

Recovering an Institutional Memory: The Origins of the Modern Veterans' Benefits System from 1914 to 1958

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INTRODUCTION

All areas of administrative law share certain common features, yet each area also has characteristics that make it unique. One bedrock feature of all forms of administrative law is the importance of statutory and regulatory interpretation. In interpreting the authorities that govern any administrative system, understanding their historical origins is crucial because, as the Supreme Court of the United States has frequently cautioned, “[s]tatutory language has meaning only in context.”² For those that work in veterans’ law, locating and understanding the history of its major authorities presents a singular challenge because there was no judicial review of this area of law until very recently.³ Although the case law in most areas of administrative law is essentially as old as the

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² *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 415 (2005); *see Johnson v. United States*, 130 S. Ct. 1265, 1270 (2010) (“Ultimately, context determines meaning”); *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 596 (2004) (“[T]he cardinal rule [is] that ‘[s]tatutory language must be read in context [since] a phrase ‘gathers meaning from the words around it.’” (quoting *Jones v. United States*, 527 U.S. 373, 389 (1999) (alteration in original) (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961))))).

³ *See generally* James D. Ridgway, *The Splendid Isolation Revisited: Lessons from the History of Veterans’ Benefits Before Judicial Review*, 3 *VETERANS L. REV.* 135 (2011) (exploring the history of the veterans’ benefits system); Kenneth B. Kramer, *Judicial Review of the Theoretically Non-Reviewable: An Overview of Pre-COVA Court Action on Claims for Veteran Benefits*, 17 *OHIO N.U. L. REV.* 99 (1990) (providing an overview of the types of review conducted in veterans’ benefits cases prior to the creation of the United States Court of Veterans Appeals (which is now called the United States Court of Appeals for Veterans Claims (Veterans Court))).

organic statutes creating the agencies involved,⁴ the case law interpreting the veterans' benefits system frequently considers statutory or regulatory provisions for the first time decades after their enactment.⁵ As a result, the case law is only rarely a useful roadmap for one delving deeply into the history of the system.⁶

Despite these complications, a deep familiarity with the history of statutes and regulations is more important in veterans' law than in many other areas. First, because veterans' law is still relatively new, especially compared to the breadth of the black letter law,⁷ there are an untold number of provisions that have yet to be explored for the first time. Second, the United States Court

⁴ For example, the Securities and Exchange Commission was created in 1934, and was already involved in numerous cases before the Supreme Court of the United States (Supreme Court) by 1936. Securities Exchange Act of 1934, ch. 404, 48 Stat. 881; *e.g.*, *Bracken v. Sec. & Exch. Comm'n*, 299 U.S. 504 (1936); *Jones v. Sec. & Exch. Comm'n*, 298 U.S. 1 (1936); *Stock Mkt. Fin. v. Sec. & Exch. Comm'n*, 297 U.S. 713 (1936). The Environmental Protection Agency was created in 1970, and was a party to a Supreme Court decision just over two years later. *Envtl. Prot. Agency v. Mink*, 410 U.S. 73 (1973); *see Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991 (1984).

⁵ For example, the first Supreme Court case to conduct a non-constitutional review of a veterans' benefits statute after the beginning of plenary judicial review interpreted a provision seventy years after the statute's initial enactment. *See Brown v. Gardner*, 513 U.S. 115, 116 n.1 (1994) (noting that the origins of the statute at issue could be traced to 1924). *Gardner* itself is an example of how potentially relevant historical context may be omitted when authorities are interpreted decades later. *Gardner* involved an interpretation of provisions defining benefits available to those injured by Department of Veterans Affairs (VA) medical care. 513 U.S. at 116. However, the decision makes no mention of the fact that the provisions involved were enacted many years before the passage of the Federal Tort Claims Act, Pub. L. No. 79-601, 60 Stat. 842 (1946), generally waiving sovereign immunity in tort suits against the federal government. This omission does not undermine the analysis, which primarily relied on the plain language of the statute. *Gardner*, 513 U.S. at 117-18. Nevertheless, it demonstrates how case law written so far after enactment will often omit the full historical context involved.

⁶ There are some notable exceptions to this observation, however. *See, e.g.*, *Read v. Shinseki*, 651 F.3d 1296, 1300-02 (Fed. Cir. 2011) (examining the statutory protections for disabilities for which service connection has been in effect for ten or more years); *Wagner v. Principi*, 370 F.3d 1089, 1094-96 (Fed. Cir. 2004) (examining the origins of the presumptions of sound condition and aggravation); *Gilbert v. Derwinski*, 1 Vet. App. 49, 55 (1991) (tracing the origins of the benefit-of-the-doubt doctrine to the post Civil War era).

⁷ NAT'L VETERANS LEGAL SERVS. PROGRAM, FEDERAL VETERANS LAWS, RULES AND REGULATIONS (2011 ed.) (setting out in 2171 pages the black letter law of the veterans' benefits system).

of Appeals for the Federal Circuit has discouraged looking to other administrative systems for guidance in interpreting veterans' law authorities when issues of interpretation arise.⁸ Third, even when the interpretation of an authority is not at issue, understanding the history of the system may still be relevant to determining the outcome of a case when it implicates an earlier claim that was first raised decades before judicial review.⁹

Unfortunately, there are two major barriers to accurately determining the history of most of the key statutes and regulations that define the veterans' benefits system. First, key parts of both the statutory and regulatory history commonly stated in current versions are misleading. As detailed below,¹⁰ the published legislative and regulatory histories included in major veterans' law authorities do not trace these provisions back to their actual origins, but to later recodifications that simply republished pre-existing laws. Thus, reliance on the official histories in the United States Code and the Code of Federal Regulations will often lead to a misunderstanding of a provision's origins. Second, even if the history of a current law was traced back to its true enactment, it may still be misleading. The current version of many statutes and regulations were not created from scratch, but were copied or

⁸ See *Hodge v. West*, 155 F.3d 1356, 1360-64 (Fed. Cir. 1998) (criticizing the opinion of *Colvin v. Derwinski*, 1 Vet. App. 171, 174 (1991), for using cases interpreting provisions of the Social Security system to inform the court's interpretation of the phrase "new and material evidence" in 38 C.F.R. § 3.156(a) (1998)).

⁹ There are two frequent issues that may require an analysis of the law as it existed many years, if not decades, earlier. First, a claimant may seek an earlier effective date for benefits by arguing that a prior claim was never finally decided. See generally John Fussell & Jonathan Hager, *The Evolution of the Pending Claim Doctrine*, 2 VETERANS L. REV. 145 (2010) (discussing the development of the pending claim doctrine). Second, a claimant may seek retroactive benefits by asserting that a prior, final VA decision contains clear and unmistakable error. See 38 U.S.C. § 5109A (2006) (revision of Regional Office (RO) decisions); *id.* § 7111 (revision of BVA decisions). As these theories can lead to decades of past benefits (and large contingency fees) if granted, claimants and their attorneys have strong financial incentives to make these arguments. See James D. Ridgway, *The Veterans' Judicial Review Act Twenty Years Later: Confronting the New Complexities of the Veterans Benefits System*, 66 N.Y.U. ANN. SURV. AM. L. 251, 285-86 (2010).

¹⁰ See *infra* notes 16, 182, 191-93 and accompanying text.

adapted from similar provisions.¹¹ Therefore, to properly interpret the language, it is important to understand any established meaning that may have existed before it was adopted in its current form.

To truly find an accurate understanding of the origins of the modern veterans' benefits system, one must go back to World War I, when the compensation model of veterans' benefits was first adopted. It is the World War I system that was transformed—more by happenstance than design—into the basis of the modern process. Prior to World War I, benefits for veterans of different conflicts were provided on an ad hoc basis, with administrative programs scattered throughout various government agencies.¹² When yet another new veterans' benefits system was created for World War I veterans, the goal was not to create a permanent, unified system.¹³ Rather, the system established for World War I veterans was merely the dominant administrative program during the brief span of time when political pressure finally forced the unification of veterans' programs into one agency and the New Deal created a permanent system of benefits for veterans.¹⁴ Nonetheless, it is essentially this World War I system that is still in place today, even though few recognize it as such.

This Article begins the process of making the hidden origins of the modern veterans' benefits system more accessible to practitioners and scholars by closely examining its defining authorities. The Article focuses on the most important elements of the development that occurred between 1914 and 1958, a period of time that can be considered “the early modern” era. The focus begins in 1914 because that is when the Bureau of War Risk

¹¹ For example, in *Boone v. Lightner*, 319 U.S. 561, 565 n.2, 569 (1943), the Supreme Court recognized that the Soldiers' and Sailors' Civil Relief Act of 1940, Pub. L. No. 76-861, 54 Stat. 1178, passed during World War II, was copied from a similar act passed during World War I and relied upon the legislative history of the earlier act to interpret the latter.

¹² See Ridgway, *supra* note 3, at 173-74.

¹³ See *infra* Part I.B.

¹⁴ See *infra* Part I.C.

Insurance was created, which was the agency that was ultimately transformed into the Department of Veterans Affairs (VA)¹⁵ that we know today. The era ends in 1958 because that was the year that Congress recodified veterans' law. The official United States Code, along with the West and Lexis/Nexis versions, traces the legislative history of key provisions (such as the definitions section, the basic entitlement provisions, and § 1154) to this recodification, rather than to their actual initial enactment.¹⁶ Thus, this is where the trail will often go cold for a person researching the history of the system without the benefit of guidance.

Part I provides the historical context necessary to understand the forces that drove the adoption and modification of the key statutes and regulations. This part looks broadly at the major political events that shaped the development of veterans' law in the early modern period. Part II then turns to the sources of the black letter law. This part details the major statutes and regulatory promulgations that defined the system in its early incarnations. Part III considers the origins and initial operation of the major organs of the current system, the Regional Offices (ROs), and the Board of Veterans' Appeals (BVA). This part provides insight into the nature of these adjudicative bodies in the early modern period, which is useful in understanding how the system applied the laws and regulations in practice. Finally, Part IV looks at the specific procedures used to process claims. Although many details have

¹⁵ Historically, "VA" has been used as an abbreviation for both the Department of Veterans Affairs and its predecessor, the Veterans Administration, and is used for both in this Article. When "VA" was an abbreviation for the Veterans Administration, it was grammatically correct to say "the VA" because the definite article was proper with the corresponding noun. However, now that "VA" is short for "Veterans Affairs," the definite article is no longer grammatically appropriate with the abbreviation. Nonetheless, for consistency, this article employs the modern grammatical usage throughout even though "VA" is frequently used as an abbreviation for the Veterans Administration rather than the Department of Veterans Affairs.

¹⁶ *See, e.g.*, 38 U.S.C. §§ 101, 1110, 1131, 1154 (2006); 38 U.S.C.A. §§ 101, 1110, 1131, 1154 (West 2002); 38 U.S.C.S. §§ 101, 1110, 1131, 1154 (Lexis/Nexis 2002). The author has made West Publishing aware of this issue and it is currently investigating whether it will alter the history provided in future editions.

changed, most of the key elements of today's adjudication system have identifiable origins in the early modern period that may provide useful insights in understanding the current process.

I. THE POLITICAL HISTORY OF THE DEVELOPMENT OF THE EARLY MODERN VETERANS' BENEFITS SYSTEM

To understand the origins of the early modern veterans' benefits system, it is necessary to understand the motivations of those who created and shaped the system. The major enactments in this era were driven by specific events that help explain their purpose, and this political history has been explored in greater depth elsewhere.¹⁷ However, the highlights are worth reviewing here before turning to the statutes and regulations themselves. This Part summarizes the political history that drove the major enactments that are examined in detail below.

A. Pre-World War I Influences

VA is the current successor of a long line of administrative bodies that have adjudicated veterans' claims in America. In 1778, the Continental Congress established the first Pension Office, which had only four employees.¹⁸ After the Revolutionary War, the office was rechristened as the Pension Bureau, and struggled through a number of uneven decades of handling claims from the nation's first war.¹⁹ In 1832, the Pension Bureau was replaced by a new Pension Office within the War Department.²⁰ In 1849, the Pension Office was moved to the Department of the Interior and renamed the Bureau of Pensions.²¹ In the wake of the Civil War,

¹⁷ See generally Ridgway, *supra* note 3 (explaining the political history of the veterans' benefits system).

¹⁸ WILLIAM H. GLASSON, FEDERAL MILITARY PENSIONS IN THE UNITED STATES 25 (1918).

¹⁹ Ridgway, *supra* note 3, at 146-48.

²⁰ *Id.* at 148-49.

²¹ DEP'T OF VETERANS AFFAIRS, THE VETERANS BENEFITS ADMINISTRATION: AN ORGANIZATIONAL HISTORY: 1776-1994, at 9 (1995) [hereinafter VA ORGANIZATIONAL HISTORY 1776-1994];

the bureau expanded dramatically²² and became highly political.²³ Eventually, in the twentieth century, the agency became smaller and more professional as the population of Civil War veterans declined, until it was finally absorbed by VA.²⁴ However, when Congress sought to provide benefits for World War I veterans, it was anxious to distance the program from the bureau's politicized reputation.

As to the substance of the benefits provided, during the period prior to World War I, the United States had not “followed any consistent policy in providing veterans with relief.”²⁵ By the beginning of World War I, the Civil War system, which handed out massive benefits to veterans as gratuities and favors in recognition of their raw political strength,²⁶ “was recognized as a failure” and there was a strong desire to develop a new paradigm.²⁷ At its inception, the program for the administration of World War I benefits was deliberately “kept completely separate from the [prior] pension system” because it “represented a new principle.”²⁸ The sentiment to make a break from the past was so strong that the legislation was not even referred to the congressional pension committees, but rather to the House Committee on Interstate and Foreign Commerce and the Senate Finance Committee.²⁹

B. World War I and the Creation of VA

In creating the system for World War I veterans, Congress did not start with a blank slate, but rather a small agency. The Bureau of War Risk Insurance had been created in 1914 to insure

GUSTAVUS A. WEBER & LAURENCE F. SCHMECKEBIER, *THE VETERANS' ADMINISTRATION: ITS HISTORY, ACTIVITIES AND ORGANIZATION* 208 (1934).

²² In 1891, the Commissioner of the Bureau referred to it as the “largest executive bureau in the world.” *VA ORGANIZATIONAL HISTORY 1776-1994*, *supra* note 21, at 12.

²³ Ridgway, *supra* note 3, at 163-64.

²⁴ *See infra* notes 51-53, 104-05 and accompanying text.

²⁵ WILLIAM PYRLE DILLINGHAM, *FEDERAL AID TO VETERANS: 1917-1941*, at 1-2 (1952).

²⁶ Ridgway, *supra* note 3, at 164-68.

²⁷ DILLINGHAM, *supra* note 25, at 11.

²⁸ *Id.*

²⁹ *Id.* at 11-12.

U.S. ships and their cargos from the hazards of the Great War that had broken out in Europe.³⁰ However, in October 1917, this relatively minor body was transformed by the addition of responsibility for handling salary, benefits, and insurance for all American service members in World War I, along with the treatment of disabled veterans.³¹ As authors Gustavus Weber and Laurence Schmeckebier have observed:

Perhaps never in the history of the federal administration was a civilian governmental agency beset with greater difficulties than those which confronted the Bureau of War Risk Insurance upon the passage of the act of October 6, 1917[,] amending the War Risk Insurance Act of 1914. From a bureau of secondary importance dealing only with marine and seamen's insurance, it suddenly became a vast business enterprise entrusted with several fields of activity which had never before been undertaken by the national government.³²

This Herculean task was made even more difficult because labor and office space were both scarce.³³ Because of the war effort, the mundane administrative tasks handled by the bureau had a low priority.³⁴ The bureau was scattered across fifteen different buildings in Washington, D.C., and was forced to reinvent itself with the surplus furniture and office supplies that it could scrape together.³⁵

Thirteen months later, the agency was transformed yet again by the end of the war. The agency was required to muster out the returning service members, transform a massive insurance system based upon automatic deductions into one based upon

³⁰ See WEBER & SCHMECKEBIER, *supra* note 21, at 212.

³¹ *Id.* at 212-13.

³² *Id.* at 213-14.

³³ *Id.* at 214.

³⁴ *Id.*

³⁵ *Id.*

voluntary payments, evaluate claims for disability compensation, “and make arrangements for . . . medical treatment and hospitalization.”³⁶ Less than a year after the conclusion of the war, the bureau had doubled in size to nearly 14,000 employees—half of whom were veterans themselves.³⁷

Although the Bureau of War Risk Insurance was responsible for the bulk of veterans’ programs, there were key gaps in its responsibilities. The Federal Board for Vocational Education was given control of rehabilitating disabled veterans, and the Public Health Service was placed in charge of hospital and medical care.³⁸ As a result, for over two years after the conclusion of the war, veterans were required to apply for eligibility with the Bureau of War Risk Insurance and then apply to the Federal Board of Vocational Education for approval for a specific training program, resulting in a disastrously inefficient and inept system that regularly frustrated veterans.³⁹

Shortly after President Warren G. Harding was inaugurated in 1921, he had Charles G. Dawes, director of the United States Bureau of the Budget, lead a commission to address the problem.⁴⁰ After just nine days of work that spring, the committee recommended the unification of all the agencies with responsibility for World War I veterans’ programs.⁴¹ This recommendation was implemented four months later when Congress created the Veterans’ Bureau.⁴² Consistent with the development of the substantive law for World War I veterans, the Bureau of Pensions was left out of the newly formed Veterans’ Bureau and continued to handle benefits for veterans of prior wars.⁴³

³⁶ *Id.* at 216.

³⁷ *Id.*

³⁸ DILLINGHAM, *supra* note 25, at 12.

³⁹ Ridgway, *supra* note 3, at 174.

⁴⁰ VA ORGANIZATIONAL HISTORY 1776-1994, *supra* note 21, at 19.

⁴¹ WEBER & SCHMECKEBIER, *supra* note 21, at 217.

⁴² *Id.* at 218-19.

⁴³ VA ORGANIZATIONAL HISTORY 1776-1994, *supra* note 21, at 19.

The Veterans' Bureau got off to a rocky start. Under the leadership of Colonel Charles R. Forbes, a campaign worker for President Harding, complaints were numerous and the public perception of the agency was terrible.⁴⁴ By February 1923, the problems were so bad that Congress formed a joint committee to investigate.⁴⁵ The committee attracted 1,350 volunteer lawyers, doctors, and other experts to assist in the investigation.⁴⁶ Director Forbes was eventually convicted of fraud and bribery after a quarter of the bureau's budget was found missing.⁴⁷ However, the important, long-term effect of Forbes's reign was that it convinced Congress that a complete reorganization and codification of the law was necessary.⁴⁸ The result was the World War Veterans' Act of 1924, which established the first elements of VA as we know it today.⁴⁹

The final unification of veterans' programs six years later was anti-climactic. By 1930, the Veterans' Bureau was the dominant veterans' agency, and the Pension Bureau was much diminished.⁵⁰ The Veterans' Bureau had also begun to mature nicely under the capable leadership of General Frank Hines, who had taken over the Bureau after Forbes's removal.⁵¹ As a result, the legacy organizations could be folded into the Veterans' Bureau without endangering the new system for veterans' benefits. Accordingly, in an effort to save money in the early days of what

⁴⁴ WEBER & SCHMECKEBIER, *supra* note 21, at 219; DILLINGHAM, *supra* note 25, at 14-15.

⁴⁵ WEBER & SCHMECKEBIER, *supra* note 21, at 220.

⁴⁶ *Id.* at 221.

⁴⁷ Rosemary Stevens, *Can the Government Govern? Lessons from the Formation of the Veterans Administration*, 16 J. HEALTH POL. POL'Y & L. 281, 295 (1991); see DAVIS R.B. ROSS, PREPARING FOR ULYSSES: POLITICS AND VETERANS DURING WORLD WAR II, at 31 (1969); DEP'T OF VETERANS AFFAIRS, VA HISTORY IN BRIEF 8, available at http://www1.va.gov/opa/publications/archives/docs/history_in_brief.pdf. In particular, Forbes steered hospital construction contracts to one specific company that provided him with a third of the profits in kickbacks. DILLINGHAM, *supra* note 25, at 14. Not only were costs exorbitant, but construction quality was shoddy, with some hospitals missing basic facilities, such as kitchens and laundries. *Id.* at 15.

⁴⁸ DILLINGHAM, *supra* note 25, at 15; WEBER & SCHMECKEBIER, *supra* note 21, at 222.

⁴⁹ Pub. L. No. 68-242, 43 Stat. 607; see *infra* notes 117-23 and accompanying text.

⁵⁰ Ridgway, *supra* note 3, at 175.

⁵¹ *Id.* at 174-75.

would become the Great Depression, Congress authorized the President to consolidate by executive order all activities affecting veterans.⁵² President Herbert Hoover then proceeded to exercise that power by creating the VA on July 21, 1930.⁵³

C. The Bonus Army and the Economy Act

Although the creation of VA met a major goal of veterans' groups,⁵⁴ almost exactly two years later, Hoover also presided over the lowest moment in America's relationship with its veterans. Along with the World War Veterans' Act of 1924, Congress had passed legislation to provide a "bonus" to World War I veterans, in part to recognize that those who had not served had profited handsomely from the demand for war materials and the labor shortage created by the rapid expansion of the Army.⁵⁵ However, the bonus was not paid immediately; instead, most veterans were issued certificates that could not be redeemed until 1945.⁵⁶ Once the Great Depression arrived in full force, tens of thousands of destitute veterans traveled to Washington, D.C., in the summer of 1932, and occupied the National Mall for weeks as they demanded immediate payment of the bonus.⁵⁷ Eventually, there was a confrontation with local police, which prompted President Hoover to call upon a contingent of the regular U.S. Army, including cavalry, tanks, and machine guns, to intervene.⁵⁸ The Army used force and tear gas to clear the Mall and "[t]he image of the desperate veterans being driven from their shanties at bayonet point and of families fleeing burning hovels as their American flags were consumed in flames

⁵² Act of July 3, 1930, Pub. L. No. 71-536, 46 Stat. 1016; see DILLINGHAM, *supra* note 25, at 16-17.

⁵³ Exec. Order No. 5398 (Jul. 21, 1930), *available at* <http://www.presidency.ucsb.edu/ws/?pid=75311>.

⁵⁴ Ridgway, *supra* note 3, at 172-76.

⁵⁵ See *id.* at 170-71.

⁵⁶ World War Adjusted Compensation Act, Pub. L. No. 68-120, 43 Stat. 121 (1924); see Ridgway, *supra* note 3, at 171.

⁵⁷ See Ridgway, *supra* note 3, at 177; see generally PAUL DICKSON & THOMAS B. ALLEN, *THE BONUS ARMY: AN AMERICAN EPIC* (2004) (describing the history of the occupation).

⁵⁸ See Ridgway, *supra* note 3, at 177-78.

haunted Hoover for the rest of his disastrous presidency.”⁵⁹ The debacle destroyed President Hoover’s hopes of reelection, and helped usher Franklin D. Roosevelt (FDR) into the presidency.⁶⁰

Part of FDR’s famous first one-hundred days in office was the passing of the Economy Act of 1933.⁶¹ The Act effectively abolished all of the post-Civil War veterans’ benefits laws that had been in place, and gave the President the power to craft a new system by executive order.⁶² The resulting executive orders that FDR issued are often regarded as the origin of the current veterans’ benefits system because some key language remains substantially unchanged to this day.⁶³ However, the “new” system was largely an adaptation of the system created for World War I veterans, and many of its provisions can be traced to pre-existing law.

The Economy Act was much more than a unification of the prior veterans’ benefits systems under a codification of the World War I system. FDR’s ulterior motive was to use the power granted to him under the Act to slash about half a billion dollars from veterans’ benefits to pay for his New Deal priorities.⁶⁴ This action was the beginning of a very difficult relationship between FDR and veterans’ groups.⁶⁵ FDR persistently proposed broad social programs and hoped to placate veterans by giving them a privileged place in these programs.⁶⁶ However, veterans’ groups perceived such programs as a threat to their special political identity as embodied in VA. This perception, in turn, prompted them to fight against all such programs that were not controlled by the agency. The veterans’ groups were victorious in these confrontations and FDR’s New Deal momentum came to an

⁵⁹ *Id.* at 178.

⁶⁰ *Id.*

⁶¹ Act of Mar. 20, 1933, Pub. L. No. 73-2, 48 Stat. 8.

⁶² Ridgway, *supra* note 3, at 179.

⁶³ *Id.* at 181 & n.306.

⁶⁴ *Id.* at 180 & n.301.

⁶⁵ *Id.* at 180-81.

⁶⁶ *Id.* at 181-82.

end with the Independent Offices Appropriations Act of 1935,⁶⁷ in which Congress overrode the President's veto to restore a significant portion of the benefits that he had terminated under the authority granted to him by the Economy Act.⁶⁸

D. World War II and Eisenhower's Presidency

The history of the World War II benefits legislation, commonly known as the G.I. Bill, is one of the few aspects of early modern veterans' legislation that has been well chronicled.⁶⁹ Nonetheless, a brief recap is useful to set the stage for understanding the other legislation in this era. Despite the acrimonious relationship between FDR and veterans' groups, the President's experience of winning his office in the wake of the Bonus Army fiasco made him quite sensitive to the political importance of caring for sixteen million returning veteran voters.⁷⁰ Accordingly, FDR and his democratic allies in Congress were pragmatic when the American Legion proposed the G.I. Bill.⁷¹ The legislation, which was a package of benefits going far beyond the educational benefits for which it is known today,⁷² did not sail smoothly into law. Other veterans' groups disagreed with its philosophy and proposed different methods of providing for veterans.⁷³ Moreover, John E. Rankin, Chairman of the House World War Veterans' Legislation Committee, and some other politicians opposed the benefits it would provide to African-American veterans.⁷⁴ Nevertheless, the bill did become

⁶⁷ Pub. L. No. 73-141, 48 Stat. 509 (1934).

⁶⁸ Ridgway, *supra* note 3, at 180-81; *see infra* Part II.A.iv (discussing the Economy Act).

⁶⁹ *See, e.g.*, GLENN C. ALTSCHULER & STUART M. BLUMIN, *THE GI BILL: A NEW DEAL FOR VETERANS* (2009) (discussing the history and impact of the G.I. Bill).

⁷⁰ Ridgway, *supra* note 3, at 182-83.

⁷¹ *Id.* at 182-84.

⁷² *Id.* at 184-85.

⁷³ *Id.*

⁷⁴ *Id.* at 185 & n.329. The story of the passage of the bill is worthy of a Hollywood movie and involves the American Legion discovering a plot to kill the legislation in the final committee vote and frantically locating and flying a vacationing congressman back to Washington, D.C., just in time to cast the deciding vote. *Id.*

law and established a new paradigm for the substance of veterans' benefits that followed. The benefits were also largely extended to Korean War veterans, although the educational benefits provided were less generous.⁷⁵

After World War II, Harry Truman continued FDR's attempts to reverse the consolidation of veterans' programs, and experienced a similar lack of success. He contended that there had been a fundamental shift in the position of veterans caused by the Cold War era growth of the military, and argued that the needs of veterans could best be met by incorporating them into programs serving the general population.⁷⁶ In 1949, the Commission on the Organization of the Executive Branch of Government, headed by former President Hoover, recommended transferring some of VA's functions to other agencies.⁷⁷ However, this proposal was stymied by opposition from the major veterans service organizations.⁷⁸ Nonetheless, the critique of VA operations in the report did spur a major reorganization.⁷⁹

The consolidation of the veterans' system as we know it today occurred during Dwight D. Eisenhower's presidency. President Eisenhower's famous skepticism of the military-industrial complex⁸⁰ included the veterans' benefits system.⁸¹ During his presidency, he made serious attempts to contract veterans' benefits. In 1954, the Comptroller General of the United States issued a report on problems with the adjudication process, and noted in particular the apparent

⁷⁵ VA ORGANIZATIONAL HISTORY 1776-1994, *supra* note 21, at 33.

⁷⁶ *Id.* at 40.

⁷⁷ *Id.* at 39-40.

⁷⁸ *Id.* at 40.

⁷⁹ *Id.* at 40-41.

⁸⁰ See Eisenhower's Farewell Address to the Nation (Jan. 17, 1961), available at <http://mcadams.posc.mu.edu/ike.htm>; see also William D. Hartung, *Eisenhower's Warning: The Military-Industrial Complex Forty Years Later*, 18 WORLD POL'Y J., no. 1, Spring 2001, available at <http://www.worldpolicy.org/journal/articles/hartung01.html> (considering the present and future of the military-industrial complex).

⁸¹ Ridgway, *supra* note 3, at 189-90.

unreliability of rating decisions made immediately after World War II when VA was crushed under a mountain of claims from recently discharged servicemen.⁸² As a result, VA undertook to review over one million claims from World War II, resulting in thousands of rating reductions and thousands more cases in which service connection was severed outright.⁸³ Two years later, in 1956, Eisenhower commissioned his West Point classmate and former administrator of VA, Omar Bradley, to study the veterans' benefits system and make recommendations.⁸⁴ The Bradley Report recommended a contraction and refocusing of veterans' programs consistent with Eisenhower's wishes to trim VA.⁸⁵ However, Eisenhower's proposals garnered little traction on Capitol Hill.⁸⁶ Instead of remaking the veterans' system, Congress upgraded the existing regulations to statutory law in 1957, thus stripping Eisenhower's ability to make unilateral changes.⁸⁷

It is this legislative reaction by Congress to Eisenhower in 1957 that really marked the last significant event in the political history of the early modern system. When the system was finally recodified in 1958, no notable changes were made.⁸⁸ Accordingly, 1958 does not represent the origin of the modern veterans' benefits system as one might believe from looking at the current legislative histories of the central statutes. Instead, it represents the end of an era of reform efforts that began during World War I.

⁸² See U.S. GOV'T ACCOUNTABILITY OFFICE, REPORT TO THE CONGRESS OF THE UNITED STATES BY THE COMPTROLLER GENERAL: REVIEW OF COMPENSATION AND PENSION PROGRAM, WASHINGTON OFFICES, VETERANS ADMINISTRATION 28 (1954) [hereinafter COMPTROLLER REPORT], available at <http://www.gao.gov/assets/280/275266.pdf>.

⁸³ *Read v. Shinseki*, 651 F.3d 1296, 1297 (Fed. Cir. 2011).

⁸⁴ *Ridgway*, *supra* note 3, at 190.

⁸⁵ *Id.* at 191-92.

⁸⁶ *Id.* at 192-93.

⁸⁷ See *id.* at 193; see *infra* Part II.A.vi (discussing the Veterans' Benefits Act of 1957, Pub. L. No. 85-56, 71 Stat. 83).

⁸⁸ See *infra* Part II.A.vii (discussing the recodification of veterans' law).

II. THE SOURCES OF AUTHORITY

Ultimately, the political dramas discussed above were translated into the statutes and regulations that defined the early modern system. It is these authorities and their successors that still define the system today. This Part turns to the black letter law that defined the early modern system and, in many cases, is still in force today. In doing so, it frequently notes the length of authorities, the amount of detail they contain, and their key provisions. This discussion provides a general sense of what additional material is likely to be found in each authority, with the understanding that describing the details of each one would be an undertaking far beyond the scope of a single article.

A. Statutes

Prior to the Veterans Claims Assistance Act of 2000⁸⁹ (VCAA), the statutes governing veterans' law largely defined the substance of the law and placed few restrictions on the procedures used to decide claims. Accordingly, the early statutes tend to be more useful for understanding the origins of substantive features, rather than procedural ones, but their role in defining the process should not be overlooked. It would be impossible to detail every piece of legislation relevant to the modern adjudication system. Then, as now, veterans' benefits laws were frequently tweaked and changed as politicians responded to the priorities of a major constituency. However, there are a number of crucial bills that are important to discuss in order to provide context for understanding the development of the modern system.

i. World War I Legislation

The Bureau of War Risk Insurance was created in 1914.⁹⁰ The Act establishing the agency was a scant two pages that outlined the new agency and its insurance mission in eleven short sections.⁹¹

⁸⁹ Pub. L. No. 106-475, 114 Stat. 2096.

⁹⁰ Act of Sept. 2, 1914, Pub. L. No. 63-193, 38 Stat. 711.

⁹¹ *Id.*

More important than the original Act were the 1917 amendments that effectively converted the Bureau of War Risk Insurance into the benefits agency for World War I veterans.⁹² Those amendments were fourteen pages long and contained a number of key concepts, which continue to this day.⁹³ In particular, Article III contained the original definition of veterans' benefits as compensation and a bar to benefits based upon willful misconduct.⁹⁴ It also authorized the creation of a schedule "of ratings of reductions in earning capacity from specific injuries or combinations of injuries of a permanent nature."⁹⁵ The Act reflected Congress's awareness of the financial consequences of the Civil War era law that had made all benefits retroactive to the date of discharge,⁹⁶ and limited retroactive awards to two years prior to the date of an original claim or one year prior to the date of a claim for an increase.⁹⁷ It also contained provisions defining what is now known as special monthly compensation,⁹⁸ including benefits for veterans "so helpless as to be in constant need of a nurse or attendant," "helplessly and permanently bedridden," blind, or who have lost both hands or both feet.⁹⁹ Furthermore, the Act also defined benefits for both death and total disability.¹⁰⁰

The War Risk Act was again amended in 1918 to presume that all veterans entered into service in sound condition.¹⁰¹ However, "[i]t was soon discovered that the wording of the amendment had been such as to facilitate an overly liberal

⁹² Act of Oct. 6, 1917, Pub. L. No. 65-90, 40 Stat. 398.

⁹³ *Id.*

⁹⁴ *Id.* § 300, 40 Stat. at 405.

⁹⁵ *Id.* § 302, 40 Stat. at 406.

⁹⁶ See Ridgway, *supra* note 3, at 164-65.

⁹⁷ Pub. L. No. 65-90, § 310, 40 Stat. at 408; see STAFF OF H. COMM. ON VETERANS' AFFAIRS, 84TH CONG., THE PROVISION OF FEDERAL BENEFITS FOR VETERANS: AN HISTORICAL ANALYSIS OF MAJOR VETERANS' LEGISLATION, 1862-1954, at 20 (Comm. Print 1955) [hereinafter HISTORICAL ANALYSIS OF MAJOR VETERANS' LEGISLATION].

⁹⁸ Pub. L. No. 65-90, § 302, 40 Stat. at 406; 38 U.S.C. § 1114(k-s) (2006).

⁹⁹ Pub. L. No. 65-90, § 302, 40 Stat. at 406.

¹⁰⁰ *Id.* §§ 300, 302, 40 Stat. at 405-06.

¹⁰¹ Act of June 25, 1918, Pub. L. No. 65-175, § 10, 40 Stat. 609, 611.

interpretation. Men who had entered service with amputations and other patent disabilities applied for compensation despite the recording of such infirmities in their personal files.”¹⁰² In 1921, Congress corrected this loophole by making an exception for conditions noted “at the time of or prior to inception of active service.”¹⁰³

ii. The Act Establishing the Veterans’ Bureau of 1921

Although VA was created in 1930, the Act finally authorizing its creation was a brief two pages and comprised seven sections.¹⁰⁴ The Act did little more than transfer the existing agencies to the newly created agency, and grant the administrator the power to reorganize the new entity as appropriate.¹⁰⁵ Thus, the law creating VA is of little interest compared to that creating its predecessor almost a decade earlier.

The legislation creating the Veterans’ Bureau was eleven pages long and provided substantial detail on the new agency.¹⁰⁶ Section 6 defined the central office, fourteen ROs, and a system of up to 140 sub-offices.¹⁰⁷ Interestingly, the Act envisioned the Bureau as a largely temporary agency that would be wound up when its work was complete.¹⁰⁸ All ROs were set to terminate on June 30, 1926, if not shuttered earlier due to inactivity.¹⁰⁹

The Act also contained a number of notable substantive provisions. Section 15 created an insanity exception allowing the director to ignore a dishonorable discharge.¹¹⁰ Section 18 rephrased the basic entitlement language into a form very close

¹⁰² HISTORICAL ANALYSIS OF MAJOR VETERANS’ LEGISLATION, *supra* note 97, at 21.

¹⁰³ Act of Aug. 9, 1921, Pub. L. No. 67-47, § 18, 42 Stat. 147, 154.

¹⁰⁴ Act of July 3, 1930, Pub. L. No. 71-536, 46 Stat. 1016.

¹⁰⁵ *Id.*

¹⁰⁶ Pub. L. No. 67-47, 42 Stat. 147.

¹⁰⁷ *Id.* § 6, 42 Stat. at 149.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* § 15, 42 Stat. at 152-53.

to that in which it appears today.¹¹¹ This section also created a presumption of service connection for pulmonary tuberculosis and “neuropsychiatric disease” if the disabilities developed to a degree of ten percent or more disabling within two years of service.¹¹²

iii. The World War Veterans’ Act of 1924

Two major pieces of legislation were passed nearly simultaneously in 1924. The first was the World War Adjusted Compensation Act,¹¹³ which created the “Bonus” benefit program.¹¹⁴ Although the flaws in the Bonus program eventually led to the Economy Act of 1933 nearly a decade later,¹¹⁵ the actual contents of the eleven-page Act are unremarkable. The Act did nothing more than define the program and contained no broader changes to veterans’ law.¹¹⁶

In contrast, the World War Veterans’ Act of 1924,¹¹⁷ passed three weeks later, was a substantial piece of legislation (twenty-three pages) that provided a considerable amount of detail as to how the Pension Bureau was to be reformed in the wake of the Forbes scandal.¹¹⁸ Many of the provisions it contained are familiar. For example, section 7 revised the previous system set up three years earlier and paved the way for the current organizational structure of VA by increasing the number of authorized ROs from fourteen to one hundred.¹¹⁹ Section 19 prohibited all claims agents and attorneys from representing veterans in compensation claims “except the recognized representatives of the American Red Cross, the American Legion, the Disabled American Veterans,

¹¹¹ *Id.* § 18, 42 Stat. at 153-54.

¹¹² *Id.*, 42 Stat. at 154.

¹¹³ Pub. L. No. 68-120, 43 Stat. 121 (1924).

¹¹⁴ See discussion *supra* Part I.C.

¹¹⁵ Pub. L. No. 73-2, 48 Stat. 8; see discussion *supra* Part I.C.

¹¹⁶ Pub. L. No. 68-120, 43 Stat. 121.

¹¹⁷ Pub. L. No. 68-242, 43 Stat. 607.

¹¹⁸ *Id.*

¹¹⁹ *Id.* § 7, 43 Stat. at 609.

and the Veterans of Foreign Wars and such other organizations as shall be approved by the Director.”¹²⁰ Perhaps most importantly, Title II took more than eight pages to define the compensation system, using language very similar to that which exists today.¹²¹

Substantively, the Act further liberalized the presumptions of service connection created in 1921:

“Tuberculosis which developed to a degree of 10 percent or more prior to January 1, 1925, was conclusively presumed to be of service origin, while neuropsychiatric diseases, paralysis agitans, encephalitis lethargica, and amoebic dysentery developing to a degree of 10 percent or more of disability before January 1, 1925, were given the benefit of a rebuttable presumption of service connection.”¹²²

These changes were made at the urging of Director Hines, who testified that “the problem of determining the service origin of veterans’ disabilities is the most difficult and involved question confronting the Veterans’ Bureau.”¹²³

iv. The Economy Act of 1933

The Economy Act has been described as the origin of the modern veterans’ benefits system because it set aside most of the prior ad hoc provisions and laid the foundation for the unified

¹²⁰ *Id.* § 19, 43 Stat. at 612-13. In addition, § 500 provided a penalty for any agent or attorney charging more than ten dollars for work on a case. *Id.* § 500, 43 Stat. at 628.

¹²¹ *Id.* §§ 200-12, 43 Stat. at 615-24.

¹²² HISTORICAL ANALYSIS OF MAJOR VETERANS’ LEGISLATION, *supra* note 97, at 22 (quoting H. COMM. ON PENSIONS., CHRONOLOGICAL RESUME OF VETERANS’ LAWS 34 (76th Cong. 1st sess., 1939)).

¹²³ *Id.* at 23 (citing 65 CONG. REC. 10,169 (1924) (statement of Rep. Royal Cleaves Johnson)). The evidence supporting the presumption of service connection indicated that veterans experienced “cases of insanity” at double the rate of the civilian population, with sixty percent of cases being of unknown origin. *Id.*

system that still exists today.¹²⁴ Nevertheless, only one aspect of the statute concerned veterans' benefits. Its stated purpose was "to maintain the credit of the United States Government."¹²⁵ The report from the House Committee on the Economy noted that in the months prior to the passage of the Act, the interest rate for ninety-day Treasury bills had skyrocketed from one-tenth of one percent to four-and-a-half percent, and detailed other aspects of the nation's deteriorating finances.¹²⁶ Although the eventual magnitude of the cuts to veterans' benefits took Congress by surprise, the basic purpose of the Act was no secret.¹²⁷ The Act's other two titles granted the President the authority to reduce the salaries of federal employees and provided that implementing executive orders needed to be submitted to Congress.¹²⁸

Only Title I of the Economy Act, the first four and one-half pages, dealt with veterans' benefits.¹²⁹ The first several sections of the Act granted the President broad authority to define the substance and procedures for the new system within a few parameters.¹³⁰ The details of the regulations issued by FDR are discussed below.¹³¹ One of the notable substantive actions taken by Congress in the Act was to tighten effective dates even further by limiting all claims to the date of application.¹³² Aside from the authority granted to the President, section 5 created a statutory bar to judicial review, which ensured that the federal courts did not interfere with FDR's use of the power granted to him to slash veterans' benefits.¹³³

¹²⁴ Ridgway, *supra* note 3, at 179-82.

¹²⁵ Act of March 20, 1933, Pub. L. No. 73-2, 48 Stat. 8, 8 (1933).

¹²⁶ See H.R. REP. NO. 73-1, at 1-2 (1933).

¹²⁷ See *id.*

¹²⁸ Pub. L. No. 73-2, tit. II-III, 48 Stat. at 12-16.

¹²⁹ *Id.* tit. I, 48 Stat. at 8-12.

¹³⁰ *Id.* §§ 1, 4, 48 Stat. at 8-9.

¹³¹ See discussion *infra* Part II.B.

¹³² Pub. L. No. 73-2, § 9, 48 Stat. at 10.

¹³³ *Id.* § 5, 48 Stat. at 9; Ridgway, *supra* note 3, at 179-80.

Congress's eventual response to the Economy Act was the Independent Offices Appropriation Act of 1935,¹³⁴ which was enacted over FDR's veto.¹³⁵ Title III of that Act reinstated many of the benefits that had been severed by FDR pursuant to the Economy Act, and prohibited some types of severance and benefits reductions.¹³⁶ However, the Independent Offices Appropriation Act specifically addressed the issue of preexisting conditions and did not reinstate benefits when "clear and unmistakable evidence discloses that the disease, injury, or disability had inception before or after the period of active military or naval service, unless such disease, injury, or disability is shown to have been aggravated during service . . . the burden of proof being on the Government."¹³⁷

v. The Servicemen's Readjustment Act of 1944

Better known as the "G.I. Bill," the Servicemen's Readjustment Act of 1944's¹³⁸ modest seventeen-page length belies its crucial importance to veterans' benefits. The Act represents the triumph of an expansive and comprehensive vision of veterans' benefits over competing conceptions.¹³⁹ Title II, providing for educational benefits, is certainly the most famous aspect of the law.¹⁴⁰ However, the Act had other key provisions. Title III created the popular home loan provisions, along with provisions for farm and business property loans.¹⁴¹ Title IV created an employment assistance program.¹⁴² Title V provided up to a year of unemployment benefits for veterans who failed to find suitable work upon discharge.¹⁴³

¹³⁴ Pub. L. No. 73-141, 48 Stat. 509 (1934).

¹³⁵ Ridgway, *supra* note 3, at 180-81.

¹³⁶ Pub. L. No. 73-141, tit. III, 48 Stat. at 524-27.

¹³⁷ *Id.* § 28, 48 Stat. at 524.

¹³⁸ Pub. L. No. 78-346, 58 Stat. 284.

¹³⁹ Ridgway, *supra* note 3, at 184-85. The provisions of the G.I. Bill were extended to Korean War veterans, with some adjustments, by the Veterans' Readjustment Assistance Act of 1952, Pub. L. No. 82-550, 66 Stat. 663.

¹⁴⁰ Pub. L. No. 78-346, tit. II, 58 Stat. at 287-91.

¹⁴¹ *Id.* tit. III, 58 Stat. at 291-93.

¹⁴² *Id.* tit. IV, 58 Stat. at 293-95.

¹⁴³ *Id.* tit. V, 58 Stat. at 295-96.

Aside from creating a variety of benefits beyond insurance, disability compensation, and vocational rehabilitation, the Act also contained other provisions with long-term relevance. By authorizing 500 million dollars for the construction of VA hospitals, section 101 helped pave the way for the eventual emergence of the “Iron Triangle” of VA—specifically, the major veterans service organizations, the congressional veterans affairs committees, and VA—which dominated the system’s operation after World War II.¹⁴⁴ Section 300 created a bar to benefits for conscientious objectors.¹⁴⁵ Section 301 directed the service departments to establish boards for reviewing character of discharge determinations.¹⁴⁶ Finally, foreshadowing current efforts to integrate the discharge and claims processes,¹⁴⁷ section 103 explicitly authorized VA to place employees in military installations for the purpose of adjudicating claims and advising service members about to be discharged.¹⁴⁸

vi. The Veterans’ Benefits Act of 1957

The Veterans’ Benefits Act of 1957 (“1957 Act”)¹⁴⁹ is often overlooked when discussing the origins of veterans’ law, but it is key to tracing its history. It elevated much of the law that had previously existed only as regulations to the status of statutory law. Not surprisingly, it was a very long statute, running just shy of one hundred pages and organized into twenty-three titles.¹⁵⁰ The table

¹⁴⁴ *Id.* § 101, 58 Stat. at 284; *see* Ridgway, *supra* note 3, at 187-89 (discussing the role of the VA hospital system in shaping the post-World War II political dynamic of veterans’ benefits).

¹⁴⁵ Pub. L. No. 78-346, § 300, 58 Stat. at 286. The validity of this provision was upheld by the Supreme Court in *Johnson v. Robinson*, 415 U.S. 361 (1974).

¹⁴⁶ Pub. L. No. 78-346, § 301, 58 Stat. at 286-87.

¹⁴⁷ *See, e.g.*, U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-901, VETERANS’ DISABILITY BENEFITS: BETTER ACCOUNTABILITY AND ACCESS WOULD IMPROVE THE BENEFITS DELIVERY AT DISCHARGE PROGRAM (2008), *available at* <http://www.gao.gov/new.items/d08901.pdf>.

¹⁴⁸ Pub. L. No. 78-346, § 103, 58 Stat. at 285.

¹⁴⁹ Pub. L. No. 85-56, 71 Stat. 83.

¹⁵⁰ *Id.*

of contents alone covered six pages.¹⁵¹ However, as described in the accompanying House report, the bill largely contained only a handful of very minor changes, almost all of which involved harmonizing provisions to eliminate minor exceptions to general rules.¹⁵² The one major change was to adjust the definition of “period of war” to make veterans of any future war automatically eligible for wartime benefits without the need for explicit legislation.¹⁵³

Despite Eisenhower’s serious attempts to shrink the veterans’ benefits system, the legislative history did not mention the Act’s effect on his initiatives to contract benefits, but rather presented the legislation as a project to simplify and standardize veterans’ law.¹⁵⁴ For its part, the Eisenhower administration did not broadly object to the legislation based upon its effect of limiting the President’s freedom to reform the system. However, the administration explicitly objected to the provisions automatically extending existing benefits to veterans of future wars, and recommended (unsuccessfully) that they be stricken from the bill.¹⁵⁵

Thus, the 1957 Act really represents the completion of the transformation of the system. By automatically extending benefits to veterans of future wars, the Act eliminated the need to reconsider benefits for each new generation of veterans, and endowed the system with an inertia that has carried it forward for more than a half century with the same core provisions and philosophy.

¹⁵¹ *Id.* at 83-88.

¹⁵² H.R. REP. NO. 85-279, at 2-3 (1957), *reprinted in* 1957 U.S.C.C.A.N. 1214, 1215-16. Although beyond the scope of this Article, the fact that Congress elevated the existing regulations to a statute in an essentially unchanged form raises an interesting question of interpretive theory. The Supreme Court has developed a substantial body of case law discussing the proper role of agency interpretations in resolving questions of statutory meanings. *See generally* Linda Jellum, *Chevron’s Demise: A Survey of Chevron from Infancy to Senescence*, 59 ADMIN. L. REV. 725 (2007). However, it is not clear whether the interpretive calculus should change in a situation in which Congress did not draft the statutory language, but instead elevated well established agency regulations.

¹⁵³ H.R. REP. NO. 85-279, at 3, *reprinted in* 1957 U.S.C.C.A.N. at 1216.

¹⁵⁴ *Id.* at 1, 1957 U.S.C.C.A.N. at 1214.

¹⁵⁵ *Id.* at 31-32, 1957 U.S.C.C.A.N. at 1240-41.

vii. *The 1958 Consolidation and Organization of Veterans' Law*

In 1958, only a year after the 1957 Act, Congress revisited its work from the prior year with another act recodifying veterans' law.¹⁵⁶ Although the 1957 Act consolidated and organized the core of veterans' law, while elevating many provisions that had previously existed only in regulation, the major accomplishment of the 1958 legislation was merely to incorporate numerous additional statutory provisions that had not been part of the 1957 Act, so as to make Title 38 truly comprehensive.¹⁵⁷ As a result, the 1958 Act was 169 pages long, and was essentially the same as Title 38 appeared immediately after its passage.¹⁵⁸

The critical aspect of the 1958 Act is that it is a red herring. Most modern compilations of veterans' law trace the older statutory provisions to this Act.¹⁵⁹ However, this legislation did not actually create any of the current law. Rather, it did little other than to reorganize the provisions from their locations of fourteen months earlier into the locations where they would remain until 1991, when the Department of Veterans Affairs Codification Act¹⁶⁰ organized Title 38 into the sections with which we are familiar today.¹⁶¹ Accordingly, any legislative history stated in the Code that terminates at "Pub. L. 85-857, Sept. 2, 1958" fails to identify the true origin of the provision. Instead, such a history fails to recognize that the basis of the modern benefits system goes back further than the United States Code traces Title 38.

¹⁵⁶ Act of Sept. 2, 1958, Pub. L. No. 85-857, 72 Stat. 1105.

¹⁵⁷ See H.R. REP. NO. 85-1298, at 1-2 (1958), *reprinted in* 1958 U.S.C.C.A.N. 4352, 4352-53 (describing the additional provisions consolidated in the Act of September 2, 1958).

¹⁵⁸ See Pub. L. No. 85-857, 72 Stat. 1105.

¹⁵⁹ See, e.g., 38 U.S.C. §§ 101, 1110, 1131, 1154 (2006); 38 U.S.C.A. §§ 101, 1110, 1131, 1154 (West 2002); 38 U.S.C.S. §§ 101, 1110, 1131, 1154 (Lexis/Nexis 2002).

¹⁶⁰ Pub. L. No. 102-83, 105 Stat. 378 (1991).

¹⁶¹ *Id.*

B. Regulations

Although the substance of veterans' law was (and is) largely defined by statute, the history of the procedures used to adjudicate claims is largely found in regulations. Of course, as a converse to the statutes, there are important substantive provisions found in the regulations that do not merely parrot the underlying statute. This is particularly true for the regulations issued by executive orders pursuant to the Economy Act.

The earliest regulations of the Bureau of War Risk Insurance and the Pension Bureau were not organized by subject matter, but rather simply by date of issuance. Spanning a mere twenty-five pages,¹⁶² the sixty official regulations issued by this agency had an emphasis on insurance issues consistent with the agency's original focus. However, these regulations contained a few provisions that are almost identical to those in force today.¹⁶³

In contrast, the Veterans' Bureau regulations were substantially longer, containing 204 regulations that spanned 156 pages.¹⁶⁴ As with the Bureau of War Risk Insurance regulations, there were recognizable pieces of modern provisions sprinkled throughout. For example, Regulation 4 dealt with effective dates and used the same "fixed in accordance with the facts found" language that still exists today.¹⁶⁵ The Veterans' Bureau regulations also had provisions describing the early organization of the RO system.¹⁶⁶

A new set of regulations for veterans' law was promulgated by executive orders pursuant to the Economy Act of 1933. Many

¹⁶² REGULATIONS AND PROCEDURE, U.S. VETERANS' BUREAU: ACTIVE AND OBSOLETE ISSUES AS OF DECEMBER 31, 1928, pt. I, 33-58 (1930) [hereinafter REGULATIONS AND PROCEDURE].

¹⁶³ For example, War Risk Regulation No. 38 (1919) looked much like the current rules on severance. *See id.* at 47.

¹⁶⁴ *Id.* at 73-228.

¹⁶⁵ Compare Veterans' Bureau Regulation No. 4, in REGULATIONS AND PROCEDURE, *supra* note 162, at 74-75, with 38 U.S.C. § 5110 (2006).

¹⁶⁶ *See* discussion *infra* Part III.A.

modern provisions can be traced verbatim to these regulations, the first twelve of which (spanning thirty-five pages) were issued by executive order a mere eleven days after passage of the Act.¹⁶⁷ The topics covered in those dozen regulations encompass the core of modern veterans' law. For example, Veterans Regulation 1 covered basic entitlement to benefits.¹⁶⁸ Regulation 2 addressed effective dates and appeal procedures.¹⁶⁹ Regulation 3 authorized the Administrator of VA to create a schedule of disability ratings.¹⁷⁰

These regulations are also noteworthy in that they have an official history. As discussed below,¹⁷¹ it would be decades before agencies were required to summarize and explain proposed rules in the *Federal Register*. However, the regulations issued pursuant to the Economy Act were required to be presented to Congress.¹⁷² As a result, when FDR transmitted the original veterans' regulations to Congress, he included an eleven-page letter explaining in further detail how the provisions would work.¹⁷³ This unusual piece of regulatory history should not be overlooked.

The three sets of regulations discussed above have many similarities and differences. One aspect they have in common is that none of them are logically organized. Formal organization would finally arrive when the Federal Register Act¹⁷⁴ was passed in 1935, which created the *Federal Register* as the daily publication of all agency rules and regulations, as well as executive orders and other similar authorities.¹⁷⁵ The Act was amended two years later to require that a codification of all current regulations be

¹⁶⁷ Exec. Order No. 6089-6100 (1933).

¹⁶⁸ Exec. Order No. 6089.

¹⁶⁹ Exec. Order No. 6090.

¹⁷⁰ Exec. Order No. 6091.

¹⁷¹ See *infra* notes 189-90 and accompanying text.

¹⁷² Act of Mar. 20, 1933, Pub. L. No. 73-2, tit. 3, § 1, 48 Stat. 8, 16.

¹⁷³ S. REP. NO. 73-19, at 37-48 (1933).

¹⁷⁴ Act of July 26, 1935, Pub. L. No. 74-220, 49 Stat. 500.

¹⁷⁵ Rick McKinney, *Hot Topic: A Research Guide to the Federal Register and the Code of Federal Regulations*, 46 LAW LIBRARY LIGHTS 10, 10 (2002).

issued every five years.¹⁷⁶ The first edition of the Code of Federal Regulations (C.F.R.) for Title 38 was published in 1939.¹⁷⁷ However, the aspiration for regular publication of updated codifications was not achieved, and new versions were initially published on a less frequent basis.¹⁷⁸ The second edition of Title 38 was published in 1949¹⁷⁹ and a “revised” edition was published in 1956.¹⁸⁰ The annual editions of Title 38 began publishing in 1964.¹⁸¹

Even then, the first annual edition issued in 1964 did not include the rating schedule, which was added as chapter 4 of the C.F.R. in May of that year.¹⁸² The current version of the C.F.R. misleadingly lists the 1964 promulgation as the origin of the rating schedule “unless otherwise noted.”¹⁸³ However, the real origin of the rating schedule is found by looking to the uncodified versions that existed prior to 1964. The first edition of the modern rating schedule was issued in 1921 and the eighty-four page document includes ratings in five percent increments.¹⁸⁴ The second edition was issued just after the passage of the Economy Act in March 1933 and introduced ten-percent increments and the diagnostic code system with which we are familiar today.¹⁸⁵ The 1945 edition is the foundation of the modern rating schedule¹⁸⁶ and the first eleven pages contain twenty-seven enumerated paragraphs of general principles that were incorporated largely verbatim in the sections found in subpart A of chapter 4 of the current regulations.¹⁸⁷

¹⁷⁶ *Id.* (citing Act of June 19, 1937, Pub. L. No. 75-158, 50 Stat. 304).

¹⁷⁷ 38 C.F.R. (1939).

¹⁷⁸ McKinney, *supra* note 175, at 10-11.

¹⁷⁹ 38 C.F.R. (1949).

¹⁸⁰ *Id.* (1956).

¹⁸¹ *Id.* (1964).

¹⁸² Part 4—Schedule for Rating Disabilities, 29 Fed. Reg. 6718 (May 22, 1964).

¹⁸³ 38 C.F.R. pt. 4 (2011).

¹⁸⁴ See U.S. VETERANS BUREAU, DISABILITY RATING TABLE (1921).

¹⁸⁵ U.S. VETERANS' ADMINISTRATION, SCHEDULE FOR RATING DISABILITIES 1 (2d ed. 1933).

¹⁸⁶ See VETERANS' DISABILITY BENEFITS COMM'N, HONORING THE CALL TO DUTY: VETERANS' DISABILITY BENEFITS IN THE 21ST CENTURY 4 (2007) (noting that “the VA Rating Schedule has not been adequately revised since 1945”).

¹⁸⁷ Compare VETERANS' ADMINISTRATION, SCHEDULE FOR RATING DISABILITIES ¶¶ 1 (“Essentials of Evaluative Rating”), 2 (“Interpretation of Examination Reports”), 3

As with the C.F.R., the content of the *Federal Register* evolved. After the passage of the Administrative Procedure Act in 1946, notices of proposed rules were required.¹⁸⁸ It was not until 1973 that summaries of rules were required, although the practice had been utilized for a decade before then.¹⁸⁹ Finally, it was not until 1977 that agencies were required to summarize and respond to comments on proposed rules when issuing a final rule.¹⁹⁰ Accordingly, for those interested in the early modern history of the system, the *Federal Register* does not capture significant portions of the development of the regulations for adjudicating veterans' claims.

Even tracking the early changes to the regulations is challenging. The 1956 edition was the first edition of the regulations to list relevant *Federal Register* postings at the end of each section.¹⁹¹ Unfortunately, these listings are deceptive, as a comparison of the 1956 edition with the first edition demonstrates that many provisions are older than they would appear from *Federal Register* citations provided in the revised edition.¹⁹² In particular, it seems that many provisions cite to the notice of the second edition published in 1949, even when those provisions were unchanged from the first edition or intervening supplements.¹⁹³ Thus, anyone conducting research into the history of a regulation that existed prior to 1956 should independently verify its origin, rather than trusting the history provided in the C.F.R.

("Resolution of Reasonable Doubt") (1945), with 38 C.F.R. §§ 4.1-4.3 (using the same headings and much of the same language).

¹⁸⁸ Pub. L. No. 79-404, § 4, 60 Stat. 237, 239.

¹⁸⁹ McKinney, *supra* note 175, at 10 (citing Revision of Regulations, 37 Fed. Reg. 23,602 (Nov. 4, 1972) (codified at 1 C.F.R. pts. 1-22)).

¹⁹⁰ *Id.* (citing Clarity of Rulemaking Documents in the Federal Register, 41 Fed. Reg. 56,624 (Dec. 29, 1976)).

¹⁹¹ Compare 38 C.F.R. § 3.31 (1949) (listing only statutory authority for the regulation), with *id.* (1956) (adding citations to *Federal Register* notices).

¹⁹² For example, 38 C.F.R. § 3.31 (1956) lists the origin of that regulation as 19 Fed. Reg. 6916 (Oct. 28, 1954), even though subsection (a) is identical to 38 C.F.R. § 2.1031(a) (1939). Similarly, 38 C.F.R. § 3.8 (1956) lists the origin of that regulation as 13 Fed. Reg. 7009 (Nov. 27, 1948) even though it is identical to 38 C.F.R. § 2.1008 (1939) except for an updated cross reference.

¹⁹³ See Revision of Regulations, 13 Fed. Reg. 6997-7289 (Nov. 27, 1948).

C. Sub-Regulatory Authority

Just as today, VA has used a variety of sub-regulatory authorities in the past to provide guidance to adjudicators. As discussed below, this included orders, manuals, and legal opinions. These sub-regulatory authorities are important in two respects. First, they often set forth the agency's interpretation of the statutes and regulations just as similar authorities do today. Second, and perhaps more importantly, key statutory and regulatory language and concepts sometimes appeared first in these sub-regulatory authorities. Thus, to fully understand many provisions, it is important not only to examine the contemporaneous agency interpretations, but also to search for antecedent authorities that may provide a fuller picture of when and why VA first began to operate in a particular manner.

The first type of authority to understand is the variety of different orders used by the Central Office at different points to provide instructions to personnel throughout VA. Some orders contain broad statements of policy or general procedure, while others address specific issues or problems. The various incarnations of VA have used several different types of orders, including "general," "special," and "field."¹⁹⁴ Unfortunately, despite the different names, a cursory review does not reveal that their uses were strictly delineated and any of the different types may contain relevant instructions to adjudicators. In 1945, VA began issuing internal guidance through circulars in a system that continued through the remainder of the time period covered in this Article.¹⁹⁵ Although searching through these orders can be tedious, they often provide good windows into how the black letter law was applied.

Another potentially useful type of authority is agency manuals, which are an important part of how VA has provided guidance and instruction to its adjudicators. Although the current

¹⁹⁴ REGULATIONS AND PROCEDURE, *supra* note 162, at v (table of contents).

¹⁹⁵ See VA Circular No. 1 (1945).

VA system of manuals for adjudicators was not started until 1953,¹⁹⁶ there was an official adjudication handbook at least as early as 1923.¹⁹⁷ The 1923 manual contains 250 paragraphs that were, unfortunately, not organized into any particular structure.¹⁹⁸ However, compensation claims were generally described in paragraphs 81 through 88.¹⁹⁹

A more extensive manual was issued in 1929. That manual was 144 pages long and divided into 485 paragraphs.²⁰⁰ Article X covered compensation claims and was twenty-eight pages long, with details on such issues as the application of the benefit of the doubt,²⁰¹ informal claims,²⁰² requesting medical evidence,²⁰³ and determining effective dates.²⁰⁴ As with the orders described above, the instructions provide a window into the application of the law.

However, the relevant VA manuals are not limited to those provided for adjudicators. Beginning in January 1940, VA issued a Manual for Medical Examiners, which was periodically updated thereafter.²⁰⁵ Even then, the manual emphasized that “[t]he data required by a rating board or the appellate agency comprehend considerably more than those which suffice for the ordinary physical examination,”²⁰⁶ and detailed “common faults in reports” that frustrated adjudicators’ ability to make timely and accurate

¹⁹⁶ VA’s Manual M1-1 was titled “Field Appellate Procedures.” VETERANS ADMINISTRATION, BOARD OF VETERANS APPEALS 1933-1984, at 8 (1984) [hereinafter BVA HISTORY 1933-1984].

¹⁹⁷ Veterans’ Bureau General Order No. 175 (1923), in REGULATIONS AND PROCEDURE, *supra* note 162, at 624-45.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 629-30.

²⁰⁰ See U.S. VETERANS’ BUREAU, MANUAL OF PROCEDURE, AWARDS DIVISION, ADJUDICATION SERVICE (1929).

²⁰¹ *Id.* at 81 (para. 295 “Border-Line Cases”).

²⁰² *Id.* at 82-83 (paras. 302-03).

²⁰³ *Id.* at 86 (para. 312).

²⁰⁴ *Id.* at 94 (para. 318).

²⁰⁵ See U.S. VETERANS’ ADMINISTRATION, MANUAL FOR MEDICAL EXAMINERS FOR THE VETERANS’ ADMINISTRATION (1940).

²⁰⁶ *Id.* at 1.

decisions.²⁰⁷ These manuals largely dealt with specific medical issues, but can still be helpful in understanding how the disability rating codes were interpreted in the past.²⁰⁸

The third important type of sub-regulatory authorities is legal opinions. Legal opinions on specific issues of interpretation and application have long been a part of the claims adjudication process.²⁰⁹ The Pension Bureau's General Counsel's Office began issuing opinions shortly after VA's formation in 1924, and the Administrator began issuing legal opinions in 1931.²¹⁰ Once again, many of the questions presented touched upon issues that are still relevant today and can help illuminate the origins of VA interpretations in a wide variety of contexts.²¹¹ In particular, most opinions were rendered in the context of deciding specific claims and therefore provided binding guidance on the application of the law to particular fact patterns.

D. Secondary Sources

Finally, there are also a number of secondary sources that may be helpful in trying to understand the origins of the modern system. Even though these secondary sources are not direct authorities on agency practice and interpretation, they often provide a contemporaneous description of the system that can add useful historical context.

²⁰⁷ *Id.* at 3-4.

²⁰⁸ For example, the 1951 edition of the manual contains diagrams of orthopedic function extremely similar to those found in the rating codes today. *Compare* MANUAL FOR MEDICAL EXAMINERS OF THE VETERANS ADMINISTRATION 10-11, Plates I-II (1951), *with* 38 C.F.R. § 4.71, Plates I-II (2011).

²⁰⁹ *See, e.g.*, U.S. PENSION BUREAU, A DIGEST OF THE LAWS OF THE UNITED STATES: GOVERNING THE GRANTING OF ARMY AND NAVY PENSIONS AND BOUNTY-LAND WARRANTS; DECISIONS OF THE SECRETARY OF THE INTERIOR, AND RULINGS AND ORDERS OF THE COMMISSIONER OF PENSIONS THEREUNDER (1885).

²¹⁰ *See, e.g.*, VETERANS' ADMINISTRATION, DECISIONS OF THE ADMINISTRATOR OF VETERANS' AFFAIRS, VOL. 1, MARCH 1, 1931 TO JUNE 30, 1946 (1947).

²¹¹ For example, the second opinion issued by Administrator Hines dealt with the willful misconduct provisions. *See* Administrator's Decision, Veterans' Administration, No. 2 (Mar. 21, 1931).

VA annual reports are excellent sources of background information. They usually include illuminating statistical data detailing the workload faced by the agency,²¹² along with narrative discussions of particular issues deemed important, as well as recent and proposed changes. For example, the 1925 report explained, in detail, how the RO system was put in place after the changes made by the World War Veterans Act of 1924.²¹³ The 1926 report contains a detailed organizational chart for a typical RO, showing all the key sections and employees with details on their responsibilities.²¹⁴ The 1933 report contains a discussion of the effect of the Economy Act and the subsequent executive orders from VA's point of view,²¹⁵ and the 1934 report discusses the formation of the BVA and the effect of the Independent Offices Appropriation Act.²¹⁶

Another potentially useful secondary source is government commission reports. As discussed above, the two major commissions that were formed during this time period were the Hoover Commission, during Truman's presidency,²¹⁷ and the Bradley Commission, during Eisenhower's presidency.²¹⁸ However, these reports must be considered with a grain of salt. Each produced recommendations in line with the policy preferences of the President who created it, but the central recommendations of both commissions failed to find support in Congress.²¹⁹ Nonetheless, their descriptions of the operations of VA provide a counterpoint to the agency's own materials.

²¹² See, e.g., U.S. VETERANS' BUREAU, ANNUAL REPORT OF THE DIRECTOR, U.S. VETERANS' BUREAU 217-18, 221-66 & chart 5 (1925) [hereinafter 1925 ANNUAL REPORT]; U.S. VETERANS ADMINISTRATION, ANNUAL REPORT OF THE ADMINISTRATOR OF VETERANS' AFFAIRS 39-75 (1933) [hereinafter 1933 ANNUAL REPORT]; U.S. VETERANS ADMINISTRATION, ADMINISTRATOR OF VETERANS AFFAIRS ANNUAL REPORT 60-73 (1957).

²¹³ 1925 ANNUAL REPORT, *supra* note 212, at 217-19.

²¹⁴ U.S. VETERANS' BUREAU, ANNUAL REPORT OF THE DIRECTOR, U.S. VETERANS' BUREAU, chart 2 (1926).

²¹⁵ 1933 ANNUAL REPORT, *supra* note 212, at 8-10.

²¹⁶ U.S. VETERANS ADMINISTRATION, ANNUAL REPORT OF THE ADMINISTRATOR OF VETERANS' AFFAIRS 3, 7-8 (1934).

²¹⁷ See *supra* note 77 and accompanying text.

²¹⁸ See *supra* notes 84-85 and accompanying text.

²¹⁹ See *supra* notes 78, 86-87 and accompanying text.

In addition, there are a number of non-governmental sources that may be of use. In 1918, William Henry Glasson published *Federal Military Pensions in the United States*.²²⁰ This book was produced by the Division of Economics and History of the Carnegie Endowment for International Peace,²²¹ and was intended to analyze the economic and political effects of past programs.²²² The clear agenda of the book was to condemn the “moral degeneration” caused by the excesses of the Civil War system and to support the compensation model adopted at that time.²²³ Therefore, it provides a window into the motivations underlying the paradigm shift that brought about the modern compensation system.

The Brookings Institution was founded in 1927 and was dedicated to “the development of sound national policies.”²²⁴ It produced an extensive series of monographs describing the operation of government in great detail, and the sixty-sixth in that series examined the operations of VA.²²⁵ Published in 1934, the nearly 500-page volume exhaustively addressed the history of the system, the benefits that VA administered, and the organization of VA’s operations.²²⁶ Unfortunately, it did not address the then-existing procedures in detail, and its discussion of the ROs contained no useful detail on the claims adjudication process.²²⁷ However, it did provide a description of the central office bodies responsible for setting policies relevant to compensation claims.²²⁸

In 1952, William Pyrlle Dillingham of the Florida State University Department of Economics published a book, *Federal Aid to Veterans, 1917-1941*, examining the history of the system

²²⁰ See GLASSON, *supra* note 18.

²²¹ *Id.* at i.

²²² *Id.* at vii.

²²³ *Id.* at vii-viii.

²²⁴ WEBER & SCHMECKEBIER, *supra* note 21, at ii.

²²⁵ *Id.* at v-vi.

²²⁶ See *id.* at vii-xi.

²²⁷ See *id.* at 339-46.

²²⁸ *Id.* at 327-31.

from 1917 to 1941.²²⁹ As an academic unburdened by an agenda-driven patron, Dillingham's book is generally neutral in tone.²³⁰ It provides a retrospective view of the politics behind the adoption of the compensation system, which illuminates how the development of the modern system was understood when the system began to incorporate the changes made during World War II.²³¹ It also has extensive discussions of the substance of the compensation benefits,²³² but offers little of use in understanding the operation of the system.

Finally, in 1954, Robert T. Kimbrough and Judson B. Glen published the second edition of *American Law of Veterans: An Encyclopedia of the Rights and Benefits of Veterans, and Their Dependents, Arising from Service During World War II, the Korean Conflict and Later, with Statutes, Regulations, Forms, and Procedures*.²³³ As the subtitle indicates, this nearly 1,400-page volume exhaustively reviews the black letter law and procedure as they existed then,²³⁴ and includes detailed footnotes identifying the governing authorities.²³⁵ Accordingly, this volume is an exceptional resource for anyone seeking a detailed understanding of the interpretation and implementation of nearly any provision that existed at the time.

III. THE ADJUDICATION DIVISIONS OF VA

Although both VA's political origins and the texts of authorities are important, statutes, regulations, and other authorities do not execute themselves. To fully appreciate the context in which they operate, it is necessary to look at the

²²⁹ See DILLINGHAM, *supra* note 25.

²³⁰ *Id.* at viii, xi.

²³¹ *Id.* at 1-20.

²³² See *id.* at 94-105.

²³³ ROBERT T. KIMBROUGH & JUDSON B. GLEN, *AMERICAN LAW OF VETERANS: AN ENCYCLOPEDIA OF THE RIGHTS AND BENEFITS OF VETERANS, AND THEIR DEPENDENTS, ARISING FROM SERVICE DURING WORLD WAR II, THE KOREAN CONFLICT AND LATER, WITH STATUTES, REGULATIONS, FORMS, AND PROCEDURES* (2d ed. 1954).

²³⁴ See *id.* at viii-xxxi ("Detailed Outline" of contents).

²³⁵ *E.g., id.* at 44-45 ("Filing and Verification of Claims").

administrative bodies that implement them. This section moves beyond examination of the governing law and its origins to consider the development of the bodies that were tasked with applying that law during the relevant time period.

Today, veterans' benefits claims are adjudicated by an essentially two-tiered agency process.²³⁶ They are initially decided by ROs, and disappointed claimants may appeal to the BVA.²³⁷ As described below, both of these bodies originated between World War I and World War II, as part of this key period of legislative developments.

A. Regional Offices

The story of the RO system begins with the creation of the Veterans' Bureau in 1921. As discussed above, the Veterans' Bureau had been created by the consolidation of the Bureau of War Risk Insurance, the Public Health Service Hospitals, and the Federal Board of Vocational Education.²³⁸ Its initial organizational structure consisted of a Central Office in Washington, D.C., and fourteen district offices.²³⁹ The director was also authorized to create such sub-districts as required,²⁴⁰ and by 1924, seventy-three sub-district offices had been added.²⁴¹ However, these had been distributed more in response to political pressure than actual need.²⁴² Even worse, little central authority was actually exercised

²³⁶ Although judicial review did not exist historically, VA decisions may now be appealed from the agency to federal courts of appeals. See James D. Ridgway, *Why So Many Remands?: A Comparative Analysis of Appellate Review by the United States Court of Appeals for Veterans Claims*, 1 VETERANS L. REV. 113 (2009) (discussing how benefits decisions are reviewed by the Veterans Court).

²³⁷ This is a bit of an oversimplification. Intermediate review at the RO level is possible through a review by a Decision Review Officer and claims remanded by the BVA may be processed by the Appeals Management Center rather than one of the traditional ROs. 38 C.F.R. § 3.2600 (2011); Ridgway, *supra* note 9, at 290-91.

²³⁸ See *supra* notes 38-43 and accompanying text; see also VA ORGANIZATIONAL HISTORY 1776-1994, *supra* note 21, at 19.

²³⁹ VA ORGANIZATIONAL HISTORY 1776-1994, *supra* note 21, at 19.

²⁴⁰ WEBER & SCHMECKEBIER, *supra* note 21, at 224-25.

²⁴¹ VA ORGANIZATIONAL HISTORY 1776-1994, *supra* note 21, at 20.

²⁴² WEBER & SCHMECKEBIER, *supra* note 21, at 219 (citing Veterans' Bureau, ANNUAL REPORT 5 (1923)).

due to defective planning and organization.²⁴³ Accordingly, Director Hines suggested a substantial reorganization during the congressional investigation into the problems of Forbes's tenure.²⁴⁴

At Hines's recommendation, the World War Veterans Act of 1924 authorized the replacement of the district system with up to 100 ROs, and 54 ROs were established by an order issued on August 28, 1924.²⁴⁵ The number of ROs has fluctuated over time. After World War II, the number increased substantially, before being contracted back to sixty-seven in 1955.²⁴⁶

The process used to decide claims at the RO level developed at the same time. In 1924, Director Hines established rating boards within the ROs for adjudicating claims. Pursuant to Regulation 74, rating boards were composed of five members: a claims examiner, a claims reviewer, a vocational specialist, and two "general medical referees" (one of whom was required to be a general medical examiner).²⁴⁷ The medical examiner was responsible for basic examinations of claimants and for referring claimants to appropriate specialists for examination when necessary.²⁴⁸

In 1928, the five-member boards were replaced by a system of three-member boards: comprised of a claims specialist, an occupational specialist, and a medical specialist.²⁴⁹

²⁴³ *Id.*

²⁴⁴ *See id.* at 219-20.

²⁴⁵ *Id.* at 225; VA ORGANIZATIONAL HISTORY 1776-1994, *supra* note 21, at 20; BVA HISTORY 1933-1984, *supra* note 196, at 6.

²⁴⁶ VA ORGANIZATIONAL HISTORY 1776-1994, *supra* note 21, at 43.

²⁴⁷ Veterans' Bureau Regulation No. 74 (1924), *in* REGULATIONS AND PROCEDURE, *supra* note 162, at 132. For more details on the organization of the ROs in this era, see Veterans' Bureau General Order No. 285-A (1927), *in* REGULATIONS AND PROCEDURE, *supra* note 162, at 923-24.

²⁴⁸ Veterans' Bureau Regulation No. 74 (1924), *in* REGULATIONS AND PROCEDURE, *supra* note 162, at 132.

²⁴⁹ Veterans' Bureau Regulation No. 187, § 7151 (1928), *in* REGULATIONS AND PROCEDURE, *supra* note 162, at 211. Detailed instructions for decision making by these boards can be found in Veterans' Bureau General Order No. 279-A (1928), *in* REGULATIONS AND PROCEDURE, *supra* note 162, at 909-11.

The early editions of the codified regulation establishing these boards refer to them as three-member groups, but do not define their membership.²⁵⁰ In any event, the report by Eisenhower's comptroller indicates that, in 1954, RO rating boards still consisted of three members, one of whom was a physician.²⁵¹

B. The Board of Veterans' Appeals

During the earliest incarnations of the modern system, a variety of appellate review schemes were tried. Initially, after the Veterans' Bureau was established in 1921, appeals could be made to the district manager.²⁵² In May 1922, district boards of appeals were established, consisting of three members.²⁵³ Two months later, another regulation was issued that permitted appeals from the district boards to the director of VA.²⁵⁴ A year later, that system was replaced by a Central Board of Appeals in Washington, D.C.,²⁵⁵ and a revised system of district boards.²⁵⁶ However, the new district board system was abolished a year after that, when the handling of claims was transferred to the five-person rating boards discussed above.²⁵⁷ In 1926, the Central Board was decentralized into five regional boards, although each of those boards retained the title of a "central board of appeals."²⁵⁸ At the same time, a separate appeal group

²⁵⁰ See 38 C.F.R. § 3.5(c) (1949); *id.* § 2.1005(c) (1939).

²⁵¹ See COMPTROLLER REPORT, *supra* note 82, at 21. The Veterans Court has recognized that physicians regularly participated in decisions prior to judicial review. See *MacKlem v. Shinseki*, 24 Vet. App. 63, 70 (2010).

²⁵² BVA HISTORY 1933-1984, *supra* note 196, at 6.

²⁵³ Veterans' Bureau Regulation No. 21 (1922), in REGULATIONS AND PROCEDURE, *supra* note 162, at 97-99.

²⁵⁴ Veterans' Bureau Regulation No. 21-A (1922), in REGULATIONS AND PROCEDURE, *supra* note 162, at 99.

²⁵⁵ Veterans' Bureau Regulation No. 42 (1923), in REGULATIONS AND PROCEDURE, *supra* note 162, at 113.

²⁵⁶ Veterans' Bureau Regulation No. 44 (1923), in REGULATIONS AND PROCEDURE, *supra* note 162, at 114-15.

²⁵⁷ Veterans' Bureau Regulation No. 74 (1924), in REGULATIONS AND PROCEDURE, *supra* note 162, at 132-34.

²⁵⁸ Veterans' Bureau Regulation No. 132 (1926), in REGULATIONS AND PROCEDURE, *supra*

was established in Washington, D.C., to hear appeals of claims handled directly by VA's Central Office.²⁵⁹

The BVA we know today was established on July 28, 1933, by Executive Order 6230,²⁶⁰ after Congress authorized FDR to create boards to review veterans' claims.²⁶¹ The BVA was patterned after the Board of Tax Appeals, the precursor to today's United States Tax Court.²⁶² The order included Veterans Regulation No. 2(a), which provided in part for "one review on appeal to the Administrator."²⁶³ The BVA was originally authorized to have a Chairman, Vice-Chairman, and no more than fifteen associate members.²⁶⁴ Six months later, the size of the BVA was doubled by executive order.²⁶⁵

From 1933 to 1961, BVA was organized into three-member sections.²⁶⁶ During this era, BVA contained both attorney and physician members.²⁶⁷ The sections were supported

note 162, at 170-71.

²⁵⁹ Veterans' Bureau Regulation No. 133 (1926), in REGULATIONS AND PROCEDURE, *supra* note 162, at 171-72.

²⁶⁰ Veterans' Regulation No. 2(a), pt. II, Exec. Order No. 6230 (July 28, 1933). Even after the BVA was established, other appellate bodies were occasionally established and disbanded. A separate board, the Veterans Tuition Appeals Board, was established as part of the G.I. Bill. BVA HISTORY 1933-1984, *supra* note 196, at 8. It was replaced by the Veterans Education Appeals Board (VEAB). Veterans' Education and Training Amendments of 1950, Pub. L. No. 81-610, § 2, 64 Stat. 336, 339. The VEAB was disbanded in 1957 after its resident member advised Congress that the board had completed its mission. BVA HISTORY 1933-1984, *supra* note 196, at 8.

²⁶¹ Independent Offices Appropriation Act of 1934, Pub. L. No. 73-78, § 20, 48 Stat. 283, 309 (1933).

²⁶² BVA HISTORY 1933-1984, *supra* note 196, at 7.

²⁶³ Veterans Regulation 2(a), pt. II, § II, Exec. Order No. 6230 (July 28, 1933). For a discussion of the modern importance of this right, see Ridgway, *supra* note 9, at 276-78.

²⁶⁴ BVA HISTORY 1933-1984, *supra* note 196, at 7.

²⁶⁵ VA ORGANIZATIONAL HISTORY 1776-1994, *supra* note 21, at 27.

²⁶⁶ BVA HISTORY 1933-1984, *supra* note 196, at 11.

²⁶⁷ *Id.* Physicians continued to be members of the BVA until the Veterans Court's decision in *Colvin v. Derwinski*, 1 Vet. App. 171 (1991), *overruled on other grounds*, *Hodge v. West*, 155 F.3d 1356 (Fed. Cir. 1998). 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, 26 (1994).

by a “Consultant Service” of staff attorneys and doctors who prepared tentative decisions for cases before they were assigned to sections.²⁶⁸ Uniformity was maintained through regular staff meetings, and “[m]any of [BVA’s] early decisions established precedents which, in time, became agency policy and were formalized as regulations.”²⁶⁹ However, BVA’s role in formulating policy was terminated in the 1960s to preserve the BVA’s independence as an adjudicatory body.²⁷⁰

IV. THE ADJUDICATION PROCESS

As anyone familiar with the veterans’ benefits system today understands, the “veteran friendly” adjudication system has become a lengthy process full of detailed requirements designed to ensure that reasonable steps are taken to assist claimants and to develop claims before making a decision on the merits.²⁷¹ Although the VCCA²⁷² introduced some relatively new aspects to the process, particularly with its detailed notice provisions, that Act largely codified and elaborated a development process that had deep historical roots.²⁷³ This Part considers the current steps in the claims adjudication process in sequential order, and discusses some of the relevant past authorities that are useful in understanding the original spirit and operation of the law.

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 7.

²⁷⁰ *Id.* at 8.

²⁷¹ See generally Ridgway, *supra* note 9 (explaining the veterans’ benefits system in the context of judicial review).

²⁷² Pub. L. No. 106-475, 114 Stat. 2096. The Act replaced the duty to assist provisions of 38 U.S.C. § 5107 (2000). That statute, in turn, had been copied from 38 C.F.R. § 3.103 (1988) without intending to enact a substantive change. See Ridgway, *supra* note 9, at 263-64. That version of the regulation was first enacted in 1972. See Due Process and Appellate Rights, 37 Fed. Reg. 14,780 (July 25, 1972).

²⁷³ Even minor administrative details can be traced to the earliest days of the modern system. For example, the convention of using the letter “C” to denominate compensation claims file numbers began with the first field order issued for the newly established Veterans’ Bureau in 1921. See Veterans’ Bureau Field Order No. 1, para. 5 (1921), in REGULATIONS AND PROCEDURE, *supra* note 162, at 1201 (“The following letters when prefixed to a number shall indicate the following file numbers: . . . C — Compensation claim N[umber] . . .”).

A. Applications and Claims

The claims process begins when a claimant applies for benefits. One of the more difficult aspects of veterans' law is determining exactly what constitutes a claim. Then, as now, there was an official application form, which during this era was Form 526.²⁷⁴ However, this form was not always used or required. Informal claims were recognized in VA's first regulations, which provided that "[a]ny communication from or action by a claimant or his duly authorized representative, which clearly indicates an intent to apply for benefits . . . may be considered an informal claim for compensation or pension."²⁷⁵ The regulation allowed for a formal application to relate back to the informal claim if it were filed "within a reasonable time."²⁷⁶ In close cases, "where the probability of an informal claim appears to be indicated, but the facts are too obscure or complicated for determination," the regulation provided for review by the director of the relevant service.²⁷⁷

When the second edition of the regulations was published, it required an informal application to "specifically refer to and identify the particular benefit sought."²⁷⁸ It also changed the language allowing for a reasonable time period for submitting a formal application, to a bright-line requirement that the formal application be received within one year.²⁷⁹ The revised regulations in 1956 preserved the changes made in 1949, and dropped the provision mandating special review in obscure or complicated cases.²⁸⁰

²⁷⁴ See, e.g., Veterans' Bureau Regulation No. 2, para. 2 (1921), in REGULATIONS AND PROCEDURE, *supra* note 162, at 73; KIMBROUGH & GLEN, *supra* note 233, at 705.

²⁷⁵ 38 C.F.R. § 2.1027 (1939).

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.* § 3.27 (1949).

²⁷⁹ *Id.*

²⁸⁰ *Id.* (1956).

B. Forms of Evidence

Once a claim has been filed, it must be supported. The need for evidence to support claims has been a perennial issue for the benefits system and one in which there is more continuity between the pre-modern and current systems.²⁸¹ The three key types of evidence frequently discussed in early modern authorities are affidavits, live testimony, and opinions provided by VA's medical service. This section discusses the first two while VA medical opinions are discussed in the context of the duty to assist in the next section.

In the early modern system, affidavits could be used to document the relevant in-service injury or disease, much as “buddy” statements are used today. For example, a Veterans’ Bureau field order from 1921 allows for claims to be supported by affidavits from “(a) [t]he medical officer or officers who treated the claimant during the period he was in active service; (b) a commissioned officer of claimant’s command; or (c) two or more claimant’s comrades.”²⁸² Affidavits could also be submitted from the claimant’s physician, and the Veterans’ Bureau did not always strictly apply the requirement that affidavits be made

²⁸¹ For example, an official 1898 treatise on veterans’ claims observes:

As a general rule it may be stated that lay testimony when unsupported by the record or by medical evidence, and dated years after the discharge of the soldier, can not be accepted as proof of service origin of obscure diseases. To show origin in the service, medical evidence must generally be produced; but there is no established rule on this subject, the circumstances surrounding these cases rendering it impracticable to adopt one.

COMMISSIONER OF PENSIONS, A TREATISE ON THE PRACTICE OF THE PENSION BUREAU GOVERNING THE ADJUDICATION OF ARMY AND NAVY PENSIONS 28 (1898), *available at* <http://archive.org/stream/cu31924030742831#page/n3/mode/2up>. Over a century later, the United States Court of Appeals for the Federal Circuit found it useful to articulate much the same conclusion. *See Jandreau v. Nicholson*, 492 F.3d 1372, 1377 n.4 (Fed. Cir. 2007) (holding that a layperson can be competent to establish matters capable of lay perception, such as a broken leg, but not a form of cancer).

²⁸² Veterans’ Bureau Field Order No. 22 (1921), *in* REGULATIONS AND PROCEDURE, *supra* note 162, at 1209.

under oath in such situations.²⁸³ At least by the end of the early modern era, VA published pamphlets explaining how affidavits should be drafted.²⁸⁴

Evidence was also clearly taken through hearings, although specific procedures were not ordinarily detailed. A claimant had an explicit right to appear before the district appeal boards established in 1922²⁸⁵ and the central board of appeals established in 1923.²⁸⁶ A 1924 regulation authorized the issuance of subpoenas for witnesses, along with reimbursement for their travel expenses.²⁸⁷ The 1928 order governing RO rating boards states that “[i]n personal appearance cases, [the medical rating specialist] will make physical examination of the claimant” and “[i]nterrogate the claimant in connection with the medical questions involved in the determination of a proper rating.”²⁸⁸ The first version of the codified regulations for Title 38 required that all evidence be given under oath, including all testimony by claimants, representatives, and witnesses “appearing before any rating or appellate body for the purpose of presenting oral testimony.”²⁸⁹ The BVA first began holding hearings prior to decisions in the 1940s.²⁹⁰ These included field hearings by “Traveling Sections,” which were recorded.²⁹¹

²⁸³ General District Manager Letter No. 87 (1924), in REGULATIONS AND PROCEDURE, *supra* note 162, at 1982. The decision to relax the technical requirements for evidence from doctors may be related to VA’s perpetual concern with maintaining a general working relationship with the private medical profession. See, e.g., Veterans’ Bureau Medical Service Circular No. 403 (1926), in REGULATIONS AND PROCEDURE, *supra* note 162, at 1708-09 (addressing “Cooperation with the Medical Profession”).

²⁸⁴ KIMBROUGH & GLEN, *supra* note 233, at 46.

²⁸⁵ Veterans’ Bureau Regulation No. 21, para. 4 (1922), in REGULATIONS AND PROCEDURE, *supra* note 162, at 98.

²⁸⁶ Veterans’ Bureau Regulation No. 42, § 7138 (1923), in REGULATIONS AND PROCEDURE, *supra* note 162, at 113.

²⁸⁷ Veterans’ Bureau Regulation No. 88, §§ 12201, 12204 (1924), in REGULATIONS AND PROCEDURE, *supra* note 162, at 141-42.

²⁸⁸ Veterans’ Bureau General Order No. 279-A, para. 8 (1928), in REGULATIONS AND PROCEDURE, *supra* note 162, at 911.

²⁸⁹ 38 C.F.R. § 2.1030 (1939).

²⁹⁰ BVA HISTORY 1933-1984, *supra* note 196, at 7-8.

²⁹¹ *Id.*

C. The Duty to Assist

Traditionally, VA has provided some level of assistance to the claimant in gathering the necessary evidence before proceeding to decide a claim. An early Veterans' Bureau General Order specified:

When in the course of reviewing a case it is found that information which may substantiate the contentions of the claimant can be obtained from third parties or that information already furnished by third parties may be supplemented by such parties in favor of the claimant, the parties whom the file indicates may furnish such information shall be communicated with by the bureau and proper opportunity given them to submit the evidence which may permit action favorable to the claimant.²⁹²

The General Order then detailed a specific procedure for obtaining information from other government agencies by communicating through VA's Central Office.²⁹³ A regulation issued that same year provided for the issuance of subpoenas requiring the "production of books, papers, documents, and other evidence."²⁹⁴

The regulations issued by FDR through executive orders are silent as to VA's duties in the section defining claims procedures.²⁹⁵ The first codified regulations indicated that claims should be "develop[ed] in accordance with established

²⁹² Veterans' Bureau General Order No. 293, para. 4 (1924), in REGULATIONS AND PROCEDURE, *supra* note 162, at 943.

²⁹³ *Id.*

²⁹⁴ Veterans' Bureau Regulation No. 88 (1924), in REGULATIONS AND PROCEDURE, *supra* note 162, at 141.

²⁹⁵ See Veterans Regulation No. 2, pt. II, Exec. Order No. 6090 (Mar. 31, 1933) ("Procedure for Filing Claims and Review of Claims on Appeal").

procedure,”²⁹⁶ and that a medical examination was authorized if, after development, the evidence “indicat[ed] the reasonable probability of a valid claim.”²⁹⁷ The second edition of the regulations used the same language, but elaborated:

All reasonable assistance will be extended a claimant in the prosecution of his claim and all sources from which information may be elicited should be thoroughly developed prior to the submission of the case to the rating board. The application of this policy should not be highly technical and rigid. . . . Every legitimate assistance will be rendered a claimant in obtaining any benefit to which he is entitled and he will be given every opportunity to substantiate his claim. Information and advice to claimants will be complete and will be given in words that the average man can understand.²⁹⁸

However, by 1956, the section requiring development and the provision of all reasonable assistance had been deleted, leaving only the section authorizing medical examinations if indicated.²⁹⁹

Historically, the key aspect of VA’s assistance has involved gathering the medical evidence necessary to decide a claim. VA’s original regulations addressed medical evidence fairly extensively. They acknowledged that opinions from private physicians sometimes “fail adequately to diagnose the disease or injury involved, the period and nature of the treatment rendered, or other facts necessary to enable the Veterans Administration to determine whether the care and treatment is associated with

²⁹⁶ 38 C.F.R. § 2.1075 (1939).

²⁹⁷ *Id.* § 2.1076.

²⁹⁸ *Id.* § 3.75(a) (1949).

²⁹⁹ *See id.* § 3.76 (1956).

the alleged service incurred disease or injury.”³⁰⁰ The regulation acknowledged that “[i]t would be unfair to the claimant arbitrarily to dismiss these statements as inconclusive without first undertaking to obtain from the physician or other person additional information, if possible.”³⁰¹ Therefore, “[i]t is to the mutual interest of the claimant and [VA] to clarify any indefinite, inconclusive or incomplete statement through correspondence, and whenever necessary through personal contact, with the physician or other person submitting the statement.”³⁰² Accordingly, the regulation required VA to seek clarification “if such action is considered necessary to an intelligent and equitable adjudication of the claim,” but noted that “it is not intended that physicians’ or laymen’s statements will be routinely subjected to investigation.”³⁰³ This language was kept verbatim in the second edition of the regulations in 1949.³⁰⁴ However, it disappeared completely from the 1956 version, and was not replaced by any comparable provision addressing private medical opinions or any VA duty to clarify evidence submitted.³⁰⁵

When private medical opinions were insufficient and the issues involved were beyond the general medical knowledge of the physicians on the rating boards, medical opinions were ordinarily obtained from VA’s medical service. Detailed instructions to the medical service on conducting examinations were issued by circular.³⁰⁶ Furthermore, an early order specified that “[c]laimants also should be furnished facts by medical examiners, such as might be disclosed by a private physician to a patient, which may enable them more closely to cooperate

³⁰⁰ *Id.* § 2.1031(a) (1939).

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Id.* § 2.1031(b).

³⁰⁴ *Id.* § 3.31(a), (b) (1949).

³⁰⁵ *See id.* pt. 3 (1956).

³⁰⁶ Medical Service Circular No. 267-B (1928), in REGULATIONS AND PROCEDURE, *supra* note 162, at 1580-83.

with the bureau.”³⁰⁷ However, as today, the process of obtaining complete and detailed opinions did not always go smoothly.³⁰⁸ As noted above, the first edition of *VA’s Manual for Medical Examiners* acknowledges the difficulty VA had in obtaining adequate medical opinions even from its own physicians.³⁰⁹

D. Weighing of Evidence

Once the evidence has been gathered, it must be weighed. The various incarnations of VA have provided a variety of guidance on this issue. The first rating boards established by the Veterans’ Bureau were instructed that “every member of the board shall give equal consideration to the facts and opinions presented by every other member, and evidence of fact from all sources, lay and professional, shall be equally weighed.”³¹⁰ It also specified that “[a]ll decisions shall be made according to the preponderance of the evidence.”³¹¹ This language was retained in the new instructions after the boards were reorganized in 1928.³¹²

The first version of the codified regulations had a specific provision presuming the credibility of evidence in support of claims:

Full credence shall be given to the evidence submitted in proper form in support of claims for disability compensation, unless there is sound basis for doubt as to the conditions set forth in the

³⁰⁷ Veterans’ Bureau General Order No. 293-B (1925), in *REGULATIONS AND PROCEDURE*, *supra* note 162, at 943.

³⁰⁸ In 1928, Director Hines issued a circular addressing the problem that the opinions provided often failed “to reconcile properly all pertinent medical facts or findings,” leaving the rating boards to make their own medical determinations in violation of the letter and the spirit of the law. Director’s Office Circular No. 491, para. 3, in *REGULATIONS AND PROCEDURE*, *supra* note 162, at 1768.

³⁰⁹ See *supra* notes 206-07 and accompanying text.

³¹⁰ Veterans’ Bureau General Order No. 279, para. 8 (1924), in *REGULATIONS AND PROCEDURE*, *supra* note 162, at 908.

³¹¹ *Id.*

³¹² See Veterans’ Bureau General Order 279-A, para. 10 (1928), in *REGULATIONS AND PROCEDURE*, *supra* note 162, at 911.

physician's or layman's statement, by reason of other conflicting evidence or otherwise. A mere belief that a statement or affidavit is made from memory, without some sound basis therefor, is not sufficient ground for questioning its integrity.³¹³

This provision was retained in the 1949 version of the regulations,³¹⁴ and again in 1956.³¹⁵

The statutory provision now located in 38 U.S.C. § 1154, requiring that VA accept lay evidence consistent with the circumstances of combat, was added on December 20, 1941, in the immediate aftermath of the attack on Pearl Harbor.³¹⁶ The simple, half-page act contains no other provisions.³¹⁷ The Senate report accompanying the legislation makes clear that the concept was not new. Rather, the legislation was intended to “place in brief legislative form the policy of the [VA] governing determination of service connection, with particular reference to determinations of fact pertaining to those persons who engaged in combat with the enemy.”³¹⁸ This was apparently necessary because a number of hearings earlier in the year showed that “it was difficult if not impracticable, to reconcile the stated policy of [VA] as contained in regulations and instructions with the disallowances of service connection in individual cases, particularly those of veterans who served in combat.”³¹⁹

The second edition of the regulations implemented the provisions of 38 U.S.C. § 1154.³²⁰ In the 1956 revision, an additional sentence was included, providing that “[t]he proximity

³¹³ 38 C.F.R. § 2.1031(c) (1939).

³¹⁴ *Id.* §§ 3.30(a), 3.31(c) (1949).

³¹⁵ *Id.* §§ 3.30(a), 3.31(a) (1956).

³¹⁶ Pub. L. No. 77-361, 55 Stat. 847 (1941).

³¹⁷ *Id.*

³¹⁸ S. REP. 902, 77th Cong., at 2 (Dec. 12, 1941).

³¹⁹ *Id.*

³²⁰ 38 C.F.R. § 3.31(d) (1949).

of the manifestation of a disability to the date of discharge from service and the evidentiary showing of the circumstances of imprisonment or continuity of significant symptomatology will be given careful consideration.”³²¹ This appears to be one of the first, if not the first, manifestation of the continuity-of-symptomatology provisions that now appear in 38 C.F.R. § 3.303(b).³²²

E. Abandonment

Another modern issue with identifiable origins in the early modern system is the abandonment of claims. The 1923 adjudication manual provided that if no medical examination of the claimant had been obtained, and “every effort has been exhausted to secure such examination, the claim may be disallowed and filed.”³²³ VA’s initial codified regulations provided that a claim would be abandoned if “no response has been made within 1 year after [a] request for . . . evidence or order for physical examination.”³²⁴ Although the section was moved in 1949, it was left largely unchanged,³²⁵ and continued in the same form in 1956.³²⁶

F. Decisions

If a claim has not been abandoned, then once a decision has been made, the claimant must be informed. Precisely what information should be conveyed was a concern in the early modern era, just as it is today. The 1923 adjudication manual specified a particular form to be used when denying claims, and explained that “the proper terms should be stricken out in the center of the form showing the nature of the claim to be disallowed; the reason

³²¹ *Id.* § 3.31(b) (1956).

³²² The version of that regulation that exists today was added in 1961. *See* 26 Fed. Reg. 1561, 1579-80 (Feb. 24, 1961).

³²³ Veterans’ Bureau General Order No. 175, para. 84 (1923), *in* REGULATIONS AND PROCEDURE, *supra* note 162, at 630.

³²⁴ 38 C.F.R. § 2.1028 (1939).

³²⁵ *Id.* § 3.28 (1949).

³²⁶ *Id.* (1956).

of disallowance should be given in the space provided therefor; and . . . also the disease or injury causing alleged disability should be stated.”³²⁷ A 1924 General Order specified:

When letters are written to the claimant or their duly authorized representatives in response to their requests for action, the bureau’s reasons for the action taken shall be embodied therein. In other words, advice to claimants and beneficiaries of the action of the bureau shall be so worded that the average man can understand why such action was taken; what is lacking in the evidence in file, and what additional evidence is needed to substantiate the claim in the event the action is unfavorable.³²⁸

A subsequent amendment to that order specified that notice could be provided in person if a decision were made at a hearing.³²⁹

The first codified version of VA’s regulations provided that claimants would be “advised upon completion of adjudicative action based upon the decision, of the provisions thereof, and his entitlement or non-entitlement thereunder and of his right of appeal, and of the time within which appeal must be taken.”³³⁰ The same regulation continued into the 1956 edition, except for the addition of a sentence providing that the failure to receive notice would not extend the time for filing an appeal.³³¹

³²⁷ Veterans’ Bureau General Order No. 175, para. 145 (1923), in REGULATIONS AND PROCEDURE, *supra* note 162, at 635.

³²⁸ Veterans’ Bureau General Order No. 293, para. 3 (1924), in REGULATIONS AND PROCEDURE, *supra* note 162, at 942.

³²⁹ Veterans’ Bureau General Order No. 293-B, para. 1 (1925), in REGULATIONS AND PROCEDURE, *supra* note 162, at 943.

³³⁰ 38 C.F.R. § 2.1007 (1939).

³³¹ *Id.* § 3.7 (1956).

G. Appellate Process

BVA's rules of practice were first codified by regulation in 1964,³³² and the current chapters 19 and 20 of the C.F.R., governing appellate procedure, were not added until 1992.³³³ Prior to that, regulations governing BVA did little more than define its jurisdiction.³³⁴ The essential elements of the Notice of Disagreement, Statement of the Case, and Substantive Appeal that we know today were added in 1962.³³⁵ Therefore, the central features of modern appellate procedure post-date the period covered by this Article. However, some of the characteristics of the current process can be found in the procedures used prior to 1962.

A six-month time period for appealing rating decisions was created by regulation in 1925.³³⁶ The General Order establishing procedures for the appellate system established in 1926 contains traces of the current process and provides that, “[s]hould a claimant or his representative express dissatisfaction with the decision, or indicate a desire to appeal, the regional manager shall furnish to such claimant or his representative a certified copy of the findings of fact made by the claims and rating board.”³³⁷ It also provided that, “[i]n the event of an appeal, no appellate body shall receive or consider any evidence which has not been received and considered by the claims and rating board in the first instance.”³³⁸

³³² See BVA HISTORY 1933-1984, *supra* note 196, at 9; Miscellaneous Amendments, 29 Fed. Reg. 1461, 1464-69 (Jan. 29, 1964).

³³³ See Appeals Regulations; Rules of Practice, 57 Fed. Reg. 4088, 4104-28 (Feb. 3, 1992).

³³⁴ See, e.g., 38 C.F.R. ch. 30 (1939); *id.* ch. 19 (1949); *id.* (1956).

³³⁵ Act of Sept. 19, 1962, Pub. L. No. 87-666, 76 Stat. 553. The legislative history indicates that these procedures were largely copied from the existing British system for adjudicating similar claims. See H.R. REP. NO. 87-1454, at 3-4 (1962).

³³⁶ Veterans' Bureau Regulation No. 97 (1925), in REGULATIONS AND PROCEDURE, *supra* note 162, at 149.

³³⁷ Veterans' Bureau General Order No. 349, para. 6 (1926), in REGULATIONS AND PROCEDURE, *supra* note 162, at 1085.

³³⁸ *Id.* para. 5.

An appellant had a reasonable amount of time, defined as “[o]rordinarily 30 days” to provide a written statement “setting forth any errors in the findings of fact”³³⁹ or explicitly concurring in the facts, and “stat[ing] specifically the error of law or misapplication of regulations.”³⁴⁰ An appellant was then given the opportunity to submit additional evidence and receive a new decision from the RO.³⁴¹ The regional manager was then required to interview the appellant and review the case before the appeal was finalized and forwarded.³⁴² The Executive Order creating the BVA again specified that appeals taken to it had to be filed within six months of the original decision.³⁴³

H. Reopening

The Bureau of War Risk Insurance had a General Order addressing the “reopening of cases” without additional evidence or examination if an error were discovered.³⁴⁴ The order also implied that the submission of additional evidence could justify the reconsideration of a decision.³⁴⁵ The Veterans’ Bureau had a General Order explicitly allowing for the reopening of claims “[u]pon receipt of additional evidence.”³⁴⁶

The Economy Act flatly stated that a finally disallowed claim “may not thereafter be reopened or allowed.”³⁴⁷ However, FDR issued an Executive Order that allowed for reopening with “new and material evidence in the form of official reports from the proper service department.”³⁴⁸

³³⁹ *Id.* para. 6, in REGULATIONS AND PROCEDURE, *supra* note 162, at 1085-86.

³⁴⁰ *Id.* para. 7, in REGULATIONS AND PROCEDURE, *supra* note 162, at 1086.

³⁴¹ *Id.* para. 8.

³⁴² *Id.* para. 9.

³⁴³ Exec. Order No. 6230, pt. II, § III (July 28, 1933).

³⁴⁴ Bureau of War Risk Insurance General Order No. 84 (1921), in REGULATIONS AND PROCEDURE, *supra* note 162, at 325.

³⁴⁵ *Id.*

³⁴⁶ Veterans’ Bureau General Order No. 255 (1924), in REGULATIONS AND PROCEDURE, *supra* note 162, at 731-32.

³⁴⁷ Act of Mar. 20, 1933, Pub. L. No. 73-2, 48 Stat. 8, 10.

³⁴⁸ Exec. Order No. 6230, pt. II, § III.

The first edition of the codified regulations permitted reopening with “[n]ew and material evidence, relating to the same factual basis . . . as that of the disallowed claim, submitted subsequent to the final disallowance of the claim, will constitute a new claim and have all the attributes thereof.”³⁴⁹ A separate regulation explicitly defined “new and material evidence” as evidence that pertains to the “general question or point in issue” and has “a legitimate and effective influence or bearing on the decision in question.”³⁵⁰ It also explicitly excluded “[e]vidence which is solely cumulative or repetitious in character.”³⁵¹ Both of these regulations persisted through the 1956 edition.³⁵²

I. Clear and Unmistakable Error

Finally, the early modern system allowed for final rating decisions to be collaterally attacked. The original versions of the authorities addressing the correction of clear and unmistakable errors were effective date provisions. Regulation 57 of the Bureau of War Risk Insurance is an effective date rule that includes an exception for “exceptional and unusual cases wherein there is a clear and unmistakable proof that a glaring error . . . has occurred.”³⁵³ This language was adopted verbatim by the Veterans’ Bureau in 1921.³⁵⁴ A 1923 Regulation added language allowing for an exception to the stated effective date rules when “the facts clearly demand it and the correctness thereof is clear and unmistakable,” while also retaining the prior language as a separate provision.³⁵⁵

³⁴⁹ 38 C.F.R. § 3.1201 (1939).

³⁵⁰ *Id.* § 3.1205. For a discussion of the modern definition of “new and material” and its more recent evolution, see *Shade v. Shinseki*, 24 Vet. App. 110 (2010).

³⁵¹ 38 C.F.R. § 3.1205.

³⁵² *See id.* §§ 3.201, 3.205 (1956).

³⁵³ Bureau of War Risk Insurance Regulation No. 57, § A.I(c) (1920), in REGULATIONS AND PROCEDURE, *supra* note 162, at 55 (1930).

³⁵⁴ Veterans’ Bureau Regulation No. 4, § A.I(c) (1921), in REGULATIONS AND PROCEDURE, *supra* note 162, at 74.

³⁵⁵ Veterans’ Bureau Regulation No. 35, § 3065(b), (c) (1923), in REGULATIONS AND PROCEDURE, *supra* note 162, at 109.

The characterization of actions based upon clear and unmistakable error as revisions of prior decisions emerged not long afterward. Section 7155 of the 1928 Regulation reconstituting the rating boards empowered them to “reverse or amend a decision by the same or any other rating board where such reversal or amendment is obviously warranted by a clear and unmistakable error shown by the evidence in file at the time the prior decision was rendered.”³⁵⁶ The same language is found in the first edition of the C.F.R. under the provisions defining the jurisdiction of the RO rating boards.³⁵⁷ It moved to § 3.9 in the second edition and remained there for the rest of the early modern era.³⁵⁸

CONCLUSION

Ultimately, the purpose of this article is not to draw conclusions either about the nature of the early modern system or about the current one. Rather, it is simply to provide a roadmap to those who, for practical or scholarly reasons,³⁵⁹ wish to trace any feature of veterans’ law with early-modern origins back to its original source. Although this overview cannot capture every detail of the development of veterans’ law in the early modern era, it should identify enough markers that anyone conducting research into a specific aspect of the law will have a fighting chance of locating what they seek.

³⁵⁶ Veterans’ Bureau Regulation No. 187, § 7155 (1928), in REGULATIONS AND PROCEDURE, *supra* note 162, at 211.

³⁵⁷ 38 C.F.R. § 2.1009 (1939) (“Revision of rating board decisions”).

³⁵⁸ *Id.* § 3.9 (1949).

³⁵⁹ Aside from the practical importance of this history discussed above, there are multiple scholarly approaches to legal history. *See generally* Catherine L. Fisk & Robert W. Gordon, Foreword, “*Law As . . .*”: *Theory and Method in Legal History*, 1 U.C. IRVINE L. REV. 519 (2011) (describing papers submitted for a symposium about the theory of legal history and the method by which legal historians complete their work); Christopher Tomlins, *Review Essay—The Consumption of History in the Legal Academy: Science and Synthesis, Perils and Prospects*, 61 J. LEGAL EDUC. 139 (2011) (discussing the interest in legal history in academia).

Despite its importance, the history of the veterans' benefits adjudication process is not on convenient public display. Rather, it is buried under layers of historical sediment that are not easily excavated. Without judicial review, a tremendous amount of change occurred in the veterans' claims adjudication system that was not subject to much, if any, independent scrutiny. Nonetheless, "the way things have always been done" was once an innovation. It is when a system is new that it is easiest to locate and understand the issues that drove the changes leading to its creation. Excavating this history decades after the fact is a much more difficult endeavor, but that does not make understanding the history of the system any less important.

Undoubtedly there are some details that have been permanently lost. However, there is more historical material available to understand the system than appears at first glance. Understanding this material is especially important in a system that recycles language and concepts in ways that make tracing the origins of any particular aspect more difficult than locating the enactment of a given statute or regulation. This Article begins the process of charting this murky history. What unexpected lessons may be found in this history is yet to be determined.