "the Tombstone Bonus" because the only way to collect it immediately was to die.²⁷³ Desperate veterans demanded that the bonus be paid immediately; however, they faced public opposition to any measure that threatened increased taxes during the Depression.²⁷⁴ Eventually Congress overrode President Hoover's veto²⁷⁵ to enact a compromise that allowed veterans to borrow against half the value of the bonus certificates, but this measure was not satisfactory.²⁷⁶

²⁷¹ See, e.g., PARALYZED VETERANS OF AM. ET AL., THE INDEPENDENT BUDGET FOR THE DEPARTMENT OF VETERANS AFFAIRS FISCAL YEAR 2011, at 39 (2010), available at <http://www.independentbudget.org/>.

²⁷² See, e.g., Robin J. Arzt, *What Veterans with Disability Claims Would Gain from Administrative Procedure Act Adjudications*, 49 FED. LAW. 60 (2002); James T. O'Reilly, *Burying Caesar: Replacement of the Veterans Appeals Process is Needed to Provide Fairness to Claimants*, 53 ADMIN. L. REV. 223 (2001).

²⁷³ DICKSON & ALLEN, *supra* note 12, at 30.

²⁷⁴ DILLINGHAM, *supra* note 250, at 55.

²⁷⁵ Hoover wrote in his memoirs that he felt the need to protect the country from "professional money-hunting veterans." Ross, *supra* note 117, at 24 (internal quotation marks omitted).

²⁷⁶ SEVERO & MILFORD, *supra* note 20, at 265-66. An earlier bill never made it out of committee. DICKSON & ALLEN, *supra* note 12, at 5.

Finally, in May 1932, a destitute Veteran living in Oregon named Walter W. Waters decided to lead a march to Washington, D.C., to press the case for immediate bonus payments.²⁷⁷ Word of Waters's march spread quickly and when his growing contingent arrived in the nation's capitol on May 29 after eighteen days of travel—much of it in railroad cattle cars—the protestors found more than a thousand other veterans already encamped in the city.²⁷⁸ Over the next two months, the number of veterans encamped in Washington would swell to somewhere between 15,000 and 40,000.²⁷⁹ “They camped wherever they could. Some slept in abandoned buildings or erected tents. But many lived in makeshift shacks along the mudflats of the Anacostia River. With no sanitation facilities, living conditions quickly deteriorated in the ‘shanty town.’”²⁸⁰ Although the House responded to the mass of veteran protestors with legislation to meet their demands, the Senate refused to pass the bill.²⁸¹

On July 28, 1932, the District of Columbia's Commissioners ordered the evacuation of the abandoned federal buildings on Pennsylvania Avenue that had been occupied by bonus marchers.²⁸² The order led to a confrontation in which two veterans were killed and a police officer was seriously injured.²⁸³ The panicked commissioners ignored the advice of the head of police²⁸⁴ to avoid escalation, and called upon President Hoover to

²⁷⁷ DICKSON & ALLEN, *supra* note 12, at 5; SEVERO & MILFORD, *supra* note 20, at 266-68.

²⁷⁸ SEVERO & MILFORD, *supra* note 20, at 268.

²⁷⁹ *Id.* at 269 (“from 25,000 to 40,000”); VA HISTORY IN BRIEF, *supra* note 223, at 9 (“between 15,000 and 40,000”); Ross, *supra* note 117, at 16 (“approximately 20,000”). A later VA survey concluded that ninety-four percent of bonus marchers were actually veterans, sixty-seven percent had served overseas, and twenty percent had been disabled in service. SEVERO & MILFORD, *supra* note 20, at 275.

²⁸⁰ VA HISTORY IN BRIEF, *supra* note 223, at 9. Although the veterans were angry and homeless, they remained disciplined. The shanty town “set up its own police force and attempted to follow military procedures.” Ross, *supra* note 117, at 16.

²⁸¹ Ross, *supra* note 117, at 16.

²⁸² *Id.* at 16-17.

²⁸³ *Id.*

²⁸⁴ Police Chief Pelham Glassford was a West Point graduate and a retired brigadier general. SEVERO & MILFORD, *supra* note 20, at 269. It was largely due to his sympathies

send in the Army.²⁸⁵ Hoover had been preparing for such an event, and immediately dispatched “four companies each of infantry and cavalry, a mounted machine gun squadron, and six tanks” to quell the riot.²⁸⁶ The Army units, led by Army Chief of Staff Douglas MacArthur and his aides Majors Dwight Eisenhower and George Patton, did not stop at clearing the federal buildings, but instead deployed tear gas and moved into the shanty town, which was quickly set ablaze.²⁸⁷ Before dawn, the veterans had been forced out of the city.²⁸⁸

Although the bonus army was evicted from Washington, D.C., empty handed, “[t]he image of the desperate veterans being driven from their shanties at bayonet point and of families fleeing burning hovels as their American flags were consumed in flames haunted Hoover for the rest of his disastrous presidency.”²⁸⁹ The day after the debacle, Franklin Roosevelt told his aides that Hoover had just handed him the election.²⁹⁰ He was quickly proven correct.²⁹¹

LESSON 13: The modern veterans’ service organizations were established in an era when veterans were very publically and dramatically frustrated in their efforts to obtain redress of their grievances. Although the Bonus Army debacle may be the most

for his fellow veterans that the bonus army was able to establish the shanty town without police interference. *Id.* In fact, he raised money for the veterans and became the de facto treasurer of the encampment. *Id.* at 270.

²⁸⁵ Ross, *supra* note 117, at 17.

²⁸⁶ *Id.*

²⁸⁷ HUMES, *supra* note 40, at 16-17; DICKSON & ALLEN, *supra* note 12, at 6.

²⁸⁸ SEVERO & MILFORD, *supra* note 20, at 275.

²⁸⁹ HUMES, *supra* note 40, at 17.

²⁹⁰ *Id.*; Franklin Roosevelt also remarked that Douglas MacArthur was the most dangerous man in America. JEAN EDWARD SMITH, FDR 285 (paperback ed. 2008) (quoting FDR as saying, “There’s a potential Mussolini for you. Right here at home.”).

²⁹¹ Ultimately, Roosevelt became the fourth president to veto legislation providing for early payment of the promised bonus. Ross, *supra* note 117, at 19. When he first vetoed such a bill in 1935, it was the first time in history that an American president traveled to Congress to deliver his veto message in person. *Id.* at 18. A year later, his second veto was overridden, and the bonus was finally paid. *Id.* at 19.

dramatic instance of Congress denying the demands of veterans, it is far from the only such instance. As a result, there are very powerful historical reasons that motivate veterans' groups to be demanding and constantly vigilant in pushing their agendas. To understand the actions of these groups, it is important to look not just at what veterans have and what they demand, but also at what they fear might happen if veterans allow Congress to become complacent about meeting their needs.

D. The Economy Act and the Making of the Modern System

Once elected, President Roosevelt quickly used his popular mandate to transform the VA system. One of the many pieces of New Deal legislation passed during Roosevelt's legendary first hundred days was the Economy Act of 1933.²⁹² The Act repealed most of the existing patchwork of veterans' benefits laws and gave Roosevelt the power to create a new system from scratch by executive order.²⁹³ During the two years that Roosevelt was authorized to reinvent the system, a total of forty-one executive orders were issued.²⁹⁴ However, the exact authorship of the ensuing regulations promulgated by executive order remains unknown.²⁹⁵ VA Director Hines and Budget Director Lewis Douglas were certainly involved, but some of the consequences of the original language suggest that the drafter did not understand the system sufficiently to appreciate the severity of many of the benefit cuts resulting from the new regulations.²⁹⁶

Significantly, Section 5 of the Economy Act explicitly prohibited judicial review of veterans' benefits decisions.²⁹⁷ As a result, even as the New Deal ethos undermined the "gratuity"

²⁹² Pub. L. No. 73-2, 48 Stat. 8.

²⁹³ DILLINGHAM, *supra* note 250, at 38, 74-75.

²⁹⁴ *Id.* at 79.

²⁹⁵ *Id.* at 76.

²⁹⁶ *Id.*

²⁹⁷ Pub. L. No. 73-2, § 5, 48 Stat. at 9.

reasoning of the Supreme Court's *Burnett* decision,²⁹⁸ it perpetuated the isolation of the VA benefits system.²⁹⁹ The reason Roosevelt inserted Section 5 into the Economy Act quickly became apparent. He promptly used the broad powers granted to him by the Act to slash benefits for veterans,³⁰⁰ freeing money to pay for his New Deal.³⁰¹

However, Congress—fearing backlash at the polls from angry veterans—quickly passed legislation to mitigate many of the reductions related to service-connected benefits.³⁰² Undaunted, Roosevelt attempted to appeal directly to veterans by going to the American Legion's annual convention in October 1933 and arguing to them “[t]hat no person, because he wore a uniform, must thereafter be placed in a special class of beneficiaries over and above all other citizens.”³⁰³ His appeal failed and, five months

²⁹⁸ See *supra* notes 182-88 and accompanying text. Even before the New Deal, the Supreme Court suggested in *Silberschein v. United States*, 266 U.S. 221 (1924), that there might be room for judicial review of benefits decisions when “the decision is wholly unsupported by the evidence, or is wholly dependent upon a question of law or is seen to be clearly arbitrary or capricious.” *Id.* at 225. The petitioner in *Silberschein* argued that his benefits could not be discontinued after a reevaluation of his case, when it was undisputed that his condition had not improved from the time of the original award. *Id.* at 224. The Supreme Court declined to address the government's arguments that pensions were merely a gratuity and that the controlling statute barred judicial review, and affirmed the termination of the pension based upon the newly articulated standard. *Id.* at 225.

²⁹⁹ Shortly after the passage of the Economy Act, the Supreme Court reaffirmed the “gratuity” status of veterans' benefits. *Lynch v. United States*, 292 U.S. 571, 577 (1934). Moreover, *Silberschein* was “so narrowly construed by the courts that [it was] virtually without effect.” LIBRARY OF CONG., *supra* note 19, at 65.

³⁰⁰ LIGHT, *supra* note 237, at 61; see HUMES, *supra* note 40, at 18. When veterans marched on Washington again, Roosevelt sent the First Lady to meet them rather than the Army. HUMES, *supra* note 40, at 18. He also signed an executive order reserving twenty-five thousand places in the Civilian Conservation Corp for veterans and gave the marchers priority in claiming those positions. ALTSCHULER & BLUMIN, *supra* note 46, at 29.

³⁰¹ Roosevelt's announced goal was to cut \$400 million in veterans' benefits from the budget. ROSS, *supra* note 117, at 25. He achieved many of the cuts by eliminating most presumptions that conditions were related to service and abolishing a lifetime monthly benefit for tuberculosis. *Id.* at 26.

³⁰² *Id.* at 27 (discussing the Independent Offices Appropriation Act of 1934, Pub. L. No. 73-78 (1933)). However, Roosevelt largely succeeded in permanently trimming non-service-connected benefits. ALTSCHULER & BLUMIN, *supra* note 46, at 32.

³⁰³ ROSS, *supra* note 117, at 27 (quoting 2 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 375-76 (Samuel I. Rosenman ed., 1938)).

later, Congress passed the Independent Offices Appropriations Act of 1935 over Roosevelt's veto, which reversed many of the president's cuts and handed him his first major political defeat.³⁰⁴ Although most changes in benefits brought about by the Economy Act were short-lived, the conflict became something of a bogey man for the next decade because it was frequently invoked by some prominent leaders in the veterans' community to caution against demanding benefits so generous that they would provoke a similar backlash.³⁰⁵ More importantly, much of the text of the current version of Title 38 is traceable directly to—if not word-for-word from—the language of Roosevelt's executive orders.³⁰⁶

The tension between Roosevelt and veterans would continue throughout his presidency. Roosevelt did not believe veterans should be a special class³⁰⁷ and the New Deal liberals' intended strategy was to use veterans to plant roots for social programs by creating general social-service agencies and giving veterans' preferences in the programs run by those new agencies.³⁰⁸ Veterans desired the benefits that Roosevelt proposed, but insisted

³⁰⁴ *Id.* at 27-28. Despite this defeat, benefits expenditures fell from \$705 million in 1932 to \$551 million in 1936. DILLINGHAM, *supra* note 250, at 81.

³⁰⁵ Ross, *supra* note 117, at 28-29.

³⁰⁶ Compare Exec. Order No. 6089, Part I(a) (1933) (basic eligibility for wartime service), with 38 U.S.C. § 1110 (2006) (same). Compare Exec. Order No. 6089, Part I(b) (presumption of sound condition for wartime service), with 38 U.S.C. § 1111 (same). Compare Exec. Order No. 6089, Part I(c), with 38 U.S.C. § 1112(a)(1) (same). Compare Exec. Order No. 6089, Part II(a) (basic eligibility for peacetime service), with 38 U.S.C. § 1131 (same). Compare Exec. Order No. 6089, Part II(b) (presumption of sound condition for peacetime service), with 38 U.S.C. § 1133 (same). Compare Exec. Order No. 6089, Part III (eligibility for non-service-connected pension for wartime service), with 38 U.S.C. § 1521 (same). Compare Exec. Order No. 6090, Part I (1933) (effective date of benefit awards), with 38 U.S.C. § 5110 (same). Compare Exec. Order No. 6090, Part II(I) (application procedure), with 38 U.S.C. § 5101 (same). Compare Exec. Order No. 6090, Part II(II) (rights to one review on appeal and to reopen with new and material evidence), with 38 U.S.C. §§ 5108 (new and material evidence), 7104(a),(b) (one review on appeal).

³⁰⁷ Ross, *supra* note 117, at 33. A recurring rhetorical device employed by Roosevelt was to refer to programs as designed to help service members "and those engaged in the war effort," so as to argue for broad government intervention. ALTSCHULER & BLUMIN, *supra* note 46, at 45.

³⁰⁸ Ross, *supra* note 117, at 42-50; ALTSCHULER & BLUMIN, *supra* note 46, at 6. For example, Roosevelt saw education benefits for veterans as an entering wedge for a program of widespread federal financial aid. Ross, *supra* note 117, at 44-45.

that all programs for veterans be exclusive and administered by VA.³⁰⁹ Again, veterans' groups largely prevailed.³¹⁰ Thus, the modern scope, substance, and procedure of the VA system trace their origins largely to Roosevelt's presidency.

LESSON 14: The modern adjudication system, including the substantive definition of benefits, was built on a foundation of controlling the costs of veterans' claims. Furthermore, it was designed largely by presidential fiat rather than compromise with veterans. Thus, in many instances the language used must be understood in this context for it to be fully appreciated.

IV. WORLD WAR II: THE PENDULUM SWINGS AGAIN

A. The G.I. Bill and the Readjustment of World War II Veterans

Based upon the experience of Civil War and World War I veterans, the federal government was deeply concerned about the reintegration of the veterans of World War II. Based upon past experience, there was a general fear that demobilization would lead to high unemployment and a renewed economic depression.³¹¹ Furthermore, the Bonus Army disaster was still fresh in the mind of Roosevelt and he was anxious to avoid a similar disaster.³¹² Accordingly, the readjustment benefits provided to World War II

³⁰⁹ Ross, *supra* note 117, at 42-50.

³¹⁰ See *id.* In one dramatic example, in December 1942, the National Resources Planning Board released a comprehensive "list of planning proposals for postwar demobilization, economic growth, urban services, transportation, land and water use, energy production, and social services[, which] articulate[d] a bold set of national goals" that largely treated veterans as ordinary citizens. ALTSCHULER & BLUMIN, *supra* note 46, at 40-41. Congress not only killed the plan, but also killed the Planning Board itself by defunding it for the next fiscal year. *Id.* at 42.

³¹¹ HUMES, *supra* note 40, at 12; DICKSON & ALLEN, *supra* note 12, at 269. The *New Republic* magazine predicted in 1943: "When demobilization day comes we are going to suffer another Pearl Harbor, a Pearl Harbor perfectly foreseeable — now — a Pearl Harbor of peace, not of war." ROSS, *supra* note 117, at 34 (quoting *When Demobilization Comes*, THE NEW REPUBLIC, Aug. 2, 1943, at 139); see SEVERO & MILFORD, *supra* note 20, at 284-85.

³¹² DICKSON & ALLEN, *supra* note 12, at 369.

veterans “emerged from the wreckage of the Bonus Army,” and were “firmly grounded in fear.”³¹³

Even before the United States entered the war, politicians appreciated the challenges that would be faced by demobilizing any army that was raised. The Selective Training and Service Act of 1940 guaranteed veterans for the first time the right to return to the jobs they had to leave when they were drafted.³¹⁴ Almost immediately after the United States entered the war, Roosevelt was actively planning for post-war demobilization.³¹⁵ However, his original proposal to establish a Federal Rehabilitation Service to serve all disabled workers, including veterans, faced immediate opposition from veterans’ groups as another attempt to “destroy the identity of veterans as a group for special consideration.”³¹⁶ Veterans found immediate allies among the anti-New Deal congressional members who were concerned about the cost and wisdom of Roosevelt’s ambitious social programs.³¹⁷ After a nine-month struggle that bridged the Seventy-Seventh and Seventy-Eighth sessions of Congress, veterans prevailed and the Disabled Veterans Rehabilitation Act of 1943 was passed.³¹⁸

Although caring for the returning disabled was an immediate need, it was only the first step in preparing for the eventual readjustment needs of returning veterans. In the fall of 1943, Roosevelt began advancing proposals for educational, unemployment, and “mustering-out pay benefits.”³¹⁹ The Rehabilitation Act battle set the stage for a bigger battle. Although the American Legion fundamentally disagreed with Roosevelt’s persistent attempts to

³¹³ HUMES, *supra* note 40, at 18.

³¹⁴ ROSS, *supra* note 117, at 36.

³¹⁵ *Id.* at 40.

³¹⁶ *Id.* at 42 (quoting *Vocational Rehabilitation: Hearings Before the H. Comm. on Educ. and Labor*, 78th Cong. 180 (1943) (statement of Omar N. Ketchum, Legislative Director, Veterans of Foreign Wars)).

³¹⁷ *Id.* at 42-43.

³¹⁸ *Id.* at 42-49. The Disabled Veterans Rehabilitation Act ultimately provided job training for 621,000 disabled World War II veterans. VA HISTORY IN BRIEF, *supra* note 223, at 13.

³¹⁹ ROSS, *supra* note 117, at 93.

integrate veterans' programs into general social service agencies, it also recognized that claiming credit for securing readjustment benefits for returning veterans would be a tremendous advantage in recruiting new members after the war.³²⁰ On January 9, 1944, the American Legion seized the initiative by publishing "a bill of rights for G.I. Joe and G.I. Jane" in the *New York Times*.³²¹ The organization's comprehensive proposal quickly became known as the "G.I. Bill of Rights," or simply, the G.I. Bill.³²² The American Legion was keenly aware that "cash compensation turned off politicians and public alike, making veterans vulnerable to claims of greed and lack of patriotism."³²³ The net result was a bill that provided educational benefits, loans for homes and farms, and unemployment benefits.³²⁴

Despite the general momentum for the bill, there were tremendous disputes about the details. Schools were skeptical of the effect of allowing masses of veterans into their ivory towers.³²⁵ The VFW was slow to endorse the G.I. Bill, and the legislation was probably delayed "due to the VFW's hurt feelings."³²⁶ DAV opposed the bill on principle for overloading VA with responsibilities unrelated to caring for disabled veterans.³²⁷ Ultimately, DAV, VFW, and other veterans' groups publicly questioned the wisdom of the G.I. Bill program, and sponsored a competing bill to provide

³²⁰ *Id.* at 98-99.

³²¹ *Id.* at 99 (internal quotation marks omitted).

³²² *Id.* at 99-100. The proposal itself was largely drafted in long-hand by the American Legion national commander Henry Colmery while staying at the Mayflower Hotel in Washington, D.C. DICKSON & ALLEN, *supra* note 12, at 270; see ALTSCHULER & BLUMIN, *supra* note 46, at 1 (showing a picture of the draft written on hotel stationary).

³²³ HUMES, *supra* note 40, at 29. Nonetheless, in February 1944, the American Legion succeeded in passing a mustering-out pay law that provided one hundred to three hundred dollars to each veteran at the time of separation based upon service. ROSS, *supra* note 117, at 87.

³²⁴ ROSS, *supra* note 117, at 100-01; VA HISTORY IN BRIEF, *supra* note 223, at 13-14. The educational benefits were extended in part to smooth the post-war employment shock by diverting millions of veterans from the labor market to schools for one or more years. DICKSON & ALLEN, *supra* note 12, at 269. The loan provisions were not a completely new idea. A loan proposal designed to ease readjustment passed the House in 1919. *Id.*

³²⁵ DICKSON & ALLEN, *supra* note 12, at 270.

³²⁶ ROSS, *supra* note 117, at 103.

³²⁷ *Id.* at 103-04.

World War II veterans with “a king-size bonus” of up to \$5,000.³²⁸ Furthermore, powerful southern politicians were set against making the benefits outlined by the G.I. Bill available to African-Americans who served.³²⁹ As a result, the final version was not passed until a year and a half later, on June 22, 1944.³³⁰

Veterans took advantage of the benefits provided in large numbers, and the G.I. Bill paid for the education of millions of returning World War II veterans, including “fourteen future Nobel Prize winners, three Supreme Court justices, three presidents, a dozen senators . . . and others.”³³¹ However, it was just the most prominent piece of a comprehensive program that provided veterans’ benefits and preferences in a wide variety of government programs.³³² As a result of these programs, World War II veterans would overwhelmingly conclude that their lives benefitted from having served.³³³

LESSON 15: Well designed readjustment benefits at the time of discharge can have a tremendous effect on the arc of the lives of veterans. There is a tremendous opportunity for popular and cost-effective interventions at this time. However, seizing this opportunity requires forethought and advance planning.

³²⁸ *Id.* at 104.

³²⁹ *Id.* at 108-09. John E. Rankin of Mississippi, Chairman of the House World War Veterans’ Legislation Committee, had grave reservations about the G.I. Bill, and attempted to block the final committee vote by refusing to vote the proxy in favor of the bill given to him by congressman John S. Gibson. *Id.* at 117. When The American Legion discovered that the deciding vote had been pocketed, they found Gibson at his home and arranged two overnight flights to bring him from Georgia to Washington, D.C., in time to cast the tie-breaking vote just before the 10 a.m. deadline. *Id.*

³³⁰ *Id.* at 102-18.

³³¹ HUMES, *supra* note 40, at 6. In the 1947 to 1948 academic year, fifty-nine percent of students enrolled at Harvard were veterans on the G.I. Bill. WILBUR J. SCOTT, VIETNAM VETERANS SINCE THE WAR: THE POLITICS OF PTSD, AGENT ORANGE, AND THE NATIONAL MEMORIAL 84 (2d ed. Univ. Okla. Press 2004) (1993) (reporting similar numbers for New York University and Stanford, and eighty-five percent for Notre Dame).

³³² See ROSS, *supra* note 117.

³³³ See *infra* note 371 and accompanying text. Although the program of benefits was a success by any measure, it must be acknowledged that the veterans of World War II also benefitted from living in one of the few major, industrialized countries that had not been devastated by war. See ROSS, *supra* note 117, at 35; HUMES, *supra* note 40, at 303.

B. The Veterans' Hospital System and the Iron Triangle

Although the G.I. Bill is frequently recognized as a tremendous boon to veterans of World War II, the changes it brought to the veterans' hospital system are arguably more important to understanding the development of veterans' law after World War II. The modern VA hospital system had already begun to take shape after the First World War. The first national home for soldiers was opened in 1851.³³⁴ The National Asylum for Disabled Volunteer Soldiers was established in 1866, and twelve facilities were eventually set up around the country to care for a relatively significant number of Civil War veterans.³³⁵ However, when World War I ended, "[t]he War Risk Bureau was caught unprepared; there was as yet no general hospitalization program, nor even any plan for the medical screening and rating of veterans."³³⁶ By 1921, the hospital system was in complete crisis, and the American Legion publicized "stories of shell-shocked veterans sent to hospitals for feeble-minded children, where they were forced to sit on infants' chairs, and of tuberculous patients sent to marshy districts detrimental to their health."³³⁷

Although there was little political support for readjustment benefits for World War I veterans, there was no shortage of sympathy for those who were severely disabled by the war. As a result, the American Legion and VFW were able to secure \$18.6 million in March 1921 for a major VA hospital construction program.³³⁸ The program succeeded in bringing a tremendous new capacity to the VA system. In fact, veterans' groups — who wanted to expand eligibility for hospital care — soon came into conflict with the

³³⁴ SEVERO & MILFORD, *supra* note 20, at 91.

³³⁵ LIBRARY OF CONG., *supra* note 19, at 52; DILLINGHAM, *supra* note 250, at 58-59; ALTSCHULER & BLUMIN, *supra* note 46, at 19. *See generally* PATRICK J. KELLY, CREATING A NATIONAL HOME: BUILDING THE VETERANS' WELFARE STATE 1860-1900 (1997) (discussing the hospital care provided to Civil War veterans).

³³⁶ Stevens, *supra* note 237, at 289.

³³⁷ *Id.* at 292 (citation omitted).

³³⁸ *Id.* at 291-92.

medical establishment, which was alarmed by the competition threatened by the rapidly expanding VA system.³³⁹ Veterans' groups quickly prevailed:

In June 1924 veterans became eligible . . . for care for *any* condition, whether connected with their service or not, provided hospital space was available With one stroke of the pen, then, the original hospital and medical program, which had been designed as workers' compensation, was translated into comprehensive hospital insurance.³⁴⁰

This insurance system was extended by Roosevelt in 1933 when he made peacetime veterans eligible for VA hospital care.³⁴¹

However, this transformation depended upon the creation of excess hospital capacity. World War II provided the opportunity to create this capacity. In 1945, the veterans' hospital system was scandalized by shocking reports of mistreatment in existing VA hospitals, which eventually led President Truman to remove Frank Hines from his position as head of VA.³⁴² He was replaced by General Omar N. Bradley,³⁴³ who set out to rectify the situation in 1946 by announcing a \$448 million program to nearly triple the capacity of the VA system, by building 183 new hospitals in 39 states.³⁴⁴

The details of this massive construction program attracted congressional attention. The House Committee on Veterans Affairs

³³⁹ *Id.* at 296. The American Legion was a major advocate of expanded access. DILLINGHAM, *supra* note 250, at 69.

³⁴⁰ Stevens, *supra* note 237, at 296 (referring to Pub. L. No. 68-243 (1924)).

³⁴¹ DILLINGHAM, *supra* note 250, at 107 (citing Exec. Order No. 6232 (1933)).

³⁴² ROSS, *supra* note 117, at 135-39. During the war, incredible demands were placed on VA because a large portion of VA's doctors, dentists, and nurses had volunteered for or been drafted into active service, forcing VA to lower qualifications for new hires in the face of rapidly rising demand. VA HISTORY IN BRIEF, *supra* note 223, at 13.

³⁴³ ROSS, *supra* note 117, at 139-40; SEVERO & MILFORD, *supra* note 20, at 306-07.

³⁴⁴ *Veterans Will Get 183 New Hospitals*, N.Y. TIMES, Feb. 17, 1946, at 1.

was established in 1947.³⁴⁵ It became the most influential body in Congress on veterans' issues in large part because one of the most important issues to veterans in the post-World War II era was the construction and renovation of VA hospitals.³⁴⁶ One of the immutable aspects of VA's hospitals was their parochial nature. Although increasing monetary benefits was a national issue, each new VA hospital had a radius of service that tended to cover individual communities.³⁴⁷ Therefore, there was no shortage of interest in the House in building new VA hospitals in many House districts.³⁴⁸ As a result, not long after the conclusion of the Korean War, the VA hospital system had completed its transformation from an acute disability treatment service to a general health care system for veterans.³⁴⁹ A decade after Bradley's building program had begun more than two-thirds of treatment provided by VA hospitals was for conditions unrelated to service.³⁵⁰

This program would lead to such close ties between the House Veterans Affairs Committee, the veterans' service organizations, and VA that the trio became known as the Iron

³⁴⁵ SCOTT, *supra* note 331, at 7.

³⁴⁶ LIGHT, *supra* note 237, at 5-6.

³⁴⁷ *Id.*

³⁴⁸ This interest was not a new phenomenon. To a lesser degree, the placement of veterans' hospitals after World War I was also a contested political plum. Stevens, *supra* note 237, at 290-91.

³⁴⁹ See DILLINGHAM, *supra* note 250, at 106 (observing that after VA hospitals were authorized to care for non-service-connected conditions, "Congress had followed a policy of building facilities to care for all veterans"). "Not surprisingly, many of the VA's flagship facilities were built in the home districts of particularly powerful members of Congress." LIGHT, *supra* note 237, at 6. The Senate did not consolidate veterans' issues into a separate committee for Veterans Affairs until 1970 or 1971. Compare SCOTT, *supra* note 331, at 7, with GERALD NICOSIA, HOME TO WAR: A HISTORY OF THE VIETNAM VETERANS' MOVEMENT 199 (2001). The Senate was not as connected to veterans issues both because hospital construction was usually a local rather than a state-wide issue, and because a majority of senators did not have to stand for reelection within two years of a major demobilization. See, e.g., *supra* notes 135-38 and accompanying text.

³⁵⁰ *Text of President Eisenhower's Budget Message to Congress Covering Fiscal Year 1956*, N.Y. TIMES, Jan. 18, 1955. By 1987, VA operated 172 hospitals, 117 nursing homes, and over 200 clinics, and care for non-service-connected conditions continued to comprise a majority of VA hospital admissions. LIGHT, *supra* note 237, at 6, 11-12, 16.

Triangle.³⁵¹ Not only did the members of the Iron Triangle work closely together to protect their mutual interests, but personnel moved freely between the positions of power within the three groups so as to cement the relationship.³⁵² The relationship was so close that “the VA internal phone book . . . listed its hospitals and clinics by House district and member.”³⁵³ A related by-product of this relationship built on providing health care was that “[t]he real power and influence inside the VA resided in the Department of Medicine and Surgery.”³⁵⁴ As a result, the benefits adjudication arm of VA was a lower priority than the hospital system, and suffered the brunt of belt tightening whenever VA’s budget was squeezed.³⁵⁵

LESSON 16: For those interested in veterans’ law, VA is like an iceberg. The hospital system is massive and vitally important to veterans, yet it is often invisible to those focused on the adjudication system. Nevertheless, a basic understanding of it is vital to understanding how VA operates and how it assesses costs and benefits.

C. The Bradley Commission

Although the hospital system led toward a massive increase in the programs overseen by VA, this increase was not unopposed. Republican Dwight Eisenhower was elected in 1952 after two decades of Democratic control of the White House. One of his major campaign promises was to reduce the federal budget, which had been expanded under the New Deal, World War II, and the Korean War.³⁵⁶ Veterans’ benefits were not

³⁵¹ LIGHT, *supra* note 237, at 5; SCOTT, *supra* note 331, at 102. The term is not unique to this relationship. For a comparison of iron triangles to issue networks, see LIGHT, *supra* note 237, at 251 n.4 (citing Hugh Helco, *Issue Networks in the Executive Branch*, in THE NEW AMERICAN POLITICAL SYSTEM 102 (A. King ed. 1978)).

³⁵² LIGHT, *supra* note 237, at 7, 62.

³⁵³ *Id.* at 20.

³⁵⁴ *Id.* at 9.

³⁵⁵ *Id.* at 82.

³⁵⁶ GEOFFREY PERRET, EISENHOWER 484 (1999); see John D. Morris, *Cutting Budget Poses Task for Eisenhower*, N.Y. TIMES, Nov. 16, 1952.

spared from cost-cutting measures.³⁵⁷ After years of piecemeal changes, Eisenhower concluded that the veterans' benefits system was ripe for transformation. To lay the groundwork for such change, in January 1955 he issued an Executive Order to form a commission to reexamine veterans' benefits in light of the "rapid and profound changes in our national military, social, economic, and fiscal circumstances [that] have occurred[,] which affect fundamentally our long-standing veterans' pension and compensation programs."³⁵⁸ The commission was headed by Omar Bradley, a West Point classmate of Eisenhower,³⁵⁹ who had not only succeeded Frank Hines as the Administrator of VA in 1944 and initiated the World War II hospital program³⁶⁰ but also served under Eisenhower in Europe.

Eisenhower's call for "sober consideration"³⁶¹ of the new realities left little doubt as to the intent of the commission, and put veterans' groups on guard.³⁶² The *New York Times* immediately predicted that any changes proposed by the commission "may bump into considerable opposition in Congress, where organized veterans' organizations have an important voice."³⁶³ Nonetheless, the administration set the stage with a GAO report on major abuses in the VA hospital system³⁶⁴ and a separate report on hundreds

³⁵⁷ See, e.g., *Aid for Veterans Put at 4.6 Billion*, N.Y. TIMES, Jan. 18, 1955 [hereinafter *Aid for Veterans*]; *Eisenhower Ends Korea G.I. Rights*, N.Y. TIMES, Jan. 2, 1955, at 1; *House Limits V.A. on Hospital Care*, N.Y. TIMES, June 18, 1953.

³⁵⁸ Letter from Dwight D. Eisenhower, President of the United States, to Omar N. Bradley, Chairman, President's Commission on Veterans' Pensions (Mar. 5, 1955) (on file with the American Presidency Project), reprinted in THE PRESIDENT'S COMMISSION ON VETERANS' PENSIONS, VETERANS' BENEFITS IN THE UNITED STATES: A REPORT TO THE PRESIDENT, app. B, at 414 (1956) [hereinafter BRADLEY COMMISSION REPORT].

³⁵⁹ *The Soldier's General*, N.Y. TIMES, Apr. 23, 1956.

³⁶⁰ See *supra* notes 342-44 and accompanying text.

³⁶¹ *Aid for Veterans*, *supra* note 357 (internal quotation marks omitted).

³⁶² Exec. Order No. 10,588, 20 Fed. Reg. 361 (Jan. 14, 1955). Bradley also had a difficult relationship with the veterans' groups while head of VA. SEVERO & MILFORD, *supra* note 20, at 307-09. In particular, he expressed concern that VA was developing too close a relationship with them, and advised VA employees that it was "bad judgment" to hold office in such organizations. *Id.* at 307 (internal quotation marks omitted).

³⁶³ *Aid for Veterans*, *supra* note 357.

³⁶⁴ *Medical Abuses Charged in V.A.*, N.Y. TIMES, Apr. 9, 1956.

of cases in which benefits held for incompetent veterans were ultimately passed on to distant relatives with little connection prior to their deaths.³⁶⁵

The Bradley Commission presented its report on April 23, 1956.³⁶⁶ The findings and conclusions of the 415-page report were dramatic. The report surveyed the history of veterans' benefits in America, and concluded that the present system "is an accretion of laws based largely on precedents built up over 150 years of piecemeal development."³⁶⁷ It continued by noting that the situation at the time was dramatically different from the past for numerous reasons. First, the number of veterans in the population had risen dramatically from four million in 1940, to twenty-two million in 1956.³⁶⁸ In addition, the large, standing military brought about by the Cold War was producing 700,000 new, peacetime veterans each year.³⁶⁹ Accordingly, the fiscal burden created by veterans' benefits was growing rapidly.³⁷⁰ Second, fifty percent of World War II veterans had received some type of benefit from the G.I. Bill, and, as a result, only six percent of veterans believed that service was a disadvantage to them over the long term, while more than forty percent believed that they had benefitted from service.³⁷¹ Furthermore, modern military service frequently provided substantial training and useful experience that improved employment opportunities after service.³⁷² Third, new social programs providing benefits to the elderly, disabled, and unemployed generally had created a safety net that largely obviated the need to provide such benefits specifically to veterans.³⁷³

³⁶⁵ *Curb Asked on Heirs of Ailing Veterans*, N.Y. TIMES, Apr. 22, 1956.

³⁶⁶ BRADLEY COMMISSION REPORT, *supra* note 358; Edwin L. Dale, Jr., *General Pension for U.S. Veterans Opposed by Panel*, N.Y. TIMES, Apr. 23, 1956, at 1.

³⁶⁷ BRADLEY COMMISSION REPORT, *supra* note 358, at 9; *see id.* at 33-61.

³⁶⁸ *Id.* at 7.

³⁶⁹ *Id.* at 16.

³⁷⁰ *Id.* at 8-9.

³⁷¹ *Id.* at 91-92.

³⁷² *Id.* at 7.

³⁷³ *Id.* at 4-5.

Based on these factors, the report recommended that the veterans' benefits system should focus on "[t]he rehabilitation of disabled veterans and their reintegration into useful economic and social life."³⁷⁴ As for those veterans not disabled during service, they should be provided such readjustment benefits as necessary to "place the veteran on a postwar footing equal to or better than that of those who were not in service, and eliminate any need for treating him throughout the rest of his life as a handicapped or privileged citizen."³⁷⁵ Accordingly, it suggested that benefits for those seriously disabled in service should be increased, while benefits in the nature of general social insurance should be handled primarily by appropriate general programs.³⁷⁶

Reaction to the report was mixed. The report was praised by the *New York Times* and *Time* magazine for its comprehensive and thoughtful articulation of a philosophy to guide the future of veterans' benefits.³⁷⁷ However, veterans' groups condemned its frontal assault on veterans' claims to special status.³⁷⁸ Nevertheless, some veterans agreed with the principles of the report,³⁷⁹ particularly as World War II veterans were also children of the Great Depression and, as a result, many harbored a deep aversion to government "hand-out" programs.³⁸⁰

Ultimately, the veterans' groups prevailed. First, in 1957, the entire body of veterans' law was consolidated, organized, and codified in Title 38 of the United States Code.³⁸¹ To the extent this

³⁷⁴ *Id.* at 11.

³⁷⁵ *Id.*

³⁷⁶ *Id.* at 17-18.

³⁷⁷ *Veterans: A New Look*, TIME, May 7, 1956, available at <http://www.time.com/time/magazine/article/0,9171,937291,00.html>; *A Nation of Veterans*, N.Y. TIMES, Apr. 24, 1956; see Howard A. Rusk, *U.S. Debt to Veterans*, N.Y. TIMES, Apr. 29, 1956.

³⁷⁸ Gladwin Hill, *Legion Criticizes U.S. on Benefits*, N.Y. TIMES, Sept. 5, 1956; *Veterans' Organizations Opposing Report of the Bradley Commission*, ST. PETERSBURG TIMES, June 7, 1956.

³⁷⁹ See *Veterans' Organizations Opposing Report of the Bradley Commission*, *supra* note 378.

³⁸⁰ HUMES, *supra* note 40, at 294.

³⁸¹ Veterans' Benefits Act of 1957, Pub. L. No. 85-56, 71 Stat. 83. The statute was recodified in 1958. Pub. L. No. 85-857, 72 Stat. 1105 (1958). As a result, most sections

action elevated some regulatory provisions to statute, it narrowed executive autonomy over the substance of veterans' law and made it difficult for Eisenhower to effect unilateral change. After reelection to his second term, Eisenhower moved to implement the major recommendations of the Bradley Commission in his budget for 1958, which was greeted by the immediate protest of veterans' groups.³⁸² However, instead of transformation, the system of special programs for veterans became further entrenched by congressional legislation in Eisenhower's second term.³⁸³ Ultimately, Eisenhower lamented his failure to transform the system in his final budget submission prior to leaving office, noting that expenditures on non-service-connected benefits had risen from less than a third of the budget for veterans' benefits to nearly one-half.³⁸⁴

LESSON 17: As a political lobby, veterans' organizations enjoy the same advantages as any other interest group. As a motivated minority, they can control legislation that affects veterans even against broad but weak support for a conflicting agenda. Therefore, it is extremely difficult to effect change in veterans' law without the support of veterans' organizations.

relating to the adjudication system in Title 38 have Public Law Number 85-857 listed as the originating law in the U.S. Code. However, the Veterans' Benefits Act of 1957 is actually the law that codified the modern system. 71 Stat. at 83.

³⁸² *Cuts to Be Asked in Veterans' Aid*, N.Y. TIMES, Dec. 15, 1957.

³⁸³ See Veterans' Pension Act of 1959, Pub. L. No. 86-211, 73 Stat. 432; Ex-Servicemen's Unemployment Compensation Act of 1958, Pub. L. No. 85-848, 72 Stat. 1087 (establishing a permanent program of veterans unemployment benefits). Eisenhower's failure is not terribly surprising. Although he was a master of foreign policy and usually enjoyed a seventy percent approval rating, he never developed a strong domestic policy team. PERRET, *supra* note 356, at 490-91; MICHAEL KORDA, *IKE: AN AMERICAN HERO* 672 (2007). Furthermore, he did not enjoy a close relationship with congressional Republicans, in part because he was more moderate than his party's congressional leaders and not an experienced politician. KORDA, *supra*, at 672-73; PERRET, *supra* note 356, at 484-85.

³⁸⁴ *President's Budget Message Reproduced Photographically from Official Document*, N.Y. TIMES, Jan. 17, 1961.

V. VIETNAM: GRAPPLING WITH THE PROBLEMS OF MODERN WAR AND POLITICS

The last major conflict to reshape the veterans' benefits system was the Vietnam War. The lessons from this era are worth examining in detail, both because the claims of Vietnam veterans are a substantial portion of the system today and because the specific political issues that arose in the 1970s and 1980s continue to reverberate today.

A. Developing a Political Consciousness

No group of veterans had a homecoming colder or more complicated than Vietnam veterans.³⁸⁵ Although the programs created by the G.I. Bill largely remained in place, their value was substantially eroded by inflation and budget cuts by the time the Vietnam veterans were eligible.³⁸⁶ Updating veterans' law was not easily accomplished. Not only was Vietnam an unsuccessful and unpopular conflict, the political power of Vietnam veterans was further diminished because veterans themselves were divided on whether they supported the war. In fact, the first major political organization of Vietnam veterans was Vietnam Veterans Against the War, which formed early in 1967.³⁸⁷ Vietnam Veterans of America (VVA) did not emerge to advocate for the needs of Vietnam veterans until 1979.³⁸⁸

Vietnam veterans were also hindered in receiving attention to their needs because they did not assimilate quickly into the

³⁸⁵ See generally NICOSIA, *supra* note 349 (describing the plight of Vietnam veterans upon their return from the Vietnam War). The first American combat troops arrived in Vietnam on March 8, 1965. SCOTT, *supra* note 331, at 1. The number of combat troops peaked at 543,000 in April 1969. *Id.* The last combat troops returned home in 1973. *Id.* at 51.

³⁸⁶ HUMES, *supra* note 40, at 288-89.

³⁸⁷ SCOTT, *supra* note 331, at 1.

³⁸⁸ *Id.* at 83. Vietnam Veterans of America (VVA) grew out of the Council of Vietnam Veterans, which was founded a year earlier, in 1978. *Id.* Concern about Agent Orange was the issue that really led to the political awakening of Vietnam veterans and the growth of VVA. *Id.* at 76; see *infra* Part V.C.

Iron Triangle.³⁸⁹ Congress was dominated by World War II veterans during the Vietnam War;³⁹⁰ although almost twenty percent of members of Congress were veterans of World War II by 1948, there were only eleven Vietnam veterans in Congress by 1978.³⁹¹ Similarly, fewer than 100,000 of the nine million Vietnam veterans had joined the American Legion, VFW, or DAV by 1980.³⁹² As a result, in the decade after the Vietnam War, the major veterans' groups routinely opposed legislation targeting the needs of Vietnam veterans because "they wanted as much of the VA pie as possible to go to their own constituency, which comprised mainly World War II vets—men twenty to thirty years older, with distinctly different needs."³⁹³ When Max Cleland was appointed by Jimmy Carter in 1977 as the first Vietnam veteran to head VA, his three immediate predecessors were all World War II veterans who also had been national commanders of either the American Legion or VFW.³⁹⁴

³⁸⁹ NICOSIA, *supra* note 349, at 365. In fact, VVA quickly developed a governing philosophy to be confrontational "with all three sides of the Iron Triangle." SCOTT, *supra* note 331, at 111. It relied heavily on the Bradley Report's principle of prioritizing disabilities directly related to service. *Id.* at 112.

³⁹⁰ Roughly seventy percent of the members of Congress were veterans at that time. Donald N. Zillman, *Where Have All the Soldiers Gone? Observations on the Decline of Military Veterans in Government*, 49 ME. L. REV. 85, 88 (1997); see Donald N. Zillman, Essay, *Where Have All the Soldiers Gone II: Military Veterans in Congress and the State of Civil-Military Relations*, 58 ME. L. REV. 135, 135 (2006).

³⁹¹ SCOTT, *supra* note 331, at 8. In 1978, those members formed an official caucus, Vietnam Veterans in Congress. *Id.* at 67. Among the members were Al Gore, Les Aspin, Tom Harkin, and Leon Panetta. *Id.* The formation of the caucus was viewed as an affront by the Chairman of the House Committee on Veterans Affairs. *Id.*

³⁹² *Id.* at 8. Because of its focus on disabilities caused by service, DAV was the first of three major groups to start embracing the issues of Vietnam veterans. NICOSIA, *supra* note 349, at 365.

³⁹³ NICOSIA, *supra* note 349, at 348; see SCOTT, *supra* note 331, at 114 (stating that Bobby Muller, a founding member of VVA, reported that the major veteran service organizations warned him not to jeopardize VA's hospital or pension programs by breaking the bank with readjustment benefits for Vietnam veterans). Not all smaller veterans' groups were aligned with the big three. Muller worked for Paralyzed Veterans of America (PVA) before being encouraged to found VVA, and PVA contributed \$42,000 to help Muller start the organization. SCOTT, *supra* note 331, at 85.

³⁹⁴ SCOTT, *supra* note 331, at 63-64.

As a result of these realities, the concerns and needs of Vietnam veterans were slow to gain recognition in VA³⁹⁵ or Congress. Indeed, the major veterans' groups initially perceived the demands of Vietnam veterans—who had a greater ratio of wounded-to-killed than any prior conflict³⁹⁶—as a threat to the funding of programs for the rapidly aging World War II generation.³⁹⁷ They were also unwilling to pressure VA to address the needs of Vietnam veterans by pressing the complex, new claims raised by this group.³⁹⁸ This inter-generational conflict was surely exacerbated by the fact that Vietnam veterans began to emerge politically during the economic malaise of the 1970s³⁹⁹ and the budget-slashing, small-government mania of Reagan's first term.⁴⁰⁰ As a result, Congress was trimming veterans' benefits just at the time Vietnam veterans were seeking new funding for their issues.⁴⁰¹ Although, the major veterans' groups ultimately had to face the demographic reality that they had to embrace Vietnam veterans to maintain their long-term political relevance,⁴⁰² this reality did not penetrate the consciousness of these groups until the early 1980s.⁴⁰³

³⁹⁵ Vietnam veterans even brought a lawsuit against VA alleging that they were denied equal protection as a class because the needs of World War II veterans were being systematically prioritized above theirs. *Hartmann v. United States*, 615 F. Supp. 446 (E.D.N.Y. 1985). Although the action was dismissed due to lack of jurisdiction over VA treatment decisions, the court felt compelled to comment on the service provided by Vietnam veterans, stating that “[t]his case would appear to be one more instance of the poor thanks we extend to our veterans and servicemen.” *Id.* at 450. This suit echoed complaints heard at the close of World War II that “veterans of past wars [were] cluttering up” VA hospitals due to the American Legion’s success in obtaining hospital treatment for aging veterans. Ross, *supra* note 117, at 135.

³⁹⁶ SCOTT, *supra* note 331, at 8-9.

³⁹⁷ LIGHT, *supra* note 237, at 24-25; SCOTT, *supra* note 331, at 9 (noting that the disabled Vietnam veterans strained a VA hospital system that was “increasingly accustomed to addressing the needs of older veterans”).

³⁹⁸ LIBRARY OF CONG., *supra* note 19, at 68.

³⁹⁹ NICOSIA, *supra* note 349, at 355-56.

⁴⁰⁰ LIGHT, *supra* note 237, at 6, 20-21.

⁴⁰¹ See *id.* at 20-21; see also *id.* at 74 (discussing the impact of budget reductions on VA operations from 1976-1988).

⁴⁰² LIGHT, *supra* note 237, at 21-22.

⁴⁰³ SCOTT, *supra* note 331, at 177.

LESSON 18: Veterans are not a homogenous group. The differences can vary over time, but may be extreme during periods when one generation has acute needs at the time of discharge while an older generation is facing the long-term needs associated with aging and retirement. Therefore, the developments in veterans' law specific to the issues of any one group of veterans must be understood by looking at all the major groups of veterans at the time.

B. Posttraumatic Stress Disorder

Vietnam veterans were certainly not the first to experience the psychological impact of war.⁴⁰⁴ However, Vietnam veterans arguably suffered from more acute psychological issues due to the relative youth of the soldiers,⁴⁰⁵ the deeply conflicted public opinion on the home front,⁴⁰⁶ the rapid transition from the battlefield to the home front,⁴⁰⁷ and the military's policy of rotating soldiers in and out of combat as individuals rather than units.⁴⁰⁸ Vietnam veterans also faced another unique difficulty upon their return. As Guy McMichael III, VA General Counsel during the Carter administration, would later admit, "VA was incapable of dealing with an undefined psychiatric problem."⁴⁰⁹ The second edition of the American Psychiatric Association's (APA) Diagnostic and Statistical Manual of Mental Disorders (DSM-II) lacked any entries for war-related trauma.⁴¹⁰ Accordingly, physicians did not normally even inquire about a veteran's combat experiences in trying to make a diagnosis of a psychological

⁴⁰⁴ *Id.* at 28-32.

⁴⁰⁵ LIGHT, *supra* note 237, at 23-24; SEVERO & MILFORD, *supra* note 20, at 347.

⁴⁰⁶ SEVERO & MILFORD, *supra* note 20, at 347-50.

⁴⁰⁷ VA HISTORY IN BRIEF, *supra* note 223, at 18.

⁴⁰⁸ SCOTT, *supra* note 331, at 51-52; LIGHT, *supra* note 237, at 23-24.

⁴⁰⁹ NICOSIA, *supra* note 349, at 355.

⁴¹⁰ SCOTT, *supra* note 331, at 34; Matthew J. Friedman et al., *PTSD: Twenty-Five Years of Progress and Challenges*, in HANDBOOK OF PTSD: SCIENCE AND PRACTICE 3 (Matthew J. Friedman et al. eds., 2007) [hereinafter HANDBOOK OF PTSD]. The prior edition contained an entry for "gross stress reaction," which many psychiatrists did use during the era of the second edition of the Diagnostic and Statistical Manual of Mental Disorders. SCOTT, *supra* note 331, at 34.

problem.⁴¹¹ A few psychiatrists and counselors within VA noticed the relationship between certain of the symptoms reported by Vietnam veterans and their combat experiences.⁴¹² However, the mental health needs of Vietnam veterans were becoming apparent well before VA and the treatment community was properly prepared to handle them.⁴¹³

Although the general psychiatric community was ill-equipped to handle returning Vietnam veterans, many professionals began to recognize the issue. One of the first prominent names to become involved was Dr. Robert Jay Lifton, who was nationally recognized for his work studying survivors of Hiroshima and the Holocaust.⁴¹⁴ In 1970, he began working with Vietnam Veterans Against the War to develop a program of “rap groups” for Vietnam veterans in New York City where they could come together to talk about their experiences.⁴¹⁵ A similar program was developed on the West Coast after Dr. Philip May, director of psychological services at VA’s Brentwood, California hospital convinced the hospital’s director, Dr. John Valance, to hire Shad Meshad to help form a Vietnam Veteran Resocialization Unit.⁴¹⁶ Meshad was not only a social worker, but also was a Vietnam veteran who had received extensive wounds to his head and back in a helicopter crash.⁴¹⁷ Meshad was convinced that veterans were wary of approaching VA hospitals, and helped set up a network of “store-front” locations in communities throughout Los Angeles.⁴¹⁸ Together, the two programs established a model of reaching out to Vietnam veterans in informal treatment gatherings that allowed them to share their experiences with and receive support from other veterans.

⁴¹¹ SCOTT, *supra* note 331, at 5, 34-35.

⁴¹² *Id.* at 35-36; *see infra* notes 416-18, 424 and accompanying text.

⁴¹³ NICOSIA, *supra* note 349, at 170-75.

⁴¹⁴ *Id.* at 158; SCOTT, *supra* note 331, at 6.

⁴¹⁵ NICOSIA, *supra* note 349, at 162-65; SCOTT, *supra* note 331, at 6-7. Dr. Lifton also wrote and spoke publically on the issues facing Vietnam veterans. SCOTT, *supra* note 331, at 6.

⁴¹⁶ SCOTT, *supra* note 331, at 35-36.

⁴¹⁷ *Id.* at 36.

⁴¹⁸ *Id.* at 37.

Despite the early emergence of a treatment model, comprehensive care for posttraumatic stress disorder (PTSD) would require an APA-recognized diagnostic model to support treatment and compensation claims. Initially, the lack of concrete evidence contributed to congressional skepticism of the assertions of PTSD advocates.⁴¹⁹ Ultimately, the battle to provide VA treatment and benefits for PTSD was fought in two parts.⁴²⁰ First, the disease had to be recognized by the APA. As early as 1971, the APA national meeting had a panel on the needs of Vietnam veterans featuring Dr. Lifton.⁴²¹ Although there was substantial momentum by 1974 to produce a new edition of the DSM, there was no plan at that time to add any type of stress disorder to the third edition.⁴²² In 1975, Dr. Lifton, Chiam Shatan (another psychiatrist with close ties to Lifton and his work in New York⁴²³), and a VA social worker Sarah Haley,⁴²⁴ formed the Vietnam Veterans Working Group (Working Group) after attending the APA's annual meeting that year.⁴²⁵ This group quickly convinced the APA to form a Committee on Reactive Disorders to propose a potential new diagnosis for the DSM-III.⁴²⁶ Both Lifton and

⁴¹⁹ NICOSIA, *supra* note 349, at 349.

⁴²⁰ This is not to say that the issue developed entirely outside the public eye. For example, Dwight Johnson, a Congressional Medal of Honor recipient, brought national attention to the readjustment problems of Vietnam veterans in April 1971, when he was killed trying to rob a Detroit liquor store after disappearing while on a three-day pass from a VA hospital. SCOTT, *supra* note 331, at 42-43. Johnson had been diagnosed with “depression caused by post-Vietnam adjustment problems.” *Id.* at 43. Johnson’s story was far from the only such story to receive publicity. NICOSIA, *supra* note 349, at 355.

⁴²¹ SCOTT, *supra* note 331, at 41-42.

⁴²² *Id.* at 58; NICOSIA, *supra* note 349, at 203-04.

⁴²³ SCOTT, *supra* note 331, at 6, 15.

⁴²⁴ Sarah Haley was a social worker at a VA hospital in Boston and concluded that psychiatrists frequently dismissed the relevance of veterans’ combat experiences. After a long struggle with VA, in 1974 she published an influential article, *When the Patient Reports Atrocities: Specific Treatment Considerations of the Vietnam Veteran*, 30 ARCHIVES OF GENERAL PSYCHIATRY 191 (1974), that helped raise awareness within the psychiatric community of the specific mental issues of Vietnam veterans. SCOTT, *supra* note 331, at 59-60. Haley soon wrote another influential paper discussing the problems of Vietnam veterans reintegrating with their families. NICOSIA, *supra* note 349, at 200-01.

⁴²⁵ SCOTT, *supra* note 331, at 60.

⁴²⁶ *Id.* at 61. The American Psychiatric Association also received significant pressure from survivors of the Holocaust and man-made disasters to study reactions to stress.

Shatan became members of that committee along with Jack Smith, a Vietnam veteran and ardent advocate of veterans' issues.⁴²⁷ Fortunately, for the Working Group, several programs had already begun to seriously study the issue and advocates were beginning to gather evidence.⁴²⁸ With the assistance of the Working Group, Lifton, Shatan, and Smith were able to present enough evidence to convert the skeptical members of the Committee on Reactive Disorders to recommend the addition of PTSD to the DSM-III in 1978.⁴²⁹ Nonetheless, the DSM-III was not formally published by the APA until 1980.⁴³⁰

The second major front in the battle for benefits and treatment was in Congress and VA to create programs tailored to the needs of veterans suffering from PTSD. The political process was complicated not only by the political activities of anti-war veterans,⁴³¹ but also by the extensive use of drugs among troops in Vietnam that clouded the causation of veterans' mental conditions and their moral claims to support.⁴³² Furthermore, the House Veterans Affairs Committee was dominated by veterans of

NICOSIA, *supra* note 349, at 203.

⁴²⁷ SCOTT, *supra* note 331, at 61; NICOSIA, *supra* note 349, at 206.

⁴²⁸ In 1973, a group called the National Veterans Resource Project raised 45,000 to 47,000 dollars to begin a pilot study of Vietnam veterans and their issues. SCOTT, *supra* note 331, at 48; NICOSIA, *supra* note 349, at 349-50. Two years later, VA provided additional funds to complete the study. SCOTT, *supra* note 331, at 57. DAV also stepped forward and provided \$45,000 in 1976 to sponsor a study of 450 Vietnam veterans known as the Forgotten Warrior Project. *Id.* at 56.

⁴²⁹ SCOTT, *supra* note 331, at 62-63, 66. They were so successful at persuading the skeptics that they were allowed to prepare the first draft of the new section. NICOSIA, *supra* note 349, at 208.

⁴³⁰ HANDBOOK OF PTSD, *supra* note 410, at 4. Even before its adoption, the proposed draft was a key factor in the legislative breakthrough in 1979 to fund the first veteran readjustment programs. NICOSIA, *supra* note 349, at 209.

⁴³¹ See *supra* note 387 and accompanying text.

⁴³² SCOTT, *supra* note 331, at 39, 53-54. One frequently cited, early study of Vietnam veterans concluded that their drug and alcohol abuse was the product of character disorders. NICOSIA, *supra* note 349, at 205. Notably, Vietnam veterans were not the first to be tarred as drug abusers. Tens of thousands of Civil War veterans became addicted to morphine after treatment in service. SEVERO & MILFORD, *supra* note 20, at 137-38. After heroin was invented, addiction to these two drugs was commonly referred to as "soldiers disease" or "army disease." *Id.* at 138.

World War II, whose in-service and post-service experiences were different than Vietnam veterans in many ways.⁴³³ In addition, VA was dominated by World War II veterans, known as “the class of ‘46,” who were often slow to embrace the belief that Vietnam veterans had returned with dramatically different needs.⁴³⁴

The leading congressional advocate supporting PTSD treatment programs for veterans was Senator Alan Cranston. In 1969, he began investigating the quality of medical care provided to Vietnam veterans,⁴³⁵ and, in 1971, he introduced his first bill to provide readjustment counseling for Vietnam veterans.⁴³⁶ Although it passed the Senate, the American Legion and VFW both opposed the bill unless it could be guaranteed that the program’s funding would not come from existing funds or impact any other health service provided by VA, and the bill subsequently died in committee in the House.⁴³⁷ The process repeated itself each year for the next five years.⁴³⁸

The battle began to shift after Jimmy Carter’s election in 1976.⁴³⁹ VA Administrator Max Cleland made “readjustment counseling” his top priority.⁴⁴⁰ He was impressed with the treatment model developed by Lifton and Meshad, and made funding widespread counseling centers his top priority.⁴⁴¹ However, Cleland came into VA from outside the Iron Triangle,

⁴³³ SCOTT, *supra* note 331, at 53.

⁴³⁴ NICOSIA, *supra* note 349, at 362, 475. This is not to say that VA employees were monolithically hostile to the emerging issues of Vietnam veterans. As one VA psychologist stated: “For every time I can talk about somebody [in the VA] who really screwed us, . . . I can tell you another story of somebody who gave me tremendous help, who went above and beyond, who worked late, [and] put in tremendous hours.” *Id.* at 514 (first alteration in original).

⁴³⁵ SCOTT, *supra* note 331, at 10.

⁴³⁶ *Id.* at 38-39. It was not the first such bill. Congressman Robert F. Drinan had introduced one a year earlier. NICOSIA, *supra* note 349, at 198.

⁴³⁷ SCOTT, *supra* note 331, at 39.

⁴³⁸ NICOSIA, *supra* note 349, at 200; SCOTT, *supra* note 331, at 54.

⁴³⁹ SCOTT, *supra* note 331, at 63.

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.* at 65.

and had great difficulty finding support for his goal.⁴⁴² Eventually, he found an ally in Senator Cranston, and was able to obtain passage of the Veterans' Health Care Amendments of 1979,⁴⁴³ even over the considerable opposition of the American Legion and VFW.⁴⁴⁴ The Act established the Vietnam Veterans' Outreach Program, and, in 1979, the rap groups started by Lifton and store-front centers invented by Meshad became the model for VA's national program.⁴⁴⁵

By 1981, VA had established 137 "Vet Centers" across the country.⁴⁴⁶ Enthusiastic administrative support for the Vietnam veterans' centers did not persist after Cleland's administration, and their continued existence became an almost constant battle as soon as Robert P. Nimmo succeeded Cleland as the VA administrator.⁴⁴⁷ Fortunately, once PTSD was recognized as a mental condition by the APA, no special legislation or regulation was necessary to provide compensation benefits.⁴⁴⁸

⁴⁴² *Id.* at 68-71.

⁴⁴³ Pub. L. No. 96-22, 93 Stat. 47.

⁴⁴⁴ SCOTT, *supra* note 331, at 69. DAV's opposition to the bill faded, and some accounts state that it secretly supported the bill in the end. *Id.*

⁴⁴⁵ *Id.* at 35, 69-71. In 1982, the first Olin Teague Award for Outstanding Service and Innovation by a Federal Employee was awarded to Shad Meshad for his work developing VA's treatment model for Vietnam veterans suffering from PTSD. *Id.* at 70-71.

⁴⁴⁶ *Id.* at 71. The politics of the Iron Triangle were in full effect during this construction process, as hundreds of congressional members pleaded with Cleland to obtain Vet Centers in their districts, regardless of the size of the local Vietnam veteran population. NICOSIA, *supra* note 349, at 513.

⁴⁴⁷ NICOSIA, *supra* note 349, at 506-55. However, the VA employees who worked in the Vet Centers often went to extraordinary lengths to help their clients. Seventy-eight percent worked more than forty hours per week, seventy-five percent visited institutionalized veterans in their free time, and fifty-seven percent visited Vietnam veterans in their homes. *Id.* at 399.

⁴⁴⁸ VA did, however, impose special evidentiary requirements in 1993, which require corroboration of the stressful event that forms the basis of the diagnosis. Direct Service Connection (Post-traumatic Stress Disorder), 58 Fed. Reg. 29,109, 29,110 (May 19, 1993). For combat veterans, proof of combat is sufficient to corroborate a veteran's account of a stressor consistent with combat. 38 C.F.R. § 3.304(f)(1) (2009). The diagnosis itself is not considered proof that the stressful event actually occurred. *Anglin v. West*, 11 Vet. App. 361, 367-68 (1998).

LESSON 19: Veterans' law cannot be isolated from medical science. The politics and procedures for changing medical orthodoxy can be extremely relevant to the development of veterans' law. For example, the success of providing compensation benefits and other programs for Vietnam veterans with PTSD depended heavily on recognition of the condition by the APA. Although the politics involved were complicated, a few VA personnel and veterans' groups who worked on the front lines of the problem were instrumental in bringing about the necessary changes to the field of psychiatry.

C. Agent Orange

The second major issue raised by Vietnam veterans was the health effects of exposure to the herbicides used by the military during the war. Dioxin is a by-product of the production of chlorinated hydrocarbons and several of its harmful effects were identified as early as 1888.⁴⁴⁹ By 1960, reducing the presence of unwanted dioxin in manufactured chemicals was a serious issue, yet the side effects that had then been identified and the process for reducing dioxin contamination were closely guarded trade secrets.⁴⁵⁰ At the time, one commonly produced compound that contained dioxin was weed killer.⁴⁵¹ In 1962, the United States began contracting to buy specialized mixes of industrial weed killer to spray in Vietnam, both to destroy the foliage that hid enemy units and to deny food to the enemy by killing crops.⁴⁵² The concentration of these military herbicides was up to a thousand times greater than that sold in commercial weed killers at the time.⁴⁵³

⁴⁴⁹ NICOSIA, *supra* note 349, at 439-40; *see generally* INST. OF MED., VETERANS AND AGENT ORANGE: UPDATE 2006 (2007) (providing a comprehensive review of studies addressing the association between various health effects and dioxin).

⁴⁵⁰ NICOSIA, *supra* note 349, at 440. In that year, Dow Chemical paid a German company \$33,000 for information on how to reduce dioxin in the manufacturing process. *Id.*

⁴⁵¹ SCOTT, *supra* note 331, at 77.

⁴⁵² *Id.* at 77-78.

⁴⁵³ INST. OF MED., *supra* note 449, at 240 (noting that these figures were based upon samples taken from manufactured stocks that were not used).

Approximately eleven million gallons of herbicide⁴⁵⁴ were used by the U.S. military in Vietnam between 1965 and 1971.⁴⁵⁵ As early as 1965, one manufacturer had warned the government that dioxin posed serious health risks in concentrations greater than one part per million.⁴⁵⁶ In 1969, the National Cancer Institute warned the Department of Defense that trace amounts of dioxin were found to cause cancer and birth defects in laboratory animals.⁴⁵⁷ Although Operation “Ranch Hand” was considered highly successful, it was canceled in 1971 due to concerns about the health consequences of Agent Orange, as well as the negative publicity and local sentiment produced by the defoliation of large parts of the Vietnamese countryside.⁴⁵⁸

Shortly after the conclusion of hostilities, veterans who experienced unusual health problems began associating their problems with exposure to Agent Orange.⁴⁵⁹ The problems included birth defects and various forms of cancer.⁴⁶⁰ Agent Orange emerged as a national issue due to Maude DeVictor, a VA benefits counselor in Chicago who took an interest in the assertions of veterans who claimed that their conditions were caused by herbicides they encountered in Vietnam.⁴⁶¹ In 1978, she took the evidence that she had gathered and worked with reporter Bill Kurtis to produce an hour-long documentary, *Agent Orange, the*

⁴⁵⁴ Although “Agent Orange” has become a popular term and it is sometimes referred to as “dioxin,” Agent Orange was only one of many herbicides used, and dioxin was not the only active ingredient. SCOTT, *supra* note 331, at 77. The major active ingredient was 2, 4, 5-T, which the military had developed as a chemical weapon during World War II. *Id.* Dioxin was an unintended by-product of the manufacturing process. *Id.* at 81.

⁴⁵⁵ *Id.* at 75.

⁴⁵⁶ *Id.* at 153. Several chemical companies produced Agent Orange with slightly different formulas. *Id.* Agent Orange with more or less than one part per million of dioxin came to be known, respectively, as “dirty” and “clean” Agent Orange. *Id.*

⁴⁵⁷ *Id.* at 81.

⁴⁵⁸ *Id.* at 79-82.

⁴⁵⁹ VA received the first claims asserting conditions related to Agent Orange in 1977. *Id.* at 87.

⁴⁶⁰ *Id.* at 89-90; NICOSIA, *supra* note 349, at 391.

⁴⁶¹ NICOSIA, *supra* note 349, at 386-87; SCOTT, *supra* note 331, at 87-88. In October 1977 alone, she made 387 telephone calls seeking information on Agent Orange. SEVERO & MILFORD, *supra* note 20, at 365.

Deadly Fog, which became a national sensation and prompted VA to receive thousands of claims asserting Agent Orange as the cause of various conditions.⁴⁶²

The movement to obtain compensation for veterans harmed by Agent Orange proceeded on two parallel tracks. First, a class-action lawsuit against the chemical's manufacturers was originally filed in January 1979.⁴⁶³ Although the government was immune to lawsuits by veterans,⁴⁶⁴ veterans hoped to hold chemical companies liable by proving that they had misled the government or withheld information about the dangers of Agent Orange so as to forfeit their ability to invoke immunity from suit as government contractors.⁴⁶⁵ Furthermore, a favorable verdict would include a finding of causation, which would validate the claims of veterans for compensation benefits regardless of whether the government had any prior knowledge of Agent Orange's dangers.⁴⁶⁶

The lawsuit moved at a glacial pace. Over the course of years, several querulous firms became involved in managing the case for the plaintiffs,⁴⁶⁷ while an interlocutory issue was appealed to the Second Circuit and supervision of the case passed from one federal judge to another, resulting in the issues being reframed and its development prolonged.⁴⁶⁸ Seven different chemical manufacturers were named as defendants, and the discovery process indicated that they varied in their culpable knowledge and

⁴⁶² NICOSIA, *supra* note 349, at 386-87; SCOTT, *supra* note 331, at 88-89.

⁴⁶³ SCOTT, *supra* note 331, at 91; NICOSIA, *supra* note 349, at 443. *See generally* PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* (1986) (telling the story of the class action lawsuit brought against the manufacturers of herbicides).

⁴⁶⁴ *See infra* notes 517-22 and accompanying text. The plaintiffs consciously avoided bringing the government in as a defendant in part because many of the veterans involved believed it would be unpatriotic to sue their government. SCOTT, *supra* note 331, at 129; NICOSIA, *supra* note 349, at 441-42.

⁴⁶⁵ SCOTT, *supra* note 331, at 153.

⁴⁶⁶ *Id.* at 105.

⁴⁶⁷ *Id.* at 151-52.

⁴⁶⁸ *Id.* at 114, 167-70, 177-81; NICOSIA, *supra* note 349, at 480-81.

their choices of how “dirty” or “clean” a mixture to produce.⁴⁶⁹ Not surprisingly, the defendants were also fractured and had difficulty agreeing on strategy.⁴⁷⁰ Ultimately, in 1984, the lawsuit settled for \$180 million plus interest after a very aggressive intervention by District Judge Jack Weinstein to avoid trial.⁴⁷¹ Although the lawsuit resulted in a landmark payout, many Vietnam veterans were disappointed or outraged that it did not result in any admission of liability.⁴⁷²

In the meantime, efforts were also made to press for compensation benefits for veterans exposed to Agent Orange. For many years, Agent Orange claims met with universal disapproval by VA.⁴⁷³ Max Cleland was skeptical of Agent Orange claims,⁴⁷⁴ and by the time support for Agent Orange compensation began to gather momentum, he was replaced by a series of administrators who were not Vietnam veterans or advocates of Agent Orange claims.⁴⁷⁵ As a result, the impetus for Agent Orange compensation largely came from outside VA.

A major part of the problem in pressing benefits claims was the lack of a substantial, scientific consensus on the effects

⁴⁶⁹ SCOTT, *supra* note 331, at 91, 153. For example, Dow was clearly aware of potential health issues as early as 1964, but continued to produce herbicides with only a relatively low concentration of dioxin as a result. *Id.* On the other hand, Monsanto was not clearly aware of the dangers and produced some of the “dirtiest” mixes. *Id.*

⁴⁷⁰ *Id.* at 114-16, 153-54.

⁴⁷¹ *Id.* at 184-86; NICOSIA, *supra* note 349, at 556-63.

⁴⁷² SCOTT, *supra* note 331, at 186-87; NICOSIA, *supra* note 349, at 565, 573. The settlement was just the end of the first act in the litigation drama. Due to legal wrangling, it would be another five years before any funds were disbursed. NICOSIA, *supra* note 349, at 573-77. In the end, only veterans totally disabled by conditions related to Agent Orange would get any money, and those veterans received at most \$12,800, while the families of deceased veterans were awarded \$3,400. *Id.* at 574-75.

⁴⁷³ See *infra* note 504 and accompanying text.

⁴⁷⁴ SCOTT, *supra* note 331, at 118. He was also hurt that his appearances at the opening of Vet Centers were marred by Agent Orange protests instead of gratitude for his work promoting PTSD treatment. *Id.* at 117-18; NICOSIA, *supra* note 349, at 392-93. At the opening of the first Vet Center in Van Nuys, California, an angry Vietnam veteran threw a punch at the wheelchair-bound Cleland. SCOTT, *supra* note 331, at 117.

⁴⁷⁵ See NICOSIA, *supra* note 349, at 400-41, 461-63 (discussing Robert P. Nimmo), 469 (discussing Harry N. Walters).

of Agent Orange.⁴⁷⁶ In December 1979, Congress directed VA to investigate the long-term effects of dioxin exposure.⁴⁷⁷ Almost two years later, VA had failed even to design a protocol for conducting the study, and responsibility for conducting it was moved to the Centers for Disease Control (CDC).⁴⁷⁸ In 1983, the Air Force conducted its own study of personnel directly involved in spraying Agent Orange, and concluded in a heavily disputed report that those personnel had not experienced any significant health outcomes.⁴⁷⁹ Meanwhile, the work of the CDC was beset with bureaucratic disputes as to the proper use of the data and design of the study.⁴⁸⁰ In 1987, the CDC scrapped its attempt to produce a comprehensive study without any conclusions being released.⁴⁸¹ All that was determined by the CDC's efforts was that Vietnam veterans were dying substantially faster than their contemporaries and experiencing worse health in general.⁴⁸² In 1990, the CDC finally released a study that tepidly concluded that it could not rule out an association between Agent Orange and six types of cancers.⁴⁸³

Part of the problem was the difficulty of the science itself. Even to begin a high-quality study, it was necessary to determine which soldiers had been exposed to herbicides and

⁴⁷⁶ SCOTT, *supra* note 331, at 82. One scholar concluded that, during the ensuing debate, the conclusions of the majority of scientists conformed to their political views about the war or to the commercial interests of their employers. *Id.* Admiral Elmo R. Zumwalt, vigorously argued—with considerable documentation—that the battle to prove the effects of Agent Orange was severely hampered by chemical industry scientists producing reports that manipulated data to avoid admitting liability. *See infra* note 492; NICOSIA, *supra* note 349, at 603-04.

⁴⁷⁷ SCOTT, *supra* note 331, at 164 (citing Veterans Health Programs Extension and Improvement Act of 1979, Pub. L. No. 96-151, § 307, 93 Stat. 1093, 1097).

⁴⁷⁸ *Id.* at 165-66.

⁴⁷⁹ *Id.* at 182-83. In 1988, the Senate began investigating allegations that the conclusions of the report had been substantially altered by the White House Agent Orange Working Group. *Id.* at 202. In March of that year, the Air Force released a “revised” study of the participants in Ranch Hand, which found significant increases in cancers and birth defects associated with those who served in the program. NICOSIA, *supra* note 349, at 591.

⁴⁸⁰ SCOTT, *supra* note 331, at 196-99.

⁴⁸¹ *Id.* at 200.

⁴⁸² *Id.* at 199-201.

⁴⁸³ *Id.* at 221-22.

what their likely level of exposure was.⁴⁸⁴ However, the project to develop an exposure model from available military data about spraying flights and troop movements was beset with disagreement and in-fighting.⁴⁸⁵ Furthermore, reaching reliable conclusions required extensive and careful documentation of the health issues of veterans because even a few missed diagnoses can have a meaningful impact on the statistical presence of rare diseases. Even though VA had developed a model program to extensively examine Vietnam veterans, in practice most Vietnam veterans at VA facilities who should have been studied were either not examined or only had urine and blood samples taken.⁴⁸⁶ As a result of the disputed and incomplete data about exposure and the conditions suffered by veterans, it was difficult to build a compelling body of evidence.

Due to the delays, Agent Orange quickly became a major political issue. However, events outside the arena of veterans' benefits had major impacts on its progress. Since the 1960s, the communist government of Vietnam had been arguing that the spraying of Agent Orange was chemical warfare and, therefore, a war crime under the Geneva Conventions that required reparation payments from the United States.⁴⁸⁷ As a result, many officials outside of VA were deeply concerned about admitting the effects of Agent Orange without definitive proof.⁴⁸⁸ Similarly, the potential budgetary cost of Agent Orange benefits encouraged caution and skepticism.⁴⁸⁹

⁴⁸⁴ See generally INST. OF MED., *supra* note 449, at 240-47 (discussing numerous studies designed to estimate exposure levels).

⁴⁸⁵ SCOTT, *supra* note 331, at 192-96.

⁴⁸⁶ NICOSIA, *supra* note 349, at 459.

⁴⁸⁷ *Id.* at 472. Litigation by Vietnamese nationals against the manufacturers of Agent Orange continued until very recently. See *Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 1524 (2009).

⁴⁸⁸ NICOSIA, *supra* note 349, at 471-72.

⁴⁸⁹ See *id.* at 458-59. VA administrator Robert Nimmo was among those who suggested that VA simply could not afford to pay Agent Orange claims. *Id.* Subsequently, VA Administrator Harry Walters testified before Congress that Agent Orange benefits could "'jeopardize the viability of [the VA's] compensation program.'" *Id.* at 469 (alteration in original).

On the other hand, the potential effects of exposure to environmental chemicals had exploded into the American consciousness with the publication of Rachel Carson's *Silent Spring* in 1962.⁴⁹⁰ In ensuing decades, domestic environmental disasters specifically involving dioxin at Love Canal, New York, and Times Beach, Missouri, helped generate public support for Agent Orange research and compensation.⁴⁹¹ After the Environmental Protection Agency spent \$33 million in 1983 to relocate the entire population of Times Beach from the uninhabitable town, one Veteran wrote in a letter to the *Washington Post*: "Perhaps dioxin is poisonous only when in proximity to civilians but harmless to men and women in uniform."⁴⁹²

The administrative, political, and judicial struggle over Agent Orange lasted over a decade. VA has the power to recognize certain conditions as presumptively related to service, and presumptive service connection was available for more than forty conditions under specific circumstances.⁴⁹³ However, VA's initial position was that Agent Orange was so completely harmless that, as one historian characterized it, "you could drink it for breakfast."⁴⁹⁴ Nonetheless, in 1978, VA established a committee

⁴⁹⁰ *Id.* at 435.

⁴⁹¹ *Id.* at 447 (discussing Love Canal), 469-70 (discussing Times Beach); SCOTT, *supra* note 331, at 170-75 (discussing Times Beach). Furthermore, in 1979, the EPA banned the commercial weed killers related to Agent Orange. NICOSIA, *supra* note 349, at 446. It had previously banned a related chemical in 1971. *Id.* at 469.

⁴⁹² NICOSIA, *supra* note 349, at 470 (quoting Vietnam Veteran Edward Manear). In addition, Admiral Elmo R. Zumwalt emerged as a powerful symbolic figure in support of the movement. As Commander of U.S. Naval Forces, in 1968 he ordered the spraying in areas where his son, Lieutenant Elmo Zumwalt III, was serving. *Id.* at 601. After the war, Lieutenant Zumwalt had a son born with severe learning disabilities. *Id.* Lieutenant Zumwalt was then diagnosed in 1983 with a rare combination of cancers that was "like winning the biggest cancer lottery in the world." *Id.* As a result of these events, Admiral Zumwalt became an activist advocating for money to study the effects of Agent Orange and to compensate veterans affected by related conditions. *Id.* at 601-05. Nonetheless, Admiral Zumwalt maintained until his death that he still would have ordered the use of Agent Orange even knowing its effects, because of its crucial role in saving thousands of soldiers during the war. *Id.* at 602.

⁴⁹³ SCOTT, *supra* note 331, at 121. In fact, Cleland created a presumption that certain circulatory problems were related to amputations. *Id.*

⁴⁹⁴ NICOSIA, *supra* note 349, at 445 (internal quotation marks omitted).

to investigate the issue.⁴⁹⁵ Almost as soon as it was established, it was challenged by Vietnam veterans in court for not conducting public meetings.⁴⁹⁶

In the political fight, veterans' groups that had opposed PTSD legislation in the 1970s were quicker to support Agent Orange compensation in the 1980s. VFW, then recognizing the need to recruit members from the younger generation, supported early legislative proposals in 1983.⁴⁹⁷ Vietnam veterans also found political allies among older veterans who had been exposed to radiation. Approximately 400,000 veterans were involved in either the occupation of Hiroshima and Nagasaki or in atmospheric nuclear testing before it was banned,⁴⁹⁸ and these veterans helped bridge the generational gap in fighting for recognition of exposure-related harms.⁴⁹⁹ Similarly, the public struggles over the design and construction of the Vietnam War Memorial on the National Mall during the early 1980s led to a groundswell of support among older American Legion leadership to recognize the sacrifices of the Vietnam generation.⁵⁰⁰ In fact, a major study of Vietnam veterans during this time was completed independently by the American Legion. The study was begun in 1983 and released on Veterans Day in 1988.⁵⁰¹

⁴⁹⁵ SCOTT, *supra* note 331, at 90.

⁴⁹⁶ NICOSIA, *supra* note 349, at 389.

⁴⁹⁷ *Id.* at 471; SCOTT, *supra* note 331, at 176. This was an about-face for VFW. Reagan had initially nominated John Behan, a Vietnam veteran who lost both his legs in combat, to head VA in 1981, but later withdrew the nomination after opposition from VFW based upon Behan's support for benefits for Agent Orange claims. SCOTT, *supra* note 331, at 141.

⁴⁹⁸ Melinda F. Podgor, Note, *The Inability of World War II Atomic Veterans to Obtain Disability Benefits: Time is Running Out on Our Chance to Fix the System*, 13 ELDER L.J. 519, 520 (2005).

⁴⁹⁹ SCOTT, *supra* note 331, at 107-09, 119-22. VA did not recognize a presumption that any condition was related to radiation exposure until 1979. *See id.* at 119-20. The Radiation-Exposed Veterans Compensation Act of 1988 created presumptive service connection for numerous conditions potentially related to radiation exposure. Pub. L. No. 100-321, 102 Stat. 485.

⁵⁰⁰ SCOTT, *supra* note 331, at 177.

⁵⁰¹ *Id.* at 203. The study helped turn the scientific tide. A year earlier, VA had published a review of the available evidence that concluded that "no scientific evidence was found that would link [Vietnam veterans'] health problems to [Agent Orange]." T.L. LAVY, HUMAN EXPOSURE TO PHENOXY HERBICIDES 93 (1987). The American Legion study not only

After years without significant action by VA, the Veterans' Dioxin and Radiation Exposure Compensation Standards Act was passed in 1984 requiring VA to establish a scientific advisory committee and to promulgate regulations creating presumptions of service connection for conditions determined to be related to herbicide exposure.⁵⁰² However, the Act did not result in substantive changes. In April 1985, VA proposed a regulation that presumed service connection only for the skin condition chloracne, and stated that "[s]ound medical and scientific evidence does not support a causal association between dioxin exposure" and any other disease.⁵⁰³ By 1987, VA had still not recognized any additional conditions as related to Agent Orange,⁵⁰⁴ and veterans' groups sued, asserting that VA was not complying with the Act and that it was demanding a higher level of proof than that specified by Congress.⁵⁰⁵ In 1989, the U.S. District Court for the Northern District of California agreed, and ordered VA to redo its rulemaking under a more generous scientific standard, and to re-adjudicate 31,000 claims that had previously been denied.⁵⁰⁶ Eight days after the court's decision, Edward Derwinski, the recently confirmed Secretary of Veterans Affairs, declined to appeal.⁵⁰⁷ Finally, in 1990, Secretary Derwinski extended presumptive service connection for non-Hodgkin's lymphoma and soft-tissue sarcomas.⁵⁰⁸

connected numerous conditions to Agent Orange, but also demonstrated that controversial military records were highly reliable in determining the likely level of exposure experienced by specific veterans. Nicosia, *supra* note 349, at 592-93. The American Legion study was followed by a compelling study of Vietnamese exposed to Agent Orange. *Id.* at 593-94.

⁵⁰² Pub. L. No. 98-542, §§ 5, 6, 98 Stat. 2725, 2727-30 (1984); Scott, *supra* note 331, at 110, 207.

⁵⁰³ Adjudication of Claims Based on Exposure to Dioxin or Ionizing Radiation, 50 Fed.

Reg. 15,848, 15,849-50 (proposed Apr. 22, 1985) (to be codified at 38 C.F.R. pt. 3).

⁵⁰⁴ As of 1988, VA had not granted even a single one of the 150,000 claims that had been filed based upon Agent Orange exposure. Nicosia, *supra* note 349, at 475.

⁵⁰⁵ *Nehmer v. U.S. Veterans' Admin.*, 712 F. Supp. 1404, 1423 (N.D. Cal. 1989).

⁵⁰⁶ *Id.* at 1423; see also Nicosia, *supra* note 349, at 599-600.

⁵⁰⁷ Nicosia, *supra* note 349, at 599-600. Secretary Derwinski was heavily influenced in his decision to reverse VA's course by Admiral Zumwalt. *Id.* at 604.

⁵⁰⁸ Scott, *supra* note 331, at 222-23; VA HISTORY IN BRIEF, *supra* note 223, at 20.

Derwinski's decision did not resolve the *Nehmer* lawsuit. Rather, it became a vehicle for the courts to consider subsequent challenges to VA's Agent Orange compensation scheme.

The ultimate resolution of the core problems of Agent Orange claims was not reached until shortly after the CAVC began operations in 1989.⁵⁰⁹ The two issues that clearly needed to be addressed were finding a credible, independent process to analyze the scientific evidence, and defining a clear and appropriate standard for determining causation. The problems were solved in legislation drafted by Senator Tom Daschle and Representative Lane Evans.⁵¹⁰ The legislation assigned the task of regularly gathering and evaluating all available evidence to the independent National Academy of Sciences (NAS).⁵¹¹ The NAS was to determine whether a “positive association” existed between Agent Orange and any condition studied, which was defined as “credible evidence . . . equal to or outweigh[ing] the credible evidence against the association.”⁵¹² Once a positive association for a condition had been determined by the NAS, the law required the VA Secretary to add that condition to the list of compensation diseases within sixty days or articulate reasons for not doing so.⁵¹³ The Agent Orange Act of 1991 was signed into law on February 6 of that year.⁵¹⁴

See *Nehmer v. U.S. Dep’t of Veterans Affairs*, 494 F.3d 846 (9th Cir. 2007), *Nehmer v. Veterans’ Admin. of Government of U.S.*, 284 F.3d 1158 (9th Cir. 2002).

⁵⁰⁹ This is not to say that *all* problems relating to Agent Orange were settled. *See supra* note 508.

⁵¹⁰ NICOSIA, *supra* note 349, at 608-09. Representative Evans was chairman of the Vietnam Veterans in Congress at the time. *Id.* at 608.

⁵¹¹ *Id.* at 608-09.

⁵¹² *Id.* at 609 (omission and alteration in original) (quoting 38 U.S.C. § 1116(b)(3) (2006)). This standard was derived from the benefit-of-the-doubt standard used in 38 U.S.C. § 5107(b). *See* NICOSIA, *supra* note 349, at 609; *see generally* Caffrey v. Brown, 6 Vet. App. 377, 382 (1994) (explaining the application of the benefit of the doubt doctrine in increased rating claims); Gilbert v. Derwinski, 1 Vet. App. 49, 57-58 (1990) (discussing the CAVC’s review of the Board of Veterans’ Appeals benefit of the doubt determinations).

⁵¹³ 38 U.S.C. § 1116(c).

⁵¹⁴ Pub. L. No. 102-4, 105 Stat. 11. The NAS continues to make recommendations under this list. Pursuant to this law, on March 25, 2010, VA proposed to add hairy cell leukemia and other chronic B cell leukemias, Parkinson’s disease, and ischemic heart disease to the list of conditions associated with Agent Orange. Diseases Associated With Exposure to Certain Herbicide Agents (Hairy Cell Leukemia and Other Chronic B Cell Leukemias, Parkinson’s Disease and Ischemic Heart Disease), 75 Fed. Reg. 14,391 (proposed Mar. 25, 2010) (to be codified at 38 C.F.R. pt. 3).

LESSON 20: Medical science is founded on the “null hypothesis,” i.e., the presumption that there is no relationship between any condition and any suggested cause.⁵¹⁵ To achieve acceptance that a condition may be caused by a suspected event, it is necessary to gather substantial evidence and, preferably, develop a theory of the causative mechanism. The scientific ethic is not one that is prone to leaping quickly to conclusions. Therefore, pursuing compensation for new types of claims can be a long and acrimonious process, because there will frequently be a very long gap between the emergence of the first anecdotal stories and the development of a body of evidence sufficient to support the claims. Furthermore, the process can be prolonged when political, budgetary, and corporate interests are added to the mix.⁵¹⁶

D. Judicial Review Revisited

Perhaps the most profound effect on the veterans’ benefits system by Vietnam veterans was the introduction of judicial review of veterans’ claims. The absence of judicial review had been once again reaffirmed and reimagined after World War II. In 1946, the Federal Tort Claims Act (FTCA) was passed, allowing a wide variety of civil lawsuits against the federal government.⁵¹⁷ Not long afterward, veterans sought to use the FTCA to obtain compensation for injuries suffered during service. Although the idea that government benefits were a mere gratuity that could not support a case or controversy had crumbled before the end of the Vietnam War,⁵¹⁸ in *Feres v. United States*,⁵¹⁹ the Supreme Court refused to allow veterans’ claims into federal court through the potential back door created by the FTCA.

⁵¹⁵ SCOTT, *supra* note 331, at 255-56. In more poetic terms, chemicals are innocent until proven guilty. SEVERO & MILFORD, *supra* note 20, at 363.

⁵¹⁶ See NICOSIA, *supra* note 349, at 605-19 (discussing the parallels and differences between the experiences of Gulf War veterans and Vietnam veterans).

⁵¹⁷ Pub. L. No. 79-601, 60 Stat. 842 (1946).

⁵¹⁸ See, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970) (discussing due process requirements that need to be followed prior to terminating a person’s welfare benefits).

⁵¹⁹ 340 U.S. 135 (1950).

The Supreme Court concluded that the waiver of sovereign immunity embodied by the FTCA did not extend to injuries suffered in service because of the “distinctly federal . . . character” of the relationship between soldiers and the government.⁵²⁰ As a result, it concluded that “the Government is not liable under the [FTCA] for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.”⁵²¹ The *Feres* doctrine was extended to government contractors on the theory that contractors would pass the expenses of liability onto the government and thereby circumvent the intent of *Feres* if not protected.⁵²²

Despite *Feres*, the bar on judicial review weakened in the decades afterward.⁵²³ A series of federal court decisions concluded that the ban on judicial review applied only to specific decisions on benefits claims, and not to more general suits such as those challenging the constitutionality of statutes or regulations.⁵²⁴ Congress responded in 1970 by tightening the preclusion language of the statute.⁵²⁵ Even so, the Supreme Court concluded in 1974 in *Johnson v. Robinson*,⁵²⁶ that the revised language did not bar constitutional challenges to VA benefit statutes.⁵²⁷ The Supreme Court’s decision in *Robinson* cleared the way for the federal courts to create a series of exceptions to the bar on judicial review for due process and equal protection claims as well as arguments that a VA decision or regulation was *ultra vires*.⁵²⁸

⁵²⁰ *Id.* at 143 (internal quotation marks omitted).

⁵²¹ *Id.* at 146.

⁵²² *Stencel Aero Eng’g Corp. v. United States*, 431 U.S. 666, 669-74 (1977).

⁵²³ See Kenneth B. Kramer, *Judicial Review of the Theoretically Non-Reviewable: An Overview of Pre-COVA Court Action on Claims for Veteran Benefits*, 17 OHIO N.U. L. REV. 99, 100 (1990).

⁵²⁴ *Id.* at 100-01 (discussing cases).

⁵²⁵ Pub. L. No. 91-376, § 8(a), 84 Stat. 787, 790 (1970). The committee report was unambiguous in stating “that the revisions ‘will make it perfectly clear that Congress intends to exclude from judicial review all determinations with respect to non-contractual benefits [i.e. life insurance] provided for veterans and their dependents and survivors.’” Kramer, *supra* note 523, at 101 (quoting H.R. REP. NO. 91-1166 (1970), as reprinted in 1970 U.S.C.C.A.N. 3723, 3731).

⁵²⁶ 415 U.S. 361 (1974).

⁵²⁷ *Id.* at 366-74.

⁵²⁸ Kramer, *supra* note 523, at 104-17 (discussing cases).

Nonetheless, the Supreme Court was explicit in avoiding either “burden[ing] the courts and [VA] with expensive and time-consuming litigation” or becoming “enmesh[ed]” in the day-to-day decisions of VA.⁵²⁹ Furthermore, the Supreme Court declined an opportunity to cast doubt on the basic validity of the VA adjudication process. In *Walters v. National Ass’n of Radiation Survivors*,⁵³⁰ the Supreme Court rejected a due process challenge to a pillar of the VA adjudication system, the severe limitation on attorney’s fees. Nearly a century after its enactment, the Civil War era restrictions on attorney’s fees remained in place.⁵³¹ The plaintiffs in *National Ass’n of Radiation Survivors* alleged that the fee limitation rendered the VA process fundamentally unfair because it denied claimants any realistic opportunity to obtain the assistance of counsel.⁵³² The Supreme Court discussed the VA adjudication process at great length.⁵³³ Ultimately, it concluded that due process did not require access to attorneys because claimants in the VA system were “provided with substitute safeguards such as a competent [veterans service officer] representative, a decisionmaker whose duty it is to aid the claimant, and significant concessions with respect to the claimant’s burden of proof.”⁵³⁴ Therefore, regardless of the Supreme Court’s willingness to open certain side doors to the courthouse, *National Ass’n of Radiation Survivors* gave little reason to believe that it would sanction a major judicial assault on the VA system.

In the end, the expanded involvement of the federal courts available after *Robinson* and its progeny was not sufficient to allow Vietnam veterans to fully air their issues in federal court. Accordingly, VVA led a movement to allow judicial review of veterans’ claims.⁵³⁵

⁵²⁹ *Traynor v. Turnage*, 485 U.S. 535, 544 (1988) (quoting *Robinson*, 415 U.S. at 370).

⁵³⁰ 473 U.S. 305 (1985).

⁵³¹ See *supra* Part II.C.

⁵³² 473 U.S. at 320.

⁵³³ *Id.* at 309-12.

⁵³⁴ *Id.* at 333.

⁵³⁵ Laurence R. Helfer, *The Politics of Judicial Structure: Creating the United States Court of Veterans Appeals*, 25 CONN. L. REV. 155, 162 (1992).

The political process took many years,⁵³⁶ and the Iron Triangle fought hard to prevent judicial review of veterans' claims.⁵³⁷ Its members firmly believed that the system took care of veterans and was more manageable without the interference of the courts.⁵³⁸ However, VVA eventually convinced a large portion of the rank-and-file veterans to support veterans' benefits.⁵³⁹ In the end, VVA succeeded in tying judicial review of veterans' benefits to a popular bill to elevate VA to a cabinet department.⁵⁴⁰ As a result, VA's "splendid isolation" finally came to an end when Ronald Reagan signed the VJRA on November 18, 1988, creating the CAVC to conduct independent judicial review of VA decisions.⁵⁴¹

LESSON 21: Claims for compensation are the 600-pound gorilla of veterans' law.⁵⁴² Despite compensation claims' foundation in tort theory, veterans' law is not a common law system. Veterans' benefits exist only because of a waiver of sovereign immunity. This waiver was a political development, not a judicial one. Accordingly, the development of emerging areas of veterans' law cannot begin with discussing what is "just" or "fair." Justice and fairness are certainly relevant concerns, but analyzing any problem in veterans' law must begin by turning to the statute that defines benefits. In many cases, major shifts in the area

⁵³⁶ See generally Bill Brew, Staff Dir. of the Senate Veterans Affairs Comm., Remarks at the Ceremonial Session of the U.S. Court of Appeals for Veterans Claims in Commemoration of the Twentieth Anniversary of the First Convening of the Court (Oct. 16, 2009), in 23 Vet. App. LV, LV (discussing the "years in the wilderness preceding the founding of the" CAVC beginning with Senator Gary Hart's first bill to allow for judicial review introduced in 1976).

⁵³⁷ See Helfer, *supra* note 535, at 156; LIGHT, *supra* note 237, at 5-7 (describing the power of the Iron Triangle).

⁵³⁸ Helfer, *supra* note 535, at 161-62.

⁵³⁹ *Id.* at 162-63.

⁵⁴⁰ See LIGHT, *supra* note 237, at 82-83.

⁵⁴¹ Pub. L. No. 100-687, 102 Stat. 4105 (1988).

⁵⁴² Compensation claims — those asserting that a veteran has a current disability caused by an injury or disease in service — are about eighty percent of the claims filed and ninety-five percent of the claims appealed to the Board of Veterans' Appeals. See James D. Ridgway, *Why So Many Remands?: A Comparative Analysis of Appellate Review by the United States Court of Appeals for Veterans Claims*, 1 VETERANS L. REV. 113, 148-49 (2009).

must begin in Congress with appropriate authorizing legislation. Thus, even though courts and attorneys have now become deeply involved in the wake of the VJRA, the politics of veterans' benefits will remain as crucial to the future of veterans' law as it has in the past.

CONCLUSION

The history of warfare is grittier and more complex than that portrayed by the jingoistic news reels of old. So too, the history of veterans' benefits is much more checkered and conflicted than might be suggested by slogans welcoming home the nation's heroes. The first two centuries of veterans' benefits were filled with highs and lows, choices and consequences. Over that period, politicians, agencies, and even veterans' organizations each made decisions and pursued paths that sometimes provoked outrage and backlash, as well as occasionally put them on the wrong side of history. In the end, it is the veterans whose lives have been truly disrupted and diminished by service who suffer when the lessons of history are ignored. It is in the best interests of veterans and the nation to meet each emerging issue brought about by the new realities of service in a modern military with policies that avoid both the euphoric highs and the catastrophic lows that have sometimes marked veterans' benefits policy in the United States. Finding the sustainable middle ground requires acknowledging the key lessons of the past.

One recurring issue is the conflicting philosophies invoked in discussing the rationale for benefits.⁵⁴³ At times, support for veterans' benefits is based upon gratitude to those who suffered severe hardships and grave peril in defending the country.⁵⁴⁴ At other times, it is based upon compensation for quantifiable injuries suffered.⁵⁴⁵ These veins are not isolated from each other because

⁵⁴³ DILLINGHAM, *supra* note 250, at 2 (observing that Glasson had also reached the same conclusion).

⁵⁴⁴ See, e.g., *supra* notes 85-86 and accompanying text.

⁵⁴⁵ See, e.g., *supra* notes 233-34 and accompanying text.

appeals to the nation's generosity are often grounded in uncertainty as to the effects of service.⁵⁴⁶ Furthermore, veterans' benefits sometimes receive conditional support in the context of promoting general social welfare programs.⁵⁴⁷ However, the limitations of support for veterans' benefits is frequently grounded on the ideal that service is an obligation of citizenship⁵⁴⁸ or the reality of budget constraints.⁵⁴⁹ At the margins, an increasingly sophisticated model of compensation tends to undermine the sense that generosity to veterans is required because of the degree to which the costs of service cannot be quantified. At the same time, the increasing role of the government in providing a general social safety net can work both for and against the expansion of veterans' programs. More integrated and sophisticated models of the role of veterans' benefits within the larger sphere of government responsibilities could help guide the handling of difficult issues.

A second recurring theme is the multi-faceted needs of veterans. Veterans' benefits can be divided between those that address acute readjustment needs at the time of discharge and those that address long-term needs of caring for those who suffer from the enduring effects of service. Although history proves the long-term efficiency of investing heavily in a smooth readjustment, it remains politically difficult to add substantial readjustment benefits to the cost of a conflict in times of intense budget pressure.⁵⁵⁰ Furthermore, the degree to which readjustment benefits reduce long-term costs is difficult to determine.

⁵⁴⁶ See, e.g., DILLINGHAM, *supra* note 250, at 51-52 (noting that Frank Hines had advocated for non-service-connected pension benefits on this basis).

⁵⁴⁷ See, e.g., NICOSIA, *supra* note 349, at 379-80 (discussing how Carter backed veterans pensions as a tool to extend government assistance to as many poor citizens as possible); see generally GILBERT Y. STEINER, *THE STATE OF WELFARE* (1971) (discussing the role of veterans' benefits in the overall development of a welfare safety net).

⁵⁴⁸ See, e.g., SEVERO & MILFORD, *supra* note 20, at 95.

⁵⁴⁹ See, e.g., *supra* notes 158, 489 and accompanying text.

⁵⁵⁰ For example, Lyndon Johnson blocked efforts to revamp the G.I. Bill for Vietnam veterans because it threatened to add to the cost of the war and compete with his Great Society program for funds. NICOSIA, *supra* note 349, at 368-69.

In contrast, the historic difficulty of quantifying the long-term effects of service has led to a separate category of lifetime benefits that are not directly related to disabilities incurred in service. However, better readjustment benefits and an increasingly sophisticated understanding of medical causation have diminished the justification for such benefits. Yet, the practical truth remains that it frequently takes years—if not decades—to recognize emerging medical issues. During that time, veterans and their dependents suffer substantial difficulties waiting for science to catch up to the realities of their conditions. Accordingly, it would be premature to declare that history has eroded the foundations of long-term, non-service-connected benefits.

The final theme of this history is that identifying the needs of veterans and developing programs to meet those needs continues to raise political and medical issues as much as legal ones. Anyone proposing reforms to the veterans' benefits system must acknowledge and address the political sensitivities involved. Veterans' groups and the congressional veterans' affairs committees remain deeply involved in monitoring and altering veterans' law.⁵⁵¹ Furthermore, the importance of scientific consensus-building to support substantive change cannot be overlooked. Particularly in this time of concern over steep federal budget deficits, any substantial reform of the veterans' benefits system is likely to require careful coordination of political support, medical research, and an appropriate theory to justify the change.

Thus, as in so many other areas, it remains true in veterans' law that "[t]he past is never dead. It's not even past."⁵⁵² More than two decades after the dawn of judicial review of veterans' benefits, history continues to cast a long shadow that can be challenging for those who labor in the dawn of a new era.

⁵⁵¹ See Ridgway, *supra* note 6 (discussing the role of Congress and veterans' groups in reforming veterans' law over the last two decades).

⁵⁵² WILLIAM FAULKNER, *REQUIEM FOR A NUN*, Act I, Scene III (1951), *reprinted in* FAULKNER: NOVELS 1942-1954 (Penguin Putnam 1994).