CRACKS IN THE ARMOR: DUE PROCESS, ATTORNEY'S FEES, AND THE DEPARTMENT OF VETERANS AFFAIRS

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The Due Process Clause of the Fifth Amendment is designed to protect all individuals that come within the United States, including citizens, non-citizens, and corporate entities. Unfortunately, due process has not always protected U.S. veterans to the extent that it protects others. This Article analyzes the legislative history behind

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laws that do not provide the protections of due process to veterans. It also examines case law that appears to reinforce the authority of the federal agency charged with protecting veterans, but which in execution, has proven to be unresponsive and overwhelmed with the task before it. Ms. Collier and Mr. Early argue that, while the situation has improved drastically since the early nineteenth century, the system facing U.S. veterans limits ready access to counsel and the courts in a manner unlike any other citizen or non-citizen seeking legal redress for other matters.

> "To care for him who shall have borne the battle and for his widow and his orphan."
>
> A. Lincoln during his second Inaugural address

I. Introduction

The U.S. Constitution, Amendment V reads:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.[1]

The Fifth Amendment and the Due Process Clause are hallmarks of rights granted to citizens of this nation. These rights have been extended in application throughout the states and even to non-citizens and legal entities such as corporations and trusts. However, and surprisingly to many, the same rights afforded under due process are not necessarily extended to one deserving group—our nation's veterans.

An initial review of the topic indicates the veteran's community has not been granted the same rights and privileges afforded so many others under our legal system. "It is absurd that an enemy combatant has a right to an attorney but a disabled American veteran does not," says Rick Weidman of the Vietnam Veterans of America.[2] Another noted veterans advocate, Gordon Erspamer, notes the dichotomy in

1. U.S. CONST. amend. V.

2. Patrick Yoest, *Staking a Claim on Veterans' Representation*, CONG. Q. WKLY. ONLINE, Jan. 22, 2007, at 222.

rights afforded a veteran, observing "that corporations possess greater constitutional rights than our veterans."[3]

The rationale behind not completely providing the protections of due process to veterans is found both in history and congressional intent. It is coupled with case law seemingly designed to reinforce the authority of the federal agency charged with protecting veterans, but which in execution, has proven to be unresponsive and overwhelmed with the task before it. Part of the foundation of this unique approach to veterans has been the historic limitation to ready access to counsel and the courts, as opposed to any other citizen or non-citizen seeking legal redress for other matters.

II. History

> The Department of Veterans Affairs (VA) was established on March 15, 1989, succeeding the Veterans Administration. It is responsible for providing federal benefits to veterans and their families. Headed by the Secretary of Veterans Affairs, VA is the second-largest of the 15 Cabinet departments and operates nationwide programs for health care, financial assistance and burial benefits.[4]

The VA publicly traces its lineage to legislation from the Lincoln administration.[5] However, the historical record shows a significantly longer commitment of support to the nation's veterans. In 1693, the Plymouth Colony directed assistance for life on the part of a soldier disabled while serving the colony.[6] This directive followed from an earlier one in 1636. During local wars with the Pequot Indians, the colony made a promise to "maytayn competently by the colony during his life" any man "mamed and hurt" while participating in colonial military expeditions.[7]

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3. Gordon P. Erspamer, *Of Corporations, Basalt Boulders, and Our Veterans*, VA WATCHDOG, Sept. 28, 2009, http://www.vawatchdog.org/09/nf09/nfsep09/nf092809-1.htm.

4. OFFICE OF PUB. AFFAIRS MEDIA RELATIONS, DEP'T OF VETERANS AFFAIRS, FACT SHEET: FACTS ABOUT THE DEPARTMENT OF VETERANS AFFAIRS (2009), http://www1.va.gov/opa/publications/factsheets/fs_department_of_veterans_affairs.pdf.

5. U.S. DEP'T OF VETERANS AFFAIRS, VA HISTORY IN BRIEF 3 (2005), http://www1.va.gov/opa/feature/history/docs/history1.pdf [hereinafter VA HISTORY IN BRIEF].

6. Tim Pluta, *The Way Our Country Treats Returning Soldiers Is a National Shame*, VETERANS TODAY, Dec. 5, 2004, http://www.veteranstoday.com/2004/12/05/the-way-our-country-treats-returning-soldiers-is-a-national-shame.

7. Veterans Assistance in U.S. History, http://www.humboldt.edu/~go1/TAH/Veterans_Chrono.html (last visited Apr. 1, 2010).

During the Revolutionary War, the national precedent of supporting serving members of the armed forces was established when the Continental Congress authorized payments of land and money for enlistees.[8] Then, in 1776, the Continental Congress passed the Nation's first pension law to provide disability payments on a half-pay for life basis to disabled soldiers.[9] This effort turned out to be less than successful as there was no mechanism at the time to ensure the individual states would actually fund this commitment, with only 3000 veterans drawing any amount.[10] "In 1789, the U.S. Congress then enacted legislation to provide for pension of disabled soldiers and their dependents."[11] This marked the first true federal effort to support veterans.

Organized support for veterans remained fragmented. In 1811, the Congress authorized a domiciliary for needy sailors.[12] This facility was completed in 1833 as the U.S. Sailors' Home at the Philadelphia Navy Yard.[13] A similar Soldier's Home was proposed in 1827 by Secretary of War James Barbour, but congressional interest was lacking in that effort.[14] In 1851, the Soldier's Home finally found an advocate in Secretary of War Jefferson Davis (yes, the same soon-to-be president of the Confederacy), who saw through the necessary legislation for its funding.[15] The administrative oversight of these veterans support functions varied. It moved alternatively in portions between the Secretary of War, the Bureau of Pensions, the Department of the Navy, and the Interior Department during the period of 1811 through 1849.[16]

With the onset of the Civil War and its accompanying casualty lists, both injured and dead, the nation experienced a significant need to rapidly expand support and assistance to veterans. This period provided an expansion of benefits to include health care and more

8. *Id.*
9. *Id.*
10. Donna Miles, *Vice-President, Veterans Affairs Secretary Celebrate VA's 75th Anniversary*, AM. FORCES PRESS SERVICE, July 21, 2005, http://freerepublic.com/focus/f-news/1447999/posts.
11. Stanley Zucker et al., *Veterans Administration Support for Medical Research: Opinions of the Endangered Species of Physician-Scientists*, 18 FASEB J. 1481, 1482 (2004).
12. JUDITH GLADYS CETINA, A HISTORY OF VETERANS' HOMES IN THE UNITED STATES, 1811–1930, at 30–39 (1977) (published Ph.D. dissertation, Case Western Reserve University).
13. *Id.* at 33–38.
14. PAUL R. GOODE, THE UNITED STATES SOLDIERS' HOME 24–26 (1957).
15. *Id.* at 70.
16. VA HISTORY IN BRIEF, *supra* note 5, at 3–4.

domiciliary homes, both at the state and federal level. Pension for deserving Union veterans and dependents was formalized as well by an act in February 1862 (known as the "General Law").[17] Many adjustments to this initial attempt at formalizing pensions followed.[18]

Coupled with the General Law was an initial limit of five dollars on attorney's fees for prosecuting a pension or disability claim,[19] amended to a limit of ten dollars two years later.[20] At inception, the fee limitation made sense. Claims were made on behalf of unschooled veterans and the ten dollar cap provided adequate legal compensation for the time and effort required. Ten dollars represented a healthy sum for a literate attorney, as the average daily wage for a skilled laborer was three dollars.[21] Additionally, veteran's claims practice was straightforward.[22] It necessitated someone with education to bring the claim on behalf of the veteran, but it was not an arcane or complicated practice, so the local attorney (or an educated claims agent with knowledge of the process) could be expected to develop the claim on behalf of the returning soldier.

An alternative purpose for placing a cap on the amount of the fee for a claim also existed. Congressional intent in establishing fee limits as expressed by Mr. Harrison was "to prevent the numerous frauds committed by pension agents"[23] and "to protect the veteran from extortion or improvident bargains with unscrupulous lawyers."[24] This cap would remain in place, unadjusted for either inflation or re-

17. DIGEST OF PENSION LAWS, DECISIONS, RULINGS, ORDERS, ETC. 1885 (Frank Curtis & William Webster eds., 1985), *cited in* Peter Blanck, *Civil War Pensions and Disability*, 62 OHIO ST. L.J. 109, 117–18 (2001); *see also* Larry Dewitt, Social Insurance in the Gilded Age & Progressive Era (Dec. 2003), http://www.larrydewitt.net/SSinGAPE/skocpolreview.htm (reviewing THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES (1992)).

18. Dewitt, *supra* note 17.

19. Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 359 (1985).

20. *Id.* at 359–60; *see also* STEVEN REISS & MATTHEW TENNER, EFFECTS OF REPRESENTATION BY ATTORNEYS IN CASES BEFORE VA: THE "NEW PATERNALISM" 5–6 (2009), http://www.bva.va.gov/docs/VLR_Vol1/vlr1Reiss.pdf.

21. AMASA WALKER, THE SCIENCE OF WEALTH: A MANUAL OF POLITICAL ECONOMY 302 (1866), *available at* http://chestofbooks.com/finance/Amasa-Walker/The-Science-of-Wealth/Chapter-VIII-Wages-Rent-Interest-And-Profits-As-Relativ.html.

22. The Veterans Consortium Pro Bono Program, Attorney Training Information, http://www.vetsprobono.org/newsite/train/faq.htm (last visited Mar. 31, 2010) (explaining why a ten-dollar attorney's fee was reasonable following the Civil War).

23. CONG. GLOBE, 37th Cong., 2d Sess. 2101 (1862).

24. *Id.*; *see also* United States v. Hall, 98 U.S. 343, 353 (1878) (discussing congressional intent to prevent diversions of pensions to those other than the pensioner); Carpenter v. Sec'y of Veterans Affairs, 343 F.3d 1347, 1350 (Fed. Cir. 2003).

quired complexity of effort, for more than 120 years until some of the limits were loosened in 1988.[25]

III. Pension and Fee Abuses

The scope of Civil War pension programs deserves attention as it provides a basis for understanding the background to fee limits on agents and attorneys seeking to assist veterans and their families. The sheer size and magnitude of Civil War pensions dwarfs our comprehension today. Its legacy lived on well through 1998, with its restrictions on fees for veteran claimants.

By the end of the Civil War period, over 1.9 million Union veterans had served.[26] Of these veterans, well over fifty percent were drawing a pension as of 1890,[27] and this percentage increased to nearly all Union veterans before significant reform was put in place.[28] (This completely excludes any state pensions awarded to Confederate veterans. These veterans were also unsuccessful in attempts to get the General Law expanded to include them; this law was for the benefit of the Northern soldiers only.[29]) In 1914, still almost half a million Civil War pensioners were on the Bureau of Pensions' rolls.[30] With the popularity of the Arrears Act of 1879 and the 1888 elections, the broad political support of pensions for Civil War veterans and their spouses or widows resulted in massive numbers of claimants.[31]

These pension claims grew from immediate post–Civil War levels to a point of ultimately constituting almost half of the entire federal budget in the late 1800s.[32] In 1893 alone, Civil War pensions

25. REISS & TENNER, *supra* note 20, at 7.
26. VA HISTORY IN BRIEF, *supra* note 5, at 4.
27. *Id.*
28. Peter Blanck & Chen Song, *Civil War Pension Attorneys and Disability Politics*, 35 U. MICH. J.L. REFORM 137, 148 (2002).
29. Peter Blanck, *Civil War Pensions and Disability*, 62 OHIO ST. L.J. 109, 117–18 (2001) [hereinafter Blanck, *Civil War*].
30. VA HISTORY IN BRIEF, *supra* note 5, at 6.
31. Blanck, *Civil War*, *supra* note 29, at 125. The 1879 Arrears Act gave veterans an opportunity to "receive lump sum pension back payments that should have been granted as a result of their military service during the Civil War," and the election of Benjamin Harrison in 1888 led to the passage of a service-based pension system in 1890. *Id.* at 123–24.
32. Larry M. Logue & Peter Blanck, *"There Is Nothing That Promotes Longevity Like a Pension": Disability Policy and Mortality of Civil War Union Army Veterans*, 39 WAKE FOREST L. REV. 49, 50 (2004).

amounted to forty-three percent of all federal expenditures.[33] This growth primarily came about as the Grand Army of the Republic and other veterans' fraternal organizations discovered the nascent political power that flowed from a significant and organized section of the electorate with a focused agenda.[34] These pensions were a key element for the Republican Party platform.[35] Because Democrats voiced opposition to these pensions, it proved to be a significant reason for the subsequent rounds of Democratic defeats in 1888 and 1890.[36]

At inception, the fixed dollar amount filing fee provided to attorneys was thought to be equitable, based on the amount of skill required to draw up the claim. Yet, as the pension program was opened up to ever more claimants, the lure of a ten-dollar-per-claim fee became increasingly attractive as a transactional business proposition. High volume practitioners successfully lobbied for greater access to pensions and applications surged. This increased access was supported by comments such as those of Commissioner of Pensions James Tanner who said, "I will drive a six-mule team through the Treasury"[37] and "God help the surplus,"[38] referring to the federal government's surplus that had been in place for thirty-seven years. This surplus simply incentivized further behavior to submit as many claims as possible, with little thought for their merit. One attorney of the period handled over 125,000 claims.[39] In addition, the Arrears Act only whetted appetites for even more claims, as claimants could seek a pension in arrears (or from the date of their discharge), rather than from the date of their claim. Because the Arrears Act was passed in 1879, it opened the door to claimants seeking an immediate fifteen-plus years of back benefits—a significant incentive to file a claim.

Ultimately, the cost of the Civil War pension programs was scrutinized. At best, the pensions were called costly[40] or extravagant.[41]

33. DORA L. COSTA, THE EVOLUTION OF RETIREMENT: AN AMERICAN ECONOMIC HISTORY, 1880–1990, at 162 (1998).

34. *See* Library of Congress, The Grand Army of the Republic and Kindred Societies, http://www.loc.gov/rr/main/gar/garintro.html (last visited Mar. 31, 2010).

35. Logue & Blanck, *supra* note 32, at 66.

36. Library of Congress, *supra* note 34.

37. COSTA, *supra* note 33, at 162.

38. *Id.*

39. Peter Blanck, *"The Right to Live in the World": Disability Yesterday, Today, and Tomorrow*, 13 TEX. J. C.L. & C.R. 367, 380 (2008) [hereinafter Blanck, *The Right to Live*].

40. *Id.* at 374.

41. *Id.* at 376.

Others referred to widespread and serious abuses of fraud and material misrepresentations,[42] especially by attorneys stoking the claims efforts.[43] A minimum of one quarter of all claims were estimated to be illegitimate or fraudulent.[44] Newspapers and politicians began to mock claimants and referred to them as scammers.[45] The level of fraudulently paid-out claims was estimated by Congress to exceed $2,000,000.[46]

Attorneys and pension agents were tarred by the same brush. Pension lawyers were called "vampires who suck the very life-blood of the poor dependent pensioners."[47] This public sentiment established the legacy of governmental distrust of attorneys in veterans' claims and fueled a tradition of little (or no) enthusiasm for increasing any statutory cap on attorney fees. Bureaucratic biases against attorney involvement in veterans' pension claims and reticence by the Congress, the VA, and its predecessor agencies to make any adjustment in attorney fees for VA claims remained institutionalized within the government for a long time.[48]

These biases were initially maintained within the Bureau of Pensions. After the Arrears Act, pension eligibility had been expanded by statute to include the period of the Indian Wars and the Spanish-American War,[49] which caused even more claimants to seek pensions. An increasingly undermanned and overburdened Bureau of Pensions was ill-equipped to keep up with the workload. Something had to be done, and in 1904, President Theodore Roosevelt issued Executive Order Number 78, which revamped the existing pension process.[50] Congress followed with legislation, sensing the largesse associated with the General Law and the Arrears Act had gone too far. Consequently, it passed a reform measure in 1907, since known as Old Age Pension.[51]

42. *See*, *e.g.*, Blanck, *The Right to Live*, *supra* note 39, at 370–72.
43. *Id.* at 381–82.
44. Blanck & Song, *supra* note 28, at 143.
45. Blanck, *The Right to Live*, *supra* note 39, at 375.
46. WILLIAM HENRY GLASSON, HISTORY OF MILITARY PENSION LEGISLATION IN THE UNITED STATES 97 (1900).
47. Blanck, *The Right to Live*, *supra* note 39, at 381.
48. *Id.*
49. Blanck, *Civil War*, *supra* note 29, at 109.
50. Peter David Blanck & Michael Millender, *Before Disability Civil Rights: Civil War Pensions and the Politics of Disability in America*, 52 ALA. L. REV. 1, 9 (2000).
51. Blanck, *Civil War*, *supra* note 29, at 109.

The Congress did not want to provide for incentives for attorneys to create more claims, so the fee portion available to attorneys remained unchanged from the 1864 levels. In a 1918 amendment, Congress indicated it was protecting veterans from the predatory practices of attorneys and claims agents.[52] The effect of this amendment was to limit veterans' ready access to counsel, but even more curbs on veterans' legal rights were yet to be affirmed.

The Old Age Pension legislation provided for new and enhanced eligibility requirements for pension claims going forward.[53] Old Age Pension remained the guideline for the Bureau of Pensions until it was absorbed into the newly created Veterans Administration in 1930 by President Hoover.[54]

This new agency combined the functions of the Bureau of Pensions, the Veterans Bureau, and the National Home for Disabled Volunteer Soldiers.[55] Shortly afterward, the Veterans Act of 1936 reaffirmed existing bureaucratic philosophies and maintained the imposition of a ten-dollar-per-claim limit on attorney fees.[56] It further provided for criminal penalties for improper practices.[57] Third-party fee agreements were allowed by the courts as long as the agreement did not "affect[] the property interests of the applicant himself."[58] This provision became the genesis of the requirement of a truly disinterested third party if any third-party agreements were entered into. Disinterested third-party language would reappear in future regulation.[59]

Unlike other U.S. citizens or even legal entities such as corporations or trusts, due process rights were severely limited for veterans seeking benefits. In 1934, the Supreme Court decided *Lynch v. United States*, a watershed case establishing that veterans' benefits are not a vested property right and that Congress can alter or eliminate the benefits at its discretion.[60] The legacy of U.S. citizens as veterans being denied due process in the pursuit of a claim with the VA lingers on through today.

52. 56 CONG. REC. 1, 5222 (1918).
53. *Id.*
54. Exec. Order No. 5398, 46 Stat. 1016 (July 21, 1930).
55. *Id.*
56. Bates v. Nicholson, 398 F.3d 1355, 1362 (Fed. Cir. 2005).
57. *Id.*
58. Welty v. United States, 2 F.2d 562, 564 (6th Cir. 1924).
59. 14 C.F.R. § 14.636 (2009).
60. 292 U.S. 571, 577 (1934).

IV. Benevolent Paternalism

The Veterans Administration saw tremendous growth as a result of the Second World War. Its leadership was very familiar with the issues of returning veterans and was keen to assist. Notables such as General of the Army Omar Bradley and other wartime leaders played key roles in the post-war VA. Bradley took on a post-war assignment as head of the VA immediately after the war.[61] He would then return to the Army as a replacement for Eisenhower as Army Chief of Staff, later as the first Chairman, Joint Chiefs of Staff.[62]

The massive growth of the VA's constituency, the success of congressional initiatives such as the Servicemen's Readjustment Act of 1944 (the GI Bill), with its education and home loan benefits, and the installation of seasoned, nationally respected leaders, who themselves had experience as veterans, provided a basis of justification for the VA to act on its own when it came to veterans issues.[63] Some within the VA openly characterized these behaviors as paternalism, and this approach went along well with institutionalized philosophies left over from the time of the Bureau of Pensions. The government acceded to this policy, recognizing and even encouraging it,[64] and was supported by both the Congress through its regulations and the Supreme Court, whose 1985 decision in *Walters v. National Ass'n of Radiation Survivors* found that fee limits did not violate Fifth Amendment due process.[65]

The tradition of paternalistic behavior offered U.S. veterans few outlets or opportunities for disagreement with the VA. Claimants, if dissatisfied, could seek political influence in decisions, but they had little other recourse. By their nature, custom, training, and experience, many former military members had an ingrained respect for governmental authority and would accept an unfavorable decision, even if they disagreed with it. Given the monolithic size and power of the VA bureaucracy, effective dissent with a VA decision was not practical for the individual veteran or a surviving spouse. Notionally, the

61. Arlington National Cemetery, Omar Nelson Bradley, General of the Army, http://www.arlingtoncemetery.net/omarnels.htm (last visited Mar. 31, 2010).

62. *Id.*

63. *See* VA HISTORY IN BRIEF, *supra* note 5, at 15–17; U.S. Dep't of Veterans Affairs, GI Bill History, http://www.gibill.va.gov/GI_Bill_Info/history.htm (last visited Mar. 31, 2010).

64. *See, e.g.*, Connolly v. Derwinski, 1 Vet. App. 566, 569 (1991).

65. 473 U.S. 305 (1985); James C. McKay, *Who Can Fight for the Soldiers?*, WASH. POST, Jan. 22, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/01/21/AR2006012100100.html.

VA portrayed itself as non-adversarial in its dealings with veterans, and it reasoned, as it was non-adversarial, that a claimant did not require an adversary on the claimant's behalf.[66] Governmental deference to the VA in matters concerning veterans was a part of this philosophy. An informality in VA agency matters with its claimant veterans was proffered to and accepted by other government entities as standard practice.[67] Hence, veterans' access to legal action in any dispute resolution with the VA was severely limited.

Continued fee limitations on attorneys were viewed as maintaining the informal and non-adversarial approach the VA took in adjudicating claims.[68] Accordingly, attorney fees in veterans' benefits cases would specifically remain limited to ten dollars,[69] even through legislation in 1942[70] and in 1979.[71] Under limited circumstances, provisos did continue to allow for third-party payments of fees to attorneys and non-attorney agents, typically Veterans' Service Organizations (VSOs), with the fees or salaries typically coming from organizations or government entities (such as a State Veterans Service officer).[72] These restrictions continued to reflect a congressional judgment that VA benefits decisions should not be subject to judicial review.[73]

V. Cracks in the Armor

Slowly, the ethos of a non-adversarial VA and the lack of need for effective representation of VA claimants became worn and frayed around the edges. Initial indications were formally detected in the late 1960s in a series of cases and congressional amendments which began to challenge the bar to judicial review of VA benefits decisions.[74]

66. *See Walters*, 473 U.S. at 359; Samuel F. Wright, *Not So 'Harmless Error': Supreme Court Decides Against Veteran in Claim Process Case,* OFFICER, July–Aug. 2009, at 52, 52, *available at* http://www.roa.org/site/PageServer?pagename=law_review_0928.

67. *Walters*, 473 U.S. at 321.

68. Wright, *supra* note 66, at 52.

69. *In re* Wick, 40 F.3d 367, 369 (Fed. Cir. 1994).

70. 38 U.S.C. § 551 (repealed 1957).

71. 38 U.S.C. § 3404(c) (1979) (amended 1988); *see also* Letter from Tim S. McClain, Gen. Counsel, Dep't of Veterans Affairs, to Lane Evans, Congressman, Comm. on Veterans Affairs (May 24, 2004).

72. Carpenter, Chartered v. Sec'y of Veterans Affairs, 343 F.3d 1347, 1357 (Fed. Cir. 2003).

73. Bates v. Nicholson, 398 F.3d 1355, 1362 (Fed. Cir. 2005).

74. *Id.* at 1363 (citing H.R. REP. NO. 100-963, at 18 (1988)).

In 1982, a U.S. Senate finding determined that limitations on attorneys fees were "no longer tenable."[75] Still, the Supreme Court upheld the fee limits on attorneys in 1985 in the case mentioned above after a challenge brought not by attorneys, but by VSOs, veterans, and a veteran's spouse.[76] Discontent at the lack of effective representation for veterans provided continued momentum for reform.

Recognizing that fee limits had effectively precluded veterans from obtaining counsel, Congress began to act.[77] It did so in the Judicial Review Act of 1988, which created the U.S. Court of Veterans Appeals (CVA), the predecessor to today's Court of Appeals for Veterans Claims.[78] This Act provided for judicial review of VA decisions[79] and the first amendment of fee limitations,[80] but only under limited circumstances.[81] The passage of this Act finally gave "veterans their day in court."[82]

The courts supported Congress' conclusion that veterans should be able to have representation during a claim for benefits.[83] As a practical matter, this conclusion was only supported for cases that extended beyond the immediate appellate level of the VA and its Article I courts, the Board of Veterans Appeals. An attorney could enter into a fee agreement which was no longer capped at ten dollars, but had rather been amended to a "reasonable amount," typically determined at no more than twenty percent of past-due benefits for cases going forward from VA jurisdiction to the Court of Veterans Appeals.[84] These fee agreements had to be submitted to the Board of Veterans Appeals for approval, and the Board was given the authority to reduce any such agreements that were "excessive or unreasonable."[85] Third-party fee payment provisions were further provided for via statute,[86] but the third-party relationship had to be of a disinterested na-

75. Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 322 (1985) (quoting S. REP. NO. 97-466, at 50 (1982)).
76. *Id.* at 307; *see also* REISS & TENNER, *supra* note 20, at 7.
77. *See* Scates v. Principi, 282 F.3d 1362, 1365–66 (Fed. Cir. 2002).
78. Veterans' Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4105.
79. Bates v. Nicholson, 398 F.3d 1355, 1359 (Fed. Cir. 2005)
80. The Veterans Consortium Pro Bono Program, *supra* note 22.
81. Carpenter, Chartered v. Sec'y of Veterans Affairs, 343 F.3d 1347, 1357 (Fed. Cir. 2003).
82. *Bates*, 398 F.3d at 1363.
83. *See*, *e.g.*, Scates v. Principi, 282 F.3d 1362 (Fed. Cir. 2002).
84. *See generally id.* (describing how attorney's fees in Veterans Affairs claims are no longer capped at ten dollars).
85. *Id.* at 1366.
86. 38 C.F.R. § 20.609(d) (1992) (*reserved by* 73 Fed. Reg. 29,852 (May 22, 2008)).

ture (meaning the third party had no financial interest in the outcome of the claim).[87]

Further guidance was necessary to fully develop the mechanics of this fee structure. It came about in case law and administratively. The VA General Counsel developed this guidance on fee matters after the CVA's decision in *In re Smith*, a case in which an attorney sought review of a fee arrangement he had made with a client due to his concerns of future criminal sanctions.[88] For CVA cases, the VA was authorized to directly pay contingency fees that had been properly entered into.[89]

The institutionalized philosophy of not supporting the representation of veterans had resulted in a crippling lack of attorneys willing to represent veterans.[90] Over half of all veterans' claims were represented on a pro se basis, with veterans' service organizations, and others, such as the AMVETS, American Legion, and Disabled American Veterans filling the gap.[91] The significant role of these VSOs in assisting veteran claimants was noted by the Supreme Court in 1985.[92]

> Perhaps more importantly for present purposes, however, various veterans' organizations across the country make available trained service agents, free of charge, to assist claimants in developing and presenting their claims. These service representatives are contemplated by the VA statute, 38 U.S.C. § 3402, and they are recognized as an important part of the administrative scheme.[93]

In 1991, the Court of Veterans Appeals formally addressed the large pro se caseload it faced.[94] Claimants were unable to secure re-

87. *Id.*
88. 7 Vet. App. 89 (1994).
89. Effect of Secondary Entitlements and Changes in Representational Status on the Department of Veteran's Affairs Obligation to Pay Attorney Fees from Past-Due Benefits, Veterans Affairs Opinion, Gen. Counsel Prec. 22-95 (1995), http://www4.va.gov/ogc/opinions/1995precedentopinions.asp (follow "PREC 22-95" hyperlink).
90. John F. Costello, Jr., Veterans' Rights Project, Legal Assistance Found. & Joseph R. Butler, Veterans Legal Support Ctr., John Marshall Law School, Presentation at the Equip for Equality Disability Rights Consortium: Overview of Veterans' Benefits (Feb. 27, 2008), www.illinoislegaladvocate.org/calendarUploads/Veterans' Benefits Powerpoint.ppt.
91. *Id.*
92. Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 366 (1985).
93. *Id.* at 311.
94. Memorandum from Douglas R. Cox, Deputy Assistant Att'y Gen., Office of Legal Counsel, to the Chief Judge, U.S. Court of Veterans Appeals (Mar. 12, 1992), http://www.justice.gov/olc/veterans.14.htm [hereinafter Cox Memorandum].

presentation because so few advocates had the motivation or expertise to practice veterans law. VSOs were simply not able to completely remedy the situation; the VSOs found themselves with an ever-increasing workload that detracted from their ability to provide personal assistance to each and every claimant.[95] Many well-meaning VSOs simply lacked the skills or professional rigor that a legal professional would utilize in grappling with legal, complex issues that not only covered veterans benefits, but also spanned administrative law and dealings with governmental agencies while ensuring the zealous preservation of their clients' rights.

Chief Judge of the Court of Veterans Appeals Donald Ivers publicly stated, "[t]he Court has historically taken a position recognizing that involvement of lawyers before the VA could be very helpful, and I concur."[96] In the following year, the Chief Judge of the same court began formally exploring options to increase pro bono representation in the court.[97] The Court of Veterans Appeals plainly saw that matters before it were of an adversarial nature.[98]

Veterans groups began to give support to the need for attorney representation. In 1999, the Vietnam Veterans Association lobbied for Congress to expand the scope of proceedings in which attorneys provided assistance on a fee basis.[99] At this point, less than one percent of veteran claimants had representation at the regional level, and less than five percent at the first formal appellate level, the Board of Veterans Appeals.[100] VSOs were themselves seeking relief from their own caseloads.[101] These well-intentioned organizations simply were not able to keep up with the volume of claims.[102]

The Veterans of Foreign Wars (VFW) recognized the increasing legal maze that applicants encountered. These complexities arose as a result of statutes, court-ordered mandates in the process, and procedural issues. The simple question for the VFW became "how can a

95. McKay, *supra* note 65.
96. *Id.*
97. Cox Memorandum, *supra* note 94.
98. *Id.*
99. *Well-Grounded Claims and H.R. 3193, the Duty to Assist Veterans Act of 1999: Hearing on H.R. 3193 Before the Subcomm. on Benefits of the H. Comm. on Veterans' Affairs*, 106th Cong. 83 (2000) (statement of John McNeil, Assistant Director, Veterans Benefits Policy, Veterans of Foreign Wars of the United States) [hereinafter McNeil Testimony].
100. Cox Memorandum, *supra* note 94, at 8.
101. *Id.*
102. Martha Neil, *Skirmish over Fees*, ABA J., May 2007, at 64, 64.

veteran—who is a novice to the system—possibly understand what is now being required of him . . .?"[103] A VSO in San Francisco commented on how veterans "have been desperate for representation for many decades."[104]

Issues associated with due process continued to vex veterans. By 1993, the courts were still not recognizing that VA benefits were a vested right, effectively denying due process to those claimants seeking to secure the benefits.[105] Rights associated with a veteran's status became murkier and murkier, which further added to complexities faced by the applicants.

Congressional pressures ramped up with individual senators and representatives petitioning the VA to increase attorney representation in the claims process. Prominent Democratic leadership told the VA that "[l]egal representation at the Court is already too low," referring to the lack of attorneys engaged at the Court of Veterans Appeals.[106] Congress understood the value of trained attorneys grasping issues of law and protecting claimants' rights, just as was done for other courts and other U.S. citizens, non-citizens, and legal entities.

Congress recognized the complexities of dealing with precedential matters at a federal appellate court. They saw that more than pro se representation was necessary for the claimant. As an example, *Santana-Venegas v. Principi* provides a perspective on the nature of problems other federal appellate courts did not commonly face—a pro se appellant arguing a case at the federal appellate level that fundamentally centered on a legal procedural matter (the equitable tolling of an appeal).[107] The court also recognized the practical issue that attorneys will not take on VA-related work if they cannot reasonably expect

103. McNeil Testimony, *supra* note 99.

104. Neil, *supra* note 102, at 66.

105. Levy v. Brown, 6 Vet. App. 23, 24 (1993) (citing the agreed-upon standard that "veterans have no contractual or vested right to an initial receipt of VA benefits").

106. Letter from Lane Evans, Ranking Democratic Member, Comm. on Veterans Affairs, to Dir., Office of Regulations Mgmt., Dep't of Veterans Affairs (Feb. 4, 1998), *available at* http://veterans.house.gov/democratic/officialcorr/oc-orm.htm.

107. 314 F.3d 1293, 1296 (Fed. Cir. 2002). The petitioner in this case, a veteran suffering from Post-Traumatic Stress Disorder, misfiled his notice of appeal with the same Department of Veterans Affairs Regional Office from which the claim originated. The court held that this filing, though misdirected, preserved the petitioner's right of appeal; in addition, the court found that "[i]t is not unreasonable for veterans to rely on the VA to fully comply with the comprehensive policies adopted by the agency including the duty to assist timely." *Id.* at 1298.

compensation for their efforts.[108] Fee limitations had resulted in a de facto exclusion of attorneys from the adjudication of veterans benefits.[109]

The passage of the Equal Access to Justice Act in 2000 eased attorney involvement in the appellate process by providing for some access to fees.[110] However, fees under the Act were limited to appearances before a Title III court, not for those matters argued on behalf of a claimant within the VA. This rule remains the case for practitioners today.

These initiatives were not done without tension and concern on the part of the VA and some VSOs, notably the Disabled American Veterans. The VA maintained its tradition of paternalism toward veterans, even within its internal Article I court system.[111] As in *Santana-Venegas*, the "non-adversarial and pro-claimants character" of the VA benefits system was still accepted as government policy.[112] This attitude was affirmed again in 2001 in *Butler v. Principi*, a decision which noted the non-adversarial and paternalistic nature of veterans benefits adjudication.[113]

Yet, the *Butler* decision also noted the requirements for the claimant to still meet legal procedural burdens[114] and legal evidentiary obligations.[115] These legal hurdles enhanced the arguments for trained attorney involvement in benefits claims. The Supreme Court had noted in *Walters* that neither the VA nor VSOs were providing all the services an attorney could provide, and there was a high risk of "erroneous deprivation" of benefits to a claimant.[116] This was because heavy caseloads and inadequate legal training prevented VSOs from adequately researching claims.[117]

Some VSOs, such as the Disabled American Veterans, opposed proposals to increase attorney participation in the process. They ra-

108. *See id.* at 1298.
109. REISS & TENNER, *supra* note 20, at 47.
110. Equal Access to Justice Act, 5 U.S.C. § 504 (2006).
111. Vito Clementi, Day in the Life: Veterans Law Judge, http://www.va.gov/JOBS/career_types/clementi-video.asp (last visited Apr. 1, 2010).
112. *Santana-Venegas*, 314 F.3d at 1298; *see also* Vargas-Gonzalez v. Principi, 15 Vet. App. 222, 231 (2001) (referring to the pro-claimant nature of the VA adjudication system and providing a number of citations).
113. 244 F.3d 1337, 1341 (Fed. Cir. 2001).
114. *Id.* at 1340.
115. *Id.*
116. REISS & TENNER, *supra* note 20, at 10 (citing Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 315 (1985)).
117. *Id.*

tionalized that inserting lawyers into VA benefits claims would require the VA to divert existing resources in order to effectively handle oversight of lawyers[118] and would decrease the benefits paid out to the veterans.[119] They also viewed such involvement as unnecessary.[120]

The VA refined and restricted third-party fee arrangements by rule on May 23, 2002.[121] This regulation provided that third-party fee agreements had to be in writing and reinforced the notion that a third-party claimant had to be truly disinterested. It also established a rebuttable presumption that family members were not disinterested parties.[122] The purpose of this presumption was to preclude efforts at circumventing existing limitations on fees.[123]

Procedures for recognition of agents and attorneys were further clarified by Congress in 2005.[124] The statute specifically provides for the recognition of the American Red Cross, the American Legion, the Disabled American Veterans, the United Spanish War Veterans, the Veterans of Foreign Wars, "and such other organizations as the Secretary may approve."[125] Agents and attorneys must seek recognition by the VA in order to present a claim on behalf of a veteran.[126] This entails presenting a power of attorney (or declaration on letterhead by an attorney) to the VA to file the claim. Regulations also provide for standards to practice before the VA.[127]

VI. Breakthrough

Recognizing the increasingly complex nature of the VA adjudications system,[128] Congress enacted The Veterans Benefits, Health Care, and Information Technology Act of 2006, which provided for

118. Neil, *supra* note 102, at 66.
119. *Id.*
120. *Id.*
121. Board of Veterans' Appeals: Rules of Practice—Attorney Fee Matters, 67 Fed. Reg. 36, 102 (May 23, 2002) (to be codified at 38 C.F.R. pt. 20).
122. 38 C.F.R. 20.609(d)(2) (2002) (*reserved by* 73 Fed. Reg. 29, 879 (May 22, 2008)).
123. Statement of Thomas Day, Dir., Nat'l Care Planning Council (citing memorandum from Bradley G. Mayes, Dir., Comp. & Pension Serv., Dep't of Veterans Affairs (June 6, 2007)).
124. *See* 38 U.S.C. §§ 5901–5905 (2005) (amending Pub. L. No. 102-40).
125. § 5902(a)(1).
126. § 5901.
127. *See* § 5904.
128. 152 CONG. REC. S3896 (daily ed. May 2, 2006) (statement of Sen. Craig).

attorney involvement earlier in the claims process.[129] Specifically, it provided:

- No fees at an initial level to make the claim, but a reasonable fee (still presumed reasonable if it was no more than 20% of past-due benefits), is allowed following an initial denial and notice of disagreement.
- The claim that is presented must not be frivolous.
- There can only be one advocate at a time for a claimant.
- The attorney or non-attorney agent representing the claimant must be accredited by the VA.[130]

Initially, the VA had proposed that both attorneys and non-attorney agents had to pass a test administered by the VA.[131] With mandatory state bars, the need for the VA to test attorney fitness and competency was ultimately waived upon a showing of fitness by admission to the state bar. Concerns that mandatory testing would deter attorney participation also detracted from any support for the notions of testing.[132]

VII. Issues Remain

Accreditation of practitioners is handled through the VA's Office of General Counsel (OGC), and the process is straightforward. An application is made to the OGC, and following the initial accreditation (which for non-attorney agents includes a VA-administered test and determination of character and fitness), ongoing Continuing Legal Education (CLE) is required to maintain an accredited status.[133] Interface with the local VA Regional Offices (VAROs) for attorneys acting on behalf of their clients is provided by designated Attorney Fee Coordinators, which are assigned to each VARO. These individuals assist in coordination, individual case queries, and routine case man-

129. Veterans Benefits, Health Care, and Information Technology Act of 2006, S. Res. 3421, 109th Cong. § 101 (2006) (enacted).
130. *Id.*
131. Costello & Butler, *supra* note 90.
132. Steve Goldstein, *Veterans' Attorneys Facing Tests*, PHILA. INQUIRER, July 16, 2007, http://www.saul.com/common/pressroom/pdf_1120.pdf.
133. 38 C.F.R. § 14.629 (2002).

agement actions. Since enactment of the 2007 legislation, over 3200 attorneys have been accredited by the VA.[134]

However, heavy caseloads remain the norm for many VSOs.[135] The VA still has a significant backlog of claims, one that has increased seventeen percent since the beginning of 2009.[136] The size of the backlog has become a point of controversy itself, as it now approaches the one million claim mark (936,690 claims as of July 25, 2009).[137] The VA expects the issues associated with its workload to continue into the future.[138]

Over one-fifth of these claims are in appeal.[139] The length of time for claims adjudication and appeals is significant. Appeals take an average of 527 days to forward to the initial appellate level (the Board of Veterans Appeals), with another 274 days for the Board to process the appeal.[140] The remand and reversal rate of cases appealed to the CAVC from the Board approaches an astonishing eighty percent, so clearly something is not being done correctly within the Board of Veterans Appeals and the VAROs.[141]

This problematic court system is coupled with vestiges of the paternalistic and supposedly benevolent approach of the VA toward claimants. Courts still recognize this philosophy, which makes it unique. In 2006, the CAVC acknowledged this during an oral argument.[142] Chief Judge Greene and Judge Schoelen both "noted that the

134. U.S. Dep't of Veterans Affairs, Accreditation Search, http://www4.va.gov/ogc/apps/accreditation/index.html (click on "Attorneys" and then "Download") (last visited Apr. 1, 2010).

135. BARTON F. STICHMAN & RONALD B. ABRAMS, VETERANS BENEFITS MANUAL 1395 (2008).

136. Larry Scott, VA Watchdog dot Org, Veterans' Benefits Claims Keep Piling Up at VA, Aug. 31, 2009, http://www.vawatchdog.org/09/nf09/nfaug09/nf083109-1.htm.

137. U.S. Dep't of Veterans Affairs, Monday Morning Workload Reports, July 27, 2009, http://www.vba.va.gov/reports/mmwr/2009/072709.xls [hereinafter Monday Morning Workload Reports].

138. U.S. DEP'T OF VETERANS AFFAIRS, FY 2008 PERFORMANCE AND ACCOUNTABILITY REPORT 274 (2008) [hereinafter FY 2008 REPORT].

139. Monday Morning Workload Reports, *supra* note 137.

140. *Board of Veterans' Appeals Adjudication Process and the Appeals Management Center: Hearing Before the Subcomm. on Disability Assistance and Memorial Affairs of the H. Comm. on Veterans' Affairs*, 110th Cong. 48 (2007) (statement of Steve Smithson, Deputy Director, Veterans Affairs and Rehabilitation Commission, American Legion).

141. *Id.* at 49.

142. Dorilyn Martz Ames, *The Application of* Bowles v. Russell *on Equitable Tolling at the CAVC,* VETERANS L.J., Fall 2007/Winter 2007–08, at 9, 9–10.

VA system is unique, in that Congress designed it to be paternalistic and benevolent towards its veteran claimants."[143]

The VA recognizes the increasing complexity of veterans claims. Drivers creating an increasing and more difficult workload include changes in statutes, court decisions, and a lag in the training of skilled VA personnel to process the claims.[144] The quality (in terms of accuracy and consistency) of claims processing remains a significant challenge for the VA.[145]

The Disabled American Veterans (DAV) fought the 2007 attorneys fees legislation tooth-and-nail and managed to get repeal legislation introduced, but the bill died, not getting out of committee.[146] A major plank of the DAV legislative platform is continued opposition to attorney fees.[147] The VA itself continues to maintain its institutionalized suspicion of attorney involvement.[148]

Ever-increasing backlogs in claims processing, a large amount of appeals and significant delays in adjudication all contribute to continued ongoing dissatisfaction with the treatment of the nation's veterans. Attorneys can play a significant role in facilitating claims on behalf of the deserving and underserved group, but historical and parochial biases remain (both from within the VA and among certain VSOs).

Rick Weidman, the Vietnam Veterans of America's director of government relations, agrees that the fight over attorney involvement in veterans' benefits adjudication will continue.[149] Due process and exactly what constitutes due process for veterans is an evolving topic.

VIII. Flashes of Lightning, Thunder Booming on the Horizon

In *Cushman v. Shinseki*, a bellwether case decided in the summer of 2009, veterans benefits were determined to be a property right for

143. *Id.*
144. FY 2008 REPORT, *supra* note 138, at 274.
145. *Id.*
146. Yoest, *supra* note 2, at 222.
147. *See* Disabled American Veterans, Advocacy in Action: 2009 Legislative Agenda, http://www.dav.org/voters/NewsArticle.aspx?ID=87 (last visited Apr. 1, 2010).
148. REISS & TENNER, *supra* note 20, at 4.
149. *See Benefits Legislative Initiatives Currently Pending Before the U.S. Senate Committee on Veteran's Affairs: Hearing Before the S. Comm. on Veterans' Affairs*, 109th Cong. 41–46 (2006) (statement of Richard Weidman, Director, Government Relations, Vietnam Veterans of America).

the first time.[150] The effect of this ruling was to establish a veteran's right to due process. Bear in mind this case came down in 2009; only now are the courts beginning to recognize that veterans are entitled to receive some of the traditional protections already afforded to other U.S. citizens and non-citizens in terms of due process.

> Veteran's disability benefits are nondiscretionary, statutorily mandated benefits. A veteran is entitled to disability benefits upon a showing that he meets the eligibility requirements set forth in the governing statutes and regulations. We conclude that such entitlement to benefits is a property interest protected by the Due Process Clause of the Fifth Amendment to the United States Constitution.[151]

Having determined that the pursuit of veterans' benefits establishes a right of due process for the veteran claimant, the logical follow-up is to ascertain the scope of procedural and substantive due process. That determination will most likely lie with the courts as an evolutionary process, determined through case law.

A glimmer of what constitutes procedural due process quickly followed the *Cushman* decision. In late September 2009, the Court of Appeals for the Federal Circuit considered the issue of procedural due process for veteran's claims.[152] Although the Court did not specifically define the nature of procedural due process, it did indicate that additional protections may be in order for those veterans known by the VA to be mentally disabled.[153]

An interesting case in 2008 raised due process issues that the court declined to answer. In *Gambill v. Shinseki*, the Court of Appeals for the Federal Circuit determined that the alleged due process violation was non-prejudicial and so avoided further discussion.[154] Of note, the court was meeting en banc, and one visiting panel member was not familiar with veterans law. In a concurrence, the judge indicated that she would have been supportive of a request for interrogatories and that such a request would likely be required by due process.[155] Fairness, even in informal procedures, and a right to confront adverse witnesses are fundamental. An analogy was drawn to social security,

150. 576 F.3d 1290, 1298 (Fed. Cir. 2009).
151. *Id.*
152. *See* Edwards v. Shinseki, 582 F.3d 1351 (Fed. Cir. 2009).
153. *Id.* at 1355.
154. 576 F.3d 1307, 1313 (Fed. Cir. 2009).
155. *Id.* at 1324 (Moore, J., concurring).

with the judge indicating that veterans should be entitled to no less due process than is afforded to a social security claimant.[156]

A substantive due process challenge is currently ongoing within the Ninth Circuit. A group of claimants are frustrated with delays in processing VA claims and the outcome of the case will most likely provide clearer insight as to what constitutes substantive due process.[157] The focus of the case is the protracted length of delays currently experienced by claimants;[158] one expected outcome is a determination as to how much time a claim should take within the VA hierarchy.

The net effect of these recent cases is that veterans law continues to evolve, particularly in terms of due process. The traditional mechanism for determination of what exact process is due follows the Supreme Court's balancing test in *Mathews v. Eldridge*. An assessment is done of the nature of the private interest that would be affected, the risk of deprivation of the interest and the value of additional procedural safeguards, and the government's interest.[159] With that framework in mind, a series of cases will be in order to fully flesh out the parameters of due process for veterans, and that journey has only just begun. To quote Professor Michael Allen, a noted scholar on veterans law and due process, "we are just at the beginning of the constitutional journey *Cushman* dictates."[160]

Practitioners should expect this to be an exciting time and a time of change. The practical effect is that attorneys with experience in zealous advocacy should have increasing opportunities for effective representation of veterans. Due process will play a larger role in VA decisions; the exact nature of that role will only be determined through case law.

In closing, the study of due process and attorney's fees as it applies to veterans seeking benefits from the Department of Veterans Af-

156. *Id.* at 1324–30 (Moore, J., concurring).

157. *See* Veterans for Common Sense v. Peake, 563 F. Supp. 2d 1049 (N.D. Cal. 2008).

158. Gordon P. Erspamer, *Returning Soldiers Deserve More Than Just Lip Service from Veterans Affairs*, L.A. DAILY J., Aug. 2, 2007, at 6, *available at* http://www.veteransptsdclassaction.org/pdf/LDJ0802006.pdf.

159. Mathews v. Eldridge, 424 U.S. 319, 321 (1976); *see also* Michael P. Allen, Due Process and the American Veteran (Mar. 5, 2010) (unpublished, presented at the 11th Annual CAVC Judicial Conference). Professor Allen, from Stetson University's College of Law, is a noted speaker on the topic of due process and veterans law.

160. Allen, *supra* note 159, at 5.

fairs combines history and politics and results in a healthy dose of skepticism as to why our nation has not afforded the veterans community the same rights and privileges afforded so many others under our legal system. Given the relative size of the veteran population and their character of service to the nation, the end result of benign or benevolent paternalistic government policies through the years has caused undue harm to a deserving segment of the nation. Compare that with the legal protections extended to non-veterans today, including enemy combatants and corporate entities. Those institutions are fully entitled to legal representation and complete due process under the law. Such is the current state of veteran's benefits. Advocates with an interest in this area should approach it with eyes wide open but know they are venturing into an area of the law that will be experiencing significant change and one that serves a deserving clientele.