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VA Accountability and Whistleblower Protection Act of 2017

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I. INTRODUCTION: THE VA ACCOUNTABILITY AND WHISTLEBLOWER PROTECTION ACT OF 2017

An effective government is made possible when elected officials "deal with what the citizens believe to be the major issues," according to political theorist, Robert Dahl.¹ Too often, the democratic process has been vulnerable to subversion by politicians' interests and motivations, as opposed to being purely driven by the public's most significant concerns. This becomes dangerous when the 'public' is left out of the *public* policymaking process. The Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017 (S. 1094) was signed into law, largely made possible by the efforts of grassroots organizations. Lobbyists or special interests did not drive the legislation. Rather the bill was the product of many years of purposeful conversations with constituents, veterans service providers, and those who desperately need these reforms to pass. All of these defining features of S. 1094 serve as an illustration of the beauty associated with fulfilling these criteria for an "effective government." The following paper will provide an overview of the law's journey throughout the three core institutions of American governance and the bureaucracy, followed by a discussion on the law's prospects and anticipated litigation in the courts.

II. BACKGROUND INFORMATION: THE DEPARTMENT OF VETERANS AFFAIRS

Millions of veterans depend on the Department of Veterans Affairs: a system that must be re-evaluated, re-structured and reformed to provide the utmost quality of care for the country's veterans. This is precisely why this piece of legislation represents a robust response from Congress to take action and respond to injustice, even if it means admitting that the systems in place are plagued with serious concerns. However, by identifying the root causes of these troubling violations rampant throughout the VA, this legislation will be the first of many steps towards restoring confidence in this essential service-centric institution. Throughout its one hundred years of existence, the Department of Veterans Affairs has struggled to provide exemplary, scandal-free, comprehensive care to the nation's millions of veterans. However, in the course of the past five years, these issues have re-emerged at the forefront of the political conversation, prompting Senator Rubio to take immediate action and propose this legislation today.

Under the Obama administration, the release of numerous 'bombshell' reports uncovered scandals throughout the VA, which sparked a national conversation that finally grabbed some legislators' attention in Washington. These exposés revealed that a large portion of VA staff routinely falsified medical and administrative records to cover up serious maltreatment.² While this should have gathered the attention of policymakers across the country three years ago, this

legislation has tremendous potential for restoring the VA's leadership which has been lacking for decades. Because these troublesome allegations were confirmed in the FBI's ultimate investigation findings, the next step towards restoring the VA's quality will depend on actionable, targeted, and timely legislation, which S.1094 aims to provide.

III. JOURNEY THROUGH THE LEGISLATIVE BRANCH: DEVELOPMENT AND INTRODUCTION

There were two primary motivations for proposing S.1094: i) to enhance the delivery of service for the nation's veterans and ii) to better identify areas of concern within the Department of Veterans Affairs. The Department of Veterans Affairs has long been criticized for poor service delivery, widespread mismanagement, and a tragic failure to offer the utmost quality of care to our nation's heroes. Senator Marco Rubio drafted S. 1094 to bring enhanced accountability legislation to correct these severe concerns. The bill enjoyed widespread bipartisan support and swift progression throughout the legislative journey. Throughout the private sector, there are measures to identify major problem areas, such as employee misconduct, behavioral violations, and illegal activities that negatively impact the workplace environment. Senator Marco Rubio understood that the Department of Veterans Affairs should be no exception to holding such high and necessary standards. This law aims to provide enhanced accountability measures to be implemented throughout the entire Department of the VA, in order to improve the quality of treatment and care for the nation's veterans.

The VA's service delivery inadequacies are not the only pressing challenges to restoring this environment. A significant component to improving the VA is the need to protect the voices of individuals who are brave enough to identify and report violations and concerns, otherwise known as "whistleblowers." This protection is critical for any workplace, considering how it empowers individuals to call attention to problem areas without the fear of being reprimanded or punished professionally. Therefore, this legislation establishes high - but necessary - standards for personnel conduct within the Department of Veterans Affairs while also providing protection for those who report severe areas of concern.

In the years leading up to this legislative accomplishment, Senator Rubio collaborated with his Democratic colleagues and various veteran service organizations to ensure their pivotal voices were included throughout the process. A few of the partners who provided this legislation assistance and who directly address the problems identified previously include: Paralyzed Veterans of America, The American Legion, Veterans of Foreign Wars, Concerned Veterans of America, the Reserve Officer Association, Iraq and Afghanistan Veterans of

America, American Veterans, the Military Officers Association of America, and several others.³ As a result of these consultations, this law was ultimately designed with the following goals in mind: strengthen measures for taking necessary disciplinary action; protect "whistleblowers" from retaliatory action; and ensure appropriate due process protections.

There is no doubt that the status-quo of relying on the market to resolve these challenges naturally has not worked for America's valued servicemembers. As a result of society's inability to resolve these problem areas that are widespread throughout the VA,⁴ the need to introduce a responsive and intentional law has become evident, given that the market cannot resolve these issues on its own. Instead, the introduction of S. 1094 satisfies various criteria for responsive public policy: it contains decisive action, aims to realign a certain sector of society (the VA) and seeks to correct intolerable social behaviors (namely criminal activity, fraud, and negligence).⁵

This law is a response to additional sources of market failure. First, the VA Accountability and Whistleblower Protection Act is designed to protect VA employees, patients, and administrators from those convicted of misconduct, criminal conduct, or other scandalous behavior. This law also protects individuals from punishment if they raise awareness of concerning allegations in the workplace. These central commitments genuinely satisfy the expectations for public policy to "prohibit morally unacceptable behavior [and] protect the activity of a group or an individual" as a way of overcoming market failure.⁶

Before this legislation was introduced, the Secretary of the VA was severely limited in his ability to take timely, disciplinary action against employees who committed major violations in the workplace. In other words, the market failed as indicated by the inability to solve the issue in a self-reliant, responsible way in the market itself.⁷ Therefore, S.1094 addresses these issues directly by empowering the VA's Secretary with the resources necessary to take immediate disciplinary action against (and remove) employees who violate the VA's core mission and policies. This legislation also established measures to deter employees from engaging in criminal activity by giving the VA Secretary discretion to withhold the pensions of employees convicted of major violations. One of the most rewarding aspects of this legislation is its intentionality to fulfill the notion of a social contract,⁸ in which the citizens expect their government to take responsive action to a problem that impacts society's general welfare at large.

I. JOURNEY THROUGH THE LEGISLATIVE BRANCH: UNORTHODOX LAWMAKING

On May 11, 2017, U.S. Senator Marco Rubio (R-FL) introduced S.1094 as its primary Sponsor, and the bill was immediately referred to the Senate Committee on Veterans' Affairs the same day. This committee held numerous hearings and the bill was quickly placed on the Senate's legislative calendar within the first two weeks of its journey. By applying the central lessons from congressional expert, Professor Barbara Sinclair's book on unorthodox lawmaking to the context surrounding S. 1094, the importance of coalition-building throughout the entire process becomes powerfully evident. Sinclair observed that "a bill's supporters have a strong incentive to put together a broad support coalition at the committee stage, one that accommodates interested Senators, both committee members and not."⁹ Remarkably, the Senate Republicans managed to achieve this early in the legislative process which allowed the bill to garner high levels of bipartisan support. This demonstrated a strong and effective coalition-building effort, which must remain the gold standard for legislators to strive towards. For the most part, S. 1094 was insulated from many of the illustrations of unorthodox lawmaking (extending the debate past one hour, blocking any action, imposing holds, or threatening to 'kill' the bill itself) presented in Sinclair's work, which demonstrates that not every modern-day legislation is vulnerable to such tactics. For instance, this bill was laid before the Senate by unanimous consent and did not come under any scrutiny by way of a traditional debate on the floor. Rather, S.1094 bypassed this stage of the legislative process altogether and passed in the Senate on June 6, 2017 by voice vote.¹⁰ This served as a strong indication that the bill lacked significant opposition, made possible by the bipartisan efforts for collaboration.

It is important to note that one amendment (S.Amdt.219) submitted by Senator Cory Gardner (R-CO) was approved "...to insert additional language outlining the reduction of annuities for removed and retired employees in response to gross negligence or conviction of criminal violations."¹¹ Although this additional language strengthened the correctional power of the law, it did not foster any major resistance to the bill's passage, as is often the case in the era of unorthodox lawmaking. One day after the bill passed in the Senate, it was sent and received in the House for consideration. Within one week, the House Rules Committee reported H. Res 378 to provide consideration for the bill, which allowed for one hour of general debate "equally divided and controlled by the chair and ranking minority member of the Committee on Veterans' Affairs."¹² In addition, the rules set forth for S. 1094 determined it would be closed to amendments and waived all points of order against consideration and provisions.¹³ Because the bill was referred to only the House Committee on Veterans' Affairs, it was much easier to avoid the internal pressures typically

associated with multiple referral, turf fights, and many competing voices. Within the same day, one hour of debate on S. 1094 was held and proved to be fairly immune from unorthodox legislative tactics. Following the debate, it was once again put to a voice vote and passed in the House with 368 'yeas' and 55 'nays' on June 13, 2017.¹⁴ Days later, the Senate presented the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017 to President Trump, and he signed it into law on June 23, 2017.¹⁵

While Sinclair presents a variety of possible consequences that may arise in the era of unorthodox lawmaking, it is important to note that there are exceptions to this style of governance, as demonstrated by the expediency to pass S.1094 into law. Traditionally, unorthodox lawmaking methods tend to exclude the minority from meaningful participation in the legislative process.¹⁶ However, S.1094 was passed without any significant opposition in the Senate and received overwhelming bipartisan support from the House. While a small percentage of voting members did not support this bill, they ultimately felt no need to impose any of the typical practices of unorthodox lawmaking.¹⁷ It's prudent to mention that the Veterans' Access to Care through Choice, Accountability, and Transparency Act of 2014 established a strong foundation for the introduction of S.1094. Although the original legislation was passed with noble intentions, it was widely criticized for failing to i) reign in control of the labor unions, ii) eliminate widespread corruption, or iii) remove truly problematic employees. Therefore, the policy areas that required further attention became clear to members of Congress, which paved the way for S. 1094 to come to fruition.

Despite the relative 'ease' and expediency in passing S. 1094, it is important to acknowledge one source of opposition that it encountered. The American Federation of Government Employees (AFGE) which represents the majority of the VA's employees, expressed concern with this legislation for the fear it would "...undercut many of the workplace rights and protections that are designed to protect government workers from disciplinary actions that are politically or personally motivated."¹⁸ Therefore, it was essential for the bill's supporters to acknowledge and address their concern that the legislation would politicize the civil service.

Upon reflection of the various aspects of unorthodox lawmaking in the context of S. 1094, this law managed to bypass many of the obstacles that define this modern era of Congress, such as hostage taking, exclusion of the minority, or an outright aversion to finding any compromise.¹⁹ The unprecedented bipartisan support, in addition to an overall lack of significant gridlock, allowed for the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017 to enjoy an expedited journey to the President's desk.

II. JOURNEY THROUGH THE EXECUTIVE BRANCH

At the beginning of the nation's founding, the process of establishing the central responsibilities for the President was one that required extensive deliberation, foresight, and complete accountability. The Founders acknowledged the complex nature associated with this endeavor and made significant philosophical contributions that have defined the modern landscape of the Executive Branch that remains today. One of the most fundamental legacies of the Founders' efforts was establishing a strong central authority to be balanced by a system of *checks and balances*.²⁰ This has remained a central pillar of American governance that aims to i) ensure widespread accountability; ii) prevent the tyranny of the majority; and iii) render unilateral action nearly impossible. However, John Burke, Professor of Political Science at the University of Vermont, draws a connection between the competitive nature of the separation of powers and a central dilemma for *presidential* power. This power struggle is seen in the way it creates additional gridlock,²¹ limits the President's control of the legislative agenda, and adds a dimension of uncertainty with respect to the President's ability to carry out his policy priorities. In light of these potential limitations, presidents have routinely engaged in a combination of 'going public,' bargaining, and persuasion strategies.²² This is precisely why Burke argues that the President must respond to times of divided government with a commitment to place pressure on other top decision makers and the public at large, thereby exercising the powers he *does* have.²³

Over the past century, there have been recent developments in presidential power that served to expand the role beyond purely traditional norms and expectations. This observation leads Burke to argue that Constitutional powers have proven to be insufficient for exercising the Oval Office's duties in the modern era. Therefore, he advocates for the recognition of alternative sources of power, which can take the form of coercive, symbolic, or loyalty power.²⁴ This development highlights the need for modern-day presidents to acknowledge the importance of their Constitutional powers and their *inherent* powers that allow them to execute their policy agenda to the fullest extent possible.²⁵ While Article II of the Constitution has raised a variety of theoretical dilemmas for presidential power, Burke remains confident that it provides a substantial framework for effective governance.

Article II of the Constitution outlines a variety of presidential powers that may be exercised in order to carry out his or her policy agenda. The most visible and widely exercised presidential power is the ability to sign bills into law upon approval from the House of Representatives and U.S. Senate, as outlined in Article I Section VII. This allows the President to independently decide whether or not to approve a piece of legislation presented to him, which becomes most important when his party does not possess control of Congress. However, it is

important to acknowledge that a president's ruling is not always final, considering Congress's power to override a Presidential veto, which requires significant support from both chambers.²⁶ Nevertheless, the President often exercises the power to sign legislation into law as a way to carry out his or her policy agenda and priorities .

In order to further strengthen the legislation's prospects of becoming law, President Donald Trump employed a combination of ambition power, persuasion power, and loyalty power. Ambition power is achieved through "the belief that compliance with presidential preference may reap future rewards, even if no direct bargain is made."²⁷ Given that U.S. Senator Marco Rubio (R-FL) previously ran for Presidential office, it became clear that the introduction of this legislation would closely align with his related ambitions. Because of the President's continued emphasis on a desire to fulfill his campaign promise to restore care for the country's veterans, Senator Rubio made a significant political calculation in response to the President's ambition power. By introducing this legislation as an ultimate victory for the President, Senator Rubio would also be well-positioned for favorable offers and recognition in the future.

President Trump also used the strategy known as persuasion power - the process of explaining the policy in a manner that is digestible and memorable - in order to bring forth the legislation known as S. 1094.²⁸ In President Trump's remarks at the 2017 Veterans Affairs Listening Session, he argued "as Commander-in-Chief, I will ... ensure our veterans have the care that they're so entitled to — maybe more entitled to than anybody. And that hasn't been the way they were treated. But it is the way they're going to be treated."²⁹ This bold and authoritative statement conveyed both his knowledge of the underlying problems, as well as a genuine determination to take significant action during his administration to improve these conditions.

The final tactic that the President employed to prompt the introduction of this legislation was his use of loyalty power, which is often represented by a "personal belief in the president or in his policy program or broader ideology."³⁰ President Trump's administration was clear in its expectation of uncompromising loyalty for him and his policy agenda. In an era where 'leaks' are so widespread and frequent, President Trump preferred to surround himself with individuals who demonstrated loyalty and carried out his agenda with full compliance and without resistance. Therefore, it is clear that the President's emphasis on loyalty power was another central driving force behind Senator Rubio's leadership that produced the VA Accountability and Whistleblower Protection Act.

III. JOURNEY THROUGH THE JUDICIAL BRANCH

The judicial branch is tasked with interpreting the nation's laws by engaging in a variety of complex legal calculations and procedures before making their ultimate decision on the case at hand. Article III of the U.S. Constitution establishes the judiciary as an independent, separate branch of American government that is tasked with the enormous responsibility of interpreting the laws of the nation. At its core, the judiciary is empowered to settle disputes between and among citizens and various government levels.³¹ Additionally, the Constitution Congress members to determine the size and scope of the lower courts,³² which was a central priority for the Founders with reservations about increasing the size of the federal government.

In the first three years of its existence, the constitutionality of S. 1094 has already been tried and tested throughout the judicial system. The most recent case that received noteworthy attention was the Federal Circuit Court of Appeals' decision³³ which ruled in favor of the petitioner who alleged his constitutional rights had been violated by the VA. Immediately after the VA Accountability and Whistleblower Protection Act was signed into law, disciplinary action was taken in order to remove employees who were found to be guilty of malpractice, fraud, or corruption. One of the many employees who was terminated under these conditions, Dr. Jeffrey Sayers, filed an appeal claiming he was punished by S. 1094 *retroactively* for conduct that took place before it became law.

The timeline shows that in 2016, a routine site-visit uncovered many concerning violations of VA policy throughout the pharmacies under Dr. Sayers' supervision.³⁴ After subsequent follow-up site visits, the VA concluded that he failed to correct these violations on time and even identified additional violations that also fell under his purview. The VA ultimately held him responsible for the negligence that harmed two veterans: using expired equipment in his pharmacies as well as failing to properly store and secure pharmaceuticals.³⁵ This pattern of poor performance and negligence quickly led to his removal.

The petitioner's complaint in question was whether or not this *retroactive* application of S. 1094 violated his right to due process under the Constitution, given that this consideration was not clarified in the original legislation passed by Congress. In this case, the Federal Circuit Court of Appeals decided in favor of Dr. Sayers, citing "...§714 cannot be applied retroactively—and Dr. Sayers's conduct underlying his removal took place before its enactment" thereby vacating his removal.³⁶ Despite these legal challenges, the VA Accountability and Whistleblower Protection Act remains valid. It maintains the Department of Veterans Affairs' authority to remove employees who engage in misconduct or abuse of authority.

It is critical to understand this particular ruling does not prevent the VA from taking disciplinary action on employees who violated policies prior to the law's passing entirely. Instead, it contains retroactive application of the *expedient disciplinary process*, thereby allowing the traditional, existing laws for removal to take place for behavior that occurred prior to the law's enactment. This ruling will likely cause many similar cases to be overturned in the coming months and years. Most importantly, it reveals a major implementation consideration that was overlooked by Congress when this law was passed: failure to protect employees' constitutional right to due process.

IV. JOURNEY THROUGH THE BUREAUCRACY

The passage of the VA Accountability and Whistleblower Protection Act established the Office of Accountability and Whistleblower Protection as the primary office for implementing S. 1094. This newly-formed office falls under the Department of Veterans Affairs' direct jurisdiction and tangential jurisdiction of the Office of Personnel Management.³⁷ Other stakeholders for the implementation of S. 1094 are i) the Office of the Inspector General and ii) the United States Merit Systems Protection Board (MSPB) who are charged with receiving and investigating whistleblower disclosures. However, the decisions reached by the MSPB may be appealed to the U.S. Court of Appeals for the Federal Circuit, thereby providing an alternative source for investigation. As will be discussed further, each of these stakeholders was deliberately included in the legislation as a way to reflect on the mission-centric questions "What shall we do?" and most importantly "What shall we be?"³⁸

In 2018, Senators Tammy Baldwin, Blumenthal, and Rep. Timothy Walz sent requests to the VA Office of Inspector General (OIG) to raise concerns that "the VA was not properly implementing the Veterans Affairs Accountability and Whistleblower Protection Act."³⁹ This comes shortly after the OIG had already been considering a variety of other operational complaints within the first year of the law's implementation. Over the course of a six-month investigation, the OIG uncovered additional allegations, which extended the review for eight more months. In October 2019, the report was published and included 22 recommendations for ensuring greater accountability and genuine whistleblower protection.⁴⁰ The Office of Accountability & Whistleblower Protection explicitly acknowledges the 2019 OIG report but there have been no indications to suggest they have resolved any of the 22 recommendations.⁴¹ At the very least, while neither the law or the rules have changed, the report is officially on the record and sets a necessary but high standard for further reform.

Engaging in the process of backward mapping of the law's journey through the bureaucracy provides an opportunity to "question the assumption that policymakers ought to, or do, exercise the determinant influence over what

happens in the implementation process." ⁴² To do this, the first step is to highlight the behavior that requires the policy in question. In the case of S. 1094, this is identified as the need to enhance the delivery of comprehensive healthcare and support services for our nation's veterans and to better identify areas of concern within the Department of Veterans Affairs. The next step is to state the policy's objective, which is to improve the VA's service delivery, identify areas of severe misconduct, and bring enhanced accountability to those convicted of behavioral violations or illegal activities. As will be discussed further, included in the foundation to engage in backwards mapping are considerations related to organizational operations and anticipated outcomes that will be derived from this policy's implementation.

To achieve the goal of bringing necessary reform to the Department of Veterans Affairs, this legislation protects the voices of whistleblowers who report employee violations and concerns (the operation), with the hope of empowering individuals to call attention to problem areas without the fear of being reprimanded or punished professionally (the outcome). This highlights the observation that "the closer one is to the source of the problem, the greater one's ability to influence it." ⁴³ The third step is to establish a target for implementation to re-evaluate, re-structure, and reform the VA to ensure the utmost quality of care for the country's veterans, made possible by identifying the root causes of these troubling violations. Proper implementation of S. 1094 will require provisions for decisive, disciplinary action as a way to correct intolerable behaviors (including criminal activity, fraud, and negligence).

Each of the previously mentioned implementing agencies are empowered through S. 1094 to achieve the target of this law. The Office of Accountability and Whistleblower Protection is to be led by a Presidential appointee (Assistant Secretary for Accountability and Whistleblower Protection) who reports to the Secretary of the VA. This office is empowered with the ability to issue reports and provide recommendations when receiving whistleblower disclosures. The Office may also refer to the Office of the Inspector General for substantive investigations of misconduct, retaliation, or poor performance. To implement these functions, this requires an ability to record, track, and review relevant audits and investigations which the Inspector General carries out.⁴⁴ The Office of Inspector General is also equipped with telephone hotlines and a government website to receive anonymous whistleblower disclosures. Additionally, the Director of the Office of Personnel Management is given the ability to review appeals in the event that an employee has their annuity reduced due to misconduct. The Director is also given the power to recalculate the annuity of the individual.

Both the Office of the Inspector General and United States Merit Systems Protection Board (MSPB) are equipped with the ability to receive and investigate

whistleblower disclosures. The OIG is equipped with the resources to impose disciplinary actions and other corrective actions, in addition to making recommendations. Overall, the OIG is responsible for serving veterans by conducting effective oversight of the Department of Veterans Affairs' programs and operations, made possible through independent audits, inspections, reviews, and investigations.⁴⁵ This confirms the importance of problem solving in order to maximize these agency's discretion precisely where the concern is most immediate.

Suppose an employee is removed, demoted, or suspended. In that case, the Merit Systems Protection Board (MSPB) is tasked with investigating such appeals and (if they deem it necessary) refer the appeal to an administrative judge. This serves to highlight the understanding of the "limited ability of actors at one level of implementation to influence behavior of actors at another level of implementation."⁴⁶ Moreover, if an administrative judge does not arrive at a conclusive decision, the MSPB is empowered to submit a report to the Committee on Veterans' Affairs of the Senate and the Committee on Veterans' Affairs of the House of Representatives which explains not reaching a decision prior.⁴⁷ To sufficiently carry out these activities, S. 1094 ensures the Secretary of the VA provides the MSPB with as much information and assistance as necessary when an appeal requires their involvement.

What becomes powerfully clear from the process of backward mapping in the case of S. 1094 is that the policymakers who crafted this legislation understood the profound reality that there is an enormous supply of labor-industry knowledge and problem-solving abilities that are outside of their immediate purview. Empowering the bureaucracy to have so many discretionary choices creates more dispersed authority and oversight, ultimately allowing the policies at the "street level" to be more reliable and useful to those requiring these services. This emphasis on discretion and the exercise of judgement in cases that are profoundly sensitive in nature allows for greater adaptability and flexibility necessary for delivering responsive services and proper care.

V. LOOKING AHEAD: FUTURE OF S. 1094

The VA Accountability and Whistleblower Protection Act has already brought enhanced accountability to the Department that is tasked with one of the noblest responsibilities: serving the nation's dedicated servicemembers and veterans with quality care, treatment, and supportive services. This law serves to restore the system's crumbling reputation by imposing higher standards, strengthened disciplinary powers, and a pathway for better identifying the most concerning areas of misconduct and illegal activity. Although S. 1094 has only become law over the past three years, it has already demonstrated a powerful ability to restore

faith in a previously failing system, made possible by providing avenues to advocate on behalf of the needs of these dedicated veterans.

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