

3-12-2018

## Paternalism and the Rise of the Disability State

David W. Engel

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David W. Engel and Jeffrey S. Wolfe, *Paternalism and the Rise of the Disability State*, 37 J. Nat'l Ass'n Admin. L. Judiciary 355 (2017)  
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# Paternalism and the Rise of the Disability State

By David W. Engel\* & Jeffrey S. Wolfe<sup>Ψ</sup>

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## I. INTRODUCTION

“[W]hat’s Past Is Prologue.”

-William Shakespeare<sup>1</sup>

Federal disability compensation in the United States has long been defined by the two largest federal disability programs: (1) that of the older U.S. Department of Veterans Affairs (VA) and its antecedents<sup>2</sup>; and (2) that of the far newer, yet far larger New Deal

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Φ *This article is entirely the work of the authors and does not represent the position or views of the United States Government or the Social Security Administration. The ideas expressed are solely those of the authors and not those of the Social Security Administration or any component thereof. All research, sources and references are from the public record and do not include any material(s) not in the public domain.*

<sup>1</sup> William Shakespeare (published 1623), *The Tempest*, Act 2, Scene I (“All that has occurred prior to the present, i.e., the ‘past,’ has led to circumstances that justifies or compels what needs to be done by those acting in the present.”)

<sup>2</sup> The former VETERANS’ ADMINISTRATION was elevated to a cabinet-level department within the Executive Branch of the federal government known as the UNITED STATES DEPARTMENT OF VETERANS AFFAIRS, as a result of the

Era social “safety-net” associated with the Social Security Administration (SSA).<sup>3</sup> Both programs have experienced significant difficulties in policy formulation, and ultimately, program execution. This has led to growing backlogs of appeals and a public outcry for reform in both agencies.<sup>4</sup> Even a cursory review reveals the

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DEPARTMENT OF VETERANS AFFAIRS ACT OF 1988, Pub. L. 100–527, 102 Stat. 2635 (Oct. 25, 1988). Its antecedents include:

- (1) Military Bounty Lands and Pension Branch, War Department (1789–1815).
- (2) Pension Bureau, War Department (1815–1833).
- (3) Office of Commissioner of Pensions, War Department (1833–1849).
- (4) Bureau of Pensions, U.S. Department of Interior (1849–1914).
- (5) Bureau of War Risk Insurance (BWRI), U.S. Department of the Treasury (1914–1920).
- (6) Veterans’ Bureau [independent agency] (1921).
- (7) U.S. Veterans’ Bureau [independent agency] (1921–1930).
- (8) Veterans’ Administration [independent agency] (1930–1989).

<sup>3</sup> The Social Security Disability Insurance program is more than twice as large as the VA program in terms of the number of recipients served (yet individual Social Security recipients received less *than half* the amount in cash as a comparable VA recipient found disabled). Moulton-Ali, *Disability Benefits Available under the Social Security Disability Insurance (SSDI) and Veterans Disability Compensation (VDC) Programs*, Washington, D.C.: Congressional Research Service (CRS), R-41289 (Sept. 12, 2012), p. 11, n. 32. The Social Security Administration is a single-headed Independent Administration located in the Executive Branch of the federal government. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES: SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES (1st ed., Dec. 2012), Table 5, p. 54. The SSA Commissioner is paid at the Executive Level I despite the fact that she does not lead a cabinet-level executive department. *Id.*, at fn. 100, p. 39. Although SSA is not a cabinet-level department, its regulatory proposals are subject to Office of Information and Regulatory Affairs (OIRA) review. *Paperwork Reduction Act of 1980*, Pub. L. 96-511, 94 Stat. 2812, 44 U.S.C. § 3502(1); 5 C.F.R. §§ 1320.3(a), 1320.4(a) (2015). *See generally*, Harvard University Political Science Abstract, Carpenter, D., & Gubb, J. (Feb. 6, 2014). *A Political Clearinghouse? Organizational and Presidential Effects in OIRA Review*, at 11.

<sup>4</sup> *See, e.g.*, Alan Zarembo, *Disability System for Veterans Strays Far From its Official Purpose*, LOS ANGELES TIMES, November 16, 2014, <http://www.latimes.com/nation/la-me-adv-disability-politics-20141116-story.html>; and Howard Gleckman, “How To Fix Our Crippled Social Security Disability Insurance System,” FORBES, June 24, 2013

commonality of the difficulties encountered — difficulties that find their genesis in the dynamic societal forces affecting both programs, in many instances clearly paternalistic. For example, there is an accepted overlap of benefits across many social programs. Many who receive VA disability benefits Veterans Disability Compensation (VDC) may also receive Social Security disability benefits. Those who receive state unemployment benefits may also receive SSA disability — despite the fact that state law often requires a person to attest under penalty that they are ready, willing, and able to perform full-time employment.<sup>5</sup>

Notable is the simple fact that such “double-dipping” is authorized, even encouraged. Indeed, “[t]here are 9.4 million military veterans receiving Social Security benefits, which means that almost one out of every four adult Social Security beneficiaries has served in the United States military. In addition, veterans and their families make up almost forty percent of the adult Social Security beneficiary population.”<sup>6</sup>

The evolutionary forces, which influence both the VA and SSA, are diverse, yet comparable. Congress has deliberately established a non-adversarial decision-making system within the VA:

Implicit in such a beneficial system has been an evolution of a completely *ex parte* system of adjudication in which Congress expects the VA to fully and sympathetically develop the veteran's claim to the optimum before deciding it on the merits. Even then, the VA is expected to resolve all issues by giving the claimant the benefit of any reasonable doubt.<sup>7</sup>

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<http://www.forbes.com/sites/beltway/2013/06/24/how-to-fix-our-crippled-social-security-disability-insurance-system/#4c1ad0e92044>.

<sup>5</sup> See, e.g., Okla. Stat., Title 40, § 2-417 (2016); O.C.G.A. § 34-8-195(a)(3)(A)(i-iii) (2016).

<sup>6</sup> Anya Olsen, “Military Veterans and Social Security, Social Security Bulletin, Vol. 66, No. 2, 2005/2006 at <https://www.ssa.gov/policy/docs/ssb/v66n2/v66n2p1.html>.

<sup>7</sup> Kenneth M. Carpenter, *Why Paternalism in Review of the Denial of Veterans Benefits Claims is Detrimental to Claimants*, 13 KAN. J.L. & PUB. POL'Y 285, 285 (2004) (emphasis added).

Similar jurisprudence infuses Social Security regulation at Title 20 Code of Federal Regulations, Part 404 § 900(b): “In making a determination or decision in your case, we conduct the administrative review process in an informal, non-adversary manner.”<sup>8</sup>

Although not formally established, the accepted political reality of Social Security as the “Third Rail of American Politics” means danger to anyone perceived as attacking the Social Security system.<sup>9</sup> Like the VA, it too mandates that hearings be “non-adversarial” — with the SSA even declining to be represented at such hearings.<sup>10</sup>

An overview of both systems reveals an evolutionary trend toward a less stringent definition of “disability,” resulting in growing and widespread public access to each system—with attendant ripple effects compounding already difficult bureaucratic dilemmas. As one writer notes of the VA: “criticized in government reviews as out of touch with modern concepts of disability, the system has strayed far from its official purpose of compensating veterans for their lost earning capacity.”<sup>11</sup> Those who view Social Security in the same light are equally critical:

One great, and valid, complaint about Social Security is that it is paternalistic: it does things for the individual that he should do for himself. In so doing, it commits the twin transgressions of forcing some

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<sup>8</sup> 20 C.F.R. § 404.900(b) (2016).

<sup>9</sup> William Safire, *Third Rail*, N.Y. TIMES, Feb. 18, 2007, [http://www.nytimes.com/2007/02/18/magazine/18wwlnsafire.t.html?\\_r=0](http://www.nytimes.com/2007/02/18/magazine/18wwlnsafire.t.html?_r=0). The now familiar description of Social Security as the “Third Rail” of American politics is attributed to former speaker of the House, Tip O’Neill, in response to suggested cuts to the Social Security program during the Regan Administration. William Safire, writing in the *New York Times Magazine*, stated, “[a]nyone who tries to touch it [Social Security] gets electrocuted.” *Id.*

<sup>10</sup> 20 C.F.R. § 404.900(b) (2018). Which provides, in-part: “In making a determination or decision in your case, we conduct the administrative review process in an informal, non-adversarial manner.”

<sup>11</sup> See Zarembo, *supra* note 4.



people to support others and making the beneficiaries the servile dependents of the state.<sup>12</sup>

One writer observes of the VA, that while “paternalism in the development and initial adjudication process inures to the benefit of claimants,”<sup>13</sup> it stands as an obstacle on appeal:

[F]undamental problems exist when extending paternalism to the appellate review process of the decisions of the Secretary. The maintenance of paternalism in the appellate process undermines and often prevents claimants from obtaining the benefits to which they are entitled to under law because of the obstacles created by paternalism that interfere with the process of review of the denial of benefits by the Secretary.<sup>14</sup>

Both disability programs have been pinned with the “paternalistic” label — an evolution of the cumulative effects of political and societal forces, which either deliberately, or consequently mold or grow both programs.<sup>15</sup>

In examining the parallels between the VA and SSA disability programs, we initially look to the evolution of veterans disability in the U.S., examining its roots and the eventual transformation of the program, which moved from state hands to the federal government with attendant growing paternalism. We explore this growing and dynamic effort and postulate its later influence upon the emergence and growth of SSA’s disability program. We argue that the growth and development of the VA disability program, and its influence on the later, more diverse Social Security disability program, is seen as

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<sup>12</sup> John Attarian, *Is Social Security Reform Paternalistic?*, FOUNDATION FOR ECONOMIC EDUCATION, Jan. 1, 2004, <http://fee.org/freeman/is-social-security-reform-paternalistic/>. The concept of the “servile state” is, of course, much older and captured in Hilare Beloc’s (1912) work by the same name in T.N. Foulis Publishing, London (1912).

<sup>13</sup> Carpenter, *supra* note 7 at 286.

<sup>14</sup> *Id.*

<sup>15</sup> See, e.g., Carpenter, *supra* note 7.

expanding expressions of governmental paternalism. We raise the question whether the problems that now beset both programs have at their root a commitment to a pattern of bureaucratic paternalism antithetical to the essential tenants of disability as originally conceived. Hidden not so far from this inquiry is the simple question of whether such paternalism is a predictable bureaucratic snowball gathering momentum in the rush downhill, politicians possessed of only one politically safe route through the maze of public largesse. The challenger who seeks to reign in Social Security or veterans' benefits runs the risk of political isolation amidst charges of indifference to program beneficiaries.<sup>16</sup>

In terms of simple behavioral psychology, legislative actions that increase benefits are rewarded with positive feedback, reinforcing such behavior, while measures which seek to curb entitlements are met with adverse stimuli, reducing behavioral responses which might lead to a reduction in benefits. The "big picture" is thus discarded in favor of simple and individual political realities — any serious challenge to the entitlements system garners a political backlash, handing ammunition to one's opponents, jeopardizing continued public service. Social Security's own history provides a telling example:

The seven years between 1977 and 1984 saw the only significant decline in SSDI receipt over the history of the program. A General Accounting Office report in 1981 had revealed SSA estimates that one in five SSDI beneficiaries was ineligible, at an annual cost of \$2 billion. As a consequence of the stepped-up

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<sup>16</sup> See e.g., Thomas F. Burke & Jeb Barnes, *Republicans Want to Reform Disability Insurance. Here's Why That's Hard*, THE WASHINGTON POST, (Feb. 17, 2015), <https://www.washingtonpost.com/blogs/monkey-cage/wp/2015/02/17/republicans-want-to-reform-disability-insurance-heres-why-thats-hard/>. ("[T]he beneficiaries of the [Social Security disability] program are well organized and can be counted on to fully mobilize to protect SSDI. Disability organizations like Disabled American Veterans, the Consortium for Citizens with Disabilities, and The Arc (for people with intellectual and development disabilities) may not have huge financial resources, but it's not fun for politicians to oppose them.").

reviews and the other policy changes, by 1989 the share of adults on SSDI had dropped to 2.3%.

The tightening of eligibility, however, produced a fierce political backlash after the widely publicized removal of 490,000 beneficiaries from the program . . . . Stories in the press dramatized the consequences of the tightening, highlighting cases that resulted in homelessness and even suicide . . . . The result was passage — *unanimously* in both Congressional chambers — of the Disability Benefits Reform Act of 1984. The law — along with regulatory changes in response to court rulings — cemented the liberalized SSDI program that we have today. Receipt of SSDI benefits began a long climb, slowly at first, then accelerating by the end of the decade, to the point where 5% of adults in 2012 were on the program.<sup>17</sup>

In raising and examining this seemingly intertwined relationship, we seek a solution — a step back from the brink of insolvency which now faces Social Security and a resolution to the mounting backlog endemic to both programs. To this end, we examine the roots of VA disability and look, in turn, to the Social Security Act of 1935 and its later disability provisions in 1956, asking whether Social Security's entrance onto the national stage was influenced by the earlier emergence and growth of the VA as a national benefits program.

As discussed in the following sections, history records an organized, progressive effort to ensure some form of relief for those injured in battle, with provisions dating back to the medieval Royal Houses of Europe and later, to a fledgling United States Congress.

The article includes six (6) sections. The topic is introduced in Section I. Section II is an overview of paternalism as a political reality, discussing paternalistic patterns and practices in both the VA and SSA disability programs.

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<sup>17</sup> Scott Winship, *How to Fix Disability Insurance*, NATIONAL AFFAIRS, Spring 2015, <http://www.nationalaffairs.com/publications/detail/how-to-fix-disability-insurance>.

Section III examines the evolution of veterans' disability from its early colonial beginnings, 1593–1692. Composed of five subparts, “A” through “E,” which trace the progression of veterans' disability from the Colonial Period (Subpart “A”) to the time of the American Revolution (Subpart “B”) and through the Congress of the Confederation (Subpart “C”). Subpart “D” examines veterans' benefits under the United States Constitution, while subpart “E” considers the emergence of formal military disability pensions and the issues associated with formalization of the program.

Section IV turns to Social Security and describes an overview of the birth and growth of SSA's Disability Insurance program beginning in 1956. Legislative changes to the Social Security Act are tracked and summarized in the body of the article through 1987 (Subparts “A” through “S”), while Appendix A lists legislative changes from 1988 to 2015.

Section V compares and contrasts current VA pension and disability programs and the SSA insurance programs (retirement and disability) found under Title II of the Social Security Act.

Section VI looks to the future, charting ways ahead, examining current Social Security legislation and potential reforms to SSA's “DIB” or “*disability insurance benefits* program”—drawing upon the lessons learned from the long history of veterans' disability benefits recounted earlier.

In the examination of both national disability programs, answers may be found to the questions posed now in the national political forum. In undertaking such a comparison,<sup>18</sup> we seek to examine the “prologue” by understanding the past. In doing so, we acknowledge the paternalism now infused within each program and ask whether there is still hope for a dialogue that might yet occur that will look at the long-term strategic fiscal projection that acknowledges those fiscal realities against the current dynamic political backdrop, coined by some as the “audacity of pessimism.”<sup>19</sup>

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<sup>18</sup> See, e.g., Moulta-Ali, U., *Disability Benefits Available Under the Social Security Disability Insurance (SSDI) and Veterans Disability Compensation (VDC) Programs*. Washington, D.C.: Congressional Research Service (CRS), R-41289 (Sept. 12, 2012).

<sup>19</sup> King, Mervyn, *THE END OF ALCHEMY: MONEY, BANKING, AND THE FUTURE OF THE GLOBAL ECONOMY, The Audacity of Pessimism: The Prisoner's Dilemma and the Coming Crisis*, Chap 9 at 334–370, W.W. Norton, New York.

We ask whether it is possible to forge for the future a more efficient and consistent definition of disability for each program. Is it possible to meet the expectations of the American people in a fiscally responsible manner and thereby transform the award of veterans' and social security disability benefits so that they might continue well into the future, recognizing the rise of "paternalism" as a condition affecting our collective view of both fiscal and political realities?

## II. PATERNALISM

"No free government, or the blessings of liberty, can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality, and virtue; and by a frequent recurrence to fundamental principles."

-Patrick Henry<sup>20</sup>

Widely divergent views characterize any discussion of governmental paternalism. One view looks at government paternalism as nothing less than government control, usurping freedom, and binding the individual to the will of the state: "[p]aternalism is the interference of a state or an individual 'with another person, against their will, and defended or motivated by a claim that the person interfered with will be better off or protected from harm.'"<sup>21</sup>

Those favoring paternalistic action point to the supposed inability of individuals to effectively exercise freedom of will:

[S]imple observation makes clear that citizens constantly make [sub-optimal] or harmful choices for themselves, ranging from finance to health to safety—decisions about retirement portfolios and stock purchases are made in relative ignorance or under

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<sup>20</sup> Liberty-Tree Quotes, [http://quotes.liberty-tree.ca/quotes\\_by/patrick+henry](http://quotes.liberty-tree.ca/quotes_by/patrick+henry) (last visited March 17, 2016). Originally set out in *American State Papers Bearing on Sunday Legislation*, Compiled by William Addison Blakely, The Religious Liberty Association, Washington D.C. (1911).

<sup>21</sup> Stanford Encyclopedia of Philosophy, *Paternalism*," <http://plato.stanford.edu/entries/paternalism/> (last updated June 4, 2014).

“irrational exuberance”; people overeat, engage in unsafe sex, smoke, and drink to excess; and drivers still neglect to wear seat belts or motorcycle helmets. Again, such tendencies challenge the traditional assumption that people know what is good for them and can be trusted to make decisions accordingly.<sup>22</sup>

Nowhere is the debate over government paternalism as fierce as it is in the context of public health, some going so far as to say opposition to paternalistic actions is both anti-democratic and deleterious to public health and safety:

Anti-paternalists' efforts to limit the scope of public health law to controlling only the proximal determinants of infectious diseases are utterly unjustifiable in the face of so much preventable death, disability, and disparity. Equally important, the anti-paternalism push is deeply counter-majoritarian and undemocratic, threatening to disable communities from undertaking measures to improve their own well-being.<sup>23</sup>

Thus stand two polar views. In one, government is assumed to know best and a failure to cede to such thinking is cast as “unjustifiable,” assuming “preventable death, disability[,] and disparity.”<sup>24</sup> Those who stand opposed to this so-called “nanny state”<sup>25</sup> call for

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<sup>22</sup> Jeremy A. Blumenthal, *Paternalism, Theory and Practice*, 197-215, (Christian Coons and Michael Weber, eds., Cambridge University Press (2013)).

<sup>23</sup> Lindsay F. Wiley, Wendy E. Parmet, & Peter D. Jacobson, SYMPOSIUM: 2014 PUBLIC HEALTH LAW CONFERENCE: INTERSECTION OF LAW, POLICY AND PREVENTION, “*Adventures in Nannydom: Reclaiming Collective Action for the Public's Health*,” 43 J.L. MED. & ETHICS 73 (2015).

<sup>24</sup> *Id.*

<sup>25</sup> “‘Nanny state’ is a term of British origin that conveys a view that a government or its policies are overprotective or interfering unduly with personal choice. The term ‘nanny state’ likens government to the role that a nanny has in child rearing. An early usage of the term comes from Conservative British MP Iain Macleod who referred to ‘what I like to call the nanny state’ in his column “Quoodle” in the December 3, 1965 edition of *The Spectator*.” *Nanny State*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Nanny\\_state](https://en.wikipedia.org/wiki/Nanny_state).

individualism, self-actualization, and freedom from undue government interference in individual lives. The battle has been underway for literally decades — working, some say, an often not-so-subtle transformation of American society from that of a nation of independent-minded citizens committed to freedom of thought and action in the exercise of self-determination, to that of a socialist collective where the government knows best, the individual yielding to the theoretic greater good of societal need.

The debate is years in the making. In a February 5, 1950 article appearing in the *Chicago Tribune*, Bruce W. Knight, then professor of economics at Dartmouth College, described state paternalism as “a fake liberalism masquerading as liberalism itself.”<sup>26</sup> He posed a simple question:

What is 'the great issue'? On the understanding that they mean the greatest public issue before Americans in general and college students in particular, I believe a reasonable answer is this: Our greatest issue is pseudo-liberalism. It is false liberalism, fake liberalism, phony liberalism, masquerading as liberalism, the pretended pursuit of liberal ends by means which lead in the opposite direction. In other words, are we to have liberalism or are we to have a wretched counterfeit in the form of state paternalism?<sup>27</sup>

Of paternalists, Professor Knight observed, “on the national scene he employs the ‘piecemeal’ technique of Hitler, presenting his program in dramatized bits, so that the expansion of expenses, burgeoning of government and contraction of individual freedom will not be noticed till too late.”<sup>28</sup> “Next,” recounts Professor Knight, is “the paternalist as an academician. Whatever his field, he not only aches vocally for

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<sup>26</sup> Bruce W. Knight, Ph.D., *Our Greatest Issue*, CHICAGO SUNDAY TRIBUNE (Feb. 5, 1950), <http://archives.chicagotribune.com/1950/02/05/page/76/article/our-greatest-issue>.

<sup>27</sup>*Id.*

<sup>28</sup> *Id.*

‘social justice’ but is very intolerant of anything save the ‘welfare state’ as a means to it.”<sup>29</sup>

While Professor Knight’s views may not, in fact, be as absolute or as radically invidious as he makes out (accounting for the era in which he writes), even those committed to a greater degree of paternalism voice the need for limits. Peter de Marneffe writes, “[p]aternalism seems repugnant because it seems infantilizing. In limiting our liberty for our own good, it seems that the government treats us like children or that it impedes our development into fully mature adults, but there is no reason to think this is true of *every* paternalistic policy.”<sup>30</sup> Still, he observes, “paternalistic interference with *some* liberties may be justifiable.”<sup>31</sup> The question, of course, is where to draw the line. For de Marneffe, there exists an outer boundary beyond which government should not trespass, assuming “that the government has a general moral obligation to recognize and protect against paternalistic interference a sufficiently wide range of important life-shaping decisions to ensure that we have adequate control over our lives, enough to achieve genuine autonomy and independence.”<sup>32</sup> Others, however, question even the efficacy of allowing individual decision-making, citing studies that call into question the quality of such decision-making:

[A]n increasing amount of empirical evidence shows that having a number of options from which to choose actually leads to lower quality decisions as well as decreased satisfaction with the choices made (Iyengar & Lepper, 2000, 2002; Schwartz, Ward, Monterosso, Lyubomirsky, White, & Lehman, 2002) . . . Thus, the simple assumption that individuals necessarily value making decisions is likely incomplete, if not flawed outright.<sup>33</sup>

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<sup>29</sup> *Id.*

<sup>30</sup> Peter de Marneffe, *Avoiding Paternalism*,” 34 PHILOSOPHY AND PUBLIC AFFAIRS, 68, Issue 1 (2006).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 69.

<sup>33</sup> Blumenthal, *supra* note 22 at 196.



These assumptions — that individuals cannot make qualitatively “good” decisions, that individual decision-making is “flawed,” and not generally valued, fuels the paternalist view. These views of paternalism have played out in both the current VA and Social Security disability systems. The creation of both federal entities embraces a systemic “bias” which undergirds both; that is, the very creation of these systems is an expression of the ideal that the federal government can (and should) tackle and solve the problem, resulting in a forced re-distribution of economic resources. While there is perhaps no single progenitor of this view, we cannot avoid and must note the increasing role of the federal government in the years following World War I (the “Great War”) and the subsequent impact of The Great Depression of the 1930s. The economic downfall beginning in 1929 arguably gave way to the most significant collection of federal government actions since the nation’s entry into World War I.

The Great Depression<sup>34</sup> was a nationwide economic collapse, described as an “economic train wreck” and marked by national impoverishment, as shantytown Hooverilles “sprang” up across the country.<sup>35</sup> The impact on American life could not have been more devastating. The solution was government relief. The Great Depression gave voice to the idea that salvation lay with the federal government — a solution voiced early on by President Hoover, who

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<sup>34</sup> The use of the term, “The Great Depression,” was originally thought to be coined by President Hoover, but more likely it is a revision of his original utterance, that the economic “situation” was “a great depression.” Noah Mendell, *When Did the Great Depression Receive Its Name? (And Who Named It?)*, HISTORY NEWS NETWORK, <http://historynewsnetwork.org/article/61931> (last visited Feb. 22, 2016). “Some historians argue that the true inventor of the phrase, the Great Depression, is Lionel Robbins, a British economist who lived during the Depression. In 1934, after Hoover’s tenure in office, Robbins wrote the book, *The Great Depression*, which contains what some historians . . . consider to be the first usage of the phrase we now use to describe the economic meltdown on the 1930s.” *Id.*

<sup>35</sup> “During the Great Depression, many families lost their homes because they could not pay their mortgages. These people had no choice but to seek alternative forms of shelter. Hooverilles, named after President Hoover, who was blamed for the problems that led to the depression, sprung up throughout the United States.” *Great Depression and World War II, 1929 – 1945*, LIBRARY OF CONGRESS, <http://www.loc.gov/teachers/classroommaterials/presentationsandactivities/presentations/timeline/depwwii/depress/hoovers.html> (last visited Feb. 23, 2016).

declared, “[w]e used such emergency powers to win the war; we can use them to fight the Depression, the misery, and suffering from which are equally great.”<sup>36</sup>

President Hoover “called openly for local and state governments to expand public works projects. . . .” He then “organized a series of conferences in November 1929 which brought together leaders of industry, labor, and government to discuss the economy.”<sup>37</sup> Government relief was called for across multiple economic sectors. “By 1931, members of Congress — especially Democrats and Midwestern progressive Republicans — began to call even more vociferously for decisive government action to combat the effects of the Depression. They were particularly desirous of relief bills for farmers and the unemployed.”<sup>38</sup>

The march of the “Bonus Army” echoed a similar theme, foreshadowing still further, federal intervention in the form of monetary benefits.

While not a relief measure per se, Congress . . . [passed] . . . the Bonus Bill in the winter of 1931. The bill allowed veterans to borrow up to one-half the value of life insurance policies that Congress had purchased in 1924; with the policies set to mature in 1945, early access to these funds came to be regarded as a “bonus.”<sup>39</sup>

Paul Dickson and Thomas B. Allen, writing for the *Smithsonian Magazine*, recounted the formation of the so-called, Bonus Army:

Congressman Wright Patman of Texas, himself a war veteran, sponsored a bill calling for immediate cash payment of the bonus. The bill never made it out of committee. Patman took steps to resurrect the legislation early in the new year of 1932. Then, on

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<sup>36</sup> David E. Hamilton, *Herbert Hoover: Domestic Affairs*, UNIVERSITY OF VIRGINIA, MILLER CENTER, <https://millercenter.org/president/hoover/domestic-affairs>.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

March 15, 1932, a jobless former Army sergeant, Walter W. Waters, stood up at a veterans' meeting in Portland, Oregon, and proposed that every man present hop a freight and head for Washington to get the money that was rightfully his. He got no takers that night, but by May 11, when a new version of the Patman bill was shelved in the House, Waters had attracted a critical mass of followers.<sup>40</sup>

In a real sense, the modern seeds of *government expectation* — the expectation that government will step in and provide relief<sup>41</sup> were arguably laid as a result of the nationwide attention garnered by the Bonus Army march on Washington D.C. The march, observed novelist John Dos Passos, who had served in World War I, *The Great War*, with the French Ambulance Service,<sup>42</sup> was a spontaneous movement of protests, arising in virtually every one of the forty-eight states.<sup>43</sup> The Bonus Bill was, in its contemplation if not in law, a federal monetary benefit, drawing upon a form of insurance funding, similar to the Social Security Retirement Program in 1935<sup>44</sup> and later, the Disability Insurance Program in 1956. The Great Depression thus set the stage for widespread popular expectation of government entitlements or in the parlance of the times, national “relief.”

These pillars of government expectation lie along a parallel track with continued federal formalization of veterans' benefits in the two decades following World War I. Notably, on August 9, 1921, Congress “combined all World War I Veterans programs to create the Veterans Bureau. Public Health Service Veterans' hospitals were

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<sup>40</sup> Paul Dickson and Thomas B. Allen, *Marching on History*, SMITHSONIAN MAGAZINE, (Feb. 2003) <http://www.smithsonianmag.com/history/marching-on-history-75797769/>.

<sup>41</sup> See, *infra* Section 3(B) for a discussion of government-funded military retirement and disability in the early colonial and Revolutionary War eras.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Signed into law by President Franklin Delano Roosevelt on August 14, 1935. *Social Security History*, SOCIAL SECURITY ADMINISTRATION, <https://www.ssa.gov/history/tally.html>.

transferred to the bureau, and an ambitious hospital construction program for World War I Veterans commenced.”<sup>45</sup> A “second consolidation of federal Veterans programs took place July 21, 1930, . . . [upon the] sign[ing of] Executive Order 5398[,] . . . elevat[ing] the Veterans['] Bureau to a federal administration — creating the Veterans['] Administration — to ‘consolidate and coordinate Government activities affecting war veterans.’”<sup>46</sup> The National Homes and Pension Bureau also became a part of the VA, becoming one of three component bureaus within the newly minted “Veterans’ Administration.”<sup>47</sup>

The prominence of government as the solution to the woes of the Great Depression is no more evident than in the Roosevelt Administration’s aggressive “New Deal.” Three notable “New Deal” programs lend credence to the notion of salvation at the hands of the federal government — programs that are credited with relief for millions of Americans, many on the verge of starvation:<sup>48</sup>

- Federal Emergency Relief Administration (FERA) (making direct cash allocations to the states for immediate payments to the unemployed);
- Civilian Conservation Corps (CCC) (returning some 300,000 young men to work in 1,200 camps planting trees, building bridges, and cleaning beaches);
- Civil Works Administration (CWA) (which spent almost \$1 billion on public works projects, including airports and roads).<sup>49</sup>

A further step was taken on August 14, 1935 when President Roosevelt signed into law the Social Security Act.<sup>50</sup> In doing so, he

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<sup>45</sup> *History – Department of Veterans Affairs*, U.S. DEPARTMENT OF VETERANS AFFAIRS, [http://www.va.gov/about\\_va/vahistory.asp](http://www.va.gov/about_va/vahistory.asp).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> William E. Leuchtenburg, *Franklin D. Roosevelt: Domestic Affairs*, UNIVERSITY OF VIRGINIA, MILLER CENTER, <https://millercenter.org/president/fdroosevelt/domestic-affairs>.

<sup>49</sup> *Id.* The CWA was short lived, — in place for only four months because of inordinate cost. *Id.*

proclaimed the Act to be “a law that will take care of human needs and at the same time provide the United States an economic structure of vastly greater soundness.”<sup>51</sup> His words, like those of President Hoover, are premised on the proposition that the federal government will change societal imperatives that would otherwise lead to disaster.

Even a cursory review, as here, makes it plain that an evolutionary path towards paternalism wends its way through the American experience — initially through the early years of the nation’s history, and then later as government became the purveyor of social entitlements in the years after the Civil War and the two great World Wars. Chief among these entitlements were disability benefits, both as awarded through the VA and later, through Social Security. The rise and consolidation of the VA in the years following World War I and the later voice of “big government” in the context of the New Deal lead to a simple conclusion: government paternalism finds its roots in government growth.

In making this assertion we note that the government addressed the concept of disability initially in the context of injuries sustained by soldiers and sailors in war — needs which were expressed across the expanse of the continental United States and initially largely borne by the states. Later, with the advent of the Great Depression came the “perfect storm” — a confluence of need and a call to action. During the Hoover Administration, and to a greater degree during the Roosevelt Administration, the solution to the Great Depression was seen to lie in government action. The “New Deal” formulation of Social Security and in particular, “disability insurance” in 1956, saw the rise of two great government structures in the VA and Social Security Board.<sup>52</sup> Both programs administered (and continue to

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<sup>50</sup> Presidential Statements – Franklin D. Roosevelt, *Presidential Statement Signing The Social Security Act*, SOCIAL SECURITY ADMINISTRATION (Aug. 14, 1935), <https://www.ssa.gov/history/fdrstmts.html#signing>.

<sup>51</sup> *Id.*

<sup>52</sup> *An Act to Authorize the President to Consolidate and Coordinate Governmental Actions Affecting War Veterans*, Pub. L. 74-536, Session II, Chap. 863 (H.R. 10630), 1016 (July 3, 1930); Exec. Order No. 5,398: Establishing the Veterans’ Administration (July 31, 1930). The V.A. was brought into being in 1930. *Id.* Social Security Act, Pub. L. 74-271, 49 Stat. 620, 635-636; Title VII §§ 701-704 (Aug. 14, 1935). The Social Security Board was brought into being in 1935. *Id.*

administer) benefits on a scale that arguably thrive upon a mix of cross-program influence. As discussed here and at later points, each system sets precedent with the other, a natural consequence of two highly public, national entitlement programs. The result: parallel development of systemic government paternalism.

Of all the federal agencies, the VA arguably has become one of the most paternalistic. Although most federal agencies require a claimant seeking benefits to produce evidence in support of their claim, Congress has enacted a statutory scheme that effectively shifts the burden of case development away from the claimant, resting instead on the VA. As a result, the VA must assist the veteran in developing his or her own claim. In particular, the VA is required to:

(1) Assist the veteran in notifying the veteran of the evidence or information necessary to substantiate a claim;<sup>53</sup>

(2) Consider all legal theories reasonably raised by the evidence even if not raised or addressed by the claimant himself [indeed, there is no requirement that the veteran specify the benefit sought—the VA must assume the veteran is seeking any and all possible benefits raised by the evidence];<sup>54</sup>

(3) Assist the claimant in obtaining records, and when necessary, and secure medical examination(s) to support the case;<sup>55</sup> with a final duty to

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<sup>53</sup> 38 U.S.C. § 5103(a) (2016).

<sup>54</sup> 38 C.F.R. § 3.103(a) (2018); *Robinson v. Shineski*, 557 F.3d 1355 (Fed. Cir. 2009); *Schroeder v. West*, 212 F.3d 1265, 1271 (Fed. Cir. 2000) (interpreting the language of 38 C.F.R. § 3.103 to require consideration of all reasonably possible legal theories for recovery of benefits).

<sup>55</sup> 38 U.S.C. § 5103A(b) (2016) (assist in obtaining records), (d) (obtain medical examinations). The CAVC enunciated what are now known as the “McClendon factors” that determine whether a medical examination is necessary and appropriate to fulfill VA’s duty to assist. *McClendon v. Nicholson*, 20 Vet. App. 79 (2006). The “factors” to be considered are: (1) competent evidence of a current disability—or recurrent symptoms of a disability; (2) evidence establishing that an injury was incurred or disease suffered during military service; (3) some indication of a connection between the in-service event and the current medical

(4) Maximize the veteran's benefit.<sup>56</sup>

Indeed, the current statutory scheme no longer even requires that the veteran submit a “well-grounded claim”<sup>57</sup> in order to trigger the VA’s responsive duty to assist, in effect this resulted in the overturning of the 1988 enactment of the Veterans Judicial Review Act (VJRA).<sup>58</sup> Congress has acted to legislatively overturn a series of court holdings,<sup>59</sup> finding that veterans no longer need file a “well-grounded claim” to move forward in the disability process. Whether a claim is “well grounded” is now only relevant to the question of whether benefits will be allowed after consideration of all the evidence — evidence which the VA must affirmatively find and, if appropriate, further develop.

To be plain, under current law, the VA is now unconditionally required to develop all possible legal theories and evidentiary routes to maximize the veteran’s potential benefit — effectively stepping into the veteran’s shoes, turning the table, and removing from the veteran any requirement that a well-grounded claim be presented at

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condition; and (4) insufficient evidence in the file to allow the VA to make a determination on the claim based on the evidence as it exists. *Id.*

<sup>56</sup> See generally, 38 C.F.R. §§ 3.159, 3.326 (2018).

<sup>57</sup> See, e.g., *Epps v. Gober*, 126 F.3d 1464, 1467–68 (Fed. Cir. 1997).

<sup>58</sup> The duty to assist statute enacted in 1988 was codified in 38 U.S.C. § 5107(a), stating in pertinent part: “[A] person who submits a claim for benefits under a law administered by the Secretary [of Veterans Affairs] shall have the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded. The Secretary shall assist such a claimant in developing the facts pertinent to the claim.” 38 U.S.C. § 5107(b) went on to state, in pertinent part: “When, after consideration of all evidence and material of record in a case before the Department [of Veterans Affairs] with respect to benefits under laws administered by the Secretary, there is an approximate balance of positive and negative evidence regarding the merits of an issue material to the determination of the matter, the benefit of the doubt in resolving each such issue shall be given to the claimant. Nothing in this subsection shall be construed as shifting from the claimant to the Secretary the burden specified in subsection (a).” See 38 U.S.C. § 5107(a) (emphasis added).

<sup>59</sup> See, e.g., *Epps v. Gober*, 126 F.3d 1464, 1467–68 (Fed. Cir. 1997) (upholding VA’s interpretation of 38 U.S.C. § 5107(a) requiring veterans to submit a “well-grounded” claim before triggering the “duty to assist”); *Caluza v. Brown*, 7 Vet. App. 498, 504 (1995), *aff’d* 78 Fed. 604 (Fed. Cir. 1996).

the outset. The VA thus finds itself in the awkward position of evaluating the efficacy of a claim, while simultaneously acting as the one filing the claim. This seeming role-reversal can only be characterized as a paternalistic license to go on an “evidentiary fishing expedition” in all cases except those patently frivolous on their face.<sup>60</sup>

The evolution of this statutory evolution is best understood in the examination of the history of veterans’ benefits, outlined in Section III, below, beginning as long ago as medieval times.

### III. THE RISE OF PATERNALISM AND VETERANS’ DISABILITY COMPENSATION

“The only thing new in the world is the history you do not yet know.”

-Harry S. Truman<sup>61</sup>

#### *A. English Origins of Veterans’ Disability Helped Shape the Early Colonial Period in America (1593–1692)*

The American constitutional and legal system did not, of course, spring anew into being with the European colonization of the New World. Neither did the current system of veterans’ disability compensation and adjudication. Both are products of complex social, economic and political undertakings — in effect, a series of incremental steps that, over time, lead to a greater whole. This becomes readily apparent when examining the evolution of veterans’ disability benefits — an examination that finds its roots firmly established in the Old World. Nowhere is this more evident than in the English common law.

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<sup>60</sup> VETERANS CLAIMS ASSISTANCE ACT OF 2000, Pub. L. 106–475, § 3, 114 Stat. 2096, 2097–2098 [H.R. 4864] (Nov. 9, 2000), currently codified at 38 U.S.C. § 5103A(a)(2) (placing on the VA the onerous burden of providing assistance to a claimant unless “no reasonable possibility exists that such assistance would aid in substantiating the claim.”).

<sup>61</sup> *Plain Speaking: An Oral Biography of Harry S. Truman*, Merle Miller, Berkeley Publishing, 10th Ed., 26 (1974).



The first recorded statute for the “Reliefe of Souldiers” [sic] (the Act) was enacted during the 1592-1593 Session of Parliament during the reign of Queen Elizabeth I.<sup>62</sup> Compared to modern legislation, the general purpose of this legislation is a model of brevity:

An Acte for reliefe of Souldiers—

[F]orasmuch as it is agreeable with Christian Charity Policy and the Honor of our Nation, that such as have since the 25<sup>th</sup> day of March 1588, adventured their lives and lost their limbs or disabled their bodies, or shall hereafter adventure their lives, lose their limbs, or disable their bodies, in defence and service of Her Majesty and the State, should at their return be relieved and rewarded to the end that they may reap the fruit of their good deservings, and others may be encouraged to perform the like endeavors: Be it enacted . . . .<sup>63</sup>

Close review of the Act reveals an award based on “Christian Charity” for those standing for the “Honor of our Nation.” Recognition was given to the declared sacrifice of the individual “in defence and service of Her Majesty and the State.”<sup>64</sup> The recipients are described as “deserving.”<sup>65</sup>

The Act further elaborated *how* such relief was to be financed by weekly churchwarden collection levies in local parishes paid over to the high constables of the various counties of Her Majesties’

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<sup>62</sup> Dom. S. Papers, Eliz., vol. 244, Ex. 68, s. 2 c., p. 326 (Mar. 8, 1593), *cited by* Hutt, G. (Ed.) (1872). *Papers Illustrative of the Origin and Early History of the Royal Hospital at Chelsea*. London: George E. Eyre and Williams Spottiswoode, Printers for the Queen’s Most Excellent Majesty, for Her Majesty’s Stationery Office [hereinafter *Hutt, G. (Ed.) (1872)*], at p. 5.

<sup>63</sup> (1592-1593), 35 Eliz., c. 4, § 1, *quoted in* Hutt, G. (Ed.). (1872), at p. 5, *cited by* Weber, G.A. & Schmeckebier, L.F. (1934). *THE VETERANS’ ADMINISTRATION: ITS HISTORY, ACTIVITIES AND ORGANIZATION* (Service Monograph No. 66), Washington, D.C.: Brookings Institution [hereinafter “WEBER & SCHMECKEBIER”], at p. 3.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

Realm.<sup>66</sup> Distributions were in the form of payments (*i.e.*, pensions) payable quarterly at rates directed by the Justices in Quarter Session<sup>67</sup> with special provision for those in immediate need.<sup>68</sup>

Enforcement of this early legislation was uneven and sporadic. As a result, remedial legislation was required. During its 1597–1598 Session, Parliament enacted three statutes to address the issue of returning veterans’ ability to work, providing for the award of pensions for those unable to do so. The first of those statutes directed men returning from military duty to “repair to their parishes for work.”<sup>69</sup> If none were available, the justices were directed to tax the hundreds [originally a medieval local administrative subunit of English counties (shires)] to pay for the soldier(s)’ relief until such work was available.<sup>70</sup> The second statute simply continued in force the original 1593 legislation.<sup>71</sup> The third piece of legislation altered the amount of pensions awarded as circumstances dictated, subject to fixed minimum and maximum awards as set forth in the legislation.<sup>72</sup>

Part of the 1597–1598 legislation was repealed during the time the last Parliament convened during Elizabeth I’s reign (1601)<sup>73</sup> and was replaced with a new statute “for the necessarie reliefe of souldiers and marriners [sic]”<sup>74</sup>:

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<sup>66</sup> *Id.*

<sup>67</sup> Hutt, G. (Ed.). (1872), *supra* note 61, at 5–6.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> (1597–1598), 39 Eliz., c.17, *cited in* Hutt, G. (Ed.) (1872), at p. 7. *See generally*, Hudson, G. (1995). *Ex-servicemen, war widows and the English County Pension Scheme, 1593-1679* (Doctoral dissertation, University of Oxford). The English common law has evolved considerably since that time. Since 2014, there is but a single civil court known as the County Court with unlimited financial jurisdiction with various “small claims track”, “fast track,” and “multi-track” dockets depending on the type of claim and financial amount at issue.

<sup>71</sup> Hutt, G. (Ed.). (1872), *supra* note 61, at 7.

<sup>72</sup> *Id.*

<sup>73</sup> In particular, (1592–1593), 35 Eliz., c. 4, (1597–1598) [and by necessary inference, 39 Eliz., c.18 (1597–1598) which continued in force the prior legislation codified at 35 Eliz., c.4], 39 Eliz., c.21, were all repealed by the later legislation: (1601), 43 Eliz., c. 3, §§ 1, 2 *cited in* Hutt, G. (Ed.) (1872), at 8.

<sup>74</sup> *Id.*

for the necessarie reliefe of souldiers and marriners

And forasmuche as it is now found more needful than it was at the making of the Said Acts to provide Relief and Maintenance to Souldiers and Marriners that have lost their Limbs and disabled their bodies in the Defence and Service of Her Majesty and the State, in Respect the Number of the saide Souldiers is so muche the greater, by how much Her Majesty's just and honorable defensive Wars are increased . . . Be it enacted . . . the succeeding clauses, reviving all the previsions of the previous Acts but in a more full and particular manner, and increasing the maximum contribution from the parishes . . . .<sup>75</sup>

With the restoration of Charles II following the English Civil War, England embarked upon the establishment of a standing army during the period 1680-1690 with permanent enlistment of soldiers.<sup>76</sup> King Charles II issued letters patent with the intent of establishing an institution for old or disabled soldiers in 1681 known as 'Chelsea Hospital.' After numerous delays, Chelsea Hospital began operations in 1692.<sup>77</sup> Again, the statutory foundation was straightforward, requiring a showing of service with a finding that "souldiers and marriners [sic]" had been "disabled" in "their bodies."<sup>78</sup> The

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<sup>75</sup> 43 Eliz., c. 3, §§ 1, 2 (1601), this 1601 legislation was continued in force during the reign of King James I. (1603-1604), Jas. I, c. 25, § 1, *cited in* Hutt, G. (Ed.) (1872), at 8, and remained in force until June 1614 when the legislation, "through some inadvertence was not re-enacted". Hutt, G. (Ed.) (1872), at 9. Nevertheless, later legislation made clear that the original Elizabethan legislation was deemed not to have lapsed. 21 Jas. I, c. 28, § 1, *cited by* Hutt, G. (Ed.) (1872), at 9. This legislation remained in form up to the time of English Civil War and thereafter even after the restoration of Charles II to the throne [1642-1662], *see e.g.*, (1627), 3 Car. 1, c. 5, § 1; (1640), 16 Car. 1, c. 4, § 31, *cited by* Hutt, G. (Ed.) (1872), at 9; (1662) 14 Car. II, c. 9, *cited by* Hutt, G. (Ed.) (1872), at 12.

<sup>76</sup> Glasson, W.H., *FEDERAL MILITARY PENSIONS IN THE UNITED STATES*. New York: Oxford University Press (1918) (American Branch), at 11, (citing Hutt, G. Ed., 13-16. (1872)).

<sup>77</sup> *Id.* at 11.

<sup>78</sup> 43 Eliz., c. 3, §§ 1, 2 (1601).

contribution was at the behest of the Crown, but derived from individual parish collections.

*B. The Early Colonial Period Through the Time of the American Revolution and the Early Republic Up Until the War of 1812 (1624–1812)*

1. Colonial Virginia

While the English were coming to terms with veterans' disability, events in New World – in America – developed along a separate track. The first written records pertaining to veterans' disability in the English-speaking New World were created in the aftermath of the Great Massacre of 1622 leading to Virginia's First Indian War (1622-1632).<sup>79</sup>

In 1624, Sir Francis Wyatt, then Governor of Virginia, persuaded the House of Burgesses to enact a body of law with the intent for it to be ratified by the Virginia Company, which was the controlling legal authority over the Virginia colony at that time. This proposed legislation stated:

That of the beginning of July next [1624] the inhabitants of every corporation shall upon their adjoining salvages [sic] as we the last yeare, those that shall be hurte upon service to be cured at the publique charge; in case any be lamed by the country according to his person and quality.<sup>80</sup>

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<sup>79</sup> See generally William S. Powell, *Aftermath of the Massacre: The First Indian War, 1622-1632*, 66 *Virginia Magazine of History and Biography* 44-75 (1958); Alden T. Vaughan, "Expulsion of the Salvages": *English Policy and the Virginia Massacre of 1622*, 35 *WM. & MARY Q.* 57-84 (1978). This early war was also known as the "First Tidewater War" (1622-1632), or "Powhatan Uprising of 1622." *S* ee, e.g. ALLAN R. MILLET & PETER MASLOWSKI, *FOR THE COMMON DEFENSE: A MILITARY HISTORY OF THE UNITED STATES OF AMERICA* 13-15 (3<sup>rd</sup> ed., 2012). *For the Common Defense: A Military History of the United States, 1607-2012*, New York: Free Press Publishing, at 13–15 ("First Tidewater War"); Wallenstein, P. (2007). *PETER WALLENSTEIN, CRADLE OF AMERICA: FOUR CENTURIES OF VIRGINIA HISTORY* 23-25 (2007).

<sup>80</sup> Hening, William W. (1823). *THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE*

Later Virginia legislation, enacted at the outset of the Second Indian War (1644-1646), was voted in October 1644 as follows:

Whereas in the late expeditions against the Indians, diverse men were hurt and maymed [sic] and disabled from provideing [sic] for their necessary maintenance and subsistance [sic], Be it therefore enacted by the authority of this present Grand Assembly [the Virginia House of Burgesses], That all hurt or maymed [sic] men be releived [sic] and provided for by the severall [sic] counties, where such men reside or inhabit [sic].<sup>81</sup>

This provision for veterans' relief emanating from local governments was copied from the English model then in existence.<sup>82</sup>

In 1675, Virginia once again enacted legislation during its most recent Indian war providing: "due consideration shalbe [sic] had by the grand assembly of the indigent ffamilies of such as happen to be slaine, and of the persons and ffamilies of those who shalbe maimed and disabled in this warr [sic]."<sup>83</sup>

Similar legislation was enacted one year later, in June 1676, providing: "that all such soldiers as shall be maimed and disabled in this war as aforesaid shall be maintained by the publique by an annuall pension dureing their lives, and dureing the time of such their disabilitye. . . ."<sup>84</sup>

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LEGISLATURE IN THE YEAR 1619, Vol. I, at 128, Para. 32 (Mar. 1624) [published pursuant to Act of the General Assembly of Virginia, 1808], New York: R. & W. & G. Bartow Publishing [hereinafter *HENING'S STATUTES AT LARGE*], referenced without the full citation in Glasson, W.H. (1918). FEDERAL MILITARY PENSIONS IN THE UNITED STATES. New York: Oxford University Press (American Branch), at 3, n.1 [hereinafter "GLASSON"].

<sup>81</sup> Hening, William W, STATUTES AT LARGE, VOL. I, 287 (Oct. 1644.); Wiley et al., *supra* note 23.

<sup>82</sup> King, *supra* note 19.

<sup>83</sup> Hening, William W, STATUTES AT LARGE, VOL. II, 331 (Act I: *An Act for the safeguard and defence of the country against the Indians*) (1675), quoted without citation in GLASSON, at 14.

<sup>84</sup> Hening, William W, STATUTES AT LARGE, VOL. II, 347 (Act I: "*An Act for carrying on a warre against the barbarous Indians*") [commonly known as

Interestingly, Virginia broke with its tradition, failing to provide for military disability pensions during King George's War (1739-1748), at which time it sought to raise troops to engage in expeditions against both the French in Canada<sup>85</sup> and the Spanish in Florida,<sup>86</sup> but did not provide for benefits for the "maimed and disabled." This break with tradition was short-lived and at the time of the outbreak of the French and Indian War (1754-1763), the House of Burgesses - the Virginia legislature at that time - returned to its former policy of funding disability pensions.<sup>87</sup> This legislation was particularly generous in that not only did it provide yearly pensions to disabled soldiers,<sup>88</sup> but it also further promised protection from creditor lawsuits and complete tax exemptions as long as they continued to

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"Bacon's Laws"] (June 5, 1676), *partially quoted without citation in* GLASSON, at 14. These laws were enacted during a period of time commonly known as *Bacon's Rebellion* [also occurring during the period known as "King Philip's War in New England (1675-1676)] They were repealed the following year on February 20, 1677, after "Bacon's Rebellion" had been suppressed. HENING'S STATUTES AT LARGE, VOL. II, at 380 (Act IV: "*An act declaring all act, orders, and proceedings of a grand assembly held at James City, in the month of June, 1676, void, null and repealed*" [sic]). *See generally* P. Wallenstein, CRADLE OF AMERICA: FOUR CENTURIES OF VIRGINIA HISTORY 33-4 (Lawrence, Kansas: University of Kansas Press, 2007) at 33-34 ("Bacon's Rebellion"). Later legislation during the French and Indian Wars (1754-1763) also provided for bounty land grants in the Western and Southwestern parts of Virginia, *see, e.g.,* W.A. Crozier, *VIRGINIA COLONIAL MILITIA, 1651-1776* (New York: Genealogical Publishing Company, (Vols. I, II, 1905).

<sup>85</sup> July 1746 Session, Ch. 1, Hening, William Chap. 1, STATUTES AT LARGE, Vol. V, 401-06, *An Act for Giving a Sum of Money, Not Exceeding Four Thousand Pounds, Toward Defraying the Expence [sic] of Inlisting [sic], Arming, Clothing, Victualling, and Transporting the Soldiers in this Colony, on an Intended Expedition Against Canada.*

<sup>86</sup> May 1740 Session, Ch. 33, Hening, William W33, STATUTES AT LARGE, Vol. V, 94-96, *An Act for Raising Levies and Recruits, to Serve in the Present War, Against Spaniards in America.*

<sup>87</sup> August 1755 Session, Ch. 11, Hening, William W11, STATUTES AT LARGE, Vol. VI, 525, 527-28, *An Act for Raising the Sum of Forty Thousand Pounds, for the Protection of his Majesty's Subjects on the Frontiers of this Colony.*

<sup>88</sup> August 1755, Session, Ch. 11, Hening, William W11, STATUTES AT LARGE, Vol. V, 94-96, 401-04, *An Act for Raising the Sum of Forty Thousand Pounds for the Protection of His Majesty's Subjects on the Frontiers of this Colony.*

serve on active military service.<sup>89</sup> While not paternalistic in a strict sense, as these benefits acknowledged those in active service, they nonetheless plainly echo the future hallmarks.

## 2. New Plymouth and Massachusetts Bay Colony (Including the Three Connecticut Colonies Prior to 1638)

In New England, the Pilgrims of the New Plymouth Colony General Court provided in 1636 that “if any man shalbee [sic] sent forth as a souldier [sic] and shall return maimed hee shalbee [sic] majntained [sic] competently by the Collonie [sic] during his life.”<sup>90</sup>

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<sup>89</sup> *Id.* The concept of civil relief for soldiers long pre-dates the U.S. experience. The first legal reference to civil relief for soldiers dates from 13<sup>th</sup> Century France in the “*Coutume de Beauvois: l’Essor de la Souveraineté Royale*” [“Beauvois Custom, the Flight of Royal Sovereignty”], Philippe de Beaumanoir (1283) [French jurist and scholar] wherein relief was accorded by the King to knights campaigning on crusade. *Referenced without the full citation* “LHP, Jr.” (1940), Soldiers’ and Sailors’ Civil Relief Act of 1940, VA. L. REV. 207-16, at 207, n.2. The Colonial Virginia legislation might be a predecessor to later legislation enacted by individual States during the Civil War—there was no general federal legislation covering moratoria of civil proceedings during the Civil War. For a complete list of individual State legislation during the civil war era. *See generally*, A.H. Feller, *Moratory Legislation: A Comparative Study*, 46 *Harv. L. Rev.*, 1061-1085, Appendices I, II, at 1081–85 (1933). Congress enacted the first federal moratorium legislation during World War I with the enactment of the *Soldiers’ and Sailors’ Civil Relief Act of 1918*, Ch. 20, §§ 101-65, 40 Stat., 440–49 (Mar. 8, 1918). The 1918 act expired by its own terms six months after the end of World War I. Ch. 20, § 164, 40 Stat. at 449. Congress later enacted the *Soldiers’ and Sailors’ Civil Relief Act of 1940*, Pub. L. 76-861, Ch., 888, 54 Stat. 1178 (Oct. 17, 1940) [which has remained in force since then and is now the *Serviceman’s Civil Relief Act as of 2003*, Pub. L. 108-189, 117 Stat. 2835 [H.R. 100] (Dec. 19, 2013), as amended by the *Veterans’ Benefits Improvement Act of 2004*, Pub. L. 108-454, Title VII—“Improvements to Servicemembers’ Civil Relief, Act”, §§ 701–04, 118 Stat. 3598, at 3624–25 (Dec. 10, 2004)] [currently codified at 50 U.S.C. §§ 501-97b].

<sup>90</sup> RECORDS OF THE COLONY OF NEW PLYMOUTH IN NEW ENGLAND, LAWS (1623-1682) (David Pulsifer, *ed.*), Part II, 106 [published by order of the Legislature of the Commonwealth of Massachusetts, 1861], Boston: William White Press *referenced without the full citation in* Glasson, 14, n.1. *See generally* Sylvester, H.M., INDIAN WARS OF NEW ENGLAND: TOPOGRAPHY OF INDIAN TRIBES, THE EARLY SETTLER AND THE INDIAN. THE PEQUOD WAR. WARS OF THE MOHEGANS (1910), Vol. I, 183–339, entitled “The Pequod War” [1636-1637], Cleveland, Ohio: The Arthur H. Clark Company (describing the colonial wars

Interestingly, the term “General Court” was used for the legislatures of the Plymouth Colony, Massachusetts Bay Colony and the three colonies that comprised Connecticut at that time.<sup>91</sup>

The Massachusetts Bay Colony appointed a standing committee on May 3, 1676, to consider wounded soldier petitions for relief.<sup>92</sup> Records from 1679 show that the colony’s General Court ordered soldiers to report to this committee for relief, noting that its meetings were held twice a year (September and March) at the “Boston toun [sic] House”.<sup>93</sup>

After the consolidation of the New Plymouth and Massachusetts Bay colonies by the Charter of 1691, the Act of November 23, 1693, was enacted, authorizing the “levying of soldiers”<sup>94</sup> A distinction

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against the Pequot Indians to which this soldiers’ relief applied), *also referenced without the full citation* in GLASSON, at 14, n.2. *See also* Bradford, William, WILLIAM BRADFORD’S HISTORY OF PLYMOUTH PLANTATION (1606-1646), New York: Scribner’s Sons (1908), at 332–38 (primary source account of the Pequot war).

<sup>91</sup> Haskins, George L., & Ewing, Samuel E. (1958), “The Spread of Massachusetts Law in the Seventeenth Century, 106 U. PA. L. REV., 413, 413, n.3, 415, n.18–23. *See generally*, Hoadley, ed. (1857), RECORDS OF THE COLONY AND PLANTATION AT NEW HAVEN, 1638-1649, 416, n.24, and Hoadley, Charles J., ed. (1858), 2 RECORDS OF THE COLONY OR JURISDICTION OF NEW HAVEN, 1663-1665, at 146–47, *cited by* Haskins at 416, n.25

<sup>92</sup> ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF MASSACHUSETTS BAY: *To Which are Prefixed the Charters of the Province, With Historical and Explanatory Notes, and an Appendix: Vol. I, [1692-1715]*, Published Under Chapter 87 of the Resolves of the General Court of Commonwealth for the Year 1867, Boston, Massachusetts: Wright & Potter, Printers to the Commonwealth, 1869, at 135, *cited in* LASSON GLASSON with the full citation to authority at 14.

<sup>93</sup> ACTS AND RESOLVES OF THE PROVINCE OF MASSACHUSETTS BAY, 1679 Session, Vol. 1. at 80, 227, *referenced without the full citation in* GLASSON, 14, n.3.

<sup>94</sup> ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF MASSACHUSETTS BAY: *To Which are Prefixed the Charters of the Province, With Historical and Explanatory Notes, and an Appendix: Vol. I, [1692-1715]*, Published Under Chapter 87 of the Resolves of the General Court of Commonwealth for the Year 1867, Boston, Massachusetts: Wright & Potter, Printers to the Commonwealth, at 135, *cited in* GLASSON with the full citation to authority at 14, n.4. The preamble states the purpose of the statute was for “the more speedy levying of souldiers [sic] for their majesties’ [King William & Queen Mary] service and the better to prevent disappointments through default in any improved therein, or by the non-appearance of such as shall be appointed to said [military] service.”



was made between “regular army” (*i.e.*, British soldiers) and those serving the consolidated colony as a local militia member.<sup>95</sup> In particular, while the legislation provided yearly pensions to soldiers and sailors who had been or might be disabled by “a wound received in their majesties’ service within this province,” a bill pertaining to the militia that very same day contained no such provision.<sup>96</sup>

Near the end of King William’s War (1689-1697), the Massachusetts Bay colony enacted legislation encouraging enlistments to engage hostile Indians. In addition to granting bounties for scalps and retention of “all plunder and prisoners taken of the enemy,” it also provided for those becoming disabled because of their military service:

In case any person or persons shall be wounded in the aforesaid service, he they shall be cured at the charge of the publick [sic]; and if maimed or otherwise disabled shall have such stipend or pension, allowed unto him or them as the general court or assembly shall think meet.<sup>97</sup>

Similar pension provisions are found in later Massachusetts legislation right up to the time of the French and Indian War (1754-1763).<sup>98</sup>

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<sup>95</sup> V RECORDS OF THE GOVERNER AND COLONY OF MASSACHUSETTS BAY IN NEW ENGLAND (1674-1686) 80 (Nathaniel B. Shurtleff ed. 1854).

<sup>96</sup> *Compare Acts and Resolves, Public and Private, of the Province of Massachusetts Bay: To Which are Prefixed the Charters of the Province, With Historical and Explanatory Notes, and an Appendix: Vol. I, [1692-1715]*, n.32 *infra*, with *An Act for Regulating the Militia*, 1693-1694 Session, ch. 3, ACTS AND RESOLVES OF THE PROVINCE OF MASSACHUSETTS BAY, Vol. 1, at 135.

<sup>97</sup> *Acts and Resolves of the Province of Massachusetts Bay*, Vol. 1, 292 (“*An Act for Encouragement of the Prosecution of the Indian Enemy and Rebels*”), 1697 Session, Ch. 12, § 1.

<sup>98</sup> *See, e.g.*, 1699-1700, ch. 19, § 6; 1702, .ch. 6, § 4; 1721-1722, ch. 1, § 9; 1744-1745, ch. 2, § 14; 1748-1749, Chap. 5, § 15, *cited in Acts and Resolves of the Province of Massachusetts Bay*, Vol. 1, 400, 499-500; Vol. 2, 146, 149.

### 3. Colonial Maryland

The Maryland General Assembly enacted its first pension legislation in 1661. It provided relief for “every person that shall venture as a Souldier [sic] in any warre [sic] in the defence [sic] of the Country and shall therein happen to be maimed or receive hurte [sic].”<sup>99</sup> The colony expanded upon this first militia law in 1678 when it enacted legislation to include yearly pensions, not just for disabled soldiers themselves but for the *widows and orphans of those killed in battle*. These benefits would be paid out of the public taxes on tobacco and would be paid once “the party petitioning for such pension and allowance procure[d] a Certificate from the Commissioners of the County Court where he[,] shee [sic] or they live that he[,] she or they are Objects of Charity & deserve to have such pension and allowance.”<sup>100</sup> These initial colonial laws remained in force in Maryland through the time of the French and Indian War. During the period from 1756-1760 the Maryland legislature reaffirmed the provisions of the earlier 1678 militia act in a series of appropriations bills authorizing the raising and supplying of soldiers to support military expeditions in western Pennsylvania and even Canada.<sup>101</sup>

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<sup>99</sup> “*An Act for Encouragement of Such Souldiers [sic] as Shall Adventure in the Defence [sic] of the Country*”, ARCHIVES OF MARYLAND, Vol. 1, 408 (enacted May 2, 1661) and confirmed by the Lieutenant General of the Maryland Colony in the Lord Proprietor’s name in April 1662. ARCHIVES OF MARYLAND, Vol. I, 436.

<sup>100</sup> ARCHIVES OF MARYLAND, Vol. 7, at 558.

<sup>101</sup> See, e.g., *An Act for Granting a Supply of Forty Thousand Pounds for His Majesty’s Service, and Striking Thirty-Four Thousand and Fifteen Pounds Six Shillings Thereof, in Bills of Credit, and Raising a Fund for Sinking the Same*, 1756 (Feb. session), ARCHIVES OF MARYLAND, VOL. 52, 480-521, at 493; *An Act for the Defence [sic] and Security of the Frontier Inhabitants of This Province, and for Other Purposes Therein Mentioned*, 1760 (March session), ARCHIVES OF MARYLAND, VOL. 56, 263-306, at 275.

#### 4. Colonial New York

The New York Assembly enacted its first veterans' pension legislation in 1691 during King William's War [1689-1697]<sup>102</sup> when it found itself having to defend against French and Indian incursions. The New York legislation provided that "any person wounded or disabled" [as the result of] "any Invasion or other publick [sic] Military Service" would be "cured and Maintained out of the publick [sic] Revenue."<sup>103</sup> Similar language was used in the 1702 militia act<sup>104</sup> enacted in New York at the commencement of Queen Ann's War [1702-1713]<sup>105</sup> as well as later, similar legislation in the years leading up to the American Revolution.<sup>106</sup>

#### 5. Colonial Rhode Island (Including Rhode Island and Providence Plantation)

As noted above, larger colonies such as Virginia and New York directed individual counties to manage veterans' pension benefits. By contrast, Rhode Island delegated its authority to manage veterans' pension cases to "the Town Council of each Respective Town in this Colony."<sup>107</sup>

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<sup>102</sup> See generally, McLay, K.A.J. (2006). WELLSPRINGS OF A 'WORLD WAR': AN EARLY ENGLISH ATTEMPT TO CONQUER CANADA DURING KING WILLIAM'S WAR, 1688-97. *J. of Imp. & Commonw. Hist.* 34(2), 155-75.

<sup>103</sup> *The Colonial Laws of New York from the Year 1664 to the Revolution, Including Charters to the Duke of York, the Commissions and Instructions to Colonial Governors, the Duke's Laws, the Law of the Donegan and Leisler Assemblies, the Charters of Albany and New York, and the Acts of the Colonial Legislatures from 1691 to 1775, Inclusive.* [Transmitted to the Legislature by the Commissioner of Statutory Revisions, Pursuant to Ch. 125 of the Laws of 1891]. Albany, New York: James B. Lyon, New York State Printer (1896), Vol. 1, 234 [hereinafter "*Colonial Laws of New York*"].

<sup>104</sup> *Colonial Laws of New York*, Vol. I, 530 (1702).

<sup>105</sup> See generally, Waller, G.M. (1952). "New York's Role in Queen Anne's War, 1702-1713." *N.Y. Hist.* 33, 40-53.

<sup>106</sup> *Colonial Laws of New York*, Vol. 2, ch. 448, 292 (1724); Vol. 3, ch. 816, 522 (1746); Vol. 3, ch. 972, 1051 (1755); Vol. 4, ch. 1241, 773 (1764); Vol. 5, ch. 1541, 351 (1772); Vol. 5, ch. 1700, 741 (1775).

<sup>107</sup> *Acts and Laws, of His Majesties Colony of Rhode Island, and Providence Plantations in America* (1719). Boston, Massachusetts: JOHN ALLEN PUBLISHER FOR NICHOLAS BOONE, at 94-95.

Rhode Island's first pension legislation was enacted in 1718.<sup>108</sup> That legislation called for the provision of an annual pension and medical care "sufficient to maintain himself and Family" to any "Officer, Soldier or Sailor, that shall be employed [sic] by this Colony, against his Majesties Enemies."<sup>109</sup> This legislation also provided for annual pensions for dependents of "any person or persons . . . slain in this Colonies Service" until such time that such dependent individual "shall happen to Die or be able to Subsist and Maintain themselves [sic]."<sup>110</sup> The definition of "dependent" was very broad and included widows, dependent children and "Parents and other Relations [sic]" whom the deceased soldier or sailor "had the charge of maintaining."<sup>111</sup>

## 6. Colonial South Carolina

South Carolina enacted its first veterans' pension legislation in 1747 with a primary goal of encouraging enlistment into military service from all levels of society. Notably, the South Carolina law encouraged military service for white indentured servants and even black slaves, something not contemplated in contemporary legislation passed by the other colonial states. In particular, the South Carolina legislation provided that very poor white males (whether freeman or indentured servants) "who shall boldly and cheerfully oppose the common enemy,"<sup>112</sup> and who became disabled or was maimed as a result of this military service was eligible for an annual pension of £12 if single or £18 if married. In a similar fashion, the widow or

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *An Act for the Better Regulating the Militia of this Province, and for Repealing the Former Acts for Regulating the Militia; and for Repealing an Act Entitled "An Act for the Further Security and Better Defence of this Province", THE STATUTES AT LARGE OF SOUTH CAROLINA, APPENDIX, 645–63, § XLI, 660–61 (June 13, 1747) <https://catalog-hathitrust.org/Record/008607543> (Acts Re: Militia Period found at Vol.9 (original from N.Y. Public Library) [hereinafter *An Act for the Better*].*

dependent of such a soldier would also be eligible for a pension of £12 per year.<sup>113</sup>

As for black slaves, the South Carolina legislation provided detailed information on the procedure for masters to enlist their slaves in the militia with a method for valuation if the slave was killed (no mention was made of disability) so that compensation could be paid to the owner. Both white indentured servants and enlisted slaves were found to “actually engage the enemy in times of invasion in this Province, and shall courageously behave in battle, so as to kill any one of the enemy, or take a prisoner alive, or shall take any of their colours” [sic] would gain their freedom.<sup>114</sup> It is interesting to note that the slave benefit clauses were not included in the Militia Act of 1778 during the height of the Revolutionary War.<sup>115</sup> In short, slaves could still be enlisted into military service, but there was no promise of manumission as a reward for that military service as had existed in prior legislation.<sup>116</sup>

## 7. Colonial Georgia

The Georgia legislature enacted its first militia bill in 1755,<sup>117</sup> appearing virtually identical to a South Carolina bill passed years earlier in 1747.<sup>118</sup> Georgia specifically retained the statutory provisions authorizing slave manumission for military service in its 1773 legislation,<sup>119</sup> only to repeal it in later 1784 legislation.<sup>120</sup>

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.*, at §§ XXXIX, XLI, 660-61.

<sup>115</sup> *An Act for the Regulation of the Militia of this State, and for Repealing Such Laws as Have Hitherto Been Enacted for the Government of the Militia*, THE STATUTES AT LARGE OF SOUTH CAROLINA, Vol. 9, ch. 1076, §§ 30-33, 679-80.

<sup>116</sup> *Id.*, ch. 1076, § 33, 680.

<sup>117</sup> COLONIAL RECORDS OF THE STATE OF GEORGIA; COMPILED AND PUBLISHED UNDER AUTHORITY OF THE LEGISLATURE, (Candler, Allen D., ed.). Atlanta, Georgia: Georgia State Printing Office (1904-1916), reprinted New York: AMS Press, Inc., 1970, Vol. 18, at 41-44 [hereinafter CHANDLER].

<sup>118</sup> See *An Act for the Better*, *supra* note 111.

<sup>119</sup> CHANDLER, at Vol. 19, 326-29.

<sup>120</sup> *Id.*, *An Act for Revising and Amending the Several Militia Laws of this State*, at Vol. 19, Part 2, 348-59 (Feb. 26, 1784).

## 8. Colonial New Hampshire

The New Hampshire legislature's records record "[a] vote for encouragement [for] soldiers that are maimed past [sic] both Houses" on July 10, 1696.<sup>121</sup> This legislation similarly called for the "an act for the payment of the care of wounded soldiers."<sup>122</sup> This included a provision for "the better Incouragement [sic] of souldiers [sic] to adventure their persons against the French & Indian Enemie [sic]."<sup>123</sup> Interestingly, although it called for the cost of medical care to be borne by the colony, it did not provide for annual pensions or allowances to those permanently injured as had been in the case in other states.<sup>124</sup>

By 1725, this situation had changed. In anticipation of attacks from the Abenaki Indians<sup>125</sup>, the legislature enacted legislation to encourage volunteers to perform military service. This included a £100 bounty for each Indian scalp taken, a daily allowance of two shillings and sixpence to cover expenses, payment for medical care for the wounded, and benefits to maimed volunteers "consistent with benefits that are allowed by the law of this Province to impress soldiers that shall be maimed in the State's service."<sup>126</sup> However, it is not clear from this legislation what those "already available" benefits might have been.<sup>127</sup>

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<sup>121</sup> *Provincial Papers: Documents and Records Relating to the Province of New Hampshire*, PUBLISHED BY AUTHORITY OF THE LEGISLATURE OF NEW HAMPSHIRE (Bouton, N., ed., 1869-1870), Manchester, New Hampshire: John B. Clarke, State Printer, 1869-1870, *reprinted* New York: AMS Press, Inc., 1973, Vol. 3, 39 [hereinafter "BOUTON"].

<sup>122</sup> *Id.*, at Vol. 3, at 41 (July 23, 1696). *See also An Act for Settling the Militia*, BOUTON, Vol. 3, at 179–83.

<sup>123</sup> *An Act for ye [sic] Paym't of Care of souldiers yt [sic] are wounded*, BOUTON, Vol. 3, at 207 (1697).

<sup>124</sup> *Id.*

<sup>125</sup> *See generally*, COLIN G. CALLOWAY, 197 *THE WESTERN ABENAKIS OF VERMONT, 1600-1800: WAR, MIGRATION, AND THE SURVIVAL OF AN INDIAN PEOPLE* (1994).

<sup>126</sup> BOUTON, Vol. 4, at 182–83 (May 25, 1725).

<sup>127</sup> *Id.*

## 9. Colonial New Jersey

In an effort to ensure inter-colony support for its war against the French during Queen Anne's War [1702-1713], Colonel Samuel Vetch of New York, acting on behalf of Queen Anne, solicited a pledge from the Governor of New Jersey to provide troops support of an expedition against French Canada.<sup>128</sup> The New Jersey legislature enacted legislation "for Encouragement of Volunteers to go on the Expedition to Canada."<sup>129</sup> It further called for a pension of nine pence per day to any person "who shall happen to loose [sic] a Leg or an Arm, or be in any way disabled from Labour [sic], in the said Expedition," but only so long as the veteran remained a resident of New Jersey.<sup>130</sup>

During the French and Indian War period, the New Jersey assembly enacted two pieces of legislation to address soldier disability pensions. The first was passed in 1758, providing for disabled soldiers to be supported at the colony's expense "on the same Allowance that other Persons who receive publick [sic] Relief usually have."<sup>131</sup> Later, 1761 legislation provided that local townships would be reimbursed out of general colony funds to pay for those "totally disabled from procuring their own subsistence by Labour" [sic].<sup>132</sup> This provision was continued in 1763 budgetary legislation enacted at the end of the French and Indian War.<sup>133</sup>

## 10. Colonial North Carolina

North Carolina archives do not show any veterans pension legislation prior to 1746. In response to military demands placed on the colony by King George's War [1744-1748], North Carolina

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<sup>128</sup> NATHANIAL C. HALE, *THE AMERICAN COLONIAL WARS: A CONCISE HISTORY (1607-1775)* 48 (1971).

<sup>129</sup> *Id.* (citing *Laws of the Royal Colony of New Jersey (1703-1775)*); *Addenda & Index*, Bush, Bernard (ed.) (1977), Vol. 2, NEW JERSEY ARCHIVES, SERIES 3. Trenton, New Jersey: NEW JERSEY STATE LIBRARY, ARCHIVE AND HISTORY BUREAU, at 66-68 [hereinafter "BUSH"].

<sup>130</sup> BUSH, Vol. 2, Series 3, at 66-68.

<sup>131</sup> BUSH, Vol. 3, Series 3, at 570.

<sup>132</sup> BUSH, Vol. 4, Series 3, at 88.

<sup>133</sup> BUSH, Vol. 4, Series 3, at 196-97.

enacted legislation providing: “That if any Person shall be so disabled in the Service of the Country, as not to maintain himself or pay for his cure, he shall be cured at the Public Charge, and have one good Negro man purchased from, and given to him, at the charge of the public, for his maintenance; and if any one shall be killed, the Public shall make the same Provision for his Wife or Family.”<sup>134</sup> Similar legislation was enacted at the commencement of the French and Indian War.<sup>135</sup>

### 11. Colonial Connecticut (After 1636)

As noted above, Connecticut had previously adopted some of the Colony of Massachusetts Bay’s laws in the early 17<sup>th</sup> Century.<sup>136</sup> In particular, it apparently adopted a system to provide military bounty lands for those who served in the Pequot War [1636-1638].<sup>137</sup> Nevertheless, as it concerned veterans’ pensions, the impact of Massachusetts law was quite limited in Connecticut. Connecticut did not make any legislative provision for cash pensions as did the other colonies. Thus, disabled veterans were often forced to seek special legislative relief from the Connecticut Assembly in the form of private relief bills to obtain reimbursement of medical expenses or abatement of State or Continental taxes.<sup>138</sup>

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<sup>134</sup> *An Act for Better Regulating the Militia of this Government*, Laws of 1746 Session, Ch. 1, § IX; *The State Records of North Carolina*, Walter Clark (ed.) [PUBLISHED UNDER THE SUPERVISION OF THE TRUSTEES OF THE PUBLIC LIBRARIES, BY ORDER OF THE GENERAL ASSEMBLY]. Goldsboro, North Carolina: Nash Brothers, Book and Job Printers, 1905). Vol. 23, at 246 [hereinafter “CLARK”].

<sup>135</sup> *An Act for the Better Regulating of the Militia and Other Purposes*, Laws of 1754-1756 Session, Ch. 2, § IV, Clark, Vol. 25, at 335.

<sup>136</sup> See *supra* note 31.

<sup>137</sup> JAMES SHEPARD, CONNECTICUT SOLDIERS IN THE PEQUOT WAR OF 1637: WITH PROOF OF SERVICE, A BRIEF RECORD FOR IDENTIFICATION, AND REFERENCE TO VARIOUS PUBLICATIONS IN WHICH FURTHER DATA MAY BE FOUND 5-7 James (1913.) cited in VETERANS’ BENEFITS AND JUDICIAL REVIEW: HISTORICAL ANTECEDENTS AND THE DEVELOPMENT OF THE AMERICAN SYSTEM, Federal Research Division, Library of Congress, Washington, D.C. (1995) at 32 n.11 (hereinafter “VETERANS’ BENEFITS AND JUDICIAL REVIEW: HISTORICAL ANTECEDENTS”).

<sup>138</sup> Hoadley, Charles J. (1868-1881), *The Public Records of the Colony of Connecticut; Transcribed and Edited, in Accordance with Resolutions of the General Assembly*. Hartford, Connecticut: Lockwood & Brainard, Vol. 3, at 550;



## 12. Colonial Pennsylvania

The two remaining colonies remain an interesting case study in that neither colony had made provisions for veterans' disability pensions prior to the Revolutionary War. The pacifistic nature of its significant Quaker population perhaps lent itself to this outcome.<sup>139</sup> In fact, even though modern Pennsylvania is the site where the French and Indian War can be said to have started in 1754, the colony did not even have a militia until 1755.<sup>140</sup>

By the time of the Revolutionary War, Pennsylvania had changed radically with respect to veterans' pensions, enacting legislation on March 17, 1777, authorizing veterans' disability pensions for Pennsylvania soldiers and their dependents regardless of whether that service was on behalf of the State or the Continental Congress.<sup>141</sup> Legislation later that same year provided benefits to disabled soldiers and sailors in service of the Continental Congress as envisioned in the 1776 Resolve of Congress.<sup>142</sup>

## 13. Colonial Delaware

In a fashion echoing the actions of its neighbor Pennsylvania, Delaware did not provide pensions for its soldiers prior to the Revolutionary War. In what appears to be an extraordinary

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Vol. 5, at 421; Vol. 6, at 211; Vol. 11, at 164–65, 189–90, *cited in* VETERANS' BENEFITS AND JUDICIAL REVIEW: HISTORICAL ANTECEDENTS, at 32 nn.113–14.

<sup>139</sup> Hoadley, *supra* 137, Vol. 6 at 211; *cited in* VETERANS' BENEFITS AND JUDICIAL REVIEW: HISTORICAL ANTECEDENTS at 32 nn.113–14.

<sup>140</sup> *An Act for the Better Ordering and Regulating Such as are Willing and Desirous to be United for Military Purposes Within this Province*, STATUTES OF PENNSYLVANIA, Vol. 5, Ch. 405, at 197–98 (Nov. 25, 1755).

<sup>141</sup> *An Act to Regulate the Militia of the Commonwealth of Pennsylvania*, Mitchell & Flanders, STATUTES OF PENNSYLVANIA, Ch. 750, §§ 28-29, Vol. 9, at 88–89 (Mar. 17, 1777).

<sup>142</sup> *An Act Making Provision for the Relief of Officers, Soldiers, Marines, and Seamen, Who in the Course of the Present War, Being in the Service of the United States of America Have Been or Shall be Maimed or Otherwise Disabled from Getting Their Livelihood and Shall be Resident in or Belong to the State of Pennsylvania*, Mitchell & Flanders, STATUTES OF PENNSYLVANIA, Ch. 763, Vol. 9, at 140–45 (Sept. 18, 1777).

oversight, legislation dating from 1746 showed Delaware had offered bounties for enlistment into military service, but made no provision for pensions for soldiers who might be killed or disabled because of their military service.<sup>143</sup>

*C. The Revolutionary War Period and the Congress of the Confederation (1776–1789)*

The history of veterans' pensions during the Revolutionary War period is a fascinating undertaking, subject to much academic analysis, most beyond the scope of this paper. Nevertheless, some highlights of legislative action taken during this period are important, illustrating the continued award of "disability" benefits even in the wake of the Revolution, drawing strongly upon the Nation's colonial heritage and laying groundwork for the entitlements yet to come.

The Continental Congress enacted a resolution on August 26, 1776, promising pensions<sup>144</sup> to soldiers who became disabled because of their military service in the Continental Army.<sup>145</sup> This first pension legislation promised officers and soldiers disabled

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<sup>143</sup> *Delaware Archives (Military)*: PUBLISHED BY THE ARCHIVES COMMISSION OF DELAWARE BY AUTHORITY. Wilmington, Delaware: Press of Mercantile Printing Company, 1911-1912, Vols. 1, 3, cited by VETERANS' BENEFITS AND JUDICIAL REVIEW: HISTORICAL ANTECEDENTS AND THE DEVELOPMENT OF THE AMERICAN SYSTEM, Federal Research Division, Library of Congress, Washington, D.C. (1995), at 31. See generally Leon de Valinger, Jr., *Colonial Military Organization in Delaware, 1638-1776* (1938). Wilmington, Delaware: Delaware Tercentenary Commission.

<sup>144</sup> This paper addresses four different types of "pensions" as they have evolved over time. These include: (1) Pensions (now, what would be called "service-connected compensation") based upon disability incurred due to military service or death resulting from such service or injuries incurred in service; (2) Pensions based on successful completion of military service and financial need (regardless of the origin of the disability or the cause of death); (3) Pensions based merely upon successful completion of military service (without regard to disability or death); and (4) Pensions based on disability (regardless of the cause of such disability and regardless of financial need).

<sup>145</sup> JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789: *Edited from the Original Records in the Library of Congress* [Manuscripts Division, Library of Congress], Washington, D.C.: Government Printing Office (GPO) (1904-1937), Vol. 5, at 702–05 (*Resolve of Aug. 26, 1776*) [hereinafter JOURNALS OF CONTINENTAL CONGRESS].

during their military service one-half of their monthly pay for life (or, for as long as their disability existed). On May 15, 1778, the Continental Congress enacted service pension legislation that promised officers who served until the end of the war half-pay for seven years.<sup>146</sup> The Continental Congress went so far as to create the first “Pension Office” in 1778; a very small operation with only four employees.<sup>147</sup>

In 1780, the original 1778 legislation was changed to provide half-pay for life.<sup>148</sup> Enlisted soldiers serving to the end of the war had been previously promised a lump sum payment of \$80.<sup>149</sup> A further March 23, 1782, result authorized the Continental Army Inspector General to discharge those sick or wounded and unfit for duty in the Invalid Corps<sup>150</sup> with a pension of \$5 per month.<sup>151</sup>

Since neither the Continental Congress (1776-1781) nor the Congress of the Confederation (1781-1789) had tax revenue to pay for these promised benefits, individual states undertook the payment of soldier pensions in 1785.<sup>152</sup> In short, veterans’ disabilities were handled differently in each of the individual colonies during the American Revolution. As one might expect, there was a wide

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<sup>146</sup> JOURNALS OF CONTINENTAL CONGRESS, Vol. 11, at 502–03 (*Resolve of May 15, 1778*).

<sup>147</sup> Cited by Ridgway, J.D. (2011). *The Splendid Isolation Revisited: Lessons from the History of Veterans’ Benefits Before Judicial Review*, 3 Veterans L. Rev. 135. See also Knight, A.W., & Worden, R.L. (1995). *THE VETERANS BENEFITS ADMINISTRATION: AN ORGANIZATIONAL HISTORY, 1776-1994*. Collingdale, Pennsylvania: Diane Publishing Co.

<sup>148</sup> JOURNALS OF CONTINENTAL CONGRESS, Vol. 18, at 958–59 (*Resolve of Oct. 21, 1780*).

<sup>149</sup> JOURNALS OF CONTINENTAL CONGRESS, Vol. 17, at 773 (*Resolve of Aug. 24, 1780*).

<sup>150</sup> JOURNALS OF CONTINENTAL CONGRESS, Vol. 7, at 288 (*Resolve of Apr 22, 1777*), Vol. 8, at 485–86 (*Resolve of June 18, 1777*), 554–56 (*Resolve of July 16, 1777*), 585 (*Resolve of July 29, 1777*), 690 (*Resolve of Aug. 28, 1777*). The “Invalid Corps” was created by Congress in 1777 to allow sick or wounded soldiers unfit for field duty but otherwise able to carry out garrison duty and other routine tasks to be placed on duty performing these garrison duties, thus freeing up otherwise able-bodied men to perform combat duties in the field.

<sup>151</sup> JOURNALS OF CONTINENTAL CONGRESS, Vol. 22, at 210–11 (*Resolve of Mar. 23, 1782*).

<sup>152</sup> JOURNALS OF CONTINENTAL CONGRESS, Vol. 28, at 435 (*Resolve of June 7, 1785*).

variation in the extent to which individual states carried out pension promises made by Congress.

For example, the Virginia Act of May 4, 1778, provided: “That all soldiers who may be disabled in the service shall be entitled to receive full pay during life, to commence at the time of their discharge.”<sup>153</sup> Benefits were expanded on October 5, 1778, when Virginia enacted legislation providing: “That the widow of every such officer and soldier shall, during her natural life, be entitled to and receive half the pay that her husband was entitled to when in the service.”<sup>154</sup>

By comparison, other states did virtually nothing to provide the promised veterans’ benefits. This unequal treatment of officers and soldiers led to concerns about possible military rebellion against civilian authority to collect promised benefits.<sup>155</sup> Although military

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<sup>153</sup> HENING’S STATUTES AT LARGE, VOL. IX, 380 (Ch. IV: “*An Act for Recruiting the Continental Army, and Other Purposes Therein Mentioned*” [sic] (May 4, 1778), 454-456, at 456, *reference without full citation in* GLASSON, 18, n.1.

<sup>154</sup> HENING’S STATUTES AT LARGE, VOL. IX, 566 (Chap XXX: “*An Act to Enable Officers of the Virginia Line, and to Encourage the Soldiers of the Same Line, to Continue in the Continental Service*” (Oct. 5, 1778), *referenced without full citation provided in* GLASSON, 18, n.1.

<sup>155</sup> This was not just a matter of political speculation. The nation came close to a military uprising against Congress on during the period March 10-15, 1783, at which time an anonymous letter circulated in the Continental Army camp at Newburgh, New York written by Major John Armstrong (aide-de-camp to General Horatio Gates) threatened unspecified action against Congress if the Army’s demands that promised pensions be paid was not for immediately forthcoming commonly known as the Newburgh Conspiracy]. Only the timely intervention of General George Washington himself in a now famous emotional appeal to his officers thwarted action against Congress. *See generally*, “Brutus”, *Anti-Federalist Papers* (Jan. 24, 1788) (noting the danger of large standing armies and citing the recent example of the Newburgh Conspiracy less than five years earlier challenging civilian control over the military). Seeing the obvious political danger in taking no action, Congress did pay of the pension arrears due and granted soldiers five years of full pay instead of half-pay for life as previously promised. For a fuller discussion of the Newburgh Conspiracy, *see* Skeen, C.E., & Kohn, R.H. (1974). “The Newburgh Conspiracy Reconsidered.” *The William and Mary Quarterly: A Magazine of Early American History*, 273–98.

insurrection against Congress was avoided on March 22, 1783,<sup>156</sup> Army officers created the *Society of the Cincinnati*, a veterans' service organization on May 13, 1783.<sup>157</sup> Led by General George Washington as its first president and General Henry Knox as its first secretary-general, this society had both a national headquarters as well as State chapters that lobbied Congress for veterans' benefits.<sup>158</sup> The demand for such payment was viewed as a natural outworking of service, not to be lightly regarded.

The final Congressional resolution on the subject under the Articles of Confederation was issued on June 11, 1788, wherein Congress clearly signaled its intent to limit payment for veterans' pensions with a provision: "That no person shall be entitled to a pension as an invalid who has not, [sic] or shall not before the expiration of six months from this time, make application therefor, and produce the requisite certificates and evidence to entitle him thereto."<sup>159</sup> A deadline was set requiring the claimant to demonstrate entitlement.

#### IV. ACT I, SCENE I: VETERANS' BENEFITS UNDER THE NEW UNITED STATES CONSTITUTION

As a precursor to the Compromise of 1790,<sup>160</sup> the first federal legislation under the new Constitution to address veterans' pensions was passed on September 29, 1789.<sup>161</sup> This legislation provided for

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<sup>156</sup> JOURNALS OF CONTINENTAL CONGRESS, Vol. 24, at 207–210 (Mar. 22, 1783).

<sup>157</sup> *Id.*

<sup>158</sup> For a more complete discussion of the Society of the Cincinnati, see Hünemörder, M. (2006). *THE SOCIETY OF THE CINCINNATI: CONSPIRACY AND DISTRUST IN EARLY AMERICA (VOL. II)*. New York: Berghahn Books Publishing.

<sup>159</sup> *Quoted in* GLASSON, at 22.

<sup>160</sup> Cooke, J.E. (1970). "The Compromise of 1790". *The William and Mary Quarterly: A Magazine of Early American History and Culture*, 524–45 (the "dinner table bargain made" at Thomas Jefferson's residence on June 20, 1790, wherein the northern colonies acceded to the location of the national capitol on the Potomac River adjacent to Virginia in exchange for the agreement of southern colonies that the federal government assume individual state Revolutionary War debts).

<sup>161</sup> *An Act to Recognize and Adapt to the Constitution of the United States, the Establishment of the Troops Raised Under the Resolves of the United States*

the continuance of military payment pensions previously granted and paid for by the states pursuant to previous legislation enacted by the Continental Congress to disabled or wounded Revolutionary War soldiers.<sup>162</sup> This legislation expired by its own terms on March 4, 1790, but was extended on several occasions through March 1794.<sup>163</sup>

*A. The Military Bounty Lands and Pension Branch: The War Department (1789–1815)*

1. Military Bounty Lands and Enlistment Incentives: Payments and/or Gratuities Separate and Apart from Disability Pensions

In addition to pensions, it should be noted that in its early years, the U.S. Government used *bounty-land warrants* as a means of inducing military enlistments. These bounty-land grants took various forms during the period of issuance, from 1776-1855.<sup>164</sup> During this period, Congress issued 598,701 *bounty-land warrants*, comprising 68,793,870 acres of public domain land.<sup>165</sup> Placing these warrants in a modern context, 107,490 square miles of land were awarded, a total larger than the State of Colorado, the 8th largest geographical state.<sup>166</sup>

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*Congress Assembled, and for Other Purposes*, Ch. 24, 1st Cong., 1st Sess., 1 Stat. 95 (Sept. 29, 1789).

<sup>162</sup> *Id.* (cited by Ritz, Wilfred J. (1958)). *United States v. Yale Todd*, (U.S. 1794), 15 WASH. & LEE L. REV. 220, 221, n.7.

<sup>163</sup> See, e.g., *An Act Further to Provide for the Payment of the Invalid Pensioners of the United States*, 1st Cong., 2nd Sess., 1 Stat. 129 (July 16, 1790); *An Act to Continue in Force the Act Therein Mentioned, and to Make Further Provision for the Payment of Pensions to Invalids, and for the Support of Light-Houses, Beacons, Buoys, and Public Piers*, 1st Cong., 3rd Sess., Ch. 24, 1 Stat. 218, § 2 (Mar. 3, 1791); *An Act to Provide for the Settlement of the Claims of Widows and Orphans Barred by the Limitations Heretofore Established, and to Regulate the Claims to Invalid Pensions*, 2nd Cong., 1st Sess., Ch. 11, 1 Stat. 243, § 2 (Mar. 19, 1792).

<sup>164</sup> WEBER & SCHMECKBIER, *supra* note 62, at 29.

<sup>165</sup> *Id.* at 30, 451 (Appendix 3, Table 7).

<sup>166</sup> *Colorado Almanac*, [www.netstat.com/states/alma/co--alma.htm](http://www.netstat.com/states/alma/co--alma.htm) (last accessed Jan.14, 2018) (showing Colorado to comprise 104,100 square miles); [www.netstate.com/states/tables.htm](http://www.netstate.com/states/tables.htm) (last accessed Jan. 14, 2018) (making Colorado the 8th largest state in terms of geographic size).

Naturally, conditions were attached to the issuance of warrants for public domain in exchange for military service. These conditions normally included service in the armed forces of the United States. Sometimes these land warrants were issued as a part of the enlistment contract, and at other times, legislation was enacted after military service was completed. In such cases, the land grants were deemed mere gratuities.<sup>167</sup>

The bounty-land warrants were issued by Acts of the Continental Congress during the period from 1776-1788 for service in the Revolutionary War,<sup>168</sup> and by Congress during the period from 1796-1855, for service in the Revolutionary War and on the frontier,<sup>169</sup> the

<sup>167</sup> WEBER & SCHMECKBIER, *supra* note 62, at 29.

<sup>168</sup> See, e.g., JOURNALS OF THE CONTINENTAL CONGRESS, Vol. 5, at 654-55 (*Resolve of Aug. 14, 1776*) (This resolution was not even directed at American soldiers. Rather, it offered 50 acres for British soldiers willing to desert.). The remaining Continental Congress legislation offered military land bounties for military service on behalf of the United States. See, e.g. [not an exhaustive listing]: JOURNALS OF THE CONTINENTAL CONGRESS, Vol. 5, at 762-63 (*Resolve of Sept. 16, 1776*); Vol. 5, at 781 (*Resolve of Sept. 18, 1776*); Vol. 5, at 787-88 (*Resolve of Sept. 20, 1776*); Vol. 8, at p. 116 (*Resolve of Jan. 26, 1779*); Vol. 16, at 10-11 (*Resolve of Jan. 3, 1780*); Vol. 17, at 726-27 (*Resolve of Aug. 12, 1780*); Vol. 18, at 847 (*Resolve of Sept. 22, 1780*); Vol. 18, at 896-97 (*Resolve of Oct. 3, 1780*); Vol. 28, at 379-82 (*Resolve of May 20, 1785*); Vol. 33, at 666 (*Resolve of Oct. 12, 1787*); Vol. 33, at 695-96 (*Resolve of Oct. 12, 1787*); Vol. 34, at 307-09 (*Resolve of July 9, 1788*).

<sup>169</sup> See, e.g., *An Act to Enable the Officers and Soldiers of the Virginia Line on Continental Establishment to Obtain Titles to Certain Lands Lying North-West of the River Ohio, Between the Little Miami and Sciota*, 1st Cong., 2nd Sess, 1 Stat. 182-184 (Aug. 10, 1790); *An Act for Raising and Adding Another Regiment to the Military Establishment of the United States, and for Making Farther Provisions for the Protection of the Frontiers*, 1st Cong., 3rd Sess., Ch. 28, 1 Stat. 222 (Mar. 3, 1791), [amended by *Act of June 9, 1794*, 1 Stat. 394]; *An Act Providing for the Sale of the Lands of the United States, in the Territory Northwest of the River Ohio, and Above the Mouth of Kentucky River*, 4th Cong., 1st Sess, 1 Stat. 464-469 (May 18, 1796); *An Act Regulating the Grants of Lands Appropriated for Military Services, and for the Society of United Brethren, for Propagating the Gospel Among the Heathen*, 4th Cong., 1st Sess, 1 Stat. 490-491 (June 1, 1796) [amended by *Act of Mar. 2, 1799*, 5th Cong., 3rd Sess., 1 Stat. 724; again by *Act of Mar. 1, 1800*, 6th Cong., 1st Sess., 2 Stat. 14-16; yet again by *Act of Apr. 26, 1802*, 7th Cong., 1st Sess., 2 Stat. 155-156; and yet again by the *Act of Mar. 3, 1803*, 7th Cong., 2nd Sess., 2 Stat. 236-237]. See also, *An Act Giving Further Time to the Holders of Military Warrants to Register and Locate the Same*, 6th Cong., 1st Sess, 2 Stat. 7 (Feb. 11, 1800); *An Act to Ascertain the Boundary of the Lands Reserved by the*

War of 1812,<sup>170</sup> the Indian Wars, and the Mexican War (1845-1848). The last act which granted bounty-land warrants was enacted on March 3, 1855, which included all war-time veterans serving on or after 1790 (thus, obviously excluding Revolutionary War service).<sup>171</sup>

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*State of Virginia, Northwest of the River Ohio, for the Satisfaction of Her Officers and Soldiers on Continental Establishment, and to Limit the Period for Locating the Said Lands*, 8th Cong., 1st Sess., 2 Stat. 274-75 (Mar. 23, 1804); *An Act Suspending the Sale of Certain Lands in the State of Ohio and the Indiana Territory*, 9th Cong., 1st Sess., 2 Stat. 378 (Apr. 15, 1806); *An Act to Extend the Time for Locating Virginia Military Land Warrants, for Returning Surveys Thereon to the Office of the Secretary of the Department of War; and Appropriating Lands for the Use of Schools, in the Virginia Military Reservation, in Lieu of those Heretofore Appropriated*, 9th Cong., 2nd Sess., 2 Stat. 424-426 (Mar. 2, 1807); *An Act for Completing the Existing Military Establishment*, 12th Cong., 1st Sess., 2 Stat. 669-70 (Dec. 24, 1811); *An Act Granting an Additional Quantity of Land for the Location of Revolutionary Bounty Land Warrants*, 22nd Cong., 2nd Sess., 4 Stat. 665 (Mar. 2, 1833).

<sup>170</sup> See, e.g., *An Act to Raise an Additional Military Force*, 12th Cong., 1st Sess., 2 Stat. 671-673 (Jan. 11, 1812) [amended by *Act of July 5, 1813*, 13th Cong., 1st Sess., 3 Stat. 3-4]; *An Act Authorizing the President of the United States to Accept and Organize Certain Volunteer Military Corps*, 12th Cong., 1st Sess., 2 Stat. 676-677 (Feb. 6, 1812); *An Act to Provide for Designating, Surveying, and Granting the Military Bounty Lands*, 12th Cong., 1st Sess., 2 Stat. 728-30 (May 6, 1812); *An Act for Making Further Provision for Filling the Ranks of the Army of the United States*, 13th Cong., 3rd Sess., 3 Stat. 146-47 (Dec. 10, 1814); *An Act of Giving Further Time to Complete the Surveys and Obtain the Patents for Lands Located Under Virginia Resolution Warrants*, 13th Cong., 3rd Sess., 3 Stat. 212 (Feb. 22, 1815); *An Act Granting Bounties in Land and Extra Pay to Certain Canadian Volunteers*, 14th Cong., 1st Sess., 3 Stat. 256-257 (Mar. 5, 1816); *An Act for Making Further Provision for Military Services During the Late War, and for Other Purposes*, 14th Cong., 1st Sess., 3 Stat. 285-87 (Apr. 16, 1816); *An Act Providing for Cases of Lost Military Land Warrants, and Discharges for Faithful Services*, 14th Cong., 1st Sess., 3 Stat. 317 (Apr. 27, 1816); *An Act to Authorize the Survey of Two Millions of Acres of the Public Lands, in Lieu of that Quantify Heretofore Authorized to be Surveyed, in the Territory of Michigan, as Military Bounty Lands*, 14th Cong., 1st Sess., 3 Stat. 332 (Apr. 29, 1816); *An Act to Provide for Satisfying Claims for Bounty Lands for Military Services in the Late War [War of 1812] with Great Britain, and for Other Purposes*, 27th Cong., 2nd Sess. 497 (July 27, 1842).

<sup>171</sup> *An Act in Addition to Certain Acts Granting Bounty Land to Certain Officers and Soldiers Who Have Been Engaged in the Military Service of the United States*, ch. 207, 10 Stat. 701, 1 (1855) (offering 160 acres of land to those who served in the land or naval service of the United States).



*B. Military Disability Pensions*

1. Congressional Pensions in the Early Federal Period 1790–1833  
(Army Pensions)

The First Congress, on April 30, 1790, undertook payments for veterans' disability pensions for future veterans.<sup>172</sup> Later, on July 16, 1790, Congress also undertook responsibility for invalid pensioners which were previously under the administration (and frequently, arrearage) of individual states.<sup>173</sup>

Even though Congress had assumed legal and fiscal responsibility for veterans' pensions, it did not enact legislation to create a system for administering such pensions until the Second Congress when it enacted the Invalid Pension Act of 1792.<sup>174</sup> As of 1792,<sup>175</sup> only

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<sup>172</sup> *An Act for regulating the Military Establishment of the United States*, Chap. 12, Vol. 1, p. 43-44, 1 Stat. 87-90 (Apr. 30, 1790), § 11 at p. 89 (providing “[t]hat if any commissioner officer, non-commissioned officer, private, or musician, aforesaid, shall be wounded or disabled, while in the line of his duty in public service, he shall be placed on the list of the invalids of the United States, at such rate of pay and under such regulations as shall be directed by the President of the United States, for the time being; *Provided always*, That the rate of compensation for such wounds or disabilities shall never exceed, for the highest disability, half the monthly pay received by any commissioned officer, at the time of being so wounded or disabled; and that the rate of compensation to non-commissioned officers, privates, and musicians, shall never exceed \$5 per month: *And provided also*, That all inferior disabilities shall entitle the person so disabled to receive only a sum in proportion to the highest disability.”).

<sup>173</sup> *An Act Further to Provide for the Payment of the Invalid Pensioners of the United States*, ch. 27, 1 Stat. 129 (1790) (stating: “Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the military pensions which have been granted and paid by the states respectively, in pursuance of former acts of the United States in Congress assembled, and such as by acts passed in present session of Congress, are or shall be declared to be due to invalids who were wounded and disabled during the late war [American Revolution], shall be continued and paid by the United States from the fourth day of March last [March 4, 1790], for the space of one year, under such regulations as the President of the United States may direct. [Approved, July 16, 1790]).

<sup>174</sup> *An Act to Provide for the Settlement of the Claims of Widows and Orphans Barred by the Limitations Heretofore Established, and to Regulate the Claims to Invalid Pensions*, ch. 11, 1 Stat. 243 (1792) (commonly known as the “Invalid Pension Act of 1792”).

<sup>175</sup> See *supra* notes 105 and accompanying text.

1,500 invalid pensioners were on the rolls at a cost of less than \$100,000 per year<sup>176</sup> (compared to the current VA budget running in excess of \$50 billion per year and climbing).<sup>177</sup>

The 1792 Act charged local circuit courts with handling pension petitions that were then forwarded to the Secretary of War, Henry Knox, for a final decision.<sup>178</sup> A 1792 legal challenge was reported upon by Chief Justice John Jay, Associate Justice Williams Cushing, and District Judge James Duane (acting in their capacity as New York Circuit Court “commissioners”) and found the Invalid Pension Act of 1792 unconstitutional in 1792.<sup>179</sup> As a result, a Revised Invalid Pension Act of 1793<sup>180</sup> was enacted that transferred initial pension petitions to United States District Court judges, leaving Congress as the final arbiter of any disputes from those findings. It lifted previous time limitations on the filing of application for pensions pertaining to Revolutionary War service—permitting such claims until February 28, 1795 and barring all claims filed thereafter.<sup>181</sup>

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<sup>176</sup> GLASSON at p. 23, *citing* REPORTS OF SECRETARY KNOX, *American State Papers, Claims*, at pp. 5, 8, 18, 28, 57. FEDERAL MILITARY PENSIONS IN THE UNITED STATES.

<sup>177</sup> U.S. DEPARTMENT OF VETERANS AFFAIRS, *2015 Budget Request Fast Facts*, <http://www.va.gov/budget/docs/summary/Fy2015-FastFactsVAsBudgetHighlights.pdf> (last accessed Aug. 22, 2015) (“Total VA Funding has grown in 2015 by 68% from 2009”). Showing a budget of \$95.6 billion in mandatory spending (disability entitlements)—up from \$36.8 billion in 2006 with total spending of \$163.9 billion in Fiscal year 2015, up from \$73.1 billion in 2006). *Id.*

<sup>178</sup> *An Act to provide for the Settlement of the Claims of Widows and Orphans Barred by the Limitations Heretofore Established, and to Regulate the Claims to Invalid Pensions*, ch. 11, 1 Stat. 243, 2–4 (1792).

<sup>179</sup> *Hayburn’s Case*, 2 U.S. 409 (1792). This case is believed by some scholars to be the “first instance in which any court declared an Act of Congress unconstitutional,” well pre-dating the conventional recognition of *Marbury v. Madison*, 5 U.S. 137 (1803) as the first case for having done so. Wilfred J. Ritz, *United States v. Yale Todd*, 15 WASH. & LEE L. REV. 220, 223–24 (1958) (citing Max Ferrand, *The First Hayburn Case, 1792*, 13 AM. HIST. REV. 281, 283 (1908)). See also AM. ST. PAPERS, MISC. Vol. I, No. 32 (1834); 3 Annals of Congress, 2<sup>nd</sup> Cong., Appendix 1317–19 (1849).

<sup>180</sup> *An Act to Regulate Claims to Invalid Pensions*, ch. 17, 1 Stat. 324, 1–2 (1793) (commonly known as *Revised Invalid Pension Act of 1793*), VETERANS’ BENEFITS AND JUDICIAL REVIEW: HISTORICAL ANTECEDENTS, at p. 28.

<sup>181</sup> *Id.* at § 4.

The U.S. District Courts proved to be an inefficient forum for adjudicating pension cases.<sup>182</sup> The management of pension cases was soon transferred to the Secretary of War on June 7, 1794.<sup>183</sup> Two days later, on June 9, 1794, legislation concerning military bounty lands was enacted, amend legislation that the First Congress passed in 1790.<sup>184</sup>

On March 13, 1795, Congress reaffirmed its duty to provide benefits to wounded and disabled veterans, adopting language virtually identical to the superseded 1790 legislation.<sup>185</sup>

Congress approved legislation in 1803 that made “provisions for persons that have been disabled by known wounds in actual service of the United States during the Revolutionary War.”<sup>186</sup> The 1803

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<sup>182</sup> History of Military Pension Legislation in the United States, Columbia University Studies in Social Sciences, Col. 3, (1900), Chap. II, “Pension Legislation, 1780-1878, p. 25–29.

<sup>183</sup> An Act Concerning Invalids, ch. 57, 1 Stat. 392–293 (1794).

<sup>184</sup> An Act to Amend the Act Entitled “An Act to Enable the Officers and Soldiers of the Virginia Line on Continental Establishment, to Obtain Titles to Certain Lands Lying Northwest of the River Ohio, Between the Little Miami and Sciota,” ch. 62, 1 Stat. 394 (1794), amending ch. 40, 1 Stat. 182 (1790).

<sup>185</sup> An Act for Continuing and Regulating the Military Establishment of the United States, and for Repealing Sundry Acts Heretofore Passed on That Subject, ch.63, § 13, 1 Stat. 430, 432 (1795) (providing: “*And be it further enacted*, That if any commissioner officer, non-commissioned officer, private, or musician, aforesaid, shall be wounded or disabled, while in the line of his duty in public service, he shall be placed on the list of the invalids of the United States, at such rate of pay and under such regulations as shall be directed by the President of the United States, for the time being; *Provided always*, That the rate of compensation for such wounds or disabilities shall never exceed, for the highest disability, half the monthly pay received by any commissioned officer, at the time of being so wounded or disabled; and that the rate of compensation to non-commissioned officers, privates, and musicians, shall never exceed five dollars per month: *And provided also*, That all inferior disabilities shall entitle the person so disabled to receive only a sum in proportion to the highest disability.”) The language of this statute is virtually identical to that found in An Act for Regulating the Military Establishment of the United States, ch. 10, § 11, 1 Stat. 87, 89 (1790). This is because section 18 of the 1795 legislation repealed the 1790 legislation and replaced section 11 of the 1790 legislation with section 13 of the 1795 Act. 1 Stat. 432.

<sup>186</sup> An Act to Make Provision for Persons That Have Been Disabled by Known Wounds Received in the Actual Service of the United States, During the Revolutionary War, ch. 37, 2 Stat. 242 (1803). The required burden of proof was draconian. No pension was made for unknown, latent or other insidious conditions

legislation was broadened in 1805 to include persons disabled at any later time, meaning persons who were “unable to procure a subsistence by manual labor” due to wounds received during the Revolutionary War.<sup>187</sup> According to some scholars: “This [1805] act set a precedent that was still adhered to in 1994 in the form of a so-called ‘presumptive service connection’ for certain disabilities that developed after wartime service.”<sup>188</sup>

Congress enacted legislation in 1806 that extended the scope of federal military pensions for Revolutionary War veterans to include militia and state troops (which would now be considered National Guard and reserve components military personnel).<sup>189</sup> This legislation rescinded the Secretary of War’s power to issue final decisions concerning pension awards and transferred such authority back to Congress.<sup>190</sup> It relegated to the secretary the simple job of

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or wounds. In fact, the legislation stated: “The evidence relative to any claimant, must prove disability to have been the effect of known wounds received while the actual line of duty, in the service of the United States, during the Revolutionary war; that this evidence must be in the affidavits of the commanding officer or surgeon of the ship, regiment, corps, or company in which such claimant served or two other credible witnesses to the same effect, setting forth the time and place of such known wound.” *Id.*

<sup>187</sup> An Act in Addition to “An Act to Make Provision for Persons that Have Been Disabled by Known Wounds Received in the Actual Service of the United States, During the Revolutionary War,” ch. 44, 2 Stat. 345 (1805).

<sup>188</sup> Knight, A.W., & Worden, R.L. (1995). *THE VETERANS BENEFITS ADMINISTRATION: AN ORGANIZATIONAL HISTORY, 1776-1994*. Collingdale, Pennsylvania: Diane Publishing Company, at p 7 (hereinafter “VBA: AN ORGANIZATIONAL HISTORY: 1776-1994”). The first actual legislation authorizing “*presumptive service connection*” was enacted in 1921 when Congress enacted the *An Act to Establish a Veterans’ Bureau and to Improve the Facilities and Service of Such Bureau, and Further to Amend and Modify the War Risk Insurance Act of 1917*, Pub. L. 67-47, Chap. 57, Title II—Amendments to the War Risk Insurance Act, § 18, 42 Stat. 148-158, at pp. 153-154 (Aug. 9, 1921). For a more complete discussion of presumptive service connection, see generally Panangala, S.V, Shedd, D.T., Moulta-Ali, U., *Veterans Affairs: Presumptive Service Connection and Disability Compensation*, Congressional Research Service, Report No. 41,405 (Nov. 18, 2014).

<sup>189</sup> An Act to Provide for Persons Who Were Disabled by Known Wounds Received in the Revolutionary War, ch. 25, 2 Stat. 376 (1806).

<sup>190</sup> *Id.*

making statements to Congress, setting forth his recommendations as to who should be awarded pension benefits.<sup>191</sup>

“Importantly, in 1808 Congress expanded its responsibility for pensions by assuming the liabilities for payment of any pensioners remaining on state eligibility rolls. Notably, this was during the evolution and growth of federal entitlements.”<sup>192</sup> These veterans’ pension statutes were applied to veterans of the War of 1812.<sup>193</sup> In 1816, Congress raised allowances for all disabled veterans and further granted pensions of half-pay for a period of five years to widows and orphans of War of 1812 soldiers.<sup>194</sup>

The Service Pension Law of 1818 introduced a new principle into the award of veterans’ pension benefits. In particular, it provided that any veteran who had served in the Revolutionary War and was “in need of assistance from his country” was entitled to a lifetime pension of \$8 per month for former enlisted members and \$20 per month for officers.<sup>195</sup> A showing of disability was no longer required for these veterans, *only* a claim of impoverishment. This same legislation also returned the authority of placing individuals on the pension rolls<sup>196</sup> to the Secretary of War; needless to say, this new legislation was controversial,<sup>197</sup> particularly in light of the revelation that pension costs had risen more than ten-fold from \$120,000 in annual costs in 1816 to \$1.4 million in 1820, just two years after the

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<sup>191</sup> *Id.* at § 3.

<sup>192</sup> An Act Concerning Invalid Pensioners, ch. 58, §§ 3, 4, 2 Stat. 496 (1808).

<sup>193</sup> An Act in Addition to the Act Entitled “*An Act to Raise an Additional Military Force,*” and for Other Purposes, ch. 16, §§ 10, 11, 2 Stat. 794 (1813).

<sup>194</sup> An Act Making Further Provision for Military Services During the Late War [War of 1812], and for Other Purposes, ch. 55, § 1-5, 3 Stat. 285 (1816).

<sup>195</sup> An Act to Provide for Certain Persons Engaged in the Land and Naval Service of the United States, in the Revolutionary War, ch. 19, § 1, 3 Stat. 410 (1818).

<sup>196</sup> *Id.*

<sup>197</sup> For a further discussion of this legislation, see J.P. Resch, *Politics and Public Culture: The Revolutionary War Pension Act of 1818*, JOURNAL OF THE EARLY REPUBLIC, at p. 139-158; (1988); J.P. Resch, *Federal Welfare for Revolutionary War Veterans*, THE SOCIAL SERVICE REVIEW, at p. 171-195 (1982). Controversy over the cost of veterans’ pensions has persisted from that 1818 legislation to the present.

new legislation came into force.<sup>198</sup> These issues foreshadowed that which was to come with the eventual growth and expanded “activity” of the U.S. military.

Veterans took advantage of Congressional largesse and soon inundated the pension system with fraudulent claims by those feigning impoverishment to obtain the benefits provided by the 1818 legislation.<sup>199</sup> According to contemporaneous Congressional reports, the appropriation for veterans’ pensions amounted to \$2,766,440, which is small by modern standards, but is a sum that exceeded the cumulative expenditure for veterans’ pensions from 1789 up until 1817 (just prior to the liberalizing 1818 legislation).<sup>200</sup> This, in turn, led to corrective legislation, then commonly known as the Alarm Act of 1820.<sup>201</sup>

Early pension legislation clearly distinguished between officers and those who were enlisted for the purpose of survivors’ benefits. For example, even though Congress made provisions for widows and orphans of commissioned officers of the “Regular Establishment” as early as 1802,<sup>202</sup> lesser provisions were often made for enlisted personnel until 1836.<sup>203</sup> Further legislation in 1836 expanded

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<sup>198</sup> Lowrie and Franklin, AM. STATE PAP. MISC., CLASS IX [CLAIMS], Nos. 578, 619, pp. 824, 885. VBA: AN ORGANIZATIONAL HISTORY: 1776-1994, at p. 8 (citing Sisson, A.F. (1946). HISTORY OF VETERANS’ PENSIONS AND RELATED BENEFITS, Washington, D.C.: American University Press, at p. 11).

<sup>199</sup> *Id.*

<sup>200</sup> WEBER & SCHMECKBIER, *supra* note 62, at 11 (citing 21 Cong., 1<sup>st</sup> Sess., House Document 90).

<sup>201</sup> An Act in Addition to an Act, Entitled “An Act to Provide for Certain Persons Engaged in the Land and Naval Service of the United States in the Revolutionary War,” Passed the Eighteenth Day of March, One Thousand Eight Hundred and Eighteen,” ch. 53, 3 Stat. 569 (1820).

<sup>202</sup> “An Act Fixing the Military Peace Establishment of the United States,” §§ 14, 15, 2 Stat. 132 (1802). Section 15 of the Act made provision for widows and orphans as follows: “That if any commissioned officer in the military peace establishment of the United States, while in the service of the United States, die, by reason of any wound received in actual service of the United States, and leave a widow, or if no widow, a child or children under sixteen years of age, such widow, or if no widow, such child or children shall be entitled to and receive half the monthly pay to which the deceased was entitled at the time of his death, for and during the term of five years.” WEBER & SCHMECKBIER, *supra* note 62, at 17.

<sup>203</sup> An Act to Provide for the Payment of Volunteers and Militia Corps in the Service of the United States, 5 Stat. 7 (1836).

pension coverage to “any officer, non-commissioned officer, musician, or private of the militia, including rangers, sea fencibles [sic], and volunteers who died in service since April 20, 1818, or who died in consequence of a wound received while in the service since that date.”<sup>204</sup>

Pensions for veterans of the War of 1812 were extremely limited;<sup>205</sup> this is because the previously existing pension provisions pertaining to veterans of regular and volunteer forces were applied to veterans of the War of 1812 and paid only for disability or death incurred during service.<sup>206</sup> This law provided for disability pensions for commissioned officers not to exceed one half pay and survivor benefits of half pay for five years for widows and children of commissioned officers.<sup>207</sup> Enlisted members disabled in service were entitled to benefits not to exceed \$5.00 per month,<sup>208</sup> which was later increased to \$8.00 per month in 1816.<sup>209</sup> These limited pension awards continued through the Civil War up until 1878.<sup>210</sup>

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<sup>204</sup> An Act Granting Half-Pay to Widows or Orphans, Where Their Husbands and Fathers Have Died of Wounds Received in the Military Service of the United States, in Certain Cases, and for Other Purposes, 5 Stat. 127 (1836).

<sup>205</sup> An Act in Addition to the Act Entitled “An Act to Raise an Additional Military Force,” and for Other Purposes, §§ 10-11, 2 Stat. 794-797 (1813).

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> WEBER & SCHMECKBIER, *supra* note 62, at 30-31. Survivor benefits were extended to widows and children of enlisted soldiers in 1816. *Id.* “An Act to Increase the Pension of Invalids in Certain Cases, for the Relief of the Militia and for the Appointment of Pension Agents in Those States Where there is No Commissioner of Loans, 3 Stat. 296 (April 24, 1816) (14<sup>th</sup> C Cong. 2d Sess.) Congress authorized payment of survivor pension benefits of half-pay for up to five years for enlisted soldiers either killed in battle or who died of wounds while in service. An Act Making Further Provision for Military Services During the Late War [War of 1812], and for Other Purposes, 3 Stat. 285 (1816). Benefits were meager—at best—with a maximum payment fixed at \$48 per annum. An Act to Amend an Act Entitled “An Act Making Further Provision for Military Services During the Late War [War of 1812], and for Other Purposes, ch. 107, § 1, 3 Stat. 394 (1817).), \$48 in 1816 dollars would be worth approximately \$800.00 in 2014 dollars. See generally <http://www.davemanuel.com/inflation-calculator.php> (July 21, 2015).

<sup>209</sup> An Act to Increase the Pensions of Invalids in Certain Cases, for the Relief of Invalids of the Militia; and for the Appointment of Pension Agents in Those

Congress continued to expand benefits so that full pay for life was granted to Revolutionary War veterans in 1828;<sup>211</sup> it later expanded this to include both disability and service pensions in 1832<sup>212</sup> and 1833.<sup>213</sup>

## 2. Congressional Pensions in the Early Federal Period 1790–1833 (Navy Pensions)

Unlike Army disability pensions, which were funded by general appropriations, Navy pension funding followed a very different path. Congress enacted its first legislation to create a Navy pension fund in 1799,<sup>214</sup> and further amended it in 1800<sup>215</sup> and 1804<sup>216</sup>. Unlike Army

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States Where There is no Commissioner of Loans, 3 Stat. 296 (1816), *referenced without full citation in* WEBER & SCHMECKBIER, *supra* note 62, at 18.

<sup>210</sup> An Act of Granting Pensions to Certain Soldiers and Sailors of the War of Eighteen Hundred and Twelve, and the Widows of Deceased Soldiers, ch. 51, 16 Stat. 411 (1871), *referenced without full citation in* WEBER & SCHMECKBIER, *supra* note 62, at 31–32 who further noted: “[The Act of Feb. 14, 1871] granted pensions of \$8.00 per month for life to all surviving officers and enlisted men who had served sixty days in the War of 1812 and were honorably discharged, and “to such officers and soldiers who may have been personally named in any resolution of Congress for any specific service in said war although their term of service may have been less than sixty days;” and to the surviving widows of such persons. *Only veterans of the War of 1812 who were loyal to the Union during the Civil War were made eligible for these pensions.* Pensions were granted to widows only if they were married to the veterans prior to treaty of peace and had not remarried. *These pensions were granted regardless of the need of the beneficiary.*” (emphasis added). *Id.* This 1871 legislation, in turn, was amended by the An Act Amending the Laws Granting Pensions to the Soldiers and Sailors of the War of Eighteen Hundred and Twelve, and Their Widows, and for Other Purposes, ch. 28, 20 Stat. 27 (1878).

<sup>211</sup> An Act for the Relief of Certain Surviving Officers and Soldiers of the Army of the Revolution, 4 Stat. 269 (1828) [extended by An Act Supplementary to the “Act for Relief of Certain Officers and Soldiers of the Revolution”, Stat. 529 (1832).

<sup>212</sup> An Act to Amend the Act, Entitled “An Act for the Relief of Certain Surviving Officers and Soldiers of the Army of the Revolution”, 4 Stat. 600 (1832).

<sup>213</sup> An Act to Amend an Act, Entitled “An Act Supplementary to the Act for the Relief of Certain Surviving Officers and Soldiers of the Revolution”, 22<sup>nd</sup> Cong., 2<sup>nd</sup> Sess., 4 Stat. 612 (Feb. 19, 1833).

<sup>214</sup> An Act for the Government of the Navy of the United States, 1 Stat. 709 (1799), *cited in* MANUAL OF THE MEDICAL DEPARTMENT OF THE UNITED STATES NAVY, Bureau of Medicine and Surgery Under the Authority of the Secretary of



pensions, the Navy Pension Fund was to be funded from the government's share of prize money taken at sea by Navy vessels.<sup>217</sup> Only if prize monies were insufficient to sustain the fund would public appropriations be necessary to make up the deficiency.<sup>218</sup>

The Navy Pension Fund legislation provided for half pay pensions for life (or for the period of disability, if shorter) to all disabled Navy officers and enlisted personnel.<sup>219</sup> Later, legislation provided half pay for up to five years to widows and orphans of those who died as a result of wounds or injuries incurred as a result of their naval service.<sup>220</sup> Still later, legislation granted half pay pension benefits to widows (or, if there was no surviving widow, the children of officers, sailors, and marines under the age of 21) who had died in naval service (regardless of the cause of death) to be paid from the date of death.<sup>221</sup>

In an even more interesting historical anomaly, Congress created a privateer pension fund in 1812 that authorized the Secretary of the Navy to pay pensions to those wounded or disabled on private armed vessels of the United States (privateers) while engaged with the enemy with survivor benefits to their widows and orphans.<sup>222</sup>

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the Navy, Washington, D.C.: Government Printing Office (1917), at p. 254–255, ¶¶ 3762-3765 (hereinafter “1917 NAVY MEDICAL MANUAL”).

<sup>215</sup> An Act for the Better Government of the Navy of the United States, 45 (1800).

<sup>216</sup> An Act in Relation to the Navy Pension Fund, 2 Stat. 293 (1804).

<sup>217</sup> *Id.*; see *supra* notes 111–112.; see also An Act in Addition to an Act Entitled “An Act in Relation to the Navy Pension Fund”, 3 Stat. 287 (1816) (directing that prize money would be paid over by the U.S. District Court (the admiralty “prize court”) to the Treasurer of the United States for the benefit of the Navy Pension Fund).

<sup>218</sup> 1917 NAVY MEDICAL MANUAL at p. 255, ¶ 3763 (citing to the 1799 legislation).

<sup>219</sup> See *supra* notes 111–112.

<sup>220</sup> An Act Providing for Navy Pensions in Certain Cases, 2 Stat. 790 (1813); An Act Giving Pensions to the Orphans and Widows of Persons Slain in the Public or Private Vessels of the United States, 3 Stat. 103.

<sup>221</sup> An Act for the More Equitable Administration of the Navy Pension Fund, 5 Stat. 180 (1837).

<sup>222</sup> An Act Concerning Letters of Marque, Prize, and Prize Goods, Cong., 2 Stat. 759 (1812). This legislation is plainly derived from Article I, Section 8 of the United States Constitution: “The Congress have power "to declare war, grant letters of marque and reprisal, and make Rules concerning captures on land and water"

Legislation in 1831 allowed money accruing from persons preying upon reserve timberlands to be credited to the Navy Pension Fund.<sup>223</sup>

On July 10, 1832, the Secretary of the Navy was designated as trustee of the Navy Pension Fund.<sup>224</sup> That same legislation directed the fund to be invested in stock of the Bank of the United States.<sup>225</sup> The Pension Office was transferred from the Department of the Navy to the War Department on March 3, 1835.<sup>226</sup>

By 1837, the privateer fund was bankrupt.<sup>227</sup> However, Congress reinstated this pension scheme in 1844, through Congressional appropriations.<sup>228</sup> Following in the footsteps of the privateer fund, the Navy Pension Fund went bankrupt in 1842, forcing Congress to

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(emphasis added). The use of privateers to execute letters of marque and reprisal has generally fallen into disuse with general international recognition of the PARIS DECLARATION RESPECTING MARITIME LAW (Apr. 16, 1856) which called for the abolition of privateering (the United States has never formally ratified this provision). In 1899, Congress repealed all prior legislation that authorized the retention of prize money by privateers. An Act to Reorganize and Increase the Efficiency of the Personnel of the Navy and Marine Corps of the United States, ch. 413, § 13, 30 Stat. 1004, 1007. Nevertheless, the “marque and reprisal” authority remains part of the U.S. Constitution in the 21<sup>st</sup> century and has even been cited as potential authority for dealing with the September 11, 2001 terrorist attacks. *See, e.g., September 11 Marque and Reprisal Act of 2001.*, (Oct. 10, 2001). This proposed legislation was introduced by Congressman Ron Paul, 107<sup>th</sup> Cong., 1<sup>st</sup> Sess, as H.R. 3076, “[t]o authorize the President of the United States to issue letters of marque and reprisal with respect to certain acts of air piracy upon the United States on September 11, 2001, and other similar acts of war planned for the future.” *Id.*

<sup>223</sup> An Act Making Appropriations for the Naval Service, for the Year One Thousand Eight Hundred and Thirty-One, 4 Stat. 460 (1831) (repealed by An Act Authorizing the Secretary of the Treasury to Employ Temporary Clerks, and Making an Appropriation for the Same; Also Making Appropriations for Detecting Trespass on Public Lands; and for Bringing into Market Public Lands in Certain States, and for Other Purposes, ch. 76, § 2, 20 Stat. 46 (1878)).

<sup>224</sup> An Act for the Regulation of the Navy and Privateer Pension and Navy Hospital Funds, 4 Stat. 572 (1832).

<sup>225</sup> *Id.*

<sup>226</sup> An Act to Continue the Office of Commissioner of Pensions, 4 Stat. 779 (1833).

<sup>227</sup> WEBER & SCHMECKBIER, *supra* note 62, at 27.

<sup>228</sup> An Act Making Appropriations for the Payment of Navy Pensions for the Year Ending Thirtieth June, Eighteen Hundred and Forty-Five, 5 Stat. 667 (1844).

fund such pensions through annual appropriations from that time to the time of the Civil War.<sup>229</sup> These actions served, yet again, to centralize the award of pensions from the federal budget.

### 3. Office of the Commissioner of Pensions, War Department (1833–1849)

As shown in the brief history recounted above, prior to 1833, the management of veterans' pensions was confusing at best. Even though the Secretary of War was originally directed to manage the list of pensioners, this responsibility overlapped from time to time with Congress' direct management. The 1828 veterans' legislation was implemented by the Secretary of the Treasury and was in effect until June 28, 1832, at which time Congress, by joint resolution, transferred all pension functions to the War Department.<sup>230</sup>

In an effort to gain better control over the veterans' pension process, Congress created the first federal government office designed to deal exclusively with veterans' pensions in 1833, known as the Bureau of Pensions.<sup>231</sup> During this time, the public obligation for veterans' pension grew as Congress provided benefits in 1836 to veterans who participated in the Indian wars in Florida (commonly known as the "Second Seminole War" (1836-1842)).<sup>232</sup> The beginning of the Mexican War in 1846 expanded congressional obligations for veterans pensions with a new cohort of war veterans.<sup>233</sup>

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<sup>229</sup> WEBER & SCHMECKBIER, *supra* note 62, at 27–28.

<sup>230</sup> Resolution Transferring Certain Duties Relating to Pensions from the Treasury to the War Department, 4 Stat. 605 (1832). *See also*, An Act Further to Extend the Pension Heretofore Granted to the Widows of Persons Killed, or Who Died in the Naval Service, 4 Stat. 550 (1832).

<sup>231</sup> An Act Making Appropriations for the Civil and Diplomatic Expenses of Government, for the Year One Thousand Eight Hundred and Thirty-Three, 4 Stat. 622 (1833).

<sup>232</sup> An Act to Provide for the Payment of Volunteers and Militia Corps in the Service of the United States, 4 Stat. 7 (1836).

<sup>233</sup> *See, e.g.*, An Act Providing for the Prosecution of the Existing War Between the United States and the Republic of Mexico, 9 Stat. 9 (1846); An Act Amending the Act Entitled "*An Act Granting Half-Pay to Widows or Orphans, Where Their Husbands and Fathers Have Died of Wounds Received in Military Service of the United States*", in Case of Deceased Officers and Soldiers of the

The Commissioner of Pensions managed the Bureau of Pensions<sup>234</sup> and served as an official of the War Department. However, this was not a wholesale transfer to the War Department. Navy Pension Fund issues were managed by the Department of the Navy from 1833 until this function was also transferred to the Department of War on March 4, 1840—once again signaling a consolidation within the federal bureaucracy.<sup>235</sup>

#### 4. Bureau of Pensions, Department of Interior (1849–1914)

Congress created the U.S. Department of the Interior on March 3, 1849 and transferred to it all responsibility for veterans' pensions.<sup>236</sup>

Congress later created the Court of Claims in 1855 and gave it the authority to “hear and determine all claims founded upon any law of Congress, or upon any regulation of an Executive Department,”<sup>237</sup> where the named defendant was the United States Government. One would have expected a floodgate of litigation based on the expansive nature of potential veterans' pensions. For reasons, as yet not fully understood, that was not the case and not a single veterans' pension case was heard by the Court of Claims between 1855-1863.<sup>238</sup>

The advent of the Civil War (1861-1865) vastly increased the demands placed on the federal government since nearly three million

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Militia and Volunteers, Passed July Fourth, Eighteen Hundred and Thirty-Six, ch. 108, 9 Stat. 249 (1848).

<sup>234</sup> James L. Edwards of Virginia was appointed the first Commissioner of Pensions on March 3, 1833. ANNUAL REPORT OF THE SECRETARY OF THE INTERIOR FOR THE FISCAL YEAR 1921 at p. vi.

<sup>235</sup> An Act to Continue the Office of Commissioner of Pensions, and to Transfer the Pension Business Heretofore Transacted in the Navy Department, to that Office, 5 Stat. 369 (1840).

<sup>236</sup> An Act to Establish the Home Department, and to Provide for the Treasury Department an Assistant Secretary of the Treasury and a Commissioner of the Customs, 9 Stat. 395 (1849).

<sup>237</sup> An Act to Establish a Court for the Investigation of Claims Against the United States, ch. 122, § 1, 10 Stat. 612 (1855).

<sup>238</sup> United States Court of Claims Digest, 1855 to Date: Covering Court of Claims Reports and Appealed Cases Decided in the Supreme Court of the United States. St. Paul, Minnesota: West Publishing Company, *cited in* VETERANS' BENEFITS AND JUDICIAL REVIEW: HISTORICAL ANTECEDENTS AND THE DEVELOPMENT OF THE AMERICAN SYSTEM, Federal Research Division, Library of Congress, Washington, D.C. (1995) at p. 52, fn. 191.

union troops had served during the war.<sup>239</sup> Congress acted immediately by passing legislation at the beginning of the war.<sup>240</sup> That legislation provided that:

[A]ny volunteer who may be received into the service of the United States under this act, and who may be *wounded or otherwise disabled in the service*, shall be entitled to the benefits which have been or may be conferred on persons disabled in the regular service, and the widow, if there be one, and if not, the legal heirs of such as die, or may be killed in service, in addition to all arrears of pay and allowances, shall receive the sum of one hundred dollars.<sup>241</sup>

This legislation was deficient because it only applied to the first cohort of volunteers called upon to serve in 1861 and not to later volunteers. The 1861 legislation provided for disability and arrears of any pay or allowance or disability pay, but did not provide for widows' or orphans' survivor benefits.<sup>242</sup>

Congress enacted corrective legislation in 1862.<sup>243</sup> This legislation provided disability pensions and survivor benefits to all volunteers who served in either the Union Army or Navy on or after March 4, 1861.<sup>244</sup> The legislation also required proof of either a service-connected injury or death to obtain benefits.<sup>245</sup> Further amendments and supplemental legislation expanding the program was enacted in 1864,<sup>246</sup> 1866,<sup>247</sup> 1868,<sup>248</sup> and 1873.<sup>249</sup>

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<sup>239</sup> VETERANS' BENEFITS AND JUDICIAL REVIEW: HISTORICAL ANTECEDENTS *supra* note 121, at 51.

<sup>240</sup> An Act to Authorize the Employment of Volunteers to Aid in Enforcing the Laws and Protecting Public Property, ch. 10, 12 Stat. 268 (1861).

<sup>241</sup> *Id.* at 270.

<sup>242</sup> WEBER & SCHMECKEBIER, *supra* note 62, at 40.

<sup>243</sup> An Act to Grant Pensions, ch. 166, 12 Stat. 566 (1862).

<sup>244</sup> WEBER & SCHMECKEBIER, *supra* note 62, at 40.

<sup>245</sup> *Id.*

<sup>246</sup> An Act Supplementary to an Act Entitled "*An Act to Grant Pensions*", Approved July Fourteenth, Eighteen Hundred and Sixty-Two, 13 Stat. 387 (1864).

<sup>247</sup> An Act Increasing the Pensions of Widows and Orphans, and for Other Purposes, ch. 235, 14 Stat. 230 (1866).

On January 25, 1879, Congress enacted the Arrears Act<sup>250</sup> which ensured that a disability pension would be payable from the date of discharge if the disability was incurred prior to discharge or, if afterwards, from the date of disability. This applied to all pensions filed on or before July 1, 1880.<sup>251</sup> If not filed before July 1, 1880, benefits would begin to accrue from the date of application.<sup>252</sup> This time limitation for filing was repealed as applied to widows' benefits in 1888.<sup>253</sup>

Costs mounted quickly and arrearages caused by the 1879 act jumped from \$26.7 million in 1878 to \$56.6 million in 1880 with more rapid increases in costs in subsequent years as the veterans' population aged.<sup>254</sup> The number of applications increased from 57,118 in 1879 to 141,166 in 1880.<sup>255</sup>

As a result of the failure of the Court of Claims to assume this workload, the Forty-Ninth Congress (1885-1887) was inundated with over 4,500 private relief bills at its first convention; the bills pertained to pensions, which constituted 40 percent of the legislative work of the House of Representatives and fifty-five percent in the Senate.<sup>256</sup> Despite this overwhelming workload, neither the House

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<sup>248</sup> An Act Relating to Pensions, ch. 264, 15 Stat. 235 (1868).

<sup>249</sup> An Act to Revise, Consolidate, and Amend the Laws Relating to Pensions, ch. 243, 17 Stat. 566 (1873).

<sup>250</sup> An Act to Provide that All Pensions on Account of Death or Wounds Received, or Disease Contracted in the Service of the United States During the Late War of the Rebellion, Which Have Been Granted, or Which Shall Hereinafter be Granted, Shall Commence from the Date of Death or Discharge from the Service of the United States; for the Payment of Arrears of Pensions, and Other Purposes, ch. 23, 20 Stat. 265 (1879). The aforementioned act is construed by An Act Making Appropriations for the Payment of Arrears of Pensions Granted by Act of Congress Approved January Twenty Fifth, Eighteen Hundred and Seventy-Nine, and for Other Purposes, ch. 187, 20 Stat. 469 (1879).

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> An Act Making Appropriations for the Payment of Invalid and Other Pensions of the United States for the Fiscal Year Ending June Thirtieth, Eighteen Hundred and Eighty-Nine, and for Other Purposes, ch. 369, 25 Stat. 173 (1888).

<sup>254</sup> WEBER & SCHMECKEBIER *supra* note 62, at 42.

<sup>255</sup> ANNUAL REPORT OF THE COMMISSIONER OF PENSIONS, 1889.

<sup>256</sup> Morton Keller, *AFFAIRS OF STATE: PUBLIC LIFE IN LATE NINETEENTH CENTURY AMERICA*, Cambridge, Massachusetts: Harvard University Press, at p. 311 (1977).

nor the Senate was ready to cede its authority for pension claims adjudication to the judiciary.<sup>257</sup>

In 1890, President Benjamin Harrison signed a service pension bill into law that applied to all persons who served for 90 days or more during the Civil War. In particular, people who would be provided a veteran's pension were honorably discharged and found to have a permanent physical or mental disability which left them incapacitated, regardless of whether that disability had been incurred as a result of military service.<sup>258</sup> Thus came the first step in the long march of federal paternalism. For the first time, disability was awarded for those in service, regardless of whether the injury was sustained by military service.

Civil War era pension benefits continued to expand at the end of the 19th century and well into the opening years of the 20th century. Congress first enacted legislation in 1892 to award pensions to all women who were employed by the Surgeon General of the Army as nurses (under contract or otherwise) for a period of six months even if they were not able to show they were capable of self-support.<sup>259</sup>

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<sup>257</sup> See, e.g., CONG. REC., 49<sup>th</sup> Cong., 2d Sess., Vol. 18, at p. 244 (Dec. 17, 1886) (discussing the demise of the Senate's Blair Bill, which was designed to move 85% of the workload to the federal courts); CONG. REC., 49<sup>th</sup> Cong., 2nd Sess., Vol. 17, at 5272 (discussing the demise of similar House legislation advanced by Rep. Gallinger of New Hampshire).

<sup>258</sup> An Act Granting Pensions to Soldiers and Sailors Who are Incapacitated for The Performance of Manual Labor, and Providing for Pensions to Widows, Minor Children, and Dependent Parents, ch. 634, 26 Stat. 182 (1890), *amended by* An Act In Amendment of Sections Two and Three of an Act Entitled "An Act Granting Pensions to Soldiers and Sailors Who are Incapacitated from the Performance of Manual Labor, and Providing for Pensions to Widows, Minor Children, and Dependent Parents" Approved June Twenty-Seventh, Eighteen Hundred and Ninety, ch. 385, 31 Stat. 170 (1900).

<sup>259</sup> An Act Granting Pensions to Army Nurses, ch. 379, 27 Stat. 348 (1892). Congress increased the monthly benefits for these pensions in 1920, An Act to Revise and Equalize the Rates of Pension to Certain Soldiers, Sailors, and Marines of the Civil War and the War With Mexico, to Certain Widows, Including Widows of the War of 1812, Former Widows, Dependent Parents, and Children of Such Soldiers, Sailors and Marines, and to Certain Army Nurses, and Granting Pensions and Increases of Pensions in Certain Cases, ch. 165, 41 Stat. 585 (1920), and again in 1926, An Act Granting Pensions and Increase of Pensions to Certain Soldiers, Sailors, and Marines of the Civil and Mexican Wars, and to Certain Widows of Said Soldiers, Sailors, and Marines, and to Widows of the War of 1812, and Army Nurses, and for Other Purposes, ch. 733, 44 Stat. 806 (1926).

Congress later enacted legislation in 1907 that granted service pensions to all persons who served ninety days or more during the Civil War regardless of disability or financial need.<sup>260</sup> In 1908, Congress enacted liberalized benefits for widows of Civil War veterans, provided they could show they were married prior to June 27, 1890.<sup>261</sup> No showing of financial dependence was required.<sup>262</sup> Thus, the liberalization continued—setting the stage for later similar actions.

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<sup>260</sup> Act of Feb. 6, 1907, 34 Stat. 879 (1907). This pension legislation was liberalized in 1912, An Act Granting Pensions to Certain Enlisted Men, Soldiers, and Officers Who Served in the Civil War and the War with Mexico, Pub. L. 62-155, 37 Stat. 112 (1912), and again in 1913, An Act to Amend an Act Entitled “An Act Granting a Service Pension to Certain Defined Veterans of the Civil War and the War with Mexico”, Approved May Eleventh, Nineteen Hundred and Twelve, Pub. L. 62-454, 37 Stat. 1019 (1913). Veterans’ pensions were increased again for those seventy-two years of age or older in 1918. An Act to Amend an Act Entitled “An Act Granting Pensions to Certain Enlisted Men, Soldiers, and Officers Who Served in the Civil War and the War with Mexico,” Approved May Eleventh, Nineteen Hundred and Twelve, Pub. L. 65-167, ch. 96, 40 Stat. 603 (1918).

<sup>261</sup> An Act to Increase the Pension of Widows, Minor Children, and So Forth, of Deceased Soldiers and Sailors of the Late Civil War, the War with Mexico, the Various Indian Wars, and so Forth, and to Grant a Pension to Certain Widows of the Deceased Soldiers and Sailors of the Late Civil War, Pub. L. 60-98, 35 Stat. 64 (1908). Even this provision was liberalized in 1916 by advancing the date for a showing of marriage from June 27, 1890 to June 27, 1905. An Act to Amend an Act Entitled “An Act to Increase the Pensions of Widows, Minor Children, and So Forth, of Deceased Soldiers and Sailors of the Late Civil War, the War with Mexico, the Various Indian Wars, and so Forth, and to Grant a Pension to Certain Widows of the Deceased Soldiers and Sailors of the Late Civil War”, Approved April Nineteenth, Nineteen Hundred and Eight, and For Other Purposes, Pub. L. 64-278, 39 Stat. 844 (1916).

<sup>262</sup> An Act to Increase the Pension of Widows, Minor Children, and So Forth, of Deceased Soldiers and Sailors of the Late Civil War, the War With Mexico, the Various Indian Wars, and so Forth, and to Grant a Pension to Certain Widows of the Deceased Soldiers and Sailors of the Late Civil War, Pub. L. 60-98, 35 Stat. 64 (1908). Widow’s benefits were again increased as a result of the Act to Amend an Act Entitled “An Act to Authorize the Establishment of a Bureau of War Risk Insurance in the Treasury Department”, Approved September Second, Nineteen Hundred and Fourteen, and for Other Purposes, Pub. L. 65-90, § 314, 40 Stat. 398, 408 (1914).



5. The Bureau of War Risk Insurance, U.S. Department of the Treasury (1914–1920)

Maritime insurance rates rose dramatically with the outbreak of war in Europe on August 1, 1914.<sup>263</sup> This led to the introduction of legislation creating a Bureau of War Risk Insurance of (BWRI) within the U.S. Department of the Treasury on August 19, 1914. The legislation passed and the Bureau was created amidst bitter opposition on September 2, 1914.<sup>264</sup> Congress amended this legislation after the United States declared war on Germany on April 6, 1917.<sup>265</sup> In particular, Congress amended the original 1914 legislation on June 12, 1917 and expanded it to include disability compensation for officers and crews of U.S. merchant vessels.<sup>266</sup>

Significant legislation amending the BWRI to include grants of disability allowances for enlisted men in the naval and military forces killed or injured in the line of duty was enacted on October 6, 1917.<sup>267</sup> This was a landmark piece of legislation transforming the BWRI from “a Bureau of secondary importance dealing only with marine and seaman’s insurance [to one that] suddenly became a vast business enterprise entrusted with several fields of activity which had never before been undertaken by the national government.”<sup>268</sup>

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<sup>263</sup> WEBER & SCHMECKEBIER *supra* note 62, at 92–93.

<sup>264</sup> An Act to Authorize the Establishment of a Bureau of War Risk Insurance in the Treasury Department, Pub. L. 63-193, 38 Stat. 711 (1914).

<sup>265</sup> WEBER & SCHMECKEBIER *supra* note 62, at 92–93.

<sup>266</sup> An Act to Amend an Act Entitled “An Act to Authorize the Establishment of a Bureau of War Risk Insurance in the Treasury Department” Approved September Second, Nineteen Hundred and Fourteen, and for Other Purposes, Pub. L. 65-20, 40 Stat. 102 - 105 (June 12, 1917) (commonly known as the *Emergency Shipping Fund Act of 1917* and implemented, in part, by President Woodrow Wilson in Exec. Order No. 2,664, (July 11, 1917)).

<sup>267</sup> An Act to Amend an Act Entitled “An Act to Authorize the Establishment of a Bureau of War Risk Insurance in the Treasury Department”, Approved September Second, Nineteen Hundred and Fourteen, and for Other Purposes, Pub. L. 65-90, ch. 105, Stat. 398, 399 (Oct. 6, 1917) (commonly known as the *Soldiers’ and Sailors’ Insurance Law*). Interestingly enough, this Act applied only to enlisted members of the armed forces, including the Marine Corps and Coast Guard, and excluded Philippine Scouts, commissioned officers, insular Navy forces as well as members of the Army or Navy Nurse Corps. *Id.*

<sup>268</sup> WEBER & SCHMECKEBIER, *supra* note 62, at 212–13.

On May 29, 1918, Congress further amended the BWRI legislation by regulating the activities of claims agents and attorneys who solicited business by representing beneficiaries under the War Risk Insurance Act;<sup>269</sup> fees were fixed at \$3.00 per case.<sup>270</sup>

Despite increasing governmental expense with the recent end of the Great War, Congress, facing an electorate in the throes of an economic recession,<sup>271</sup> enacted legislation in 1920 that yet again increased veterans' pensions and survivor benefits for those serving in the War of 1812, the Mexican War, and the Civil War.<sup>272</sup>

By 1921, the BWRI was best described by contemporaries as being in a hopeless morass:

The Bureau was organized at this time [1918-1921] into thirteen Divisions namely: Insurance, Compensation and Claims; Actuarial; Legal; Finance; Medical; Allotment and Allowance; Receipts and Disbursements; Liaison; Marine and Seaman's; Personnel; Chief Clerk; and Administration Divisions, each presided over by a division chief . . . .

. . . .

While remedial legislation had been secured to adjust some of the shortcomings of the World War veteran relief system, Congress was slow in enacting legislation to meet the requirements of the existing situation. . . . Repeated efforts were made by the Director to obtain legislation for increased facilities and for physical coordinations [sic] of veterans' relief

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<sup>269</sup> Lindsay, S.M. (1918). PURPOSE AND SCOPE OF WAR RISK INSURANCE. *Annals of the American Academy of Political and Social Science*, 79, 52-68, at p. 55.

<sup>270</sup> *Id.*

<sup>271</sup> Daniel Kuhn, *A Note on America's 1920-1921 Depression as an Argument for Austerity*, *Cambridge Journal of Economics* (2012), Vol. 36, pp. 155-160. "The 32% loss in industrial production from March 1921 was second only to the Great Depression in severity." *Id.*

<sup>272</sup> Act of May 1, 1920, 41 Stat. 585 (1920).

agencies, and bills were introduced with these ends in view, but Congress failed to take prompt action.<sup>273</sup>

On March 28, 1921, President Warren G. Harding appointed a presidential committee led by Charles G. Dawes to inquire into the “administration of the laws providing for the care of disabled soldiers.”<sup>274</sup> On April 7, 1921, the Dawes Committee unanimously recommended, the creation of a Veterans’ Service Administration to consolidate the functions that were divided amongst the Bureau of War Risk Insurance, the Rehabilitation Division of the Federal Board for Vocational Rehabilitation and even components of the Public Health Service.<sup>275</sup> The Committee stated:

It cannot be too strongly emphasized that the present deplorable failure on the part of the government to properly care for the disabled veterans is due in large part to an imperfect organization of governmental effort. There is no one in control of the whole situation. Independent agencies by mutual agreement now endeavor to coordinate their action, but in such efforts the joint action is too often modified by minor considerations, and there is always lacking that complete cooperation which is incident to a powerful superimposed authority. No emergency of war itself was greater than is the emergency which confronts the nation in its duty to care for their disabled in its service and now neglected.<sup>276</sup>

Thus, the seeds of the modern Department of Veterans Affairs were planted.

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<sup>273</sup> WEBER & SCHMECKBIER, *supra* note 62, at 216–17.

<sup>274</sup> *Id.* at 217.

<sup>275</sup> *Id.*

<sup>276</sup> *Id.* at 218, n.91 (quoting Cong. Rec., 67 Cong., 1st Sess., Vol. 61, Part I, p. 458).

6. The Veterans' Bureau (VB, 1921) and the U.S. Veterans' Bureau (1921–1930)

The BWRI was abolished on August 9, 1921 and its functions transferred to the Veteran's Bureau (VB).<sup>277</sup> This same legislation also transferred duties pertaining to vocational training that had previously been assigned to the Federal Board of Vocational Rehabilitation by previous World War I legislation commonly known as the Vocational Rehabilitation Act.<sup>278</sup> That same month, the Veteran's Bureau was renamed the U.S. Veterans Bureau (USVB).<sup>279</sup>

Despite cost concerns, veterans' benefits legislation had wide support in Congress. G.A. Weber's observation of the events of 1933 is telling:

While expenditures for pension have always shown a tendency to increase, the eight years ending with March 4, 1933, saw the greatest expansion and liberalization in legislation relating to veterans ever known in this country [until the period 2006-2015] or probably any other country.<sup>280</sup>

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<sup>277</sup> An Act to Establish a Veterans' Bureau and to Improve the Facilities and Service of Such Bureau, and Further to Amend and Modify the War Risk Insurance Act, Pub. L. 67-47, ch. 57, § 2, 42 Stat. 147, 148 (1921) (commonly as known as the "Sweet Act" or "Sweet Bill").

<sup>278</sup> Vocational Rehabilitation Act, 40 Stat. 617 (1918).

<sup>279</sup> Joint Resolution Changing the Name of the Veterans' Bureau to "*United States Veterans' Bureau*", 42 Stat. 202 (1921).

<sup>280</sup> WEBER & SCHMECKEBIER, *supra* note 62, at 227. For a complete discussion of the expansionist legislation from this time period, see WEBER & SCHMECKEBIER, *supra* note 62, at 227–70. The authors noted in 1933 that expenditures had grown 62% from 1924-1932 from \$537 million in fiscal year 1924 to \$893 million in fiscal year 1932. *Id.* at 228. These sums appear miniscule compared to the huge increases experienced in the early part of the 21<sup>st</sup> Century, *see surpa* note 112 (*citing* U.S. DEPARTMENT OF VETERANS AFFAIRS: 2015 BUDGET REQUEST FAST FACTS which states total VA Funding has grown in 2015 by 68% from 2009), which showed a budget of \$95.6 billion in mandatory spending (disability entitlements)—up from \$36.8 billion in 2006 with total spending of \$163.9 billion in Fiscal year 2015 and up from \$73.1 billion in 2006, a 224% increase in VA program costs in just 9 years). Retrieved Aug. 22, 2015, <http://www.va.gov/budget/docs/summary/Fy2015-FastFactsVAsBudgetHighlights.pdf>.

The program was not, however, without its detractors. The overly expansive (and expensive) veterans' pension legislation led to at least one Presidential veto in 1923. The sixty-seventh Congress enacted Senate Bill 3275 calling for yet again increases in survivor and widow benefits for veterans of the various Indian Wars, Mexican War, and Civil War. In his veto remarks, President Harding indicated that the limits of the taxpayer's willingness to bear such burdens had been reached with \$108 million in current outlays projected to rise to \$50 billion in fifty years.<sup>281</sup> In particular, he further remarked:

The act makes no pretense of new consideration for the needy or dependent, no new generosity for the veteran wards of the Nation; it is an outright bestowal upon the Government's pension roll, with a heedlessness for the Government's financial problems which is a discouragement to every effort to reduce expenditures and thereby relieve the [f]ederal burdens of taxation.

The more particular objection to this act, however, lies in the loose provision for pensioning widows. The existing law makes the widow of a Civil War veteran eligible to a pension if she married him prior to June 27, 1905. In other words, marriage within 40 years of the end of the Civil War gives a veteran's widow a good title to a pension. The act returned herewith extends the marriage period specifically to June 27, 1915, and provides that after that date any marriage or cohabitation for two years prior to a veteran's death shall make the widow the beneficiary of a pension at \$50 per month for the remainder of her life . . . . Frankly, I do not recognize any public obligation to

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<sup>281</sup> 67 Cong., S. Doc. 281, Cong. Record, 67th Cong., 4th Sess., Vol. 64, Part A, at 1175, *cited in* WEBER & SCHMECKEBIER, *supra* note 62, at 47.

pension women who now, nearly 60 years after the Civil War, became veterans of that war.<sup>282</sup>

Outside the issues of VA program costs, the House of Representatives had to contend with issues pertaining to management of the veterans' pension program. Toward that end, it established the Committee on World War Veterans' Legislation [1924-1926] on January 18, 1924, with the following subject-matter jurisdiction:

War-risk insurance of soldiers, sailors, and marines, and other persons in the military service of the United States during or growing out of the World War, the United States' Veterans Bureau, the compensations and allowances of such persons and their beneficiaries, and all legislation affecting them other than civil service, public lands, adjusted compensation, pensions, and private claims.<sup>283</sup>

It was clear that the earlier adjudication process, largely left in the hands of Congress in the 1880s, was not functional in the aftermath of the Great War. Congressional legislation in 1924 made clear Congressional intent to establish programs to handle veterans' pensions. Equally clear was the intent to do so through authority vested in the Executive Branch of the federal government, then the

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<sup>282</sup> WEBER & SCHMECKEBIER, *supra* note 62, at 47–48. President Harding would likely be distraught if he knew that the last dependent of a Revolutionary War veteran did not die until 1911 [only 12 years before his veto message], the last dependent War of 1812 veteran would not die until 1946, that the last Mexican War dependent would not die until 1962, the last known Civil War widow would not die until 2003, and that the last Great War veteran would not die until 2011. VETERANS' BENEFITS AND JUDICIAL REVIEW: HISTORICAL ANTECEDENTS, at 49. See also <http://www.cnn.com/2011/US/02/27/wwi.veteran.death/index.html>, retrieved Sept. 5, 2015; <http://www.infoplease.com/ipa/A0778679.html>, retrieved Sept. 5, 2015. He would also likely be astounded to learn that VA costs had exceeded \$163 billion in annual outlays in 2015, up 68% from “just” \$36.8 billion in 2006. U.S. DEPARTMENT OF VETERANS AFFAIRS: 2015 BUDGET REQUEST FAST FACTS), <http://www.va.gov/budget/docs/summary/Fy2015-FastFactsVAsBudgetHighlights.pdf> (last retrieved Sept. 6, 2015). See also *supra* note 112.

<sup>283</sup> U.S. Congress, House, *Constitution, Jefferson's Manual, and Rules of the House of Representatives of the United States*, H.R. Res. 78th Cong., Doc. 812, 77th Cong., 2d Sess., 325 (1943).

Veterans' Bureau.<sup>284</sup> This clearly delineated division between Congress, authorizing such programs and the Executive as program administrator was outlined by Senator David Walsh, a sponsor of the 1924 legislation:

I think the public ought to distinguish between enacting laws that are beneficial and helpful to the disabled soldiers and the managerial work of the bureau. The administration of the bureau is an Executive function, and the Executive department must be held responsible for the mismanagement of the past and that of the future. Congress is responsible for providing the money and for enacting the laws that will help relieve the difficulties of administration due to red tape and divided responsibility . . . The Director and the President must now accept full responsibility. Congress has given them the machinery; time will determine if they are capable of operating it.<sup>285</sup>

Equally interesting was the fact that determination of veterans' pension benefits continued to remain largely outside the scope of judicial review during the period from 1924 until the advent of the *Veterans Judicial Review Act*. In construing earlier veterans' legislation,<sup>286</sup> the Supreme Court held that decisions of the Veterans' Bureau director were "final and conclusive and not subject to judicial review" unless the aggrieved claimant pension petitioner could

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<sup>284</sup> *An Act to Consolidate, Codify, Revise, and Reenact the Laws Affecting the Establishment of the United States Veterans' Bureau and the Administration of the War Risk Insurance Act, as Amended, and the Vocational Rehabilitation Act, as Amended*, PUB. L. 68-242, Chap. 320, § 5, 43 Stat. 607, 608-609 (June 7, 1924).

<sup>285</sup> 65 CONG. REC., at 10, 929-10, 930 (June 6, 1924) (comments made by U.S. Senator David I. Walsh, Massachusetts), *quoted in* VETERANS' BENEFITS AND JUDICIAL REVIEW: HISTORICAL ANTECEDENTS, at 64, n. 237.

<sup>286</sup> An Act to Amend an Act Entitled "An Act to Authorize the Establishment of a Bureau of War Risk Insurance in the Treasury Department, Approved September Second, Nineteen Hundred and Fourteen, and for Other Purposes, PUB. L. 65-90, §§ 2, 13 Chap. 40 Stat. 398, 399 (Oct. 6, 1917); *An Act to Establish a Veterans' Bureau and to Improve the Facilities and Service of Such Bureau, and Further to Amend and Modify the War Risk Insurance Act*, PUB. L. 67-47, Chap. 57, § 2, 42 Stat. 147, 148 (Aug. 9, 1921).

demonstrate that the “decision [was] wholly unsupported by the evidence, or [was] wholly dependent upon a question of law or [was] seen to be clearly arbitrary or capricious.”<sup>287</sup>

Assuming a veteran had evidence to make such a showing, it was nevertheless unclear how they could seek relief if there was no forum in which the evidentiary assertions could be tested. The Supreme Court decision was silent on that point.

## 7. Veterans’ Administration (1939–1989)

The roots of today’s Department of Veterans’ Affairs are found in the continued merger of the various congressionally created veterans’ agencies. The USVB consolidated with the Bureau of Pensions and the National Home for Disabled Volunteer Soldiers to form the Veterans Administration in 1930.<sup>288</sup>

Responsibility for litigating veterans’ war risk and life insurance claims was transferred to Department of Justice (DOJ), September 11, 1933.<sup>289</sup>

## V. ACT I, SCENE 2: THE VCAA<sup>290</sup> TO THE PRESENT (2000–2015)

The evolution of administrative management of veteran’s benefits makes plain the congressionally-mandated commitment to individual veterans. It is a commitment dating to colonial times. The question becomes, how far should that commitment extend? The evolution of the current VA would seem well beyond that which was contemplated in colonial times. The evolution of the VA lies fundamentally in the lens through which the veteran is seen.

Claimants before the VA are not regarded as adversaries, but as an essential protected class, in effect, honored for their service and

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<sup>287</sup> *Silberschein v. United States*, 266 U.S. 221, 225 (1924).

<sup>288</sup> An Act to Authorize the President to Consolidate and Coordinate Governmental Activities Affecting War Veterans, 71 Cong. Ch. 863, 46 Stat. 1016 (July 3, 1930); EXEC. ORDER NO. 5398: Consolidation and Coordination of Government Activities Affecting Veterans (July 21, 1930).

<sup>289</sup> EXEC. ORDER NO. 6166: *Organization of Executive Agencies* (June 10, 1933).

<sup>290</sup> Veterans Claims Assistance Act, PUB. L. 106-475, 114 Stat. 2096 (Nov. 9, 2000).



sacrifice.<sup>291</sup> Administratively, VA's creation enables even greater emphasis on such concern. Under current legislation, the VA is more paternalistic than the SSA in the duty owed to claimants. Even a cursory review of the requirements necessary to establish a service-connected claim makes this readily apparent. For example, Congress enacted the Veterans Claims Assistance Act of 2000 (VCAA).<sup>292</sup> The Act requires that the VA assist a claimant by both: "(1) Notifying the claimant of the information necessary to prove his claim; and (2) Helping the claimant obtain the necessary evidence and information."

This "duty to assist" includes the further duty to *notify* the claimant of the information needed to complete a claim application,<sup>293</sup> the duty to provide any information or medical evidence the claimant must produce to substantiate his claim, and<sup>294</sup> to further inform the claimant of the evidence (s)he must provide and which evidence the VA will attempt to obtain.<sup>295</sup>

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<sup>291</sup> Carpenter, *supra* note 7. Carpenter writes: "Historically, Congress has endeavored to create a non-adversarial system for awarding benefits to veterans, thus creating a unique character and structure to the Veterans Benefits System. In 1988, Congress enacted the Veterans Judicial Review Act and Veterans Benefits Improvement Act of 1988 establishing, for the first time, judicial review of decisions of the Department of Veterans Affairs ("VA"). On November 18, 1988, President Reagan signed into law the Veterans Judicial Review Act (VJRA). This statute constituted a sea change in the history of veterans' claims . . . . The passage of this act created judicial review in the Veterans Benefits context establishing a clear intent to preserve the historic, pro-claimant system. Implicit in such a beneficial system has been an evolution of a completely *ex parte* system of adjudication in which Congress expects VA to fully and sympathetically develop the veteran's claim to the optimum before deciding it on the merits. Even then, VA is expected to resolve all issues by giving the claimant the benefit of any reasonable doubt." *Id.*

<sup>292</sup> *Supra* note 257.

<sup>293</sup> 38 U.S.C. § 5102(b).

<sup>294</sup> 38 U.S.C. § 5103(a), cited by *Dingess v. Nicholson*, 19 Vet. App. 473, 486, 488–89 (2006). *See also* 38 C.F.R. § 3.159(b) (2015); *see generally* *Mayfield v. Nicholson*, 444 F.3d 1328, 1333 (Fed. Cir. 2006) ("The post-2000 version of [38 U.S.C. § 5103(a)] requires the VCAA to be issued prior to the initial decision on the claim, not afterwards.").

<sup>295</sup> 38 U.S.C. § 5103(a), cited in *Charles v. Principi*, 16 Vet. App. 370, 373–74 (2002); 38 C.F.R. § 3.159(b) (2015).

The VA is also required to either provide a medical examination or obtain a medical opinion when necessary to make a decision on a claim when trying to prove service connection.<sup>296</sup> However, this duty is triggered only when four (4) elements (the “McLendon elements”)<sup>297</sup> are satisfied.

Notwithstanding a clearly paternalistic process, the VA system takes note of the fact that the VA Secretary also “plays the role of the guardian of the public fisc [sic].”<sup>298</sup> (“[I]t must be remembered that the Secretary is not merely representing the departmental interests, he is, in a larger sense, representing the taxpayers of this country and defending the public fisc [sic] from the payment of unjustified claims. . . . There is a duty to ensure that, insofar as possible, only claims established within the law are paid. The public fisc [sic] and the taxpayer must be protected from unjustified claims.”)<sup>299</sup>

Without doubt, the VA Secretary is required to procure evidence “in an impartial, unbiased, and neutral manner.”<sup>300</sup> However, there is no doubt the Secretary has the authority to develop the claim, which includes the gathering of all information and evidence relevant and material thereto, positive and negative, sufficient to render a decision thereon.<sup>301</sup>

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<sup>296</sup> 38 U.S.C. § 5103A(d) (2017).

<sup>297</sup> So named after *McLendon v. Nicholson*, 20 Vet. App. 79, 80 (2006). These elements are, as follows: The claimant must show the following to trigger the VA’s duty to assist in this area: (1) Competent evidence of a current disability; (2) Evidence showing that an event, injury, or disease occurred during active duty (or, alternatively, a showing that with respect to certain diseases, that disease manifested during an applicable presumptive period for which the claimant qualifies); (3) Indication that the disability or persistent (or recurrent) symptoms of a disability may be associated with military service (or another service-connected disability); (4) Insufficient competent medical evidence exists in the claimant’s file to allow the VA to make a decision on the case. *Id.*

<sup>298</sup> *Ribaud v. Nicholson*, 21 Vet. App. 137, 152 (2007) (Schoelen, J., concurring in part and dissenting in part). *See also* *Rhodan v. West*, 12 Vet. App. 55, 58 (1998).

<sup>299</sup> *Rhodan v. West*, 12 Vet. App. 55, 58 (1998).

<sup>300</sup> *See Austin v. Brown*, 6 Vet. App. 547, 553 (1994) (“[B]asic fair play requires that evidence be procured by the agency in an impartial, unbiased, and neutral manner.”).

<sup>301</sup> *Id.*

The VA Secretary's authority to develop a claim necessarily includes the authority to collect and develop evidence that might rebut the presumption of service connection. Congress not only created a presumption of service connection for certain diseases and disabilities, it explicitly stated that the presumption was rebuttable.<sup>302</sup>

Against this evolutionary backdrop, we turn to the initiation of civilian disability benefits, paid by the federal government for those who can no longer engage in competitive work.

#### VI. ACT I, SCENE 3: THE SOCIAL SECURITY DISABILITY INSURANCE PROGRAM (1956–1958)

“This social security measure gives at least some protection to thirty million of our citizens who will reap direct benefits through unemployment compensation, through old-age pensions and through increased services for the protection of children and the prevention of ill health.”

-Franklin Delano Roosevelt<sup>303</sup>

President Franklin Delano Roosevelt signed the Social Security Act into law on August 14, 1935. When first enacted, Social Security did not provide for the award of disability benefits, focusing

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<sup>302</sup> See 38 U.S.C. §§ 1112, 1113; see also *Wagner v. Principi*, 370 F.3d 1089 (Fed. Cir. 2004) (clarifying burdens of proof related to presumptions of soundness and aggravation, implicitly recognizing that the secretary, to rebut such presumptions, can and should gather evidence). Specifically, when, *inter alia*, "there is affirmative evidence to the contrary," the presumption created by § 1112 (among certain other statutory presumptions) "will not be in order." 38 U.S.C. § 1112.

<sup>303</sup> John R. Kearney, *Social Security and the 'D' in OASDI: The History of a Federal Program Insuring Earners Against Disability*, 66 Social Security Bulletin, No. 3 (2005); Eliot, T., *The Legal Background of the Social Security Act*, speech delivered at Social Security Administration Headquarters, Feb. 3, 1961, <http://www.socialsecurity.gov/history/eliot2.html> (last visited, Aug. 11, 2016); Perkins, F., *The Roots of Social Security*, speech delivered at Social Security Headquarters, Baltimore, Maryland, Oct. 23, 1962, [www://socialsecurity.gov/history/perkins5.html](http://www://socialsecurity.gov/history/perkins5.html) (last visited, Aug. 11, 2016).

instead on old age or “retirement” benefits.<sup>304</sup> Much as seen in the evolution of veterans’ disability benefits, the shift to allow for a monetary Social Security disability benefit took place over a number of years.<sup>305</sup> The initial reluctance in adopting a Social Security disability insurance program with attendant monetary benefits revolved about two issues:

[T]he administrative difficulty of determining whether or not an applicant was too disabled to work and the potential cost of the program. Much of the concern surrounding these issues was due to the empirical experience of private insurance companies in providing disability insurance. At that time, evidence concerning permanent and total disability insurance revealed that private insurance companies providing such insurance were experiencing serious losses.<sup>306</sup>

The 1948 Report of the Advisory Council on Social Security recommended to the Senate Finance Committee payment of cash benefits to the permanently and totally disabled, regardless of age, as part of a system of social insurance.<sup>307</sup> Two members of the Social Security Advisory Council disagreed with this recommendation, noting that: “protection against risk of total disability should be provided by State assistance programs aided by [f]ederal grants and should not be included in a [f]ederal contributory system.”<sup>308</sup>

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<sup>304</sup> John R. Kearney, *Social Security and the ‘D’ in OASDI: The History of a Federal Program Insuring Earners Against Disability*, 66 Social Security Bulletin, No. 3 (2005).

<sup>305</sup> For a comprehensive overview of the evolution of public welfare generally, see, Dr. Abe Bortz, Ph.D., Social Security Historian, *Historical Development of the Social Security Act*, at Social Security, “Agency History,” <https://www.ssa.gov/history/bortz.html>.

<sup>306</sup> Kearney, at n.265.

<sup>307</sup> Social Security Administration, 1986 Disability History Report, A HISTORY OF THE SOCIAL SECURITY DISABILITY PROGRAMS, “Introduction,” Jan. 1986, <https://www.ssa.gov/history/1986dibhistory.html>.

<sup>308</sup> Jeffrey S. Wolfe and David W. Engel, *Restoring Social Security Disability’s Purpose*, CATO Institute, Regulation 36, no. 1, 46, 49 (2013) [hereinafter, “WOLFE & Engel”].

It was not until 1956 that monetary benefits for disability came into being.<sup>309</sup> The legislative history<sup>310</sup> of the Social Security Act reflects an ongoing discussion regarding disability insurance during the period 1940 through 1950.<sup>311</sup> Both the Social Security Board and later, the Social Security Administration, consistently “recommended in its annual report the payment of social insurance benefits to permanently and totally disabled persons.”<sup>312</sup>

In 1950, the Senate Finance Committee observed: “We recognize that the problem of disabled workers is one which requires careful attention especially because of the increasing proportion of older workers and the rising rate of chronic invalidity in the population.”<sup>313</sup>

With passage of the 1954 Amendments to the Social Security Act, the first iteration of a disability “benefit” was adopted in the form of a disability “freeze.”<sup>314</sup> As such, “[t]hese amendments established the first operating disability program under the Social Security Act.”<sup>315</sup> Unlike even the earliest veteran’s payments, the first Social Security disability “benefit” was a mathematical calculation designed not to penalize a “disabled” worker. If insured<sup>316</sup> and found “disabled,” the quarters during which the claimant had no earnings were “frozen.” As such, these “frozen” quarters did not factor into the calculation of retirement benefits, preserving the retirement benefit, which would have otherwise been eroded by factoring in quarters with “0” earnings. Put simply, once “frozen” during a defined period of disability, these quarters did not

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<sup>309</sup> See, Social Security Administration, 1986 Disability History Report, *supra*, note 306.

<sup>310</sup> See generally, SOCIAL SECURITY ADMINISTRATION, *Legislative History*, <https://www.ssa.gov/history/reports/dibhistory.html>.

<sup>311</sup> United States House Ways and Means Committee, “Committee Staff Report on the Disability Insurance Program,” 107 (July 1974), <https://www.ssa.gov/history/pdf/dibreport.pdf>.

<sup>312</sup> *Id.* at 108.

<sup>313</sup> Wolfe *supra* note 268, at 49.

<sup>314</sup> *Id.*

<sup>315</sup> United States House Ways and Means Committee, “Committee Staff Report on the Disability Insurance Program,” (July 1974) <https://www.ssa.gov/history/pdf/dibreport.pdf>.

<sup>316</sup> “The insured status requirements for a “freeze” were 20 quarters of coverage in the 40-quarter period ending with the quarter of disablement and 6 quarters of coverage in the 13-quarter period ending with such quarter . . .” *Id.*

count against the disabled wage-earner's retirement benefit. No separate monetary benefits for disability, per se, was otherwise authorized.<sup>317</sup>

It was not until 1956 that legislation was first passed providing for a federally mandated civilian monetary disability benefit. The next thirty years, from 1956 to 1987, marked significant evolutionary milestones in the growth and establishment of the civilian disability program briefly outlined and discussed below.

The question remains, whether the ultimate purposes of both the VA and SSA have been served; and whether their continued expansion works contrary to the purposes of both programs as originally conceived? The award of Social Security monetary benefits begins with the passage of the Social Security amendments in 1956.

#### A. The 1956 Social Security Amendments

President Eisenhower signed the *Social Security Amendments of 1956* into law on August 1, 1956.<sup>318</sup> This landmark legislation provided, *inter alia*, monthly cash benefits, beginning in July 1957,<sup>319</sup> to “permanently and totally disabled workers”<sup>320</sup> between

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<sup>317</sup> The fact that Congress did not initially provide a separate disability cash benefit did not stop it in 1950 from authorizing an increase in those able to receive retirement benefits. Characterized as a liberalization, Carolyn Puckett writes, “The 1950 amendments also liberalized the eligibility requirements, making about 700,000 persons immediately eligible for benefits; increased benefits substantially for about 3 million existing beneficiaries, effective September 1, 1950 . . . .” Carolyn Puckett, “Administering Social Security: Challenges Yesterday and Today,” *SOCIAL SECURITY BULLETIN*, Vol. 70, No. 3, 2010 at <https://www.ssa.gov/policy/docs/ssb/v70n3/v70n3p27.html>.

<sup>318</sup> *Social Security Amendments of 1956*, Pub. L. 84-880, 70 Stat. 807–56 [H.R. 7225] (Aug. 1, 1956).

<sup>319</sup> § 103(a), 70 Stat. at 816 (provisions pertaining to the “waiting period” postponing cash benefits for a period of six months from the period beginning on January 1, 1957, thus rendering no payments prior to July 1, 1957, codified at 42 U.S.C. § 423(c)(3)).

<sup>320</sup> § 103(a), 70 Stat. at 816 (provisions pertaining to the definition “permanent and total disability” codified at 42 U.S.C. § 423(c)(2) requiring a showing of a “physical or mental impairment which can be expected to result in death or to be of long-continued and indefinite duration.”) (emphasis added).

the ages of 50 and 65<sup>321</sup> (but not to their dependents). The award of “civilian” monetary benefits changed America’s landscape. Arguably, the motivation behind such an award was multi-faceted; however, one cannot ignore the simple truth of the Great Depression. It is one thing to be able to work and not have a job, quite another in a competitive economic landscape to be even unable to compete. The 1956 amendments tackled the tough questions of disability.

To qualify for monetary disability benefits, the worker must have been both currently (and fully) insured and to have had 20 quarters of coverage during the 40-quarter period that ended with the quarter in which the disability began.<sup>322</sup> A waiting period of six consecutive months had to elapse before payments could begin.<sup>323</sup> When a recipient also received another federal benefit based on disability, or a workman's compensation benefit, the disability benefit under Social Security was to be reduced by the amount of the other benefit.<sup>324</sup> In addition, the law required recipients to accept rehabilitation services offered by the states.<sup>325</sup>

To finance these new benefits, the Amendments to the Social Security Act established a Disability Insurance (DI) trust fund to which an additional .25% of contributions from employers and employees and .375% from the self-employed were allocated, raising the total employee/employer tax rate to 2.25% in 1957 and ultimately to 4.25% in 1975.<sup>326</sup>

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<sup>321</sup> § 103(a), 70 Stat. at 815 (the provisions pertaining to recipients being between 50 and 65 years of age was codified at 42 U.S.C. § 423(a)(1)(B)).

<sup>322</sup> § 103(a), 70 Stat. at 815 (the provisions pertaining to quarters of coverage were codified at 42 U.S.C. § 423(c)(1)(B) with cross-reference to the definition of quarters of coverage found at 42 U.S.C. § 416).

<sup>323</sup> See *supra* note 44, at 816, pertaining to the six-month waiting period.

<sup>324</sup> § 103(a), 70 Stat. at 816 (provisions pertaining to Social Security disability offset based on payments from any other federal disability program, codified at 42 U.S.C. § 424a(a)(2)).

<sup>325</sup> § 103(a), 70 Stat. 817-819 (provisions pertaining to mandatory referral to and participation State rehabilitation service programs were codified at 29 U.S.C. § 31, 42 U.S.C. 422(a)-(d) and later repealed and replaced by the *Ticket to Work and Work Incentives Improvement Act of 1999*, Pub. L. 106-170, § 101(b)(1)(B), 113 Stat. 1912 (see 42 U.S.C. § 1320b-19).

<sup>326</sup> § 201(b)(1), (2), 70 Stat. at 820.

The required offset provisions served to protect the integrity of the Trust Fund from those who might double dip.<sup>327</sup>

### *B. The 1957 Social Security Act Amendments*

The 1957 Amendments to the Social Security Act are singularly notable for reversing the disability offset provisions in the 1956 Amendments. Unlike others who receive federal disability benefits from “another [f]ederal disability” benefits program, the 1957 Amendments allow veterans to double-dip, receiving a civilian benefit with no offset.<sup>328</sup>

### *C. The 1958 Social Security Act Amendments*

Once the initial gate was opened for payment of cash benefits, it was off to the races as the expansion floodgates opened. The *Social Security Amendments of 1958*<sup>329</sup> increased disability benefits by 7%, effective January 1, 1959. Other changes, such as raising the earnings base from \$4,200 to \$4,800,<sup>330</sup> were also initiated, including the award of benefits payable to dependents of disabled workers.<sup>331</sup> It also eliminated the “currently insured status” (6 quarters of coverage in preceding 13 quarters) as requirement for eligibility for disability benefits or for a disability freeze.<sup>332</sup> It further increased scheduled payroll taxes by .25% on employers and employees alike, the rate ultimately rising to 4.5% by 1969.<sup>333</sup>

The 1958 Amendments further provided that disability benefits could be paid retroactively for 12 months if all other requirements had been met for the earlier months (previously, benefits could not be

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<sup>327</sup> See *supra*, note 273 at 113.

<sup>328</sup> *Id.*

<sup>329</sup> *Social Security Amendments of 1958*, Pub. L. 85–840, 72 Stat. 1013-1057 [H.R. 13,549] (Aug. 28, 1958).

<sup>330</sup> §§ 102(a), 402(b), 72 Stat. at 1019–20, 1042 (codified at 26 U.S.C. § 3121(a); 42 U.S.C. §§ 409, 411, 413).

<sup>331</sup> § 205(a), 72 Stat. at 1021–24 (codified at 42 U.S.C. §§ 401(h), 402).

<sup>332</sup> § 204(b), 72 Stat. at 1021, 1025 (codified at 42 U.S.C. §§ 414(b), 423(c)(1)(A)).

<sup>333</sup> § 401(b), 72 Stat. at 1041-1042 (codified at 26 U.S.C. §§ 3101, 3111).



paid for the months prior to filing for benefits).<sup>334</sup> The 1958 Amendments also eliminated offset of disability benefits for workmen's compensation or other benefits from federal programs.<sup>335</sup> Lastly, the Amendments withheld one (1) month's benefit under the earnings test for each \$100 in excess of yearly earnings of \$1,200.<sup>336</sup> Even in four (4) short years, the transformation of Social Security benefits was evident as it became a welcomed centerpiece in the American dream.

VII. ACT II, SCENE 1: GRAND PATERNALISM OR NECESSARY  
PROCESS: A CRITICAL COMPARISON OF VETERANS' DISABILITY  
COMPENSATION (VDC) AND SOCIAL SECURITY DISABILITY  
INSURANCE (SSDI)

“A people that values its privileges above its principles soon loses  
both”.

-Dwight D. Eisenhower<sup>337</sup>

The Veterans Administration articulates five “core values” which underlie its mission: Integrity, Commitment, Advocacy, Respect, and Excellence.<sup>338</sup> It explains that these words constitute the VA’s mission, stating, “[o]ur values are more than just words – they affect outcomes in our daily interactions with Veterans and eligible beneficiaries and with each other.”<sup>339</sup> The mission statement continues, informing the reader that the first letter of each of these words form the acronym, “I CARE,” to remind “each VA employee of the importance of their role in this Department.”<sup>340</sup>

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<sup>334</sup> § 202(b), 72 Stat. at 1020 (codified at 42 U.S.C. § 423(c)(3)(B)).

<sup>335</sup> § 206, 72 Stat. at 1025 (repealing what had been codified at 42 U.S.C. § 424). The repeal was effective upon enactment of the legislation. *Id.*, at § 207(a), 72 Stat. at 1026.

<sup>336</sup> *Id.* § 308(d), 72 Stat. at 1033-1034 (codified at 42 U.S.C. § 403(g)(1)(A)).

<sup>337</sup> President Dwight D. Eisenhower, *First Inaugural Address* (Jan. 20, 1953), [http://avalon.law.yale.edu/20th\\_century/eisen1.asp](http://avalon.law.yale.edu/20th_century/eisen1.asp).

<sup>338</sup> U.S. DEPARTMENT OF VETERANS AFFAIRS, *Mission, Vision, Core Values & Goals*, <http://www.va.gov/aboutva/mission.asp>, (last visited March 17, 2016).

<sup>339</sup> *Id.*

<sup>340</sup> *Id.*

The Social Security's Mission Statement harkens to the agency's roots, "to promote the economic security of the nation's people through compassionate and vigilant leadership in shaping and managing America's social security programs."<sup>341</sup> Both strike a common theme – Social Security committing itself to "compassionate...leadership" while the VA declares concern, "*CARE*." Both echo a concern for those seeking services through two mass social justice/welfare<sup>342</sup> agencies. The question arises: To what extent do these generally 'broad brush' expressions become descriptions of necessary process; that is, when does a relatively noncommittal statement of purpose become a description of programmatic implementation? Some fear a paternalistic transformation, by its nature precluding necessary reforms, pointing both to Social Security's inability to solve a decades-long backlog of pending appeals, and the delivery-of-service deficits now plaguing the VA.

The declared mission statement(s) of purpose of both the VA and SSA embody a commitment by both agencies framed by general statements of caring – a not-so innocuous principal which has arguably led to the growth of these now widely criticized benefits systems. Nowhere is this more clearly seen than in the jurisprudential matrix underlying the VA, VDC, and SSA disability programs. Despite differences between the programs, they still retain fundamental similarities. Quite apart from the heritage of the English Common Law, the nation's premier disability programs have opted out of the adversarial model of dispute resolution, adopting instead a variation of the civil law inquisitorial system. Each system allows

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<sup>341</sup> SOCIAL SECURITY ADMINISTRATION, *Mission and Organizational Structure*, <https://www.ssa.gov/finance/1998/98md&a1.pdf>, (last visited March 18, 2016).

<sup>342</sup> Using the term "welfare" in its broad sense, as for the public good; and not as a critique of either the VA or SSA. Each may be said to be an extension of the following common definition as: "Social welfare generally denotes the full range of organized activities of voluntary and governmental agencies that seek to prevent, alleviate, or contribute to the solution of recognized social problems, or to improve the well-being of individuals, groups, or communities." See <http://web.hku.hk/~hrnwlc/introsocwelfare/welfareconcepts.htm> (citing, THE NATIONAL ASSOCIATION OF SOCIAL WORKERS, *ENCYCLOPEDIA OF SOCIAL WORK* VOL. II., at 1446 (1971)).

appeals to the federal courts, wherein agency counsel may appear arguing in support of the agency's decision.<sup>343</sup>

The Supreme Court in *Sims v. Apfel*<sup>344</sup> draws a sharp distinction between hearings that are analogous to adversarial proceedings and those that are not.<sup>345</sup> Although "many agency systems of adjudication are based to a significant extent on the judicial model of decisionmaking [sic],"<sup>346</sup> the SSA is "[p]erhaps the best example of an agency" that is not.<sup>347</sup>

The Court further notes, "[t]he Commissioner has no representative before the ALJ to oppose the claim for benefits, and we have found no indication that he opposes claimants before the Council."<sup>348</sup>

Concluding that it would not impose a requirement of issue exhaustion in Social Security administrative appeals, the *Sims* Court held that "the desirability of a court imposing a requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative

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<sup>343</sup> Decisions of the Board of Veterans Appeals (BVA) may be taken to the United States Court of Appeals for Veterans Claims per Rule 3, Appellate Procedure; while aggrieved Social Security claimants may appeal the Commissioner's final decision to the United States District Court for the district where they reside. See 2 U.S.C. § 405(g) (2015).

<sup>344</sup> 530 U.S. 103 (2000).

<sup>345</sup> *Id.* at 110. The Supreme Court noted: "The regulations make this nature of SSA proceedings quite clear. They expressly provide that the SSA conduct the administrative review process in an informal, nonadversary manner." 20 C.F.R. § 404.900(b) (1999). They permit-but do not require the filing of a brief with the Council (even when the Council grants review), § 404.975, and the Council's review is plenary unless it states otherwise, § 404.976(a). See also § 404.900(b) ("[W]e will consider at each step of the review process any information you present as well as all the information in our records"). The Commissioner's involvement in the Appeals Council's decision whether to grant review appears to be not as a litigant opposing the claimant, but rather just as an adviser to the Council regarding which cases are good candidates for the Council to review pursuant to its authority to review a case *sua sponte*. See § 404.969(b)-(c); *Perales, supra*, at 403.

<sup>346</sup> 2 K. Davis & R. Pierce, *Administrative Law Treatise* § 9.10, p. 103 (3d ed. 1994).

<sup>347</sup> B. Schwartz, *Administrative Law* 469-470 (4th ed. 1994). See also, *Sims* at 111.

<sup>348</sup> *Sims*, 530 U.S. at 111.

proceeding.”<sup>349</sup> Citing its decision in *McKart v. United States*,<sup>350</sup> the Court noted with approval its earlier holding stating that the “application of [the] doctrine of exhaustion of administrative remedies ‘requires an understanding of its purposes and of the particular administrative scheme involved.’”<sup>351</sup> The Court held that “[w]here, by contrast, an administrative proceeding is not adversarial, we think the reasons for a court to require issue exhaustion are much weaker.”<sup>352</sup>

Title 20 Code of Federal Regulation Part 404 § 900 is clear; it ensures that hearings before federal administrative law judges are conducted in “an informal, non-adversary manner.”<sup>353</sup> As in the VA system, the declaration of a non-adversarial adjudication signals an expectation that the agency will proactively develop the record for the claimant. Title 20 C.F.R., Part 404 § 944 states that in Social Security hearings, the Administrative Law Judge “looks fully into the issues, questions you and the other witnesses, and accepts as evidence any documents that are material to the issues.”<sup>354</sup> Social Security proceedings are inquisitorial rather than adversarial. It is the Administrative Law Judge’s duty to investigate the facts and develop the arguments both for and against granting benefits.<sup>355</sup>

VA jurisprudence contemplates a non-adversarial proceeding before the Board of Veterans’ Appeals (BVA). Long-time veterans’ law practitioner, Kenneth Carpenter, observes that:

Historically, Congress has endeavored to create a non-adversarial system for awarding benefits to veterans, thus creating a unique character and structure to the

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<sup>349</sup> *Id.* at 109.

<sup>350</sup> *Id.*, citing, *McKart*, 395 U.S. 185, 193 (1969).

<sup>351</sup> 530 U.S. at 109-10.

<sup>352</sup> *Id.* at 110.

<sup>353</sup> 20 C.F.R. § 404.900 (1999).

<sup>354</sup> *Id.*; see also, *Completeness of the Social Security Administration’s Disability Claims Files*, SOCIAL SECURITY ADMINISTRATION, (July 2014), [https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-01-13-23082\\_0.pdf](https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-01-13-23082_0.pdf) (wherein the IG recommends “that SSA remind ODAR staff to follow the regulations and policies to make every reasonable effort to obtain all evidence and document attempts in the disability folder.”).

<sup>355</sup> See *Richardson v. Perales*, 402 U. S. 389, 400–01 (1971) (the Court noting also that the Appeals Council’s review is similarly broad).

Veterans Benefits System. In 1988, Congress enacted the VETERANS JUDICIAL REVIEW ACT and VETERANS BENEFITS IMPROVEMENT ACT OF 1988 establishing, for the first time, judicial review of decisions of the Department of Veterans Affairs.<sup>356</sup>

Carpenter describes the impact of the new law as nothing short of a “sea change in the history of veterans’ claims. Prior to this statute,” he observes:

[A]ttorney fees were capped at 10 dollars total compensation; after the enactment, no attorneys’ fees lawfully can be charged or paid for work at the administrative level, prior to a first final decision of the Board of Veterans’ Appeals. Attorneys may charge a fee for representing VA claimants, only *after* a first final decision of the Board of Veterans’ Appeals. The result of such paternalism . . . is to realistically prevent attorneys from representing VA claimants until after the record of the administrative proceedings has been *closed*.<sup>357</sup>

The passage of this act created judicial review in the Veterans Benefits context establishing a clear intent to preserve the historic, pro-claimant system.

Implicit in such a beneficial system . . . has been an evolution of a completely *ex parte* system of adjudication in which Congress expects VA to fully and sympathetically develop the veteran’s claim to the optimum before deciding it on the merits. Even then, VA is expected to resolve all issues by giving the claimant the benefit of any reasonable doubt.<sup>358</sup>

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<sup>356</sup> Carpenter, *supra* note 7, at 285.

<sup>357</sup> *Id.*

<sup>358</sup> *Id.*

Sounding a similar note, James Ridgeway identifies the issue within the VA as “a search for balance between a paternalistic charitable model and an adversarial entitlement model.”<sup>359</sup> He argues that the VA is a “paternalistic entitlement system, a hybrid of both characterizations. It is paternalistic because claimants receive significant procedural assistance. It is also an entitlement system because claimants pursue non-discretionary benefits.”<sup>360</sup> Pointing to an inherent conflict within a divided VA, he asserts that the VA, “seeks to comprehensively cover all deserving claimants through substantively and procedurally complex rules intended to address all possible fact patterns, yet it also seeks to be informal so as to avoid denying claims on technicalities or requiring applicants to bear the expense of expert attorneys.”<sup>361</sup> In accompanying notes he points to this conflict of complexity, observing that:

[W]hile attempting to act paternalistically, 38 C.F.R. § 3.7 (2009) . . . lists over fifty classes and subclasses of military service . . . [while] . . . 38 C.F.R. Part 4 . . . contains thousands of diagnostic codes used to rate nearly all possible physical and mental disabilities. Schedule for Rating Disabilities, 38 C.F.R. pt. 4 (2008).<sup>362</sup>

As illustrated by the comments of the Court of Veterans Appeals, the point is clear: nowhere is the conflict in decision-making more evident than in the tensions between a paternalistic agency, judged by an Article I federal court – here, the Court of Appeals for Veterans Claims. The Court came into being with the passage of the Veterans Judicial Reform Act.<sup>363</sup> In *Bailey v. West*,<sup>364</sup> the court observed that:

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<sup>359</sup> James Ridgeway, *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 (2010).

<sup>360</sup> *Id.*

<sup>361</sup> *Id.* at 252.

<sup>362</sup> *Id.* at n.4.

<sup>363</sup> On November 18, 1988, President Reagan signed into law the VETERANS' JUDICIAL REVIEW ACT, Pub. L. 100-687, 102 Stat. 4105-4138 [S.11] (Nov. 18, 1988), which established as a court of record the United States Court of Veterans Appeals. 102 Stat. at 4113-4122. Pursuant to the VETERANS' PROGRAMS

Since the [VJRA], it appears the system has changed from a non-adversarial, *ex parte*, paternalistic system for adjudicating veterans' claims, to one in which veterans like Bailey must satisfy formal legal requirements, often without the benefit of legal counsel, before they are entitled to administrative and judicial review.<sup>365</sup>

Both disability programs (VA and SSA) follow a general administrative template which casts aside the traditional adversarial adjudicatory model. Both declare themselves as standing apart from a decisional paradigm which follows the adversarial model, in favor of a single-party process; a policy found both within governing law and regulation. Notwithstanding a common sentiment towards those whom they serve, considerable differences nevertheless exist between the VA and Social Security disability systems, making it possible, for a veteran deemed to be 100% disabled for VA purposes while simultaneously found to be ineligible for Social Security disability.<sup>366</sup> This is because, although the SSA Disability and VA programs both provide income security for disabled individuals, they embrace similar and different definitions of disability, fundamentally differing as to how benefit eligibility is determined.<sup>367</sup>

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ENHANCEMENT ACT OF 1998, Pub. L. 105-368, 112 Stat. 3315-3367 [H.R. 4110] (Nov. 11, 1998), and effective March 1, 1999, the Court's name was changed to the "United States Court of Appeals for Veterans Claims", § 511, 112 Stat. at 3341 [38 U.S.C. § 7251, note]. As a court of record, the court is part of the United States judiciary and not part of the Department of Veterans Affairs. The laws creating and establishing the Court are codified in chapter 72 of title 38, United States Code [38 U.S.C. §§ 7251-7299]. UNITED STATES COURT of Appeals for Veterans Claims, <https://www.uscourts.cavc.gov/about.php>.

<sup>364</sup> 160 F.3d 1360, 1365 (Fed. Cir. 1998).

<sup>365</sup> James Ridgeway, *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, n. 3 (2010).

<sup>366</sup> Moulta-Ali, U. (ANALYST IN DISABILITY POLICY). *Disability Benefits Available Under the Social Security Disability Insurance (SSDI) and Veterans Disability Compensation (VDC) Programs*. Washington, D.C.: Congressional Research Service (CRS), R-41289 (Sept. 12, 2012), at p. 15.

<sup>367</sup> *Id.* at 1.

As evident from earliest times, the stated obligation of a government to its military veterans is founded on reciprocity of commitment, recognizing the veteran's service and sacrifice on behalf of the Nation; whereas no similar reciprocity of commitment defines the non-military award of disability benefits. The Social Security responsibility (as opposed to "obligation") is arguably derived from a Constitutional obligation to "insure domestic Tranquility, provide for the common defence [sic], promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity . . . ." <sup>368</sup>

So, while a debt to veterans is owed in recognition of service to the Nation, no such debt is owed to those seeking Social Security disability benefits. Yet, the two systems mirror one another in the evident paternal treatment of their constituents, raising questions in 2017 whether the underlying world-view of each program should not be reconsidered.

Both programs have evolved over time, fueling a bottom-line increase in the total number and amount of disability awards, with expenditures totaling billions of dollars annually. <sup>369</sup> In Fiscal Year 2013, 4,120,238 veterans and/or their families received an estimated \$54.92 billion annually. <sup>370</sup> See Figure 1 below.

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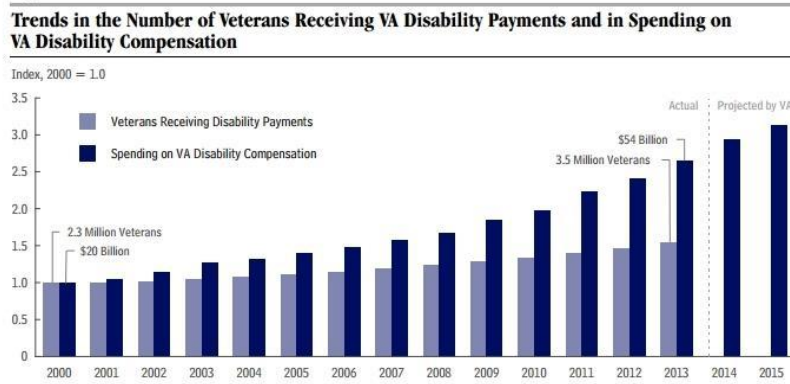
<sup>368</sup> The Constitution, NATIONAL ARCHIVES, [http://www.archives.gov/exhibits/charters/constitution\\_transcript.html](http://www.archives.gov/exhibits/charters/constitution_transcript.html).

<sup>369</sup> See, e.g., *FY2013 Annual Benefits Report*, U.S. DEPARTMENT OF VETERANS AFFAIRS, [http://www.benefits.va.gov/REPORTS/abr/ABR\\_FY2013\\_Compensation\\_07172014.pdf](http://www.benefits.va.gov/REPORTS/abr/ABR_FY2013_Compensation_07172014.pdf).

<sup>370</sup> *Id.*



Figure 1



Source: *United States Department of Veterans Affairs*<sup>371</sup>

More than twice as many Americans received civilian Social Security Disability Insurance benefits, with 10,261,268 beneficiaries at a cost of \$107,458,056 annually.<sup>372</sup> The total number of Social Security disability beneficiaries expands by a factor of two when SSI disability recipients are added in, accounting for 8.4 million more recipients. The result? Some 18,661,268 Social Security beneficiaries are awarded combined annual benefits (both SSDI and SSI)<sup>373</sup> in excess of \$162,069,046,000.<sup>374</sup> Figure 2 depicts the steady, rise of the disability insurance benefits program (DIB)<sup>375</sup> beneficiaries from 1970, with projections showing a continued increase to A.D. 2026.

<sup>371</sup> *Trends in Veterans with a Service-Connected Disability: 1985 – 2012*, U.S. DEPARTMENT OF VETERANS AFFAIRS, National Center for Veterans Analysis and Statistics (2014), <http://www.vba.va.gov/REPORTS/abr/index.asp>.

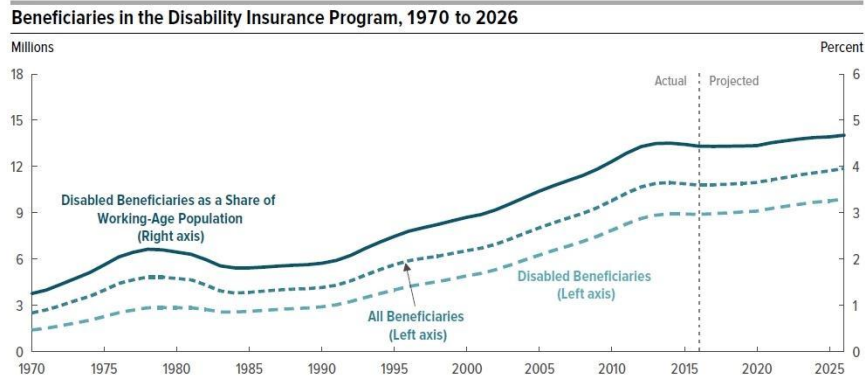
<sup>372</sup> *Annual Statistical Report on the Social Security Disability Insurance Program, 2014*, SOCIAL SECURITY ADMINISTRATION, [https://www.ssa.gov/policy/docs/statcomps/di\\_asr/2014/di\\_asr14.pdf](https://www.ssa.gov/policy/docs/statcomps/di_asr/2014/di_asr14.pdf).

<sup>373</sup> Disability Insurance Benefits (SSDI) and Supplemental Security Income Benefits (SSI).

<sup>374</sup> *Fast Facts and Figures about Social Security*, Social Security Administration, 24 (2014), [https://www.ssa.gov/policy/docs/chartbooks/fast\\_facts/2014/fast\\_facts14.pdf](https://www.ssa.gov/policy/docs/chartbooks/fast_facts/2014/fast_facts14.pdf).

<sup>375</sup> The acronyms “DIB” and “SSDI” are synonymous references to *disability insurance benefits* under Title II of the Social Security Act.

Figure 2



Source: Congressional Budget Office and Social Security Administration<sup>376</sup>

When considered together, total VA and civilian disability expenditures exceed \$210 billion annually,<sup>377</sup> – and the number continues to grow. The trillions of dollars in national debt<sup>378</sup> calls for a conversation regarding the future of both the VA and Social Security disability benefits programs must be had.

#### A. To Be or Not to Be “Disabled”

Paternalism stands to the fore when examining both the definition of what it means to be disabled as well as the process by which such a determination is made. Each is examined, in turn, below.

While some may believe the question of disability to be obvious, reaching, much less defining, such a result is neither intuitive nor obvious. This is no more significant as between the VA and its civilian counterpart, the SSA. Despite these massive national disability programs, the federal definition of disability varies between

<sup>376</sup> *Social Security Disability Insurance: Participation and Spending*, CONGRESSIONAL BUDGET OFFICE, [https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/51443-SSDI\\_Participation\\_Spending.pdf](https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/51443-SSDI_Participation_Spending.pdf).

<sup>377</sup> This contemplates a \$54.92 billion expenditure for VA disability and some \$162 billion for the two Social Security disability programs. *See id.*

<sup>378</sup> *Treasury Direct*, UNITED STATES DEPARTMENT OF TREASURY, <http://www.treasurydirect.gov/NP/debt/current>. The national debt totals \$19,203,187,186,595.43 as of April 14, 2016. *Id.*

different federal agencies.<sup>379</sup> “Disability” is not defined as adversely affecting one’s ability to engage in work or work-like activity, but is, instead, defined at Section 12102 of the Americans with Disabilities Act as: “(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment (as described in paragraph (3)).”<sup>380</sup>

Under the ADA, one need not actually be “disabled” but can allege to be *perceived* to be disabled.<sup>381</sup> This, of course, would not do for either Veteran’s Disability Compensation (VDC) or Social Security disability (SSDC, SSI or DIWW) as disability benefits are paid as a result of an *actual* disability.<sup>382</sup>

The Rehabilitation Act of 1974 poses yet another definition of “disability”:

[T]he term “individual with a disability” means any individual who—(i) has a physical or mental impairment which for such individual constitutes or results in a substantial impediment to employment; and (ii) can benefit in terms of an employment outcome from vocational rehabilitation services provided pursuant to subchapter I, III, or VI.<sup>383</sup>

This definition of “disability” requires “a substantial impediment to employment,” but offers no statutory definition of the operative terms, with seemingly far-reaching possibilities.<sup>384</sup> Under the

<sup>379</sup> Americans with Disabilities Act, 42 U.S.C. § 12101 (1990).

<sup>380</sup> *Id.*

<sup>381</sup> *Id.*

<sup>382</sup> BARTON STICHMAN ET AL, Veterans Benefits Manual, 285 (Lexis-Nexis, 2014). Although an argument could be made that the VA Schedule for Rating Disabilities (VASRD) system can be said to be one of *perception* of disability, as the standard used by the VA in determining rating assesses the effect of the alleged “disability” on “the average impairments of earning capacity, in civil occupations, resulting from such injuries” as opposed to an individual assessment of actual functional limitations suffered by the individual. *Id.*

<sup>383</sup> 29 U.S.C. § 705(20)(i), (ii) (1998).

<sup>384</sup> See also *Frequently Asked Questions*, Office of Disability Employment Policy, U.S. DEPARTMENT OF LABOR, <https://www.dol.gov/odep/faqs/general.htm#3>.

REHABILITATION ACT, services are provided for “an individual with a disability to enable the individual to maximize opportunities for employment, including career advancement.”<sup>385</sup> The question thus lies not solely in an inability to work but also embraces inability to take advantage of “opportunities” to further one’s career.

The difference between VA, the foregoing federal statutory definitions and Social Security is similarly divergent. Consider the VA disability system outlined below:

The VA employs a graduated or scaled assessment such that the term “disability” does not refer to a global inability to work (understanding that the term “work” is, itself, subject to definition) but refers instead to a degree of impairment as a result of a service-connected impairment.<sup>386</sup> Appendix 4.1 describes the nature of a service-connected disability, in-part as follows:

This rating schedule is primarily a guide in the evaluation of disability resulting from all types of diseases and injuries encountered as a result of or incident to military service. The percentage ratings represent as far as can practicably be determined the average impairment in earning capacity resulting from such diseases and injuries and their residual conditions in civil occupations.<sup>387</sup>

Total VA disability is defined as follows:

Total disability will be considered to exist when there is present any impairment of mind or body which is sufficient to render it impossible for the average person to follow a substantially gainful occupation; *Provided*, that permanent total disability shall be taken to exist when the impairment is reasonably certain to continue throughout the life of the disabled person.<sup>388</sup>

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<sup>385</sup> 29 U.S.C. § 705(4).

<sup>386</sup> 38 C.F.R. § 4.1 (1976).

<sup>387</sup> *Id.*

<sup>388</sup> 38 C.F.R. § 4.16(a) (2014).

“Unemployability” may also be found: “Total disability ratings for compensation may be assigned, where the scheduler [sic] rating is less than total, when the disabled person is, in the judgment of the rating agency, unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities.”<sup>389</sup>

Notably, VA policy further provides: “It is the established policy of the Department of Veterans Affairs that all veterans who are unable to secure and follow a substantially gainful occupation by reason of service-connected disabilities shall be rated totally disabled.”<sup>390</sup>

This language is critically distinctive. “Total disability” exists when the veteran can demonstrate either an inability to secure or an inability to follow “a substantially gainful occupation.”<sup>391</sup> VDC thus iterates itself in two versions. One can be found incrementally “disabled” (from 10% to 100%) and yet not found “unemployable” (able to work fulltime while simultaneously receiving Disability Compensation. Alternatively, one can be found “unemployable.”

Social Security’s assessment of disability differs significantly from that adopted by the VA. Social Security specifically looks to the availability of jobs in the national and regional economies as an entitlement metric. Once the claimant has established a *prima facie* case that she cannot return to his or her “past relevant work” (performed at “substantial gainful” levels over the past 15 years), the burden shifts to the Commissioner to show that there remain a “significant number” of jobs in the national or regional economy that the claimant can nevertheless perform. If the Commissioner meets her burden, the claimant is found not disabled.<sup>392</sup>

Social Security defines substantial gainful activity as a three-pronged test, looking first to income:

To be eligible for disability benefits, a person must be unable to engage in substantial gainful activity (SGA). A person who is earning more than a certain monthly

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<sup>389</sup> *Id.* § 4.16(b).

<sup>390</sup> *Id.*

<sup>391</sup> *Id.*

<sup>392</sup> *See* 20 C.F.R. § 404.1566(a) (2016) (“We consider that work exists in the national economy when it exists in significant numbers either in the region where you live or in several other regions of the country.”).

amount (net of impairment-related work expenses) is ordinarily considered to be engaging in SGA. The amount of monthly earnings considered as SGA depends on the nature of a person's disability. The Social Security Act specifies a higher SGA amount for statutorily blind individuals; Federal regulations specify a lower SGA amount for non-blind individuals. Both SGA amounts generally change with changes in the national average wage index.<sup>393</sup>

VA disability benefits fundamentally differ in character from Social Security disability. Whereas Title II Social Security disability benefits are awarded under a contract of insurance, to which entitlement must be shown (such that one is insured during the period for which benefits are sought), VA benefits are of an entirely different character. VA benefits are treated as compensatory in nature—in effect viewed as *owed* as a result of the recipient's service to the Nation. Such is the determination when there is a finding that the diagnosed impairment(s) are “service-connected,” the impairments being either medical or psychiatric or both.<sup>394</sup>

Once determined to be “service-connected,” the VA's reach of is sweeping. “If there is a clear in-service diagnosis of a condition that is listed in 38 C.F.R. § 3.03 (2016), any manifestation of the condition after service will be connected no matter how long after service the condition manifests itself, unless the subsequent manifestation is clearly attributable to an intercurrent cause.”<sup>395</sup> That is, injuries suffered while in service to one's country are compensatory where there is a determination that they are “service-connected.”

Indeed, where the service connection is readily apparent, a medical opinion need not even be had. “[A] medical opinion regarding linkage [between the one's service and the medical/psychiatric condition] is not needed where the veteran suffered from and was diagnosed with a chronic disability in service

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<sup>393</sup> *Substantial Gainful Activity*, SOCIAL SECURITY ADMINISTRATION, <https://www.ssa.gov/oact/cola/sga.html>.

<sup>394</sup> See 38 C.F.R. § 3.03(a) (2016).

<sup>395</sup> STICHMAN ET AL, *supra* note 333, at 155.

and currently suffers from and has been diagnosed with the same chronic disability.”<sup>396</sup>

Thus, for certain categories of “disabilities” a presumption arises as to service connection even if not diagnosed until after service.<sup>397</sup> These include a mental disorder first evidenced while in service, a preexisting mental disorder aggravated by service activity, or a mental disorder that was proximately caused by a service connected physical condition.<sup>398</sup> Additionally, where a veteran is injured by VA care, a mental disorder arising from such injury is also recognized as service connected. Finally, a mental disorder may be *presumed* if it manifests itself after one year of service in the case of a former prisoner of war.<sup>399</sup> In other words, certain circumstances are deemed to be so egregious so as to warrant a finding of service connection by reason of the nature of service related event and / or the resulting status of the individual.<sup>400</sup>

In making an award of benefits, the VA follows a congressionally-mandated schedule to rate disabilities.<sup>401</sup> The VA term disabilities refers to what is, in Social Security parlance, described as an “impairment.” In Social Security nomenclature, an “impairment” is a medically-determinable, that is, medically diagnosable, physical or mental condition.<sup>402</sup> In SSA terms a “symptom” is not an “impairment.”<sup>403</sup>

As a result of this nomenclature difference, confusion sometimes arises in equating the effect of decision making between the VA and

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<sup>396</sup> *Id.* at 136.

<sup>397</sup> *See id.* at 141 (noting that such connection arises under federal statute at section 1112(a) of title 38 of the United States Code, which states: “a chronic disease becoming manifest to a degree of 10 percent or more within one year from the date of separation from [active service] . . . shall be considered to have been incurred in or aggravated by such service, notwithstanding there is not a record of evidence of such disease during the period of service.”).

<sup>398</sup> STICHMAN ET AL, *supra* note 348, at 141

<sup>399</sup> *Id.*

<sup>400</sup> *Id.* at 136.

<sup>401</sup> *Id.* at 285.

<sup>402</sup> SSR 96-4p: *Policy Interpretation Ruling Titles II and XVI: Symptoms, Medically Determinable Physical and Mental Impairments, and Exertional and Nonexertional Limitations* (July 2, 1996).

<sup>403</sup> *Id.*

SSA systems. This becomes significant, as a veteran may apply and receive, without offset, both VA as well as SSA disability benefits. In Social Security language, the term “disability” (*i.e.*, the claimant has a disability) refers to the claimant’s global condition—a Social Security claimant is either “disabled” or “not disabled.” The VA, however, uses the term “disability” to refer to a specific medical or psychiatric diagnosis and has developed a Schedule for Rating Disabilities (“VASRD”) which rates the severity of a “disability” on a 100-point (10% to 100%) rating scale.<sup>404</sup>

The severity of the individual VA “disability” is divided into 10% increments, each 10% valued as representing a loss of “earning capacity in civil occupations resulting from” the specific injury,<sup>405</sup> with “[t]he lowest compensable rate of 10 percent . . . worth \$130.94 as of December 1, 2013.”<sup>406</sup> See Figure 3 (*Yearly Payment Rates for VA Disability Compensation by CDD*).

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<sup>404</sup> STICHMAN ET AL, *supra* note 348, at 285. At most, a disabled veteran is entitled to a “100%” rating. *Id.* The calculation among multiple impairments is predicated on this provision. *Id.* So, if a 50% rating is established on the first disability rating, a subsequent finding of 20% for a second disability is calculated on the remaining balance, or 20% of the remaining 50%, with an actual valuation of 10% (20% x 50% = 10% overall additional rating valuation.) (commonly known as the “combined ratings table”, codified at 38 C.F.R. § 4.25 (2016)). See also *Compensation*, U.S. DEPARTMENT OF VETERANS AFFAIRS, <http://www.benefits.va.gov/COMPENSATION/rates-index.asp#combined>.

<sup>405</sup> STICHMAN ET AL, *supra* note 348, at 285.

<sup>406</sup> *Id.*



Figure 3

**YEARLY PAYMENT RATE FOR VA DISABILITY  
COMPENSATION BY CDD**

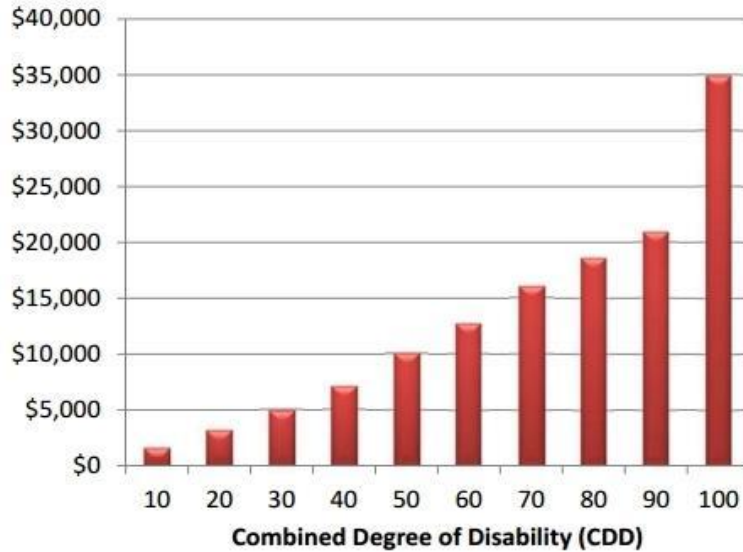


Figure 3. Source: *Institute for Defense Analysis*<sup>407</sup>

Different percentages can be assessed on a given “disability” dependent upon severity.

When evaluating a disability, the rating activity examines the veteran’s medical records to ascertain the medical diagnosis for the particular service-connected disability at issue. The rating activity then finds the appropriate diagnostic code for the disability and selects the degree of disability that corresponds with the symptomology of the veteran’s condition?<sup>408</sup>

The VA presumes a value for each 10% added to the equation, aggregating the individual ratings to a global rating, assigned a value

<sup>407</sup> Sarah K. Burns *et al.*, Institute for Defense Analysis, *Trends in VBA Compensation Spending*, IDA Document NS-D-5781, page 2 (June 2016).

<sup>408</sup> Stichman, *supra* note 351, at 287.

dependent upon the total percentage assessed. If, for example, a VA claimant were found to have *three “disabilities,” each rated at 10%, the claimant would have an aggregate rating of 30%. If one were eventually rated at 100%, the highest compensable VA rating, the monthly benefit (assuming service connection) would be \$2,858.24 as of December 1, 2013.*<sup>409</sup>

Unlike SSA, the VA does not have a regulatory definition for “substantial gainful activity” or “SGA.” The VA attempts, in its *Adjudication Procedures Manual*,<sup>410</sup> to define “SGA” to mean: “[T]hat which is ordinarily followed by the nondisabled to earn their livelihood with earnings common to the particular occupation in the community where the veteran resides.”<sup>411</sup> However, the simple truth is that a VA rating decision under 100% is *not* tied to any actual ability to engage in competitive work.

To the contrary, when evaluating a Social Security disability claim, the primary inquiry begins with an objective examination of one’s earnings record. No reference is otherwise made to extrinsic indicia such as “the national poverty level.” Not so with the VA. In VA parlance, “marginal employment” is not considered “SGA.” The VA defines “marginal employment” as “earned income that does not exceed the poverty threshold for one person as established by the U.S. Department of Commerce, Bureau of the Census.”<sup>412</sup> Under the current threshold, established by the Bureau of the Census, “marginal employment” in 2014 (the most recent year available) was \$12,316.<sup>413</sup> The Court of Appeals for Veterans Claims (CAVC) concluded that “SGA” is “[an occupation] that provides [the veteran with an] annual income that exceeds the poverty threshold for one person, irrespective of the number of hours or days that the veteran

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<sup>409</sup> *Id.*

<sup>410</sup> U.S. DEPARTMENT OF VETERANS AFFAIRS, “WEB AUTOMATED REFERENCE MATERIAL SYSTEM,” M21-1 Adjudication Procedures, [http://www.benefits.va.gov/WARMS/M21\\_1.asp](http://www.benefits.va.gov/WARMS/M21_1.asp) (last visited Mar. 18, 2016).

<sup>411</sup> MANUAL M21-1MR, Part VI, Subpart ii, 2.F.24.d (2016).

<sup>412</sup> 38 C.F.R. § 4.16(a) (2016).

<sup>413</sup> UNITED STATES CENSUS BUREAU, <http://www.census.gov/hhes/www/poverty/data/threshld/index.html> (last visited May 28, 2015).

actually works. . . .”<sup>414</sup> The national “poverty level” thus becomes the baseline for computation of “SGA.”

Unlike SSA, which considers the question of one’s “disability” as a global functional inquiry (assessing the individual’s *residual functional capacity* (RFC)),<sup>415</sup> the term “disability” as used by VA refers to “the average impairment in earning capacity” resulting from diseases, injuries, or residual conditions.”<sup>416</sup> There is not generally a finding as to the veteran’s individual capacity for work; instead, the question is whether the “average” person would be limited? The basis for what amounts to a “non-determination determination” by the VA lies in the character of the disability rating. The overall purpose of VA disability compensation is to compensate veterans “when they have, in honorable service to their nation, suffered a loss that is reflected in the decreased ability to earn a living for themselves or their families.”<sup>417</sup> The issue is not singularly focused on whether the injured veteran can work, as veteran’s disability does not solely look to the question whether the veteran can engage in substantial gainful activity, asking instead whether the veteran has suffered an “impairment in earning capacity.” Compensation is paid to the veteran even if the disability rating is only 10% and even if the veteran is gainfully employed.

VA disability “compensation” is defined, in relevant part, as a “monthly payment made by the Secretary to a veteran because of [a]

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<sup>414</sup> *Faust v. West*, 13 Vet. App. 342, 356 (2000). See generally, *Roberson v. Principi*, 251 F.3d 1378, 1385 (Fed. Cir. 2001) (holding the CAVC had erred in finding that a claimant had to be shown “100% unemployable” in order to obtain a TDIU finding). In *Faust v. West*, the Federal Circuit stated: “[r]equiring a veteran to prove that he is 100 percent unemployable is different from requiring the veteran to prove that he cannot maintain substantially gainful employment. The use of the word “substantially” suggests the intent to impart flexibility into a determination of the veteran’s overall employability, whereas a requirement that the veteran is 100 percent unemployability leaves no flexibility. While the term “substantially gainful occupation” may not set a clear numerical standard for determining TDIU, it does indicate an amount less than 100 percent.”

<sup>415</sup> Social Security Administration, Programs Operations Manual System (“POMS”), DI 24510.001 Residual Functional Capacity (RFC) Assessment, describing a claimant’s “residual functional capacity (“RFC”) as describing “what an individual is able to do, despite functional limitations resulting from a medically determinable impairment(s) and impairment-related symptoms.”

<sup>416</sup> 38 C.F.R. § 4.1 (2016).

<sup>417</sup> *Ferenc v. Nicholson*, 20 Vet. App. 58, 61-62 (2006).

service-connected disability.”<sup>418</sup> VA compensation benefits are awarded even if the individual is working full time (*i.e.*, with no reduction in actual vocational functioning.) They are tax-exempt and not included as income for federal income tax purposes.<sup>419</sup>

“Total Disability” ratings based on Individual Unemployability (TDIU) are made considering an individual’s vocational capabilities regardless whether an average person would be rendered unemployable under the same circumstances.<sup>420</sup> Where the percentage of the total Disability Rating is less than 100% the veteran can appeal, seeking a finding of “unemployability.” It is here that individual subjective allegations are considered. Unlike Social Security, however, the availability of work in the national or local economy is irrelevant to a TDIU evaluation.<sup>421</sup> Rather the issue is whether the veteran is unable to engage in substantially gainful employment, regardless whether the diagnoses would objectively support such a finding.<sup>422</sup>

The fundamental difference between Social Security disability and VA disability thus lies in a conceptual variance in the definition of “disability.” In the world of Social Security entitlement, “disability” is a global definition. An individual SSA claimant who

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<sup>418</sup> 38 U.S.C. § 101(13).

<sup>419</sup> 26 U.S.C. § 104(a)(4).

<sup>420</sup> *Hatlestad v. Derwinski*, 3 Vet. App. 213 (1992); VA Gen. Coun. Prec. 75-91 (Dec. 27, 1991).

<sup>421</sup> *Smith v. Shineski*, 647 F.3d 1380 (Fed. Cir. 2011) (holding that the VA has no duty to obtain a labor market survey, vocational report or similar document to make the determination of whether a veteran is incapable of engaging in substantial gainful employment). While the TDIU regulation, 38 C.F.R. § 4.16(a) (2016) requires that the veteran be capable of obtaining employment that would provide income “exceed[ing] . . . the poverty threshold for one person”, it does not state that a particular job meeting this standard must exist in the national or local economy. The VA Adjudication Procedures Manual explicitly states that the “availability of work” is an “extraneous factor” that is irrelevant to the TDIU determination. VA ADJUDICATION PROCEDURES MANUAL REWRITE, M21-1MR, PART IV, SUBPART II, CHAPTER 2, SECTION F, 2-F-12. For a full history of VA TDIU ratings from 1933-1990, see Veterans Benefits Administration [VBA] raining Letter 10-07, SUBJ: Adjudication of Claims for Total Disability Based on Individual Unemployability, <http://www.ftptf.com/Misc/TDIUFastLetter.pdf> (last visited Aug. 12, 2016).

<sup>422</sup> See, *infra* note 522.

is “disabled” cannot engage in *any* “substantial gainful activity” — or, she is not “disabled.”<sup>423</sup> This stands in stark contrast with both the VA fractional “disability” rating as well as the VA TDIU finding. The VA system of fractional disability ratings asks not whether one is globally “disabled,” (unable to engage in any competitive work); it instead asks whether the veteran suffers from one or more fractional “disabilities,” ultimately asking whether the veteran is “100% unemployable” (regardless of whether the veteran is actually working).<sup>424</sup>

In VA parlance, the inability to engage in competitive work is *not* generally a measuring stick by which a VA “disability” award is determined — unlike an SSA disability assessment. The VA system of fractional “disabilities” rewards a service-connected less-than-global injury/illness, generally without regard for whether the individual can actually work (much less, actually is working.)

If the two systems swapped definitional paradigms, a Social Security claimant who has a “90%” “disability” but could still engage in “substantial gainful activity,” would *not* be “disabled”; while a veteran who cannot, in Social Security parlance, engage in “substantial gainful activity,” would be “disabled” even if, under VA standards she would only be entitled to a 10% rating. In other words, the two systems stand astride the question of “disability” as apples are to oranges when defining and finding “disability.” This does not mean, however, that the two programs are not cut from the same cloth. To the contrary — we assert they are. Both systems embrace a complex claims-based social welfare system in which the ultimate determination of an award (whether it be military or civilian) is often a result of an adjudicatory process — a multiplier of bureaucratic processes. Indeed, as early as 1972, it became apparent that such

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<sup>423</sup> *Substantial Gainful Activity*, *supra* note 392. The SSA provides, in-part: “To be eligible for disability benefits, a person must be unable to engage in substantial gainful activity (SGA). A person who is earning more than a certain monthly amount (net of impairment-related work expenses) is ordinarily considered to be engaging in SGA. The amount of monthly earnings considered as SGA depends on the nature of a person's disability. The Social Security Act specifies a higher SGA amount for statutorily blind individuals; Federal regulations specify a lower SGA amount for non-blind individuals. Both SGA amounts generally change with changes in the national average wage index.” *Id.*

<sup>424</sup> See *Robertson*, *supra*, note 455.

systems tend to expand bureaucratic function. Robert Dixon observes:

The filing of a claim, however, . . . is only the beginning of the administrative process – multiple stages of review significantly increase the agency’s burden . . . As welfare caseloads rise and as the number of determinations and appeals thus soars, the natural instinct of administrators is to seek a simpler, more automatic method for delivering money to eligible welfare recipients.<sup>425</sup>

In one sense, the VA incremental rating system closely resembles the SSA Step 3 analysis, in that a finding of either a ratable “disability” (VA language) or an impairment which “meets” or “equals” a listing within the Listing of Impairments (SSA language) is *presumed as a matter of law* to be disabling without any assessment of a claimant’s actual functional capacity.<sup>426</sup> The VA presumes a loss of earnings capacity once a certain diagnosis is assessed, (measured in 10% increments depending on the assessed severity level); while SSA presumes total disability at Step 3, there being no incremental assessment. Neither system assesses actual functional capacity at this juncture.

Still, any assessment of the VA rating system must necessarily include an examination of the VA concept of “total disability.” In VA parlance, the term “total disability rating” is synonymous with “100 percent disability rating.”<sup>427</sup> When examining the severity level at 100% the VA system will consider total disability “to exist when there is present any impairments of mind or body which is sufficient to render it impossible for the *average person* to follow a substantially gainful occupation.”<sup>428</sup> This measure by the VA is not, as required under SSA regulations, a measure of the claimant’s actual

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<sup>425</sup> Robert G. Dixon, “*The Welfare State and Mass Justice: A Warning from the Social Security Disability Program*,” 1972 DUKE L. J. 681 (1972).

<sup>426</sup> Which also includes “medically equaling a Listing” when examining multiple impairments at Step 3. See 20 C.F.R. § 404.1526 (2016).

<sup>427</sup> Stichman, *supra* note 351, at 291.

<sup>428</sup> 38 C.F.R. § 4.15 (2016).

residual functional capacity to work, but is, instead, measured against the hypothetical “average person.” The result: VA “disabled” veterans who also work in civilian occupations with no impact on receipt of “disability” funds.

If the VA finds that the “average person” would be unable to work as a result of his diagnoses, then a 100% total disability may be found, even if the veteran continues to work.<sup>429</sup> Applying this to the question of Social Security disability, if the SSA claimant were a veteran who is rated with a 100% VA disability, yet who continued to work full-time, the weight given the VA award in the determination of SSA benefits would presumably be slight, if any. To give persuasive weight to the VA award under such circumstances would contravene the essential premise upon which SSA disability benefits are awarded and would, in effect, recognize the VA rating while ignoring the weight of the evidence assessed in the SSA claim.

If, however, the SSA claimant who is also a veteran receiving a 100% total VA rating, is not working and testifies to the inability to work, giving persuasive weight to the VA rating would arguably not contravene the essential premise underlying the SSA disability. Nevertheless, a fundamental difference exists in the determination of a VA “disability” when contrasted with SSA’s definition of disability.

Quite like SSA, the VA will also consider a 100% total disability rating where a person who fails to meet the scheduler rating percentage is, nevertheless, unable to secure a substantially gainful occupation.<sup>430</sup> This concept, of total disability based on individual unemployment (“TDIU”), is an individualized assessment which considers “the effect that service-connected disabilities have on a particular veteran’s ability to work.”<sup>431</sup> As the court stated in *Norris v. West*,<sup>432</sup> a claim for TDIU is based on an acknowledgement that even though a rating less the 100 [percent] under the rating schedule may be correct, objectively, there are subjective factors that may permit assigning a 100 [%] rating to a particular veteran under particular facts.<sup>433</sup>

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<sup>429</sup> Stichman, *supra* note 351, at 29.

<sup>430</sup> 38 C.F.R. § 4.16 (2016).

<sup>431</sup> Stichman, *supra* note 351, at 356.

<sup>432</sup> *Norris v. West*, 12 Vet. App. 413 (1999).

<sup>433</sup> Stichman, *supra* note 351, at 356.

In this, the two programs find both common ground and vast differences; for the Social Security definition of disability is a global functional assessment, ultimately asking whether the claimant can engage in competitive work eight hours a day, five days per week.<sup>434</sup>

*B. The Future Bodes Ill: Unresolved Disability “Spikes” in Both the VA and SSA Disability Programs*

Parallel growth in the number of disability recipients coupled with increasing benefits amounts have produced significant “spikes” or increases in recent disability expenditures — of such magnitude as to imperil the long-term health of both the VA and SSA disability programs. Skyrocketing costs in both the VA and SSA programs have followed in the wake of what can only be described as a rise in political paternalism — making it less difficult to qualify for disability, thereby increasing the numbers of persons dependent upon such programs.

Indeed, unless bounded by law to the contrary, there is, in such systems, the potential for not only double-dipping (working at a job while receiving VA rating benefits), but for triple-dipping (working at a job, collecting VA disability benefits, and a military pension based on accrued military service.)<sup>435</sup> Double-dipping with Social Security is equally likely, as a claimant may receive both SSA disability and unemployment benefits. While simultaneously declaring to the state government his or her willingness to look for a new job, the state unemployment applicant may, without penalty or offset, maintain a concurrent application for Social Security disability in which the individual declares a complete inability to perform competitive work.<sup>436</sup> The impact of a growing laxity in the

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<sup>434</sup> See generally, SOCIAL SECURITY RULING (SSR) 85-15 <https://www.ssa.gov/OPHome/rulings/di/02/SSR85-15-di-02.html>.

<sup>435</sup> See, Romina Boccia, TRIPLE-DIPPING: THOUSANDS OF VETERANS RECEIVE MORE THAN \$100,000 IN BENEFITS EVERY YEAR, The Heritage Foundation, Issue Brief No. 4295, <http://thfmedia.s3.amazonaws.com/2014/pdf/IB4295.pdf> (last visited Nov. 6, 2014).

<sup>436</sup> SOCIAL SECURITY ADMINISTRATION, Frequently Asked Questions, “WILL UNEMPLOYMENT BENEFITS AFFECT MY SOCIAL SECURITY BENEFITS?” <https://faq.ssa.gov/link/portal/34011/34019/Article/3741/Will-unemployment-benefits-affect-my-Social-Security-benefits>.

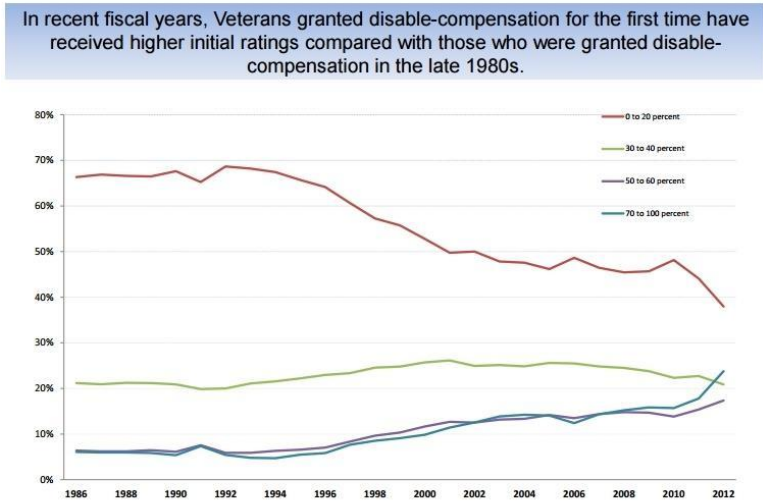


qualifications for both VA and SSA disability benefits is evident in a rising numbers of applicants coupled with a rising increase in benefits paid. These “spikes” are evident in even a cursory review. We shine the light on the “spike” in both the VA and SSA programs in the following two sections, ultimately asking whether this signals a “spike” in government paternalism.

1. The “Spiking” VA Disability Program

In recent years, the VA has seen a growing number of disability applicants, in part a result of heightened global conflicts; and in part, something more. *Figure 4* clearly shows apparent steady increases, not in simple numbers of applicants, but in the degree of *initial* VA disability ratings from 1996 forward. *Figure 5* makes it plain that this is not a gradual rise, but one finding its energy in significant recent increases in initial ratings awards (with an increasing number of “disabled” veterans whose rating awards are 50% or greater post 2006), as compared to literally decades of “disabled” veterans with dramatically lower initial ratings.

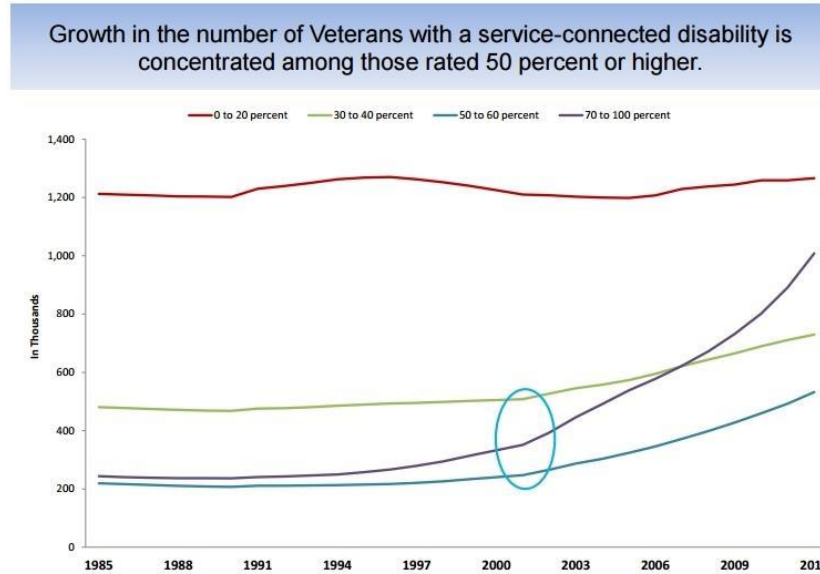
*Figure 4*



Source: United States Department of Veterans Affairs<sup>437</sup>

<sup>437</sup> UNITED STATES DEPARTMENT OF VETERANS AFFAIRS, “Trends in Veterans with Service-Connected Disability: 1985 – 2012,” National Center for Veterans

Figure 5



Source: United States Department of Veterans Affairs<sup>438</sup>

This “spike” in initial awards led the Congressional Budget Office (CBO) in August 2014 to observe that “[a]djusted for inflation to 2014 dollars, VA disability compensation to veterans amounted to \$54 billion in 2013, or about 70 percent of VBA’s total mandatory spending.”<sup>439</sup> Underlying this increase is an oft-unconsidered incentive – more money. A 2013 Government Accountability Office (GAO) report observes that in 2013 “[m]ore than 2,300 veterans received \$100,000 or more in annual benefits each, and the highest annual benefit amounted to more than \$200,000.”<sup>440</sup>

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Analysis and Statistics, <http://www.vba.va.gov/REPORTS/abr/index.asp> (last visited February 2014).

<sup>438</sup> *Id.*

<sup>439</sup> Congressional Budget Office, “VETERANS’ DISABILITY COMPENSATION: TRENDS AND POLICY OPTIONS,” Publication No. 4617 (August 2014) at [http://www.cbo.gov/sites/default/files/113th-congress-2013-2014/reports/45615-VADisability\\_2.pdf](http://www.cbo.gov/sites/default/files/113th-congress-2013-2014/reports/45615-VADisability_2.pdf).

<sup>440</sup> Romina Boccia, “TRIPLE-DIPPING: THOUSANDS OF VETERANS RECEIVE MORE THAN \$100,000 IN BENEFITS EVERY YEAR,” , The Heritage Foundation, Issue Brief No. 4295 (November 6, 2014) (citing, Government Accountability

Writing for the Heritage Foundation, Romina Boccia<sup>441</sup> points to the fact that the current system of disability compensation, embracing both military and civilian benefits entitles “veterans who receive military retirement pay and VA disability compensation . . . [to] . . . further supplement their income with Social Security disability benefits.”<sup>442</sup> The problem: dual compensation for the same diagnosis. Ideally, says Boccia, veterans should be eligible for Social Security only to the extent the claimed impairment is not service-connected, given already existing VA compensation for service-connected ailments.<sup>443</sup>

Concerns have also reached the popular media. Consider the questions raised about the integrity of the VA disability compensation system, and particularly the rising number of claims of Post-Traumatic Stress Disorder (“PTSD”). “As disability awards for PTSD have grown nearly fivefold over the last 13 years, so have concerns that many veterans might be exaggerating or lying to win benefits.”<sup>444</sup> Alan Zarembo of the Los Angeles Times observes that, “[d]epending on severity, veterans with PTSD can receive up to \$3,000 a month tax-free, making the disorder the biggest contributor to the growth of a disability system in which payments have more than doubled to \$49 billion since 2002.”<sup>445</sup> Zarembo notes the rapid rise in the number of such claims in a relatively short time-span. See Figure 6 below.

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Office, “*Disability Compensation: Review of Concurrent Receipt of Department of Defense Retirement, Department of Veterans Affairs Disability Compensation, and Social Security Disability Insurance*,” letter to Senator Tom Coburn (R-OK), September 30, 2014, <http://www.gao.gov/assets/670/666267.pdf>.

<sup>441</sup> *Id.*; Deputy Director, Thomas A. Roe Institute for Economic Policy Studies and Grover M. Hermann Research Fellow, Thomas A. Roe Institute for Economic Policy Studies.

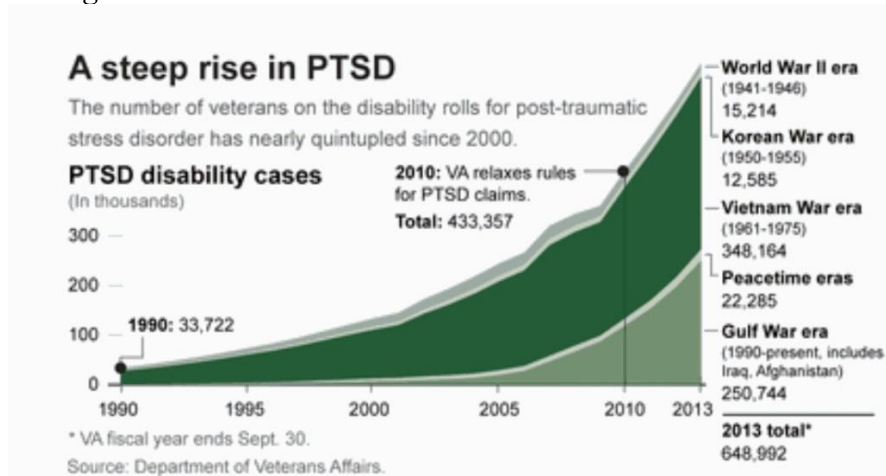
<sup>442</sup> *Id.*

<sup>443</sup> *Id.*

<sup>444</sup> Alan Zarembo, *As Disability Awards Grow, So Do Concerns with Veracity of PTSD Claims*, LOS ANGELES TIMES, (Sept. 10, 2016) <http://www.latimes.com/local/la-me-ptsd-disability-20140804-story.html#page=1>.

<sup>445</sup> *Id.*

Figure 6



Source: *Los Angeles Times*, citing Department of Veterans Affairs.<sup>446</sup>

Troubling, however, is the persistent public perception of cheating. While one former VA psychiatrist believes:

[A] large chunk of patients are flat-out malingering, . . . [a]ssessing PTSD becomes even more difficult in a VA system that gives veterans a financial incentive to appear as sick as possible, former and current VA mental health clinicians said. The number of veterans on the disability rolls for the disorder [PTSD] has climbed from 133,745 to more than 656,000 over the last 13 years.<sup>447</sup>

Equally troubling is the failure of the VA to make “disability payments to thousands of veterans without adequate evidence they deserve the benefits as the agency attempts to cut the huge backlog of claims.”<sup>448</sup> The VA Office of Inspector General cautions that

<sup>446</sup> *Id.*

<sup>447</sup> *Id.*

<sup>448</sup> Fox News, “VA is Making Disability Payment Errors in Rush to Cut Backlog, Watchdog Says,” at <http://www.foxnews.com/politics/2014/07/15/va-is-making-disability-payment-errors-in-rush-to-cut-backlog-watchdog-says.html>.

“[w]ithout improvements, the VA could make unsupported payments to veterans totaling about \$371 million over the next five years for claims of 100 percent disability alone.”<sup>449</sup>

## 2. The “Spiking” SSA Disability Insurance Program

Echoing its VA findings, the CBO also finds SSA’s Disability Insurance (DIB) fund foundering as a consequence of a similar “spike” in rising number of claimants and increases in amounts of benefits paid. Indeed, as the number of “covered” or contributing workers (those who pay into the Old Age, Survivors and Disability Insurance fund) decrease, the DIB fund, saved in 2015 from exhaustion in 2016, will again run to exhaustion in 2019. Despite the passage of the Bipartisan Budget Act of 2015,<sup>450</sup> the “fix” — the actions necessary to prevent the exhaustion of the DIB fund — is a moving target, far from permanent:

The projected exhaustion date for the DI trust fund was recently delayed by enactment of the Bipartisan Budget Act of 2015. That legislation reallocated a share of payroll tax revenues from the trust fund for Old-Age and Survivors Insurance (OASI) to the DI trust fund for calendar years 2016 through 2018, leading to an increase in the projected income to the DI trust fund. Even though CBO projects that the DI caseload will grow at a more modest rate over the coming decade than in the years before the most recent recession, under current law spending would exceed income after 2018, and the trust fund would be exhausted in 2022, according to CBO’s projections.<sup>451</sup>

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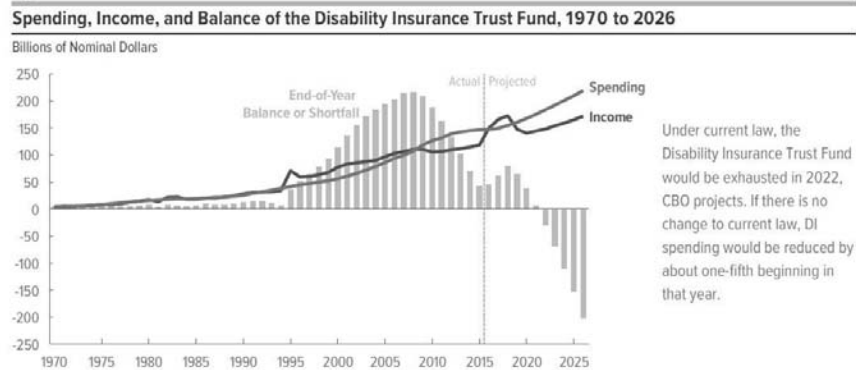
<sup>449</sup> *Id.*

<sup>450</sup> Social Security Administration, Social Security Legislative Bulletin, *Congress Passes H.R. 1314, the Bipartisan Budget Act of 2015*, [https://www.ssa.gov/legislation/legis\\_bulletin\\_110315.html](https://www.ssa.gov/legislation/legis_bulletin_110315.html).

<sup>451</sup> Congressional Budget Office, “SOCIAL SECURITY DISABILITY INSURANCE: PARTICIPATION AND SPENDING,” Publication No. 51443 (June 2016) at [https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/51443-SSDI\\_Participation\\_Spending.pdf](https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/51443-SSDI_Participation_Spending.pdf).

Figure 7 illustrates the CBO's projected post-2018 DIB decline.

Figure 7



Source: *The Congressional Budget Office and the Office of Management and Budget*<sup>452</sup>

The Social Security Advisory Board speaks plainly to the issue in its 2016 Annual Report: “While legislation is needed to address all of Social Security’s financial imbalances, the need remains most pressing with respect to the program’s disability insurance component.”<sup>453</sup> The Advisory Board forecasts available funding to exceed expenditures through 2019, with a sharp deficit thereafter:

Social Security's total income is projected to exceed its total cost through 2019, as it has since 1982. The 2015 surplus of total income relative to cost was \$23 billion. However, when interest income is excluded, Social Security's cost is projected to exceed its non-interest income throughout the projection period, as it has since 2010. The Trustees project that this annual non-interest deficit will average about \$69 billion between 2016 and 2019. It will then rise steeply as

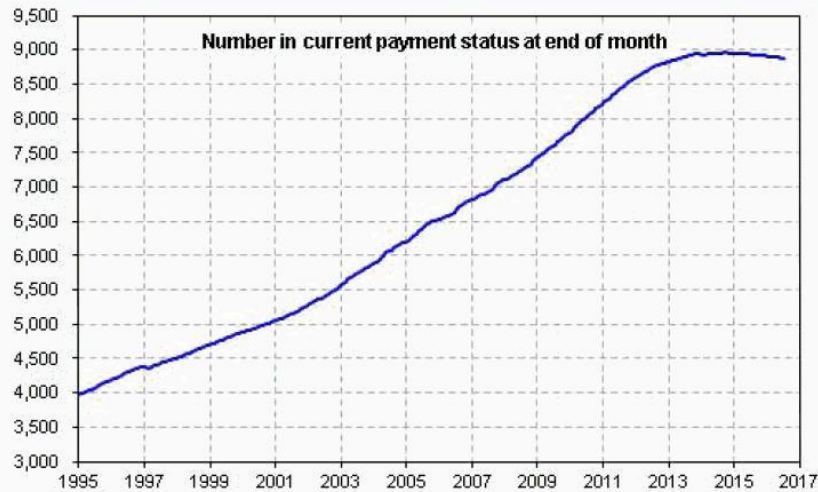
<sup>452</sup> *Id.*

<sup>453</sup> “A SUMMARY OF THE 2016 ANNUAL REPORTS: STATUS OF THE SOCIAL SECURITY AND MEDICARE PROGRAMS, SOCIAL SECURITY ADVISORY BOARD (Aug. 26, 2016), <https://www.ssa.gov/oact/TRSUM/tr16summary.pdf>.

income growth slows to its sustainable trend rate as the economic recovery is complete while the number of beneficiaries continues to grow at a substantially faster rate than the number of covered workers.<sup>454</sup>

As with the VA, SSA Disability Insurance program expenditures continue to rise, both in the numbers of applicants and amount paid. *Figure 8* documents the growth in numbers of beneficiaries “in pay status” from 1995 projecting through 2017.

*Figure 8*



Source: Social Security Administration<sup>455</sup>

*Figure 9* details the growth in the monthly SSA disability benefits paid; a figure which has almost doubled in a twenty-two-year period.<sup>456</sup> The program was “rescued”<sup>457</sup> from insolvency in 2015.

<sup>454</sup> *Id.* at 2-3.

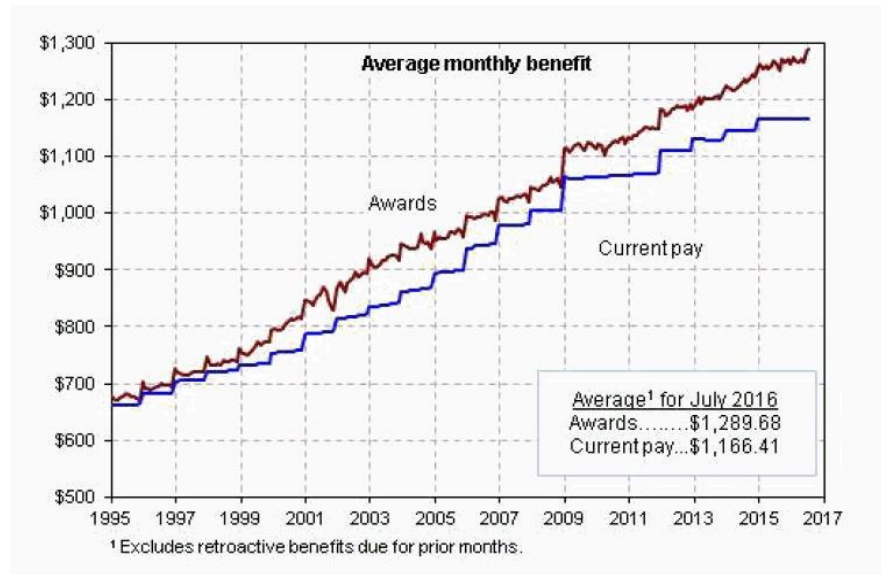
<sup>455</sup> *Selected Data from Social Security's Disability Program*, SOCIAL SECURITY ADMINISTRATION (September 30, 2016), <https://www.ssa.gov/oact/STATS/dibGraphs.html>.

<sup>456</sup> *Id.*

<sup>457</sup> *Social Security Legislative Bulletin*, Social Security Administration, [https://www.ssa.gov/legislation/legis\\_bulletin\\_110315.html](https://www.ssa.gov/legislation/legis_bulletin_110315.html) (Reporting the passage of H.R. 1314, the Bipartisan Budget Act of 2015).

Writing for *Forbes Magazine*, Howard Gleckman observes that in 2009 SSA “paid disabled workers \$121 billion, triple what it paid in 1989,”<sup>458</sup> with an attendant increase in numbers of beneficiaries.

Figure 9



Source: Social Security Administration<sup>459</sup>

An equally steady decrease in the number of covered workers per individual beneficiary is shown at *Figure 10*, showing a decrease from 3.2 covered workers in 1980, to 2.7 covered workers in 2016.<sup>460</sup> This steady reduction in the number of covered workers per single beneficiary is a formula for future insolvency. The issue is that the current Social Security system cannot continue to function as it has,

<sup>458</sup> Howard Gleckman, *Forbes Magazine*, “How to Fix Our Crippled Social Security Disability Insurance System,” FORBES MAGAZINE (June 24, 2013), <http://www.forbes.com/sites/beltway/2013/06/24/how-to-fix-our-crippled-social-security-disability-insurance-system/#401b83bb2044>.

<sup>459</sup> *Id.*

<sup>460</sup> Social Security Online, Actuarial Publications, “Covered Workers and Beneficiaries,” SOCIAL SECURITY ADMINISTRATION, <https://www.ssa.gov/oact/tr/2011/lr4b2.html>.

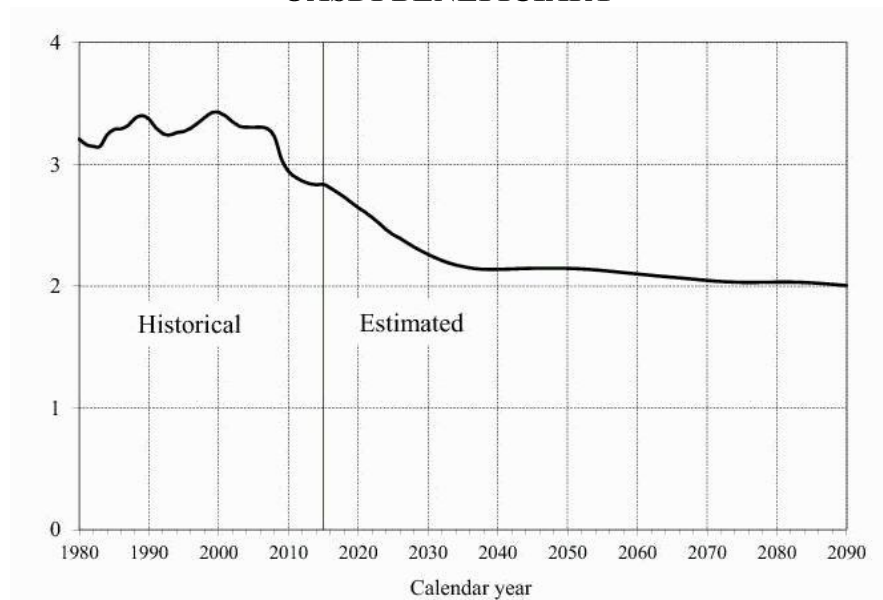
<sup>406</sup> 2016 OASDI Trustees Report, SOCIAL SECURITY ADMINISTRATION, [https://www.ssa.gov/OACT/TR/2016/II\\_D\\_project.html#132991](https://www.ssa.gov/OACT/TR/2016/II_D_project.html#132991).



paying more and greater amounts of benefits, without yet a further bailout in the not-too-far future.

Figure 10

**NUMBER OF COVERED WORKERS PER  
OASDI BENEFICIARY**



Source: Social Security Administration.<sup>461</sup>

Finally, one cannot speak of “spiking” Social Security disability claims without addressing the most significant evidence of paternalism in the United States government – that of the ever-growing backlog of pending Social Security disability appeals. “SSA’s pending hearing backlog grew from about 694,000 cases at the end of June 2010 to approximately 1 million at the end of June 2015. Average processing time on hearings has also increased from 415 days in June 2010 to 498 days in June 2015.”<sup>462</sup> SSA’s plan included, “(1) improving hearing office procedures, (2) increasing

<sup>462</sup> Office of Inspector General, “*Improve the Responsiveness and Oversight of the Hearings Process*,” SOCIAL SECURITY ADMINISTRATION, <https://oig.ssa.gov/audits-and-investigations/top-ssa-management-issues/social-security-disability-hearings-backlog>.

adjudicatory capacity, and (3) increasing efficiency through automation and improving business processes. The hearings backlog reduction plan included 38 initiatives.”<sup>463</sup>

On May 6, 2016, the *Huffington Post* reported that SSA spokesman Mark Hinkle stated that “[w]ith over 1.1 million people waiting for a hearing decision, we are in the midst of a public service crisis.”<sup>464</sup> Wait times often exceed “17 months to receive a hearing decision,” which, Hinkle declares, “is unacceptable service.”<sup>465</sup>

#### VIII. ACT II, SCENE 2: PATERNALISM DEFROCKED

“The willingness with which our young people are likely to serve in any war, no matter how justified, shall be directly proportional as to how they perceive the veterans of earlier wars were treated and appreciated by their nation.”

-George Washington<sup>466</sup>

Paternalism has been described as “legal moralism: preventing inherently immoral though not harmful or offensive conduct;” and “moral paternalism,” as “preventing moral harm (as opposed to physical, psychological or economic harm) to the actor himself.”<sup>467</sup> Other distinctions are described variously as “negative and positive paternalism,”<sup>468</sup> “mixed and unmixed paternalism,”<sup>469</sup> “direct and

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<sup>463</sup> Office of Inspector General, “*The Social Security Administration’s Efforts to Eliminate the Hearings Backlog*,” SOCIAL SECURITY ADMINISTRATION, <https://oig.ssa.gov/audits-and-investigations/audit-reports/A-12-15-15005>.

<sup>464</sup> Arthur Delaney, *Huffington Post*, “*Social Security Administration Seeks Shortcut Through Massive Disability Backlog*,” HUFFINGTON POST (May 6, 2016), <http://www.huffingtonpost.com/entry/social-security-disabilityus572cd6d8e4b016f378959d03>.

<sup>465</sup> *Id.*

<sup>466</sup> Benjamin Krause, *The Best Quote Against Veterans Benefits Cuts*, DISABLEDVETERANS.ORG (Sept. 31, 2013), <http://www.disabledveterans.org/2013/12/31/best-quote-veterans-benefits-cuts/>.

<sup>467</sup> Julian Le Grand and Bill New, *GOVERNMENT PATERNALISM, NANNY STATE OR HELPFUL FRIEND?* 35 (Princeton University Press, 2015).

<sup>468</sup> *Id.* “*Negative paternalism* “refers to actions the protect people from harming themselves and *positive paternalism* to those that promote a positive benefit.” *Id.* at 36.

indirect paternalism,”<sup>470</sup> “paternalistic laws which require action and those which prohibit action,<sup>471</sup> and “pure and impure paternalism.”<sup>472</sup> At bottom, the action of government relative to individual freedom defines the nature, extent, and persistence of paternalism. This is particularly true of government intervention in the lives of millions of Americans who are claimants and/or recipients of VA, VDC, and/or SSA disability benefits. Recipients laud the role of government as payer with seeming little consideration for the tens of millions of workers whose monies fuel the rapid growth of America’s disability programs – and a corresponding proliferation of government-funded paternalism.

Casting the government as an intervenor in the lives of its citizens implies an alteration of both societal and individual norms with attendant adverse consequences for individual choice, triggering a Constitutional question implicating individual freedom. At issue is the notion of “*Pareto optimality*,” described as the impossibility of making “one person better off without making another worse off.”<sup>473</sup> Expressed simply, governmental action which both takes and then gives, is but government picking the “winners” and “losers” – those who are the recipients of government largesse and those whose resources have been surrendered. A simple message is thereby conveyed: Government knows best how to use your money. A redistribution of money in the form of income taxes or other income debits (such as FICA and SECA)<sup>474</sup> creates a valid question regarding

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<sup>469</sup> *Id.* at 37. “*Mixed paternalism* refers to “paternalistic policies that are combined with other motives (such as . . . promoting social justice) . . . while” *unmixed paternalism* is motivated “to improvement in the well-being of the individual who’s autonomy is interfered with.” *Id.*

<sup>470</sup> *Id.* “*Direct paternalism* involves only one party, such as prohibiting suicide” . . . while “*indirect paternalism* involves two parties so that the actions of a second person are interfered with to benefit the first” [emphasis added]. *Id.*

<sup>471</sup> *Id.* Sometimes “termed *active* and *passive paternalism*,” such as compelling action (i.e., use of a helmet); or outlawing use of certain drugs, representing passive paternalism [emphasis added]. *Id.*

<sup>472</sup> *Id.* *Pure paternalism* refers “to cases where there are consequences for the intended individual only, and *impure paternalism* where there are consequences for both the individual and for others” [emphasis added]. *Id.*

<sup>473</sup> *Id.* at 54.

<sup>474</sup> Social Security Administration, “Frequently Asked Questions, SOCIAL SECURITY ADMINISTRATION,

the efficacy of re-distribution of funds to those who are not working (*i.e.*, payment of VDC and/or SSA disability benefits.) Government redistribution generally raises a question of paternalism, as the true “payer” – the taxed worker – now has less than before, but for the enforced government taking.

When examined through the lens of paternalism, the circumstances surrounding the increasing award of disability benefits are analogous to those found in government sponsored healthcare. Consider *LeGrand and New’s* assertion that government healthcare is “paternalistic to the extent that it is intended to prevent people from judging that they would be better off doing without health insurance.” Paternalism, they explain, works its ill-effect to the extent “that people miscalculate the effect of not taking out health insurance on their future well-being.”<sup>475</sup> They argue that paternalism creates a skewed world-view, coloring reality with the ink of a seeming real, albeit objectively false, reality. Paternalism is an artificial construct, casting an image of reality whose boundaries end not in reality as it is, but as it is created to be.

Following this view, adoption of a less stringent, or “liberal” definition of “disability, fosters dependence to an even greater degree, encouraging disability applications from a greater percentage of the population with consequent demands on both society generally, as well as upon the independent taxpayer and the dependent applicant specifically. Explicitly:

One great . . . complaint about Social Security is that it is paternalistic: it does things for the individual that he should do for himself. In so doing, it commits the twin transgressions of forcing some people to support others and making the beneficiaries the servile dependents of the state.<sup>476</sup>

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<https://faq.ssa.gov/link/portal/34011/34019/Article/3815/What-are-FICA-and-SECA-taxes>.

<sup>475</sup> Julian Le Grand and Bill New, *Government Paternalism, Nanny State or Helpful Friend?*, p. 35 (Princeton University Press, 2015).

<sup>476</sup> John Attarian, *Is Social Security Reform Paternalistic?*, Foundation for Economic Education (January 1, 2004), <https://fee.org/articles/is-social-security-reform-paternalistic/>.

[I]n providing old-age, survivors, and disability benefits, it usurps the individual's responsibility to make prudent provision for his old age or disability and for the well-being of dependent family members who would suffer financially if he died. In so doing, it encourages individuals to take less thought for the future and to make less provision for it. In short, Social Security encourages them to behave less like prudent, future-conscious, responsible adults and more like feckless, irresponsible, improvident children.<sup>477</sup>

A similar and equally demanding observation can be made in regards to the VDC program, for it too is described as "paternal" in its practices. Why is it, then, that the definition of both Social Security and VDC disability has changed, becoming less stringent over time? Why is it that VDC disability benefits are initially based on incremental determinations which look not to an actual inability to function in the workplace, but to what a hypothetical "average man" is unable to do? Why is it that one's actual ability to work is accorded little weight when assessing VDC "disability?" Have we, in a rush to meet a perceived growing need, sacrificed objectivity in Veterans' disability determinations? In Social Security disability decision-making? Could it be that we have collectively become victims of a mounting avalanche of paternalistic policies, such that a continuation of ever-greater numbers of disability payments is the only politically advantageous route which remains viable for elected politicians?

Here, there remains a fundamental paternal paradox which impacts any political democracy: We have met the enemy and he is us."<sup>478</sup> We, the people, the inheritors and the progenitors of this Grand Experiment, stand in the shoes of the governed and governing. It is not a distant government unnamed which plausibly engages an ever-widening circle of paternalistic practices; it is but we, who stand in the only shoes of any import. It is we, the citizenry, who have contemplated, adopted and implemented paternalistic methodologies

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<sup>477</sup> *Id.*

<sup>478</sup> Walt Kelly, *Pogo*, THIS DAY IN QUOTES (APR. 22, 2015), <http://www.thisdayinquotes.com/2011/04/we-have-met-enemy-and-he-is-us.html>.

which now permeate government operations. In the words of Le Grand and New, “even democratic governments will in fact be pursuing their own agendas that may or may not include their citizens’ well-being and autonomy.”<sup>479</sup>

Still, the question remains: “[w]hat of the danger that those governing the state will promote their own interests rather than those of the citizens?”<sup>480</sup> The answer is not necessarily obvious. Close review of the legislative evolution of both VDC and SSA disability programs reveals a gradual widening of the disability doorway over time.<sup>481</sup> The reasons are plain. Social Security has oft been described as the “Third Rail” of American politics,<sup>482</sup> likening it to the electrically charged subway rail, which if touched, electrocutes all who venture so far as to suggest change. Even in the face of impending financial failure, the political choice regarding the insolvency of the Disability Insurance Benefits fund has been akin to kicking the proverbial can down the road—deferring the need for hard measures to a later date and a future Congress.<sup>483</sup> The VA VDC program is no different. For the hue and cry in the wake of proposed VDC changes will just as surely result in a new manifestation of political shock and awe—deleterious to those who seek to transform the VDC disability program.

Legislative and/or administrative proposals for disability reform perceived as programmatically adverse (regardless of the actual merits) are hard-pressed to survive politically. It is one thing to sponsor proposals perceived by the public as favorably affecting the award of disability benefits. It is quite another to seek benefits reform where such reform is perceived as adversely affecting eligibility criteria, benefit rates, or amounts.

While increases in the amount of disability awards and/or adoption of less stringent eligibility criteria may be welcomed as positive enhancements to these national disability programs, such changes are politically positive for the politician while and hostile to the long-term interests of the individual citizen. For example, a

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<sup>479</sup> See *supra* note 474, at 181.

<sup>480</sup> *Id.*

<sup>481</sup> See *supra* note 461.

<sup>482</sup> See *supra* note 8.

<sup>483</sup> See *supra* note 548.

politically expedient increase in benefit amounts subjectively reflects positively on the politician who is perceived as working for the betterment of his or her constituency; while objectively harmful to the public—who become ever more dependent on dwindling public resources.

Increasing applications for an award of disability benefits—evident in both the civilian and military sectors—leaves little doubt that this is an era of growing paternalism. It is an era in which government monies are paid to one group of citizens—having first been taken from the hands of other citizens. It is an era in which the rise of the paternalistic state is announced hand-in-glove with the emergence of the regulatory state, as much of the growth in such programs is based on passage of new regulations; or, a liberal interpretation of existing regulation.<sup>484</sup> The proliferation of disability benefits—resulting from either an increase in the amount of benefits or from looser or less stringent eligibility criteria—encourages greater numbers of claims which further increases dependency and conformity to an imposed governmental norm. The individual claimant is thereby deprived of freedom of choice<sup>485</sup> and ultimately

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<sup>484</sup> See Martin Loughlin & Colin Scott, *The Regulatory State*, ANDREW GAMBLE, IAN HOLIDAY, GILLIAN PEELE, eds., in *DEVELOPMENTS IN BRITISH POLITICS* 5, 205 (Macmillan Education UK, 1977), describing the emergence of “the regulatory state” as a means of steering “the behavior [sic] of a variety of actors — both public and private”). “Recently, there has been a discernible shift towards a regulatory mode of governance. This innovation has inspired commentators to talk of the emergence of ‘the regulatory state’, a distinctive style of governance which they see evolving throughout the industrialized world (Majone, 1994; Majone, 1996; McGowan and Wallace, 1996). In examining this trend, we must first try to identify this phenomenon. By ‘regulation’ we mean the attempt to modify the socially-valued behaviour [sic] of others by the promulgation and enforcement of systems of rules, typically by establishing an institutionally distinct regulator (Selznick, 1985; Ogun, 1994; Daintith, 1989). The increasing use of regulation as a formal instrument of government may thus arise because of the growing need to ‘steer’ the behaviour [sic] of a variety of actors — both public and private — who operate at some remove from the central state (Osborne and Gaebler, 1993).” *Id.*

<sup>485</sup> GERALD DWORKIN, *AVOIDING PATERNALISM* n.10 (Blackwell Publishing Ltd., 2006) (“By paternalism I shall understand roughly the interference with a person’s liberty of action justified by reasons referring exclusively to the welfare, good, happiness, needs, interests, or values of the person being coerced.”). See “Paternalism,” ed. Rolf Sartorius (Minneapolis, Minn. University of Minnesota Press, 1983), 19–34, 20.

freedom of action.<sup>486</sup> The result: *A proliferation in benefits resulting in expenditures far beyond those originally contemplated.*

Despite these problematic circumstances, past events show that a remedy remains. The Nation has been in similar circumstances before. As before, a national determination to correct the long slide into politically-driven disability benefits increases can be reversed. This is most clearly seen in an examination of the Civil War era—with particular emphasis on the post-Civil War years. The post Civil War era paints a painful, yet historic picture of a proliferation of benefits—a template for paternalism in the wake of the horrific aftermath of the Civil War. Time has not shown human nature, nor the nature of government to be otherwise.

Some one hundred fifty-five years hence reveal unprecedented increases in both the VDC and SSA disability programs which now threaten to overwhelm both programs. In acting, the Congressional challenge to this emerging *status quo ante* lies in that body's institutional memory. In fact, the current proliferation of disability benefits is not the first instance of such rapid growth. Civil War pension legislation was initially adopted in 1861. Congress failed, however, to address all who served in the Union's armed forces, even omitting survivor's benefits. Corrective legislation qualified all volunteers who served in the Union Army or Navy after March 4, 1861. Follow-up legislation was enacted in 1866, 1868 and 1873.

The Arears Act of 1879 signaled a continuing rise in benefits applications, repealing the time limit for widow's applications. Costs mounted quickly; and arrearages caused by the 1879 act jumped from \$26.7 million in 1878 to \$56.6 million in 1880<sup>487</sup>—just two years later. Even more rapid increases in costs followed in subsequent years as the veterans' population aged.<sup>488</sup> During this

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<sup>486</sup> See, e.g., *Substantial Gainful Activity*, *supra* note 392. For example, SSA DIB benefits are subject to a finding that the individual earn less than “substantial gainful activity” (beginning 2017, \$1,170 per month (non-blind); and \$1,950 per month for the blind). One cannot generally earn more without jeopardizing disability benefits, effectively forcing the individual recipient to accept a capped income or surrender the entitlement. *Id.*

<sup>487</sup> See ANNUAL REPORT OF THE COMMISSIONER OF PENSIONS, *supra* note 228.

<sup>488</sup> See *id.*



same period, the number of applications increased from 57,118 in 1879 to 141,166 in 1880<sup>489</sup>—the lesson is evident.

The promise of pensions drew greater and greater numbers of Civil War era applicants (much as do today's VDC and SSA disability programs).<sup>490</sup> Between 1879 and 1880 (less than a year) the number of disability pension applications almost tripled—foreshadowing circumstances now facing both the VA and SSA. In 1890, President Benjamin Harrison signed a service pension bill into law that provided for all persons who served for 90 days or more during the Civil War.<sup>491</sup> In particular, such persons, provided they were honorably discharged and found to have a “permanent physical or mental disability which left them incapacitated, regardless of whether that disability had been incurred as a result of military service” would be provided a veteran's pension.<sup>492</sup> Of note is the relaxation in entitlement criteria, providing for such an award “even where the disabling condition was not a result of ‘military service.’” Congress later enacted legislation in 1907 granting service pensions to all persons who served 90 days or more during the Civil War, “regardless of disability or showing of financial need.”<sup>493</sup> These liberalizations, enacted between the late 1800's into the early 1900's, mirror present-day circumstances which effectively marks a renewed re-alignment of American principles, including a warning which cannot be ignored: “The American Republic will endure until the day Congress discovers that it can bribe the public with the public's money.”<sup>494</sup>

To what degree is the post-Civil War emergence and proliferation of government benefits a precursor to the modern era? Was the

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<sup>489</sup> See Morton, *supra* note 255.

<sup>490</sup> See *supra*, Figure 9.

<sup>491</sup> Congressional Record, First Sess., 64th Congress, Vol. III, page 13019, Government Printing Office, Washington (1916).

<sup>492</sup> An Act Granting Pensions to Soldiers and Sailors Who are Incapacitated for The Performance of Manual Labor, and Providing for Pensions to Widows, Minor Children, and Dependent Parents, ch. 634, 26 Stat. 182 (1890). See *supra* note 231. See, *supra*, note 231.

<sup>493</sup> See *supra* note 233.

<sup>494</sup> Alexis de Tocqueville, Quotes, GOOD READS, [https://www.goodreads.com/author/quotes/465.Alexis\\_de\\_Tocqueville](https://www.goodreads.com/author/quotes/465.Alexis_de_Tocqueville) (Last visited October 31, 2016).

liberal award of Civil War-connected benefits the opening gambit in a new political game—creating a dependent class whose political loyalties were tied to the award of benefits? Is this not the pinnacle of paternalism—encouraging dependence within a defined framework and thereby undermining political thought, innovation and a renewed vision for the future? Is this not the very stance taken in treating Social Security as the “Third Rail of American politics?” Do not these modern paternalistic roots harken back to the post-Civil War era in which benefits were awarded regardless of whether the applicant was injured in the Civil War?

Consider Thomas Jefferson’s admonition against government-mandated sharing of the fruit of one’s labor:

To take from one, because it is thought that his own industry and that of his fathers has acquired too much, in order to spare to others, who, or whose fathers have not exercised equal industry and skill, is to violate arbitrarily the first principle of association, — the guarantee to every one of a free exercise of his industry, and the fruits acquired by it.<sup>495</sup>

It is the tangible desire and commitment to sustain and govern through a democracy which fuels the American democratic experiment. Alexis de Tocqueville’s impression of the American experience is equally telling:

Imagine, my dear friend, if you can, a society composed of all the nations of the world: English, French, Germans . . . , everyone having a language, a belief, opinions that are different; in a word, a society without common prejudices, sentiments, ideas, without a national character, a hundred times happier than ours. More virtuous? I doubt it. There is the point of departure. What serves as a bond for such diverse

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<sup>495</sup> Monticello.org, <https://www.monticello.org/site/jefferson/democracy-will-cess-exist-quotations> (citing L&B, 14:446., transcription of relevant section available in Thomas Jefferson Quotes and Family Letters database, Jefferson’s comment in a prospectus for his translation of Destutt de Tracy’s *Treatise on Political Economy*).

elements, what makes all of that a people? Interest. There is the secret. Particular interest that pokes through at every instant, interest that, moreover, arises openly and calls itself a social theory.<sup>496</sup>

There is little question but that the American democracy is a vast experiment in human nature; a test of resolve yet potentially as fragile as the flickering of a votive. In a society premised upon independence, opportunity and reward for work, the proliferation of entitlements—especially so in the context of VA and SSA disability programs—signals a departure from Jeffersonian principles of work fundamental to democratic governance. Today’s disability programs reflect a fundamental sea change in the American populace—an erosion of interest in the foundations upon which the American dream is built. It is this which signals the rise of the disability state—diluting dedication to the principles which underlie democratic ideals which were lost in increasing waves of public dollars paid by those who work, appropriated by Congress and re-distributed to those not working.

The remedy lies not in ending the VA and SSA disability programs, but rather becomes a question of leadership founded on organic democratic ideals. By restoring integrity and perspective to each program, we return these programs to a principled balance of democratic ideals while reaching out to those who cannot compete in a competitive society. We speak of the re-infusion of ideals which frame the central goals by which we define our commitment to those within our society who can no longer compete in the competitive workplace. In so doing, we act not to save but to restore.

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<sup>496</sup> ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA: HISTORICAL-CRITICAL EDITION*, OF *DE LA DÉMOCRATIE EN AMÉRIQUE* VOL. 1 n.70 (James T. Schleifer trans., Eduardo Nolla ed. 2017) (*vol.*“Tocqueville copied this passage into his alphabetic notebook A. This letter contains several key ideas of the book. Chabrol is also the recipient of a letter dated 26 November 1831 that contains very precise information about the American judicial system. YTC, BIa2.”)

## IX. THE MEASURE OF AUTONOMY

“There is no worse tyranny than to force a man to pay for what he does not want merely because you think it would be good for him.”

-Robert Heinline<sup>497</sup>

We stand in the growing shade of a great oak—limbs once soaring but burdened now downward: the ponderous weight of countless patterned responses to the residue of paternalistic policies. Disability benefits, anon. Should we never recover, we may not know the difference.

At issue is a dynamic balance between proclaimed autonomy and gathered paternalism.<sup>498</sup> Autonomy in its essence speaks to the individual and group freedom, its extremes endorsing freedom from all government, effectively sanctioning anarchy. Autonomy is, for Americans, a founding principle whose roots lie in the American ideal. Myron Magnet, writing for *National Review* observes:

The Founders believed that the purpose of government was to protect life, liberty, and property from what they called the depravity of human nature — from man’s innate capacity to do the kinds of violence that slave-owners, to take just one example, did every day. But government, they recognized, is a double-edged sword. You arm officials with the power to protect you; but those officials have the same fallen human nature as everyone else, so who is to say that they won’t use that power to oppress you, as European

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<sup>497</sup> ROBERT HEINLINE, *THE MOON IS A HARSH MISTRESS*, (G.P. Putnam Sons, 1966).

<sup>498</sup> *Autonomy*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Autonomy>. “Autonomy” has its origins in Ancient Greek entomology, where “auto” means “self” and “nomos” means “law.” *Id.* Hence, when combined the term is understood to mean “one who gives oneself one’s own law” and is a concept found in moral, political, and bioethical philosophy. *Id.* Within these contexts, it is the capacity of a rational individual to make an informed, un-coerced decision. *Id.*

governments had oppressed the colonists' forebears?<sup>499</sup>

Has paternalism become oppressive? The question can only be answered in the affirmative. It has. Two national systems of disability benefits seek to support those found to be “disabled.” Those who can no longer compete in competitive marketplace may see an award of Social Security Disability Benefits; while those injured in military service may seek award of Veterans Disability Benefits. The divide is not so simple. Indeed, under current law, veterans may apply for both Social Security and Veteran’s Disability Benefits, in effect double-dipping – a practice which raises questions about the efficacy of such spending in a downturned economy. While arguably laudatory, the award of both civilian and military disability benefits requires a balance between the unfettered payment of benefits and a restoration of democratic ideals of individual freedom. Is not the payment of Social Security or Veterans’ disability benefits laudatory standing alone?

The way forward, the balance, demands a commitment to the common-sense ideals of democratic governance. This pathway embraces autonomy while recognizing the inherent balance between the principles of individual freedom and paternalism. Restoration of these principles, including the right of self-determination, affirms these ideals, leading to an acknowledgement of individual liberty while preserving the right, if not the obligation, to extend a helping hand, not in furtherance of paternalism, but as an expression of common human decency. To make a blanket declaration to the effect that government disability benefits are a manifestation of an insidious policy of paternalism is too simplistic, for doing so fails to recognize that human kindness and concern are fundamental markers of human civilization.<sup>500</sup>

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<sup>499</sup> Myron Magnet, “What Kind of Nation did the Founders Aim to Create?”, NATIONAL REVIEW (July 3, 2015), <http://www.nationalreview.com/article/420615/>.

<sup>500</sup> Yet, paternalism continues to grow. See, e.g. Maria Popova, “How Kindness Became Our Forbidden Pleasure,” <https://www.brainpickings.org/2015/07/13/on-kindness-adam-phillips-barbara-taylor/>. See also Christian Coons and Michael Weber (Eds.), *Paternalism: Theory and Practice*, Cambridge University Press, 2013,

A. *Senate Bill 3003, Protecting Social Security Disability Act of 2014*

Before leaving office, Senator Tom Coburn of Oklahoma, in the company of others, introduced Senate Bill 3003, the *Protecting Social Security Disability Act of 2014*.<sup>501</sup> This legislation sought to close loopholes that have effectively converted the Social Security “safety net” to something more resembling a “hammock” paid for at taxpayer expense. As proposed, the authors recommend significant reforms to the Social Security Retirement and Disability Insurance programs, designed to save Social Security from ultimate bankruptcy. Without delving into the details of execution, we summarize here the ideas endorsed by proposed legislation, making plain the proposition that there are alternatives which can be implemented to reverse the growing paternalism that has infiltrated the Social Security Disability program.

1. Early Retirement Age: Actuarial Reduction of Benefits

The authors of S. 3003 (2014) proposed an actuarial reduction for disabled beneficiaries who attain early retirement age.<sup>502</sup> In short, claimants who retired “early,” at age sixty-two may no longer receive disability benefits that are greater than regular early retirement benefits. Under current law, a claimant may “retire” at age sixty-two with a reduced retirement benefit, yet still assert she or he is

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<https://ndpr.nd.edu/news/paternalism-theory-and-practice/>. Edward Erwin, University of Miami, reviewing the work, comments: “In their Introduction, the editors discuss recent trends. One is a growing consensus in favor of paternalism. Related to this is another: increased agreement that the perceived evils of paternalism, including coercion, removal of choice, and disregard of the target's evaluative perspective, need not be present in instances of paternalism.”

<sup>501</sup> Senate Bill 3003, *To Protect the Social Security Disability Insurance Program and Provide Other Support for Working Disabled Americans, and for Other Purposes* [§ 1 Short Title—“*Protecting the Social Security Disability Act of 2014*”], 113rd Cong., 2nd Sess. (Dec. 11, 2014). Introduced by U.S. Senator Tom Coburn (Republican—Oklahoma) to the Senate Committee on Finance [hereinafter “S. 3003”].

<sup>502</sup> S. 3003, § 101: “Application of actuarial reduction for disabled beneficiaries who attain early retirement age.”

“disabled” and unable to work. If found to be “disabled” she or he will receive a “disability” benefit which is equivalent to the amount paid had one waited until full retirement age (sixty-six or sixty-seven.) In short, this is a “loophole” by which one may avoid the limitations placed on early retirement by later claiming to be “disabled,” even though “retired.”

Implementing this proposal eliminates the retirement-disability manipulation, closing the current loophole that allows individuals to receive reduced retirement benefits at age sixty-two yet collect full retirement-age (FRA) benefits through the disability claims process, collecting disability as if they had waited to retire at the full retirement age of sixty-six to sixty-seven. Why should a claimant be able to apply for “disability” benefits when she or he has declared him/herself to be “retired?” To close the loophole is to save millions of dollars.

## 2. Limit the Duration of Disability Benefits When First Awarded

The authors of S. 3003 (2014) propose time limits for certain types of conditions that are likely susceptible to medical improvement. They propose that Social Security disability benefits would, by definition, be deemed temporary disability benefits, awarded for a period of thirty-six months, if accompanied by a finding that “medical improvement [is] likely.”<sup>503</sup>

Continuation of benefits after this time should require that the claimant reapply, enabling a renewed scrutiny of the claimant’s then-current condition. Benefits would *not* be continued as a matter of course pending such an appeal, but would cease in accord with their original designation as “temporary” benefits, — to be continued only after a finding that there has not been medical or psychological improvement. What have heretofore been essentially lifetime benefits would cease. Temporary disabling conditions would result in an automatic cessation of benefits, without need of any government showing. This burden is, by reason of this proposal, shifted to the claimant to show an ongoing impairment at such levels as to be disabling. As a result, the claimant bears the burden of

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<sup>503</sup> S. 3003 § 102: “Revising disability classifications; requiring periodic continuing disability reviews or time limiting benefits for certain beneficiaries.”

showing a continuing legal or medical basis for continuing such benefits, absent which, benefits cease in accord with the temporary nature of the original award. This corrects the current practice of awarding “permanent” benefits able to be terminated only after a Continuing Disability Review (CDR), allowing the claimant to continue to receive benefits during any appeal.

### 3. Curtail the Application of the Medical-Vocational Guidelines Under Age 55 or after Early Retirement at Age 62

Senate Bill 3003 eliminates applicability of the Medical-Vocational Guidelines (the “Grids”) for anyone under the age of fifty-five and forecloses application of the Grids in all circumstances where the claimant has received ordinary retirement benefits at age of sixty-two.<sup>504</sup> That is, the award of disability benefits is logically reconnected with public policy which holds that such benefits should be for those who cannot work and who have not retired (“retirement” being a declaration that one is no longer working in the competitive marketplace.) This action restores the disability program to its original purposes when first enacted in 1956 and eliminates what has been virtually “automatic disability” for younger individuals aged fifty to fifty-four. S. 3003 remedies these loopholes, raising the critical decision point to age fifty-five and reclassifying age fifty from its current designation as “closely approaching advanced age” to “a younger individual.”

S. 3003 thus eliminates age fifty as a critical decision point in the disability decision-making process, recognizing a fundamental change in actuarial adult longevity. Americans are now living longer than at any other time in our nation’s history. Figure 11 illustrates the decline in mortality, utilizing the age-adjusted rate, per 1,000 persons.<sup>505</sup> Considered with the aging population and the reduction in the number of workers per beneficiary, change is necessary. It is not a question of government action, but of action by the American

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<sup>504</sup> S. 3003 § 103: “Adjustment of age criteria for social security disability insurance medical-vocational guidelines; consideration of work which exists in the national economy.”

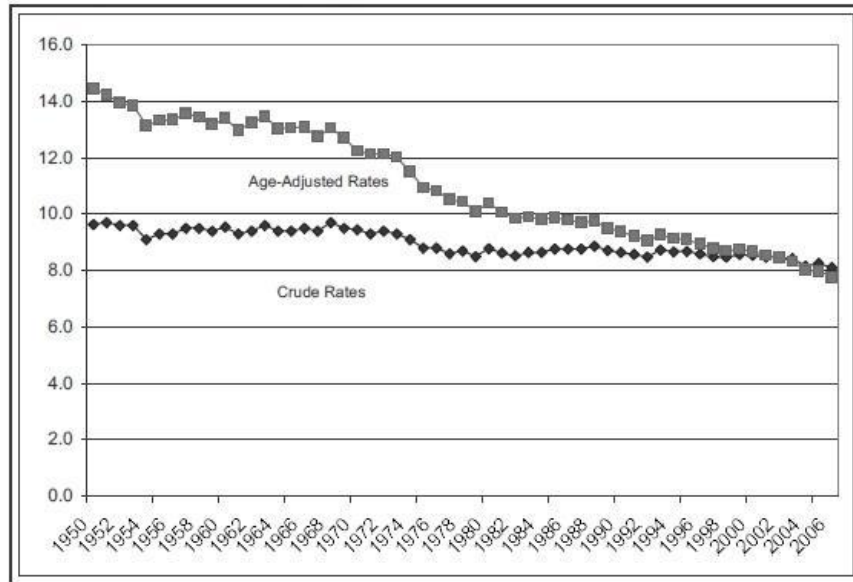
<sup>505</sup> Laura B. Shrestha & Elayne J. Heisler, *The Changing Demographic Profile of the United States*, CONGRESSIONAL RESEARCH SERVICE, RL32701, <https://fas.org/sgp/crs/misc/RL32701.pdf>.



people, who must, by necessity, literally “buy into” the need to save Social Security’s Disability Insurance program.

Figure 11

**CRUDE AND AGE-ADJUSTED DEATH RATES:  
UNITED STATES, 1950-2007**



Source Research Service<sup>506</sup>

4. Remove “Reconsideration” from the Administrative Determination Process

S. 3003 sought to eliminate the “Reconsideration” or “Recon” step in the administrative determination process when applying for disability benefits.<sup>507</sup> The “Recon” step has previously been eliminated in ten states as part of a pilot program, under the moniker, Disability Service Improvement (DSI). “Recon” embodies yet a further examination of the claim for disability, yet, in practice, only

<sup>506</sup> *Id.* at 8, where the authors note “CRS computations using data from the vital statistics system, NCHS;” and further that “CDRs are on an annual basis per 1,000 population; age-adjusted rates per 1,000 U.S. standard population (year 2000).” *Id.*

<sup>507</sup> S. 3003 § 201. “Elimination of reconsideration review level for an initial adverse determination of an application for disability insurance benefits.”

changes the original decision in a statistically insignificant number of claims—while otherwise delaying the hearings process for all claims.

The Reconsideration stage should be stricken from the administrative disability determination steps in all fifty states.

#### 5. Appointment of a Non-Adversarial Social Security Hearing Representative

Senate Bill, S. 3003 provides for the appointment of non-adversarial disability hearing attorneys who are described as responsible for developing the evidentiary record in conjunction with the claimant's representative.<sup>508</sup> While laudable, this proposal only works if the government attorney/representative acts independently of the judge and claimant's counsel. To be effective, his/her role is not simply limited to "development" of the record, but is to promote administrative justice for all parties to the administrative hearing.<sup>509</sup> In so acting, the government representative assumes a presence in all disability hearings, his or her role simply defined as ensuring the "right result" be reached.

As proposed, a government attorney or representative shall be assigned to each case for which a *Request for Hearing* has been made. While S. 3003 states that a government attorney may not recommend favorable decisions without hearing before an administrative law judge, such a limitation is both impractical and contrary to what should be a meaningful government role. At present, the Social Security has declined to appear as a party to the hearing before the federal administrative law judge. This, we submit, is error, particularly in a time when more than 80% of claimants are represented by counsel.

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<sup>508</sup> S. 3003, § 203. "Non-adversarial disability hearing attorneys"; see also Engel, D.W., Glendening, D., & Wolfe, J.S. (2016). *Social Security: Restructuring Disability Adjudication*. Symposium paper, COMMITTEE FOR A RESPONSIBLE FEDERAL BUDGET (Aug. 4, 2015), Washington, D.C. (advocating for the creation of a government attorney along the lines set forth in the 2014 proposed legislation).

<sup>509</sup> David Engel, Dale Glendening & Jeffrey S. Wolfe, "*Social Security: Restructuring Disability Adjudication*," *SSDI Solutions: Ideas to Strengthen the Social Security Disability Program*, The McCrery-Pomeroy SSDA Solutions Initiative, Committee for a Responsible Federal Budget, pp. 213-14, Infinity Publishers (2016).

Unlike some critics of government representation, a government representative appearing before an administrative law judge for the SSA is bound by the founding principle for all government attorneys — to ensure that justice is done. This does not mean the government attorney opposes or seeks to defeat the claim, but, rather, acts to ensure that the just result is obtained, consistent with a preponderance of the evidence before the administrative law judge. If this means that the government and claimant’s representatives can resolve the case by agreement, submitting an agreed order for the judge’s signature, then let it so be, as this is the very manner in which modern American courts function. Resolution by agreement in face of a preponderance of the evidence is a primary benefit of adversarial jurisprudence.

#### 6. Establish Enforceable Rules of Practice and Procedure

Formal, enforceable rules of practice and procedure<sup>510</sup> must be established, similar to those that govern adjudicatory proceedings before other Agencies.<sup>511</sup> The adoption of procedural rules for Social Security hearings will substantially assist judges to ensure due process in what has been described as the world’s largest adjudicatory system.<sup>512</sup>

At present, few practice rules describe the Social Security adjudicatory system. Fewer still may be directly enforced, creating a system whose already limited rules do little to serve the purpose for which one might think they are intended. Rather than provide for a just, speedy resolution of pending appeals,<sup>513</sup> largely unenforceable rules as are now in place serve to delay, and ultimately result in a paternalistic network in which delay is endemic, a circumstance rewarded by *increasing* the amount of the attorney fee when

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<sup>510</sup> S. 3003, § 204: *Procedural rules for hearings*.

<sup>511</sup> See, e.g., MERIT SYSTEMS PROTECTION BOARD (MSPB), *Practices and Procedures*, 5 C.F.R. §§ 1201.1–1201.2015 (2015).

<sup>512</sup> Jeffrey S. Wolfe, *Civil Justice Reform in Social Security Adjudications*, 64 ADMIN. LAW R. 379, 382 (2012).

<sup>513</sup> Federal Rule of Civil Procedure, Rule 1, provides in-part that the FRCP “be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.”

decisions are delayed.<sup>514</sup> The remedy: end paternalistic, largely unenforceable rules and adopt meaningful, time-sensitive rules of procedure and practice.

#### 7. Expand the Social Security Judge's Ability to Fairly Evaluate the Medical Evidence: Repeal the Treating Physician Rule

The authors of S. 3003 seek to expand the ability of administrative law judges to evaluate medical evidence.<sup>515</sup> This includes abolition of the so-called “treating physician” rule, which requires greater weight be given to a treating physician’s opinion.<sup>516</sup> S. 3003 would repeal the treating physician rule, which confers “controlling weight” upon a treating physician’s opinion — giving greater weight to such opinions, even in light of persuasive evidence to the contrary.

Widespread resort to consultative medical/psychological examiners (CE’s)<sup>517</sup> who conduct one-time physical or psychological examinations can result in significant variance in the resulting medical or psychological opinion. Under the proposed legislation, consultative examiners must acknowledge in a writing submitted contemporaneously with the report of their examination that they understand how to complete a *Residual Functional Capacity* (RFC) assessment form. They must further acknowledge the legal and ethical responsibilities inherent in both conducting a medical/psychological examination and reporting on the results of their respective findings.

Finally, and most significantly, S. 3003 would allow a presiding judge to use “symptom validity tests” and even social media sources to aid in assessing a claimant’s credibility — evidence now declared “out-of-bounds” by the SSA in yet a further expression of

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<sup>514</sup> See Past Due Benefits, HALLEX, I-1-2-7, Calculating a Fee for Services, (Last update 2/25/05 (Transmittal I-1-48)).

<sup>515</sup> S. 3003, § 207: *Evaluating medical evidence*.

<sup>516</sup> 20 C.F.R. § 404.1527(c)(2) (2016) (“If we find that a treating source’s opinion on the issue(s) of the nature and severity of your impairment(s) is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in your case record, we will give it controlling weight.”).

<sup>517</sup> See, e.g., 20 C.F.R. § 404.1519(a).

unreasonable paternalistic policies.<sup>518</sup> The authors of the paper, *Symptom Validity Assessment: Practice Issues and Medical Necessity*, "speak plainly to the need for such testing:

Symptom exaggeration or fabrication occurs in a sizeable minority of neuropsychological examinees, *with greater prevalence in forensic contexts*. Adequate assessment of response validity is essential in order to maximize confidence in the results of neurocognitive and personality measures and in the diagnoses and recommendations that are based on the results.<sup>519</sup>

#### 8. Reform SSA's Attorney Fee Structure

The authors of S. 3003 propose reforming SSA's attorney fee structure when awarding attorney's fees in a successful disability claim. The proposed amendment requires an attorney or representative to account for work performed as the basis for a fee, whether or not a fee agreement is signed.<sup>520</sup> This revises the current practice which simply awards an attorney fee as a percentage of the claimant's award of "past due benefits" regardless of the work actually performed. In this, the fee is more akin to the paradigm followed in a personal injury claim. Unfortunately, the current fee structure unintentionally rewards delay, increasing the attorney-fee over time.

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<sup>518</sup> See *Congressional Report: The Social Security Administration's Policy on Symptom Validity Tests in Determining Disability Claims*. The OIG introduction speaks directly to the issue: "While SSA does not allow the purchase of SVTs [symptom validity tests] in its disability determinations, we found that medical literature, national neuropsychological organizations, other [f]ederal agencies, and private disability insurance providers support the use of SVTs in determining disability claims." Christian Coons and Michael Weber (eds.), *Paternalism: Theory and Practice*, Cambridge University Press, 2013, 283, <https://ndpr.nd.edu/news/paternalism-theory-and-practice/>.

<sup>519</sup> Shane S. Bush, Ronald M. Ruff, Alexander I. Tröster, Jeffrey T. Barth, Sandra P. Koffler, Neil H. Pliskin, Cecil R. Reynolds, and Cheryl H. Silver, SYMPTOM VALIDITY ASSESSMENT: PRACTICE ISSUES AND MEDICAL NECESSITY, 419, 419 (20 Archives of Clinical Neuropsychology 419 (2005) (emphasis added).

<sup>520</sup> S. 3003, § 208: *Reforming fees paid to attorneys and other claimant representatives*.

The proposed revisions require attorneys and representatives to a fee based on the work performed irrespective of the time passed. Current rules reward delay and fail to incentivize resolution in a timelier manner. Under the present system, the greater accrued “past due benefits” the greater the attorney fee. This directly contravenes the Agency’s mission, to promptly resolve claims made.

The reforms of S. 3003 also make clear that provisions of the Equal Access to Justice Act (EAJA),<sup>521</sup> allowing taxpayer-funded attorney fees would no longer apply to proceedings initiated by the Social Security Commissioner or when based on new evidence submitted after the hearing before the administrative law judge. This precludes additional attorney’s fee under EAJA where a remand is sought on the basis of evidence not actually provided to the administrative law judge for review. This closes yet another loophole that currently allows, and in effect rewards, post-appeal submissions of evidence to the Appeals Council, that is, evidence not actually submitted to the administrative law judge during the course of the hearing.

## 9. Offset Unemployment Compensation

Under current law, claimants may seek unemployment benefits (a state/federal program)<sup>522</sup> even while applying for federal Social Security disability benefits. The conflict in such a request is immediate. Many states require, as a condition of receipt of unemployment benefits that the beneficiary be actively searching for

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<sup>521</sup> 28 U.S.C. § 2412.

<sup>522</sup> See *Social Security Programs in the United States - Unemployment Insurance*, SOCIAL SECURITY ADMINISTRATION, at <https://www.ssa.gov/policy/docs/progdesc/sspus/unemploy.pdf>, which provides in part: “Unemployment insurance was initiated on a national basis in the United States as Title III and Title IX of the Social Security Act of 1935. It is a [f]ederal-[s]tate coordinated program. Each State administers its own program within national guidelines promulgated under [f]ederal law. The program is designed to provide partial income replacement to regularly employed members of the labor force who become involuntarily unemployed. To be eligible for benefits a worker must register at a public employment office, must have a prescribed amount of employment and earnings during a specified base period, and be available for work and able to work. In most States, the base period is the first four quarters of the last five completed calendar quarters preceding the claim for unemployment benefits.”

employment. This places the Social Security claimant in the position of telling both the State and federal governments that (s)he is ready willing and able to work; while at the same time telling the SSA as well as the Department of Veteran's Affairs that, "I cannot work because I am disabled."

Receipt of unemployment benefits should be treated as are Worker's Compensation benefits. Unemployment benefits should be offset against the award of disability benefits in the same manner as are Worker's Compensation benefits. This resolves the potential conflict that now burdens the federal government. That is, the federal government pays both Unemployment and Disability benefits simultaneously, though logically, one might think such benefits are paid through two mutually exclusive programs.<sup>523</sup>

In sum, there should be a complete offset of unemployment compensation where disability benefits are awarded under any other federal program, including the VA, as was originally the law in 1956 when the Social Security Disability program was originally created.<sup>524</sup>

#### 10. End Taxpayer Monetary Payments for Private Attorney/Representative Travel

Paternalism reaches a high level with the payment of travel costs to private attorneys and representatives. One might think entirely private practitioners representing claimants before the SSA would be responsible for their own travel expenses as a cost of doing business. Not so under current law and regulation. Amazingly, the federal government pays private attorneys and representatives a host of expenses, including air and carfare.

20 C.F.R. §404.999(c) sets out reimbursed travel costs:

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<sup>523</sup> See generally, William R. Morton (ANALYST IN INCOME SECURITY). *Concurrent Receipt of Social Security Disability Insurance (SSDI) and Unemployment Insurance (UI): Background and Legislative Proposals*. 12-14 (Washington, D.C.: Congressional Research Service (CRS), R-43471 (July 31, 2015)).

<sup>524</sup> *Social Security Amendments of 1956*, Pub. L. 84-880, § 103(a), 70 Stat. at 816 (provisions pertaining to Social Security disability offset based on payments from any other federal disability program were codified at 42 U.S.C. § 424a(a)(2)). See *infra* note 225.

(a) Reimbursement for ordinary travel expenses is limited— (1) To the cost of travel by the most economical and expeditious means of transportation available and appropriate to the individual's condition of health as determined by the State Agency or by us, considering the available means in the following order— (i) Common carrier (air, rail, or bus); (ii) Privately owned vehicles; (iii) Commercially rented vehicles and other special conveyances.<sup>525</sup>

Surprisingly, travel reimbursement further includes “unusual travel expenses,” provided approved in advance. These are: “Unusual expenses that may be covered in connection with travel include, but are not limited to— (1) Ambulance services; (2) Attendant services; (3) Meals; (4) Lodging; and (5) Taxicabs.”<sup>526</sup>

Travel costs should be borne by the private practitioner as a cost of doing business, given literally no apparent reason for such payments in a time when more the 80% of claimants are represented.<sup>527</sup> There is no shortage of counsel; no overarching public purpose served. Millions of taxpayer dollars now flow into a paternalistic loophole, in effect freeing both the practitioner and the claimant from a key cost of private representation and practice. It is time for this loophole to be closed. Travel costs should not be borne by the general public, but by those who endeavor to profit in the exercise of their legal talents in representing clients seeking disability benefits.

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<sup>525</sup> 20 C.F.R. § 404.999(c).

<sup>526</sup> See generally, D.W. Engel, (2015). *Social Security: Restructuring Disability Adjudication*. (COMMITTEE FOR A RESPONSIBLE FEDERAL BUDGET, Glendening, D. & Wolfe, J.S Aug. 4, 2015), Washington, D.C. (advocating for the creation of a government attorney along the lines set forth in the 2014 proposed legislation).

<sup>527</sup> Office Of Inspector Gen., Soc. Sec. Admin., A-12-07-17057, *Claimant Representatives Barred From Practicing Before The Social Security Administration*, 1 (2007), <http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-12-07-17057.pdf>.



### 11. End Cash Payments in the Award of Childhood Disability Benefits

The payment of *cash benefits* in childhood disability cases should be ceased; and the loophole closed, to be replaced with in-kind services as proposed in a recent 2016 study entitled: *Poverty, Opportunity, and Upward Mobility*.<sup>528</sup> That study observed of childhood SSI recipients as follows:

One of the most concerning trends in the SSI program is the rising number of children coming onto the program. The average lifetime stay on SSI for people who come onto benefits as children is an incredible 26.7 years. Further, a disturbing 30 percent of older teens on SSI have dropped out of high school, which only adds to the barriers they face in going to work and leading productive lives as adults. Access to needed services in lieu of cash assistance, whether it be mental or physical therapies, or special-education services in school should be the focus of the SSI program.<sup>529</sup>

One policy consideration voiced by the *Task Force on Poverty, Opportunity, and Upward Mobility*<sup>530</sup> promotes flexibility in the nature and type of benefits to be awarded, as contrasted with simple monetary benefits:

State and local governments should be allowed to develop new ways of addressing incentives for all stakeholders. Instead of the federal government continuing to develop policies separately for each of the more than 80 welfare programs, states should be allowed to link these programs in a way that provides a more holistic approach for families they serve.

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<sup>528</sup> *Poverty, Opportunity, and Upward Mobility* (June 7, 2016), <http://abetterway.speaker.gov/assets/pdf/ABetterWay-Poverty-PolicyPaper.pdf> (last accessed Aug. 12, 2016).

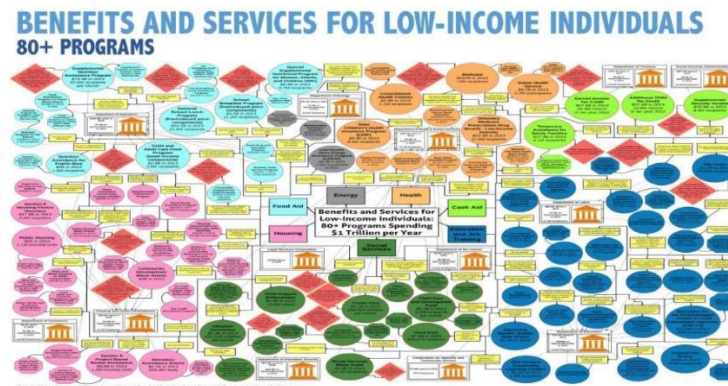
<sup>529</sup> *Id.* at 12.

<sup>530</sup> *Id.* at 1.

When someone faces disincentives to work or marry, states should test ways of repackaging welfare benefits to reward desired outcomes. In exchange for more flexibility, states must also be held accountable, and each demonstration should be paired with an evaluation to determine whether state policies are achieving real results for those in need.<sup>531</sup>

In making such observation, the authors of the *Task Force* report note a plethora of federal benefits programs, many with overlapping and some conflicting rules, as illustrated in *Figure 12* below.

*Figure 12*



*Source: Congressional Research Service, House Ways and Means Committee* <sup>532</sup>

Restructuring the award of monetary benefits in children's disability awards is consistent with the observation that the award of such funds is not as a result of a need to replace lost income. Accordingly, the issue is more properly focused on the child's needs, medically, educationally and socially, designed to meet targeted needs, as are potentially reflected in already existing low-income programs. In effect, this suggests a need to replace monetary benefits with a coordination of programs, already extant, in such a way as to maximize the nature and impact of such programs.

<sup>531</sup> *Id.* at 17.

<sup>532</sup> *Id.*

### B. Close the VA Disability Loophole

We recognize as between the VA and SSA a fundamental difference in the nature of benefits awarded. Social Security Disability monies are paid from a dedicated trust fund, dependent for its success on the work of others who pay into the trust fund.<sup>533</sup> Those deemed “entitled” by reason of disability insurance, may then draw upon the Title II Disability Insurance Trust Fund, the amount dependent upon the amount contributed through the course earnings, covering at least 40 quarters or work. As such, access to Social Security Disability benefits is characterized as an insurance<sup>534</sup> “entitlement,” with benefits payable upon proof of disability.

By contrast, the Veteran’s disability benefit is regarded as “compensatory,” representing a debt owed to the wounded veteran as compensation for the injury suffered in defense of the Nation.<sup>535</sup> Why is it then, that veterans may also receive Social Security Disability benefits in addition to VA disability? The rationale for award of concurrent monetary civilian disability benefits makes little sense apart from an extreme exercise in paternalism, especially so, given the fragile state of the Social Security Disability Trust Fund, which was to be exhausted in August 2016. Only late bipartisan

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<sup>533</sup> See SOCIAL SECURITY ADMINISTRATION, *Agency History*, <https://www.ssa.gov/history/BudgetTreatment.html>. “In the 1939 Amendments, a formal trust fund was established and a requirement was put in place for annual reports on the actuarial status of the fund.” *Id.*

<sup>534</sup> Umar Moulta-Ali, CONGRESSIONAL RESEARCH SERVICE, *Disability Benefits Available Under the Social Security Disability Insurance (SSDI) and Veterans Disability Compensation (VDC) Programs*, (Sept. 12, 2012), <https://fas.org/spp/crs/misc/R41289.pdf>.

<sup>535</sup> Veterans “Disability Compensation” is described by the U.S. Department of Veterans Affairs as: “A tax-free monetary benefit paid to Veterans with disabilities that are the result of a disease or injury incurred or aggravated during active military service. The benefit amount is graduated according to the degree of the Veteran's disability on a scale from 10 percent to 100 percent (in increments of 10 percent). Compensation may also be paid for disabilities that are considered related or secondary to disabilities occurring in service and for disabilities presumed to be related to circumstances of military service, even though they may arise after service. Generally, the degrees of disability specified are also designed to compensate for considerable loss of working time from exacerbations or illnesses.” See <http://www.benefits.va.gov/COMPENSATION/types-compensation.asp>.

action staved off insolvency, Congress temporarily diverting a small percentage of the Social Security Retirement Trust Fund. In doing so, Congress “kicked the can” down the road, neutralizing an unwanted election-year issue, but failing to solve the problem in the long run. The Social Security Disability Trust Fund remains economically fragile.

It makes little sense, in the face of the teetering insolvency of the Disability Insurance Trust Fund to confer upon veterans the privilege of double-dipping when they are otherwise entitled to a greater monetary tax-free award for “disability” than that conferred under the Social Security Act.<sup>536</sup> More to the point, the ability to collect twice for the same “disabling” condition is nothing less than overt paternalism. This is no more clearly seen than in the introduction of the proposed “BRAVE Act” of 2009. Pandering to a powerful political force in American politics “both houses of Congress . . . [have] . . . introduced legislation known as the BRAVE Act<sup>537</sup> that would certify veterans judged by the VA to have total disability (that is, having a combined rating of 100% [Note 2 omitted] or a rating of *individual unemployability* (IU)) as meeting the *medical requirements* of the disability programs administered by SSA,” an action which effectively cedes to the VA a significant decisional element in the SSA disability determination process. Were such legislation passed, its provisions would undermine the efficacy of the Social Security Disability Insurance program, as there is significant variance in the decisional criteria under each program.<sup>538</sup>

Some might argue that the Social Security Disability Insurance Trust Fund is created and maintained, in-part, through contributions by veterans, thus entitling them to an award of Social Security

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<sup>536</sup> *Veterans Who Apply for Social Security Disabled-Worker Benefits After Receiving a Department of Veterans Affairs Rating of “Total Disability” for Service-Connected Impairments: Characteristics and Outcomes*, SOCIAL SECURITY ADMINISTRATION, Office of Retirement and Disability Policy, <https://www.ssa.gov/policy/docs/ssb/v74n3/v74n3p1.html>.

<sup>537</sup> See H.R. 4054 and S. 2759, both titled the “*Benefit Rating Acceleration for Veteran Entitlements Act of 2009*.” Neither bill was enacted in 2009 and, through 2013, neither had been reintroduced. <https://www.congress.gov/bill/111th-congress/house-bill/4054/related-bills>.

<sup>538</sup> See *supra* note 536 for a discussion of the decisional criteria applied by the Department of Veterans Affairs, in contrast with decision-making by the Social Security Administration.

Disability benefits as contributors to the Fund. The argument fails, however, when considering the magnitude of funds contributed by the American taxpayer to the General Fund of the United States – from which veterans’ disability payments are made.

Closing the double-dipping disability loophole restores the statutory framework to its original state following passage of the 1956 Amendments to the Social Security Act. For the first time since the passage of the Social Security Act in 1935, the 1956 Amendments specifically authorized “monthly disability insurance benefits . . . to eligible disabled workers between the ages of 55 and 65” providing further, however, “that insurance benefits were reduced in any case where the individual was another [f]ederal disability benefit or a work-men’s compensation payment.”<sup>539</sup> While authorizing a monetary monthly benefit, the 1956 Amendments also called for an offset where there was “another [f]ederal disability benefit.” Double-dipping was prohibited by statute.

It was not to last as “the 1957 amendments exempted from this [offset] provision veterans’ compensation received on account of service-connected disabilities.”<sup>540</sup> The House Committee on Ways and Means offered a vague, dissembling, seemingly patriotic rationale, in essence a substance-free hollow political expression which nevertheless gave ample ‘wobble-room’ to justify paternalistic pandering to a powerful political constituency: “The purpose of veterans’ compensation is such as to justify disregard of that compensation in the determination of rights to disability insurance benefits under the social security program”.<sup>541</sup>

In so saying, the Committee failed to provide any substantive rationale to explain why an exception should be drawn reinstating veterans’ double-dipping. One plausible explanation stands out. Social Security Disability Insurance Benefits are paid to veterans as an expression of paternal influence, earning for the politician the benefit of ‘insurance’ in the polling booth. The politician and the veteran are further endowed with the ability to point to the 1957 amendments, declaring that s/he/they support the award of double

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<sup>539</sup> SOCIAL SECURITY ADMINISTRATION, *Legislative History: The Development of the Disability Program Old-Age Survivors Insurance, 1935-74*, <https://www.ssa.gov/history/pdf/dibreport.pdf>.

<sup>540</sup> *Id.*

<sup>541</sup> *Id.*

benefits as thanks of a grateful Nation for the service rendered. The problem? That was the reason for the original award of Veterans Disability Compensation administered by the VA; not a reason for legitimizing double-dipping under the Social Security Act.

Closing veterans' double-dipping ends a paternalistic practice seemingly intended as an expression of political influence. Doing so slows the decline of the Disability Insurance Trust Fund, plainly intended as a safety net for those unable to work under the Social Security Act. This is evident from the legislative history of the Social Security Act, *to-wit*: The mission of the Social Security Act is to provide a "monthly disability insurance benefits to . . . eligible disabled workers between the ages of and 65."<sup>542</sup> As such, it is a *civilian* benefits program whose mission is not to compensate veterans but to establish a safety net for civilian employees unable to work. Inclusion of veterans, who may otherwise claim disability under the auspices of a program administered by the VA, contravenes the underlying public purpose of both Acts.

*C. End the Practice of Allowing Military Members to Receive  
Social Security Disability Benefits when Still on Active  
Duty and Earning Full Military Pay*

At issue is the payment of disability benefits for service members who are still full-time active-duty military.<sup>543</sup> We suggest that payment of Social Security Disability benefits to active-duty service members end, given that its recipients already receive full military pay and have access to full military benefits, including healthcare.

In making this suggestion we are keenly aware of the unpopularity such a move might have; but such is the effect of a program which paternalistically awards monetary benefits to persons already receiving full military pay – it is difficult to end such payments. At issue is a primary example of paternalism gone astray – an example of formal enactment of actions which fail to pass even the simplest test of common sense. Like any disability claim the

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<sup>542</sup> *Id.*

<sup>543</sup> *Disability Benefits for Wounded Warriors*, SOCIAL SECURITY ADMINISTRATION, <https://www.ssa.gov/people/veterans/ww.html>. Last visited February 2, 2018.

program asks the question whether (despite acknowledged full-time active-duty status) the service member is “disabled?” That is, despite receipt of full-time military pay, is the service member unable to engage in full-time work? If so, the military claimant can apply to receive a Social Security Disability (which asks at Step 1 of a 5-step sequential analysis whether the individual is engaged in “substantial gainful activity – a question for all civilian claimants which looks as part of the answer, to receipt of pay and benefits.)

Here, there can be no issue of whether a full-time service member is engaged in full-time work. Military pay is an entitlement not subject to reduction while the service member is in an active duty status, regardless of what the individual’s duties are during that period of active duty service.<sup>544</sup> This is true even if the active duty service member is deemed to be insane.<sup>545</sup>

Thus, an analysis of what duties the claimant actually performs while on active duty is meaningless, since the claimant’s required duties (including medical treatment or convalescence treatment entitle that person to full pay and benefits. In short, the military claimant’s medical treatment is deemed to be his assigned “military duty” until released from active duty or released from medical treatment and returned to other military duties. This is especially so, when, as here, there is no civilian equivalent to the military duties performed by the military claimant, making an SGA (substantial gainful activity) analysis impossible under current regulation.<sup>546</sup>

The active-duty military has long recognized this principle in defining official duty and in similar fashion has long recognized this principle in defining official duty and in similar fashion has disallowed simultaneous collection of VA disability and active-duty military pay.<sup>547</sup>

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<sup>544</sup> 37 U.S.C. §§ 101(18), (21). See also, DoD 7000.14-R, Financial Management Regulation, Vol. 7A, Chapter 1, ¶ 010301.A at page 1-18 (Apr. 2017).

<sup>545</sup> 37 U.S.C. § 602 (2016).

<sup>546</sup> See, Title 20 C.F.R. Part 404.1520 for the five steps in a sequential disability analysis under the Social Security Act.

<sup>547</sup> See, Title 10 U.S.C. § 12316; and Title 38 U.S.C. § 5304(c).

## X. CONCLUSION: AN AUTONOMOUS FUTURE?

“[T]he whole art of government consists in the art of being honest.”  
-Thomas Jefferson<sup>548</sup>

### A. *Of Peril and Paternalism*

The rise of paternalism and the resulting peril to the Nation’s two largest disability programs is plain, requiring in its solution a shared commitment to autonomy. By this we mean a commitment to the integrity of the individual, and a restructuring of each program to reflect such a commitment. Such a commitment examines the individual and asks whether the action propose or /taken:

- Unnecessarily expands public benefits;
- Creates or expands beneficiary dependency;
- Creates or expands a moral/legal dilemma for the beneficiary or the government;
- Creates or expands a political agenda; and/or
- Offers opportunity for the exercise of political influence.

To address these issues, we propose a *Test of Autonomy (TOA)*. The TOA must ideally govern disability policy formation and program implementation. Absent such a test or one similar, there remains a political temptation to do more, provide more and in so acting usurp the individual, ultimately imperiling the larger group. At bottom, such a test must reflect individual consequences, respecting a collective interest in individual choice. Christopher Muscato, faculty member of the University of Northern Colorado describes autonomy as “[the] capacity of an individual for self-determination.”<sup>549</sup> He postulates three aspects of autonomy: “*personal autonomy*, [the] capacity to choose your own actions; *moral autonomy*, the capacity to define your own morality; and

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<sup>548</sup> Thomas Jefferson, *Extract from Thomas Jefferson’s Summary View of the Rights of British America*, July 1774, MONTECELLO.ORG, <http://tjrs.monticello.org/archive/search/quotes>.

<sup>549</sup> Christopher Muscato, *Lecture Notes, “Autonomy,”* UNIVERSITY OF NORTHERN COLORADO, <http://study.com/academy/lesson/comparing-autonomy-paternalism-respect-for-persons.html>.



*political autonomy*, the right to have your decisions respected within a political context.”<sup>550</sup>

Muscato adds, “at the end of the day, theories on autonomy always come back to the ability of the individual to make his or her own choices.”<sup>551</sup> “Paternalism” is described as “an interference with another's autonomy based on the assumption that it [the interference] is ultimately beneficial to that person.”<sup>552</sup> Muscato’s observations are potent.

Where, as here, Congress expands the reach of a dedicated *civilian* disability program, despite the existence of a dedicated *veterans’* disability program, there is little question of political influence in the guise of governmental action. By overriding the 1956 Amendments to the Social Security act and thereby expanding Social Security Disability Insurance Benefits to veterans, Congress has undermined the SSA’s program, creating an entitlement for a class of recipients (veterans) who have no need of such benefits absent the offset provision.<sup>553</sup> Veterans have a similar, arguably less stringent, tax free disability benefits program. Unlike Social Security, benefits are paid from General Fund of the United States. To burden the civilian Social Security system is to take political action for the sake of paternalistic influence.

Consider Dworkin’s view: “Paternalism is behavior by an organization or state that limits some person or group's liberty or autonomy for what is presumed to be that person's or group's own

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<sup>550</sup> *Id.*

<sup>551</sup> *Id.*

<sup>552</sup> *Id.*

<sup>553</sup> The VA makes its findings on a graduated basis. The intent of the 1956 Amendments to the Social Security Act, authorizing monetary benefits, was to offset amounts received from other federal disability program, to the extent of the amount of the “other federal program.” Our argument lies in precisely this point. The harm wrought by the 1957 Amendments was to do away with the offset, thus allowing veterans to be compensated through both the Social Security Administration and the Department of Veterans Affairs. The resulting double-dipping undermines the Social Security Disability Insurance Fund by allowing its dedicated funds to be paid without regard to monies received by veterans as VDC.

good.”<sup>554</sup> Paternalism can also imply that the behavior is against or regardless of the will of a person, or also that the behavior expresses an attitude of superiority.<sup>555</sup>

A *Test of Autonomy* embraces the viewpoint of the individual, and might ask five questions:

- First, what action is taken or withheld?
- Second, is there a moral imperative implicit or explicit in the taking or withholding of action?
- Third, is a political outcome at issue?
- Fourth, is there an individual outcome at issue?
- Fifth, does the individual have choice and is there an opportunity to choose?

Applying this test to the question of overlapping disability entitlement programs makes plain the assessment. Congress passed the 1957 Amendments to the Social Security Act, and in doing so contravened the public policy underlying Social Security Act in 1956, allowing veterans to receive not only a VA disability benefit, but a Social Security disability payment as well. Is there a moral imperative? The answer can only be in the affirmative.

The 1956 Amendments established a separate Trust Fund, placing its preservation in the hands of the Secretary of Health, Education and Welfare.<sup>556</sup> S/he was to “fully utilize his authority to . . . protect the Federal Disability Insurance Trust Fund from unwarranted costs.”<sup>557</sup> To act otherwise, as is seemingly required by the 1957 Amendments (which allow Veterans to collect Social Security

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<sup>554</sup> Wikipedia, *Paternalism*, <https://en.wikipedia.org/wiki/Paternalism> (November 6, 2017) (citing Gerald Dworkin, *Paternalism*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY, (Summer 2010 Edition).

<sup>555</sup> Wikipedia, *Paternalism*, <https://en.wikipedia.org/wiki/Paternalism> (November 6, 2017) (citing Seana Shiffrin, *Paternalism, Unconsonability Doctrine, and Accommodation*, PHILOSOPHY AND PUBLIC AFFAIRS 29(3): 205-250 (2000).

<sup>556</sup> SOCIAL SECURITY ADMINISTRATION, *Legislative History: The Development of the Disability Program Old-Age Survivors Insurance, 1935–74*, <https://www.ssa.gov/history/pdf/dibreport.pdf> (citing H. Rpt. 2936, 84th Cong., p. 26).

<sup>557</sup> *Id.*

Disability Insurance without offsetting Veterans Disability payments), disturbs the public trust, requiring the HEW Secretary to violate the very policy s/he was charged to execute; that is, protecting the Disability Insurance Trust Fund.

The *Test of Autonomy* is violated with the passage of the 1957 Amendments, authorizing veterans' access to the Social Security Trust Fund without offset. The authorization to allow double-dipping by veterans is plainly a political attempt to garner political support from veterans, notwithstanding the damage to the Trust Fund.<sup>558</sup> Is the individual affected? Does s/he have a choice and is there an opportunity to act? The *Test of Autonomy* is violated both individually as well collectively. The individual Social Security recipient has an irrefutable stake in the integrity of the Social Security Trust Fund. Congressional action in 1957 and the subsequent relaxation of disability eligibility criteria in the years following, adversely affected all who qualify for Disability Insurance Benefits.

### B. *Should Have Seen This Coming*

The convergence of disability programs in America is found in its two largest disability benefits programs. History reflects the evolution of both; the long-standing veterans program serving as the progenitor for the later civilian disability program. The intertwining of these programs, allowing veterans to “double-dip,” serves to highlight what is plainly evident in decades of paternalistic

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<sup>558</sup> Others have commented similarly. See Armstrong Williams, *The Tremendous Failure of Government Paternalism*, WORLDNET DAILY, <http://www.wnd.com/2015/05/the-tremendous-failure-of-government-paternalism/#WwfOQDI7cxseqY8h.99> (last visited February 6, 2017) (“The [Great Society] programs began to grow and expand as more and more citizens got involved. For far too many, Johnson-era anti-poverty programs became more of a permanent dependency rather than a lift out of poverty . . . One of the major problems is that the programs became a political patronage strategy for successive generations of politicians – any time they wanted to secure a part of the American electorate they would campaign on expanding federal spending to cover some new area of social need – whether that was prescription drug coverage, expanded Head Start, a new jobs program – and ultimately between new programs, slowing population growth and an aging population, we inadvertently created the almost impossible budgetary situation that we are facing today.”).

management practices, leaving both programs gasping on the verge of collapse. Dramatic service issues affect the VA; while a continuing loosening of eligibility SSA's disability criteria threaten to swamp the disability rolls, leading to collapse of the Disability Insurance Fund.

Social Security's grand expectations of 1956 were dashed in 1957. The charge to the Secretary of HEW to "protect the Federal Disability Insurance Trust Fund from unwarranted costs"<sup>559</sup> went seemingly unheeded. Veterans were permitted to "double-dip" into the civilian Disability Insurance Trust Fund with no offset, while Social Security's changing eligibility criteria opened the gateway ever wider. The SSA has even gone so far as to underwrite private businesses, paying a broad range of "travel expenses" to claimant's counsel and/or non-lawyer "representatives;" a practice which continues to the present day.<sup>560</sup> In short, the original call upon the Secretary of HEW to protect the Disability Trust Fund has vanished into the haze, swept up in a rising tide of paternalistic interference.

The problems are not confined to Social Security. The VA declares individuals "100% disabled" and then ignores the fact of contemporaneous full-time employment. Why? Notwithstanding the fact of a finding of "100% disability" such a finding is not an assessment of "individual unemployability" or "IU." Only when the veteran has been declared "IU" is s/he precluded from contemporaneous full-time work. So, while the VA may find a veteran to be "100% disabled," common sense is disregarded as such a finding may not embrace a finding that the veteran cannot work. Common sense would seem to endorse a finding which declares a veteran as unable to work (being 100% "disabled"); yet the VA often makes no such finding. As such, a veteran may be 100% disabled and continue 100% working, unless found "IU."

The SSA and the VA are unfortunate exemplars in the rise of the disability state. Armstrong Williams observes:

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<sup>559</sup> *Legislative History: The Development of the Disability Program Old-Age Survivors Insurance 1935-74*, Social Security Administration, <https://www.ssa.gov/history/pdf/dibreport.pdf>.

<sup>560</sup> See 20 C.F.R. § 416.1498.

Today we face a situation in which social programs have grown from a miniscule proportion of the GDP (initial Great Society programs cost a mere \$2 billion), to one in which entitlements have grown so onerous that we now have to borrow funds (at great peril to our future stability) to fulfill current obligations.<sup>561</sup>

David Autor concurs, observing:

Despite dramatic reductions in the physical demands of the workplace in recent decades and significant improvements in medical care, workers in industrialized economies face a substantial lifetime risk of developing a work-limiting disability. The U.S. Social Security Administration estimates that a 20-year-old U.S. worker has a three in ten chance of becoming disabled before reaching full retirement age.

...

Second, the program's expenditures are extremely high and growing rapidly [Figure 1 omitted]. In 2010, SSDI cash transfer payments totaled \$124 billion, while the cost of Medicare for SSDI beneficiaries was \$59 billion . . . As a consequence[,] SSDI's share of total Social Security outlays has risen from one in ten dollars in 1988 to almost one in five dollars at present [Figure 2 omitted]. Perhaps most ominously, SSDI expenditures now exceed by 30 percent the payroll tax revenue dedicated to funding the program.<sup>562</sup>

Apart from the temporary infusion of monies originally intended for Social Security's Retirement Trust Fund, the Social Security Disability Insurance Trust Fund is insolvent.

We should have seen this coming.

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<sup>561</sup> *Id.*

<sup>562</sup> David H. Autor, "The Unsustainable Rise of the Disability Rolls in the United States: Causes, Consequences, and Policy Options," MIT and NBER (Nov. 23, 2011), <http://economics.mit.edu/files/11649>.

As recounted earlier, military disability benefits have long been part of America's commitment to those who risk all in service to the Nation. From these lessons we should have recognized the emerging pattern: a pattern of ever-less stringent disability standards, the political pressure on elected members of Congress to do more, pay more, and open wide the gates of political largess. Consider the experience of the Pension Office both during and after the Civil War:

The U.S. government operated a single social welfare program, the Pension Office, which by 1900 dispensed funds to one million Civil War veterans and their survivors. A sprawling bureaucratic colossus, the Pension Office support a vast rent-seeking industry of attorneys and examining physicians, who conspired with applicants to defraud the government. A corrupt machine that disbursed public monies to buy political support, the Pension Office was no model for the administrative state. It was, rather, a cautionary tale.<sup>563</sup>

When Social Security's Retirement and Disability Insurance Programs were dubbed with the appellation, "the Third Rail of American politics"<sup>564</sup> we should have seen this coming. Social Security and to a lesser extent, the VA, had become 'untouchable,' beyond the reach of meaningful political discussion. Preparations should have been made, contemplating the time when the baby-boomers began to retire, live longer and demand more from elected officials. We should have learned from our experiences with the Pension Office in the post-Civil War era.

America has not learned from her experience. It is time she did. It is time to share the truth and enlist the American spirit.

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<sup>563</sup> *Liberal Reformers: Race, Eugenics & American Economics in the Progressive Era*, 2017 paperback edition, Princeton University Press, p. 27 (ISBN # 978-0-691-17586-7), citing as its source, Theba Skocpol (1992), *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States*, Cambridge, MA, Belknap Press of Harvard University.

<sup>564</sup> Safire, *supra* note 9.

“We don’t always have to agree, but we must empower each other, we must find the common ground, we must build bridges across our differences to pursue the common good.”

-Senator Cory Booker<sup>565</sup>

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<sup>565</sup> Cory Booker, Speech at the Democratic National Convention (2016), [http://www.nj.com/politics/index.ssf/2016/07/dnc\\_2016\\_what\\_njs\\_booker\\_told\\_the\\_delegates.html](http://www.nj.com/politics/index.ssf/2016/07/dnc_2016_what_njs_booker_told_the_delegates.html).