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Simplify, Simplify, Simplify – An Analysis of Two Decades of Judicial Review in the Veterans Benefits Adjudication System

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Simplify, Simplify, Simplify – An Analysis of Two Decades of Judicial Review in the Veterans Benefits Adjudication System

Abstract Prior to the Veterans' Judicial Review Act, the Department of Veterans Affairs existed in "splendid isolation" - meaning that the department was insulated from judicial review by statute. After the due process revolution of the 1960's and pressure from various veterans' organizations after the Vietnam war, Congress passed the Veterans' Judicial Review Act in 1988. The Act created the U.S. Court of Appeals for Veterans Claims, an article I court with exclusive jurisdiction over decisions by the Board of Veterans' Appeals. This article argues that 20 years after the Veterans' Judicial Review Act was implemented, the system has become more complex, requiring Congress to amend the VA adjudication system. Specifically, this article advocates that one of the many levels of regional office review should be eliminated in order to simplify the system and provide more timely decisions to our nation's veterans.

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I. Introduction

“Simplify, simplify, simply!”¹ In analyzing the past two decades of judicial review in the veterans benefits adjudication system, Henry David Thoreau’s declaration from his renowned work *Walden* comes to mind. Although twenty years of judicial review has, overall, proven to be a positive addition to the veterans benefits arena, it has added an extra layer of review to an already complicated system. Thus, in celebrating the twentieth anniversary of judicial review, Congress would be wise to heed Thoreau’s advice and “simplify” the many layers of review in the veterans benefits adjudication system.

In 1988, the Veterans’ Judicial Review Act (VJRA or the Act)² dramatically affected the veterans benefits adjudication system by establishing the United States Court of Appeals for Veterans Claims (CAVC), an Article I court that was enacted to provide external judicial review of decisions by the Board of Veterans Appeals (BVA or Board).³ The implementation of judicial review caused the BVA to make several significant improvements to its adjudication process, to include providing a statement of “reasons and bases” for the Board’s findings and conclusions, eliminating its panel of experts format, and refraining from using its own medical judgment in rendering Board decisions.⁴

Nonetheless, a closer look at the Department of Veterans Affairs reveals that 20 years after the VJRA was implemented, the system has become even more complex than it was prior to judicial review. Although many envisioned the newly created CAVC as stepping in to simplify

¹ Henry David Thoreau, *WALDEN* 66 (Signet Books 1949).

² The Veterans’ Judicial Review Act of 1988, Pub.L.No. 100-687, 102 Stat. 4105 (1988).

³ UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS HISTORY [hereinafter CAVC HISTORY], *available at* <http://vetapp.gov/about/History.cfm>.

⁴ Charles L. Cragin, *A Time of Transition at the Board of Veterans’ Appeals*, 38 FED. B. NEWS & J. 500, 501-02 (1991); *see also* Gilbert v. Derwinski, 1 Vet. App. 49 (1990); Colvin v. Derwinski, 1 Vet. App. 171 (1991).

the veterans benefits adjudication process,⁵ judicial review has further complicated the system due to varied effects on the BVA and the Regional Office (RO) levels of review.⁶ In this regard, most adjudicators at the RO levels are not attorneys and do not possess any formal legal training.⁷ Therefore, at the initial levels of the veterans benefits adjudication process, judicial review has not produced great improvements because those adjudicating veterans claims are not only overwhelmed by their enormous workload, but are also not properly trained in how to utilize and apply court decisions. In fact, 8 years after the implementation of judicial review, Frank Q. Nebeker, former Chief Judge of the CAVC, testified before Congress that the VA had made no “significant improvements in implementing the court’s decisions at its VAROs.”⁸ Accordingly, some scholars have argued that judicial review “put veterans in only a marginally better position than they were in before the Act.”⁹

Despite this flaw, it is unfair to say that judicial review has not produced any benefits to the veterans’ benefits adjudication system. Most importantly, judicial review has provided veterans with their “day in court,” and has brought the VA into alignment with modern notions of due process¹⁰ In addition, the quality of BVA decisions has improved, the Court has provided

⁵ James T. O’Reilly, *Burying Caesar: Replacement of the Veterans Appeals Process is Needed to Provide Fairness to Claimants*, 53 ADMIN. L. REV. 223, 248 (2001).

⁶ See BOARD OF VETERAN’S APPEALS, HOW DO I APPEAL? 3 (2002), available at <http://www.va.gov/vbs/bva/010202A.pdf>.

⁷ Jeffrey Parker, *Two Perspectives on Legal Authority Within The Department of Veterans Affairs Adjudication*, 1 VETERANS L. REV. 208, 216 (2009).

⁸ Bill Russo, *Ten Years After the Battle for Judicial Review: An Assessment*, 46-JUN FED. LAW. 26, 28 (1999), citing *Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations for 1998*, 104th Cong. (Apr. 9, 1997) (Hon. Frank Q. Nebeker, Chief Judge, witness).

⁹ Jonathan Goldstein, *New Veterans Legislation Opens the Door to Judicial Review . . . Slowly!*, 67 WASH. U. L.Q. 889, 921 (1989).

¹⁰ Laurence R. Helfer, *The Politics of Judicial Structure: Creating the United States Court of Veterans Appeals*, 25 CONN.L.REV. 155, 162 (1992) (noting that other recipients of federal benefits had the right to challenge their awards in court. See, e.g. 42 U.S.C. § 422.210 [conferring statutory right of judicial review of social security award determinations]).

a medium for debating the validity of VA regulations, and as a result, a much needed body of case law on veterans benefits issues has developed.¹¹

Thus, after two decades of judicial review, the veterans benefits adjudication system has improved, but it has also become more complex. The twentieth anniversary of judicial review provides those involved with the veterans benefits adjudication system a valuable opportunity to assess the current system, and most importantly, to simplify it. As stated above, most improvements have taken place at the BVA, and fewer improvements have taken place at the RO.¹² Although the effects of judicial review have still been felt at the RO, for example, in complying with the provisions of the Veterans Claims Assistance Act of 2000,¹³ many at the RO are simply too busy to take mind of court precedents.

This article argues that in order for judicial review to have the “profound”¹⁴ effect that it was intended to on the VA, the RO and BVA adjudication processes must be simplified so that more emphasis may be placed on decisions handed down from the CAVC. Specifically, this Article advocates that the VA should eliminate one of its many levels of review and utilize attorneys at the RO level. In this regard, the current system involves an initial rating decision¹⁵ and, if a claimant appeals that decision by filing a notice of disagreement (NOD), a statement of the case (SOC).¹⁶ Both the rating decision and the SOC are issued by non-attorney adjudicators

¹¹ See Lawrence B. Hagel & Michael P. Horan, *Five Years Under the Veterans' Judicial Review Act: The VA is Brought Kicking and Screaming Into the World of Meaningful Due Process*, 46 ME. L. REV. 43, 46 (1994); 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, 40 (1994).

¹² It should be noted however, as of February 1, 1990, 38 U.S.C. § 5104(b) was added to the law, which requires ROs to specify the evidence considered and the reasons for the disposition, similar to the “reasons and bases” requirement placed on the BVA. See also Crippen v. Brown, 9 Vet. App. 412, 420 (1996).

¹³ The Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096 (codified as amended in scattered sections of 38 U.S.C.).

¹⁴ *Effects of Judicial Review*, PARAPLEGIA NEWS, May 1993, at 47.

¹⁵ See 38 U.S.C. § 315 (West 2002 & Supp. 2008).

¹⁶ See 38 C.F.R. §§ 20.201, 20.302 (noting that a decision is appealed by filing a notice of disagreement); 38 C.F.R. § 19.29.

at the RO.¹⁷ If the case is appealed to the BVA, the case is then adjudicated de novo by attorneys at the BVA.¹⁸ Furthermore, if the Veteran is still dissatisfied with their decision, they may appeal to the CAVC.¹⁹ Thereafter, in certain limited circumstances, a veteran can appeal to the United States Court of Appeals for the Federal Circuit, and ultimately, the Supreme Court.²⁰ Therefore, in order to simplify the system, this Article proposes eliminating the SOC stage of review and regionalizing the BVA, such that a BVA decision would be issued follow the filing of a notice of disagreement. Furthermore, in order to ensure better decision making in the process, Decision Review Officers (DROs), who are usually more experienced RO non-attorney adjudicators that issue SOCs, should perform initial rating decisions.

Part II of this Article provides a history of the preclusion of judicial review in the processing of veterans benefits claims. Part III discusses the history of the VJRA, focusing on the establishment of the CAVC. Part IV analyzes the effects of judicial review within the VA over the past 20 years, to include its effects on the BVA and the RO. Part V provides recommendations as to how the effects of judicial review may further benefit the VA system by restructuring and simplifying the current veterans benefits adjudication system. Part VI provides a brief conclusion.

II. Judicial Review of VA Claims prior to the VJRA

Despite the fact that there is a “basic presumption of judicial review of administrative action[.]”²¹ prior to the passage of the VJRA, the VA stood in “splendid isolation” as the only

¹⁷ Parker, *supra* note 7, at 216.

¹⁸ *Id.*

¹⁹ 38 U.S.C. § 7252(a).

²⁰ 38 U.S.C. § 7252(c).

²¹ *Abbott Laboratories v. Gardner*, 37 U.S. 136, 140 (1967); *see also* 38 U.S.C. §211(a) (1988).

administrative agency that was exempt from judicial review.²² The first barrier to judicial review of veterans' claims was passed in 1887, when Congress provided for the specific preclusion of judicial review in cases involving veterans' pensions under the Tucker Act.²³ However, the first Congressional legislation that explicitly precluded judicial review of veterans' claims was passed in 1924, pursuant to the World War Veterans Act, which stated that decisions by the Veterans Bureau were "conclusive."²⁴ In 1930, when the Veterans Administration (the predecessor to the current Department of Veterans Affairs) was created to replace the former Veterans Bureau, Congress maintained this provision.²⁵ Shortly thereafter, the Economy Act of 1933 established a non-review clause of VA decisions.²⁶ Specifically, section five of the Act stated that VA decisions were final, and as such, no court in the United States had the authority to conduct judicial review of such decisions.²⁷ This non-review clause was codified at 38 U.S.C. § 211(a), which remained in effect in various forms until the passage of the VJRA in 1988.²⁸

Although 38 U.S.C. § 211(a) remained in effect for over 50 years, the issue of judicial review of veterans benefits claims continuously emerged during that timeframe. Beginning in 1952, the first Congressional hearings on the topic were held.²⁹ At that time, a pattern emerged that would be repeated until the passage of the VJRA some 35 years later: some veterans service organizations, as well as the VA, opposed external judicial review of VA decisions, while other

²² Robert L. Rabin, *Preclusion of Judicial Review in the Processing of Claims for Veterans' Benefits: A Preliminary Analysis*, 27 STAN. L. REV. 905 (1975).

²³ *Id.* at 907 n. 14.

²⁴ WILLIAM F. FOX, JR., *AN ANALYSIS OF THE JURISPRUDENCE, ORGANIZATION AND OPERATION OF THE NEWEST ARTICLE ONE COURT* 6 (2d ed. 1998).

²⁵ *Id.* at 6-7.

²⁶ Kenneth B. Kramer, *Judicial Review of the Theoretically Non-Reviewable: An Overview of Pre-COVA Court Action on Claims for Veterans Benefits*, 17 OHIO N.U. L. REV. 99, 100 (1990).

²⁷ *Id.*

²⁸ *Id.* n 5 (stating that "Title 38 of the United States Code generally deals with veterans' benefits. The preclusion provision of title 38 was rewritten in 1940 and 1958. Some of the 1958 language in the non-review provision was altered in 1970 in order to clarify its meaning."). See also Kim Lacy Morris, *Judicial Review of Non-Reviewable Administrative Action: Veterans Administration Benefits Claims*, 29 ADMIN. L. REV. 65 (1977).

²⁹ Hagel & Horan, *supra* note 11, at 44-45.

veterans service organizations, as well as several other organizations, such as the American Bar Association, supported external judicial review of VA decisions.³⁰ Arguments against judicial review included fears that federal courts would be overburdened by an influx of claims, that the judiciary would become entangled in complex decisions best left to agency expertise, that judicial review would result in inconsistent decisions, and that the informal, pro-claimant nature of the VA system would be lost if VA claims were taken to a more adversarial setting, such as the federal court system.³¹ In an April 23, 1959 letter, the VA summarized its position, stating

In the final analysis, the question posed by the bill is whether there is any demonstrated need for, or real benefit to be derived from, the imposition of an additional review system with its attendant delays, uncertainties, and extra expense, upon an appellate system which has functioned fairly and efficiently for 25 years. We think not.³²

Arguments in favor of judicial review included “the popular tendency to consider access to court a fundamental aspect of due process of law[,]”³³ as well as veterans’ perceived injustice with the VA system.³⁴ Further Congressional hearings considering the issue of judicial review of veterans benefits claims were also conducted in 1960, 1962, 1970, 1980, 1983 and 1986.³⁵ However, the establishment of external judicial review was hindered by a lack of agreement as to what such review would entail and what form it would take.³⁶

In the meantime, several attempts were made to challenge the provisions of 38 U.S.C. § 211(a) in Court. A series of cases from the Court of Appeals for the District of Columbia

³⁰ *Id.* at 45; citing H.R. Rep. No. 100-963, 100th Cong., 2d Sess. (1998), reprinted in U.S.C.C.A.N. 5782, at 10.

³¹ Goldstein, *supra* note 9, at 891.

³² John J. Farley, III, *The New Kid on the Block of Veterans Law*, 38 FED. B. NEWS & J. 488 (1991) (citing Judicial Review of Veterans’ Claims, 1960: Hearing on H.R. 947, 975, 1202, 3048, 4146, 5986, 8375, 9591, and 9632 Before a Special Subcomm. Of the House Comm. of Veterans’ Affairs, 86th Cong., 2d Sess. (1960), letter to the then Chairman of the House Committee on Veteran’s Affairs by the Administrator Sumner G. Whittier).

³³ Rabin, *supra* note 22, at 905.

³⁴ Hagel & Horan, *supra* note 11, at 44.

³⁵ *Id.* at 45.

³⁶ Farley, *supra* note 32, at 488.

(D.C. Circuit) held that veterans were only precluded from contesting denials of VA benefits; thus, a claimant could challenge the termination of such benefits.³⁷ In response to this line of cases, the provisions of 38 U.S.C. § 211(a) were changed in 1970 in order to further insulate the VA from judicial review.³⁸ The rationale provided for this revision to the statute was to make it “perfectly clear that Congress intends to exclude from judicial review all determinations with respect to non-contractual benefits provided for veterans and their dependents and survivors.”³⁹

Despite the 1970 revisions, in 1974, the Supreme Court heard the case of *Johnson v. Robinson*.⁴⁰ In that case, Robinson, a conscientious objector to the Vietnam War, filed a claim for VA educational benefits under the Veterans Readjustment Act of 1966.⁴¹ However, because he had performed alternate civil service rather than active duty service, his claim was denied on the basis that he did not meet the statutory “active duty” service requirements.⁴² Robinson argued that the active duty requirement was unconstitutional, asserting that the statute denied him freedom of religion and equal protection of the laws pursuant to the first and fifth amendments, respectively.⁴³ In response, the VA first argued that 38 U.S.C. §211(a) barred Robinson’s claim, and also argued that his constitutional claims were invalid.⁴⁴ Although Robinson ultimately lost his case on the merits, the Supreme Court did grant him the right to judicial review of his claim. The Supreme Court held that 38 U.S.C. § 211(a) applied only to

³⁷ *Wellman v. Whittier*, 259 F.2d 163, 168-69 (D.C. Cir. 1958) (law which precludes review of VA decisions concerning claim for benefits does not also preclude challenge to forfeiture of those benefits); *Thompson v. Gleason*, 317 F.2d 901, 907 (D.C. Cir. 1962) (same); *Tracy v. Gleason*, 379 F. 479, 473-74 (D.C. Cir. 1967) (same).

³⁸ Goldstein, *supra* note 9, at 892 n. 24 (noting that “the House report on H.R. 17958, which effected this change, specifically mentioned the three D.C. Circuit cases.” Service Connected Compensation Increase for Veterans: Report of the House Committee on Veterans’ Affairs, H.R. REP. No. 1166, 91st Cong., 2d Sess. 9-11 (1970)).

³⁹ H.R. No. 91-1166, 91st Cong. 2d Sess. (1970), reprinted in 1970 U.S. Code Cong. & Admin. News 3723, 3731.
⁴⁰ 415 U.S. 361 (1974).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

decisions of law or fact in VA benefit claims, and that in Robinson’s case, the question of law presented arose under the Constitution, not the facts or law of his VA benefits decision.⁴⁵

The Supreme Court revisited the issue of judicial review of veterans benefits decisions in 1988, when it decided *Traynor v. Turnage*.⁴⁶ In that case, a group of veterans argued that the VA, through a provision that denied benefits to primary alcoholics, violated section 504 of the Rehabilitation Act.⁴⁷ In essence, the veterans argued that 38 C.F.R. §3.301(c)(2), which categorized primary alcoholism as “willful misconduct” discriminated against the handicapped and as such, violated section 504 of the Rehabilitation Act.⁴⁸ The Supreme Court again granted judicial review of the claim, but, just as in *Robinson*, the claimants also lost on the merits.⁴⁹ Nonetheless, the Supreme Court opened the door to judicial review of veterans’ claims slightly wider by holding that the court could review a VA regulation to ensure that it complied with a non-VA statute.⁵⁰

Although the Supreme Court only made two exceptions to the VA’s non-review statute in its 55 year history, the importance of these two exceptions should not be overlooked.⁵¹ Once the door to judicial review was cracked, Congress began to examine the issue more closely.⁵² In addition, veterans continued to voice their complaints to Congress about their perceived

⁴⁵ *Id.*

⁴⁶ 485 U.S. 535 (1988).

⁴⁷ *Id.* See also 38 C.F.R. §3.301(c)(2)(1987) (defining “primary alcoholism” as alcoholism unrelated to an underlying psychiatric disorder, and labeled it as “willful misconduct.”)

⁴⁸ *Id.*

⁴⁹ *Traynor v. Turnage*, 485 U.S. 535.

⁵⁰ *Id.*

⁵¹ *But see Kramer*, *supra* note 26, (summarizing other areas where courts granted review of VA claims).

⁵² See, e.g., Pub. L. No. 87-97 (codified as 38 U.S.C. § 7104), Pub. L. No. 87-866 (codified as 38 U.S.C. §7015); Pub. L. No. 85-857 (codified as 38 U.S.C. §5110).

ineptitude of the VA and the arbitrary and unfair nature of its decision making process.⁵³ The combination of these two factors paved the way for the enactment of the VJRA.

III. The Veterans' Judicial Review Act of 1988

Although veterans and various veterans service organizations had been dissatisfied with the VA adjudication process for many years, in the 1980's, Vietnam Veterans of America (VVA) became even more so due to the fact that the VA failed to recognize many Vietnam-era veterans' claims. In particular, veterans' exposure to herbicides, such as Agent Orange, were not being accepted as a basis for VA disability benefits.⁵⁴ Thus, the VVA pushed for judicial review as way of legitimizing Vietnam-era veterans' claims, as well as a means to create a more impartial system generally.⁵⁵ In vociferously advocating for judicial review, VVA "rel[ied] on the pervasive public sentiment that every American has a right to have his or her 'day in court[.]'"⁵⁶ Indeed, VVA pointed out to both Congress and the media that groups such as illegal aliens and criminals had the right to judicial review.⁵⁷ Such realizations prompted many to wonder why veterans, "who defended our government in time of need . . . are now forced to petition that

⁵³ See, e.g. Goldstein, *supra* note 9, at 895.

⁵⁴ See JUDICIAL REVIEW OF VETERANS' AFFAIRS: HEARINGS BEFORE THE HOUSE COMM. ON VETERANS' AFFAIRS, 100TH CONG., 2D SESS. 442 (1988) at 16 (statement of Rep. Lane Evans).

⁵⁵ See HOUSE COMM. ON VETERAN'S AFFAIRS, 100TH CONG., 1ST SESS. PROCEEDINGS OF THE OF THE 41ST ANNUAL CONVENTION OF THE NATIONAL ASSOCIATION OF STATE DIRECTORS OF VETERANS AFFAIRS ON JUDICIAL REVIEW OF VA ADMINISTRATIVE DETERMINATIONS 24 (statement of Jack Powell, National Executive Director, Paralyzed Veterans of America).

⁵⁶ Laurence R. Helfer, *The Politics of Judicial Structure: Creating the United States Court of Veterans Appeals*, 25 CONN. L. REV. 155, 162 (1992).

⁵⁷ *Id.*

government to gain equal access to the same fundamental rights that [they] fought to secure for others.”⁵⁸

Accordingly, the VJRA was signed into law by President Ronald Reagan on November 19, 1988.⁵⁹ The final version of the act contained five major components: (1) 38 C.F.R. § 211 was repealed; (2) the CAVC (originally known as the United States Court of Veterans Appeals),⁶⁰ an Article I court, was created to perform external, independent judicial review of decisions by the BVA; (3) the BVA was maintained as the final administrative adjudicator within the VA; (4) the \$10 limit on attorneys fees was abolished for cases being heard at the CAVC; and (5) an additional level of judicial review was also created, in that certain cases could be appealed from the CAVC to the United States Court of Appeals for the Federal Circuit.⁶¹

The CAVC took the form of a “traditional federal appellate court.”⁶² The statute provided that there would be a chief judge and from two to six associate justices, who would be appointed by the President for fifteen year terms.⁶³ Appeals could be heard by a single judge or a panel.⁶⁴ In terms of its jurisdiction, the court was given exclusive authority to review final decisions by the BVA.⁶⁵ In addition, only veterans who were dissatisfied with a BVA decision obtained the right to appeal to the CAVC; the VA could not appeal a decision favorable to the claimant.⁶⁶ The CAVC’s decisions were to be based solely on the evidence of record that was before the VA

⁵⁸ H.R. 858 and Other Bills Relating to Judicial Review of Veterans’ Claims: HEARINGS BEFORE THE HOUSE COMM. ON VETERANS’ AFFAIRS, 99TH CONG., 2D SESS. 233 (1986) (statement of Robert O. Muller, president of Vietnam Veterans of America).

⁵⁹ Pub.L. No. 100-687, 102 Stat. 4105 (1988) (codified in various sections throughout Title 38).

⁶⁰ The Court’s name was changed effective March 1, 1999, pursuant to the Veterans’ Programs Enhancement Act of 1998. See Pub. L. No. 105-368, §511, 112 Stat. 3315, 3341 (1998); see also CAVC HISTORY, *supra* note 3.

⁶¹ Fox, *supra* note 24, at 17.

⁶² Farley, *supra* note 32, at 489.

⁶³ 38 U.S.C. § 4053 (a), (c) (recodified in 1991 as 38 U.S.C. § 7253(a),(c)).

⁶⁴ 38 U.S.C. § 4054(b) (recodified in 1991 as 38 U.S.C. § 7254(b)).

⁶⁵ 38 U.S.C. § 4052(a) (recodified in 1991 as 38 U.S.C. §7252(a)).

⁶⁶ *Id.*; 38 U.S.C. §4066(a) (recodified in 1991 as 38 U.S.C. §7266(a)).

at the time the unfavorable decision was made.⁶⁷ In this regard, the CAVC could not conduct de novo review of factual determinations made by the BVA.⁶⁸ Indeed, the Court has repeatedly made clear that “[b]ecause we are a Court of review, it is not appropriate for us to make a de novo finding, based on the evidence, of [a factual matter].”⁶⁹ After reviewing the record, the Court was to “affirm, modify, or reverse [the] decision of the Board or to remand the matter, as appropriate.”⁷⁰

The Court’s standard of review was based on the Administrative Procedure Act (APA).⁷¹ Pursuant to 38 U.S.C. § 7261,⁷² the Court may only overturn the Board’s findings of fact if such findings are “clearly erroneous.”⁷³ Describing this standard, retired CAVC Judge John J. Farley stated:

This means that the court does not decide whether a veteran was injured or whether such an injury was service-connected. Rather, it reviews the decision of the factfinder, the Board of Veterans’ Appeals, on such issues and, if there is a basis in the record for the Board’s conclusion, even if this court might disagree with that conclusion, it cannot reverse the Board’s decision. This restrictive standard of review is designed to ensure that the court does not merely substitute its judgment for that of the Board of Veterans’ Appeals on factual determinations.⁷⁴

⁶⁷ 38 U.S.C. §4052(b) (recodified in 1991 as 38 U.S.C. §7252(b)); *see also* Rogozinski v. Derwinski, 1 Vet. App. 19 (1990) (holding that the record on appeal before the Court is limited to the evidence of record at the time of the proceedings before the Secretary and BVA).

⁶⁸ 38 U.S.C. §4601(c) (recodified in 1991 as 38 U.S.C. §7261(c)).

⁶⁹ *Hensley v. West*, 212 F.3d 1255, 1263 (Fed.Cir. 2000) (quoting *Webster v. Derwinski*, 1 Vet. App. 155, 159 (1991); *see also* *Landicho v. Brown*, 7 Vet. App. 42, 48 (1994) (stating that “[t]his Court is not generally an initial trier of facts. In appeals of BVA decisions, this Court reviews fact determinations made by the Board and does not engage in de novo factfinding (citing 38 U.S.C. §7261(a)(4), (c)); *Badua v. Brown*, 5 Vet. App. 472, 473 (1993) (providing that the “determination whether appellant’s third wife . . . is his lawful spouse for the purposes of receiving additional VA disability pension benefits . . . is a finding of act that the Court must affirm unless that determination is found to be “clearly erroneous”); *Gilbert v. Derwinski*, 1 Vet. App. 49, 53 (1990); *Bledsoe v. Derwinski*, 1 Vet. App. 32, 33 (1990) (stating that the “clearly erroneous” standard must be applied in assessing the Board’s factual “determination of the capacity of the appellant’s son to support himself”).

⁷⁰ 38 U.S.C. §4052(a) (recodified in 1991 as 38 U.S.C. §7252(a)).

⁷¹ 5 U.S.C. § 706 (2009).

⁷² Formerly 38 U.S.C. §4061.

⁷³ 38 U.S.C. § 4061(a)(4) (recodified in 1991 as 38 U.S.C. § 7261(a)(4)).

⁷⁴ Farley, *supra* note 32, at 489; *see also* *Gilbert v. Derwinski*, 1 Vet. App. 49, 52-53 (1990).

In *Booton v. Brown*,⁷⁵ the CAVC quoted a decision from the U.S. Court of Appeals for the Seventh Circuit, which described this standard by stating that “[t]o be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must . . . strike us as wrong with the force of a five-week-old, unrefrigerated dead fish.”⁷⁶

Thus, the CAVC’s primary function is to review cases that have been appealed from the BVA for errors and questions of law.⁷⁷ In addition, the CAVC has the authority to set aside legal determinations made by the Secretary, the BVA, or the Chairman of the Board, as well as to “compel action of the Secretary unlawfully withheld or unreasonably delayed.”⁷⁸ The CAVC may also issue contempt citations and other writs as necessary.⁷⁹

In summary, the VJRA eliminated the bar to judicial review of VA decisions by creating the CAVC pursuant to Article I of the U.S. Constitution.⁸⁰ The VJRA also abolished the previous fee limit for attorneys representing veterans at the CAVC.⁸¹ When the CAVC convened for the first time on October 16, 1989,⁸² a new era of veterans law was born, which changed the course of the veterans benefits adjudication process. The actual significance of those changes is discussed in the section that follows.

⁷⁵ 8 Vet. App. 417, 422 (1995).

⁷⁶ *Id.* at 372 (citing *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988)).

⁷⁷ Farley, *supra* note 32 at 489.

⁷⁸ 38 U.S.C. §4061(a)(2), (3) (recodified in 1991 as 38 U.S.C. §7261(a)(2), (3)).

⁷⁹ 38 U.S.C. §4065(a), (b) (recodified in 1991 as 38 U.S.C. §7265(a), (b)).

⁸⁰ CAVC HISTORY, *supra* note 3.

⁸¹ *Id.*

⁸² The Court convened for the first time in a borrowed ceremonial courtroom from the United States District Court of the District of Columbia. Chief Justice of the U.S. Supreme Court, William B. Rehnquist and Chief Judge of the CAVC, Frank Q. Nebeker, presided. Interestingly, Rehnquist noted that the CAVC shared its birthday with the U.S. Supreme Court, which was formed on that date two hundred years earlier, in 1789. See Farley, *supra* note 32 at 490.

IV. The Effects of Judicial Review on the Department of Veterans Affairs

Initially, it should be noted that the most obvious effect of judicial review has been providing veterans with due process.⁸³ Throughout the past twenty years, judicial review has allowed thousands of veterans their day in court.⁸⁴ Furthermore, the addition of judicial review to the veterans benefits arena has also brought “VA procedures within the mainstream of American administrative law.”⁸⁵

During the past twenty years, judicial review has had both positive and negative effects on the VA. The positive effects of judicial review include providing veterans with due process, further attorney involvement in the claims process, better quality BVA decisions, and the production of a uniform body of law for veterans claims adjudicators to apply. The negative effects of judicial review include the increased amount of time required to process claims, as well as the CAVC’s high remand rate. However, most of the effects of these changes, both positive and negative, are felt primarily at the BVA.

A. Effects on the BVA

One of the first major changes to be brought about by judicial review, and perhaps one of the most important, was the transformation of the BVA decision process.⁸⁶ These changes included how Board decisions were made as well as the format of such decisions. Prior to the era of judicial review, physicians served as Board members and were an integral part of the BVA

⁸³ See, e.g. Hagel & Horan, *supra* note 11.

⁸⁴ See, e.g. UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORT FISCAL YEAR 2008 [hereinafter CAVC ANNUAL REPORT FY 2008, available at http://vetapp.gov/documents/Annual_Report_-_20081.pdf (providing the number of new claims filed at the CAVC each year from 1997 to 2008).

⁸⁵ William F. Fox, Jr., 13 KAN. J.L. & PUB. POL’Y 339, 342 (2004).

⁸⁶ See generally Cragin, *supra* note 4 ; Cragin *supra* note 11.

decision process.⁸⁷ However, once judicial review was imposed, the Court often found that BVA decisions were based on the opinions of the participating Board members, who provided findings and conclusions that were not sufficiently explained by the record such that effective judicial review could be conducted.⁸⁸

Therefore, one of the first major cases decided by the CAVC was *Colvin v. Derwinski*, which held that the BVA panels could only consider “independent medical evidence to support their findings rather than provide their own medical judgment in the guise of a Board opinion.”⁸⁹ Subsequent to this decision, the BVA phased out the role of physicians as Board members.⁹⁰ Currently, most decisions are made by single member Veterans Law Judges.⁹¹ The Board has retained a small number of physicians to serve in an advisory role; however, physicians no longer participate in the BVA adjudication process, and the BVA can no longer rely on its own medical determinations in rendering a decision.⁹²

In addition, judicial review has arguably improved the quality of Board decisions. Most notably, the VJRA required Board decisions to contain a statement of “reasons or bases” with regard to “findings and conclusions on all material issues of fact and law presented on the record.”⁹³ The CAVC wasted no time in asserting that it intended to enforce this provision. In *Gilbert v. Derwinski*, the CAVC explained that a BVA decision must “contain clear analysis and succinct but complete explanations. A bare conclusory statement, without both supporting analysis and explanation, is neither helpful to the veteran nor ‘clear enough to permit effective

⁸⁷ Cragin, *supra* note 4, at 501.

⁸⁸ *Id.*

⁸⁹ 1 Vet. App. 171, 175 (1991).

⁹⁰ Cragin, *supra* note 11, at 26.

⁹¹ *See* 38 U.S.C. §§ 7101, 7101A; it should also be noted that on occasion, the Board still uses three member panels to decide cases. However, all three panel members are Veterans Law Judges.

⁹² Cragin, *supra* note 11 at 26.

⁹³ 38 U.S.C. § 4004 (recodified in 1991 as 38 U.S.C. § 7104(d)(1)).

judicial review,' nor in compliance with statutory requirement."⁹⁴ Although the Board defended its prior format by stating that "the most significant motivation for providing a truncated explanation for the basis of a decision was the necessity of processing an enormous caseload in a timely manner with limited resources[,]”⁹⁵ the Court has continued to vigorously and unremittingly enforce this requirement on the Board.⁹⁶ In fact, a more adequate statement of reasons or bases continues to be the most frequently cited reason for remanding cases to the Board.⁹⁷

Despite the large number of remands that have resulted from enforcement of the reasons or bases requirement, most involved with the system agree that judicial review has had a positive effect on the overall quality of the veterans benefits adjudication process.⁹⁸ Although it may take longer to issue a Board decision in order to comply with this requirement, subsequent Board decisions have been more helpful to the veteran and have allowed for more effective judicial review.⁹⁹

Judicial review has had other positive effects on the VA decision making process as well. The VJRA eliminated the \$10 fee limitation placed on attorneys representing veterans before the CAVC.¹⁰⁰ Recent legislation has also allowed attorneys to receive compensation for representing claimants before the VA.¹⁰¹ Although the VA and some veterans service

⁹⁴ 1 Vet. App. 49, 57 (1990).

⁹⁵ Cragin, *supra* note 11, at 25.

⁹⁶ *See, e.g.* Polovick v. Shinseki, Vet. App. No. 06-3024 (Apr. 22, 2009), *available at* <http://vetapp.gov/documents/Polovick-3024.pdf>; Anderson v. Shinseki, Vet. App. No. 06-2240 (Mar. 13, 2009), *available at* <http://vetapp.gov/documents/Anderson-2240.pdf>.

⁹⁷ Fox, *supra* note 24, at 98; Lathan v. Brown, 7 Vet. App. 359 (1995); Spurgeon v. Brown, 10 Vet. App. 194 (1997).

⁹⁸ Fox, *supra* note 85, at 342.

⁹⁹ *See* Gilbert v. Derwinski, 1 Vet. App. 49, 57 (1990).

¹⁰⁰ The \$10 fee limitation was previously found at 38 U.S.C. § 3404(c). *See also* Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305 (1985).

¹⁰¹ *See* Pub. L. 109-461, Sec. 101; *see also* 38 U.S.C. §§5902 to 5905 (shifting the entry point for paid representation as of June 20, 2007, and amending the provisions relating to fee assessments and review of fee agreements).

organizations had long opposed attorney representation in the veterans benefits adjudication system, thus far, attorneys have had a positive effect on the system. In this regard, a “specter of litigious, overzealous counsel has not yet materialized as a serious or systemic problem.”¹⁰² To the contrary, attorney representation has been shown to greatly improve a veteran’s chances of winning his or her case.¹⁰³

Furthermore, and also of much importance, judicial review has resulted in a uniform body of veterans case law. One of the main arguments for creating the CAVC as a specialized Article I Court was to confine review of VA decisions to a single forum, rather than “regional circuits where disuniformity can arise because of the absence of intercircuit stare decisis.”¹⁰⁴ In addition, veterans law is complex, and therefore the CAVC, as a specialized court, has proven better able to make correct decisions on relevant veterans law topics.¹⁰⁵ For example, in *Shinseki v. Sanders*,¹⁰⁶ the U.S. Supreme Court found that

It is the Veterans Court, not the Federal Circuit, that sees sufficient case-specific raw material in veterans’ cases to enable it to make empirically based, nonbinding generalizations about ‘natural effects.’ And the Veterans Court, which has exclusive jurisdiction over these cases, is likely better able than is the Federal Circuit to exercise an informed judgment as to how often veterans are harmed by which kinds of notice errors.¹⁰⁷

¹⁰² Cragin, *supra* note 11, at 27.

¹⁰³ Professor William Fox, Presentation at the Fourth Annual Judicial Conference, 10 Vet. App. No. 3, p. LXXVII 9196).

¹⁰⁴ Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1114 (1990).

¹⁰⁵ *Id.* at 1117.

¹⁰⁶ 129 S. Ct. 1696 (2009).

¹⁰⁷ *Id.* at 1707 (cf. U.S. v. Haggard Apparel Co., 526 U.S. 380, 394 (1999) [Article I Court’s specialized “expertise . . . guides it in making complex determinations in a specialized area of law.”]).

Thus, judicial review has had a positive effect on the BVA because court decisions are received from a centralized authority, and accordingly, there is less difficulty in interpreting and applying court precedents to VA claims.

However, judicial review has also produced some negative effects on the BVA as well. First and foremost, judicial review has caused a significant increase in the amount of time required to process veterans benefits claims. As was noted shortly after the imposition of judicial review, “applicable law, as articulated by the decisions of the court, is changing on almost a daily basis. Because of the increasing complexity and rapidly evolving state of the law, BVA decisions are lengthier, more complex, and require more time to prepare than ever before.”¹⁰⁸ Although there are numerous court precedents that affect the timeliness of the veterans claims process, the most significant factor has been the CAVC’s extensive interpretation of the VA’s duty to assist claimants, including the passage of the VCAA.¹⁰⁹ Nonetheless, the Board is slowly adapting to these changes, as fiscal year 2008 was the most productive year for the BVA since 1991.¹¹⁰

The problems resulting from such lengthy delays have caused some to call for the elimination of both the BVA and the CAVC.¹¹¹ Indeed, a leading scholar of administrative law has stated that judicial review of veterans’ claims was a “failed experiment.”¹¹² To this end, he noted that when Congress passed judicial review, their vision was to have the CAVC “decide

¹⁰⁸ Cragin, *supra* note 11, at 33.

¹⁰⁹ *Id.* at 34; Tom Philpott, *Law to Help Vets Also Slowed Claims*, July 10, 2008, available at <http://www.military.com/features/0,15240,171460,00.html> (noting that since the passage of the VCAA in 2000, “two thirds of the time required to process a claim is committed to blocks of time set up to develop evidence to support the claim.”).

¹¹⁰ James P. Terry REPORT OF THE CHAIRMAN OF THE BVA FOR FISCAL YEAR 2008 1 (2009) [hereinafter BVA CHAIRMAN’S REPORT FOR FY 2008], available at <http://www.va.gov/Vetapp/ChairRpt/BVA2008AR.pdf>.

¹¹¹ O’Reilly, *supra* note 5, at 233.

¹¹² *Id.* at 248.

cases and return them to the VA for payment.”¹¹³ Instead, judicial review resulted in a large number of remands that prolonged claims processing time and postponed final decisions.¹¹⁴ Furthermore, the CAVC has been criticized as being too deferential to the VA.¹¹⁵

Related to the increased time required to process veterans claims subsequent to judicial review is the CAVC’s high remand rate. Most cases that are remanded back to the BVA require additional development, and therefore must be further remanded back to the RO, which of course takes additional time.¹¹⁶ In fiscal year 2008, the CAVC remanded approximately 68 percent of new cases filed.¹¹⁷ Similarly, the Board remanded 16,096 cases in fiscal year 2008, or approximately 37% of its total caseload.¹¹⁸

B. Effects at the RO Level

As was noted above, most of the effects of judicial review, both positive and negative, have been felt at the BVA. Although the effects of judicial review have also been felt at the RO level, due to the administrative, rather than legal nature of the RO adjudication process, the effects of judicial review are much different at the RO level.¹¹⁹ In this regard, a brief background of the RO adjudication process is first necessary.

While decisions at the BVA are made by attorneys, decisions at the RO are made by non-attorney adjudicators.¹²⁰ Thus, the decision-making process at the RO is quite different than is

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 234.

¹¹⁶ Cragin, *supra* note 11 at 35.

¹¹⁷ CAVC ANNUAL REPORT FY 2008, *supra* note 84 (noting that out of 4,128 new cases filed, 603 were affirmed or dismissed in part, reversed/vacated & remanded in part; 559 were reversed/vacated & remanded; and 1625 were remanded).

¹¹⁸ BVA CHAIRMAN’S REPORT FOR FY 2008, *supra* note 110, at 26.

¹¹⁹ *See generally* Parker, *supra* note 7.

¹²⁰ *Id.* at 208.

the decision making process at the BVA, which relies heavily on CAVC and Federal Circuit decisions, as well as citations to numerous statutes and regulations.¹²¹ RO adjudicators tend to rely more on the VA Adjudication Procedure Manual, as well as medical and legal guidance from the VBA Director of Compensation and Pension Service, circulars (such as fast letters and training letters), and Service Center Manager memoranda, which state local VA office protocol.¹²² These documents are generally regarded as quasi-legal authority, since their primary purpose is to distill practical application of laws, regulations and court precedents for RO adjudicators.¹²³ Thus, practically speaking, there is little, if any, distinction between legal authority and administrative guidance at the RO level.¹²⁴

Although the RO's non-attorney adjudicators have often undergone extensive training in the area of veterans benefits law, most of this training comes from firsthand experience at the RO, administrative materials, as well as local VA customs and traditions, rather than formal legal training or understanding of CAVC decisions.¹²⁵ Accordingly, the effects of judicial review on the RO's is only what those at VA's Central Office tell them it is. VA Central Office guidance on how to interpret CAVC decisions usually comes in the form of a Decision Assessment Document (DAD).¹²⁶

Nonetheless, the effects of judicial review can still be felt at the RO level. By far, the greatest effect of judicial review on RO adjudicators is in the area of claims development. Indeed, many have commented that one of the CAVC's greatest contributions to the veterans'

¹²¹ *Id.* at 220.

¹²² *Id.* at 210. For further explanation of these documents, *see* n. 18-24.

¹²³ *Id.* at 211.

¹²⁴ *Id.* at 212.

¹²⁵ *Id.* at 217.

¹²⁶ *Id.* at n. 24 (stating that the DAD "is another form of VBA circular that is a self-contained summary of precedential court cases for use by the VBA adjudicator. The DAD provides a summary of the case, the impact of the case on VBA, and a discussion of the facts and the court's reasons.").

benefits process “has been to breathe life into the long-standing statutory obligation of the VA ‘to assist . . . a claimant in developing the facts pertinent to the claim.’”¹²⁷ The clearest illustration of this statement is the passage of the VCAA, which redefined the VA’s duties to notify and assist.¹²⁸ Thus, because nearly all of the development required pursuant to VA’s duty to assist takes place at the RO level, many RO employees have come to regard judicial review as negatively impacting the veterans benefits adjudication process. In fact, between 1998 and 2008, the average time to process a veteran’s initial disability claim increased from four months to six, even though the number of VA claims processors had doubled.¹²⁹

As will be discussed in the section that follows, this Article asserts that simplifying the veterans benefits adjudication process by eliminating at least one level of RO review is required to provide veterans with more timely decisions. In addition, having attorney adjudicators at the RO level would result in more quality decisions issued, thus preventing many remands and allowing judicial review to have its intended consequences on the VA as a whole. As is explained more fully below, the best way to achieve this objective would be to restructure the VA adjudication process.

V. Recommendations

From the time of our nation’s founding, notions of law and justice have garnered a great deal of respect.¹³⁰ Indeed, in order to “think like a lawyer” one must be able to master “the art of

¹²⁷ Barton F. Stichman, *The Era of Reform Generated by the U.S. Court of Veterans Appeals*, 38 Fed. B. News & J. 494, 494 (1991).

¹²⁸ The Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096 (codified as amended in scattered sections of 38 U.S.C.).

¹²⁹ Philpott, *supra* note 109.

¹³⁰ WILSON HUHN, *THE FIVE TYPES OF LEGAL ARGUMENT* 7 (2d ed. 2008).

legal analysis.”¹³¹ This includes the ability to learn rules of law, learn how courts interpret the law, and develop the ability to foresee what the law may become.¹³² In so doing, “[e]mphasis is placed on the parsing of statutes and, of particular importance in a case law system, of judicial opinions; on learning the contours of fundamental legal doctrines; [and] on professional values[.]”¹³³ Thus, as is the case with other professions, the “distinguishing mark” of a lawyer “is knowledge that other people do not have.”¹³⁴

Non-attorney adjudicators at the RO fall under this category of people who do not have specialized knowledge of the law. Although RO adjudicators are frequently praised for their “vast institutional knowledge” of the VA system, the fact of the matter is that many do not possess the analytical abilities to “think like a lawyer.”¹³⁵ There are two main arguments against having lawyers as adjudicators at the RO, (1) the traditional nonadversarial system of the VA benefits adjudication process, and (2) the vast number of claims that are handled by the RO each year.¹³⁶

With regard to the former, the traditional nonadversarial nature of the VA system, it should be noted that when the VJRA eliminated the \$10 fee limit for attorneys representing veterans at the CAVC, many feared that the VA system would become flooded with adversarial attorneys.¹³⁷ However, several years after the imposition of judicial review, these fears proved to be

¹³¹ *Id.* at 11.

¹³² *Id.*

¹³³ RICHARD A. POSNER, *FRONTIERS OF LEGAL THEORY* 1 (2004).

¹³⁴ STEFAN H. KRIEGER & RICHARD K. NEUMANN, JR., *ESSENTIAL LAWYERING SKILLS* 3 (2d ed. 2003).

¹³⁵ Interviews with several employees who have both BVA and RO experience, in Washington, D.C. (Apr. 30 2009 and May 6 2009) (hereinafter Interviews) (notes from interviews on file with author. Please note that those being interviewed wished to remain anonymous).

¹³⁶ *See, e.g.* *Hodge v. West*, 155 F.3d 1356, 1362 (Fed.Cir.1998) (stating that “[t]his court and the Supreme Court have both long recognized that the character of the veterans’ benefits statutes is strongly and uniquely pro-claimant” and describing “the historically non-adversarial system of awarding benefits to veterans”); *Trilles v. West*, 13 Vet. App. 314, 326 (2000) (describing “the VA pro-claimant nonadversarial claims adjudication process”).

¹³⁷ Cragin, *supra* note 11 at 27.

unfounded.¹³⁸ Indeed, this appears to still be the case, as the VA has recently lifted its ban on lawyers representing veterans at the VA.¹³⁹ Moreover, attorney involvement at the CAVC has been viewed as overwhelmingly positive.¹⁴⁰

With regard to the latter, the vast number of claims handled by the RO, the author agrees that the sheer number of claims handled by the RO should not be underestimated. In fiscal year 2008, the VA estimated that it received 891,547 new claims, over 53,000 more than the 838,141 received in fiscal year 2007.¹⁴¹ In order to deal with this large number of claims, RO adjudicators are expected to produce 3.5 credits per day, whereas attorneys at the BVA are expected to produce 3 credits per week.¹⁴² Thus, at the RO, most adjudicators are focused on the quickest way to decide a claim, and not necessarily on the policy behind the cases, statutes and regulations being applied.¹⁴³ The unfortunate reality of this system is that most RO adjudicators are focused on “how they can get the claim off their desk” as opposed to how to best serve veterans.¹⁴⁴ As one VA employee observed “doing justice and moving the case along clashes.”¹⁴⁵ Thus, the argument against using attorneys as adjudicators at the RO level is that attorneys with formal legal training conduct a more in-depth analysis of each claim, which therefore increases the overall time required to process the claim.

¹³⁸ *Id.*

¹³⁹ Pub. Law No. 109-461, § 101, 120 Stat. 3408; *see also* 38 U.S.C. §§ 5902, 5903, 5904 and 5905 (eliminating the prohibition on the charging of fees for services of an attorney or agent provided before the Board of Veterans’ Appeals makes its first final decision in the case. As amended, section 5904 now allows accredited attorneys and agents to charge fees for services provided after a notice of disagreement (NOD) has been filed with the VA Regional Office (RO) in the case).

¹⁴⁰ Russo, *supra* note 8, at 28.

¹⁴¹ DEPARTMENT OF VETERANS AFFAIRS PERFORMANCE SHORTFALL ANALYSIS, *available at* http://www.va.gov/budget/report/2008/PartI/Performance_shortfall_%20Analysis.pdf.

¹⁴² Interviews, *supra* note 135. At the RO, cases with multiple issues are divided so that the adjudicator receives one credit for every seven issues. At the BVA, decisions and remands, no matter how many issues, are each assigned one credit no matter how many issues are involved in the claim; however, cases that involve a decision and a remand receive 1.5 credits.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

Accordingly, throughout the past twenty years of judicial review, it is clear that the greatest effect, by far, has been on the increase in claims processing time required to adjudicate a veteran's claim.¹⁴⁶ Despite this fact, judicial review has consistently been regarded as a positive addition to the veterans benefits adjudication system.¹⁴⁷ Thus, in order to more fully appreciate the effects of judicial review while continuing to provide veterans with quality, timely decisions, the VA should simplify its claims adjudication process by eliminating one of its many levels of review and regionalizing the BVA.

Currently, there are several levels of review of a VA benefits claim. Veterans Claims Examiners (VCEs) first handle a claim, by conducting initial development such as requesting service treatment records when a claim is filed and sending out initial VCAA notice letters.¹⁴⁸ Next, Veterans Service Representatives (VSRs) handle the claim. VSRs are not raters, but are responsible for additional evidentiary development, such as ordering a VA medical examination.¹⁴⁹ Next, Rating Veterans Service Representatives (RSVRs) perform the initial adjudication of the veterans claim, via a RO rating decision.¹⁵⁰ If a veteran files a NOD, the veteran may elect to have a Decision Review Officer (DRO) conduct a de novo review of the claim. DROs tend to have years of VA experience which translates into a considerable amount of institutional knowledge.¹⁵¹ Accordingly, DRO's perform a more in-depth review than does the RSVR.¹⁵² Although some DROs are attorneys, there is little, if any, attorney involvement at

¹⁴⁶ See, e.g., Philpott, *supra* note 109.

¹⁴⁷ See, e.g. Hagel & Horan, *supra* note 11; Russo, *supra* note 8; Farley, *supra* note 32.

¹⁴⁸ Interviews, *supra* note 135.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

the RO level.¹⁵³ VA attorneys are typically not involved in the process until a veteran appeals their case to the BVA.

Because there are so many levels of review of veterans' benefits claims, the process is quite lengthy and often times complex. Howard Pierce, chief executive officer of PKC Corp., testified in 2008 that his company was tasked to set up a computerized decision making model to be used by VA claims adjudication staff. He stated that his staff was "stunned" by the complexity of the process.¹⁵⁴ Pierce elaborated that "we have never seen anything more complex [than the VA claims system.]"¹⁵⁵

Thus, it seems that if there is one lesson to be taken away from the past twenty years of judicial review, it is that the veterans' benefits adjudication process must somehow be simplified. The easiest and most logical way to achieve this goal would be to eliminate one of the many levels of review. To this end, since there is a need for better decision making at the RO level, this article proposes eliminating the role of the RSVR, having DRO's perform initial rating actions, and regionalizing the BVA, such that BVA attorneys issue decisions in place of the current statement of the case (SOC).¹⁵⁶

Eliminating or regionalizing the Board of Veterans Appeals is not a new topic. In designing an "ideal" system for administering veterans' benefits, one of the nation's leading scholars in veterans law stated that he would "simply eliminate the Board of Veterans' Appeals."¹⁵⁷ As rationale for this proposal, he stated that by using attorneys and Administrative Law Judges (ALJs) to conduct formal adjudications at the RO level, the VA would be able to

¹⁵³ *Id.*

¹⁵⁴ Philpott, *supra* note 109.

¹⁵⁵ *Id.*

¹⁵⁶ 38 U.S.C. §19.29.

¹⁵⁷ Fox, *supra* note 85, at 344.

simplify its current system of intra-agency review.¹⁵⁸ He also indicated that in attempting to create such an ideal system, that “judicial review must be preserved.”¹⁵⁹ He concluded by stating that he “firmly believe[d] that good decisions by [his] newly-commissioned corps of ALJs in a system in which lawyers fully participate through the entire agency decisional process would likely produce fewer appeals.”¹⁶⁰

Similarly, as was noted previously, one of the nation’s leading scholars in administrative law has also suggested eliminated the BVA.¹⁶¹ In this proposal, the author noted that at that time, the average time to resolve a VA appeal was 745 days, and that justice delayed was justice denied.¹⁶² Overall, the author vigorously argues that changes to the current system were necessary in order to produce better results in a more timely fashion.

This author agrees that at least one layer of review must be removed in order to reconcile quality with quantity in VA benefits decisions. Given modern notions of due process and the need for independent review outside the agency, the CAVC should not be the level that is eliminated. Although the VJRA deliberately maintained the BVA as the final administrative adjudicator at the VA, it appears that two decades of judicial review have altered the role of the BVA, such that veterans would be better served by placing BVA attorneys at the RO level. Although many at the RO argue that the in-depth review conducted by attorneys would slow down the current claims adjudication process, this would most likely be only a temporary

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 345.

¹⁶⁰ *Id.*

¹⁶¹ O’Reilly, *supra* note 5, at 233.

¹⁶² *Id.*

setback. Indeed, once attorneys are involved at the RO, veterans' claims will be better developed early on, thus preventing the need for many remands later in the process.¹⁶³

In addition, RO decisions will become better written and articulated. Currently, one of the main reasons for remands from the BVA to the RO is due to the "subpar writing skills" of many claims adjudicators.¹⁶⁴ Although the CAVC often remands BVA decisions on similar grounds (reasons or bases), Board decisions are, generally speaking, more detailed and better articulated than most RO rating decisions and DRO decisions.

In summary, the past two decades of judicial review in the veterans benefits arena has had a positive impact on the VA and veterans themselves. However, due to the increased time required to process veterans claims, the system must be simplified. As described above, the most beneficial way to do so would be to eliminate the SOC and regionalize the BVA. In addition to decreasing the VA's current multi-layered system of review, utilizing attorneys at the RO level will translate into a more fully developed record and as such, fewer remands from the CAVC.

VI. Conclusion

Today, it is easy to take judicial review in the United States for granted. The idea of judicial review has become so deeply entrenched in our present Constitutional law system that it is difficult to imagine how our legal system would function without it.¹⁶⁵ However, for many veterans, this was not always the case. As has been discussed above, veterans were insulated from judicial review until the passage of the VJRA in 1988. Thus, in analyzing the effects of twenty years of judicial review on the veterans benefits adjudication system, it is important not to

¹⁶³ See Fox, *supra* note 85, at 345.

¹⁶⁴ Interviews, *supra* note 135.

¹⁶⁵ D. Brooks Smith, *Judicial Review in the United States*, 45 DUQ. L. REV. 379, 382 (2007).

take judicial review for granted. On the contrary, it is important to continue to reflect on how judicial review has affected the VA, veterans, and their advocates.

With regard to veterans themselves, one would be hard-pressed to find much information suggesting that they have been harmed by judicial review. Although the amount of time it takes for the CAVC to issue a decision has increased from 364 days in 1999 to 446 days in 2008,¹⁶⁶ judicial review has produced numerous benefits to the veterans benefits adjudication system. In this regard, the VA now issues more quality decisions and it has interpreted many statutes and regulations in a more pro-veteran manner. The general consensus is that since judicial review, veterans have received more equitable treatment in VA decisions.¹⁶⁷ Likewise, although some veterans service organizations feared that they would become obsolete in light of the VJRA provisions that allowed attorneys to represent veterans at the CAVC, judicial review has certainly not put any veterans service organizations “out of business.”¹⁶⁸

However, the first twenty years of judicial review have also taught us that despite these benefits, the system is not perfect. Celebrating the twentieth anniversary of judicial review and the elevation of the VA to a cabinet department¹⁶⁹ invites judicious analysis of the pros and cons of the veterans benefits adjudication process. As is argued throughout this paper, the past twenty years of judicial review have served as a reminder that the VA system is in desperate need of simplification.

Because there are so many levels of review of a VA decision that is appealed – an initial rating decision, a statement of the case, a possible supplemental statement of the case, a BVA

¹⁶⁶ CAVC ANNUAL REPORT FY 2008, *supra* note 84.

¹⁶⁷ Hagel & Horan, *supra* note 11, at 50.

¹⁶⁸ Russo, *supra* note 8, at 29.

¹⁶⁹ See DEPARTMENT OF VETERANS AFFAIRS, VA HISTORY IN BRIEF 3, *available at* <http://www1.va.gov/opa/feature/history/docs/histbrf.pdf> (noting the elevation of the BVA to a cabinet department on March 15, 1989).

decision and a CAVC decision, there is a noticeable disconnect between each level of review. Furthermore, because each decision made prior to the BVA decision is made by non-attorney adjudicators, there is an even greater divide between the RO and the BVA, even though both are part of the VA. Thus, in order to simplify the overall adjudication process, the Board should be regionalized, effectively eliminating the SOC level of review. In addition to decreasing the time required to process appeals, having attorneys performing RO adjudications will enhance the quality of initial VA decisions, and will ensure that CAVC precedents play a larger role in such decisions.

Therefore, after two decades of judicial review, the veterans benefits system has certainly improved, but it still has a long way to go. Although the initial impact of judicial review on the VA was certainly “profound,”¹⁷⁰ twenty years later, its effects have shown that it is now time to “simplify.” Providing veterans with due process was certainly a step in the right direction, and it was a step that was long overdue. Although those within the VA have proven reluctant to change,¹⁷¹ the passage of the VJRA provides hope that further extraordinary changes to the system, such as the ones suggested in this article, are possible, and, more importantly, that such changes would greatly benefit the current veterans benefits adjudication process.

¹⁷⁰ *Effects of Judicial Review*, *supra* note 14.

¹⁷¹ *See Parker*, *supra* note 7, at 211 (in describing the attitude of VA adjudicators, quoting Robert Hall – we “[a]re apt to be strongly prejudiced in favor of whatever is countenanced by antiquity, enforced by authority, and recommended by custom.”