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New Veterans Legislation Opens the Door to Judicial Review...Slowly!

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NEW VETERANS LEGISLATION OPENS THE DOOR TO JUDICIAL REVIEW . . . SLOWLY!

> Why are we as American veterans who defended our government in time of need . . . now forced to petition that government to gain equal access to the same fundamental rights that we fought to secure for others?[1]

On November 18, 1988, President Ronald Reagan signed the Veterans' Judicial Review Act (the Act),[2] ending over a century of Congressional measures to keep veterans' claims for benefits completely out of the court system.[3] Prior to this new law, any decision by the Veterans' Administration (VA) with respect to a veteran's benefits was final. Many hailed the recent reversal of past policy, likely the result of a confluence of political and judicial developments,[4] as a major breakthrough toward equal treatment of the nation's retired servicemen and women.[5]

The facts reveal the veterans' plight. The number of veterans has climbed to more than 28,000,000.[6] Ex-servicemen and women file 800,000 disability benefits claims[7] each year, of which the VA grants

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1. *H.R. 585 and Other Bills Relating to Judicial Review of Veterans' Claims: Hearings Before the House Comm. on Veterans' Affairs*, 99th Cong., 2d Sess. 233 (1986) [hereinafter 1 *Hearings on H.R. 585*] (statement of Robert O. Muller, president of Vietnam Veterans of America).

2. Pub. L. No. 100-687, 102 Stat. 4105, Div. A (1988) (to be codified at 38 U.S.C. § 101).

3. Congress initially provided a specific preclusion of judicial review in 1887 for pension cases arising under the Tucker Act, 28 U.S.C. §§ 1346, 1491 (1982). Rabin, *Preclusion of Judicial Review in the Processing of Claims for Veterans' Benefits: A Preliminary Analysis*, 27 STAN. L. REV. 905, 907 n.14 (1975). In 1933, Congress passed an early version of the modern preclusion statute. *See* 38 U.S.C. § 705 (1934). This was later slightly reworded and recodified under 38 U.S.C. § 211(a) (1982).

4. Prior to the 100th Congress, the House Committee on Veterans' Affairs, and more specifically its chairman, G.V. "Sonny" Montgomery, had stalled all previous attempts at providing judicial review for veterans' claims. *See infra* note 54. The new push for a VA cabinet post, recently approved by President Reagan, may have softened the Committee's position. Wash. Post, Oct. 19, 1988, at A21, col. 1. Also, a new spirit of compromise seemed to overtake the various veterans' service organizations. A new congressional report highlighting the errors in the VA claim process helped focus the Committee's efforts. HOUSE COMM. ON GOVERNMENT OPERATIONS, INVESTIGATION OF DISABILITY COMPENSATION PROGRAMS OF THE VETERANS' ADMINISTRATION, H.R. REP. NO. 886, 100th Cong., 2d Sess. 1 [hereinafter cited as *Investigation of the VA*] (1988). Finally, a recent Supreme Court decision, Traynor v. Turnage, 108 S. Ct. 1372 (1988), eroded the effectiveness of § 211(a)'s preclusion.

5. *See, e.g.*, 134 CONG. REC. S16,658-59 (daily ed. Oct. 18, 1988) (statement of Sen. Murkowski); 134 CONG. REC. S16,638-39 (daily ed. Oct. 18, 1988) (statement of Sen. Cranston). *See also* 134 CONG. REC. H10,342 (daily ed. Oct. 19, 1988) (statement of Rep. Montgomery, calling the new legislation a "very good compromise").

6. 1984 VA ANN. REP. 237 (estimated veteran population).

7. This Note will focus primarily on disability claims, because of their frequency of appeal and

roughly one half.[8] Approximately 66,000 of those veterans initially rejected contest the denial, with a fifteen percent success rate.[9] About 36,000 of the remainder then appeal to the Board of Veterans' Appeal (BVA), but almost 27,000 of these remain unsatisfied.[10] Yet prior to the Act, these claimants, unlike social security, medicare, and welfare recipients,[11] had no recourse to the courts for independent judgment on their appeals.

This Note will address the likely impact of the new legislation on judicial oversight of the VA[12]: just how much review did the veterans get? Part One will briefly recount the history of the judiciary's encounters with the ban on judicial review. Part Two will describe the Act and trace the development of the new law from its earliest drafts to the final statute. Part Three will analyze the language of the new law, highlighting the problematic areas a court might face in interpreting its role. Part Four will predict the judiciary's response to the Act through application of new law to recurrent fact patterns brought before the courts.

I. 38 U.S.C. § 211(A) AND THE PRECLUSION OF JUDICIAL REVIEW.

Prior to the passage of the Veterans' Judicial Review Act, the language of 38 U.S.C. § 211(a) severely limited judicial review of individual VA benefits decisions, barring review of any decision of the Administrator on a benefits question.[13] With certain limited exceptions,[14] section 211(a)

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the complexity of their treatment. The VA also handles pension claims, as well as a variety of educational, loan, health and insurance programs.

Approximately 75% of the cases appealed to the Board of Veterans' Appeal (BVA) are disability cases. SENATE COMM. ON VETERANS' AFFAIRS, VETERANS' ADMINISTRATION ADJUDICATION PROCEDURE AND JUDICIAL REVIEW ACT, S. DOC. NO. 418, 100th Cong., 2d Sess. 110 (1988) [hereinafter *Senate Report on S. 11*] (statement of Kenneth E. Eaton, chairman of the Board of Veterans Appeals). This number may become less dramatic compared to pensions claims, given the lengthening time span since the last large-scale active combat situation. *See, e.g.*, 1984 VA ANN. REP. 237 (table 51, comparing percentage of veterans receiving disability versus pension, by period of service).

8. Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 309 (1985) (1978 data from Legal Services Corp. report to Congress).

9. *Id.*

10. *Id.* The BVA actually grants about twelve percent of the claims and remands another thirteen percent back to the regional offices. *Id.*

11. 134 CONG. REC. S16,638, S16,643-44 (daily ed., Oct. 18, 1988) (statement of Sen. Cranston).

12. The Act will affect the operation of the VA in other ways as well. These other provisions are discussed briefly *infra* notes 41-51 and accompanying text.

13. 38 U.S.C. § 211(a) (1982) reads as follows:

[T]he decisions of the Administrator on any question of law or fact under any law adminis-

and its predecessors[15] kept most of the decisions of the VA out of the courts. Despite the modern presumption of a right to judicial review,[16] Congress until recently seemed content with the VA anachronism. Legislators feared that judicial review for veterans' claims would overburden the courts, involve them in complex policymaking best left to agency expertise, and defeat both the uniformity of decisions and the informality of procedure at the VA.[17] As a result, courts had to apply the statute despite any apparent inequity.[18] Regardless of whether the question appealed was one of law or fact,[19] courts denied review with very little

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tered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

14. *See infra* notes 22-37 and accompanying text.

15. *See supra* note 3.

16. "We have repeatedly acknowledged 'the strong presumption that Congress intends judicial review of administrative action.' " Traynor v. Turnage, 108 S. Ct. 1372, 1378 (1988) (*quoting* Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 670 (1986)).

17. Although testimony cited additional reasons for continuing some level of preclusion, these four reasons were consistently relied upon to defend § 211(a) or to promote a limited scope of review. *See, e.g.*, 1 *Hearings on H.R.* 585, *supra* note 1, at 249-55 (statement of Robert O. Muller). *See also* Johnson v. Robison, 415 U.S. 361, 370 (1974) (attributing two reasons to Congress for maintaining the bar on judicial review).

18. The VA decisions denied review range from the illogical to the appalling. *See, e.g.*, 1 *Hearings on H.R. 585*, *supra* note 1, at 242-44 (statement of Robert O. Muller) (describing two systems of veteran benefits, one more advantageous to higher ranking soldiers because of its foundation on base pay, and the other (the VA) more beneficial financially to lower-paid soldiers; only the former receives judicial review); Milliken v. Gleason, 332 F.2d 123 (1st Cir. 1964) (*in forma pauperis* appeal, alleging, *inter alia*, "intimidation and physical assault upon [female appellant] by an agent of the [VA]," barred by § 211(a)).

19. A reviewing court will distinguish between questions of law and questions of fact in agency actions in general because it affords each differing levels of deference. A court traditionally will "substitute its judgment" on issues of law, but will apply a more lenient standard in reviewing agency findings of fact. Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L.J. 1, 9-10 (1985). The distinction may actually be futile because, while its purpose is to define varying levels of deference accorded, there is authority for the proposition that deference owed to findings of fact and law are, practically speaking, minimal. *See* 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 30.13 (1st ed. 1958). The delineation waxes in importance for purposes of this Note, however, because of its use in the Act's scope of review section. *See infra* notes 120-149 and accompanying text.

Drawing a line between questions of law and fact has proven to be an elusive task. *See, e.g.*, 5 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.10 (2d ed. 1984); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION ch. 14 (1965); Levin, *supra*; Stern, *Review of Findings of Administrators, Judges, and Juries: a Comparative Analysis*, 58 HARV. L. REV. 70, 93-94 (1944). A satisfactory delineation between issues of law and fact was provided by Robert Stern:

> Obviously an issue as to whether a particular act occurred or what a person intended in a particular situation is factual .... A man's intent may be proved directly by what he said or circumstantially from what he did .... When the issue relates to the existence or nature

pause or reflection.

Though many found the statute praiseworthy,[20] section 211(a) elicited much criticism as well.[21] One early attempt to cut back on the statute's preclusive effect came not from Congress, but from the Court of Appeals for the District of Columbia (D.C. Circuit). Interpreting the language of an older version of the statute,[22] the D.C. Circuit held in a series of cases that veterans were precluded from challenging only the denial of *claims* for benefits; as for already existing benefits, they were free to challenge the *termination* thereof.[23] Congress closed this loophole in 1970, when it amended the statute's language.[24]

Even after the 1970 amendment, peripheral questions remained as to whether the scope of section 211's preclusion extended to review of constitutional questions and alleged ultra vires actions.[25] The Supreme

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of a general rule or standard which will be applicable to many cases, it is normally regarded as presenting a question of law.

Stern, *supra*, at 94-95. The difficulty arises in part because questions often will have both factual and legal elements.

20. The VA Administrator supported § 211(a) in every congressional inquiry but one. *Veterans' Judicial Review Act: Report to Accompany H.R. 5288*, 100th Cong., 2d Sess., 10-13 (1988) [hereinafter *Report on H.R. 5288*]. More important, perhaps, veterans' organizations continued to support the bar. *Id.* at 13. *See also* 2 *H.R. 585 and Other Bills Relating to Judicial Review of Veterans' Claims: Hearings Before the House Comm. on Veterans' Affairs*, 99th Cong., 2d Sess. 393 (1986) [hereinafter 2 *Hearings on H.R. 585*] (letter from Charles Joeckel, Jr., Executive Director, Disabled Veterans of America, opposing judicial review); *id.* at 395 (letter from R. Powell, Executive Director, Paralyzed Veterans of America, opposing judicial review). The most influential supporter, however, was Rep. Montgomery, chairman of the House Veterans' Affairs Committee. Note, for example, his statement in the 1986 hearings on a veterans' judicial review bill. 1 *Hearings on H.R. 585*, *supra* note 1, at 103.

21. One must remember that prior to 1970 and Goldberg v. Kelly, 397 U.S. 254 (1970), the courts treated a benefit from the government as a mere "gratuity," and not as a right to which constitutional concerns of due process attach. Nevertheless, criticism of the preclusion of review existed. *See, e.g.*, Davis, *Veterans' Benefits, Judicial Review and the Constitutional Problems of "Positive" Government*, 39 IND. L.J. 183 (1964).

22. During the period the D.C. Circuit heard these cases, *infra* note 23, § 211(a) read: "[T]he decisions of the Administrator . . . on any question of law or fact concerning a *claim* for benefits or payments under any Act administered by the Veterans' Administration shall be final and conclusive." 38 U.S.C. § 211(a) (1964) (emphasis added).

23. Wellman v. Whittier, 259 F.2d 163, 168-69 (D.C. Cir. 1958) (law which precludes review of VA decisions concerning claim for benefits does not also preclude challenge to forfeiture of those benefits); Thompson v. Gleason, 317 F.2d 901, 907 (D.C. Cir. 1962) (same); Tracy v. Gleason, 379 F.2d 469, 473-74 (D.C. Cir. 1967) (same).

24. For the text of § 211(a) see *supra* note 13. The House report on H.R. 17958, which effected this change, specifically mentioned the three D.C. Circuit cases. *Service Connected Compensation Increase for Veterans: Report of the House Committee on Veterans' Affairs*, H.R. REP. NO. 1166, 91st Cong., 2d Sess. 9-11 (1970).

25. In the context of agency actions, "ultra vires" actions are those that the Administrator

Court began its own critical treatment of section 211(a) in 1974, with *Johnson v. Robison*.[26] *Johnson* excepted from the law's preclusion constitutional challenges to underlying VA statutes. Addressing the VA's contention that section 211(a) barred the Court from reaching the constitutionality of veterans' benefits legislation, Justice Brennan wrote, "[s]uch a construction would, of course, raise serious questions concerning the constitutionality of § 211(a). . . ."[27] The *Johnson* opinion did not fully indicate the scope of this constitutional exception,[28] leaving the lower courts in disagreement over two related questions: whether a court could review the constitutionality of a VA regulation,[29] and whether the VA's individual adjudications could be subject to the same attack.[30]

takes beyond his authority under applicable statutes, and are thereby analogous to a corporate director's ultra vires actions when she oversteps her authority under the corporation's articles and bylaws. One can differentiate between two types of laws an Administrator can violate: generally applicable statutes and the agency's organic statutes. This distinction becomes important in the Supreme Court's decision on ultra vires actions, Traynor v. Turnage, 108 S. Ct. 1372 (1988). *See infra* notes 31-37 and accompanying text.

26. 415 U.S. 361 (1974). Although Justice Brennan did not explain exactly why the prohibition would therefore be unconstitutional, one might suppose he was referring to the power of the courts to interpret the law, as set forth in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

27. *Id.* at 366 (footnote omitted).

28. Brennan's opinion carefully distinguished a challenge to the underlying statute from a challenge to the "decisions of the Administrator." *Id.* at 367. Yet nowhere did the opinion specifically address constitutional challenges to individual decisions, in either permissive or prohibitive language.

29. Because the language of § 211(a) specifically refers to *decisions* of the Administrator, courts seemed more comfortable in allowing constitutional attacks on Agency-promulgated rules and regulations than on individual claims. Nevertheless, some courts at least intimated that they would restrict *Johnson* to its facts, that is, to a constitutional challenge to a statute. *Compare* Roberts v. Walters, 792 F.2d 1109 (Fed. Cir. 1986) (reading *Johnson* as allowing a challenge only to a decision of *Congress*, not the Administrator) *and* Anderson v. Veterans Administration, 559 F.2d 935 (5th Cir. 1977) (limiting *Johnson* to challenges of statutory provisions or classifications) *with* Zayas v. Veterans Administration, 666 F.Supp. 361 (D.C.Cir. 1980) (§ 211(a) does not bar a court from hearing constitutional challenges to VA promulgated rules) *and* Carter v. Cleland, 643 F.2d 1 (D. P.R. 1987) (same) *and* Plato v. Roudebush, 397 F.Supp. 1295 (D. Md. 1975) (same).

30. Appellants who have brought constitutional challenges to individual claims decisions have generally based their claims on allegations of procedural due process deficiencies, although some have pressed equal protection challenges as well. Prior to the Act, courts disagreed over reviewability of individual decision appeals couched in constitutional terms. *Compare* Pappanikoloaou v. Administrator of Veterans Adm'n, 762 F.2d 8 (2d Cir. 1985) (one may not circumvent § 211(a) by seeking damages on a constitutional claim arising out of a claim for benefits) *and* Hartmann v. United States, 615 F.Supp. 466 (E.D.N.Y. 1985) (denying jurisdiction over plaintiff's equal protection challenge to VA's decision not to provide benefits) *and* Mulvaney v. Stetson, 470 F. Supp. 725 (N.D. Ill. 1979) (court has no jurisdiction to hear constitutional challenges to actions of the Administrator) *with* Walters v. National Ass'n. of Radiation Survivors, 473 U.S. 305, 311 n.3 (dicta) ("de-

More recently, the Supreme Court, in *Traynor v. Turnage*,[31] decided the ultra vires issue.[32] In that suit, veterans alleged that the VA violated section 504 of the Rehabilitation Act[33] through a regulation denying benefits to primary alcoholics.[34] The Supreme Court held that a court could review a VA regulation for legality under the Rehabilitation Act.[35] As a result, although they lost on the merits,[36] plaintiffs forced the Supreme Court to admit that it would likely review a VA regulation for consistency with a non-VA statute.[37]

One should not overstate the importance of these exceptions, as they were just that — two minor gaps in a broad preclusion of review that kept perhaps 4000 appeals from VA actions out of the courts each year.[38]

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spite the general preclusion of judicial review with respect to VA benefits claims, [the] Court held in *Johnson* . . . that the district courts have jurisdiction to entertain constitutional attacks on the operation of the claims systems.") *and* Marozsan v. United States, 852 F.2d 1469 (7th Cir. 1988) (en banc) (veteran can challenge the procedures by which claim was processed for constitutional deficiency) *and* Devine v. Cleland, 616 F.2d 1080 (9th Cir. 1980) (under *Johnson*, veteran can challenge the *absence* of procedural safeguards in VA regulations).

Plaintiffs' procedural challenges in *Marozsan* and *Devine* clearly involved more than just the individual decisions of the Administrator in their respective cases. However, one cannot read the cases as challenges to regulations; the procedures used were either informal (*Marozsan*) or simply absent (*Devine*). In practical terms, these decisions really did allow challenges to the VA's individual decision. *See, e.g., Marozsan*, 852 F.2d at 1485 (Easterbrook, J., dissenting).

31. 108 S. Ct. 1372 (1988).

32. *Traynor* presented only one type of ultra vires claim: a challenge to the Administrator's action on the basis of a non-VA statute, that is, one not "administered by the Veterans Administration." *See* 38 U.S.C. § 211(a) (1982). Veterans have also attempted, with limited success in the lower courts, to challenge the Administrator's interpretation of VA-specific statutes. *See, e.g.*, Evergreen State College v. Cleland, 621 F.2d 1002 (9th Cir. 1980) (veterans challenged VA educational benefit regulations as contrary to intent of organic statute under which rule was promulgated); Wayne State Univ. v. Cleland, 590 F.2d 627 (6th Cir. 1978) (same).

33. 29 U.S.C. § 794 (1973). This section requires that federal programs not discriminate against handicapped individuals solely because of their handicaps.

34. "Primary alcoholism," as the VA defines it, is alcoholism unrelated to an underlying psychiatric disorder. *Traynor*, 108 S. Ct. at 1376 n.2. The petitioners claimed that 38 C.F.R. § 3.301(c)(2) (1987), which labeled primary alcoholism as "willful misconduct" and thus denied benefits to those afflicted, violated the subsequently enacted section 504 of the Rehabilitation Act as discriminating against handicapped. *See Traynor*, 108 S. Ct. at 1376 & n.2.

35. 108 S. Ct. 1372, 1378-80. In answering this narrow question, the Court hinted that it would review violations of any statute that the VA did not administer, but avoided the broader question of whether it would review a violation of a VA organic statute. *Id.*

36. *Traynor*, 108 S. Ct. 1384.

37. *Id.* at 1379 ("[T]he cases now before us involve the issue whether the law sought to be administered is valid in light of a subsequent statement whose enforcement is not the exclusive domain of the Veterans' Administration.")

38. Judges Arnold and Breyer, in their statement before the Senate Committee on Veterans' Affairs, estimated that veterans would appeal 4,550 cases each year from the BVA to the courts if the

As Congress heard more stories of the farcical procedures that periodically occurred at the VA[39] and received reports that the VA generally was hiding its problems,[40] the Veterans' Judicial Review Act took shape.

II. THE VETERANS' JUDICIAL REVIEW ACT

A. Overview of the Act

Division A of Public Law 100-687,[41] while titled the Veterans' Judicial Review Act, implements a number of changes related to the fairness of the VA claims process in general, as well as specifically altering the judicial review scheme of Title 38.[42] The new law codifies a set of procedures to be followed at both the local level[43] and at the BVA.[44] Additionally, the Act creates an extra level of review within the Agency. Prior to the Act, the BVA was the final level of review for a veteran's benefit claim.[45] The new law establishes the Court of Veterans Appeals (CVA), an article I court[46] that will review appeals from the BVA.[47]

The new law will also affect the veteran's representation before the VA.

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bar to judicial review was lifted. *Judicial Review Legislation: Hearing on S. 11 and S. 2292 Before the Senate Comm. on Veterans' Affairs*, 100th Cong., 2d Sess. 582 (1988) [hereinafter *Senate Hearings on Judicial Review*].

39. One incredible report reached Congress in 1983 through a hearing statement by the Veterans' Due Process, Inc. A former staff legal advisor to the BVA asked her chairman why the Board had denied a seemingly routine case, in which a black serviceman incurred "pes planus," or flat feet, while serving in Korea. "He explained that it was because the veteran was black and all black people eventually get flat feet." *Judicial Review of Veterans' Claims: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Veterans' Affairs*, 98th Cong., 1st Sess. 255 (1983).

40. *See, e.g., Investigation of the VA*, *supra* note 4, at 3-8 (reporting that the VA had been understating the number of errors found in the claims processing programs, and that favoritism, undue emphasis on production quotas, etc., hampered the BVA from operating in the best interests of veterans).

41. Pub. L. No. 100-687, 102 Stat. 4105, Div. A (1988). Division B of Public Law 100-687 is the Veterans' Benefits Improvement Act.

42. Although these elements merit analysis, they are analytically distinguishable from the issue of judicial review and thus fall outside the focus of this Note. They are mentioned here merely to convey the context of the Act's judicial review provision.

43. Pub. L. No. 100-687, § 103, 102 Stat. 4105 (1988) (to be codified at 38 U.S.C. §§ 3007-09).

44. Pub. L. No. 100-687 §§ 201-209, 102 Stat. 4105, 4109-12 (1988). Apparently these procedures were in some respects only a codification of what was already going on informally at the VA. *See Senate Report on S. 11*, *supra* note 7, at 27. Some parties to the Act's development thought that codification of certain adjudications procedures would preserve informality at the VA even after the imposition of judicial review. *Id.* at 32.

45. *See* Rabin, *supra* note 3, at 913.

46. An article I court, or an administrative court, is an adjudicative body that is part of the executive branch. In this way, agencies often adjudicate claims within their jurisdiction first, with

The ten dollar ceiling on attorney fees, unchanged since the Civil War,[48] effectively eliminated private counsel from the process,[49] and left veterans only the free representation offered by the various veterans' service organizations.[50] In the Act, Congress lifted this limitation with respect to work performed after a final BVA decision.[51]

Concerning judicial review, the Act provides for oversight in two places. First, it allows review of direct challenges to VA regulations.[52] Second, it allows review of benefits adjudications.[53] The history of the

judicial review by an article III court generally to follow. *See* R. CASS AND C. DIVER, ADMINISTRATIVE LAW: CASES AND MATERIALS 631-33 (1987).

47. The CVA will enjoy a scope of review of appealable BVA decisions roughly equivalent to that of a reviewing court over an agency under the Administrative Procedure Act (APA), 5 U.S.C. § 706 (1982). The major difference occurs in review of fact findings, which the CVA can set aside if it finds them to be "clearly erroneous." 38 U.S.C.A. § 4061 (West Supp. 1989). This standard is arguably broader than either the "substantial evidence" or "arbitrary and capricious" standards accorded such findings under the APA. 5 U.S.C. § 706 (1982).

48. *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 359-60 & n.2.

49. Private counsel might have offered to help out a veteran gratuitously, but these gestures were likely rare.

50. *Walters*, 473 U.S. at 311.

51. Pub. L. No. 100-687, § 104, 102 Stat. 4105, 4108 (1988). The new law may prove ineffective. First, the BVA can review and reduce an attorney's fee if it finds it "excessive or unreasonable"; moreover, in no event can the fee exceed twenty percent of the *past-due* benefits awarded. *Id.* Second, as noted above, the attorney cannot bill for work performed prior to a final decision by the BVA. This leaves the veteran without paid counsel's assistance during the initial rating board decision and first appeal. *Id.*

52. 38 U.S.C.A. § 223(c) (West Supp. 1989) (So one is not confused, Pub. L. 100-322, Title II, 1203(b)(1), 102 Stat 487, 509 (1988) also added to Title 38 a section 223, entitled "Administrative settlement of tort claims," which Congress apparently forgot when it passed the Act). This section essentially opens VA regulations to direct challenges before the courts under APA § 706 scope of review standards. As will be discussed later, a court can review a challenge to a regulation only within the context of a benefits adjudication under the new scope of review devised for 38 U.S.C. § 4092. *See infra* note 214 and accompanying text.

53. 38 U.S.C.A. § 4092 (West Supp. 1989). Subsection (d) of § 4092 provides as follows:

> (d)(1) The Court of Appeals for the Federal Circuit shall decide all relevant questions of law, including interpreting constitutional and statutory provisions. The court shall hold unlawful and set aside any statute or regulation or any interpretation thereof (other than a determination as to a factual matter) that was relied upon in the decision of the Court of Veterans Appeals that the Court of Appeals for the Federal Circuit finds to be —
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> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
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> (B) contrary to constitutional right, power, privilege, or immunity;
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> (C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or
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> (D) without observance of procedure required by law.
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> (2) Except to the extent that an appeal under this chapter presents a constitutional issue, the Court of Appeals may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case.

Act illuminates the development of these provisions.

B. *History of the Act*

1. *Senate Efforts to Expand Review*

Prior to 1988, Congress frequently held hearings concerning section 211(a)'s strict bar on judicial review.[54] On each occasion that the Senate actually passed measures to amend the law, an unyielding House of Representatives thwarted the attempt.[55] Counting on a shift of political forces, including an initiative to designate a new cabinet post for veterans' affairs,[56] Senator Cranston introduced Senate bill S. 11, the Veterans' Judicial Review Act, on the opening day of the One Hundredth Congress.[57] The following spring, Senator Murkowski introduced a substitute bill, S. 2292.[58] These two bills presented the Senate with an adequate medium to debate the issue of scope of review.

Although both Senate bills called for some review of VA regulations,[59] they differed on the question of factual review for adjudications.[60] From

54. *See, e.g., 1 Hearings on H.R. 585, supra* note 1; *Judicial Review of Veterans' Claims: Hearings on H.R. 1959 Before the Subcomm. on Oversight and Investigations of the House Comm. on Veterans' Affairs*, 98th Cong., 1st Sess. (1983); *Veterans' Administration Adjudication Procedure and Judicial Review Act: Hearing on S. 349 and Related Issues Before the Senate Comm. on Veterans' Affairs*, 97th Cong., 1st Sess. (1981); *Judicial Review of Veterans' Claims: Hearings Before the Subcomm. on Special Investigations of the House Comm. on Veterans' Affairs*, 96th Cong., 2d Sess. (1980); *Veterans' Administration Adjudication Procedure and Judicial Review Act: Hearings on S. 330 Before the Senate Comm. on Veterans' Affairs*, 96th Cong., 1st Sess. (1979); *VA Administrative Procedure and Judicial Review Act: Hearings on S. 364 and Related Bills Before the Senate Comm. on Veterans' Affairs*, 95th Cong., 1st Sess. (1977).

55. *See* S. 636, 98th Cong., 1st Sess., 129 CONG. REC. S8488-97 (daily ed. June 15, 1983); S. 349, 97th Cong., 1st Sess., 127 CONG. REC. 1353-65 (1981); S. 330, 96th Cong., 1st Sess., 125 CONG. REC. 24,751-54 (1979). Each of these bills died in the House. *See* 134 CONG. REC. S16658 (daily ed. Oct. 18, 1988) (statement of Sen. Murkowski).

56. *See supra* note 4.

57. 133 CONG. REC. S148 (daily ed. Jan. 7, 1987) (continuation of Senate proceedings of Jan. 6, 1987).

58. 134 CONG. REC. S4188 (daily ed. Apr. 18, 1988).

59. Both bills allowed the Administrator to promulgate rules under the Administrative Procedures Act's provisions, and to varying degrees, each allowed judicial review of those regulations. *See* S. 11, 100th Cong., 1st Sess. 17 (1987) (allowing review of regulations within a challenge to an adjudication), *reprinted in Senate Hearings on Judicial Review, supra* note 38, at 67; S. 2292, 100th Cong., 2d Sess. 2, 7-8 (1988) (allowing direct review of regulations), *reprinted in Judicial Review of Veterans' Affairs: Hearing Before the House Comm. on Veterans' Affairs*, 100th Cong, 2d Sess. 133, 138 (1988) [hereinafter *House Hearings on Judicial Review*].

60. S. 2292 actually limited judicial review to determining the validity of agency regulations only. S. 2292, 100th Cong., 2d Sess. 7 (1988), *reprinted in House Hearings on Judicial Review, supra* note 59, at 138. Under this version, a court could review neither the interpretation of a regulation or

previous attempts to rewrite section 211(a), the Senate had learned that full factual review under traditional standards[61] would arouse fear in the House of Representatives of both overburdening the court system and disrupting the nonadversarial nature of the VA claims system.[62] Therefore, constraining factual review within the new scheme became a priority, the question remaining being just how far.

S. 11's scope of review section followed almost exactly the format of the Administrative Procedures Act (APA),[63] except that, instead of reviewing factual findings for "substantial evidence,"[64] a court would be able to set aside a finding only "when it [was] so utterly lacking in a rational basis in the evidence that a manifest and grievous injustice would result if such finding were not set aside."[65] Acknowledging that under this new standard a court would overturn only a very small number of fact findings,[66] Senator Cranston still considered some level of factual review necessary to address the problems existing under section 211(a).[67]

Conversely, S. 2292 called for the BVA to address separately in any

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statute within a case nor the fact findings of a case. S. 11, on the other hand, allowed not only for review of regulations and questions of law from adjudications, but even provided for limited review of fact findings as well. S. 11, 100th Cong., 1st Sess. 22 (1987), *reprinted in Senate Hearings on Judicial Review*, *supra* note 38, at 88. Because the question of fact review dominated the Senate committee's report on the two bills, it is clear that this difference, and not review of nonfact issues, was of central importance to the Committee. *See, e.g., Senate Hearings on Judicial Review*, *supra* note 38, at 175 (statement of Sen. John Kerry, Comm. on Veterans' Affairs, denouncing S. 2292 for its failure to allow fact review); *id.* at 124 (statement of Sen. Matsumaya, same).

61. The term "traditional standards" refers to those standards which courts apply under the APA when reviewing fact findings in adjudications: findings found to be "arbitrary and capricious," APA § 706(2)(A) 5 U.S.C. § 706 (2)(A), (1982), or "unsupported by substantial evidence." APA § 706(2)(E), 5 U.S.C. § 706(2)(E) (1982).

62. For one manifestation of these fears, see *House Hearings on Judicial Review*, *supra* note 59, at 259 (statement of Paul R. Verkuil). For criticism of such concerns, see 1 *Hearings on H.R. 585*, *supra* note 1, at 249-54 (statement of Robert O. Muller).

63. Compare the language of S. 11's scope of review provision, S. 11, 100th Cong., 1st Sess. 21-22 (1987), *reprinted in Senate Hearings on Judicial Review*, *supra* note 38, at 87-88, with the APA's scope of review, 38 U.S.C. § 706 (1982). The only variations, aside from organizational changes, are the deletion of the trial de novo section, § 706(2)(f), the specification of review on the whole record, and the change of § 706(2)(e)'s "substantial evidence" standard.

64. 38 U.S.C. § 706(2)(e) (1982) applies the "substantial evidence" test to formal rulemaking and adjudications.

65. S. 11, 100th Cong., 1st Sess. 22 (1987), *reprinted in Senate Hearings on Judicial Review*, *supra* note 38, at 88.

66. *See Senate Report on S. 11*, *supra* note 7, at 130-31 (additional views of Sen. Cranston). Note also Sen. Murkowski's recounting of Judge Arnold's view that "almost any factual finding could survive [S. 11's] test." *Id.* at 114.

67. *See Senate Report on S. 11*, *supra* note 7, at 130-31 (additional views of Sen. Cranston). This Note discusses the problems Senator Cranston may have feared in Part IV.

appeal the validity of the VA regulation questioned therein.[68] A court of appeals could then hear a challenge only as to this determination.[69] Senator Murkowski believed that the power to review the validity of a VA regulation would make the BVA a more independent body and therefore a more dependable forum of review overall.[70] S. 2292, however, did not allow for judicial review of either the VA's findings of law or findings of fact.[71]

Hence, the critical question of whether or not to grant judicial review of the VA's factual determinations in adjudications was before the Senate. Senator Murkowski denounced factual review, emphasizing a number of concerns including the added strain on the judicial system,[72] the misleading sense of hope S. 11 would give veterans,[73] and the need for compromise to get the measure through the House.[74] Senator Cranston responded to this challenge by citing a veteran's right to equal access to the court system,[75] the need for factual review to answer some of the problems judicial review is intended to solve,[76] and the favorable impact factual review would have on BVA adjudication outcomes and clarity.[77] By close votes in both the Committee on Veterans' Affairs and on the floor, the Senate opted for S. 11's scope of review, including review of

68. S. 2292, 100th Cong., 2d Sess. 7 (1988), *reprinted in House Hearings on Judicial Review, supra* note 59, at 138.

69. *Id.*

70. *Senate Report on S. 11, supra* note 7, at 112, 114-15 (additional views of Senators Murkowski, Thurmond, and Stafford). Even the new law left unchanged 38 U.S.C. § 4004(c), which precludes the BVA from questioning VA regulations in the context of an appeal. *See* 38 U.S.C.A. § 4004 (West Supp. 1989). However, the new CVA will have jurisdiction over such questions. *See supra* note 47.

71. *See supra* note 60.

72. *Senate Report on S. 11, supra* note 7, at 115 (additional views of Sen. Murkowski).

73. Murkowski dramatized this point on the floor of the Senate: "Where is the justice there, Mr. President? We create the illusion that there is a review, but there really is not. All that is left are the attorneys' fees to be paid, and paid by whom? Paid by the veteran." 134 CONG. REC. S9192 (daily ed. July 11, 1988).

74. "I see S. 2292 as a compromise which has the potential of enactment . . . . We have to look at why our bills died in the House on four occasions." 134 CONG. REC. S9191 (daily ed. July 11, 1988).

75. *Senate Report on S. 11, supra* note 7, at 60.

76. Note Cranston's discussion of scope of review on the floor of the Senate. 134 CONG. REC. S9185 (daily ed. July 11, 1988).

77. "I am satisfied that providing for factual review even of a narrow scope will have a very salutary effect on the operations of the BVA — on the evenhandedness of its decisions and on the thoroughness and clarity of its opinions." *Senate Report on S. 11, supra* note 7, at 130 (additional views of Sen. Cranston).

fact findings.[78]

2. *The House Compromise*

The House Committee on Veterans' Affairs and its chairman, G.V. "Sonny" Montgomery, were not impressed with the arguments for factual review.[79] Notwithstanding the various bills favoring some standard of factual review which were presented in the House,[80] the Committee chose to write its own bill[81]—one which formulated a new compromise scope of review.

The product of the House committee's efforts, H.R. 5288, followed a consensus among the bills presented[82] by allowing full judicial review of VA regulations. The bill essentially borrowed the APA's procedures for both rulemaking[83] and judicial review of rules so promulgated.[84] The House committee changed the forum for judicial review, however; instead of allowing appeals to be heard in federal district courts or courts of appeal,[85] H.R. 5288 gave exclusive jurisdiction to the Court of Appeals for the Federal Circuit (CAFC).[86]

The House committee struck a compromise on scope of review for adjudications which divided potentially appealable issues into three catego-

78. The Committee voted to report S. 11, as amended, over S. 2292 by only a 7-4 vote. *Senate Report on S. 11*, *supra* note 7, at 111. The Senate tabled the motion to amend S. 11 with the substitute, S. 2292, by only a 61-36 margin, despite the Committee's recommendation. 134 CONG. REC. S9205 (daily ed. July 11, 1988). The amended version of S. 11 included a provision allowing review of VA regulations, undoubtedly added in response to S. 2292. S. 11, 100th Cong., 2d Sess. 26, *reprinted in House Hearings on Judicial Review*, *supra* note 59, at 169.

79. Rep. Montgomery, opening the House committee hearings, stated, "I am not persuaded, however, that factual decisions on veterans' claims should be subject to judicial review in the Federal courts . . . ." *House Hearings on Judicial Review*, *supra* note 59, at 2.

80. Besides S. 11, the House committee also considered H.R. 639, which called for review of fact findings under an "arbitrary and capricious" standard. H.R. 639, 100th Cong., 1st Sess. 1, 16-17 (1987), *reprinted in House Hearings on Judicial Review*, *supra* note 59, at 83, 98-99.

81. H.R. 5288 was introduced to the House on September 14, 1988, six days after the House hearings. The Committee ordered the bill reported out on September 15. *See Report on H.R. 5288*, *supra* note 20, at 4.

82. *See supra* notes 59, 78. *See also*, H.R. 5039, 100th Cong., 2d Sess. 1, 10-11, (1988), *reprinted in House Hearings on Judicial Review*, *supra* note 59, at 116-17; H.R. 639, 100th Cong., 1st Sess. 1, 16-17 (1988), *reprinted in House Hearings on Judicial Review*, *supra* note 59, at 98-99.

83. *See* H.R. 5288, *Report on H.R. 5288*, *supra* note 20, at 54.

84. *Id.*

85. H.R. 639 provided for judicial review by any federal district court. *House Hearings on Judicial Review*, *supra* note 59, at 96. H.R. 5039, S. 2292 and S. 11 all would have allowed review in the federal courts of appeals. *Id.* at 125, 138, 169-79.

86. *Report on H.R. 5288*, *supra* note 20, at 69.

ries: questions of law, questions of fact, and questions of "application."[87] Because the language of the Act as passed arguably adopts the same preemption scheme,[88] a brief consideration of what the House probably meant by this breakdown will be useful.

Courts have generally used differing levels of deference when reviewing an agency's findings of law and findings of fact, substituting their own judgment relatively freely[89] in the case of the former but reviewing the latter only for some level of rationality.[90] However, commentators have noted that courts often apply the more lenient rationality test to agency findings which in effect impose normative standards, that is, they appear to be findings of law.[91] Such determinations constitute a third category of issues on appeal, termed questions of application,[92] analogous to a finding of law yet receiving the treatment of findings of fact. The House was evidently describing this third category through the use of the phrase "application of any law."[93]

There has been much debate over why courts choose a more or less

87. H.R. 5288's preclusion section, after specifically allowing appeal on questions of law, states: "The Court of Appeals may not review the facts of the appeal or the application of any law or regulation to those facts unless there is presented a constitutional issue." *Report on H.R. 5288, supra* note 20, at 69-70. Note how this formulation compares with the "traditional" breakdown of only questions of law and questions of fact. *Supra* note 19.

88. This Note posits that the language of the Act as adopted may create a different effect than the language of H.R. 5288. *See infra* notes 121-51 and accompanying text.

89. "Substituting their judgment" is the phrase traditionally associated with the low level of deference the courts show toward agency findings of law. *See* 5 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29:9 (2d ed. 1984). However, because of developments in recent years, this phrase requires qualification. The principles laid out in Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984) and other cases dictate that, as a prudential matter, a court should pay some deference to the agency's interpretation.

90. *See supra* note 19.

91. Compare, for example, NLRB v. Hearst Publications, Inc., 322 U.S. 111, 130-31 (1944), which applies a lenient test, with Packard Motor Co. v. NLRB, 330 U.S. 485, 490 (1947) which seems to substitute the Court's judgment on the same question of defining "employee." Several commentators have picked up on the striking difference in treatment of these two cases. *See, e.g.*, L. JAFFE, *supra* note 19, at 558-64; Levin, *supra* note 19, at 24-25. Another example of lenient review in a normative context occurs in Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 568 (1980) (court is bound by agency interpretation so long as it "is not irrational"). The last section of this Note will develop more fully how a court is likely to handle mixed questions as they arise in the VA context.

92. *See* Levin, *supra* note 19.

93. Rep. Montgomery describes the language as referring to "mixed questions." 134 CONG. REC. H10343 (daily ed., Oct. 19, 1988). "Mixed questions" is another name for law application. L. JAFFE, *supra* note 19, at 563; Levin, *supra* note 19, at 6.

lenient test in cases which all seem to involve enforcing legal standards.[94] The House appears to have adopted the view that a court finds a question of application where the court believes the underlying law or regulation gives the agency discretion in fixing a standard.[95] Whereas Congress often clearly imposes rules for the agency to enforce, sometimes the legis-

94. Aside from the theory described in the following text, this Note will only mention several major commentators and the relative likelihood of their theories serving as the House's model in adopting § 4092. A more comprehensive listing of the literature can be found in Levin, *supra* note 19.

Henry Hart began with the proposition that questions of law must be open to judicial consideration. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1377 (1953). Hart found decisions such as *Hearst*, 322 U.S. 111, consistent with his proposition, because these presented not questions of law, but rather a " 'body of rules and principles that grow out of the exercise of administrative discretion' — at least while the rules are in process of crystallizing." Also, he anticipated that courts would be able to decide the breadth of agency discretion and control it. Hart, *supra* at 1377-78. Hart's second argument does not go very far in relating a standard that Congress might enforce. His first argument, that courts will defer to agencies when they see the agency using discretion, is actually quite close in language to the theory discussed in the text of this Note. However, Professor Hart did not explain his "discretion" theory very thoroughly.

Louis Jaffe's theory confronts this issue differently; he adopts the understanding that both categories of questions are still questions of law. L. JAFFE, *supra* note 19, at 553-55. Because Congress specifically differentiated questions of law from questions of application, it is unlikely it intended to adopt Professor Jaffe's view.

Finally, Professor Davis proposed that the confusion surrounding the two levels of review could not be defined by differentiating "law" from related concepts, due to the lack of a meaningful distinction between the two. K. DAVIS, *supra* note 19, at § 29:9. This theory, like Jaffe's, does not help determine what the House intended, because the House attempted just what Davis proposed was impossible.

95. The House Report's section-by-section analysis of the bill describes the fact and application preclusion, and follows it with an explanatory reference to the ABA restatement of the scope of review doctrine. *Report on H.R. 5288*, *supra* note 20, at 36. The position of this restatement is that questions of law arise only where there is some standard, either statutory or constitutional, that the agency must follow. Levin, *Scope-of-Review Doctrine: Restatement and Commentary*, 38 ADMIN. L. REV. 233, 235, 267-8. This division leaves out from questions of law instances where, although the agency is defining principles to be followed, it does so with Congress' intent that the agency exercise its discretion. The restatement, therefore, follows the "discretionary" model described by several recent commentators. *See* Levin, *supra* note 19; Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1 (1983). *See also* Wald, *Some Thoughts on Beginnings and Ends: Court of Appeals Review of Administrative Law Judges' Findings and Opinions*, 67 WASH. U.L.Q. 661, 666 (1989) (Chief Judge of the D.C. Circuit, stating that "[agency] interpretation of statutory law, if reasonable, will prevail when we do not think Congress has spoken to the precise issue.").

Although the above reference in the legislative history is not dispositive, there is so little legislative history on the interpretation of "application of law" that such reference takes on great weight. The dearth of history is the result of the Committee's drafting of H.R. 5288, which went unreported. Additionally, the provision was injected into the final bill in secret committee meetings, again unreported. Thus, one is left only with the above reference and several informal remarks made on the floor of either house.

lation leaves the decision to the agency as to what rule to impose.[96] Under the theory that the House adopted, a court will review normative findings for mere rationality when it concludes that Congress has left the issue open for agency discretion; the agency's "application" of a broad statute garners greater deference than its interpretation of a rule imposed by Congress.[97]

Returning to the House compromise, H.R. 5288 barred a court from reviewing any findings of fact or any application of law to fact in the meaning discussed above.[98] This scheme left a court only the authority to review adjudications on questions of law.

The addition of a new administrative level of appeal may have placated those Congressmen who believed H.R. 5288's scope of review was too narrow.[99] The CVA was to consist of a panel of judges[100] appointed by

96. In some situations, this difference could be blatant in the statute: Congress may enact a standard, or explicitly defer to the agency. In others, the distinction may come from the legislative history.

97. Where Congress has left the decision of a standard up to the agency, it is possible to refer to the agency's ultimate decision as "applying" the statute to the given situations that arise. This use of "application" makes the statements on the floor of either House at the time of passage consistent with the "discretionary" theory proposed here. *See, e.g.*, 134 CONG. REC. H10,343 (daily ed. Oct. 19, 1988) (statement of Rep. Montgomery, explaining that the CAFC must deny relief where a veteran "alleges that the regulation as applied to the particular facts in his or her case produced a result that should be overturned"); 134 CONG. REC. S16,659 (daily. ed. Oct. 18, 1988) (statement of Sen. Cranston, explaining that "[t]he federal circuit cannot review whether, in a particular case, a law or regulation was applied inappropriately").

In fairness, two other explanations for these illustrative comments exist. First, it is possible Congress really did envision a difference, even where the organic statute dictated a standard, between the standard itself and the agency's "application" of that standard (and, implicitly, between that application and the agency's understanding of the facts). Implying such a "third step" in the process of agency adjudication makes little sense. Once an agency has determined the standard to be applied, and interpreted the facts presented by the case before it, there seems little room for complaint as to how it fits those two pieces together.

The second possible explanation, one which might obtain even were a court to believe the first, is that many or all of those in Congress involved in the debate simply did not *understand* the exact contours of the distinction they were announcing. Differentiating between questions of fact and law has given Congress trouble before, in the context of the Bumper's Amendment. *See* Levin, *supra* note 19, at 5-9.

98. Part Four of this Note assumes that the above discussion describes the intent behind the Act as well, and discusses the effect such preclusion will have on recurrent situations brought before the VA.

99. H.R. 5288's plan for the CVA, a new article I court, eventually became law. *See supra* notes 45-47 and accompanying text.

100. Under H.R. 5288, the CVA was to consist of up to sixty-five judges. *Report on H.R. 5288*, *supra* note 20, at 62. The final version reduced the number to no more than seven judges. 38 U.S.C.A. § 4053(a) (West Supp. 1989).

the President and empowered to review BVA decisions. Many thought that this independent review board would compensate for any deficiencies inherent in the limited scope of judicial review.[101]

S. 11, as amended by the substitute H.R. 5288, passed in the House,[102] and was reintroduced to the Senate at the beginning of the final week of the One Hundredth Congress.[103] Pressed for time,[104] the heads of both House and Senate committees bypassed conference, and apparently held private meetings to hammer out a further compromise.[105] The Senate passed the resulting bill on October 18,[106] and the House approved the compromise amendment the next day.[107]

III. 38 U.S.C. § 4092: AN ANALYSIS

The new statute provides separately for judicial review of VA regulations[108] and for judicial review of individual decisions of the new CVA.[109] Although the change in the scope of review for regulations was much more sweeping when compared to the old law,[110] by far the greater controversy surrounded the new scope of review for individual benefits claims.[111] Several portions of the Act are noteworthy, because of either

101. *See* 134 CONG. REC. S16,658 (daily ed. Oct. 18, 1988) (statement of Sen. Murkowski). Under the law as passed, the CVA will have reversal power equivalent to an appeals court, that is, where the findings below were "clearly erroneous." 38 U.S.C.A. § 4061(a)(4) (West Supp. 1989). The scope of this Note does not include an analysis and prediction of the CVA's effectiveness at rooting out VA claims errors. It should be stressed, therefore, that the discussion in Part Four predicts only the effectiveness of independent judicial review, and not of the new law overall.

102. 134 CONG. REC. H9370, H9375 (daily ed. Oct. 3, 1988).

103. 134 CONG. REC. S16,632 (daily ed. Oct. 18, 1988).

104. At the end of that week, the legislature would adjourn, the One Hundredth Congress would close, and all legislation not passed at that time would die. To avoid this fate, and the prospect of having to build momentum and a coalition again, the bill's sponsors pushed hard for passage.

105. Cranston cryptically announced the bill as a "substitute amendment . . . in lieu of a conference report." 134 CONG. REC. S16,638 (daily ed. Oct. 18, 1988). One newspaper called the final bill the product of "secret negotiations." N.Y. Times, October 19, 1988, at A14, col. 5.

106. 134 CONG. REC. S16,660 (daily ed. Oct. 18, 1988) (statement of Sen. Cranston).

107. 134 CONG. REC. H10,333-61 (daily ed., Oct. 19, 1988).

108. 38 U.S.C.A. § 223 (West Supp. 1989).

109. 38 U.S.C.A. § 4092 (West Supp. 1989).

110. The language of 38 U.S.C. § 211(a) (1982) (old law) seemed to preclude all review of agency regulations; the new law provides full Administrative Procedure Act (APA) style review for both legal and factual components of VA regulations, as found in 5 U.S.C. § 706 (1982). *See supra* note 52. This change is not as sweeping as one might think, in light of some judicial interpretations of the scope of § 211(a). *See, e.g.*, Traynor v. Turnage, 108 S. Ct. 1372 (1988) (§ 211(a) does not bar review of a VA regulation on an ultra vires challenge); Carter v. Cleland, 643 F.2d 1 (D.C.Cir. 1980) (§ 211(a) does not bar a court from hearing constitutional challenges to VA promulgated rules).

111. VA regulations review aroused little complaint, *supra* note 82 and accompanying text,

their effect or the very uncertainty of their effect. This Part addresses the controversial portions: first, it questions Congress' ultimate choice of the forum in which judicial review will take place; second, it gives careful analysis to the literal meaning of the Act's division of reviewable and nonreviewable issues; third, it illustrates the effect of Congress' decision to allow full judicial review of any constitutional issue; and fourth, it demonstrates the import of the Act's preclusion of VA rating schedule review.

A. Review by the Court of Appeals for the Federal Circuit

Although one cannot doubt Congress' desire to open the courts to veterans, one might question its choice of forums for judicial review. Proposals forwarded in each house provided schemes that would have allowed review either by any federal district court or by any federal court of appeals.[112] Each plan would have assigned an appeal to a court which stood reasonably close geographically to the appealing veteran's home. Nevertheless, the Act drew from H.R. 5288[113] the limitation that the Court of Appeals for the Federal Circuit (CAFC), located in Washington, D.C., would enjoy exclusive jurisdiction.[114] While Congress stressed the advantage such limited jurisdiction would have for the uniformity of nationwide VA policy,[115] this choice will likely impede some eligible veterans in seeking judicial review.[116] Balanced against this hardship is the notion of uniform policy, a benefit that no comparable agency enjoys[117] and one that is of questionable utility.[118]

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whereas much of the debate in Congress centered on fact finding review. *See supra* notes 60-88 and accompanying text.

112. *See supra* note 85.

113. *Report on H.R. 5288*, *supra* note 20, at 69.

114. 38 U.S.C.A. § 4092 (West Supp. 1989).

115. 134 CONG. REC. S16,649-50 (daily ed. Oct. 18, 1988) (statement of Sen. Cranston); *Report on H.R. 5288*, *supra* note 20, at 28.

116. Senator Cranston admits to this failing of the new legislation, but cites the need to compromise as a reason for the limitation. *Id.* His alternative explanation, that the veteran need not appear at the argument before the CAFC, makes little sense, considering the expense of sending an attorney to Washington. A Veterans Organization service representative would be available in Washington, D.C., but this answer ignores the veterans' major victory of the removal of the attorney fees cap. *See* Pub. L. No. 100-687, § 104, 102 Stat. 4105 (1988) (amending 38 U.S.C. § 3404). *See also supra* notes 48-51 and accompanying text.

117. The only agency comparable in size to the VA and distributing benefits across the country is the Social Security Administration. It does not enjoy the convenience of exclusive CAFC jurisdiction.

118. Because the VA distributes benefits through its regional offices, these offices would follow

Moreover, while opponents of full judicial review often cited the massive burden it would impose on the federal courts,[119] there is no appraisal in the legislative history of how the final legislation would affect the CAFC's docket.[120] In protecting the efficiency of the country's judicial system as a whole, Congress may have clogged the very court in which veterans themselves may seek review.

B. Review of Issues of Law

Naturally much of the debate in the committee hearings centered on which issues the Act should allow the judiciary to scrutinize.[121] Review of agency adjudications is generally divided between review of issues of law, issues of fact, and issues of application of law to fact.[122] In choosing to report out S. 11 rather than S. 2292, the Senate committee explicitly opted for a level of factual review as well as review of legal issues.[123] The House version, on the other hand, allowed review of questions of law, but barred review of either "facts . . . or the application of any law or regulation to those facts . . . ."[124]

In the broad effort to compromise, Congress adopted scope of review language which paralleled the House bill, but with a shift in word order. This shift may present a problem of interpretation for a reviewing court. Instead of barring review of a challenge to the application of law to fact, the Act precludes review of "a challenge *to a law or regulation* as applied to the facts."[125] Because the language speaks of a challenge to a law rather than to the application of a law, the provision appears to sidestep the administrative review concept of law application.[126]

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the rules laid down by their particular jurisdiction. On appeal, the BVA, like any other agency, could simply follow the law of the circuit from which the appeal came.

119. *See supra* note 17 and accompanying text.

120. The number of cases filed in the CAFC in the administrative year 1987-88 was slightly less than 1300. *Detailed Statistical Tables*, ANN. REP. OF THE DIRECTOR OF THE ADMIN. OF COURTS 1 (1988). The addition of veterans' appeals, estimated conservatively at more than 4000, to that court's docket may quadruple the number of cases of which the court will have to dispose. *See supra* note 38.

121. *See supra* 59-98 and accompanying text.

122. *See supra* note 53 (language of § 4092(d)(2)).

123. *Supra* notes 72-78 and accompanying text.

124. *See supra* note 87.

125. 38 U.S.C.A. § 4092 (d)(2)(B) (West Supp. 1989) (emphasis added). Subsection (d)(2) reads: "Except to the extent that an appeal under this chapter presents a constitutional issue, the Court of Appeals may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case." *Id.*

126. Reading the provision to cover applications of law to fact in the administrative review sense

On examination, the literal meaning of the section more closely describes an as-applied challenge, the type evidenced in the Supreme Court's decision of *Bowers v. Hardwick*.[127] In such an attack, a party makes no attempt to invalidate the statute or regulation in every application,[128] conceding that in some instances it might very well be legitimate. The party instead charges that when the statute or regulation is applied to him, it violates some outside authority[129]; in that particular application, the law is invalid. The *Bowers* Court dealt only with the question raised by the particular facts: whether the Georgia sodomy statute was unconstitutional as applied to members of the same sex.[130] The Court refused to answer respondents' challenge that the statute would be unconstitutional when applied to any couple, even one of opposite gender.[131] Central to this or any other as-applied analysis is the limited remedy available. Had respondents won in *Bowers*,[132] the statute would not be completely invalid, but merely inapplicable to same-sex couples.[133]

Usually, as-applied challenges arise under an asserted constitutional privilege. For example, the procedural due process clause,[134] substantive

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is not implausible. However, the language is at best confusing, and one not well versed in the provision's history might easily come up with a different understanding.

127. 478 U.S. 186 (1986). *Bowers* dealt with a substantive due process challenge to a Georgia sodomy law under which a couple of the same sex was arrested. *Id.* at 187-88.

The argument that the language of § 4092 invokes this as-applied understanding gains strength from misstatements or misunderstandings of members of Congress themselves. Note, for example, one attempt by Rep. Montgomery to explain the application provision: "The Courts cannot hold that a regulation is valid generally but is invalid as applied to the facts of a given case." 134 CONG. REC. H10,343 (daily ed. Oct. 19, 1988). The description defines an as-applied attack in the *Bowers v. Hardwick* sense.

128. This would be a facial challenge to the statute. As an example, a facial challenge might be brought on the facts of Plessy v. Fergusson, 163 U.S. 537 (1896), in which a statute barred blacks from riding in the same train car as whites. This law is invalid on its face by modern fourteenth amendment standards, as it could never be applied in a way consistent with the Constitution.

129. The authority violated might be constitutional or statutory, as the discussion brings out.

130. *Bowers*, 478 U.S. at 190.

131. Brief for Respondent at 5, *Bowers*, 478 U.S. 186 (1986) (No. 85-140).

132. Respondents lost in *Bowers*, the Court ruling that the due process clause does not protect the right to engage in homosexual sodomy. *Bowers*, 478 U.S. at 196.

133. This result is intended for illustration only. In reality, the Court's purpose in paring the issue down to an as-applied challenge was to avoid answering whether the statute was constitutional when applied to mixed gender couples, married or not. Therefore, there was never a possibility that it may have struck down the law with respect to same sex couples only.

134. An as-applied challenge under the procedural due process clause is relatively easy to imagine. In the context of a benefits administration like the VA, due process may not always require a hearing before a denial of benefits. Suppose a VA regulation denies any formal hearing on a disabil-

due process clause,[135] and even the equal protection clause[136] provide the type of rights on which a statute or regulation might only occasionally infringe, making each susceptible to use in this form of attack. Therefore, one arguing against the above reading of section 4092(d)(2) could complain that it conflicts with the directly preceding constitutional exception.[137] Were as-applied challenges limited to constitutional violations, a reader could conclude that, because the Act explicitly allows review of any challenge of constitutional magnitude, Congress would not have immediately thereafter prohibited a class of challenges which could only be constitutional. However, as-applied challenges might arise in a statutory context as well, thus rebutting the alleged inconsistency.[138]

An example of a statutory as-applied challenge might be helpful. The petitioners in *Traynor v. Turnage*[139] challenged a regulation that specifically deemed primary alcoholism[140] "willful misconduct," a status under which a veteran forfeits certain benefits.[141] Had the Rehabilitation Act demarcated only a certain subset of primary alcoholics, and forbidden any denial of federal benefits based solely on this more specific handi-

ity benefits determination. A veteran with a broken arm could likely get an equally accurate determination with only a submission of doctors' reports. However, a veteran claiming Agent Orange-related illness might argue that his situation is so complex that due process requires a hearing based on the risk of erroneous deprivation. This veteran would not challenge the regulation on its face, but only as it applies to his situation.

135. *Bowers* was a substantive due process case. *See supra* notes 126-32 and accompanying text.

136. As-applied challenges based on the equal protection clause are more rare than due process challenges. In the usual context of race or gender, the classification involved is unlikely to violate the fourteenth amendment with regard to some members of the class but not others. Such a challenge did arise in the context of the mentally handicapped, in City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985). There, petitioners argued that the operation of the zoning ordinance to deny a building permit to them specifically, and in that particular spot, was an equal protection violation. They were willing to concede that such a claim on a denial of a permit might not be available to other mentally handicapped persons or to them if they were in a different location. *Id.*

137. The exception allows any challenge based on the Constitution. 38 U.S.C.A. § 4092(d)(2) (West Supp. 1989).

138. With the existence of statutory as-applied challenges, § 4092(d)(2) is consistent. The provision might be read to allow review of all constitutional challenges, but to deny review of as-applied challenges that are not constitutional in nature.

Although this Note calls the challenges "statutory as-applied," the same principles apply to an as-applied challenge to a regulation.

139. 108 S. Ct. 1372 (1988).

140. *See supra* note 34.

141. 38 U.S.C. § 1662(a)(1) (1982) allows a time extension on VA educational benefits for veterans who were prevented from using them earlier due to "a physical or mental disability which was not the result of . . . [their] own misconduct."

cap,[142] veterans falling within that subset could raise an as-applied challenge to the VA regulation.[143] While not invalid on its face, the regulation might violate the hypothetical Rehabilitation Act as applied to these veterans.[144]

In the context of the Act, the VA might proffer this literal reading to prevent a veteran from getting review for a statutory as-applied challenge.[145] Conversely, the veteran who desires access to the courts on a question involving the application of law to facts would also find this analysis useful[146]: if section 4092(d)(2)(B) addresses only as-applied challenges, nothing in the subsection explicitly precludes challenges to law application in the administrative law sense.[147]

Pragmatically, a veteran is unlikely to be able to convince a court that Congress was only concerned with statutory as-applied challenges when it enacted section 4092(d)(2)(B). The legislative history spells out too clearly the emphasis on barring both review of facts and review of "mixed questions,"[148] which relates to the administrative law concept of law application.[149] Nevertheless, the wording of the provision might per-

142. The argument in *Traynor* was, in reality, only that the Rehabilitation Act mandates that all alcoholics be treated on a case-by-case basis, without a per se rule as to their right to benefits. *Traynor* 108 S. Ct. at 1384. The above hypothetical serves to illustrate a statutory as-applied challenge.

143. For simplicity, suppose there is a divorce section of the Rehabilitation Act, which singles out persons whose alcoholism was brought on by divorce. These individuals then cannot be denied a federal benefit based on their alcoholism. The VA regulation would, in denying benefits to the general set of primary alcoholics, also deny benefits to this subset of divorced primary alcoholics. The latter denial violates the hypothetical Rehabilitation Act's proscription.

144. The remedy for a statutory as-applied challenge to an administrative regulation might vary from the norm of constitutional challenges to statutes. Instead of letting the regulation remain on the books with its narrower scope of application, the reviewing court might simply strike the whole regulation and give the agency a chance to repromulgate.

145. As described above, only nonconstitutional challenges can be precluded in this manner, because of the constitutional exception in § 4092(d)(2). *See supra* note 137. *See also infra* notes 152-60 and accompanying text.

146. For examples of challenges that involve questions of law application, see *infra* notes 169-216 and accompanying text.

147. *See supra* notes 89-97 and accompanying text (defining administrative law concept of law application).

148. *See, e.g.*, 134 CONG. REC. H10,343 (daily ed., Oct. 19, 1988) (Statement of Rep. Montgomery). A "mixed question" is another way to describe the administrative law concept of law application. Levin, *supra* note 19, at 6.

149. *See, e.g., Report on H.R. 5288, supra* note 20, at 36 (House Committee explains that " 'mixed' questions will not be subject to review"). Even clearer proof arises from H.R. 5288's preclusion language, which seems to describe clearly an administrative law type "application of law [to] facts." *Supra* note 87. No one suggested that the compromise version had in any way altered

mit the VA to argue that review in the statutory as-applied context is prohibited along with review of law application. Occasional comments by congressmen fortify this argument.[150] It is the position of this Note, however, that such a reading is contrary to Congress' "true intent."[151]

While hereafter this Note will treat section 4092 as if it allowed full review of law with no review of fact or law application, the misstatement highlighted in this part of the Note will perforce be a point of controversy in any number of VA benefit appeals.

C. The Constitutional Exception.

Although it is unclear just how great an effect judicial scrutiny of purely legal issues, without review of fact findings, will have on appeals from VA decisions,[152] it is clear that section 4092's constitutional exception will bring about a rapid change.[153] Under the old section 211(a), the Supreme Court addressed constitutional challenges to VA decisions in only one capacity, allowing a veteran to challenge the relevant underlying statute's constitutionality.[154] Lower courts were divided over the more frequent questions of whether a court could review the constitutionality of either VA regulations[155] or individual claim dispositions.[156] The exception in section 4092, which apparently passed without mention through both houses,[157] swiftly ends the debate among the circuits. For whatever reason,[158] Congress seems satisfied that all complaints of con-

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the House version's scope of review in this area. *See also supra* notes 82-100 and accompanying text (describing transition from H.R. 5288 to the Act).

150. *See supra* note 127 (statement of Rep. Montgomery, supporting an as-applied reading of § 4092).

151. *See supra* notes 87-98 and accompanying text.

152. *See infra* notes 169-216 and accompanying text, predicting the effect of the Act on appeals.

153. The Act prohibits judicial review of fact findings, but excepts from this proscription "the extent [to which] an appeal under this chapter presents a constitutional issue." 38 U.S.C.A. § 4092(d)(2) (West Supp. 1989).

154. Johnson v. Robison, 415 U.S. 361 (1974).

155. *See supra* note 29.

156. *See supra* note 30.

157. Rep. Montgomery, in his summary of the scope of review, does not even mention the exception. 134 CONG. REC. H10,343 (daily ed. Oct. 19, 1988).

158. It is possible that Congress allowed this exception merely as a concession, due to past case law, that the courts were simply not going to refuse to review constitutional challenges.

Another explanation takes into account the origin of the exception, S. 2292. *See House Hearings on Judicial Review, supra* note 59, at 140. Sen. Murkowski, that bill's sponsor, was in favor of judicial review, generally restraining himself in order to allow compromise with the House. *Supra* note 74. Following this analysis, the exception is more likely part of the deal Murkowski received during the give and take in the compromise to get the Act passed.

stitutional magnitude should be heard.

This abrupt resolution of the constitutional preclusion debate creates some concern. There might be great potential for cloaking a blatant request for factual review in constitutional clothing.[159] Aside from those instances in which the very lack of factual basis for a decision takes on constitutional overtones,[160] factual challenges masquerading as constitutional claims will force the court to balance the legitimacy of the claim against the underlying purposes of the Act. Nevertheless, federal courts have taken on the task of unmasking such tactics in other contexts.[161]

D. No Review of the Ratings Schedule

When a regional office of the VA receives a claim for disability benefits, it must determine where the veteran's disability falls on the VA rating schedule[162] in order to award the appropriate amount of benefits. The VA disperses benefits based on the level of impairment, with disabilities ranging from zero to one hundred percent along ten percent increments.[163] The ratings schedule classifies disabilities by type, and then breaks each type down according to severity in order to assign it a grade of impairment.[164]

The Act has specifically excluded the ratings schedule from judicial review.[165] Notwithstanding the arguments in favor of this exclusion,[166]

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159. Several cases under § 211(a) suggest this fear. *See, e.g.*, Ryan v. Cleland, 531 F.Supp. 724, 730 (E.D.N.Y. 1982) ("[w]hile plaintiffs' attempt to elevate their claims to a constitutional level is certainly inventive, after careful consideration the court concludes that no bona fide constitutional issue is presented.").

160. *See infra* notes 174-80 and accompanying text.

161. For example, the courts have to determine what claims do or do not reach constitutional magnitude in any § 1983 action. 42 U.S.C. § 1983 (1982).

162. This finding is only one of three the board will make. *See infra* notes 181-83 and accompanying text.

163. 38 U.S.C. § 314 (1982).

164. 38 C.F.R. § 3.1 (1988). The following example illustrates the complexity of the schedule:

7305 Ulcer, duodenal:

> Severe; pain only partially relieved by standard ulcer therapy, periodic vomiting, recurrent hematemesis or melena, with manifestations of anemia and weight loss productive of definite impairment of health . . . 60[percent]
>
> Moderately severe; less than severe but with impairment of health manifested by anemia and weight loss; or recurrent incapacitating episodes averaging 10 days or more in duration at least four or more times a year . . . 40
>
> Moderate; recurring episodes of severe symptoms two or three times a year averaging 10 days in duration; or with continuous moderate manifestations . . .20
>
> Mild; with recurring symptoms once or twice yearly . . . 10

Id. § 4.114. There is also a table for combining two or more ratings. *See id.* § 4.25 (Table 1).

165. 38 U.S.C.A. § 4052(b) (West Supp. 1989) denies the CVA the power to review the schedule

such blanket treatment leaves some concern. Might the exclusion prevent the court from analyzing what are really legal issues?[167]

From an interpretive standpoint, this question is, of course, moot: it no longer matters whether the issues so excluded are legal or factual because Congress has decided to shield the ratings schedule from review. However, from a policy approach, one wonders whether those in Congress understood the freedom this exception might give the VA.[168] The bar on review of the ratings schedule presents a potentially imposing limit on the amount of judicial review available to the veteran under the Act.

IV. THE EFFECT OF 38 U.S.C. § 4092 ON JUDICIAL REVIEW AND THE VA.

The most important questions about section 4092 concern its practical application. Although the actual answers await the first cases to reach the CAFC,[169] this Part will attempt to predict what effect the new law will have. With many recurring fact patterns, the change in judicial response from the old section 211(a) outcome will be clear and marked. With others, there will be no change whatsoever. With some, the court's response is anything but certain.

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of ratings. 38 U.S.C.A. § 4092(a) (West Supp. 1989) bars the CAFC from hearing an appeal from the CVA's refusal to review the schedule.

166. This commentator could find no statement as to why the exception was placed in the law. *See, e.g., Report on H.R. 5288, supra* note 20, at 5, 29. However, one might expect Congress to have desired the agency to use its expertise in such complicated determinations.

167. Without the schedule, the rating board would face, with every new claim, a hearing on the issue of how impaired a veteran is as a result of the fact findings on the type and severity of the disability. The administrator has instead chosen to lay down guidelines based on average impairments resulting from such symptoms. Through rulemaking, then, the VA has accomplished part of the adjudication procedure. The Supreme Court allowed this type of adjudication through rulemaking in the Social Security context in Heckler v. Campbell, 461 U.S. 458 (1983).

Legal issues can arise from the schedule when, for example, the Administrator makes a factual assumption which is actually beyond his or her authority; the decision *not* to allow any impairment grading to issue for a specific disability might be one such ultra vires act. For illustration, see *infra* notes 207-11 and accompanying text.

168. This Note develops further the effect such a broad exemption from review might have in Part IV, *infra* notes 204-11 and accompanying text.

169. The CAFC will not properly acquire jurisdiction over a veteran's appeal until an appeal goes before the CVA. 38 U.S.C. § 4092. The CVA will come into existence only upon presidential appointment of its judges. Pub. L. No. 100-687, § 302, 102 Stat. 4105 (1988).

A. Constitutional Review

As noted earlier,[170] section 4092(d)(2)'s constitutional exception to factual preclusion will swiftly resolve some strong disagreements among the lower courts. Besides challenging the constitutionality of underlying statutes administered by the VA,[171] an appellant might now challenge other, less obvious infirmities. The Act makes it clear that a veteran may challenge the procedural steps in the claims department on due process grounds.[172] Likewise, a veteran may now challenge individual VA decisions under the equal protection clause.[173]

A more interesting development in constitutional questions might derive from challenges to decisions based on a total absence of evidence. Under the new law, the regional offices and BVA develop a record for use on appeal at the CVA and CAFC.[174] The Supreme Court, in *Superintendent, Massachusetts Correctional Inst. v. Hill*,[175] held that a decision of a prison disciplinary board based on no evidence whatsoever would amount to a denial of due process.[176] In the usual agency review, such a standard presents no real advantage for the reviewing court; it might as easily have overturned the agency's decision on grounds that the action was "arbitrary" or against "substantial evidence."[177] Yet in the context of the VA, the Act precludes a court from looking at the facts. Notwithstanding this preclusion, the language of section 4092(d)(2) clearly suggests that a *Hill*-type due process claim would require the court to

170. *Supra* notes 154-58 and accompanying text.

171 The Supreme Court secured this right to review in Johnson v. Robison, 415 U.S. 361 (1974), *see supra* notes 26-30 and accompanying text, and veterans still enjoy it under the Act.

172. Prior to the Act, courts had been wary of such challenges, often treating them as mere challenges to the decision reached, but cloaked in a constitutional mantle. *See supra* note 159 and accompanying text. Compare specifically the majority and dissent in Marozsan v. United States, 852 F.2d 1469, 1485 (7th Cir. 1988) (the majority finds a distinction between formal regulations and informal-yet-generally-applicable procedures ludicrous; the dissent asserts that to review the procedures is to review the decision, not a regulation). The exception in 38 U.S.C.A. § 4092 (West Supp. 1989) settles this disagreement.

173. Courts have denied such challenges in the past. *See, e.g.*, Hartmann v. United States, 615 F. Supp. 446 (E.D.N.Y. 1985).

174 "Review in the [CVA] shall be on the record of proceedings . . . ." 38 U.S.C.A. § 4052(b) (West Supp. 1989).

175. 472 U.S. 445 (1985).

176. "Ascertaining whether this standard is satisfied does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing the evidence. Instead, the relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board." *Id.* at 455-56.

177. Normally, a court can review an agency's decision under § 706 of the APA. 5 U.S.C. § 706 (1982).

investigate the facts, reviewing the agency's factual record in the process. The exception therefore undermines Congress' protections against a court's temptation to review the facts.[178]

For the veteran, *Hill*'s reasoning offers two benefits. Surprisingly, a veteran may find occasion to use this rule in overturning baseless VA decisions.[179] On a more practical level, the standard will force the regional officer and BVA to make and record their decisions with greater care.[180]

B. The Preclusion of Factual Review

The preclusion of factual review, when coupled with full review of legal issues, raises additional concerns, especially in the context of disability benefits. Understanding these issues requires a minimal awareness of the VA disability benefits claim process. At the entry level, a veteran who seeks benefits goes before a local ratings board authorized to make two predicate findings. The board must first find a veteran eligible to receive benefits; only veterans who were discharged "under conditions other than dishonorable" are eligible.[181] The second finding, one of entitlement, revolves around the injury itself. This inquiry can be divided into two subfindings: (1) whether the injury was "service related"[182] and (2) where the injury falls on the VA's rating schedule in type and severity.[183] The eligibility finding and both components of entitlement merit inspection under the Act.

1. Eligibility

Findings of eligibility would seem to involve nothing more than a simple review of the veteran's military record;[184] nevertheless, questionable

178. This was the purpose behind the application of law language. 134 CONG. REC. H10,343 (daily ed., Oct. 19) (statement of Rep. Montgomery).

179. The Korean war veteran, denied benefits on the basis of a racial stereotype, *see supra* note 39, would benefit from this standard. So might the veterans who allege their benefits were decreased due solely to VA budget cuts.

180. A VA cynic might argue the VA will simply bolster the record with any evidence it can find, regardless of merit.

181. 38 U.S.C. § 101(2) (1982). *See also*, Note, *A Critique of the Veterans Administration Claims Process*, 52 BROOKLYN L. REV. 533, 544 (1986).

182. 38 U.S.C. § 310 (1982). *See also*, Rabin, *Preclusion of Judicial Review in the Processing of Claims for Veterans' Benefits: A Preliminary Analysis*, 27 STAN. L. REV. 905, 913 (1975).

183. *See supra* notes 163-64 and accompanying text.

184. This apparent simplicity deceived at least one commentator. See Note, *supra* note 180, at

practices exist. There is a gray area between honorable[185] and dishonorable discharges, within which the VA has developed policies defining who is and is not eligible for benefits.[186] For example, the VA has adopted a regulation that classifies a discharge for homosexual acts as dishonorable.[187] Similarly, there is a regulation that denies benefits to one discharged for "an offence involving moral turpitude."[188] The question in both cases is whether Congress intended to allow the VA to expand the meaning of "dishonorable" to include the respective discharging offenses.

These examples pose an interesting test for the consequences of the new law. Where the veteran challenges the regulation directly, the court can review the regulation for both factual rationality and conformity to law.[189] However, if a veteran simply challenges the regulation in the context of his own claim for benefits, the court can review the regulation under section 4092 standards only.[190] Under the division this Note proposes Congress to have enacted,[191] the CAFC can review the decision only as to a claim that it violates a standard which Congress intended to impose. Applying the Act to eligibility, the court would need to find that the phrase "under conditions other than dishonorable" adopts some view of what is dishonorable, as opposed to leaving that determination up to the VA.[192]

544, which moves quickly past the eligibility stage to discuss the problems in the entitlement procedure.

185. General discharges are treated as honorable discharges by the VA, entitling the veterans to full benefits. TWENTIETH CENTURY FUND TASK FORCE ON POLICIES TOWARD VETERANS, THOSE WHO SERVED 31 (1974).

186. Of the 200,000 Vietnam-era veterans given less than a general discharge, most fell into the gray area. *Id. See also*, P. STARR, THE DISCARDED ARMY 176-77 (1973).

187. 38 C.F.R. § 3.12(d)(5) (1988).

188. *Id.* § 3.12(d)(3).

189. The Act provides review under APA § 706, 5 U.S.C. § 706 (1982) for such challenges. *See supra* note 52.

190. *See infra* note 214. In regard to such rules, there would be no difference had the regional office, on its own initiative, decided the same discharges were "dishonorable" for eligibility purposes. Even absent a regulation, a veteran's eligibility status will be determined at the regional office. P. STARR, *supra* note 186, at 177.

Where no regulation exists, but decisions consistently enforce a standard, such an approach is known as rulemaking by adjudication. *See infra* notes 212-16 and accompanying text. This may lead to a different treatment if the court is unable to determine the legal standard imposed. In such event, the court may have the power to remand the decision for clarification before answering the "question of law."

191. *See supra* notes 89-97 and accompanying text.

192. The most logical argument for such a reading is that Congress only intended "dishonorable" to describe those discharges which the military itself has classified as dishonorable. This inter-

2. *Entitlement: "Service Related"*

A similar controversy over review arises in the first arm of the entitlement inquiry, which deals with whether the disability was "service related."[193] In most situations, the veteran's burden of showing such connection is either easy to meet[194] or actually presumed in the veteran's favor.[195] Where more controversial injuries arise, however, the VA can make proving service relation a formidable task.[196]

Disabilities allegedly resulting from exposure to dioxin[197] in Vietnam were just such a problem for the VA. The agency had denied almost all dioxin-related disabilities on the grounds that plaintiffs could not prove them to be service related.[198] Congress took note of the VA's balking on this and other controversial disability claims when it deliberated over judicial review.[199] Congress also noted several denials of claims poten-

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pretation would leave several VA regulations in violation of the law. *See supra* notes 187-88 and accompanying text.

Another challenger might posit that, while Congress desired to give the VA some power to determine what was and was not "dishonorable," it also intended some boundaries to this discretion: a court might find a particular application of the broad "moral turpitude" standard to go beyond this congressional intent.

To understand the freedom a court has here, suppose a veteran was discharged for acts of "moral turpitude" because he smoked marijuana. A court that finds this basis for denying benefits ludicrous would reach the issue as a question of law, answering either that the VA has no authority to reclassify a discharge as dishonorable or that the act itself involved no moral turpitude which Congress by its statute would have intended to label "dishonorable." A court that thought such a veteran deserved to be denied benefits for this transgression could simply avoid review by treating the issue on appeal as an agency application of law and disclaiming any jurisdiction.

193. 38 U.S.C. § 101(16); 38 U.S.C. ch. 11 (1982); more specifically, see 38 U.S.C. §§ 310, 331 (1982).

194. Generally, a veteran can prove "service connection" by comparing her pre-entrance medical examination with her severance examination. *See* Note, *supra* note 183, at 546.

195. *See, e.g.*, 38 U.S.C. § 312 (1982).

196. One instance where the VA made proving service relatedness difficult involved the allegation of disability as a result of freak Air Force experimentation. *See infra* note 200. The predictable absence of any records from those experiments kept the veteran from receiving benefits. *Id.*

197. Dioxin is the toxic chemical found in Agent Orange and other defoliates.

198. Congress attempted to correct this situation through specific legislation. *See* Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, 98 Stat. 2725 (1984) (codified at 38 U.S.C. § 354 (Supp. III 1985)). The effectiveness of that law, however, is open to question. *See, e.g.*, Nehmer v. United States Veterans' Admin., 118 F.R.D. 113 (N.D. Cal. 1987).

199. Senator Cranston actually felt he needed to address speculation that the Committee on Veterans' Affairs was pursuing judicial review *only* as a response to difficulties in certain complex areas, such as post-traumatic stress disorder (PTSD; a psychological condition), radiation, or Agent Orange cases. *See* 134 CONG. REC. S9182 (daily ed. July 11, 1988). He later brought up these issues as ones wherein the VA's reaction has raised controversy. *Id.* at S9183.

tially embarrassing to the VA.[200]

Unlike the eligibility finding, however, establishing a service connection is almost entirely a factual matter. The veteran must prove, to the satisfaction of the VA under the circumstances, that the disability was incurred or aggravated during the time provided by Congress.[201] The veteran will likely find causation quite difficult to prove, especially where the disability surfaces only years later. Yet a court will not review the VA's findings on such questions because they are clearly findings of fact. Thus, a major portion of the complaints that prompted the new legislation will still go without judicial review.

One should note that it is possible for a question of law to arise in this decision. Two examples illustrate this point. Congress might have intended in a given situation to add a presumption of service relatedness, or at least to deny any irrebuttable presumption against such a finding.[202] In either event, the VA's failure to comply is reviewable under section 4092. Similarly, Congress may not decide the service related question on a given issue, but may prescribe what factors must be taken into account in making the decision. Failure of the rating board or BVA to cite these factors would also raise a question of law on review.[203]

3. *Entitlement: Placement on the Ratings Schedule*

The second arm of the entitlement inquiry involves positioning the vet-

200. Two examples of claims that, if granted, could have embarrassed the VA surfaced in the 1986 hearings. *See* 1 *Hearings on H.R. 585*, *supra* note 1, at 133 (vivid detail of a macabre series of experiments performed by the Air Force, yet the effects of which the VA decided were not "service related"); 2 *Hearings on H.R. 585*, *supra* note 20, at 34 (veteran denied benefits despite evidence of gross negligence occurring at VA hospital which substantially aggravated pre-existing condition).

201. *See* 38 U.S.C. § 310 (1982), *supra* note 181 and accompanying text.

202. A plausible argument to this effect exists in the dioxin law. *See* Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, 98 Stat. 2725 (1984) (codified at 38 U.S.C. § 354 (Supp. III 1985)). Section 5(b)(2)(A)(iii) of that law states that the VA "shall include . . . provisions specifying the factors to be considered in adjudicating . . . service connection" with regard to those diseases found in § 5(b)(2)(B). *Id.* § 5(b)(2)(A)(iii). This later section arguably mandates the inclusion of several diseases listed earlier and supplements that list with any others which the VA might find sufficiently connected to dioxin. *Id.* § 5(b)(2)(B). Therefore, with respect to the diseases listed earlier, Congress apparently never gave the VA the option of creating an irrebuttable presumption *against* their service connection; instead, the VA can only specify the factors to be considered.

This argument might be brought today under the Act, as 38 C.F.R. § 3.311a (1988) creates such an irrebuttable presumption against all but one of the diseases outlined in the statute.

203. *See* Levin, *supra* note 94, at 235, 267-68 (Section (b)(2) of the ABA restatement of scope of review doctrine, describing the issue of ignoring factors which Congress intended that courts address as one of law).

eran on the rating schedule.[204] One complaint that Congress heard accused the VA of allowing various rating boards to issue greatly disparate ratings. A rating board in Arizona might grant far higher disability ratings for a condition than one in Illinois.[205] Because placing veterans on the rating schedule involves only fact finding and applying the law embodied in the schedule, these decisions, too, will remain unreviewable. In light of the importance of this placement—and inasmuch as the placement determines the money a veteran will receive, it may be the most important finding—Congress' decision not to authorize judicial oversight is striking indeed.

C. Barring Review of the Ratings Schedule

Beyond entitlement and eligibility, the ratings schedule itself is also not subject to judicial scrutiny due to a statutory exception that prevents both ultra vires and constitutional challenges.[206] There is no question as to a court's reaction to this unqualified preclusion to a schedule challenge. After the Act takes effect, a court will deny any such appeal outright. The implication of this decision might be far reaching, however.

There are some decisions that would be beyond the scope of a court's jurisdiction under the Act even without the specific preclusion of the ratings schedule. An increasing number of Vietnam era veterans suffer from a psychological disability known as Post-Traumatic Stress Disorder (PTSD), yet they have elicited little response from the VA in the form of benefits. Nevertheless, Congress has not addressed this problem directly, and so the Administrator's decision to leave the controversial disorder out of the ratings schedule is likely not a question of law. Without more from Congress, a court would probably consider this as within the province of the agency's discretion, a question of "application."

Other VA decisions will escape review solely due to the ratings schedule exception. In the area of dioxin-related disabilities, Congress did enact, in the Veterans' Dioxin and Radiation Exposure Compensation

204. *See supra* notes 162-64 and accompanying text.

205. The Attorney General of Illinois raised this complaint during the 1986 hearings, claiming that, while the Illinois regional office had the seventh largest veteran population, they handled only three percent of all PTSD cases approved at 100 percent, while Wyoming, the smallest of 52 regional veteran populations, approved twenty eight percent of those cases. 1 *Hearings on H.R. 585*, *supra* note 1, at 35.

206. *See supra* note 165. The bar of judicial review of the ratings schedule occurs in § 4092(a), well ahead of the constitutional exception of § 4092(d)(2).

Standards Act,[207] a provision which a court might find requires certain diseases to go on the ratings schedule.[208] Were the Administrator to place only some of these diseases on the schedule, a question of law would evolve. However, under section 4092 a court cannot review even that choice, owing to the ratings schedule exemption described above.

The statutory exception might also shield from judicial review non-military, moral choices which Congress may not have intended the Administrator to make. For example, suppose that at some future date, soldiers in active duty, for whatever reason, come in contact with the HTLV virus, and many of them contract Acquired Immune Deficiency Syndrome (AIDS). When the disease begins to surface some time later, the soldiers, now veterans, press their claims for disability benefits. The Administrator decides, for personal reasons based largely on stereotype, that the contracting of AIDS must have resulted from some "immoral" behavior, and therefore should go uncompensated. Instead of promulgating a rule on the subject, or even addressing the eligibility component[209]—actions which might subject the VA to a costly and embarrassing court struggle—the Administrator in this hypothetical works through the ratings schedule. By withdrawing compensation for certain predominantly AIDS-related ailments, such as pneumocystis carinii pneumonia,[210] the Administrator could effectively keep the AIDS veterans from receiving the benefits promised them. A court might find no statutory authority for the Administrator to make this kind of purely moralistic decision, and therefore conclude that the Administrator's decision raises a question of law. Executed through the ratings schedule, however, the decision would escape judicial review.[211]

D. Deterring Rule Promulgation

One final effect of the Act deserving mention is its propensity to dissuade the Administrator from rulemaking. As mentioned above, the courts will have the power to review direct challenges to rules and regulations promulgated by the Administrator, under APA section 706 stan-

207. Pub. L. No. 98-542, 98 Stat. 2725 (1984) (codified at 38 U.S.C. § 354 (Supp. III 1985)).

208. *See supra* note 202.

209. *See supra* note 181 and accompanying text.

210. This form of pneumonia is one of the leading killers of AIDS victims, and is quite rare in the rest of the population. New York Times, February 2, 1989, at A1, col. 3.

211. Of course, judicial review, relatively deferential even on questions of law, *see supra* note 89, might not change the result in every case. Nevertheless, in many instances the new law provides veterans the same treatment as other citizens with respect to access to the courts.

dards for regulations.[212] The new jurisdiction will allow a court to step in where it finds that the Administrator adopted bad policy; hence, the prospect of judicial review might also convince the agency to rely more heavily on case-by-case determinations. Of course, some issues will be so clear and uncontroversial that a regulation makes sense for reasons of efficiency.[213] But where the Administrator is uncertain she is taking a defensible position, at least with respect to her factual premise,[214] the chances for reversal on judicial review diminish appreciably in case-by-case policy formation.[215] By shielding factual elements of claims procedures from judicial review, Congress may have inadvertently created a disincentive for rule promulgation, contrary to general agreement that promulgation is preferential to rulemaking by adjudication.[216]

V. CONCLUSION

The role of this Note has essentially been to report the intentions of Congress in passing the Act and the consequences of the product of its labor. Two interpretive points should be stressed, however, both of which relate to the interpretation of the phrase "law . . . as applied to the facts."[217] First, this Note posits that Congress was referring to the ad-

212. *Supra* note 52 and accompanying text.

213. A regulation is a more efficient way to implement a standard than adjudication. Promulgating a regulation requires time, especially if notice and comment procedures are followed, but this is a one-time expenditure. Subsequently, adjudicators need only refer to the regulation, which has the force of law.

Rulemaking by adjudication, on the other hand, requires the agency to make its case before the adjudicator each time, and forces the adjudicator to allow the private party involved to produce evidence against the adoption of the rule. This requirement makes rulemaking by adjudication far more time consuming for the agency in the end. *See generally* SEC v. Chenery Corp., 332 U.S. 194 (1947) (allowing an agency to proceed by adjudication, but criticizing it for the inefficiency and unfairness of this process); NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969) (same).

214. Where the decision is made by the adjudicating body, and not by the Administrator in a regulation, 38 U.S.C.A. § 4092 (West Supp. 1989) will apply and, therefore, preclude review of findings of fact. *See supra* notes 41-107 and accompanying text.

215. Although rulemaking by adjudication still results in an interpretation of law, reversible by the court, it seems more likely that a court would deny jurisdiction of an appeal from an adjudication, given the narrower scope of review.

216. Courts and commentators agree that rulemaking is better than a case-by-case approach; rules more clearly articulate broad agency policy and allow more interested parties a simultaneous chance to be heard on the issue involved. *See* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.25 (2d ed. 1984); Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571, 587-98 (1970). *See also Chenery*, 332 U.S. at 202 ("The function of filling the interstices of the [Securities] Act should be performed, as much as is possible, through this quasi-legislative promulgation of rules to be applied in the future").

217. 38 U.S.C.A. § 4092(d)(2) (West Supp. 1989).

ministrative law concept of law application and not, as the language of 38 U.S.C. § 4092 might suggest, to as-applied challenges raised by the veteran.[218] Second, a court should interpret this phrase as referring to the instances in which Congress has left the choice of a standard up to the VA.[219] No other theory conforms as well to the choice of language or the legislative history.

The question that emerges from this study is whether all members of Congress realized the limited nature of review they now offer veterans. When one backs away from the specifics and gains perspective on the Act's consequences for judicial review, Congress actually put veterans in only a marginally better position than they were in before the Act. Under 38 U.S.C. § 4092, a court may review constitutional questions concerning both the underlying statute and a VA regulation or adjudication. Yet under the old law, the courts had claimed a right to statutory review since *Johnson v. Robison*,[220] and review of constitutional issues within regulations or adjudications had been gaining acceptance.[221] Section 4092 also allows review of questions of law, which can be equated to ultra vires review.[222] Again, the Supreme Court had already granted review in one type of ultra vires attack,[223] and some lower courts had done so in the other type.[224] Finally the Act allows review of agency regulations for factual rationality,[225] but even this improvement comes only on direct attack,[226] and not the more likely collateral attack within a benefits claim.

Congress' message in the Veterans' Judicial Review Act should be clear: the agency and Congress together will determine what is best for

218. *See supra* notes 121-51 and accompanying text.

219. *See supra* notes 89-97 and accompanying text.

220. 415 U.S. 361 (1974). *See supra* notes 26-28 and accompanying text.

221. *See supra* notes 29-30.

222. As this Note defines questions of law, they arise only when the agency acts contrary to the will of Congress or an agency regulation. This is precisely an ultra vires action. *See supra* note 25.

223. Traynor v. Turnage, 108 S. Ct. 1372 (1988) (allowing review of a challenge that an agency regulation violated a non-VA statute).

224. *See supra* note 32 (cases which allowed review of an ultra vires challenge based on the VA's own organic statutes).

Also, note that the House committee itself recognized this trend, and proffered the allowance of review of questions of law in acquiescence to that movement. *Report on H.R. 5288, supra* note 20, at 22.

225. *See supra* note 52.

226. *See supra* note 214 and accompanying text.

veterans,[227] and the role of the courts will be limited to assuring compliance with the law.

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227. Although the new CVA is given more authority than the CAFC to review agency policy, this article I court is still part of the agency and the executive branch. It therefore does not figure into the judicial review equation.