

Of Two Minds: Charitable and Social Insurance Models in the Veterans Benefits System

Richard E. Levy*

Over the past several years, it has been my pleasure to participate in a number of programs addressing the administration of veterans benefits. Because I am not an expert on the veterans benefit system, my role has been to offer a general or comparative administrative law perspective on this unique and highly specialized area of law. In the process, I have had the opportunity to learn about the system from experts such as the participants in this symposium. The more I have learned about the veterans benefit system, the more I have been struck by its distinctive features. I am grateful to have the opportunity in this article to explore some of these features and their implications.

A central theme in these programs, and this symposium has been no exception, is widespread dissatisfaction with and criticism of the veterans benefit administration process. The Department of Veterans Administration (VA or DVA) and its subsidiary agencies responsible for processing claims, The Veterans Benefit Administration (VBA) and Board of Veterans Appeals (BVA), face criticism for lengthy delays in the processing of claims and a significant backlog of cases,¹ for inadequate or poorly prepared records, and for unfair or arbitrary decisions.² A variety of criticisms have also been leveled against the Court of Appeals for Veterans Claims (CAVC), the Article I court that reviews administrative decisions.³

My general thesis is that many of these problems are related to the veterans benefit system's uneasy mixture of two basic models of government benefits. The evolution of the system was driven by what I shall call the "charity" model of government benefits that prevailed under the traditional common law. In the charity model, whatever moral obligation the nation may owe its veterans, the fulfillment of that responsibility is, from a legal perspective, a voluntary undertaking. In this model, legal protections such as adversarial procedures and judicial review are unnecessary, inappropriate, and undesirable. Because the veterans benefit system emerged during a time when the charity model prevailed, many of its distinctive features reflect that model.

The charity model no longer pertains, if it ever did, to other government benefit programs, such as Social Security, Welfare, and Medicare or Medicaid, which operate under what I shall call the "social insurance" model. In the social insurance model, benefits are a form of social contract through which the government uses its taxing and

spending powers to spread the costs of old age, disability, unemployment, and poverty. While these programs are not perfectly analogous to private insurance, they create entitlements subject to the protections of the law, including procedural due process and independent adjudication.

Although veterans benefit programs have come to exhibit many characteristics of the social insurance model, the claims determination process has been resistant to change and continues to incorporate many elements of the charity model, including nonadversarial procedures and limited judicial review. In my view, the disjunction between the charity-based assumptions of the claims determination process and the social insurance form of benefit programs contributes to many of the problems identified by critics of the system.

I will develop this thesis as follows. Part I of the article describes in general terms the charity and social insurance models of government benefits and identifies the key features of each model. Part II provides a short history of the veterans benefit system, examining the evolution of the system in terms of the two models. Part II concludes that the benefits adjudication system was shaped and continues to reflect the charity model of government benefits, even as the underlying benefit programs have taken on many attributes of social insurance programs. Part III explores the relationship between the mixed model of veterans' benefits, with particular reference to the use of nonadversarial procedures and the lack of independent adjudication. Finally, Part IV considers the implications of this analysis for possible reform.

I. TWO MODELS OF GOVERNMENT BENEFITS

The charity and social insurance models rest on fundamentally different assumptions about government benefits. Under the charity model, government benefits are mere "gratuities" whose distribution involves discretionary judgments that operate largely outside the law. Under the social insurance model, by way of contrast, government benefits are legally protected interests whose distribution is governed by comprehensive legal standards and procedures. Each model has important implications for the structure and process of benefits administration.

A. The Charity Model

Under the charity model, decisions respecting government benefits are largely beyond the cognizance of the legal system. There is no legally enforceable right to receive or duty to provide benefits, which are given out of a sense of moral obligation.⁴ As a moral obligation, the decision whether to provide benefits and who should receive them is, from a legal perspective, a discretionary judgment. Thus, for example, benefit

programs under the charity model are often ad hoc and without comprehensive legal standards, as typified by the frequent use of private bills to provide veterans benefits.⁵

It follows from the premises of the charity model that benefits are mere gratuities rather than legally enforceable entitlements. This view of veterans benefits was aptly summarized by the Supreme Court in *Lynch v. United States*,⁶ in which Justice Brandeis explained that “[p]ensions, compensation allowances and privileges are gratuities . . . [that] create[] no vested rights [and] may be redistributed or withdrawn at any time in the discretion of Congress.”⁷

This view of benefits as mere gratuities, has important implications for the manner in which individual benefit decisions are made. First, adversarial procedures are unnecessary and undesirable. In providing benefits, the government is acting paternalistically and this helping relationship is not an adversarial one. The recipient, moreover, has no legal rights to protect. Second, because the dispensation of charity is a discretionary act that confers no legal rights, independent adjudication is not required.⁸

The veterans benefit system reflects the charity model insofar as it incorporates nonadversarial procedures and does not provide for independent adjudication. Nonadversarial elements of veterans benefits include the ex parte character of administrative adjudication, substantive presumptions in favor of the veteran, the VA’s duty to assist veterans, and limitations on attorney compensation.⁹ As far as independent adjudication is concerned, administrative decisions are made by subordinate entities within the VA,¹⁰ and judicial review is limited.¹¹

B. The Social Insurance Model

The social insurance model of benefits emerged in the wake of the Great Depression and the New Deal. The first large scale federal benefit program (other than veterans benefits) was the Social Security Act of 1933,¹² which included old age benefits, unemployment insurance, and aid to families with children (welfare). Benefit programs expanded thereafter with the addition of federal disability benefits to Social Security in the 1950s,¹³ and the creation of the Medicare,¹⁴ Medicaid,¹⁵ Supplemental Security Income¹⁶ and Food Stamp¹⁷ programs during the 1960s and 70s.

These programs reflected a conception of government benefits as a form of social insurance.¹⁸ The old age and unemployment benefits of the Social Security Act, for example, were structured to resemble a government insurance program in which “contributions” purchased protection against later hardship.¹⁹ In a broader sense, the programs reflected a societal consensus that government has a responsibility to protect its citizens from the hardship of old age, poverty, and disease. Thus, even need-based benefits, such as welfare, came to be understood as a form of social insurance i.e., the

“social safety net.”

Given the quasi-contractual character of these programs, the benefits provided were not mere gratuities to be distributed in an ad hoc and discretionary manner. The programs were comprehensive and incorporated binding legal standards for eligibility. As a result, the distribution of benefits was not a discretionary act. Perhaps the most dramatic illustration of this new understanding was the so-called “due process revolution,” under which the Supreme Court recognized various types of government benefits as a form of property protected by the Due Process Clause.²⁰

The paradigmatic case for the due process revolution was *Goldberg v. Kelley*,²¹ which held that because recipients had a protected property interest in welfare benefits, those benefits could not be terminated without a prior hearing.²² Although it is likely that due process applied to many government benefit decisions well before the due process revolution, the application of due process to benefits underscored their character as legally enforceable rights.

If government benefits are entitlements creating legally enforceable rights,²³ it follows that decisions concerning them should be subjected to traditional legal safeguards, including adversarial procedures and independent adjudication. Thus, administrative decisions under these programs are quasijudicial and adversarial. The burden is on claimants to prove their eligibility, even if there is an administrative duty to assist in some programs.²⁴ There are no significant limits, other than ability to pay, on legal representation.²⁵ Likewise, these programs generally incorporate independent adjudication by administrative law judges and broader judicial review by Article III courts.²⁶

C. Comparison of the Two Models

The key features of the charity and social insurance model can be summarized in the following table:

Table: The Two Models of Benefits

Model	Charity	Social Insurance
Obligation	Moral	Quasi-Contractual
Programs	Ad Hoc	Comprehensive
Decisions	Discretionary	Legal Standards
Benefits	Mere Gratuities	Entitlements
Procedures	Non-Adversarial	Due Process
Decision Maker	Agency	Independent

As the table suggests, the two models start with different premises about the obligation to provide benefits and their basic characteristics flow from those premises. Under the charity model, benefits are a moral obligation, while under the social insurance model they are contractual. As a result, the charity model produces ad hoc benefit programs and discretionary benefit decisions, while the social insurance model produces benefit programs that are comprehensive and decisions that are subject to legal standards. The benefits provided are therefore regarded differently – as gratuities under the charity models and as entitlements under the social insurance model. Thus, the charity model assumes nonadversarial procedures by the administrative agency are sufficient protections, while the social insurance model incorporates procedural due process and independent decision makers.

In the following section, I will apply the two models to the evolution of veterans benefits. This history demonstrates the early influence of the charity model in the development of the veterans benefit system and the later movement toward the social insurance model.

II. A BRIEF HISTORY OF VETERANS BENEFITS

The history of veterans benefits in America is a long and remarkable one that predates the founding.²⁷ Thus, while the creation of the Interstate Commerce

Commission in 1887 is often identified as the birth of administrative law,²⁸ by then the federal veterans benefits system had already been in operation for nearly a century.²⁹ And when the social insurance model of benefits began to emerge in the 1930s,³⁰ the veterans benefit system had been in operation for 150 years, with established customs and an entrenched bureaucracy. As veterans benefit programs began to resemble the social insurance programs of the welfare state, the processing of veterans benefit claims proved resistant to change and continues to bear the hallmarks of the charity model.

A. Early Constitutional Conundrums

Congress' initial efforts to design an administrative apparatus for veterans benefits represents one of the earliest historical examples of administrative law. Indeed, the administration of veterans benefits occasioned important early judicial decisions that laid the foundations for modern administrative law doctrine and ultimately figured in no less important a Supreme Court decision than *Marbury v. Madison*.³¹ At the same time, they present a fascinating story of the early interplay between constitutional theory and practice and between Congress and the Courts.³²

Although the First Congress adopted temporary benefits legislation, the administration of the system was unclear and disputed claims were handled by private bills. By the time of the Second Congress, this practice had proven "tedious and unsuitable,"³³ and a statutory and administrative solution was sought in the form of the "Act to regulate the Claims to Invalid Pensions" of March 23, 1792.³⁴ Under the Act, an initial determination of eligibility would be made by federal courts, who would pass the names of eligible claimants along to the Secretary of War, who in turn would place the names on a list of veterans receiving benefits unless he suspected "imposition or mistake."³⁵ This arrangement, of course, is the exact opposite of modern administrative law's typical institutional hierarchy, in which executive officials (i.e., agencies) make the initial decision and are subject to judicial review.³⁶

We owe the modern understanding of proper institutional arrangements at least in part to *Hayburn's Case*,³⁷ in which several United States Circuit Courts, whose members included Justices riding circuit,³⁸ questioned the constitutionality of having courts make the initial determination of eligibility.³⁹ These courts reasoned either that the Act improperly vested judicial power in the Secretary of War by authorizing him to revise the decisions of courts or that the Secretary's power of revision rendered the courts' decisions "advisory opinions," which are not within the judicial power.⁴⁰ Either way, the process contemplated by the Act violated the separation of powers. Although *Hayburn's Case* is reported in the United States reports, the Supreme Court itself never addressed the merits of the case because Congress passed a new statute

providing “in another way, for the relief of the pensioners”⁴¹ Nonetheless, *Hayburn’s Case* is one of the earliest known examples of federal courts holding an act of Congress unconstitutional,⁴² and the participation of several sitting justices in the circuit court decisions gives the case added precedential value.

The new statute referenced in *Hayburn’s Case* provided the occasion for a second interesting early Supreme Court decision, *United States v. Todd*, which was never reported.⁴³ Congress modified the process by vesting initial eligibility determinations in *judges* acting as commissioners rather than in the *courts* and directing the Secretary of War to present the judicial findings to Congress, which would decide the matter.⁴⁴ In fact, some judges had interpreted the original statute in this manner and had proceeded to decide cases as commissioners rather than courts.⁴⁵ This raised the problem of how to deal with the earlier decisions and the new statute provided a mechanism for testing their legal validity: the Secretary of War and the Attorney General were directed to seek a decision on the issue from the Supreme Court.⁴⁶

Shortly after the adoption of the new statute, Secretary of State Edmund Randolph attempted to comply with its directive by seeking a writ of mandamus from the Supreme Court directing the Secretary of War to include on the pension list veterans who had been awarded benefits under the old statute (by judges sitting as commissioners).⁴⁷ Randolph apparently withdrew the motion for writ because there was no individualized claim involved,⁴⁸ but his successor, William Bradford, appeared on behalf of the United States in a suit seeking to recover benefits awarded under the earlier statute to one Yale Todd, brought in the form of an original action before the U.S. Supreme Court.⁴⁹ Although no opinion was filed in *Todd*, the Supreme Court later described the decision in a note appended to *United States v. Ferreira*,⁵⁰ in which Chief Justice Taney indicated that United States had won, i.e., that the decision awarding benefits under the earlier act was not legally valid. It is not entirely clear whether the *Todd* decision was based on the ground that the earlier act could not be construed to authorize judges to act as commissioners, or on the constitutional ground that providing for judges to sit as commissioners violates separation of powers.⁵¹ Chief Justice Taney apparently read the case as statutory.⁵²

One provocative feature of the *Todd* case was that the Court exercised its original jurisdiction even though the suit did not appear to be a case or controversy of the sort enumerated in Article III as within the original jurisdiction of the Court.⁵³ Thus, *Todd* apparently reflects a reading of Article III that is contrary to *Marbury v. Madison*, which held that Article III’s list of cases within the Supreme Court’s original jurisdiction was exclusive.⁵⁴ This inconsistency is no small matter, insofar as the exclusivity interpretation was the basis for *Marbury’s* exercise of the power to declare statutes unconstitutional.⁵⁵ Indeed, Justice Marshall’s failure to discuss *Todd* in this

respect is particularly striking because elsewhere in the opinion he relied on early veterans decisions as precedent for judicial authority to issue writs of mandamus to cabinet officials.⁵⁶

As this early history suggests, while institutional struggles over control of administrative decisions often involve the struggle *for* the power to decide, in the veterans benefit context, the issue for Congress and the courts has often been how *not* to be involved in deciding veterans' cases. Thus, in the early years, Congress sought to divest itself of deciding claims by private bill, attempting to enlist the courts, which resisted the assignment.⁵⁷ In the compromise legislation that followed, both Congress and the courts were to play a role, but this system was quickly abandoned for one in which the executive branch had a more or less exclusive power of decision.⁵⁸

B. Evolution of the Charity Model of Veterans Benefits

As the veterans benefit system evolved in the 19th Century, it took on many attributes of the charity model. Veterans programs remained ad hoc and situational through most of the century, resulting from a mix of private bills and specific statutes providing benefits for particular veterans of specific wars.⁵⁹ Neither the courts nor Congress seemed much inclined to oversee the implementation of these statutes, so the institutions and processes for determining benefit claims under these statutes were developed internally by the agencies responsible for administering them.

Veterans of the Revolutionary war initially received only disability pensions,⁶⁰ but benefits to widows and orphans of veterans killed in action were added over time.⁶¹ Revolutionary War veterans also received the first service pensions (i.e., pensions based on service regardless of whether the veteran was disabled) in 1818, although such service pensions were not provided consistently to veterans of later wars.⁶² This change alone increased the number of veterans receiving benefits from 2,200 to nearly 20,000, and increased the costs of providing benefits from roughly \$120,000 to \$1.4 million.⁶³ Congress extended disability and survivors benefits, but not service pensions, to veterans of the War of 1812 and the Mexican War.⁶⁴

The Civil War, which left many veterans severely wounded, marked a significant expansion of benefits, as the size of the veteran population and the problems they faced forced Congress to become more involved and to initiate new programs. The forerunner of veterans hospitals came with the establishment of the National Home for Disabled Volunteer Soldiers, which provided medical care and rehabilitation for disabled veterans.⁶⁵ Likewise, although eligibility for pensions was initially limited to veterans discharged because of illness or disability incurred during the war, in 1890 the Dependent Pension Act extended benefits to any veteran unable to perform manual labor from causes other than vice or misconduct.⁶⁶ As a result of this

Act alone, the number of veterans receiving benefits doubled, from approximately 500,000 to approximately 1,000,000 recipients.⁶⁷

As this brief overview suggests, veterans benefit legislation was far from comprehensive and systematic, but rather remained ad hoc and case specific. The various benefit statutes were supplemented by private bills awarding pensions to specific veterans, a practice particularly common toward the close of the century as a result of limited judicial remedies available to veterans and the advantages to legislators of patronage politics.⁶⁸ It was not until the close of the 19th century that Congress “established a general pension system that could be applied to current as well as future recipients.”⁶⁹

Throughout this period, the various agencies administering veterans benefits were left largely to their own devices with little judicial oversight or legislative direction.⁷⁰ The courts shied away from broad authority to review executive branch decisions concerning veterans claims. Thus, while *Marbury v. Madison* had indicated that judicial remedies would be available to require payment of veterans benefits wrongly withheld,⁷¹ in *Decatur v. Paulding*,⁷² the Supreme Court held that it lacked jurisdiction to issue a writ of mandamus when a veterans benefit decision involved discretionary judgments.

Mrs. Paulding claimed a widow’s pension under both a general pension bill and a private bill, both of which had been adopted in 1837.⁷³ The Secretary of the Navy, after consulting with the Attorney General, concluded that she could claim under either the general law or the private bill, but not both.⁷⁴ When Mrs. Paulding sought to challenge this decision and claim both pensions, the Supreme Court held that the courts lacked jurisdiction to review the Secretary of the Navy’s decision.⁷⁵

The Court reasoned that this decision was not a ministerial act subject to mandamus since it involved discretionary judgments,⁷⁶ and emphasized that “interference of the Courts with the performance of the ordinary duties of the executive departments of government, would be productive of nothing but mischief”⁷⁷ The Court’s characterization of a veterans benefit decision as “discretionary” contrasts sharply with *Marbury’s* view of a veteran’s pension as a legal right,⁷⁸ and reflects the charity model of veterans benefits. This holding is particularly striking insofar as the issue involved was the interaction between two legislative acts (even if one was a private bill), which would normally be thought to be a purely legal question within the core jurisdiction of the courts.

The courts’ reluctance to review veterans claims continued following the Civil War, when the Court of Claims read narrowly its jurisdiction to review veterans claims.⁷⁹ The court had previously reviewed veterans benefits in cases where the amount of a pension was in dispute, but the claimant’s entitlement to the pension was undisputed.⁸⁰ In *Daily v. United States*,⁸¹ however, the court held that it lacked

jurisdiction to review the Commissioner of Pensions' decision that a widow was not entitled to a pension. The court relied on other cases in which it had "refused to take jurisdiction of suits proceeding on inchoate rights, which, however meritorious as such, still needed some definite action on the part of some executive department or officer, to give the party a vested right upon which a judgment . . . could be based."⁸² Thus, the court disclaimed any authority to review the most fundamental and contentious aspect of the veterans claim process.⁸³

One effect of *Daily* was to send claimants who had been denied pensions to Congress for relief in the form of private bills, and Congress was apparently willing to oblige. The demands on Congress were exacerbated by the adoption of the Pension Arrears Act of 1879, which vastly increased the number of claims. The Federal Research Division of the Library of Congress described the situation after the adoption of the act in its report to the Court of Veterans Appeals:

Members of the Forty-Sixth Congress (1879-81) were quickly importuned to investigate delayed or rejected applications: the House Select Committee on Pensions, Bounty Land, and Back-pay stated in 1880 that it had been receiving 5,000 such requests a month, and the Bureau of Pensions reported over 40,000 inquiries had been made by members of Congress on behalf of various applicants during the same year. Congress agreed to hold additional evening sessions on Fridays to consider the flood of private acts introduced into both chambers seeking pensions for those not eligible under existing laws.⁸⁴

Notwithstanding the weight of these demands, Congress rejected a number of bills that would have assigned the tasks of reviewing rejected claims to courts or administrative tribunals, apparently because the opportunities for casework on behalf of constituents were too valuable.⁸⁵

Aside from private bills, neither Congress nor the courts took much interest in the institutional structure or processes through which individual benefit claims were resolved. Thus, the development of these institutions and processes was largely a matter internal to the agencies responsible for administering benefits under a particular statute.⁸⁶ As a result, there is little precise information about the procedures used by the veterans agencies to process veterans benefit claims during the 19th century.

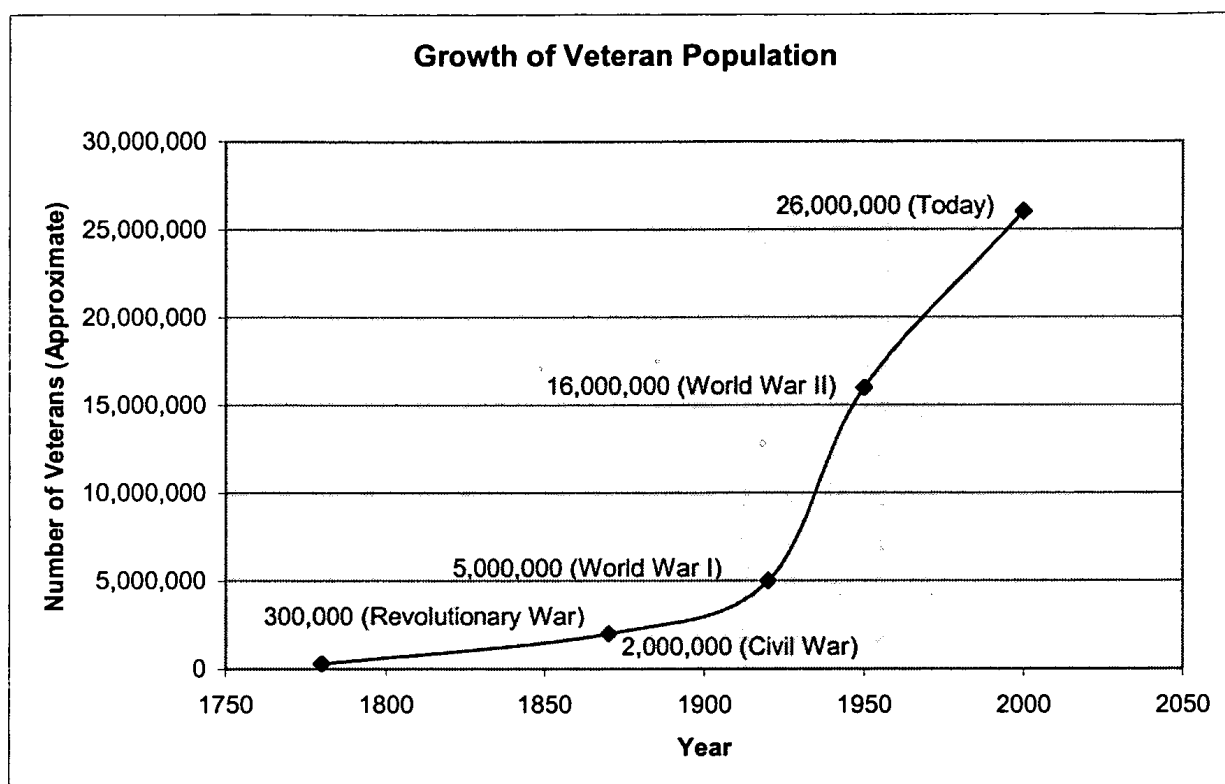
Nonetheless, the process that emerged during the 19th century was apparently nonadversarial.⁸⁷ First, the "benefit of the doubt" rule that favors veterans in cases where the evidence is balanced apparently emerged as an administrative directive during the post Civil War period, although it was not embodied in a regulation until much later.⁸⁸ Second, limits on attorney compensation also can be traced to Civil War era statutes.⁸⁹ Although these limits were intended primarily to protect veterans

against overreaching by unscrupulous attorneys,⁹⁰ “[a] necessary concomitant of Congress’ desire that a veteran not need a representative to assist him in making his claim was that the system should be as informal and nonadversarial as possible.”⁹¹

C. Growth of the Benefit System and the Social Insurance Model

The picture of veterans benefits administration that emerged by the close of the 19th century is largely reflective of the charity model. Benefit decisions were ad hoc, discretionary judgments. They were made through nonadversarial procedures and insulated from judicial oversight, leaving the veteran dependent upon the goodwill of the decisionmaker. However, with the advent of the 20th century, the growth of the veterans benefits system began to transform it along the lines of the social insurance model. Veterans benefits became more comprehensive and systematic, with ongoing programs replacing ad hoc legislation for veterans of particular conflicts,⁹² and the administration of veterans benefits became more centralized and bureaucratic.⁹³

The growth of the veterans benefits system is most evident in terms of the size of the veteran population to be served, as successive wars brought with them dramatic increases in the number of veterans. After the Revolutionary War, there were about 286,000 veterans.⁹⁴ By the close of the Civil War, the number of veterans had increased to nearly 2 million. World War I and World War II saw the number of veterans increase to approximately 5 million and 16 million respectively. Counting the veterans of the Korean and Vietnam Wars, there are over 26 million veterans today. The following graph helps to visualize this exponential growth.⁹⁵



With successive wars, the scope and array of benefits has also expanded. World War I saw the emergence of programs for vocational and educational rehabilitation.⁹⁶ World War II and its aftermath saw further expansion of available benefits, with a particular focus on easing the economic transition of veterans. The GI Bill of 1944⁹⁷ provided education and training, federal guarantees for home loans for veterans, and unemployment insurance to all veterans regardless of disability. The Readjustment Assistance Act of 1952 provided similar benefits for veterans of the Korean War⁹⁸ and similar benefits were extended to veterans of the war in Vietnam.⁹⁹

The massive influx of veterans as a result of World War I provided a spur towards institutional reform. Congress provided for the consolidation of various existing agencies into the Veterans Bureau in 1921,¹⁰⁰ and further consolidation came with the creation of the Veterans Administration in 1930 as a single agency with administrative responsibility for the veterans benefit system.¹⁰¹ The VA was elevated to cabinet level and renamed the Department of Veterans Affairs in 1988.¹⁰²

This period also saw important developments for the processing of individual benefits claims. In 1933 President Franklin D. Roosevelt issued a series of executive orders establishing detailed standards and an administrative review process, including the creation of the Board of Veterans Appeals (BVA).¹⁰³ At about the same time,

Congress enacted legislation precluding judicial review of veterans claims, in effect insulating the BVA from judicial oversight.¹⁰⁴

With the bureaucratic reorganization and the growth of veterans benefit programs, they have come to resemble the benefit programs of the social insurance model. Because programs are ongoing and comprehensive, enlisted servicemen and women join the military with the understanding that benefits will be provided, adding a contractual component to the receipt of benefits.¹⁰⁵ Benefits decisions require the application of complex legal standards by a massive bureaucracy whose personnel must be concerned with the fiscal integrity of the program and guard against fraud and abuse.

Although these developments draw the fundamental assumptions of the charity model into question, the veterans benefits system retains many features that reflect that model. In particular, procedures remain nonadversarial and judicial review remained foreclosed until the adoption of the Veterans' Judicial Review Act (VJRA) in 1988.¹⁰⁶ Indeed, the VJRA itself illustrates the problematic mixture of the charity and social insurance models of veterans benefits.

Insofar as the VJRA permitted some judicial review, it reflected the social insurance model's premise that benefits are legally cognizable rights and clearly moved the system toward that model. At the same time, however, the VJRA attempted to preserve and reinforce the nonadversarial character of the administrative process.¹⁰⁷ Moreover, primary responsibility for review was vested in an Article I Court, the CAVC, with only limited review by the Article III U.S. Court of Appeals for the Federal Circuit.¹⁰⁸

In short, the current veterans benefit system is of two minds. At one level, the system operates as a social insurance program of comprehensive size and scope with the need to process myriad cases in a fair, timely and efficient process. At another level, the system is seeking to preserve the paternalistic, informal, and nonadversarial process of the charity model. As will be developed more fully in the following section, the mixture of the two models contributes to many of the problems associated with the system.

III. MIXED MODELS AND THE FUTURE OF VETERANS BENEFITS

Within the concept of the rule of law, two critical safeguards emerge from our constitutional system – fair procedures (due process) and judicial review to ensure government actors comply with the law. To a large extent, the current veterans benefit system confounds the operation of these basic rule of law safeguards. First, nonadversarial procedures depart dramatically from our usual conception of due process and their fairness rests on the assumption that the system truly operates in a

pro-veteran manner. Second, although judicial review is now available, veterans receive fewer overall guarantees of decisional independence than their counterparts in other benefit programs.

A. Nonadversarial Veterans Benefit Procedures

Under the charity model, the giver of benefits stands in a helping relationship to the recipient, not an adversarial one.¹⁰⁹ This perspective is amply reflected in the veterans benefit system, which is “imbued with special beneficence” and is “uniquely pro-claimant.”¹¹⁰ From this perspective, adversarial procedures are both unnecessary and counterproductive. As a result, veterans benefit procedures, at least at the administrative level, are ex parte and nonadversarial.¹¹¹

1. Benefit of the Doubt

The most basic expression of the nonadversarial ideal in veterans benefits is the so-called “benefit of the doubt” rule, under which cases involving an approximate balance of the evidence are to be resolved in the veteran’s favor.¹¹² If, as the charity model implies, veterans benefit decisions are made with a strongly pro-veteran attitude, then adversarial procedures would not generally be necessary to protect the interests of claimants.¹¹³ But notwithstanding frequent proclamations of the pro-veteran character of the system, a common criticism of the benefits process is that the VA does not really give the benefit of the doubt to claimants.¹¹⁴

The pro-veteran perspective of the charity model is difficult to maintain in the context of comprehensive social insurance programs. The missions of a charitable agency and a social insurance agency differ in fundamental ways. The mission of a charitable agency is to help those in need, but the mission of a social insurance agency is to properly administer funds, conserving them to preserve the fiscal integrity of the system as a whole.¹¹⁵ Thus, a pro-veteran posture is to some extent incompatible with a social insurance mission, which places the agency in an adversarial posture vis-a-vis some veterans. The addition of judicial review,¹¹⁶ moreover, reinforces this adversarial posture, as the VA opposes the veteran to defend its denial of benefits.¹¹⁷

2. Duty to Assist

The duty to assist, like the benefit of the doubt rule, was a longstanding administrative practice prior to its codification in 1988.¹¹⁸ This duty not only reflects the general attitude of benevolence that is intended to prevail in veterans benefit determinations,¹¹⁹ but also is a natural byproduct of a nonadversarial procedure. In a

nonadversarial system, it is the duty of the decisionmaker, not the parties, to develop the facts necessary to a decision.¹²⁰ Conversely, given the lack of legal representation at the administrative level, VA assistance in developing the evidence is especially important because attorneys play a major role in developing the facts in an adversarial process.¹²¹ In light of the dependence of many veterans on the VA's assistance in developing the record, it is not surprising that one of the most frequently lodged criticisms of the VA relates to its alleged failure to fulfill the duty to assist.

One problem caused by the VJRA is the threshold question of when the duty to assist is triggered. Prior to the VJRA, the duty to assist co-existed with a separate regulation providing that a veteran has the burden of submitting evidence sufficient to justify the belief that the claim was "well grounded."¹²² These two provisions were not linked. In codifying the provisions, the VJRA combined them in a single statutory provision¹²³ in such a way that the CAVC,¹²⁴ and eventually the Federal Circuit¹²⁵ read the establishment of a well grounded claim as a prerequisite to trigger the VA's duty to assist.¹²⁶

Congress responded with the Veterans Claims Assistance Act of 2000,¹²⁷ which eliminated the prior duty to assist provision and inserted a new provision, section 5103A, which made the duty to assist applicable unless "no reasonable possibility exists that such assistance would aid in substantiating the claim."¹²⁸ The Act also specifies in much greater detail the obligations imposed by the duty to assist.¹²⁹

Although Congress clearly intends that the VA implement the duty to assist expansively as part of the general pro-claimant posture of the process, there is a certain incompatibility between that duty and the increasingly adversarial posture that has emerged as a result of the social insurance elements of the veterans benefit system.¹³⁰ An additional difficulty is that even with the best of intentions, the VA may be unable to assist claimants fully because of its limited resources.¹³¹

Difficulties fulfilling the duty to assist may result in a variety of problems. Most obviously, the failure to develop essential factual information may lead to the denial of benefits (or a lower rating) to many veterans entitled to them (or to a higher rating). Second, the administrative records in VA cases are often poorly organized and contain a great deal of extraneous materials, making key documents difficult to find and easy to overlook.¹³² Third, by adding an extra burden on the agency, the duty to assist contributes to lengthy delays in processing claims.

3. Limits on Attorneys

In a world in which the attitude of the VA is strongly pro-veteran and the VA provides comprehensive assistance to veterans in establishing their claims, representation of claimants would be largely unnecessary. In practice, however, the

problems described above interact with limitations on attorney compensation that sharply restrict representation in the early stages of the administrative process. These limits are intended to protect veterans and preserve the nonadversarial character of the process. But in view of the problems described thus far in this section, it may be that attorney representation during the administrative phase of the process is necessary.

Under the current provision contained in the VJRA, attorneys are prohibited from receiving any compensation until after the initial decision by the BVA.¹³³ As a result, few veterans are represented by attorneys during the administrative phases of the process.¹³⁴ They are, however, frequently represented at no charge by non-attorney advocates from service organizations, such as the American Legion or the Disabled American Veterans.¹³⁵ These organizations have played and continued to play an enormously important role helping veterans, and their assistance with veterans claims is an essential component of that role.

In light of the increasingly complex and legalistic character of the process, a critical question is whether non-attorney representation is sufficient. For example, the CAVC has adopted an exhaustion requirement under which it will not consider matters that were not raised before the BVA.¹³⁶ Without representation by attorneys, claimants often may find that they have failed to properly raise critical matters before the agency and, as a result, their claims are foreclosed.¹³⁷

The constitutionality of earlier versions of the fee limit statute was addressed by the U.S. Supreme Court in *Walters v. Nat'l Ass'n of Radiation Survivors*.¹³⁸ The Court upheld the statute, reasoning that attorneys would undermine the nonadversarial character of the procedures.¹³⁹ The Court also relied on statistics indicating that veterans represented by attorneys before the BVA experienced only a slightly higher success rate (18.3 percent) than those represented by service organizations (between 16 percent and 17 percent, depending on the organization).¹⁴⁰

The figures clearly reflect the high caliber of representation by service organizations, but they may not demonstrate, as the Court seemed to think, that having a lawyer would be unlikely to affect the outcome.¹⁴¹ Because there was no judicial review at the time of *Walters*, the figures say nothing about any potential link between representation at the administrative phases and the eventual success of any appeal. This connection may be significant in view of the importance of developing a record on behalf of the claimant and the exhaustion doctrine. In addition, although a large percentage of cases may be relatively easy, the figures do not show one way or another whether attorneys make a difference in close and difficult cases.¹⁴²

In any event, limits on compensation serve as an important barrier to legal representation of veterans before the VBA and BVA. While attorneys may seem to be unnecessary and counterproductive under a uniquely pro-claimant nonadversarial system, the movement of the veterans benefit system toward the social insurance

model draws this policy into question. At the very least, veterans are left without an important source of protection considered essential in other legal contexts.

B. Independent Decisions and Judicial Review

Under a social insurance model in which benefits are a form of legal entitlement and subject to comprehensive standards, government actors such as the VA are bound by law. Independent decision making, including independent administrative adjudication and judicial review of administrative decisions are essential safeguards of legal regularity.¹⁴³ For veterans claims, the adjudication process involves several levels of decision: initial decisions by regional offices of the VBA, de novo administrative review by the BVA, deferential review by the CAVC, and very limited review by the Federal Circuit. Within this process, veterans receive fewer guarantees of decisional independence than claimants for other benefits, such as Social Security.

1. Administrative Decisions

Administrative decisions are made by the VBA and subject to internal review by the BVA. The VBA has over 12,000 employees dispersed in over 50 regional offices. As VA employees, these decision makers have little or no legally enforceable independence from the VA. This factor, standing alone, is little cause for concern to the extent that these are merely initial decisions subject to further de novo administrative review,¹⁴⁴ which is conducted by the BVA. Thus, the critical issues is the independence of the BVA.

Although proposals for making the BVA an independent administrative tribunal were made in connection with the VJRA, the final legislation ensured BVA "was retained in its existing form as the final administrative decisional body within the DVA."¹⁴⁵ Because the BVA remains a part of the VA, it lacks full decisional independence.¹⁴⁶ As one observer put it: "The VA's use of subordinated employees at its final level of administrative review, the BVA, together with the BVA's low favorable ruling rate and high remand rate, unsurprisingly has fostered the public perception that the BVA is an instrument and mouthpiece of the VA."¹⁴⁷

One issue is the appointment process. The chair of the BVA is appointed by the President and confirmed by the Senate for a six year term.¹⁴⁸ Members are appointed by the Secretary (on recommendation by the chair) and approved by the President.¹⁴⁹ A recent ABA committee report expresses concern that "[m]any BVA members have been selected from among the BVA staff attorneys and other VA employees [and that the] Chairman has, in some instances, limited applicants to those who were then employed by VA."¹⁵⁰ While the primary concern expressed by the

report was that the most highly qualified applicants were not being sought, appointment from within the VA is likely to produce board members sympathetic to the VA's position and is hardly a recipe for decisional independence.¹⁵¹

Another issue is removal. The removal provisions of the BVA statute are very confusing,¹⁵² but appear to give broader authority for the Secretary to remove members from office. First, while administrative law judges are exempt from generally applicable performance review provisions for agency employees,¹⁵³ BVA members are explicitly required to undergo performance review every three years, and may be "noncertified" for renewal based on poor performance.¹⁵⁴ Second, although the Secretary must follow the statutory procedures for performance based removal¹⁵⁵ and the hearing procedures for ALJs apply if a BVA member is removed for cause,¹⁵⁶ the Secretary is also authorized to remove a member, upon the recommendation of the Chairman, "for any other reason as determined by the Secretary."¹⁵⁷

All this is not to say that the VA has sought actively to influence the outcome of individual cases at the BVA, but rather that the VA's institutional structure and the statutory appointment and removal process do not give the BVA full independence. Thus, BVA review of VBA decisions may be de novo, but that review is more in the nature of an internal review than an independent decision.¹⁵⁸

The impact of this lack of full independence is suggested by comparing the veterans benefit system with Social Security, in which disability claimants receive a de novo hearing before an independent ALJ following initial denials by state agencies.¹⁵⁹ In fiscal year 2002, the BVA ruled favorably to veterans in just under 28 percent of all claims, and remanded almost another 20 percent.¹⁶⁰ In contrast, Social Security ALJ allowance rates averaged between 60 and 70 percent from 1985-2000.¹⁶¹ In addition to a higher favorable decision rate, it is critical that ALJs rendered final decisions awarding benefits, thus limiting the cycle of appeals, remands, and appeals that plagues the veterans system.¹⁶²

2. Review by the Court of Appeals for Veterans Claims

Until the adoption of the Veterans' Judicial Review Act (VJRA), decisions of the BVA were final and unreviewable.¹⁶³ Although pressure for judicial review increased after World War II and again in the 1970s following the Vietnam War,¹⁶⁴ the VA and others resisted these efforts, often emphasizing that judicial review would undermine the nonadversarial process that favored veterans.¹⁶⁵ Thus, when Congress finally adopted the VJRA, it enacted something of a compromise.¹⁶⁶ The first level of judicial review was vested in an Article I court, the Court of Veterans Appeals, later renamed the Court of Appeals for Veterans Claims. Judicial review by an Article III court followed, but this review was sharply limited.¹⁶⁷

Pursuant to its statute, the CAVC has the full scope of review available to Article III courts reviewing administrative decisions – including the power to review questions of law, to set aside decisions that are arbitrary and capricious, and to reverse factual findings that are clearly erroneous.¹⁶⁸ Indeed, the “clearly erroneous” standard of review is nominally a less deferential standard of review than typically applies in judicial review of administrative agency fact finding, in which the substantial evidence standard usually applies.¹⁶⁹ In practice, however, there has been significant dissatisfaction with the exercise of judicial review functions by the CAVC.

First, the CAVC has been reluctant to scrutinize agency decisions as carefully as the “clearly erroneous” standard would suggest.¹⁷⁰ Ordinarily, the standard is met when the reviewing court “has a ‘definite and firm conviction’ that an error has been committed.”¹⁷¹ The CAVC, however, has interpreted this standard as precluding it from reversing the BVA so long as there is a “plausible basis” for the BVA’s factual determinations.¹⁷² Although we must be careful not to exaggerate the significance of variations in the verbal formulation of the scope of review,¹⁷³ the plausible basis standard would appear to be even *more* deferential than the substantial evidence test.¹⁷⁴ It seems to require the reviewing court to affirm if the agency can point to some evidence in the record that plausibly supports its decision.¹⁷⁵

Second, there is a great deal of concern with the large number of remands ordered by the CAVC.¹⁷⁶ In other words, while the CAVC has found error in a high percentage of cases, these errors do not result in a decision awarding benefits to the claimant, but rather in further administrative proceedings before the VBA and/or BVA. The high rate of remands contributes to the caseload problems of those agencies and the lengthy delays in processing cases.¹⁷⁷ The practice of remanding cases is normal for reviewing courts, who are not finders of fact in the first instance, but – particularly when claims have dragged out for an especially long period of time – courts reviewing Social Security cases have at times simply ordered the award of benefits.¹⁷⁸ From the veteran’s perspective, of course, the practice of remanding cases makes the CAVC a far less effective check than *de novo* administrative hearings by ALJs would be.

Complaints about excessively deferential CAVC review and the practice of remanding cases made their way to Congress, which attempted to encourage less deferential review in the Veterans Benefit Act of 2002.¹⁷⁹ While the Act did not change the standard of review itself,¹⁸⁰ the legislative history made clear that congress intended “to provide for more searching appellate review of BVA decisions, and thus give full force to the ‘benefit of doubt’ provision.”¹⁸¹ The Act amended 38 U.S.C. § 7261(a)(4) by authorizing the CAVC to “reverse” (as opposed to merely set aside) BVA factual findings.¹⁸² It also amended subsection 7261(b) by directing the CAVC to “take due account” of the Secretary’s application of the benefit of the doubt rule.¹⁸³ Nonetheless, in *Roberson v. Principi*,¹⁸⁴ the CAVC concluded that the statute did not

effect any change in the scope of review.

It is difficult to assess how many of the issues surrounding CAVC review relate to its Article I status. Professor Fox has cautioned against questioning the legitimacy or power of the CAVC on the grounds that it is “merely” an Article I court,¹⁸⁵ and there are many safeguards for the independence of the court.¹⁸⁶ On the other hand, the court does not enjoy the full protections of Article III.

The more significant distinction may be the specialized subject matter of the court. Although specialized courts have many advantages, especially the development of subject matter expertise, they are not without problems.¹⁸⁷ Specialization also may mean isolation or stagnation, because the court’s jurisprudence is not leavened by insights from other areas of the law. This may have been a factor, for example, in the court’s unusual interpretation of the clearly erroneous standard.¹⁸⁸ In addition, specialized courts tend to be staffed by judges from within the bureaucracy and may become sympathetic to the arguments of those who appear regularly before the court – in this case the VA.

3. Federal Circuit Review

To the extent that problems with the veterans benefit system stem from a lack of independence in the BVA or insufficient review by the CAVC, those problems are unlikely to be corrected by judicial review in the Federal Circuit in its current form. Under the VJRA, Federal Circuit review of individual benefit cases is strictly limited.¹⁸⁹ In particular, the Federal Circuit is expressly precluded from reviewing “(A) a challenge to a factual determination; or (B) a challenge to a law or regulation as applied to the facts of a particular case.”¹⁹⁰ Thus, while the Federal Circuit is available to address interpretive issues and the validity of agency regulations, it is not generally available to review the agency’s evaluation of an individual claim.¹⁹¹ In contrast, a court of appeals ordinarily reviews *de novo* the decisions of a district court reviewing an administrative decision (as in *Social Security*).¹⁹²

In practice, the Federal Circuit does not represent an effective avenue for redress if veterans are dissatisfied with the resolution of their cases by the CAVC. Statistics gathered by Professor Fox suggest that while there has been significant growth in the number of veterans cases filed with the Federal Circuit, the number of published decisions favorable to veterans remains very small.¹⁹³ Of course, the lack of fact review by the Federal Circuit is not the cause of problems with the disability claims process, but it does mean that the Federal Circuit has a limited ability to intervene on behalf of veterans whose claims are denied.

Overall, the lack of full review by the Federal Circuit is the final piece of a larger process in which veterans benefit decisions are made without the ordinary

safeguards to ensure the independence of decision makers. Initial decisions are made by subordinate employees of the VA, and reviewed internally by the BVA. There is no *de novo* hearing before an ALJ. Judicial review is available before an Article I court that has been reluctant to interpret its mandate aggressively and is limited in its ability to award benefits as opposed to merely remand cases. CAVC review of BVA factual determinations or application of law to facts is itself effectively insulated from review.

Thus, while the VJRA represents a compromise between those who would have subjected the VA to ordinary judicial review provisions and those who would have retained nonreviewability, it may have had a perverse effect. The availability of review has forced the agency to be more careful in documenting its decisions, thus contributing to delays and backlogs, while at the same time, review has had only a limited impact on the actual results of cases, as CAVC remands and limited Federal Circuit review have not satisfied disappointed claimants.

IV. CONCLUSION: IMPLICATIONS FOR THE FUTURE OF VETERANS BENEFITS

As the foregoing discussion suggests, many of the problems associated with the veterans benefit system can be linked to the system's efforts to mix two distinct models of veterans benefits. This is not to say that the mixture of models is the only cause of problems or that moving to one model or the other is a panacea. Indeed the problems with the VA are in some sense inherent in any large scale benefit program that must make complex factual and legal determinations for a large number of cases. It is easy to focus on the relatively small percentage of cases that are problematic and overlook the majority of cases in which the system works relatively well. Many problems, moreover, are the result of chronic underfunding and inadequate resources.

Nonetheless, the question of what can be done to improve the system remains. There is no going back to a pure charity model; the size and scope of the programs, the legal context in which they operate, and the emergence of the social-welfare state means that veterans benefit programs have become a form of social insurance, not charity. It is tempting to say that the system would function better if it moved entirely to the social insurance model, as some critics have suggested.¹⁹⁴ At the same time, however, even the most ardent advocates of reform would not abandon the pro-veteran character of the system, especially the benefit of the doubt rule and the duty to assist.

Thus, it seems likely that the veterans benefit system will continue to mix elements of the charity and social insurance models. Nonetheless, by highlighting the tension between the two models, I hope to have focused attention on several key features of the system that contribute to ongoing problems. Given my limited practical experience with VA claims and the law of unintended consequences, I am hesitant to make any definitive recommendations, but the following reforms may warrant

consideration:

1. First, elimination of the limits on attorney compensation, perhaps the most entrenched feature of the system, warrants careful consideration. The administrative process is not always veteran friendly and may have become more adversarial as a result of judicial review. At any rate, the preservation of issues for review, which was not a factor before the VJRA, has become an important consideration and attorneys are likely to be especially helpful there. Moreover, while attorney representation is often seen as a negative from an agency perspective, attorney representation of veterans may well help the VA by reducing its burden of developing facts and compiling the record.¹⁹⁵
2. Second, the use of ALJs to provide an independent de novo hearing at some point of the administrative process may be advisable. In addition to the obvious benefits to veterans of an independent determination, the ability to enter final orders awarding benefits would be a critical step toward resolving the seemingly endless cycle of appeals, remands, appeals, and remands. ALJ hearings also serve as a vehicle for finalizing the administrative record and ensuring its quality.
3. Third, expansion of the scope of judicial review may be desirable. The CAVC should be less deferential than the “plausible basis” standard suggests, and it could be more aggressive in winding up cases and forcing the VA to act on longstanding claims. More important, perhaps, review in the Federal Circuit could be expanded, which in turn might give greater guidance to the CAVC on the appropriate scope of review.

Of course, these changes, which tend toward the social insurance model, would not be without costs. In addition to adding to the bureaucracy and complexity of the claims adjudication process, they may further undermine the nonadversarial ideal. But right now, the veteran appears to have the worst of both worlds – a faceless bureaucracy that is supposed to be on his or her side but is not, and a system that denies him or her most of the traditional safeguards against error and abuse. If one thing is clear, it is that our veterans deserve better.

Notes

* Professor of Law, University of Kansas School of Law. I would like to thank Rob Mead for valuable research assistance and Sid Shapiro and the other symposium participants for their helpful input into this article.

1. See generally VA Claims Processing Task Force, Report to the Secretary of Veterans Affairs

- (2001).
2. Professor O'Reilly considers the system to be so deeply flawed that he advocates abolishing the VA appeals process and merging the system with the Social Security disability appeals system. See James T. O'Reilly, *Burying Caesar: Replacement of the Veterans Appeals Process is Needed to Provide Fairness to Claimants*, 53 ADMIN L. REV. 223 (2001). But see Gary E. O'Connor, *Rendering to Caesar: A Response to Professor O'Reilly*, 53 ADMIN L. REV. 343 (2001) (defending the current system). Ironically, proponents of reform in the Social Security system, including myself, have at times recommended moving that process towards the veterans benefit model. See Richard E. Levy, *Social Security Disability Determinations: Recommendations for Reform*, 1990 BYU L. REV. 461 (report for the Federal Courts Study Committee); Paul R. Verkuil & Jeffrey S. Lubbers, *Alternative Approaches to Judicial Review of Social Security Disability*, 55 ADMIN. L. REV. 731 (2003).
 3. One example of this is the contribution of Ron Smith to this Symposium, which questions the prevalence of single-judge decisions by the CAVC. See 13 Kan. J.L. & Pub. Pol'y 1 (2003-04). There has also been some concern that the CAVC gives excessive deference to the VA and that too many cases are remanded to the agency, rather than resolved by the court. See *infra* notes 170-84 and accompanying text.
 4. In this sense benefits are roughly the same as gifts. Promises to make gifts are not legally enforceable under the common law, although they become the property of the recipient once they are given.
 5. See *infra* notes 36, 68, 84-85 and accompanying text.
 6. 292 U.S. 571 (1934).
 7. *Id.* at 577.
 8. For purposes of this article, "independent adjudication" includes protections for the independence of administrative decision makers and judicial review sufficient to ensure administrative compliance with the law.
 9. For further discussion of these features, see *infra* notes 109-42 and accompanying text.
 10. Initial decisions are made by the Veterans Benefit Administration (VBA) within the Department of Veterans Affairs and administrative appeals are made to the Board of Veterans Appeals (BVA), also within the VA. See *infra* notes 144-62 and accompanying text.
 11. Until the Veterans Judicial Review Act (VJRA), Pub. L. No. 100-687, 102 Stat. 4105 (1988), judicial review was generally precluded by statute. See generally, Scott H. Reisch, Note, *211 in Progress: Must the Veteran's Administration Comply with Federal Law?*, 40 STAN. L. REV. 323 (1987) (analyzing scope of preclusion just prior to adoption of the VJRA). Even under the VJRA, review is limited in two ways. First, initial review is by an Article I court, the Court of Appeals for Veterans Claims (CAVC), rather than by an Article III court. See *infra* notes 163-88 and accompanying text. Second, Article III review by the United States Court of Appeals for the Federal Circuit (Federal Circuit) is strictly limited. See *infra* notes 189-92 and accompanying text.
 12. Pub. L. No. 74-271, 49 Stat. 620 (Aug. 14, 1935).
 13. Social Security Act Amendments of 1954, Pub. L. 83-761, 68 Stat. 1052.
 14. Medicare Act, Pub. L. No. 89-97, Title I, 79 Stat. 290 (1965) (codified as amended in scattered sections of 42 U.S.C.).
 15. Medicaid Act, Pub. L. No. 89-97, Title I, § 121(a), 79 Stat. 343 (1965) (codified as amended in scattered sections of 42 U.S.C.).

16. Social Security Act Amendments of 1972, Pub. L. No. 92-603, 86 Stat. 1329, 1465-75 (1972) (codified as amended at 42 U.S.C. §§ 1381-1383c).
17. The Food Stamp Act of 1964, Pub. L. No. 88-525, 78 Stat. 703 (1964).
18. For an early state court decision reflecting changing attitudes toward government benefits, *see* Commonwealth *ex rel.* Schnader v. Liveright, 308 Pa. 35, 161 A. 697 (1932) (upholding state law providing unemployment benefits as consistent with state constitution's ban on appropriations "for charitable, educational or benevolent purposes"). Interestingly, the constitutional provision at issue contained an exception for veterans pensions.
19. *See generally* SOCIAL SECURITY ADMINISTRATION, A BRIEF HISTORY OF SOCIAL SECURITY (2000).
20. *See generally* ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW 151-65 (2d ed. 2001); RICHARD J. PIERCE, JR., SIDNEY A. SHAPIRO & PAUL R. VERKUIL, ADMINISTRATIVE LAW AND PROCESS 227-43 (3d ed. 1999).
21. 397 U.S. 254 (1970).
22. In particular, the Court explicitly rejected the notion that benefits were mere gratuities or privileges, or that characterizing them as such meant that they were legally unprotected. *Id.* at 262 ("The constitutional challenge cannot be answered by an argument that public assistance benefits are a 'privilege' and not a 'right.'").
23. This is not to say that these benefits were always or completely understood in terms of the social insurance model. *See* Flemming v. Nestor, 363 U.S. 603 (1960) (holding that Social Security benefits are not vested rights and can be withdrawn by Congress, but requiring that legislation curtailing benefits satisfy minimum rational basis scrutiny).
24. Specifically, there is some duty to assist claimants in obtaining records and other necessary evidence in Social Security disability cases. *See* Sims v. Apfel, 530 U.S. 103, 110-11 (2000) ("Social Security proceedings are inquisitorial rather than adversarial. It is the ALJ's duty to investigate the facts and develop the arguments both for and against granting benefits....").
25. However, the amount of any attorney fee must be reasonable and cannot generally exceed 25 percent of any benefits recovered. *See* 42 U.S.C. § 406 (2003).
26. *See, e.g.*, 42 U.S.C. § 405(g) (providing for judicial review of Social Security disability decisions).
27. The first reported benefits in America were apparently provided by the Plymouth Colony as early as 1636. VETS Resource Connection, <http://nvti.cudenver.edu/VETSResource/benefits2.htm> (visited Aug. 15, 2003).
28. *See, e.g.* Gabriel J. Chin, *Regulating Race: Asian Exclusion and the Administrative State*, 37 HARV. C.R.-C.L. L. REV. 1, 6 (2002) ("The Interstate Commerce Commission is routinely described as the first modern federal administrative agency."); *see also* AMAN, JR. & MAYTON, *supra* note 20, at 2 (observing that while the thirties were "watershed years" for administrative law, agencies had previously been a part of American government and citing the ICC as an example); STEPHEN G. BREYER, ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 19 (5th ed. 2002) (describing ICC as "the first great federal regulatory agency").
29. Under the Articles of Confederation, Congress could only recommend to states that they provide benefits to veterans of the Revolutionary War, and most states did so. *See* VETERANS BENEFITS AND JUDICIAL REVIEW: HISTORICAL ANTECEDENTS AND DEVELOPMENT OF THE AMERICAN SYSTEM 35-39 (1992) (prepared by the Federal Research Division of the Library of Congress) (hereinafter VETERANS BENEFITS). It has been suggested that as a result of the inadequacies of state pensions, "veterans of the war were among the strongest advocates of the Federal Constitution." *Id.* at 40. For additional treatments of the early history of the veterans benefit system, *see* THE VETERANS

BENEFITS ADMINISTRATION: AN ORGANIZATIONAL HISTORY: 1776-1994 (1994) ((prepared by the Federal Research Division of the Library of Congress) (hereinafter ORGANIZATIONAL HISTORY); GUSTAVUS A. WEBER & LAURENCE F. SCHMECKEBIER, THE VETERANS' ADMINISTRATION: ITS HISTORY, ACTIVITIES AND ORGANIZATION (1934).

30. See *supra* notes 12-17 and accompanying text.
31. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). See *infra* notes 53-56 and accompanying text.
32. See generally WILLIAM F. FOX, JR., THE LAW OF VETERANS BENEFITS: JUDICIAL INTERPRETATION 3-5 (2002).
33. DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801, 155 (1997).
34. 1 Stat. 243.
35. *Id.* at § 2, 1 Stat. at 244.
36. See generally Sydney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387 (discussing role of judicial review in legitimizing agency decisionmaking). Viewed from the perspective of the Second Congress, writing on a blank slate, this institutional arrangement must have seemed perfectly reasonable. At least there was apparently little controversy about it and no one in Congress challenged its constitutionality. See CURRIE, *supra* note 33, at 155 (“[T]he Annals reveal no debate of any kind on the pension bill.”).
37. *Hayburn’s Case*, 2 U.S. (2 Dall.) 409 (1792).
38. Under the Judiciary Act of 1789, Act of Sept. 24, 1789, ch. 20, § 4, 1 Stat. 73, Justices of the Supreme Court also sat as judges on the U.S. Courts of Appeals, with each Justice assigned to one circuit. Given the predominant mode of transportation at the time, “riding circuit” is an apt description of this practice.
39. Some judges and Justices read the statute creatively as permitting the judges to act as “commissioners” rather than as courts when making these determinations. See *infra* notes 45-46 and accompanying text.
40. The reasons of the circuit courts for declining to enforce the Act are provided in a footnote to the reporter’s account of the Supreme Court proceedings. This footnote has had significant precedential value, given its timing, the stature of the judges, and the fact that multiple circuits were involved.
41. *Hayburn’s Case*, 2 U.S. at 409-410. The lower court decisions came in 1792, the same year as the adoption of the Act and the Supreme Court took up the case the same year. The case was delayed, however, by procedural wrangling over the Attorney General’s right to bring a mandamus action against the judges and the Court held the case over until the next term to consider the Attorney General’s motion to bring the action on behalf of Hayburn, a veteran. In the meantime, Congress amended the statute, effectively mooting the case.
42. Although the courts did not phrase it in those terms, the refusal to enforce the law could only be justified if the law was invalid, and the law would be invalid only if it violated the constitution. As will be discussed *infra* note 56 and accompanying text, Chief Justice Marshall referred to veterans benefits as precedent for judicial review.
43. At the time of the decision, there was no Supreme Court reporter. In a later decision, *United States v. Ferreira*, 54 U.S. (13 How.) 40 (1851), Chief Justice Taney appended a note discussing *Todd*, “in order that it may not be overlooked, if similar questions should hereafter arise.” *Id.* at 52-53. This discussion is in turn referenced in a note added to *Hayburn’s Case*. The *Todd* decision has received some attention in the academic literature. See, e.g., Susan Low Bloch & Maeva Marcus, *John*

Marshall's Selective Use of History in Marbury v. Madison, 1986 WIS. L. REV. 301; Wilfred J. Ritz, *United States v. Yale Todd*, 15 WASH. & LEE L. REV. 220, 227 (1958).

44. See Act of February 28, 1793, 1 Stat. 324. As noted by Professor Currie, this change may not seem like a much of a difference, but it probably reflected a good faith effort to comply with the decisions in *Hayburn's Case*. See CURRIE, *supra* note 33, at 156.
45. See *Hayburn's Case*, 2 U.S. (2 Dall.) at 409.
46. Act of February 28, 1793, *supra* note 44 at § 3.
47. See Bloch & Marcus, *supra* note 43, at 306-07 (describing case based on Randolph's letters, but noting that no official record of the filing is available).
48. *Id.*
49. Had the earlier decision been rendered by a court, the matter could properly be characterized as an appeal, but not if the judges were sitting in their individual capacities as commissioners.
50. *Ferreira*, 54 U.S. (13 How.) 40, 52-53 (1851). Chief Justice Taney reasoned that the decision must have been unanimous because no dissenting opinions were filed and that "Chief Justice Jay and Justice Jay became satisfied, on further reflection, that the power given in the act of 1792 to the Circuit Court as a court, could not be construed to give it to the judges out of court as commissioners." *Id.* at 53.
51. See CURRIE, *supra* note 33, at 156 n.181; see also DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST ONE HUNDRED YEARS: 1789-1889*, 9-11 (1985).
52. See *Ferreira*, 54 U.S. (13 How.) at 53.
53. U.S. CONST., Art. III, § 2, cl. 2:

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.
54. 5 U.S. (1 Cranch) 137, 173-76 (1803). Chief Justice Taney commented on this inconsistency in *Ferreira* as follows:

[I]n the early days of the Government, the right of Congress to give original jurisdiction to the Supreme Court, in cases not enumerated in the Constitution, was maintained by many jurists, and seems to have been entertained by the learned judges who decided Todd's case. But discussion and more mature examination has settled the question otherwise

54 U.S. at 53.
55. Specifically, the Court held that § 13 of the Judiciary Act of 1789 was unconstitutional because it attempted to vest original jurisdiction to issue writs of mandamus in the Supreme Court, in violation of Article III. See *Marbury*, 5 U.S. (13 Cranch) at 174-80.
56. See *id.* at 164. In this discussion, Marshall apparently combined elements of *Todd* with the earlier mandamus action filed by Attorney General Randolph and a private mandamus action filed by a veteran seeking benefits, *Ex Parte Chandler* (unreported). See Bloch & Marcus, *supra* note 43, at 304-18.
57. See *supra* notes 33-52 and accompanying text.
58. Whereas the compromise legislation contemplated congressional review of decisions by the Secretary of War, see *supra* note 44 and accompanying text, Congress apparently was satisfied with regular reports of applications and irregularities. See *VETERANS BENEFITS*, *supra* note 29, at 45. Of

- course, Congress continued to become involved on occasion by providing pensions through private bills. See *Decatur v. Paulding* 39 U.S. (14 Pet.) 497 (1840) (declining to review Secretary of Navy's decision that widow could not claim under both a general pension law and a private bill).
59. See ORGANIZATIONAL HISTORY, *supra* note 29, at 7-12. Thus, the eligibility for benefits and the amount of benefits provided depended on the particular circumstances of the day, including the popularity of veterans and budgetary considerations. For example, while disability pensions and pensions for survivors were provided with some consistency, pure service pensions were a source of periodic controversy.
60. Disability pensions were initially provided only for veterans disabled during the war, but were soon extended to veterans wounded during the Revolutionary War whose disability manifested itself later. Act of March 3, 1805, 2. Stat. 345.
61. When states provided benefits under the Articles of Confederation, several provided invalid pensions only, while others provided for both invalids and survivors. The earliest federal legislation also provided for invalid pensions only. Pensions for dependents of deceased soldiers were added in 1816. See VETERANS BENEFITS, *supra* note 29, at 46.
62. See *id.* at 46.
63. See *id.* at 48.
64. *Id.* at 49.
65. See *id.* at 52. The Home was originally named the National Asylum for Disabled Volunteer Soldiers, but its name was changed in 1873. The home established facilities in various cities around the country.
66. 26 Stat. 182 (June 27, 1890); see ORGANIZATIONAL HISTORY, *supra* note 29, at 11.
67. *Id.* This period appears to be one of considerable political patronage and corruption. *Id.* at 11-12; VETERANS BENEFITS, *supra* note 29, at 58-62.
68. See *infra* notes 84-85 and accompanying text.
69. *Id.* at 12. Nonetheless, ad hoc legislation continued into the 20th Century. For example, the Sherwood Act of 1912 made special provision for service pensions for veterans of the Mexican War and Union veterans of the Civil War. *Id.*
70. Congress, however, continued to enact private bills. See *infra* notes 84-85 and accompanying text.
71. See 5 U.S. (1 Cranch) at 164:
By the act concerning invalids, passed in June 1794, the secretary at war is directed to place on the pension list all persons whose names are contained in a report previously made by him to congress. If he should refuse to do so, would the veteran be without a remedy? Is it to be contended that where the law in precise terms directs the performance of an act in which an individual is interested, the law is incapable of securing obedience to its mandate?
72. 39 U.S. (14 Pet.) 497 (1840).
73. *Id.* at 513-14. This problem was a current one, insofar as Congress continued to award benefits on the basis of private bills. See *United States ex rel. Burnett v. Teller*, 107 U.S. (17 Otto) 64 (1882).
74. *Id.* at 514.
75. In the meantime, the Secretary of the Navy who originally denied the double claim, Secretary Dickerson, had retired and Mrs. Paulding petitioned his successor to reconsider, which he declined to do. *Id.* at 514. Thus, the suit was against the successor, Secretary Decatur.
76. *Id.* at 515.
77. *Id.* at 516.

78. The difference may be between pensions that have not yet been vested and those that have. *See infra* notes 81-82 and accompanying text (discussing Court of Claims' reliance on this distinction).
79. Under the Act of February 24, 1855, 10 Stat. 612, the Court of Claims was established and given jurisdiction to hear claims against the United States "founded upon any law of Congress, or upon any regulation of an Executive department" The court apparently did not begin hearing veterans claims until the 1860s, however. *See* VETERANS BENEFITS, *supra* note 29, at 52.
80. *E.g.*, *Mays v. United States*, 4 Ct. Cl. 218 (1868), *reversed sub nom.* *United States v. Alexander*, 79 U.S. (12 Wall.) 177 (1870) (holding that the Court of Claims had erred on the merits of the pension claim). The Supreme Court specifically declined to decide "[w]hether or not the Court of Claims has jurisdiction in a case such as the present." *Id.* at 178.
81. 17 Ct. Cl. 144 (1881).
82. *Id.* at 147.
83. While the Supreme Court did not definitively resolve the judicial review question, it showed little inclination to require judicial review of veterans benefit decisions. *See Silberschein v. United States*, 266 U.S. 221, 225 (1924):
- The statute which creates the asserted right, commits to the Director of the Bureau the duty and authority of administering its provisions and deciding all questions arising under it; and in light of the prior decisions of this Court, we must hold that his decision of such questions is final and conclusive and not subject to judicial review, at least unless the decision is wholly unsupported by the evidence, or is wholly dependent on a question of law or is seen to be clearly arbitrary and capricious.
- Although the Court found ways to construe constitutional questions, *see Johnson v. Robison*, 415 U.S. 361 (1974), it acquiesced in the statutory preclusion of judicial review throughout the 20th century.
84. VETERANS BENEFITS, *supra* note 29, at 54 (footnotes omitted).
85. *See id.* at 54-58. For example, pension claims were exempted from the suits brought within the Court of Claims jurisdiction under the Tucker Act, An Act to Provide for the Bringing of Suits Against the Government of The United States, March 3, 1887, 49th Cong., 2d Sess., 24 Stat. 505. *See* VETERANS BENEFITS, *supra* note 29, at 56 (describing machinations surrounding the bill). As Mayhew has explained, casework provides the opportunity for legislators to "claim credit" for helping constituents, which in turn aids them in their re-election efforts. *See* DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 52-61 (1974).
86. During the 19th Century, administration of veterans benefits was divided over a variety of agencies. *See* ORGANIZATIONAL HISTORY, *supra* note 29, at 5-14.
87. In addition to the benefit of the doubt rule and limitations on attorney compensation, which are discussed here, a third feature of benefit decisions that reflects nonadversarial procedures is the VA's "duty to assist" claimants. *See infra* notes 118-132 and accompanying text. I have been unable to trace the precise origins of the duty to assist, however, and therefore do not claim here that its origins lie in the historical influence of charity model during the 19th Century, although I strongly suspect that is the case.
88. *See Gilbert v. Derwinski*, 1 Vet. App. 49, 55 (1991); *see also* Barton F. Stichman, *The Era of Reform Generated by the U.S. Court of Veterans Appeals*, 38 FED. BAR NEWS & J. 494, 495 (1991) (noting that as part of the Veterans Judicial Review Act "Congress codified a longstanding VA policy that the veteran is entitled to the 'benefit of the doubt'"). The policy was apparently

- developed internally by veterans agencies, then embodied in a regulation, 38 C.F.R. § 3.102, and eventually codified by statute in the Veterans Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988). Statutory codification may have been thought necessary to provide a statutory foundation for purposes of review by the Court of Appeals for Veterans Claims and the Federal Circuit. *See infra* notes 163-93 and accompanying text (discussing review).
89. These limits originated with a Civil War Era statute limiting the amount of compensation that veterans' attorneys could be paid to five dollars. Act of July 14, 1862, 12 Stat. 568. This limit was raised to ten dollars in 1864. Act of July 4, 1864, §§ 12-13, 13 Stat. 387, 389. *See generally* *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 321-26, 359-66 (1985); Staff of the House Comm. on Veteran's Affairs, Report on Legislative History of the Ten Dollar Attorney Fee Limitation in Claims of Veterans Benefits (1987). While ten dollars may have been some compensation during the Civil War, *see* *Walters*, at 361 (Stevens, J. dissenting) ("a \$10 fee then was roughly the equivalent of a \$580 fee today"), the amount remained fixed at this figure until 1988.
 90. *See Walters*, 473 U.S. at 361 (Stevens, J., dissenting).
 91. *Id.* at 323 (majority opinion).
 92. *See supra* note 69 and accompanying text.
 93. The transformation of veterans benefits administration into a professional bureaucracy was part of a broader contemporaneous development in administrative law. *See* MAX WEBER, *ECONOMY AND SOCIETY; AN OUTLINE OF INTERPRETATIVE SOCIOLOGY* 1, 2 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., 1978).
 94. These figures are approximations taken from VETS Resource Connection, *supra* note 27.
 95. To some extent, this growth mirrors general growth in population and is reflected as well in other benefit systems, such as Social Security and Welfare, which have also experienced growth. *See, e.g.,* Social Security Administration, Annual Statistical Report on the Social Security Disability Insurance Program, 2002 at Table 3 (August 2003) (showing growth in beneficiaries from 1960 to 2002); Administration for Children and Families, Number of Persons on Welfare since 1960, available at http://www.acf.hhs.gov/news/stats/6090_cht.htm (visited Jan. 22, 2004).
 96. The War Risk Insurance Act Amendments of 1917 established the authority to provide programs and the Rehabilitation Act of 1918 created an independent agency to manage the program. *See* ORGANIZATIONAL HISTORY, *supra* note 29, at 17.
 97. Servicemen's Readjustment Act of 1944, PL 78-346, 58 Stat. 284 (June 22, 1944).
 98. Pub. L. No. 82-550, 66 Stat. 690 (July 16, 1952).
 99. *See* Vietnam Era Veterans' Readjustment Assistance Act of 1974, Pub. L. No. 93-508, 88 Stat. 1578 (Dec. 3, 1974).
 100. Veteran's Bureau Act of 1921, Pub. L. No. 67-47, 42 Stat. 147 (Aug. 9, 1921).
 101. Act of July 2, 1930 (authorizing consolidation effected by President Hoover).
 102. Department of Veterans Affairs Act of 1988, Pub. L. No. 100-527, 102 Stat. 2635 (Oct. 25, 1988). Conveniently, the Department of Veterans Affairs can also be designated with the abbreviation, "VA."
 103. *See* VETERAN'S BENEFITS, *supra* note 29, at 66.
 104. For discussion of the history of the preclusion statute, *see* Fox, *supra* note 32, at 6-11; Reisch, *supra* note 11, at 347-51.
 105. *I.e.,* the promise of benefits is part of the compensation service men and women receive in exchange for their service, just as private sector pensions and other fringe benefits are part of the employment contract. This is not to deny that benefits often were used as an inducement to military service even

- before the founding. See ORGANIZATIONAL HISTORY, *supra* note 29, at 6.
106. Pub. L. No. 100-687, 102 Stat. 5105 (Nov. 18, 1988), codified at 38 U.S.C. §§ 4051-92 (1988), recodified by Pub.L. No. 102-40, 105 Stat. 238
107. On the incompatibility of nonadversarial procedures with judicial review, see Charles L. Cragin, *The Impact of Judicial Review on the Department of Veterans Affairs Claims Adjudication Process: The Changing Role of the Board of Veterans' Appeals*, 46 ME. L. REV. 23 (1994).
108. See *infra* notes 189-92 and accompanying text.
109. See John J. Farley, III, *The New Kid on the Block of Veteran's Law*, 38 FED. BAR NEWS & J. 488, 490 (1991): "The claims adjudication process of the Department of Veterans Affairs has been described as benevolent and paternalistic. Whether one agrees with this characterization or not, the fact remains that the process is not an adversarial one."
110. *Forschey v. Grober*, 226 F.3d 1299, 1303 (Fed. Cir. 2000).
111. See 38 C.F.R. § 3.103(a). The claimant does, however, have a right to a hearing on request prior to termination, modification, or reduction of benefits, *id.* at § 3.103(b)(2), and on appeal to the BVA. *Id.* at § 3.103(c)(1).
112. See 38 U.S.C. § 5107; 38 C.F.R. § 3.102. An analogous canon of statutory construction provides that ambiguities in veterans benefit statutes should be construed to favor veterans. See *Brown v. Gardner*, 513 U.S. 115, 118 (1994); *Nat'l Org. of Veterans' Advocates v. Sec'y of Veterans Affairs*, 260 F.3d 1365, 1378 (Fed. Cir. 2001). For a review of other presumptions that favor veterans, see Gary E. O'Connor, *Review of the 1998-2001 Veterans Benefit Decisions of the United States Court of Appeals for the Federal Circuit*, 51 AM. U. L. REV. 779, 825-87 (2002).
113. Indeed, adversarial procedures would tend to be counterproductive because they would undermine the helping relationship.
114. This criticism was voiced by both participants and the audience at the symposium. See also 2002 United States Court of Appeals for the Federal Circuit 20th Anniversary Judicial Conference 217 F.R.D. 548, 761-62 (2002) (comments of Mary Ellen McCarthy, the Democratic staff director of the Subcommittee on Benefits, House Committee on Veterans Affairs); Robin J. Arzt, *What Veterans with Disability Claims Would Gain from Administrative Procedure Act Adjudications*, 49 FED. LAW. 60 (Dec. 2002) (discussing perceived lack of fairness in VA adjudications). One reflection of this concern is the recent efforts of Congress to direct the Court of Appeals for Veterans Claims to enforce the benefit of the doubt rule more effectively. See *infra* notes 179-83 and accompanying text.
115. See Richard E. Levy, *Social Security Claimants with Developmental Disabilities: Problems of Policy and Practice*, 39 U. KAN. L. REV. 529, 531-36 (1991) (discussing emergence of administrative policy perspective restricting benefits in Social Security disability cases); William Simon, *Legality, Bureaucracy and Class in the Welfare System*, 92 YALE L.J. 1198, 1223 (1983) (discussing the changing attitudes in the administration of welfare benefits).
116. Although judicial review of benefits remains limited by comparison to other benefit programs, see *intra* notes 189-93 and accompanying text, its addition nonetheless placed the agency in the position of defending individual benefit decisions before independent decisionmakers.
117. See Farley, *supra* note 119 at 490 (noting that while the process before the agency is not adversarial, "once the veteran leaves the relatively friendly confines of the Department of Veterans Affairs and appeals an adverse BVA decision of the United States Court of Veterans Appeals [now the Court of Appeals for Veterans Claims], 'the VA in effect takes off the gloves'" (quoting *BahnMiller v. Derwinski*, 724 F. Supp. 1208, 1219 (E.D. Va. 1989), *aff'd in part*, dismissed and vacated in part,

- 923 F.2d 1085 (4th Cir. 1990)); *see generally* Cragin, *supra* note 107 (discussing impact of judicial review on the claims process).
118. The duty to assist was codified by regulation, 38 C.F.R. § 3.103(a) in 1972 as part of a general regulation on procedural rights. *See* 37 CFR 14780 (July 25, 1972). The notice of the proposed rule (which was adopted without change) did not offer any specific discussion of the duty to assist, but did indicate generally that the regulation was proposed “[i]n order to assemble various Veterans’ Administration directives relating to due process and appellate rights . . . so that the principles contained therein may be more readily available to interested members of the public.” 37 C.F.R. § 10745 (1972). This statement certainly implies that the duty to assist predates the regulation.
119. The regulation provides that “it is the obligation of VA to assist a claimant in developing the facts pertinent to the claim and to render a decision which grants every benefit that can be supported in law while protecting the interests of the Government.” 38 C.F.R. § 3.103(a) (1972).
120. *See generally* John H. Langbein, *Judging Foreign Judges Badly: Nose-Counting Isn’t Enough*, 18 JUDGES’ J. 4 (Fall 1979) (arguing that comparison of U.S. and European investments in judicial resources must take into account the broader role of judges in nonadversarial civil law systems).
121. To be sure, the majority of veterans receive representation at the administrative level by service organizations, but these representatives are not attorneys. *See* Gary E. O’Connor, *Rendering to Caesar: A Response to Professor O’Reilly*, 53 ADMIN. L. REV. 342, 355 (2001) (observing that “while only about 5% of claimants before the [BVA] had attorneys, about 84% of claimants were represented by service organizations, such as The American Legion and Disabled American Veterans”). The question is whether this representation is as effective as representation by an attorney. *See infra* notes 141-42 and accompanying text.
122. The requirement was in the original procedural regulations promulgated by the VA in 1961, *see* 26 CFR 1563, 1568 (Feb. 24 1961), but was removed in 2001 in response to the Veterans Claims Assistance Act of 2000. *See* 66 CFR § 45630 (2001).
123. Prior to its amendment in 2000, 5107(a) provided that unless the VA provides otherwise, “a person who submits a claim for benefits . . . shall have the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded. The Secretary shall assist *such a claimant* in developing the facts pertinent to the claim.” 38 U.S.C. 5107(a) (pre 2000 version) (emphasis added). The emphasized language certainly invites the inference that the duty to assist attaches only to claimants who have substantiated a well grounded claim. The problem is that claimants will often require assistance to establish that their claims are well grounded.
124. *See* Gilbert v. Derwinski, 1 Vet. App. 49 (1990). The VA responded by amending its field manuals to direct that claims be “fully developed” before determining whether they were well grounded, but this revision was rescinded in the wake of Morton v. West, 12 Vet. App. 477 (1999), which suggested that the provisions might be invalid as contrary to the statute. *See generally* H.R. Rep. 106-781, Report on the Veterans Claims Assistance Act (July 24, 2000).
125. *See* Epps v. Gober, 126 F.3d 1464 (Fed. Cir. 1997).
126. *See generally* Statement of Joseph Thompson, Under Secretary for Benefits, Veterans Benefit Administration, Department of Veterans Affairs before the House Veterans Affairs Committee Subcommittee on Benefits (March 23, 2000), available at http://www.va.gov/OCA/testimony/23mr0020_USA.htm (visited Jan. 24, 2004).
127. Pub. L. No. 106-475, 114 Stat. 2096 (Nov. 9, 2000).
128. 38 U.S.C. 5103A(a)(2).

129. *Id.* at § 5105A(b)-(d).
130. It is worth noting that in Social Security hearings an administrative law judge has a similar duty to assist a claimant with the development of medical evidence, 20 C.F.R. §§ 404.1512(d)-(f); *id.* at §§ 416.912(d)-(f); and these hearings have therefore at times been characterized as nonadversarial. *See Sims v. Apfel*, 530 U.S. 103, 110-11 (2000) ("Social Security proceedings are inquisitorial rather than adversarial. It is the ALJ's duty to investigate the facts and develop the arguments both for and against granting benefits....").
131. Indeed, one justification for the CAVC's rejection of the VA's expansive application of the duty to assist was a perceived congressional policy "that implausible claims should not consume the limited resources of the VA and force into even greater backlog and delay those claims which--as well grounded--require adjudication." *Morton v. West*, 12 Vet. App. at 480. This issue interacts with limitations on attorney representation, *see infra* note 195 and accompanying text, because attorneys would otherwise supplement the VA in providing assistance.
132. The state of the record in benefit cases was an often-stated complaint at the symposium.
133. 38 U.S.C. § 5904(c) (originally codified as 38 U.S.C. 3404(c)).
134. In cases remanded after the first BVA decision, the ban on compensation would no longer be applicable and representation by attorneys is more common.
135. *See O'Connor*, *supra* note 2, at 355.
136. *See, e.g., Richards v. Brown*, 9 Vet. App. 255, 257 (1996); *Talbert v. Brown*, 7 Vet. App. 352 (1995); *Horowitz v. Brown*, 5 Vet. App. 217, 225 (1993); *Talon v. Derwinski*, 3 Vet. App. 74, 74 (1992); *Smith v. Derwinski*, 1 Vet. App. 267, 275 (1991); *see generally* Gary E. O'Connor, *Did Decide or Should Have Decided: Issue Exhaustion and the Veterans Appeals Process*, 49 AM. U. L. REV. 1279 (2000).
137. One response would be to statutorily eliminate the exhaustion requirement, as recommended by the Administrative Law Section of the ABA. *See* Administrative Law Section, ABA, Report to the House of Delegates (2003), *available at* <http://www.abanet.org/leadership/recommendations03/102.pdf> (visited Jan. 23, 2004).
138. 473 U.S. 305 (1985).
139. *Id.* at 321-26.
140. *Id.* at 327. More recent statistics show a much higher success rate (reversal or remand) but the success rates of attorneys are again only slightly higher for attorneys than for service organizations. *See* Report of the Chairman, Board of Veteran's Appeals, Fiscal Year 2002, at 14 (2003).
141. Under the *Matthews v. Eldridge* balancing formula, which the Court applied, the importance of the interest at stake, discounted by the likelihood of error, is weighed against the cost of additional procedures. 424 U.S. 319, 335 (1976). The relatively small marginal success rate of attorneys suggested to the majority that the likelihood of error was small.
142. For example, if we assume that 90 percent of the cases are easy and attorney representation will not affect the outcome, then a difference of 1.5 percent in total outcomes reflects a difference of 15 percent in the outcomes of the remaining 10 percent of difficult cases.
143. The concept that no person should be a judge in his or her own cause is a core maxim of due process. *See Dr. Bonham's Case*, 8 Co. Rep. 107a, 118a, 77 Eng. Rep. 638 (C.P. 1610) (Lord Edward Coke, J.).
144. The analogy in a private insurance context would be that initial determination of insurance claims are made by employees of the insurance company. There may even be an internal appeal within the company. Critically, however, if the claimant is dissatisfied with the company's decision, he or she

- may obtain a de novo determination of his or her rights by an independent decisionmaker.
145. Fox, *supra* note 32, at 16-17.
146. By analogy, Social Security disability claims are processed initially by state agencies under contract with the SSA in an ex parte evaluation process that is very similar to that used by the VBA. See Levy, *supra* note 2, at 468-471. Critically, however, there is a de novo hearing before and independent administrative law judge. *Id.* at 471-72.
147. Arzt, *supra* note 114, at 61.
148. 38 U.S.C. § 7101(b)(1) (2003).
149. 38 U.S.C. § 7101A(a)(1).
150. Administrative Law Section Report, *supra* note 137, at 10.
151. The report recommends an appointment process “modeled on those used for the selection of Administrative Law Judges and Board of Contract Appeals Administrative Judges.” *Id.* at 1.
152. 38 U.S.C. § 7101A(c)-(e).
153. See 38 U.S.C. § 4301(2)(D). Indeed agency efforts to use performance reviews to influence Social Security ALJs under the “Bellmon Review Program” were disapproved in *Association of Administrative Law Judges, Inc. v. Heckler*, 594 F.Supp. 1132 (D.D.C. 1984).
154. See 38 U.S.C. § 7101A(c) & (d).
155. *Id.* at § 7101A(e)(1).
156. *Id.* at § 7101A(e)(2).
157. *Id.* at § 7101A(e)(1).
158. See FOX, *supra* note 32, at 17 (noting that under the VJRA, the BVA “was retained in its existing form as the final administrative decisional body within the DVA”).
159. That this independent decision is also subject to de novo review by the Social Security Appeals Council, which is similar to the BVA, has been the cause for some concern. Critically, however, the SSA does not appeal ALJ decisions granting benefits to the Appeals Council.
160. See Report of the Chairman, *supra* note 140, at 14.
161. See Social Security Advisory Board, Disability Decision Making: Data and Materials 70 (2001), available at <http://www.ssab.gov/NEW/publications.htm>.
162. This is also a critical problem for the CAVC. See *infra* notes 176-78 and accompanying text.
163. See *supra* note 106 and accompanying text.
164. See JUDICIAL REVIEW, *supra* note 29, at 67-68.
165. See Cragin, *supra* note 107, at 26-27.
166. See generally FOX, *supra* note 32, at 13-17 (summarizing debates surrounding the adoption of the VJRA).
167. For further discussion of limited Article III review, see *infra* notes 189-93 and accompanying text.
168. 38 U.S.C. § 7261(a).
169. See *Dickinson v. Zurko*, 527 U.S. 150, 162-63 (1999). As *Dickinson v. Zurko* explained, the clearly erroneous standard ordinarily applies to court-court review, while the substantial evidence standard applies to court-agency review. *Id.* A somewhat more deferential standard for court-agency review may be justified by separation of powers and institutional delegation concerns that are not present when a court reviews another court. The use of the clearly erroneous standard for CAVC review reflects the CAVC’s intermediate status as an Article I court. It is like an agency in terms of its removal provisions and specialized jurisdiction, but it is like a court insofar as it is located within the judicial branch. Oddly, however, judicial review of CAVC decisions is especially limited. See *infra* notes 189-92 and accompanying text.

170. This issue was the subject of at least two of the panels in which I have participated, both sponsored by the CAVC Bar Association. The first was in June 2002 and dealt with proposals for reform that eventually became part of the Veterans Benefit Act of 2002, *see infra* notes 179-83 and accompanying text. The second came the following year and dealt with the impact of the Act.
171. *Id.* at 162 (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).
172. *See, e.g.*, O'Connor, *supra* note 2, at 797.
173. At the second CAVC Bar association panel discussed *supra* note 170, Professor Richard Pierce argued that the formulation of the standard of review made no real difference in the outcome of cases.
174. Nonetheless, the Federal Circuit upheld the CAVC's formulation in *Sanchez-Benitez v. Principi*, 259 F.3d 1356, 1360 (Fed. Cir. 2001). The Federal Circuit relied on language in *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985), in which the Supreme Court -- after describing the "definite and firm conviction" formulation as the "foremost" principle governing application of the standard -- explained that a court of appeals may not reverse "[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety." *See* 259 F.3d at 1360. With all due respect to the Federal Circuit, which apparently thought that because the Supreme Court and the CAVC both used the word "plausible," the standards were the same, there is a significant difference between saying that there is a plausible basis in the record and saying that the CAVC's account of the evidence is plausible in light of the entire record. The former requires an affirmance if there is some evidence to support the finding, while the latter focuses on the agency explanation of the record as a whole. The Federal Circuit may have recognized this difference insofar as it explained that the CAVC's review was sufficient because it was "expressly based upon 'consideration of the record on appeal, the appellant's original and reply briefs, the Secretary's brief, and oral argument of the parties.'" *Id.* (quoting the CAVC). One may wonder how much weight to give such formulaic recitations if the agency's explanation does not reflect the entire record, however.
175. Thus, as a verbal formulation, it appears to be similar to an early formulation of the substantial evidence standard under which the reviewing court would not consider the record as a whole or the evidence that weighed against the agency decision. This approach was changed by statute. *See generally* *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).
176. This is probably the single most commonly voiced complaint. *See, e.g.*, *Administrative Law Section*, *supra* note 137, at 4 (observing that "the CAVC has remanded nearly 70 percent of its cases over the last seven years.").
177. The delays are especially lengthy for veterans whose claims were remanded, *see id.* at 7 (the VA takes four times as long to process remanded cases as original claims), especially because once the CAVC has found a reversible error requiring remand, it will not resolve other alleged errors, which may require further rounds of review (and remands). *Id.* at 8.
178. *See, e.g.*, *Young v. Bowen* 858 F.2d 951 (4th Cir. 1988).
179. Pub. L. No. 107-330, § 401, 116 Stat. 2820, 2832, (Dec. 6, 2002).
180. As originally introduced, the bill would have allowed the CAVC to reverse the BVA when its factual findings were "not reasonably supported by a preponderance of the evidence," and that was changed in the Senate committee to the substantial evidence standard. *See* Senate Report No. 107-234, at pp. 17-18 (2002), reprinted in 2002 U.S.C.C.A.N., vol. 4, at 1788, 1804-05 (2002). The final version of the Act retained the clearly erroneous standard.
181. 148 CONG. REC. S11,337, H9,003 (daily ed. Nov. 18, 2002) (explanatory statement accompanying the bill).

182. Veterans Benefit Act of 2002, § 401(a). Presumably, this change responded to concerns about CAVC remands by authorizing the CAVC to make factual determinations contrary to those of the BVA.
183. *Id.* at § 401(b).
184. 17 Vet.App. 135 (2003).
185. FOX, *supra* note 32, at 19.
186. Members are appointed by the President and confirmed by the Senate for 15 year terms and can be removed only “for cause.” See 38 U.S.C. § 7253.
187. See Rochelle Cooper Dreyfuss, *Specialized Adjudication*, 1990 BYU L. REV. 377, 379-81 (discussing potential disadvantages of specialized courts).
188. See *supra* notes 170-75 and accompanying text.
189. See 38 U.S.C. § 7292.
190. *Id.* at § 7292(d)(2). These restrictions, however, do not apply to constitutional claims. *Id.*
191. See generally FOX, *supra* note 32, at 220-26 (discussing the relationship between the CAVC and the Federal Circuit).
192. Under Social Security, in which district courts fulfill the role of the CAVC as the first level of judicial review, appellate review of district court decisions reviewing agency decisions is de novo. See, e.g., *Ramirez v. Shalala*, 8 F.3d 1449, 1451 (9th Cir.1993); see also *Tenet HealthSystems HealthCorp. v. Thompson*, 254 F.3d 238, 244 (D.C. Cir. 2001) (engaging in de novo review of district court review of agency under Medicare).
193. See FOX, *supra* note 32, at 224; see also Charles G. Mills, *Is the Veterans Benefits Jurisprudence of the U.S. Court of Appeals for the Federal Circuit Faithful to the Mandate of Congress?*, 17 *TOURO L. REV.* 695 (2001) (discussing preliminary statistics reported by Professor Fox and evaluating the case law of the Federal Circuit).
194. See O’Reilly, *supra* note 2 (recommending that the appeals process of the veterans system be merged with Social Security).
195. This has been my own experience working within our own university’s administrative adjudication system for internal dispute resolution. Attorney representation helps immensely by focusing the issues, developing a clear and concise record, and identifying relevant legal authority.

