

THE POLITICS OF JUDICIAL STRUCTURE: CREATING THE UNITED STATES COURT OF VETERANS APPEALS

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I. INTRODUCTION

In the last fifty years there has been an enormous growth in the scope and complexity of the federal bureaucracy. As the number of government decisions undertaken within the confines of administrative agencies has grown, so too has judicial review of these agencies' actions. Both Congress and the courts have repeatedly asserted that judicial review of the findings, conclusions, and rulings of administrative agencies is available in a federal court.¹

At its core, the judicial review function is grounded on the separation of powers principles enshrined in the United States Constitution. These principles mandate an important role for an independent federal judiciary in ensuring that the actions of officials and administrators within the executive branch comply with certain key standards. If agency actions violate a specific constitutional prohibition, fail to comport with congressional intent, or are not based on any reasonable interpretation of the facts, courts are expected to overturn them.²

Although the presumption of judicial review in the administrative context is pervasive, until recently, judicial oversight was strikingly absent in one important area of agency decision-making—the disability and pension benefit awards of the Veterans Administration (VA). As

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1. Congress created this right in the Administrative Procedure Act, Pub. L. No. 94-574, 90 Stat. 2721 (1976) (codified at 5 U.S.C. §§ 701-706 (1988)) [hereinafter APA]. The Supreme Court has in many cases upheld the right to judicial review of administrative agency actions. *See, e.g., Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986) (“We begin with the strong presumption that Congress intends judicial review of administrative action.”).

2. *See* STEVEN G. BREYER & RICHARD B. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 38 (1979).

part of its function of ministering to the needs of U.S. veterans and their dependents, the VA — the largest independent agency in the United States with an annual budget of over \$26 billion and over 250,000 employees — processes over five million claims for benefits each year.³ Although prior to 1988 the agency had its own internal review mechanism, the Board of Veterans Appeals (BVA), which reexamined the benefits determinations of VA regional offices, the findings of this tribunal were final and could not be challenged in court.⁴

Since the late 1970s, Congress and the service organizations which represent veterans' interests have debated the desirability of permitting judicial review of veterans' benefit awards. In the Ninety-Sixth, Ninety-Seventh, Ninety-Eighth, and Ninety-Ninth Congresses, the Senate overwhelmingly passed legislation authorizing federal court review of BVA decisions, but similar bills were defeated in the House Committee on Veterans' Affairs.⁵ In 1988, after much wrangling behind the scenes, Congress passed, and President Reagan signed, the Veterans' Judicial Review Act (VJRA),⁶ which allows veterans limited access to the federal courts on issues relating to their benefit awards.

The text and legislative history of the VJRA suggest that the statute embodies a compromise between two camps of opposing veterans' interest groups. One faction, composed of powerful and long-standing veterans service organizations (VSOs) such as the American Legion, the Veterans of Foreign Wars of the United States, the Paralyzed Veterans of America, and the Disabled American Veterans, argued against judicial review or advocated it only in very limited circumstances. The other camp, headed by the Vietnam Veterans of America and Veterans Due Process, argued stridently in favor of sweeping judicial oversight.

This Essay explores the role of these interest groups in convincing Congress to permit judicial scrutiny of veterans' benefit claims. It attempts to explain why Congress chose to organize judicial review of these claims in the particular manner that it did. Relying on what Pro-

3. 1987 VETERANS ADMIN. ANN. REP. xii.

4. See Act of March 20, 1933, ch. 3, § 5, 48 Stat. 9 (codified as amended at 38 U.S.C. § 211(a)(1) (1988)) (repealed 1988).

5. For a summary of these bills and their contents, see Barton F. Stichman, *The Veterans Judicial Review Act of 1988: Congress Introduces Courts and Attorneys to Veterans' Benefits Proceedings*, 23 CLEARINGHOUSE REV. 506, 508 (1989); see also Julie Rovner, *House Panel Kills Judicial Review for Veterans*, 44 CONG. Q. WKLY. REP. 1630 (1986).

6. Pub. L. No. 100-687, § 301, 102 Stat. 4105 (1988) (to be codified at 38 U.S.C. §§ 7251-7298).

fessor Terry Moe has termed the "politics of bureaucratic structure,"⁷ the Essay argues that the interest groups played a key function in shaping the judicial oversight mechanism according to their particular needs. Thus, although policy-neutral arguments such as efficiency and uniformity can be marshalled in support of the VJRA's creation of a new specialized federal court, a more compelling analysis must explore the underlying motivations of those political actors who lobbied Congress for a change in judicial policy.⁸

This Essay first discusses the veterans' benefit adjudication process which existed prior to passage of the VJRA. It explores the important role that VSOs played in representing veterans before the VA and Congress. The Essay then turns to the Act itself, focussing in particular on the new judicial entity which it created—the United States Court of Veterans Appeals. Relying on the text of the statute and its legislative history, the Essay explains how the limited judicial oversight function exercised by this new federal court is a product of competing conceptions among veterans' interest groups over how benefit claims should be handled. Finally, the Essay concludes by making some predictions about the future role of these interest groups in shaping the court's review of veterans' affairs.

II. THE POLITICS OF INFORMAL ADVOCACY: VETERANS SERVICE ORGANIZATIONS AND THE VETERANS' BENEFIT CLAIMS PROCESS

Before the VJRA was enacted, a veteran who experienced a service-related disability could file a claim at one of fifty-eight VA regional offices located around the country. There, a three-member panel composed of a medical, a legal, and an occupational specialist evaluated the claim and the degree of disability. The panel was required by law to consider all evidence proffered by the veteran and to offer assistance in developing his or her claim. Only the veteran appeared before the panel; no representative of the VA made a case opposing the veteran's claim. In addition, no formal rules of evidence were applied, and the panel was required to resolve doubts on any issue in favor of the veteran.⁹ If the panel denied the claim, the veteran could appeal to the

7. Terry M. Moe, *The Politics of Bureaucratic Structure*, in *CAN THE GOVERNMENT GOVERN?* 267 (John E. Chubb & Paul E. Peterson eds., 1989).

8. See Lawrence Baum, *Specializing the Federal Courts: Neutral Reforms or Efforts to Shape Judicial Policy*, 74 *JUDICATURE* 217, 224 (1991) (arguing that interests groups influence the substance of judicial policies).

9. See Christopher D. Knopf, Note, *One Last Battle: Reform of the Veterans' Administration*

BVA to have the panel's decision reviewed on the merits. If the BVA denied the veteran's request for relief, s/he could file a motion for reconsideration or accept the BVA decision as final. In the face of a failed BVA appeal, the veteran had the option of starting the entire process over again by submitting new material to the regional office in support of the original claim.¹⁰

In the mid-1980s, the VA struggled under a crushing workload of benefits cases. In an average year, veterans filed nearly 800,000 disability claims, about half of which were granted by the regional offices. Of those claims that were denied by VA panels, 66,000 were contested at the regional level, and a further 36,000 were appealed to the BVA. The BVA granted about 12% of the claims and remanded another 13% to the regional offices for further action.¹¹

Although the efficiency of this adjudication process has been debated,¹² two facts are especially significant about the pre-judicial review claims procedures. First, a veteran could relitigate his or her claim before the VA by submitting new evidence or arguments even after the original claim for benefits had been rejected. This practice is contrary to the principle of *res judicata*, which prevents plaintiffs from contesting a claim once it has been finally decided by the highest reviewing authority. Second, at no stage in this process could a veteran be represented by an attorney if the attorney's fee exceeded ten dollars.¹³ This fee cap was established by Congress shortly after the Civil War and was not altered until passage of the VJRA. Thus, unless a veteran could convince an attorney to represent him or her without compensation, s/he was forced to argue the claim without the benefit of legal representation.

Veterans pursuing benefit awards did not entirely forego professional assistance, however. Congress authorized representatives from

Claims Procedure, 74 VA. L. REV. 937, 939-40 (1988).

10. These procedures are described in Stichman, *supra* note 5, at 509.

11. See Knopf, *supra* note 9, at 940 (citing *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 309 (1985)).

12. Compare *H.R. 585 and Other Bills Relating to Judicial Review of Veterans' Claims: Hearings Before the House Comm. on Veterans' Affairs, vol. I*, 99th Cong., 2d Sess. 248-56 (1986) (statement of Robert O. Muller, President, Vietnam Veterans of America) (arguing that current VA procedures are too bureaucratic) with *H.R. 585 and Other Bills Relating to Judicial Review of Veterans' Claims: Hearings Before the House Comm. on Veterans' Affairs, vol. II*, 99th Cong., 2d Sess. 220-21 (statement of Donald L. Ivers, General Counsel, VA) (arguing that an informal, nonadversarial system facilitates the claims process).

13. See Act of July 4, 1864, ch. 247, §§ 12-13, 13 Stat. 387, 389 (codified at 38 U.S.C. § 3404(c) (1982)) (repealed 1988).

VSOs to advise claimants seeking benefit awards.¹⁴ These representatives provided their services free of charge to any veteran who requested assistance in filing a claim with the VA. Approximately 86% of veterans who brought such claims were advised by VSO representatives. Only 2% were represented by attorneys and the remaining 12% appeared pro se.¹⁵

Taken together, the informal benefits claim procedures and the free advocacy provided by the VSOs afforded to veterans what one opponent of judicial review described as "an undeniable advantage in their appeal[s]."¹⁶ Moreover, they also provided the VSOs with a powerful means to influence the VA. VSOs are quite proud of their efforts on behalf of individual veterans. As an official of the American Legion noted:

[W]e have been in the business of assisting veterans get their benefits from the Federal Government for nearly seventy years. We have handled literally untold thousands of claims as advocates for the veterans. We will stand on the fact that our credibility as veterans' representative in the city of Washington is unsurpassed. We believe, therefore, that we have the knowledge, the background, the expertise, the credibility, and the right . . . to say . . . whether in fact veterans do receive due process.¹⁷

The VSOs' principal concern in allowing judicial review was the potential decline in their ability to represent veterans before the VA. In particular, they feared that attorneys unfamiliar with veterans' needs and hungry for lucrative fees would descend on the hapless veterans in an attempt to represent them before the layers of administrative tribunals and courts. If judicial review became possible, service representatives would not be able to counsel their clients during the judicial appeals process, since only attorneys may appear before a federal court.¹⁸

14. See Stichman, *supra* note 5, at 516.

15. See Knopf, *supra* note 9, at 941.

16. HOUSE COMM. ON VETERANS' AFFAIRS, 100TH CONG., 1ST SESS., PROCEEDINGS OF THE 41ST ANNUAL CONVENTION OF THE NATIONAL ASSOCIATION OF STATE DIRECTORS OF VETERANS AFFAIRS ON JUDICIAL REVIEW OF VA ADMINISTRATIVE DETERMINATIONS 27 (Comm. Print 1988) [hereinafter CONVENTION] (statement of John Adams, National Veterans' Affairs Director, Non Commissioned Officers Association).

17. *Id.* at 6 (statement of Robert Lyngh, National Rehabilitation and Service Director, American Legion).

18. Although only attorneys may appear before federal courts created under Article III of the Constitution, non-attorney advocates are permitted to appear before federal courts created under

As the national legislative director of AMVETS explained:

[T]here is going to be a heck of a lot of cost imposed on the veterans service organizations if they want to remain in the business of representing veterans effectively because we don't want to take our cases through the system to go to the BVA and then have to turn to our clients and say that's the end of the line . . . we can't represent you any further.

Service organizations, from now on you will have to go out and spend money and hire a lawyer if you want to go to court, because that's the next stage in the system. We are not going to be able to do that, we don't want to do that.¹⁹

The VSOs' sphere of influence was not limited to representation before the VA, however. These interest groups also served as a powerful lobby for veterans' concerns with national legislators. According to one judicial review opponent, "the service organizations [had] enormous influence in the Congress" because of their very large memberships (about five million veterans in total) and the leverage they exerted on the voting behavior of veterans and their families.²⁰

The VSOs have a history of persuading Congress to modify VA rules and procedures that do not conform to their conception of the veterans' best interest. In 1940, for example, the Attorney General's Committee on Administrative Procedure noted that the VSOs had successfully lobbied Congress to correct VA policies unfavorable to veterans. The Committee concluded that the VSOs' influence was so pervasive that they were likely to prevail in any direct conflict with the VA.²¹

Through the force of their advocacy, the VSOs have captured Congress' attention with a degree of success that few other interest groups can match. As a representative from the Disabled American Veterans has noted:

In no other case in the American Government does the Con-

Article I, known as administrative or legislative courts. See RONALD A. CASS & COLIN S. DIVER, *ADMINISTRATIVE LAW: CASES AND MATERIALS* 631-33 (1987). This distinction provides a key insight into why Congress chose to establish a new Article I court — the United States Court of Veterans Appeals — to hear veterans' benefit claims. See *infra* part IV.

19. CONVENTION, *supra* note 16, at 10 (statement of Lt. Col. David Passamaneck, AMVETS).

20. *Id.* at 21 (statement of Joseph Zengerle, speaking on behalf of Disabled American Veterans).

21. The Committee's report is discussed in Joseph C. Zengerle & Charles E. Joeckel, *Vets Are Helped*, NAT'L L.J., Aug. 17, 1987, at 9.

gress hear from any other interest group in America like it hears from veterans. . . . In no other case that I know of is there a regular practice in which the authorizing committees of the House and the Senate join together and call before it any group other than the veterans' service organizations to hear their legislative proposals placed side by side with that of any administration, Republican or Democrat. It seems to me that that speaks uniquely to the powerful influence of the quasi-governmental function of the service organizations.²²

The oversight function that the VSOs provide for their members has been compared to the role that courts play in checking the actions of the executive branch.²³ Since the VA is aware of the enormous influence that the VSOs have with the Veterans' Affairs Committees in both houses of Congress and with individual legislators, the agency is likely to respond to VSO demands even before Congress formally requires it to do so.²⁴ The VA is also likely to be sympathetic to the arguments of VSO service representatives who help veterans through the benefit claims process.

The VSOs relied on this structural check on agency behavior to justify continuing the ban on judicial appeals. Opponents of judicial review believed that the VSOs' actions produced greater uniformity and greater electoral influence over agency decision-making than could be achieved under a system of judicial oversight. Court supervision, they argued, would eventually dilute the ability of the VSOs to lobby Congress effectively. Because some veterans would consult attorneys rather than the VSOs to assist them with the claims process, the VSOs' authority, derived from their status as the exclusive representatives for millions of American veterans and their families, would certainly diminish.²⁵

Given the VSOs' powerful incentive to oppose judicial review, one might wonder why the issue ever surfaced in Congress. Indeed, it would appear to be in the VSOs' interest to limit their members' access to information concerning judicial oversight.²⁶ Much of the credit for

22. CONVENTION, *supra* note 16, at 21-22 (statement of Joseph Zengerle).

23. *See id.* at 21 (statement of Joseph Zengerle).

24. *See id.* at 20 (statement of Joseph Zengerle) (discussing VSOs' efforts to have Congress and VA recognize validity of disability claims based on exposure to atomic radiation).

25. *See Zengerle & Joeckel, supra* note 21, at 12.

26. *See Judicial Review of Veterans' Affairs: Hearings Before the House Comm. on Veterans' Affairs*, 100th Cong., 2d Sess. 442 (1988) [hereinafter *House Hearings*] (written submission of Veterans Due Process) (claiming that VSO publications ignore the issue of judicial review).

making judicial review a viable political issue belongs to one organization, the Vietnam Veterans of America (VVA).

The VVA became dissatisfied with the VA adjudication process because many of the disability claims of Vietnam-era veterans were not recognized by the VA. Specifically, the veterans' exposure to Agent Orange and other herbicides was never accepted as the basis for a disability award.²⁷ Unlike nearly all of the other VSOs, the VVA did not enjoy strong political influence in Congress, nor was it able to provide for its membership the kind of successful benefits representation before the VA that the other VSOs were able to achieve. Although some of the VVA's deficiency of influence can be traced to the American public's reticence over the Vietnam War, much of it was linked to the hostility with which the older VSOs viewed the VVA. As an official from the American Legion explained:

[S]ome of the proponents of . . . judicial review as far as we are concerned represent nothing and nobody and they haven't done anything that is visible to people in general to develop any credibility that would entitle them to take the position they do. You have organizations who have made an entire cause out of creating the issue of judicial review . . . that have never handled one damn case²⁸

Such hostility led the VVA to believe that veterans from previous wars (many of whom held positions of importance within the VA) were biased against the claims of Vietnam veterans. The VVA looked to judicial review as a means of putting additional pressure on Congress to acknowledge the injuries its members suffered during the Vietnam War and to create a less biased adjudication process in general.²⁹ In order to make judicial review politically palatable, however, the VVA had to appeal to all American veterans.

The VVA began a campaign to frame the terms of the debate so as to make judicial review politically unstoppable. Relying on the pervasive public sentiment that every American has a right to have his or her "day in court," they pointed out to Congress and the media that even illegal aliens and state and federal prisoners have a right to invoke

27. *See id.* at 16 (statement of Rep. Lane Evans).

28. CONVENTION, *supra* note 16, at 7 (statement of Robert Lyngh).

29. *See id.* at 24 (statement of Jack Powell, National Executive Director, Paralyzed Veterans of America).

the judicial checking function.³⁰ Why should veterans, who defended the Constitution against attack by foreign powers, be denied the very rights they were willing to give their lives to uphold?³¹

In addition to these calculated appeals to justice and fairness, the VVA commissioned a poll of veterans to determine their beliefs about judicial review. Veterans responded extremely positively to the idea: 72% favored review, 22% opposed review, and 6% were undecided.³² The poll also indicated that the desire for change cut across all major demographic and age groups, with no subgroup indicating a support level of less than 60%. Intensity of support varied significantly according to age, however. Younger veterans under fifty were most supportive of change, while the least supportive groups were those retired and over fifty.³³

The VVA used these surveys to publicize the fact that judicial review (at least when reduced to the simple concept of the right to a "day in court") was extremely popular among all veterans groups. As the idea of judicial review gained political momentum, the VSOs on each side of the debate lobbied Congress intensively to create a structure for

30. It should be noted that Congress is not required by the Constitution to provide veterans with disability payments, although once they have been granted they may only be terminated subject to constitutional due process guarantees. *See Goldberg v. Kelly*, 397 U.S. 254 (1970). Thus, veterans' failure to receive judicial review of their benefit claims cannot be compared to the rights of prisoners and aliens, whose detention implicates well-established constitutional principles. It is true, however, that other recipients of federal benefits may challenge their awards in court. *See, e.g.*, 42 U.S.C. § 402(g) (1988) (conferring statutory right to judicial review of social security award determinations).

31. *See House Hearings, supra* note 26, at 3 (opening statement of Rep. Lane Evans).

32. *See id.* at 394-96 (findings of Cambridge Survey Research poll of veterans). It appears, however, that the question asked by the survey researchers was biased toward a pro-judicial review response. The question read as follows:

With one exception, Americans have the right to take a government agency to court if they disagree with a decision made by that agency. This right, called the right of "judicial review," is currently denied to veterans in disputes with the Veterans Administration, known as the VA. When veterans disagree with decision of the VA, the VA itself reviews that decision and makes a final judgment which cannot be appealed in court. Some people feel that this denies veterans fair treatment. Others say that the current system has treated veterans fairly. Which of the following statements comes closer to your point of view?

—The current system used by the VA to handle veteran's claims is fair. There is no need to change the system by subjecting the VA to judicial review.

—Veterans should have the right to appeal administrative decisions to the courts. The VA should be subject to the same judicial oversight as every other government agency.

Id. at 396.

33. *See id.* at 395-99.

judicial oversight which was favorable to their own interests. As Professor Terry Moe stated, "Organized interest groups . . . are active, informed participants in their specialized issue areas, and they know that their policy goals are crucially dependent on precisely those fine details of administrative structure that cause voters' eyes to glaze over."³⁴

A fight between the VVA and the more established VSOs over exactly the sort of judicial appeals that veterans would be permitted now seemed inevitable. Although both sides agreed that the ten dollar fee cap for attorneys³⁵ and the preclusion of review of VA regulations³⁶ would certainly be eliminated,³⁷ the key point of confrontation centered on the standard of review that a court would use to evaluate issues of fact upon which veterans' benefit claims were based.

Given the VSOs' key role in the non-adversarial VA claims process, the older organizations were ardently opposed to a court's ability to alter factual findings. In questions of fact, they reasoned, the VA had particular expertise in gathering relevant information through its use of medical, legal, and occupational experts, while courts were comparatively less equipped to decide such matters.³⁸ Perhaps more significantly, factual review would cause the BVA and VA to rely on substantially more complex rationales to justify their decisions. With greater complexity and a more formalized decision-making structure would also come increased reliance on attorneys and a concomitant decline in the status of the VSO service representatives.³⁹

Predictably, the VVA and its ally, Veterans Due Process, wanted full factual review of all issues related to veterans' benefit claims. Only in this way, they argued, could the courts excise the biases inherent in

34. Moe, *supra* note 7, at 269.

35. See *supra* note 13 and accompanying text.

36. See Act of March 20, 1933, ch. 3, § 5, 48 Stat. 9 (codified as amended at 38 U.S.C. § 211(a)(1) (1988)) (repealed 1988).

37. By 1988, most of the traditional VSOs had come around to supporting review of VA regulations. See, e.g., *House Hearings, supra* note 26, at 36 (statement of James Magill, Veterans of Foreign Wars).

38. This argument against judicial review of VA factual determinations is also supported by the Judicial Conference of the United States, which is the policy-making arm of the federal judiciary. See *House Hearings, supra* note 26, at 7-8 (statement of Christy Massie on behalf of Judge Stephen G. Breyer).

39. See CONVENTION, *supra* note 16, at 7 (statement of Robert Lyngh) (stating that American Legion would win more cases under the pre-1988 system than under a system with judicial review); See also *id.* at 10 (statement of Lt. Col. David Passamaneck, AMVETS) (arguing that exposing VA to the "frustrations, prohibitive expense and the precedential chaos" of judicial review would create a lucrative area of practice for lawyers).

VA claims procedures.⁴⁰ These organizations had little to lose from a more formalized adjudication process, since the bulk of their members' claims had yet to be recognized by the VA. Thus, the stage was set for a pitched battle between interest groups in Congress.

III. LEGISLATIVE HISTORY OF THE VETERANS' JUDICIAL REVIEW ACT

Prior to 1988, Congress frequently held hearings on the statute that precluded veterans from obtaining judicial review of their disability awards. Each time the Senate managed to pass a measure to amend the law, the House Veterans' Affairs Committee blocked its final enactment, emphasizing the costs of judicial review in terms of formalized decision-making and the burden on an already overworked federal court system.⁴¹ Capitalizing on a shift of political forces, including a congressional report highlighting the errors in the VA claims process,⁴² Senator Alan Cranston introduced senate bill S. 11 on the opening day of the One Hundredth Congress in 1987. In providing for judicial scrutiny of VA actions, the bill created an extraordinarily narrow standard to review BVA factual determinations.

Because the standard of review issue is central to an understanding of the politics underlying the VJRA, some general principles of interpretation which courts apply to review agency actions must be considered. From a broad perspective, the extent to which a court will be allowed to reevaluate the rationales underlying agency decision-making sets parameters on how much discretion the agency is permitted. In fixing a standard of review, Congress in effect makes a policy determination that different types of agency decisions should be accorded more or less deference. Accordingly, the Administrative Procedure Act (APA),⁴³ the statute which permits review of the rules, findings, and conclusions of most federal bureaucracies, contains several standards of review.

The most favorable standard to a challenger of an administrative action is *de novo* review, which permits a court to examine the record

40. *See House Hearings, supra* note 26, at 376-78 (prepared statement of Vietnam Veterans of America).

41. *See id.* at 265 (statement of Paul R. Verkiul).

42. *See* HOUSE COMM. ON GOVERNMENT OPERATIONS, INVESTIGATION OF DISABILITY COMPENSATION PROGRAMS OF THE VETERANS' ADMINISTRATION, H.R. REP. NO. 886, 100th Cong., 2d Sess. (1988).

43. 5 U.S.C. §§ 701-706 (1988).

without regard to any prior determination made by the agency.⁴⁴ This standard is most often applied to legal conclusions, which a reviewing court is as competent to address as the agency itself.⁴⁵ A somewhat more limited standard permits agency findings and conclusions to be set aside if they are "unsupported by substantial evidence."⁴⁶ Finally, the most restrictive criterion applied in the APA allows a court to overturn agency findings only when it considers them to be "arbitrary [and] capricious."⁴⁷ These last two tests of agency behavior are generally applied to factual questions, which are more proficiently addressed by expert federal bureaucrats than by a reviewing court.⁴⁸

Senator Cranston's proposal, S. 11, created an entirely new standard of review which permitted a court to overturn a finding of fact 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."⁴⁹ While Senator Cranston believed that only limited factual oversight was necessary to correct the more egregious errors of VA and BVA decisions, critics charged that under this new standard a court would overturn an extremely small number of findings.⁵⁰

Later in 1988, the House passed H.R. 5288, a radically different bill which abolished the BVA and replaced it with a sixty-five-member administrative tribunal with the authority to review VA regional office decisions de novo. Appeals from this new tribunal could be made to the United States Court of Appeals for the Federal Circuit rather than to the twelve courts of appeals scattered throughout the country. In addition, H.R. 5288 adopted an "arbitrary and capricious" standard for examination of legal questions, more limited review for mixed questions of law and fact, and no review whatsoever for factual determinations.⁵¹

In the waning days of the One Hundredth Congress, the leaders of the House and Senate Committees bypassed conference and held meet-

44. *Id.* § 706(2)(F).

45. See 5 KENNETH C. DAVIS, *ADMINISTRATIVE LAW TREATISE* 332 (2d ed. 1984).

46. 5 U.S.C. § 706(2)(E) (1988).

47. *Id.* § 706(2)(A).

48. See DAVIS, *supra* note 45, at 356-63.

49. S. 11, 100th Cong., 1st Sess. 22 (1987), reprinted in *Judicial Review Legislation: Hearing on S. 11 and S. 2292 Before the Senate Comm. on Veterans' Affairs*, 100th Cong., 2d Sess. 88 (1988).

50. See Richard Cowan, *Veterans' Panel OKs Limited Judicial Review*, 46 CONG. Q. WKLY. REP. 1848 (1988).

51. For a detailed discussion of H.R. 5288, see Jonathan Goldstein, Note, *New Veterans Legislation Opens the Door to Judicial Review . . . Slowly!*, 67 WASH. U. L.Q. 889 (1989).

ings in private to hammer out a compromise, issuing an "explanatory statement" in lieu of a more formal conference report.⁵² The final version of the bill, later passed as the VJRA, contained some significant changes advantageous to the VSOs which revealed the organizations' ability to maintain their influence among veterans even in a setting where judicial review was available.

IV. THE VETERANS JUDICIAL REVIEW ACT AND THE POLITICS OF JUDICIAL STRUCTURE

The VJRA effects a wholesale revision of the VA claims process. In addition to permitting direct challenges to VA regulations and legal rules in the Federal Circuit,⁵³ the Act changes the procedures to be used by the VA regional offices and the BVA in making an initial determination of benefit awards.⁵⁴ More importantly, however, the Act provides for judicial review of these awards after they have been appealed to the BVA.

For veterans challenging their benefit awards, three levels of appeal are possible. First, the Act establishes a new specialized federal court—the United States Court of Veterans Appeals (CVA).⁵⁵ This court, which has exclusive jurisdiction to review decisions of the BVA,⁵⁶ is empowered to overturn "clearly erroneous" findings of fact made by the BVA in determining benefit awards.⁵⁷ Since this particular standard of review has rarely been used in the administrative context, legal commentators are divided over whether it is essentially the same as the Administrative Procedure Act's "arbitrary and capricious" standard or whether it is marginally broader.⁵⁸

52. 134 CONG. REC. H10,344 (daily ed. Oct. 19, 1988) and 134 CONG. REC. S16,650 (daily ed. Oct. 18, 1988), reprinted in 1988 U.S.C.C.A.N. 5834-55.

53. See 38 U.S.C.A. § 502 (West 1991) (Federal Circuit has exclusive jurisdiction to review direct challenges to VA regulations, rules of procedure, substantive rules of general applicability, and interpretations of VA general counsel). See also Barton F. Stichman, *The Impact of the Veterans' Judicial Review Act on the Federal Circuit*, 41 AM. U. L. REV. 855, 865-66 (1992) (discussing this aspect of Federal Circuit's jurisdiction).

54. See 38 U.S.C.A. §§ 5107-5109 (West 1991).

55. See *id.* § 7251.

56. See *id.* § 7252(a).

57. See *id.* § 7261(a)(4). The CVA also has the power to overturn BVA conclusions of law that it finds to be arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law. See *id.* § 7261(a)(3).

58. Compare Goldstein, *supra* note 51, at 896 n.47 (same standard as APA) with Stichman, *supra* note 5, at 512-13 (broader review than APA). In *Gilbert v. Derwinski*, 1 Vet. App. 49, 52-53 (Ct. Vet. App. 1990), the CVA held that the "clearly erroneous" standard would be governed by the scope of review provisions set forth in FED. R. CIV. P. 52(a) ("[f]indings of fact . . . shall not be set aside unless clearly erroneous").

Veterans dissatisfied with their appeal to the CVA may seek further review in the Federal Circuit.⁵⁹ This court is itself a specialized tribunal which hears patent, trademark, and other government benefits cases. The Federal Circuit's scope of review is much more limited than the CVA's, however. The Federal Circuit reviews all legal determinations of the CVA under a de novo standard,⁶⁰ but may not review any factual issues unless they arise in the context of a constitutional challenge to a benefit award.⁶¹ After the Federal Circuit issues its decision, veterans have ninety days to petition the United States Supreme Court for a writ of certiorari.⁶²

The most significant feature of this multi-layered judicial oversight structure is the decision to limit the first round of veterans' appeals to a specialty court created under Article I of the Constitution. Legal scholars have long debated the merits of such tribunals, known as Article I courts. Their judges do not have life tenure, and thus they are viewed as more susceptible to political influence by the agencies they regulate and by interest groups than their colleagues in the judicial branch. In addition, the courts' specialized jurisdiction can lead to tunnel vision and the loss of a generalist's perspective on particular problems.⁶³

Nevertheless, there are several significant advantages to Article I courts. Because these courts focus on a limited range of issues, their judges quickly develop a fund of specialized knowledge which gives them the ability to decide cases quickly and consistently.⁶⁴ In many instances, these courts have exclusive jurisdiction to review the actions of a particular agency. In such cases, the agency can adapt more easily to judicial oversight, since it need only follow the commands of one tribunal rather than several conflicting decisions from federal courts around the country.⁶⁵

Commentators are divided over whether the CVA is merely a cos-

59. Unlike the CVA, the Court of Appeals for the Federal Circuit was created by Congress under the authority of Article III of the Constitution. See *Crowell v. Bensen*, 285 U.S. 22, 50-51 (1932) (discussing powers of so-called "constitutional" courts).

60. See 38 U.S.C.A. § 7292(d)(1) (West 1991).

61. See *id.* § 7292(d)(2).

62. See *id.* § 7292(c).

63. See Irving R. Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671, 687-700 (1980).

64. See Richard H. Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 935-37 (1988).

65. See Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1154-65 (1990).

metic alteration of existing BVA adjudicative procedures or whether it is a truly independent body with the power to provide significant checks on VA action.⁶⁶ From a purely functional perspective, the VJRA appears to place CVA judges on close to an equal footing with their Article III counterparts. The CVA has seven judges, who serve for fifteen year terms once they have been nominated by the President and confirmed by the Senate, and who receive salaries comparable to life-tenured federal court judges.⁶⁷ Far more importantly, however, the CVA is not bound in any way by the official legal viewpoints expressed by the VA.⁶⁸ Thus, it is distinctly different from the BVA, which is constrained to follow the VA's interpretation of the law.⁶⁹

In debating the degree of autonomy the fledgling court will exercise, however, commentators have missed several key facts which are central to understanding why the CVA was created and that may influence its ability to function independently in the future. First, because of its status as an Article I court, qualified non-attorneys can practice before the CVA.⁷⁰ The legislative history of the VJRA makes clear that this provision was designed to allow veterans service representatives to continue their role as counsel to veterans in benefits appeals.⁷¹

Second, the VJRA limits an attorney's incentive to represent veterans by strictly controlling fees.⁷² Attorneys are not permitted to charge for services performed prior to a decision by the BVA, leaving veterans without paid legal assistance during the early stages of the appeals process.⁷³ When representing veterans before the CVA, an attorney must file a copy of any fee agreement with the court, which is empowered to reduce fees that it finds to be "excessive or unreasonable."⁷⁴ In addition, where an attorney agrees to be paid by a contingency fee, that fee is limited to twenty percent of the past-due benefits

66. Compare Stichman, *supra* note 5, at 512-13 (noting with approval the CVA's ability to check VA abuses) with Sidney Cooper, *Veterans Deserve Simple Justice on Claims*, NY TIMES, Mar. 27, 1991, at A22 (calling VJRA "legislation . . . whose cure is worse than the disease").

67. See 38 U.S.C.A. § 7253 (West 1991). The CVA began hearing cases on October 16, 1989. See Stichman, *supra* note 53, at 860.

68. See 38 U.S.C.A. § 7261(a)(3) (West 1991).

69. See *id.* § 7104(c) (BVA is bound by VA regulations, instructions of Secretary of Veterans Affairs, and precedent opinions of VA general counsel).

70. See *id.* § 7263(b).

71. See 134 CONG. REC. H10,343 (daily ed. Oct. 19, 1988) (statement of Rep. Montgomery).

72. See Stichman, *supra* note 53, at 866-68.

73. See 38 U.S.C.A. § 5904(c)(1) (West 1991).

74. See *id.* § 7263(c)-(d).

awarded.⁷⁵

Finally, unlike federal district courts and courts of appeals, the CVA's principal place of business is in Washington, D.C.⁷⁶ Since the Federal Circuit, which hears all CVA appeals, also sits in Washington, a decided bias exists against veterans from distant locations who wish to hire an attorney to represent them.⁷⁷ This does not, however, disadvantage the VSOs, all of which maintain well-staffed Washington offices.⁷⁸ Taken together, these facts reveal the power of the VSOs to maintain their influence over veterans' affairs and the benefit claims process even with a significant degree of judicial oversight.⁷⁹

V. CONCLUSION

Commentators have chided Congress for the unusual judicial review structures that it created in the VJRA. They have correctly noted that no other federal agency of comparable size enjoys the ability to develop uniform national policy which is made possible by limiting review to a single judicial forum.⁸⁰ They have also questioned the wisdom of concentrating all appeals in the nation's capital and of restricting an attorney's role in the initial stages of the claims process.⁸¹ They have even predicted that the VJRA's seemingly bizarre oversight structure "will likely impede some eligible veterans in seeking judicial review."⁸²

These commentators have ignored the role that politics plays in determining the structure of the federal bureaucracy. Indeed, it is precisely because bureaucracies — in this case a new administrative federal court — are shaped by "the interests, strategies, and compromises of those who exercise political power," that they are rarely designed to

75. See *id.* § 5904(d)(1). This restriction applies only to those agreements in which the VA pays the attorney's fee directly out of the benefit award. Where the client pays the contingency fee, the "excessive or unreasonable" standard governs. *Id.* § 5904(c)(2).

76. See *id.* § 7255. Although the court's home is in Washington, it may sit temporarily anywhere in the United States. *Id.*

77. See Cooper, *supra* note 66, at A22.

78. See *House Hearings*, *supra* note 26, at 46 (statement of John Heilman, Disabled American Veterans).

79. For an early indication of how successfully the VSOs are coping with the new court, see Anne Kornhauser, *Today's Veterans Have More Rights*, *Advocates*, LEGAL TIMES, Feb. 18, 1991, at 1. Although the VSOs appear to be prospering, veterans and their dependants have yet to attract large numbers of attorneys to represent them before the CVA and Federal Circuit. See Stichman, *supra* note 53, at 866-68.

80. See Goldstein, *supra* note 51, at 905 & n.116.

81. See Stichman, *supra* note 5, at 523.

82. See Goldstein, *supra* note 51, at 905.

be effective.⁸³ The VJRA was not the result of a rational decision to allow veterans their "day in court." Rather, the Act reflects a clash among competing factions of veterans' interest groups, one of which strongly favored unlimited judicial review but did not have sufficient resources to see its vision implemented, and the other of which was opposed to review but realized the political necessity of some form of oversight, however limited.

The compromise which Congress was forced to broker between these competing groups appears to have favored the more traditional VSOs, who will maintain tremendous influence with veterans even after the implementation of judicial review. By restricting review of factual questions and limiting the role of attorneys, the VSOs have ensured that they will remain the primary organizations to which veterans will turn in times of need, thereby securing their place as advocates for veterans' interests before Congress. The VSOs will also have a significant role in shaping the future direction of the CVA's judicial policies, both by litigating cases before CVA judges and by encouraging Congress to modify the court's jurisdiction to conform to their vision of how veterans' benefit claims should be adjudicated.

83. Moe, *supra* note 7, at 267.