The Lost History of Veterans' Due Process Rights

By Eric Lee Hughes[1]

Abstract

Tracing the history of veterans' rights to judicial review from the 1600s to the present day, I argue that access to the courts has been the norm – and not the exception - since the nation's founding. Further, while Congress curtailed a veteran's access to the courts in the Economy Act of 1932 and subsequent veterans' legislation until the passage of the Veterans Judicial Review Act in 1989 the intervening 57 years of splendid isolation were quite possibly unconstitutional according to the Veterans Administration's precedent. Finally, I point out that the Secretary of Veteran's Affairs took affirmative action just before the creation of the Court of Appeals for Veteran's Claims to deprive the fledgling court of over 200 years of the Secretary's precedent-setting case law. This spoliation of the law itself is unprecedented in western history.

The importance of history in assessing Constitutional Rights

At its core, rights of appeal arise out of the fundamental Due Process right enshrined in the 5th Amendment. When interpreting a Constitutional right SCOTUS has recently emphasized the importance of history in evaluating Constitutional rights. *See* New York State Rifle & Pistol Association et. Al. v Bruen, Superintendent of New York State Police et. Al., (Slip Op. at 28) (2022). SCOTUS will pay particular attention to the understanding of the nation and its policymakers at the time the particular amendment was passed. Consistent with the approach SCOTUS applied in New York State Rifle & Pistol, I will discuss a veteran's right to due process in the adjudication of benefits in the historical context.

When viewed in the historical context, a veteran's right to judicial review of benefits decisions has been the norm, not the exception. True, the jurisdiction that has the authority to hear a benefits appeal has changed over time. But the period between the Economy Act, P.L. 73-2, 48 Stat. 8, (1933). -that first limited judicial review - and the Veterans Judicial Review Act was passed in 1989 only comprises 56 years of the 386 years that American veterans have been afforded monetary benefits for service in defense of the nation. Even during the period of splendid

[1] Eric Hughes is an Accredited Veterans Claims Agent

isolation between 1933 and 1989, veterans still were afforded judicial review of claims arising out of VA malpractice.

History and the hidden purpose of the pro-veteran canon

The veteran's right to receive veterans' benefits is an ancient one. Department of Veterans Affairs (DVA) traces its history to November 15, 1636,[2], at which time the Plymouth Colony was at war with the Pequot Indians. The colonial court issued a ruling that the colony may conscript sufficient soldiers to press the cause against the Pequot, and in turn, the colony would provide for any soldier that was injured or maimed by the action. On 20 September 1674, the Virginia Assembly passed "An Act for the Safeguard and Defense of the Country against the Indians." 2 Hen. Stat. (1674). It was a provision that the soldiers disabled in the line of duty would be cared for by the colony. A year later on 3 May 1675, the Massachusetts Bay Company established a standing committee for the relief of soldiers wounded in service.[3] On 4 October 1675, the Plymouth Colony court expanded the economic protections afforded by the Act of 1636 to widow's *sua sponte*. In 1718 Rhode Island expanded on the idea by adding health

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[2] David Pulsifer, *Records of the Colony of New Plymouth in New England–Laws 1632-1682,* 106 ¶ 6 (Printed by order of the Legislature of the Commonwealth of Massachusetts, 1861) https://www.google.com/books/edition/Records_of_the_Colony_of_New_Plymouth_in/hsESAAAAYAAJ?hl=en&gbpv=1&dq=plymouth+colony+records+vol+11&printsec=frontcover

See also: Weber, G. Adolphus., Schmeckebier, L. F. (Laurence Frederick). (1934). *The Veterans' administration, its history, activities and organization.* Washington: The Brookings institution, at 3. (Book found at: https://hdl.handle.net/2027/uva.x030789862 ; Point cite: https://hdl.handle.net/2027/uva.x030789862?urlappend=%3Bseq=19%3Bownerid=27021597769735243-23

[3] 5 Nathaniel B. Shurtleff, M.D., *Records of the Governor and Company of the Massachusetts Bay in New England 1674-1686,* 80 ¶ 3 (Printed by Order of the Legislature 1854)

care benefits to the disability and survivor's pensions, previously enacted by the other colonies.[4]

Additionally, the fate of soldiers wounded in service was a pressing concern for the new country when the Declaration of Independence was issued. So, on August 26, 1776, the Continental Congress passed a resolution that granted invalid (disabled) veterans economic protections from injury.[5] But there was a problem with this noble goal. The problem was rooted in Article VIII of the Articles of Confederation. This weakness is because Congress lacked the power to tax. As such the Continental Congress relied solely on voluntary appropriations from the States to provide the national income needed to fight the Revolutionary War. By April 30, 1781,[6], the colonial finances were in shambles and General Washington's Aide de Camp, Alexander Hamilton would write Robert Morris, who was then head of the Department of Finance for the Colonies. Mr. Hamilton raised concern about the effect of the desperate situation on the military and by extension his soldiers and veteran. As the war was coming to an end historians point to a near political cataclysm. On two separate occasions, military veterans conspired to overthrow Congress and establish a military dictatorship.

The first was the Newburgh Conspiracy[7] – which was led by senior officers. If the court is not familiar with the Newburgh Conspiracy, certainly the court is familiar with the legend that George Washington was offered the position of the first king of America. It was the Newburgh Conspiracy and Washington's refusal

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[4] Evans Early American Imprint Collection, *Acts and laws, of His Majesty's colony of Rhode-Island, and Providence-Plantations, in New-England, in America* 7 (1718)

[5] 5 Journals of the Continental Congress, 700-705 (1775)

[6] Letter from Alexander Hamilton to Robert Morris 30 April 1781, Founders Online, https://founders.archives.gov/documents/Hamilton/01-02-02-1167

[7] Mountvernon.org Newburgh Address: George Washington to Officers of the Army, March 15, 1783, (1783) https://www.mountvernon.org/education/primary-sources-2/article/newburgh-address-george-washington-to-officers-of-the-army- march-15-1783/

to participate that prompted this legend. The second revolt was Shay's rebellion[8] – which was largely comprised of enlisted soldiers. The issue that drove both rebellions was the fact that throughout the revolution the Army operated without pay. Instead, soldiers were given promissory notes in such numbers that the notes themselves held no value. Soldiers who disbanded prematurely forfeited their right to any salary, and other benefits they were promised upon enlistment.

In direct response to the fragile situation, Congress called a convention to fix the weaknesses inherent in the Articles of Confederation. Most notably the convention focused on the inability of Congress to raise national funds and respond to internal or external threats. This morphed into Constitutional Convention that wrote the document we are familiar with today.

The States that ratified the Constitution were quite mindful of the disparagement of the nation's creditworthiness to the detriment of our veterans at our country's founding. In Federalist No. 15, Alexander Hamilton would express the frustrations of the Constitutional Convention, and of Congress, in securing funds to pay Revolutionary War Debt – including veterans' benefits - thusly:

> We may indeed with propriety be said to have reached almost the last stage of national humiliation. There is scarcely anything that can wound the pride or degrade the character of an independent nation which we do not experience. Are there engagements to the performance of which we are held by every tie respectable among men? These are the subjects of constant and unblushing violation. Do we owe debts to foreigners and to our own citizens contracted in a time of imminent peril for the preservation of our political existence? These remain without any proper or satisfactory provision for their discharge.
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> Federalist No. 15 (Alexander Hamilton)

Hamilton would make good on these words in his first official act as Secretary of the Treasury in George Washington's first administration. In his report to Congress Hamilton would write *"[T]he debt of the United States...was the*

[8] Mountvernon.org, Shays Rebellion, https://www.mountvernon.org/library/digitalhistory/digital-encyclopedia/article/shays-rebellion/

*price of liberty. The faith of America has been repeatedly pledged for it, and with solemnities that give peculiar force to the obligation." See "*History of the Treasury, US Department of Treasury."

Placed in this historical context the motive behind drafting the Constitution can be boiled down to just two needs. First to provide for the common defense against foreign powers by facilitating the funding of a national military. The second was to safeguard the new nation from internal threats facilitated by disgruntled and battle-hardened veterans, either on their own initiative or on the initiative of the larger states of the union.

It can be said therefore that while pro-veteran canon is not written in the Constitution, the Constitution would not exist without the pro-veteran canon. Or rather, the Constitution would not exist without fear of the consequences of ignoring the pro-veteran canon. The Bill of Rights, the Federal Reserve, the National Currency, and the Separation of Powers were all designed with one goal in mind. They were contrived to prevent a new domestic tyranny from replacing the foreign tyranny the revolution was fought to overthrow.

Veterans' rights in the wake of ratification

The proposed Bill of Rights was finalized by the first Congress on September 29, 1789.[9] That same day President George Washington signed a law providing that the Federal Government would assume responsibility for paying military pensions promised by the States for one year. Congress asserted responsibility for protecting the interest of invalids (disabled veterans) going forward on April 30, 1790. On December 15, 1791, the Bill of Rights was ratified. It may surprise the court to learn that as a consequence of this act of the First Congress, a veteran's right to judicial review of benefits decisions as well as his property interest in veterans benefits was settled centuries before Cushman v. Shinseki, 576 F.3d 1290 (Fed. Cir. 2009).

The case is Innis v. Roane, 8 Va. 379, 4 Call 379 (Ct. App. VA 1797). In that case officers of Virginia, and the militia were raised to fight in the Revolutionary War in 1779 by an act of the Virginia Legislature. *See* 10 Hen. Stat. 18 (1779). The veterans appealed the denial of their in State court, not Federal Court. The Federal Government didn't assert Sovereign Immunity in this state

[9] Gales & Seaton's *History of Debates in Congress*, 946-964 (1789) https://babel.hathitrust.org/cgi/pt?id=uc1.a0013393855&view=1up&seq=486&q1=September%2023

court claim. In Innis issue was the veterans were denied benefits because they failed to remain on active duty until the formal end of the war. They mustered out after the British surrender at Yorktown, but before the peace treaty was ratified by both combatants. So, the veterans lost on a technicality. What matters, in this discussion, however, is that Innis v. Roane found that a contractual relationship existed between the officers and the State. As such the veterans had a property interest in the benefits *provided* that they fulfilled the obligations set forth in that contract. This interest existed because contracts cannot exist without a vested exchange of property interests. Judge Lyon's concurrence lays this out plainly. First, allowing a soldier to only partially fulfill his obligations to receive benefits is contrary to good order and discipline. Second, substantial performance never entitles someone to a gratuity. Innis v. Roane at 767. This concurrence in Innis v. Roane would become foundational in contract law and relied upon by SCOTUS in a Copyright case in 1889. *See* Thompson v. Hubbard, 131 U.S. 123 (1889).

A few years after this decision, the Supreme Court would rely on the importance of judicial review in veteran's cases in the most important case in American Jurisprudence - Marbury v. Madison, 5 U.S. 137 (1803). Marbury is of such importance that it is drilled into every law student, discussed in every high school civics class, and is even a subject of discussion in junior high history classes. The resounding theme of all these educational discussions is largely the same. In Marbury, the Supreme Court gave itself the right to find laws contrary to the Constitution making itself the final arbiter in all legal proceedings. But the case – and its history – is much more complex and nuanced than this one-dimensional conclusion of its significance. The Supreme Court had to issue multiple holdings in favor of Mr. Marbury before reaching its ultimate conclusion. Two of those holdings are material to this veteran's case, and the veteran's benefits were central to the court's rationale.

Recall that William Marbury and his associates were aggrieved because the Secretary of State James Madison would not provide them with their commissions to serve as a magistrate in Washington, D.C. As laid out by the Court, multiple questions needed to be addressed. The first determination was if Mr. Marbury had a right to the commission he requested, and the Court found that he did. The second question then inquired if that right was violated. The Court found that Mr. Marbury's rights were so violated. Then the Court inquired if the laws of the country afford Mr. Marbury a remedy. Again, the Supreme Court found in favor of Mr. Marbury in that the law provided a remedy. The third question then asked if a writ of mandamus – *issued by the Supreme Court* - was the proper remedy under law. It was only this third question that was fatal to Mr. Marbury's cause. Even

then, only the selection of venue was fatal. This was not because of any error on Mr. Marbury's part, nor was it because of any material defect in the merits of his case. Rather Marbury failed because the Judiciary Act of 1789 unconstitutionally established the Supreme Court's status as a court of original jurisdiction. *See* Marbury at 154. In this discussion, I am only citing only the first two questions of inquiry in Marbury.

In setting forth its findings in Marbury, the Supreme Court relied on a statute passed on June 7, 1794, to provide disabled veterans of the Revolutionary War compensation benefits to illustrate its thought process. At that time in history, compensation benefits were referred to as "pensions" and the eligible veteran was called an "invalid." Quoting from Marbury:

> "By the act concerning invalids, passed in June 1794, vol. 3. p. 112. the Secretary at War is ordered to place on the pension list all persons whose names are contained in a report previously made by him to Congress. If he should refuse to do so, would the wounded veteran be without remedy? Is it to contend that where the law in precise terms, directs the performance of an act, in which an individual is interested, the law is incapable of securing obedience to its mandate? Is it on account of the character of the person against whom the complaint is made? Is it to contend that the heads of departments are not amenable to the laws of their country?" Marbury at 164

As you can see, the Marbury Court was gravely concerned about the enforceability of the laws of Congress and the protections afforded by the Constitution. This was particularly true when the failures of the executive branch impacted veterans. The Marbury court believed that denying Mr. Marbury's petition on the merits would set a precedent that the executive branch may ignore laws and rights it found inconvenient. This concern was expressly raised about veterans' benefits. Further, the Supreme Court was concerned the executive branch would devolve into uncontrolled despots answerable to no one unless restrained by common law.

The reader may be surprised to learn that prior to the passage of the "Economy Act" on March 20, 1933, (48 Stat. 8 § 5) veterans possessed all the rights to due process every other citizen enjoyed. Specifically, they could sue the

United States to enforce the nation's obligations to prior service members under the numerous veteran's laws on the books. This right included the right to a jury trial if so selected. The federal government never asserted sovereign immunity in these suits until 1934.

The federal government would finally assert sovereign immunity in Lynch v. the United States, 292 U.S. 571 (1934). In that case, SCOTUS ruled The Supreme Court distinguished between War Risk Insurance Policy – which SCOTUS declared to be binding contracts – and other benefits which SCOTUS declared to be gratuities that can be taken away by Act of Congress. The latter finding was based on a determination that 'gratuities' are not anchored to a vested property interest and therefore do not require due process under the 5th Amendment, Lynch at 576-577. There is a key implication of the finding in Lynch. When there is a vested property interest in a veteran's claim for benefits, the finality clause in 48 Stat. 8 § 5 that prohibits judicial review of the Secretary's decision – consider 38 U.S.C. § 511 - holds no weight. If it did, SCOTUS could not have rendered a decision in favor of Mr. Lynch because the finality clause would have precluded the jurisdiction of the Supreme Court.

In Cushman, the Federal Circuit disagreed with the holding in Lynch that pensions, compensation, and other privileges can be taken away without due process. In Cushman, the Federal Circuit stated:

> It is well established that disability benefits are a protected property interest and may not be discontinued without due process of law. *See* Atkins v. Parker, 472 U.S. 115, 128, (1985); Mathews v. Eldridge, 424 U.S. 319 (1976). The Supreme Court has not, however, resolved the specific question of whether applicants for benefits, who have not yet been adjudicated as entitled to them, possess a property interest in those benefits. *See* Lyng v. Payne, 476 U.S. 926, 942 (1986); Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 312, 320 n. 8,; Peer v. Griffeth, 445 U.S. 970, (1980) (Rehnquist, J., dissenting).

Based on this analysis the Federal Circuit held that applications for veterans' benefits carried the same due process property interest because veterans have more than an abstract need or desire for the benefits and veterans' benefits are granted on a facts-found basis and not on a purely discretionary basis.

The property interest in applications for veterans' disability compensation having been re-established in Cushman, it is imperative to return attention to Lynch. There SCOTUS points out "*Although popularly known as the Economy Act, it is entitled an 'Act to maintain the credit of the United States.' Punctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors."* Since a veteran's property interest in benefits arises out of the dutiful fulfillment of his enlistment contract with the United States, *see* Innis, the property interest found in Cushman ties back to the recognition of the enlistment contract and the mutual fulfillment of both parties. Then again in Lynch, SCOTUS quoted Sinking-Fund Cases, 99 U.S 700, 719 (1878) when the Supreme Court said "*The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen."*

The little-known administrative case-law history of veterans disability law:

It may be surprising to learn that there exists an uninterrupted history of veterans' administrative caselaw spanning the years 1775 to 1974. Most of this administrative case law was generated by the Secretary and his predecessors. We will start with the decisions of the Secretary. In 1854 a compilation of U.S. law and decisions about veterans' revolutionary war claims was published by the Government Printing Office by Frank Curtis and William Webster under then-Secretary of Interior L.Q.C. Lamar.[10] A newly updated publication of the Army and Navy pension laws would be updated and issued by Holcomb Webster, and

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[10] United States, Ferdinand Moulton, and Robert Mayo. Army And Navy Pension Laws, And Bounty Land Laws of the United States: Including Sundry Resolutions of Congress From 1776 to 1854 Inclusive, Executed At the Department of the Interior: With an Appendix Containing the Opinions of Attorneys General of the United States, With the Decisions, Rules, And Regulations Adopted by Different Secretaries, Relative to the Execution of Those Laws. 2nd ed. Baltimore: Lucas Bros., 1854. https://hdl.handle.net/2027/hvd.32044031705213

See also: United States. Pension Bureau., Webster, W. Holcomb., Curtis, F. B. (1885). A digest of the laws of the United States: governing the granting of army and navy pensions and bounty-land warrants; decisions of the Secretary of the Interior, and rulings and orders of the commissioner of pensions thereunder. Washington: Govt. print. off.. (Available at https://hdl.handle.net/2027/hvd.hl4oew)

F.B. Curtis in 1885. These publications spanned the era from 1775 to 1885. Moving forward, the Government Printing Office began publishing the Agency's Precedent Decisions relating to veterans' claims in 22 volumes spanning from 1887 to 1930.[11] These were referred to as the "Precedent Decisions" and were cited as "[vol#] P.D. [Page#]."

When President Herbert Hoover consolidated the various executive branch organizations serving veterans in Executive Order 5398, the new Administrator of Veterans Affairs continued the practice of publishing precedent-setting decisions through the Government Printing Office under a new title.[12] These decisions span from 1931 to 1955. Then In 1974 the Secretary again printed a consolidated volume of its precedent authority for the years between 1955 to 1974.[13]

The following Congress a return to judicial review of VA decisions would first gain steam. So, the 95th Congress held the first hearings on establishing this court.[14] During the period between 1974 and 1989, the Secretary published the holdings of his precedent opinions in the Federal Register but did not publish the dicta, rationale, or argument. As these cases were never indexed or printed in a

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[11] United States. Department of the Interior., United States. Department of the Interior. Office of the Solicitor., The United States. Board of Pension Appeals. (18871930). Decisions of the department of the interior: in appealed pension and retirement claims, also a table of cases reported, cited, distinguished, modified, and overruled and of statutes cited and construed. Washington: U.S. Govt. Print. off. (Available at https://catalog.hathitrust.org/Record/002140888 and https://catalog.hathitrust.org/Record/010307456)

[12] United States. Veterans Administration. *Decisions of the Administrator of Veterans' Affairs, Veterans Administration.* https://catalog.hathitrust.org/Record/010068909

[13] United States. Veterans Administration. (19471974). *Decisions of the Administrator of Veterans' Affairs, Veterans Administration*. Washington, D.C.: U.S. G.P.O.. (Accessible at https://hdl.handle.net/2027/umn.31951d010452721)

[14] United States. Congress. Senate. Committee on Veterans' Affairs. (1977). *VA administrative procedure and judicial review act: hearings before the Committee on Veterans' Affairs, United States Senate, Ninety-fifth Congress, first session, on S. 364 and related bills ...* Washington: U.S. Govt. Print. Off.. https://hdl.handle.net/2027/mdp.39015078681841

consolidated printing, they are difficult to research. Only the OGC and the BVA librarian know the full extent of these opinions. Most recently from 1989 to 2019, the Secretary took to publishing his Precedent Opinions on the Office of General Counsel website. As of the date of writing, the Office of General Counsel has not published its Precedent Decisions since 2019.

I acknowledge that the Secretary's view of what is in the public interest may change, either with or without changing circumstances. But an agency changing its course must supply a reasoned analysis to support the change. Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 57 (1983), *Citing* Greater Boston Television Corp. v. FCC, 444 F. 2d 841, 852 (1970). Unfortunately, the Secretary would partake in administrative sleight of hand in 1989 to hide his past opinions from scrutiny by the courts.

It is to be remembered that each of the above-cited historical administrative cases is required to be electronically published by the Secretary. This requirement for notice and publication is laid out in 5 U.S.C § 552(a). Instead of complying with the law to make available his prior rulings the Secretary revised the Code of Federal Regulations in 38 C.F.R. § 3.101 and 38 C.F.R. § 19.103 to remove from the Board's jurisdiction consideration of prior binding authorities just mentioned. *Ref*, In 54 Fed. Reg. 5611 (1989).

There the Secretary wrote, *"Pursuant to this change, such decisions, opinions, instructions, and policy statements will be without precedential or conclusive effect in future Secretary adjudications."* This change occurred after the Veteran's Judicial Review Act was passed by Congress, but before it took effect. As any politician in Washington D.C. will tell you timing is everything. Here the timing indicates a premeditated plan to deprive this Court of the 200 years of case law that predated the return to judicial review. This freed the Secretary from the burden of having to follow his sense of justice. But more importantly, it blocked the courts from holding the Secretary to his sense of right and wrong. Never in the history of the nation has there been a more sweeping contempt for judicial review than displayed by this act of the Secretary. It is a classic case of arbitrary action because like facts lead to different outcomes under this scheme.

The Secretary would paper over his sleight of hand, without fan fair, as discussed on February 15, 2019, in 84 Fed. Reg. 4337 when the Agency published: "*In the consideration of appeals and its decisions, the Board is bound by applicable statutes, regulations of the Department of Veterans Affairs, and precedent opinions of the General Counsel of the Department of Veterans Affairs. The Board is not bound by Department manuals, circulars, or similar*

administrative issues." This change marked a return to the express language of statutory authority that predated the change in 54 Fed. Reg. 5611 (1989).

When in 1989 the Secretary said prior administrative caselaw was to not affect decisions going forward, he lied. He not only lied to Congress and the veteran's bar, but he also lied to the court. That lie has occurred at least twice. The first was in Cushman when the Secretary argued that veterans do not have a vested property interest in benefits. The second occurs repeatedly when the Secretary asserts that the 'default' status of a veteran's benefits is they cannot be appealed unless Congress specifically grants appellate rights. I will now take to prove this serious allegation.

Consider now the Precedent Opinions of the General Counsel. Multiple references to the opinions issued as "A.D. [#]" are contained therein. These are citations to the very administrative precedents the Secretary tried to remove from history. For example, "A.D. 101" refers to the 101st precedent decision of the Administrator. I have used the phrase "Administrator Decision" as a citation substitute for A.D. for clarity as "A.D." is also the Blue Book Citation for the "Appellate Division Reports" which contains decisions of the New York Supreme Court.

OPINION ISSUED	CITES TO THE FOLLOWING
Vet. Aff. Op. Gen. Counsel Prec. 4-90	Administrator Decision No. 931 (1953) Administrator Decision No. 772 (1947)
Vet. Aff. Op. Gen. Counsel Prec. 18-90	Administrator Decision No. 715 (1946)
Vet. Aff. Op. Gen. Counsel Prec. 70-90	Administrator Decision No. 688 (1946)
Vet. Aff. Op. Gen. Counsel Prec. 74-90	Administrator Decision No. 607 (1944)
Vet. Aff. Op. Gen. Counsel Prec. 17-91	Administrator Decision No. 702 (1946)
Vet. Aff. Op. Gen. Counsel Prec. 32-91	Administrator Decision No. 702 (1946)
Vet. Aff. Op. Gen. Counsel Prec. 58-91	Administrator Decision No. 979 (1962)
Vet. Aff. Op. Gen. Counsel Prec. 68-91	Administrator Decision No. 963 (1959)
Vet. Aff. Op. Gen. Counsel Prec. 69-91	Administrator Decision No. 976 (1961)
Vet. Aff. Op. Gen. Counsel Prec. 04-92	Administrator Decision No. 760 (1947)

Vet. Aff. Op. Gen. Counsel Prec. 21-92	Administrator Decision No. 498 (1942)
Vet. Aff. Op. Gen. Counsel Prec. 22-92	Administrator Decision No. 181 (1933)
Vet. Aff. Op. Gen. Counsel Prec. 3-93	Administrator Decision No. 201 (1933)
Vet. Aff. Op. Gen. Counsel Prec. 16-94	Administrator Decision No. 280 (1934)

The "Administrator's Decisions" respected the "Precedent Decisions" issued by the Secretary's predecessor Agency the Bureau of Pensions, and the Department of the Interior. The format for citation is "vol. 'P.D.' page#".

Pre 1974 Decision	Cites to:
Administrator Decision No. 101 (1932)	In Re. Vinal, 9 P.D. 19 (1897) In Re. Ames, 8 P.D. 171 (1896) In Re. Showalters, 7 P.D. 478 (1895)
Administrator Decision No. 130 (1933)	In Re. Graham, 18 P.D. 461, 463 (1911)
Administrator Decision No. 219 (1934)	In Re. Landon, 14 P.D. 83 (1903)
Administrator Decision No. 242 (1934)	In Re. Tallman, 6 P.D. 261 (1893) In Re. McGregor, 22 P.D. 51 (1925) In Re. Widdow of Pillsbury, 21 P.D. 145 (1921)
Administrator Decision No. 375 (1936)	In Re. Apgar, 14 P.D. 7 (1903)
Administrator Decision No. 436 (1938)	In Re. Mary W., as Widow as Edgar Chadwick, 22 P.D. 136 (1926) In Re. Moore, 21 P.D. 443 (1924)
Administrator Decision No. 561 (1944)	In Re. Gleeman, 15 P.D. 54 (1904) In Re. Macentee, 12 P.D. 464 (1902)
Administrator Decision No. 646 (1945)	Davis v. Davis, 10 P.D. 403, 408 (1899)

Administrator Decision No. 661 (1945)	In Re. Bice, 9 P.D. 21 (1890) In Re. Graham, 18 P.D. 461, 464 (1911)
Administrator Decision No. 975 (1961)	In Re. Dudley, 6 P.D. 205 (1893) In Re. Dempsey, 9 P.D. 149 (1897) In Re. Dees 9 P.D. 455 (1898) In Re. Hill, 14 P.D. 57 (1903)

As evidenced by the large number of Administrator Decisions cited by the VAOGC, Secretary clearly believed earlier decisions were controlling when they benefited the Agency. This is made more evident when noting that many of these subsequent references were made less than a year after the Secretary said he would not refer to them for guidance. Yet, the Secretary deprived veterans and their advocates of the same administrative case law when it benefited the claimant. This was premeditated. Properly executed, the law is neutral. It is blind to whom it affects. But it has been the VA Office of General Counsel's (OCG) policy to cherry-pick what administrative case law to apply, and when to apply it. This is not only contrary to the pro-veteran canon. It is contrary to the very principle that there should be a common law to which both the government and the governed are beholden.

The veteran now points your attention to "An Act Making appropriations for the payment of invalid and other pensions of the United States for the fiscal year ending June thirtieth, eighteen hundred and 95, and for other purposes, 53 Congress, Session II, Chapter 140 (July 18, 1894). The now-obscure Act was signed into law by Grover Cleveland. It should be noted that because this statute did not govern benefits arising out of service during the first world war, it was never repealed by the Economy Act. This Act of 1894 provided funding of one million dollars for fees and expenses incurred by providing special examinations in due course of adjudicating a veteran's claim.[15] As such it did not expressly authorize benefits payable to veterans – which was the subject of the Economy Act. Instead, it governed the conduct of the Secretary in carrying out the ministerial functions of his office. The bottom line is this statute is still good law. Quoting from the statute:

> "That the report of such examining surgeons when filed in the Pension Office shall be open to the examination and inspection of the claimant or his attorney, under such reasonable rules and regulations as the Secretary of the Interior may provide."

As discussed in a precedent-setting case on August 26, 1898. The case was In Re. H.S. Berlin, 9 P.D. 471 (1898). H.S. Berlin was an attorney representing a veteran before the Bureau of Pensions. He sought access to his client's record and was denied that request administratively. He appealed ultimately to then-Secretary of the Interior, C.N. Bliss. After an extensive on-the-record 'discussion' between the Commissioner of Pensions and his superior, Secretary Bliss ordered the Commissioner of Pensions to allow attorneys and claimants to review and inspect the C-File. Quoting Secretary Bliss:

> [T]he claimant is entitled to be present, or to be represented by an attorney throughout the examination, and to cross-examine witnesses if he desires. In other words, it is his right to hear or know every word of testimony in his case, whether favorable or unfavorable. No Court in the land would deny him this privilege. It is a Constitutional right, which cannot be abridged. In Re. H.S. Berlin, 9 P.D. 471, 477 (1898)

The context makes it clear. Secretary Bliss was referring to the U.S. Const. Amend. V., and the right of due process. In doing so, Secretary Bliss had to find that the veteran had a vested property interest in the benefits he was seeking. This is not surprising as it represents the early understating of a veteran's historic due process rights explained above in Innis. Secretary Bliss closed his ruling by stating:

> I am led to the conclusion that the practice which prevails in your Bureau of denying to claimants or their authorized attorneys the right to examine the evidence obtained by special examination, except that contained in "reports of special examiners relating to criminal charges and investigations," is unjust to claimants and unwarranted by law. It is therefore directed that all orders or instructions which have that effect shall be revoked. - In Re. H.S. Berlin, 9 P.D. 471, 477 (1898)

Thus, a claimant has an absolute Constitutional right to know the record the Government has in its possession and to be present when his claim is being decided. This recognized Constitutional right is established by the Secretary's own hand. Chevron deference should be granted to the Secretary's holding in H.S. Berlin because this holding of a Constitutional right is in keeping with the historic practice in place at the nation's founding, and the Bill of Rights has never been repealed.

Consider now the case of Mr. Berger who was indicted in Federal District Court for conspiracy to counterfeit notes used by the Federal Reserve Banks. He was convicted only of the conspiracy count, and not the act of counterfeiting. At trial, the prosecutor misstated facts in the cross-examination of witnesses. The prosecutor put words in the mouths of witnesses that they had not said. The prosecutor's questions suggested statements by witnesses and the accused were made to him out of Court. The prosecutor acted "indecorous and improperly" before the bench and jury. SCOTUS sided with Mr. Berger's contention that the prosecutor had proceeded before the Court and jury unfairly and to Mr. Berger's detriment when it held:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. Berger v. U.S., 295 U.S. 78, 88 (1935)

As stated in Berger, Federal attorneys are representatives of the Sovereign and engage in the national quest for justice, not victories.

There is a tendency to conclude that the holding in Berger only applies to criminal cases. But this is not so. The nation's interest in obtaining just outcomes is not limited to cases where an individual's life or liberty is at issue. The duty to seek justice is demanded of all Federal Attorneys and in all controversies. *See* Freeport-McMoRan Oil & Gas Co. v. FERC, 962 F.2d 45, 47 (D.C. Cir. 1991). This concept should be heightened by the "pro-veteran canon." Not mitigated by it.

I now return to where this article began. In Innis the veteran's attorney raised the pro-veteran canon by stating in their appellate brief. "*That act should be favorably expounded for the appellees, according to the practice in England of construing, with benignity, statutes which respect the army and navy, who fight the*

battles of the country." This history is covered by the Agency's own history book.[16]

Spoliation of Records

As mentioned above the agency is obligated to make all its administrative rules and interpretations publicly accessible see 5 U.S.C. § 552. This requirement was first codified on September 6, 1966, in P.L. 89-554 and some 23 years prior to the Secretary's issuance withdrawing them from consideration by the Board. I first became aware of this Administrative Caselaw history when conducting a Google Search in 2013, at books.google.com. There one of the volumes had been scanned digitally. Over time, the consortium of land grant library systems scanned the limited print runs of these cases into the HathiTrust database. That scanning process is now complete. Due note HathiTrust is the same database the various hyperlinks to records marked in footnotes applies to. Even with a concerted effort on my part, it took nearly a decade and thousands of hours of research to recover the precedents the Secretary tried to hide.

Spoliation is a term used to describe what happens when records are destroyed, lost, or otherwise not preserved. When this occurs in the context of litigation the spoliation of evidence is a sanctionable act and the evidence not preserved is presumed to be favorable to the innocent party. But the Secretary's affirmative act to obfuscate his own decision history goes beyond a simple failure to preserve discoverable records. It strikes at the very core of judicial review. I do not believe any other example of spoliating *case law* has happened in the western world. It certainly hasn't happened in the United States. At least until now, no agency has ever been caught in the act. If the Secretary's spoliation of case law doesn't strike at the integrity of the judicial process, what does?

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[16] Weber, G. Adolphus., Schmeckebier, L. F. (Laurence Frederick). (1934). *The Veterans' administration, its history, activities and organization.* Washington: The Brookings institution, at 3. (Book found at: https://hdl.handle.net/2027/uva.x030789862 ; Point cite: https://hdl.handle.net/2027/uva.x030789862?urlappend=%3Bseq=19%3Bownerid=27021597769735243-23)

Conclusion

This brief laid out that the Constitution itself is an outgrowth of the pro-veteran canon. The pro-veteran canon is embedded in both reasons for the drafting of the Constitution, and in the national consciousness. A cautionary tale from history must be considered. When various executive departments were consolidated to form the Veteran's Administration, thousands of veterans were denied the benefits they depended upon to feed their families. As many as 43,000 veterans took over Washington. In response, Douglas MacArthur, George Patton, and Dwight D. Eisenhower expelled them from Washington, D.C. with Tanks, Bayonets, and Teargas on President Hoover's orders. Thousands were injured, and there were several veterans – and civilian – casualties. *See* "The 1932 Bonus Army story from the National Mall and Memorial Parks".

This would be the undoing of Hoover's reelection bid. But more importantly the resulting landslide in favor of Franklin Delano Roosevelt and one-party rule of Washington for 16 years. I do not point to the protest, nor to the military response, but rather to the response of the electorate The American citizen embodies the pro-veteran canon and votes accordingly. The expressed intent of the electorate should certainly be a factor in evaluating the express intent of Congress.