

COMMENTS

THE DEPARTMENT OF VETERANS AFFAIRS' ENTITLEMENT COMPLEX: ATTORNEY FEES AND ADMINISTRATIVE OFFSET AFTER *ASTRUE V. RATLIFF*

STACY L.Z. EDWARDS*

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* J.D. Candidate, 2012, American University Washington College of Law; B.A. Economics, 2008, Hillsdale College. It is with particular gratitude that I recognize my editor, Joseph Richardson, whose edits were kind and thorough. I must also thank the members of the *Administrative Law Review*, who have endured many months of fussing over this Comment and its contents. The final product is lovingly dedicated to my two favorite veterans, my grandfathers: Wayne A. Edwards (U.S. Army Air Forces and U.S. Air Force) and D. Wayne Zimmerman (U.S. Air Force).

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INTRODUCTION

The Department of Veterans Affairs (VA) administers a benefits system designed to be largely paternalistic.¹ An important aspiration of this benefits scheme is that the process should be navigable by a veteran without savvy legal prowess or the assistance of an attorney.² Although the regulations governing attorney involvement have changed, the intentions behind them have not: VA insists it must protect veterans from lawyers.³ Congress, however, is less skeptical of legal representation and has enacted statutes designed to encourage lawyers to take the cases of deserving veterans that might prove too difficult to win otherwise.⁴

1. See, e.g., Kenneth M. Carpenter, *Why Paternalism in Review of the Denial of Veterans Benefits Claims is Detrimental to Claimants*, 13 KAN. J.L. & PUB. POL’Y 285, 285–86 (2003) (mentioning the nonadversarial, pro-claimant, and ex parte system of adjudication that contributes to the “paternalism” of veterans law).

2. See, e.g., *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998) (“This court and the Supreme Court both have long recognized that the character of the veterans’ benefits statutes is strongly and uniquely pro-claimant.”); see also *Henderson v. Shinseki*, 131 S. Ct. 1197, 1205–06 (2011) (“The contrast between ordinary civil litigation . . . and the system that Congress created for the adjudication of veterans’ benefits claims could hardly be more dramatic.”).

3. See, e.g., Accreditation of Agents and Attorneys; Agent and Attorney Fees, 73 Fed. Reg. 29,852, 29,866 (preamble to final rule issued May 22, 2008) (codified at 38 C.F.R. § 14.636 (2010)) (reflecting suspicions that contingent fee agreements present “a more specific risk of exploitation” because attorneys have a “better sense of the value of a particular veteran’s claim than the veteran does”).

4. See 38 U.S.C. § 5904(c)–(d) (2006) (allowing attorneys to collect fees and setting forth the requirements for Department of Veterans Affairs (VA) enforcement of fee agreements).

As part of this congressionally mandated incentive structure, the Equal Access to Justice Act (EAJA)⁵ is available as a way for plaintiffs, through VA's pockets, to pay the fees for lawyers who "win" against the government before the Court of Appeals for Veterans Claims (CAVC).⁶ The EAJA does not compensate attorneys for work done on the vast majority of veterans' claims, which never reach the courts but are instead adjudicated at the agency level.⁷ There is, however, a separate compensation scheme to encourage attorney participation in the adjudication of VA benefits.

To ensure lawyers were not discouraged from representing veterans at this first, crucial stage, Congress instituted a contingency fee system: an attorney who succeeds in gaining benefits can receive 20% of the veteran's past-due benefits award directly from the Secretary of Veterans Affairs.⁸ This largely straightforward system has raised few problems for attorneys and veterans—in most cases VA simply parcels out 20% to the attorney and then hands over the rest to the veteran. However, there is a small but critical area of complexity involving veterans who for whatever reason will

5. See 28 U.S.C. § 2412(b), (d) (2006) (allowing a court to award to a nongovernment prevailing party reasonable attorney fees when the position of the United States was not substantially justified); see also U.S. COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORTS FOR 2000–2009, http://www.uscourts.cavc.gov/documents/Annual_Report_FY_2009_October_1_2008_to_September_30_2009.pdf (documenting that in 2009 the Court of Appeals for Veterans Claims (CAVC) granted 2,385 Equal Access to Justice Act (EAJA) fee applications and denied or dismissed only 38). This highlights the need for attorneys to hold VA accountable earlier in the adjudication process, at the agency level. See, e.g., Carpenter, *supra* note 1 (asserting attorney representation throughout the administrative appellate process is necessary to ensure the record is fully developed and veterans receives all benefits they are entitled to).

6. See 28 U.S.C. § 2412(d)(2)(F) (including the CAVC in the definition of *court*).

7. In 2010, veterans filed more than 1.1 million claims for disability. DEP'T OF VETERANS AFFAIRS, FY 2010 PERFORMANCE AND ACCOUNTABILITY REPORT I-3 [hereinafter VA FY 2010 P&A REP.]. 150,475 preliminary requests for appeal were also filed; of these only 57,925 appeals to the Board of Veterans' Appeals (BVA) were perfected. BD. OF VETERANS' APPEALS, REPORT OF THE CHAIRMAN FISCAL YEAR 2010 17–21, http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2010AR.pdf. These figures illustrate that the vast majority of veterans claims are handled at the agency level.

8. See 38 U.S.C. § 5904(d) (mandating that to qualify for direct payment the fee agreement must specify direct payment, meet statutory requirements, and be appropriately filed with VA). Firms are free to charge a greater fee percentage so long as it is still deemed reasonable. See *id.* § 5904(a)(5) (establishing a 20% fee as presumptively reasonable and giving VA discretion to decide beyond that). However, VA does not "protect" these higher fees and it is up to the attorney to collect from the client. See Payment of Fees, 38 C.F.R. § 14.636(g)(2) (2010) ("A fee agreement . . . that specifies a fee greater than 20 percent of past-due benefits awarded . . . [is] considered to be an agreement in which the . . . attorney is responsible for collecting any fees . . . without assistance from VA.").

not receive the entirety of their award.⁹ In these cases, the question becomes whether attorneys are to receive 20% of the original award or 20% of the award after offset or withholding.

For veterans who still receive some portion of their award, the answer is on the books. By statute, contingency fees are to be calculated from any past-due benefits awarded on the basis of the claim;¹⁰ “award” does not mean amount payable to the veteran but the actual award prior to any withholding.¹¹ *Snyder v. Nicholson*¹² held that *award*, in the “parlance of veterans’ benefits,” means “the amount stated as the award for success in pursuit of a claim for benefits.”¹³ Thus, even though a veteran might receive only a portion of his award, the attorney will still receive 20% of the original.¹⁴ This all flows from the idea that contingency fees in veterans’ benefits cases belong, by statute, to the attorney—and are thus payable directly from the benefits awarded on the claim, rather than being calculated from the actual payment to the veteran.¹⁵

This result reflects Congress’s decision to promote attorney participation in the VA process by guaranteeing enforcement of a 20% contingency fee agreement should the veteran win the claim.¹⁶ But VA regulations institute a caveat: a contingency fee agreement will be upheld only if the award of past-due benefits “results in a cash payment to a claimant . . . from which the fee may be deducted.”¹⁷ By using *results*, VA asserts that contingency fee agreements lose their statutory protection if the claimant, by virtue of

9. It could be that the veteran is incarcerated and only entitled to a reduced portion of benefits during his confinement, *see* 38 U.S.C. § 5313, or perhaps the veteran is already receiving an offsetting benefit such as a pension, *see id.* § 5304(a) (restricting receipt of multiple types of benefits, such as both compensation and retirement pay). This Comment deals almost exclusively with the cases of veterans whose awards are offset toward their debt to the United States.

10. *Id.* § 5904(d) (setting forth the requirements for a fee to qualify for direct payment).

11. *Snyder v. Nicholson*, 489 F.3d 1213, 1219 (Fed. Cir. 2007).

12. 489 F.3d 1213, 1219 (Fed. Cir. 2007).

13. *Id.* (emphasizing “awarded” as clearly and unambiguously referring to what the veteran has won from the government).

14. *See id.* at 1219–20 (determining that while an incarcerated veteran may receive a temporary reduction in benefits received, his attorney is still entitled to, and should receive, 20% of the award—just as if the veteran was to receive full benefits).

15. *Cf. Astrue v. Ratliff*, 130 S. Ct. 2521, 2526–27 (2010) (holding that an attorney prevailing against the Social Security Administration has no statutory entitlement to an EAJA fee because the statute’s plain text awards fees to the *litigant* as the “prevailing party”).

16. *See Scates v. Principi*, 282 F.3d 1362, 1366 (Fed. Cir. 2002) (characterizing Congress’s establishment of direct payment as an “offsetting benefit” compensating for the mandatory low fee percentage). There are other types of fee agreements available to attorneys, though this Comment focuses on contingency fee agreements. *See infra* note 124.

17. Payment of Fees, 38 C.F.R. § 14.636(h)(iii) (2010).

indebtedness to the United States, does not receive any payment at all.¹⁸ If no “fund” of past-due benefits is created, VA maintains that there is no percentage of that fund to which an attorney can be entitled.¹⁹ VA further reasons that if the veteran, as assignor, has no right to receive payment of any part of the past-due benefits, then his attorney, as assignee, cannot have such a right either.²⁰ This policy has troubling consequences: by protecting only the fee agreements of veterans *not* in debt to the government beyond their claims’ values, VA in fact ensures that some of the neediest veterans cannot retain legal representation.²¹

VA’s line drawing, protecting the fee agreements of veterans who emerge from their administrative battles with even a little something left in their award but refusing to enforce the agreements of those who break even or still have debt, needs explanation. Administrative offset is a concept not yet squarely dealt with in veterans law,²² but the Supreme Court has recently provided an analytical framework in *Astrue v. Ratliff*.²³ Although *Ratliff* dealt not with contingency fees but with the award of EAJA fees, the decision offers a useful comparison. The Court decided that if the pertinent statute does not specify that fees are payable directly to the attorney, the fees will not be severed from the claimant’s overall award and will be applied to the claimant’s debt to the government.²⁴ That EAJA awards the prevailing party with fees “in which her attorney may have a beneficial

18. See VA Opinion of the General Counsel, Precedent Opinion 12-93 (Dec. 21, 1993) [hereinafter Precedent Opinion 12-93], <http://www.va.gov/ogc/docs/1993/PRC12-93.doc> (interpreting “results in a cash payment” to require a fund, whatever the amount, to be actually paid to the veteran); Summary of Precedent Opinions of the General Counsel, O.G.C. Precedent 12-93, 59 Fed. Reg. 4752, 4753 (Feb. 1, 1994).

19. Precedent Opinion 12-93, *supra* note 18.

20. *Id.* at cmt. 10 (declaring a contingent fee agreement as in “the nature of an assignment of the veteran’s right to receive the portion of past-due benefits covered by the fee agreement”).

21. An important assumption underlying this Comment is that while pro bono representation of veterans has always been permitted, statutes and regulations prohibiting compensation result in fewer lawyers practicing veterans law and thus more obstacles in obtaining representation. Pro bono attorneys and other free legal help can only take on so many cases, see *infra* note 122 and accompanying text, and the opportunity for compensation is of course an excellent—if not critical—incentive for attorney participation, see *infra* note 224.

22. See *Snyder v. Nicholson*, 489 F.3d 1213, 1220 n.2 (Fed. Cir. 2007) (declining to reach the validity of 38 C.F.R. § 20.609 (2007), which contains identical language to its successor, 38 C.F.R. § 14.636 (2008)).

23. 130 S. Ct. 2521 (2010).

24. See *id.* at 2529–30 (concluding that without statutory protection, the contractual nature of a fee agreement is in essence overridden by the agency’s duty to collect outstanding debts).

interest or a contractual right” does not resolve the essential question of whether the attorney was entitled by statute to direct payment prior to offset.²⁵ Enforceable entitlement to direct payment is thus not a question of contracts or interest but of statutory rights and protection.²⁶ While the Supreme Court was firm in its declaration that EAJA fees are fair game for administrative offset,²⁷ it also established that resolution of similar cases depends on whether the governing statutes provide that fees are payable directly to the attorney.²⁸ If so, such fees may not be taken by the government to satisfy the claimant’s obligations.²⁹

Although the recent ruling in *Ratliff* instructs courts to look to the underlying statute when determining if attorneys are entitled to receive direct payment of fees despite the operation of administrative offset, VA has instead decided to interpret its regulations so that attorney fees will not be paid if the claimant does not receive an actual cash payment.³⁰ This interpretation relies on two pieces of agency regulatory issuances: 38 C.F.R. § 14.636(h), which upholds contingency fees only under certain conditions,³¹ and Precedent Opinion 12-93, which reads administrative offset into the regulation and was issued by the VA Office of General Counsel (OGC).³²

25. *Id.* at 2526–27.

26. *Id.*; *see also* Hanlin v. United States, 316 F.3d 1325, 1329 (Fed. Cir. 2003) (explaining that “[t]he statute and the regulation set forth [VA’s] authority and obligation to act” and rejecting an implied-in-fact contract or promissory undertaking theory with regards to payment of attorney fees); *cf. Ratliff*, 130 S. Ct. at 2528–29 (remarking that contractual or assignment relationships are unnecessary if the statute provides a basis for entitlement).

27. *Ratliff* was in reality a unanimous decision; Justice Sotomayor wrote a concurring opinion, joined by Justices Stevens and Ginsburg, only to note that while the law was clear and she was compelled to find with the majority, she did not like it. *Ratliff*, 130 S. Ct. at 2529–33 (Sotomayor, J., concurring) (deploring the practical effect of undermining the aim of the EAJA).

28. *Id.* at 2527–28 (majority opinion) (“Congress knows how to make fees awards payable directly to attorneys where it desires to do so.”).

29. *See id.* at 2524 (summarizing that all funds payable by the United States are subject to offset unless exempted by statute).

30. Precedent Opinion 12-93, *supra* note 18.

31. Specifically, (i) the total fee cannot exceed 20% of the past-due benefits awarded, (ii) the amount must be contingent on whether the claim is resolved in favor of the veteran, and (iii) the award of past-due benefits must result in a cash payment from which the fee may be deducted. Payment of Fees, 38 C.F.R. § 14.636(h) (2010).

32. Precedent Opinion 12-93, *supra* note 18; *see also* 38 C.F.R. § 14.507 (classifying a written legal opinion of the Office of General Counsel as a “conclusive” interpretation and binding unless it is designated as “advisory only”); *cf.* 38 U.S.C. § 501 (2006) (giving the Secretary authority to “prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department and are consistent with those laws”).

This Comment challenges VA's regulations as departing from the clear language of 38 U.S.C. § 5904(d) and undercutting Congress's intent to establish by statute an attorney's right to direct payment out of past-due benefits awarded. Part I briefly sketches the VA benefits system as it stands today, outlining the evolving role of attorneys and explaining the history of VA's grudging acceptance of their increased participation. Part II analyzes *Ratliff* and relevant Federal Circuit cases to explain how the courts have interpreted Congress's provisions for attorney involvement as evidence of its intent. Part III examines the underlying statutes that establish direct payment for attorneys and provide for administrative offset, as well as the accompanying regulations. Finally, Part IV explains why the VA's position on administrative offset is an unreasonable interpretation of the underlying statute and a measure exceeding its authority.

I. THE VA BENEFITS PROCESS AND THE HISTORY OF ATTORNEY REPRESENTATION

The history of veterans' benefits in America is rich and colorful. It illustrates how the country feels about its returning heroes and also tracks the changing societal perceptions regarding disability.³³ Attorneys have played a variety of roles in this history—sometimes foiling the system and other times championing it. This Part will first explain how the disability compensation system works today, next returning to the beginning of VA history to trace the involvement of attorneys as the process has changed.

A. *The Modern Disability Compensation Claims Process*

A veteran seeking disability compensation³⁴ must first, of course, make a claim—a process typically initiated by filing a request for benefits at one of the fifty-seven Veterans Affairs Regional Offices (ROs).³⁵ The RO must

33. For a more thorough introduction to the history of veterans benefits, see DEP'T OF VETERANS AFFAIRS, VA HISTORY IN BRIEF (2010) [hereinafter VA HISTORY IN BRIEF], http://www.va.gov/opa/publications/archives/docs/history_in_brief.pdf.

34. There are numerous claims for benefits other than disability compensation claims that can be made, such as pension claims or dependency and indemnity compensation claims. See PAUL M. SCHOENHARD, VETERANS AFFAIRS LAW (forthcoming 2011) (manuscript at 7-1 to -30, 9-1 to -14) (on file with author) (explaining these and various additional benefits, such as education assistance); Thomas J. Reed, *Parallel Lines Never Meet: Why the Military Disability Retirement and Veterans Affairs Department Claim Adjudication Systems Are a Failure*, 19 WIDENER L.J. 57, 73-82 (2009) (discussing the various types of benefits claims a veteran may file and their accompanying standards of proof and adjudication procedures).

35. See 38 U.S.C. § 5101(a) ("A specific claim . . . must be filed in order for benefits to be paid . . . under the laws administered by the Secretary."); Claims for Disability Benefits, 38 C.F.R. § 3.151 (2010) (espousing similar language). This Comment only purports to

review the application and assist the veteran with locating military service and medical records,³⁶ retrieving medical records from treatments at VA facilities,³⁷ and obtaining any records of other administrative disability adjudications the veteran has disclosed.³⁸ A veteran dissatisfied with the RO's determination of the existence, nature, or severity of the disability can then request a rehearing³⁹ or appeal the decision to the Board of Veterans Appeals (BVA).⁴⁰ This requires the filing of a Notice of Disagreement (NOD),⁴¹ which triggers the first opportunity for representation by a compensated attorney.⁴² Following receipt of an NOD, the RO issues a Statement of the Case, which sets forth the legal basis for the decision and summarizes the evidence considered.⁴³ This gives the veteran a chance to prepare evidence in rebuttal and informs the veteran of the additional procedural requirements needed to push the case through to the BVA.⁴⁴

The BVA is the final stage in agency adjudication and review.⁴⁵ The

sketch the basic path for resolution of a disability compensation claim; for an excellent and in-depth articulation of the process see SCHOENHARD, *supra* note 34, at 5-1 to -18; and Reed, *supra* note 34, at 82-97.

36. 38 U.S.C. § 5103A(c)(1); VA Assistance in Developing Claims, 38 C.F.R. § 3.159(c)(3).

37. 38 U.S.C. § 5103A(c)(2); 38 C.F.R. § 3.159(c)(2).

38. 38 U.S.C. § 5103A(c)(3); 38 C.F.R. § 3.159(c)(2).

39. 38 U.S.C. § 7105(d); Review of Benefit Claims Decisions, 38 C.F.R. § 3.2600(a). This may be undertaken by way of a Decision Review Officer. *See* 38 C.F.R. § 3.2600(a) (giving a claimant sixty days to request this sort of view as an alternative to the "traditional appellate process"). Although this route sounds like a tempting alternative to adjudication, it acts as a trap for the unwary veteran and can add years to a claim. *See, e.g.,* Benjamin W. Wright, Comment, *The Potential Repercussions of Denying Disabled Veterans the Freedom to Hire an Attorney*, 19 FED. CIR. B.J. 433, 438-39 (2010) (reporting that it takes, on average, 645 days for a Decision Review Officer to reach a decision).

40. 38 U.S.C. § 7105.

41. *Id.* § 7105(b); 38 C.F.R. § 3.2600.

42. 38 U.S.C. § 5904(c); Payment of Fees, 38 C.F.R. § 14.636(c). The assertion requires one caveat: attorneys may be compensated for work done prior to a veteran's decision to file a claim, encompassing tasks such as document review. *See, e.g.,* VETERANS BENEFITS MANUAL 1546 (Barton F. Stichman & Ronald B. Abrams eds., 2010)

43. 38 U.S.C. § 7105(d)(1); Statement of the Case, 38 C.F.R. § 19.29.

44. *See* 38 U.S.C. § 7105(d)(3) (giving the claimant sixty days from the mailing of the Statement of the Case to file a formal appeal, which must set out "specific allegations of error of fact or law" and clearly identify the benefits sought); 38 C.F.R. § 19.30 (specifying that to perfect an appeal the veteran must file VA Form 9); *see also* Victoria L. Collier & Drew Early, *Cracks in the Armor: Due Process, Attorney's Fees, and the Department of Veterans Affairs*, 18 ELDER L.J. 1, 16 (2010) (outlining the consequences of legal and procedural hurdles imposed in addition to the filing of a Notice of Disagreement (NOD)).

45. *See* DEP'T OF VETERANS AFFAIRS, FEDERAL BENEFITS FOR VETERANS: DEPENDENTS & SURVIVORS 103-04 (2010) (designating the BVA as the appellate body that "makes decisions on appeals on behalf of the Secretary of Veterans Affairs" as opposed to the

BVA may grant relief, deny relief, or remand the case to the RO for further development.⁴⁶ In so doing, the BVA must demonstrably base its decision on the entire record before the agency and consider all evidence and provisions of law and regulation.⁴⁷ If adversely affected by the decision of the BVA, the veteran has a right to appeal to the CAVC.⁴⁸

The CAVC's appellate jurisdiction is limited: the CAVC may not undertake de novo review of the BVA's findings of fact⁴⁹ and can set aside or reverse a finding of fact only if it is clearly erroneous.⁵⁰ To prevail at the CAVC the veteran will usually be forced to demonstrate the BVA mistakenly applied the law.⁵¹ Because the CAVC is only looking for legal errors and will ignore factual disputes unless glaringly incorrect, the presence of a lawyer at this stage becomes more essential to the outcome of a claim—especially because VA will almost certainly be represented.⁵²

From there, veterans' claims follow a more familiar course through the Court of Appeals for the Federal Circuit⁵³ and occasionally on to the Supreme Court.⁵⁴ These Article III courts can review the actual validity and interpretation of VA regulations and statutes.⁵⁵ However, in contrast even to the CAVC's very limited authority to consider facts,⁵⁶ these Article III courts may not disturb the factual determinations made below; the application of the law to the facts of a particular case is likewise precluded

CAVC, which is an "independent court" and not part of VA).

46. 38 U.S.C. § 7104; 38 C.F.R. § 19.4.

47. 38 U.S.C. § 7104(d); 38 C.F.R. § 19.7.

48. See 38 U.S.C. § 7266(a); see also *id.* § 7252 (giving the CAVC exclusive jurisdiction over appeals from BVA).

49. See 38 U.S.C. § 7261(c) ("In no event shall findings of fact made by [the BVA] be subject to trial de novo by the Court.").

50. *Id.* § 7261(a)(4).

51. The CAVC has considerably more latitude to review legal determinations than factual determinations. Compare *id.* § 7261(a)(1) (granting the CAVC blanket authority to decide all legal matters, including interpretation of the Constitution, the relevant statutes, and the governing regulations), and *id.* § 7261(a)(3) (enabling the CAVC to set aside VA decisions, findings, conclusions, and rules only if arbitrary and capricious, contrary to the Constitution, or in excess of statutory jurisdiction), with *id.* § 7261(a)(4) (allowing the CAVC to set aside findings of fact only if clearly erroneous).

52. See, e.g., Matthew J. Dowd, Note, *No Claim Adjudication Without Representation: A Criticism of 38 U.S.C. § 5904(c)*, 16 FED. CIR. B.J. 53, 79–80 (2006) (quoting the remarks of two CAVC judges who emphasize the imperative of legal assistance at this stage in benefits proceedings).

53. 38 U.S.C. § 7292(c).

54. *Id.*

55. See *id.* § 7292(d)(1) (giving the Federal Circuit power to interpret all relevant questions of veterans law and set aside regulations).

56. See *supra* note 51 and accompanying text (describing CAVC jurisdiction).

from review.⁵⁷

When a veteran's disability claim achieves final resolution and is granted by VA, two types of compensation benefits are offered: continuing monthly payments to compensate the veteran going forward⁵⁸ and a lump sum award of past-due benefits compensating the veteran for accumulated benefits since the effective date of the claim.⁵⁹ In general, the effective date is the day the claim was first filed at the RO—even if it takes years for the veteran's case to be resolved or if a veteran seeks to reopen an old claim based on clear and unmistakable error.⁶⁰ A lengthy adjudication process thus has vast implications for the amount of benefits eventually received by veterans as well as their quality of life in the meantime.⁶¹

57. See 38 U.S.C. § 7292(d)(2) (prohibiting the Federal Circuit from reviewing factual disputes except to the extent they involve constitutional issues). The Supreme Court could undertake a factual review, but I have assumed this is unlikely.

58. See Schedule for Rating Disabilities, 38 C.F.R. pt. 4 (2010) (setting forth the hundreds of disabilities qualifying for monthly compensation and tabulating the severity of each); see also DEP'T OF VETERANS AFFAIRS, VETERANS COMPENSATION BENEFITS RATE TABLES (2009), <http://www.vba.va.gov/bln/21/rates/comp01.htm> (listing the monthly compensation rates associated with each level of disability; for example, in 2009 a single veteran who was 20% disabled would receive \$243 a month). For an explanation of how to use disability compensation tables and rates, see SCHOENHARD, *supra* note 34, at 5-22 to -30.

59. Definitions, 38 C.F.R. § 20.3(n). In essence, past-due benefits reflect all the benefits the veteran was entitled to receive before a final decision was made on the claim. See, e.g., *Snyder v. Nicholson*, 489 F.3d 1213, 1217–18 (Fed. Cir. 2007) (explaining that the disability forms the basis of the claim, and “[a]ny compensation not paid to the claimant in a given month becomes a ‘past-due benefit’”). Thus, if a veteran filed a claim in January 2000, and was ultimately determined to be 10% disabled in January 2001, he would receive a lump sum reflecting the past-due benefits he did not receive for the past year as well as a monthly payment reflecting the compensation assigned to a 10% disability rating. Cf. Schedule for Rating Disabilities, 38 C.F.R. pt. 4; DEP'T OF VETERANS AFFAIRS, VETERANS COMPENSATION BENEFITS RATE TABLES (2009), <http://www.vba.va.gov/bln/21/rates/comp01.htm>.

60. See 38 U.S.C. § 5110 (qualifying the rule in that the effective date shall be the later of the date the claim was filed and the date entitlement to disability compensation began, and listing effective date rules for claims for increased ratings and claims filed within one year of discharge from the armed services); 38 C.F.R. § 3.400 (applying the statutory language).

61. Compensation rates are keyed toward inability to work due to a service-connected injury or condition. See Essentials of Evaluative Rating, 38 C.F.R. § 4.1 (2010) (the ratings “represent as far as can practicably be determined the average impairment in earning capacity” due to an injury occurring in service). However, the rating tables are not based on actual impairment but instead reflect a determination of averages: even though a particular veteran may be able to manage a successful career despite the loss of his leg—which carries a 50% disability rating—he is still entitled to that sum. *Id.* Although societal aversion to the overinclusion inherent in such a system is understandable, it is a vestige of the “old way” of thinking about veterans benefits as merit or need-based rather than as entitlements. See, e.g.,

Unfortunately, obtaining a final and accurate resolution of a veteran's case can take years. While the RO may be reasonably quick to give an initial decision,⁶² an appeal to the BVA usually takes five years or more.⁶³ This is partly due to the extraordinary number of claims VA receives—almost 1.1 million filed in 2010.⁶⁴ Inaccuracies only extend the process; VA's records show 84% accuracy for initial entitlement claims.⁶⁵ The Federal Circuit has expressed its particular frustration with frequent mistakes that go unnoticed (and sometimes uncorrected).⁶⁶ In large part, accuracy problems are linked to deficiencies in the development of claims—missing examinations, inadequate medical opinions, and lack of training completed by VA staff.⁶⁷ Fully developing the record before the agency is thus the key to a successful claim for benefits.⁶⁸

Peter Blanck, "*The Right to Live in the World*": *Disability Yesterday, Today, and Tomorrow*, 13 TEX. J. C.L. & C.R. 367, 370–72 (2007) (detailing the changes in how society views disability and compensation benefits).

62. VA FY 2010 P&A REP., *supra* note 7, at II-10 (finding that initial rating decisions take an average of 166 days).

63. The average veteran waits 656 days from the filing of an NOD to a final decision from the BVA. *Id.* at II-20. *See also* Wright, *supra* note 39, at 439 (explaining that the five-year approximation assumes that a veteran can immediately answer VA's denial and that it is more likely that a veteran will require time to prepare an appeal).

64. *See* VA FY 2010 P&A REP., *supra* note 7, at I-3 (mentioning that it is not just the volume but also the complexity of claims that continues to increase).

65. *Id.* at I-18.

66. *See, e.g.,* Dambach v. Gober, 223 F.3d 1376, 1381 (Fed. Cir. 2000) (noting that the particular case had been in contest for seven years and was first remanded because of an inaccurate doctor's report and then again to determine if the doctor was an independent medical expert, leading the court to urge in exasperation that it "would be appropriate for the Veterans Court to set a deadline by which this veteran's case will be concluded"); *see also* VA FY 2010 P&A REP., *supra* note 7, at II-165 (finding that at the Veterans Affairs Regional Offices (ROs) inspected in 2010, staff incorrectly processed 27% of the benefit claims reviewed). Of the errors caught by VA's quality assurance program, 14% went uncorrected despite staff statements to the contrary. *Id.*

67. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-120T, VA DISABILITY BENEFITS: ROUTINE MONITORING OF DISABILITY DECISIONS COULD IMPROVE CONSISTENCY (2005) (showing great discrepancies across ROs, with average compensation varying as much as 63% and the percentage of exam reports containing the required information varying from 57% to 92%); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-561, VETERANS' BENEFITS: INCREASED FOCUS ON EVALUATION AND ACCOUNTABILITY WOULD ENHANCE TRAINING AND PERFORMANCE MANAGEMENT FOR CLAIMS PROCESSORS 3 (2008) (complimenting VA's standard training curriculum for claims processors but finding staff was not held accountable for meeting the requirements and there was no policy outlining consequences for those who fail to do so).

68. *See* Carpenter, *supra* note 1, at 285 (noting that it is not only the legal character of the representation that matters, but it is critical that representation take place before the record is closed). *See also* James T. O'Reilly, *Burying Caesar: Replacement of the Veterans Appeals*

B. *Blunders of the Civil War and the Resulting Attorney Restrictions*

America boasts a long tradition of providing benefits to veterans, stretching all the way back to Plymouth Colony.⁶⁹ The Civil War, however, sorely taxed America's resolve to support benefits programs for the returning heroes.⁷⁰ Widespread, blatant misuse of the era's benefits programs resulted in severe aversion to mixing veterans and attorneys.⁷¹

The Civil War left 1.9 million veterans eligible for assistance,⁷² and the government dedicated vast funds for their assistance—at one point in 1893 nearly half the federal budget.⁷³ Attorneys flocked to veterans law in droves. Far from being generally responsible, the new attorney bar succeeded in spawning “a morass of fraud” and digging a “bottomless pit of extravagance,”⁷⁴ complete with agents traveling the country persuading veterans to manufacture an infirmity and to blame it on the war.⁷⁵ Society was already straining, and it perceived attorneys as nothing but leeches on an already exhausted system.⁷⁶

This tide of attorneys did not pass unchallenged; Congress enacted attorney fee limitations to discourage lawyers from becoming unnecessarily involved in veterans law. The first fee limitation—\$5 per claim—was enacted in 1862 during the early stages of the Civil War; two years later this fee increased to \$10.⁷⁷ This limitation was designed “to protect the veteran from extortion or improvident bargains with unscrupulous lawyers”⁷⁸ and

Process is Needed to Provide Fairness to Claimants, 53 ADMIN. L. REV. 223, 240–41 (2001) (mentioning missed or unscheduled exams, unobtained records, and decisions not compliant with remand instructions that plague VA on appeal and add time and cost to the process).

69. See, e.g., VA HISTORY IN BRIEF, *supra* note 33, at 3 (relating that in 1636, Plymouth Colony provided money to those who were injured while defending the settlement).

70. See, e.g., Collier & Early, *supra* note 44, at 5–8 (describing the public sentiment that led to government distrust of attorneys involved in veterans' claims).

71. See, e.g., Blanck, *supra* note 61, at 369–85 (detailing the extensive fraud and the resulting public outcry against veterans perceived to be milking the system).

72. See VA HISTORY IN BRIEF, *supra* note 33, at 4. This number only includes Union veterans; former Confederate soldiers were ineligible for any federal veterans benefits until they were pardoned in 1958. *Id.* Of course at that point, there was only one Confederate veteran left. *Id.*

73. Blanck, *supra* note 61, at 374.

74. *Id.* at 376 (quoting *The Democrats and the Pensions*, N.Y. TIMES, Dec. 9, 1898, at 6).

75. *Id.* at 380.

76. *Id.* at 376–81.

77. See *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 359–60 (1985) (Stevens, J., dissenting) (tracing this history of fee limitations). See generally Collier & Early, *supra* note 44, at 5 (explaining that \$5 made sense when the claims process consisted of filling out a form and the claims themselves were simple to handle and adjudicate); Dowd, *supra* note 52, at 60–61 (further exploring the history of VA fee agreements).

78. *Walters*, 473 U.S. at 360; see CONG. GLOBE, 37TH CONG., 2D SESS. 2101 (1862)

encompassed reasonable compensation for the attorney's time, which was mainly spent locating and filling out the proper form.⁷⁹ Fee limitations ensured that attorneys could not siphon away a veteran's benefits award, but they did not create an incentive for a lawyer to "win" for his client. Because the fee was collected regardless of whether the benefits claim was successful, the fee limitations instead created an incentive to maximize volume of claims.⁸⁰

But as \$10 became a less valuable prize, even a lawyer filing a high number of claims could not make much of a living. Eventually, there was no incentive at all for attorneys to meaningfully participate in the administration of veterans' benefits.⁸¹ Despite minor statutory changes over time, Congress made no mentionable change to attorney fees⁸² and left the \$10 limit intact for almost 120 years.⁸³ Thus, by the 1980s, few lawyers practiced before VA or even cared to.⁸⁴

C. Walters and the Due Process Challenge

Though veterans, legislators, and attorneys disputed the restrictions,⁸⁵

(expressing Congress's intention to "prevent the numerous frauds" by limiting compensation to a level in accord with "services actually rendered").

79. Justice Stevens estimated this to be equivalent to a \$580 fee in 1985. *Walters*, 473 U.S. at 361. The success of the claim was irrelevant to collection of the fees—attorneys received the fee just for filling out the paperwork and forwarding it along. *Id.*

80. George Lemon provides the best stand-out example: he handled more than 125,000 pension claims for \$10 apiece—a hefty sum by any standards. Blanck, *supra* note 61, at 380–81; *see also* Collier & Early, *supra* note 44, at 7–8 (estimating that "[a] minimum" of one-fourth of all claims submitted were illegitimate or fraudulent). This led to a "moral economy of veterans benefits" with complicated societal judgments as to who was worthy and who was faking. Blanck, *supra* note 61, at 376–85 (quoting historian Larry Logue) (citation omitted).

81. *See* James D. Ridgway, *The Veterans' Judicial Review Act Twenty Years Later: Confronting the New Complexities of the Veterans Benefits System*, 66 N.Y.U. ANN. SURV. AM. L. 251, 260 (2010) (observing that despite a few dominating claims agents, the restrictions on attorney fees allowed a "vast network" of Veterans Service Organizations (VSOs) to replace attorneys by the time of the Veterans Judicial Review Act (VJRA)).

82. Throughout, Congress's intentions were to protect veterans from predatory attorneys and claims agents. *See* Collier & Early, *supra* note 44, at 9 (discussing the retention of the fee limitations despite changes in the benefits system).

83. Dowd, *supra* note 52, at 61. *See also* Ridgway, *supra* note 81, at 256–57 & nn. 29–31 (crediting Vietnam veterans' fight over Agent Orange as breaking the "Iron Triangle" of VA, veterans affairs congressional affairs committees and various VSOs that were opposed to judicial review).

84. *See* VETERANS BENEFITS MANUAL, *supra* note 42, at 1544 (identifying the erosion of the value of a \$10 fee as a "virtual economic bar to the hiring of an attorney").

85. *See, e.g.,* Collier & Early, *supra* note 44, at 11–12 (documenting a general "[d]iscontent at the lack of effective representation for veterans" in the years prior to judicial

only one—ultimately unsuccessful—legal challenge occurred, resolved in 1985 by the Supreme Court in *Walters v. National Ass'n of Radiation Survivors*.⁸⁶ In *Walters*, the Supreme Court declared that veterans' due process rights were not violated by restrictions on representation.⁸⁷ It also rebuked the district court, which had held that the fee limitation denied veterans any realistic opportunity to obtain legal representation,⁸⁸ for being so hasty to cast out over a century worth of practice.⁸⁹

The Supreme Court found the district court's *Mathews v. Eldridge*⁹⁰ analysis absolutely lacking, taking special issue with its faulty weighing of the government interest.⁹¹ Primarily concerned with protecting Congress's purpose behind the statutory scheme, the Court was convinced that eliminating fee agreements would wreak havoc on the system.⁹² It stressed that the veterans' disability system did not contemplate adversarial proceedings—which was to be “expected” considering the enormous number of claims VA received each year.⁹³ The government's interest in maintaining an orderly, paternalistic system was thus significant.⁹⁴

Determining that the government's interest consisted in perpetuating a benefits process “as informal and nonadversarial as possible,” the Court found that introducing lawyers into the equation would only serve to frustrate that goal.⁹⁵ Although the opinion focused on protecting the

review). Senator Tom Daschle expressed his dissatisfaction with VA procedures and lamented its arbitrary, behind-the-times adjudication of claims involving Post-Traumatic Stress Disorder, exposure to herbicides such as Agent Orange, and encounters with radiation. See generally Tom Daschle, *Making the Veterans Administration Work for Veterans*, 11 J. LEGIS. 1 (1984). He was also critical of the idea that providing judicial review would make the system adversarial. See *id.* at 11–12 (arguing that the appeals process is “already adversarial” and that a veteran must face opposition that “acts as both defendant and judge”).

86. 473 U.S. 305 (1985).

87. *Id.*

88. Nat'l Ass'n of Radiation Survivors v. Walters, 589 F. Supp. 1302 (N.D. Cal. 1984), *rev'd*, 473 U.S. 305 (1985).

89. *Walters*, 473 U.S. at 322–23.

90. 424 U.S. 319 (1976).

91. See *id.* (admonishing the district court for “cavalierly dismissing a long-asserted congressional purpose”).

92. *Id.* at 324–25.

93. See *id.* at 309–10 (mentioning the 800,000 claims received in 1978).

94. See *id.* at 321–22 (finding that the government's interest has been consistently asserted since the Civil War).

95. See *id.* at 323–25 (listing as probable consequences of lawyer involvement a prolonged decisionmaking process, great financial cost, longer records, and “the possibility of judicial review” (quoting *Gagnon v. Scarpelli*, 411 U.S. 778 (1973))). The Supreme Court was dismissive of the district court's determination that the system was already adversarial. See *id.* at 324 n.11 (finding that the statements of a few veterans and attorneys were not

system, it also noted that Congress's "principal goal" was to ensure the veteran received the entirety of the award.⁹⁶ The Supreme Court's *Mathews* analysis was thus quite different from the district court's: it accorded "great weight" to the government's interest in a paternalistic system.⁹⁷

Correspondingly, it looked for an "extraordinarily strong showing" of probable error and probability that attorneys would "sharply diminish" that possibility—and found neither.⁹⁸ Although Justice O'Connor's concurring opinion remarked that the door was still open for the district court to consider individual claims and "as applied" due process challenges,⁹⁹ the Supreme Court's majority was clear: a \$10 fee limitation did not violate a veteran's due process rights. Congress, in 1988, changed the game.

D. Growing Discontent and the Veterans Judicial Review Act

In 1988, Congress departed from the decades of tradition the Supreme Court found so convincing in *Walters* and enacted the Veterans Judicial Review Act (VJRA), allowing for judicial review and attorney involvement.¹⁰⁰ Vietnam-era veterans, fed up with VA's inability to process

persuasive).

96. *See id.* at 326. For example, Congress had considered modifications to the fee limit but cautioned those changes needed to be "made carefully so as not to induce unnecessary retention of attorneys" or "disrupt unnecessarily the very effective network of nonattorney resources." *Id.* at 322 (quoting S. REP. NO. 97-466, at 49 (1982)). *Walters* recognized, as did the Senate, that VA's insistence that veterans must be protected from unscrupulous lawyers was "no longer tenable." *Id.* However, the Court specifically mentioned its fears that a claimant with a "factually simple and obviously deserving claim may nonetheless feel impelled to retain an attorney simply because so many other claimants retain attorneys." *Id.* at 326.

97. *Id.* at 329. For a thorough analysis of the difference between the district court's and the Supreme Court's *Mathews* analysis, see generally David R. DiMatteo, Comment, *Walters Revisited: Of Fairness, Due Process, and the Future of Veterans' Fight For the Right to Hire an Attorney*, 80 TUL. L. REV. 975, 983-93 (2006).

98. *Walters*, 473 U.S. at 326. The Supreme Court found the numbers telling: VSOs had a 16.2%–16.8% success rate at the BVA; attorneys had an 18.3% success rate. *Id.* at 327–28. The Court did indicate that the "availability of particular lawyers' services in so-called 'complex' cases" could be a factor in preventing error in those cases—but this concession was tempered by lack of knowledge as to how to define such cases or how many of them there were. *Id.* at 330. Even then, the Court pointed out, due process must be judged by the generality of cases; a process sufficient for the large majority of claims is deemed sufficient for them all. *Id.*

99. *See id.* at 337–38 (O'Connor, J., concurring) (reasoning that though the majority concluded denying legal representation was not per se unconstitutional, the district court should still consider individual claims alleging that VA did not fulfill its obligations).

100. Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988) (codified

claims fairly and accurately, are largely credited with sparking this drastic reform.¹⁰¹ Before the VJRA, there was no judicial review of VA decisions;¹⁰² the Secretary's say was final and only challenges to the constitutionality of the underlying statute were justiciable.¹⁰³ The VJRA created the CAVC, an entirely new court allowing for initial review outside of VA, and then provided for further review by Article III courts.¹⁰⁴

Besides adding much to the perceived fairness of benefits adjudication,¹⁰⁵ traditional judicial review allowed attorneys to become involved and represent veterans once the BVA issued its first final decision.¹⁰⁶ Congress also allowed for direct payment of attorney fees, so long as the agreement capped the fee at 20% of past-due benefits and the agreement was properly filed with VA.¹⁰⁷

The VJRA certainly gave the veterans their day in court but not necessarily much assistance before the agency.¹⁰⁸ While Congress and courts agreed that veterans should have the opportunity to secure legal representation during a claim, the VJRA was geared toward cases that extended beyond the intermediate appeal at the BVA.¹⁰⁹ Indeed, the new

as amended throughout sections of 38 U.S.C.). For a critical look at the benefits process before and after the Veterans' Judicial Review Act (VJRA), see Lawrence B. Hagel & Michael P. Horan, *Five Years Under the Veterans' Judicial Review Act: The VA is Brought Kicking and Screaming into the World of Meaningful Due Process*, 46 ME. L. REV. 43 (1994) (parsing the different views of various VSOs on the subject and concluding that, for the most part, the VJRA simply had the impact of making VA do what it was supposed to be doing all along).

101. See, e.g., WILLIAM F. FOX, JR., THE UNITED STATES BOARD OF VETERANS' APPEALS: THE UNFINISHED STRUGGLE TO RECONCILE SPEED AND JUSTICE DURING INTRA-AGENCY REVIEW 23 (2000) (identifying the Vietnam generation of veterans as having enough political clout to push for reform).

102. 38 U.S.C. § 211 (1982) ("[T]he decisions of the Administrator on any question of law or fact . . . providing benefits for veterans . . . shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision."), amended by Veterans Judicial Review Act, 38 U.S.C. §§ 7251–7252 (2006).

103. See, e.g., *Johnson v. Robison*, 415 U.S. 361, 367 (1974) (finding that a veteran may constitutionally challenge decisions of Congress even if he could not challenge decisions of VA).

104. See *supra* notes 49–52 and accompanying text (discussing the CAVC's limited jurisdiction to reverse findings of fact but authority to provide de novo review of the BVA's legal conclusions).

105. See, e.g., Wright, *supra* note 39, at 433–39 (discussing how veterans were fed up by unfairly decided and inaccurately processed claims and demanded judicial review).

106. See Ridgway, *supra* note 81, at 260 (criticizing fee restrictions as showing that "[a]lthough Congress opened the door to attorneys, it could not force them through it").

107. 38 U.S.C. § 5904(d).

108. See *Bates v. Nicholson*, 398 F.3d 1355, 1363 (Fed. Cir. 2005).

109. See Collier & Early, *supra* note 44, at 12 (citing judicial conclusions regarding the then-simple procedures and the adequacy of VSOs to handle the vast majority of claims).

access to courts was accompanied by a measure replacing the \$10 fee previously charged for representation before VA with a general prohibition against charging any fee at the agency level prior to the BVA's final decision.¹¹⁰ The VJRA thus entirely excluded compensated attorneys from initial VA proceedings, despite the expanded opportunities for representation at the courts.

VA assured veterans that, despite ousting attorneys from the initial stages of benefits adjudication, it remained committed to a paternalistic system.¹¹¹ Yet there was a definite drawback to VA's benevolence: its paternalism basically barred attorneys from representing veterans until after the administrative record was closed—and at that point no further fact-finding or development could occur.¹¹² Veterans, advocates, and even the CAVC pleaded with Congress to change the rules in favor of permitting meaningful attorney participation in VA adjudication.¹¹³ VA pushed back by pointing to the availability of Veterans Service Organizations.

E. Veterans Service Organizations as Alternatives to Legal Representation

Many of the restrictions on attorneys have been justified by references to other available representation. Veterans Service Organizations (VSOs), congressionally recognized organizations created to assist veterans with claims, have long been part of the benefits claims system.¹¹⁴ VSOs are statutorily prohibited from earning any fee or type of compensation (even at the judicial stage), which makes them an attractive option for many claimants.¹¹⁵

VSOs provide useful assistance to many veterans' claims, especially those

110. See 38 U.S.C. § 5904(c)(1) (2000), *amended by* 38 U.S.C. § 5904(c)(1) (2006). An attorney could continue representation after successfully winning a remand at the CAVC and be compensated for the time spent before the agency, but could not charge any fee prior to a BVA final decision. *Id.* Of course, this likely made no practical difference, as the disparity between \$10 and nothing was probably not determinative to a lawyer in 1988.

111. See, e.g., Carpenter, *supra* note 1, at 285 (documenting Congress's expectations that VA fully and sympathetically develop the veteran's claim to its optimum and then give the veteran the benefit of the reasonable doubt).

112. *Id.*

113. See, e.g., *Benefits Legislative Initiatives Currently Pending Before the U.S. Senate Committee on Veterans' Affairs: Hearing Before the S. Comm. on Veterans' Affairs*, 109th Cong. 28 (2006) [hereinafter *Benefits Hearing*] (statement of Donald Ivers, Former C.J., U.S. Court of Appeals for Veterans Claims) ("The [CAVC] has long been on record in support of a veteran's right to retain counsel at the initial stages of the process.").

114. 38 U.S.C. § 5902 (2006) (establishing representatives of VSOs such as the Vietnam Veterans of America and the American Legion as recognized "in the preparation, presentation, and prosecution of claims").

115. *Id.* §§ 5902(b)(1)(A), 5903(a)(1) (prohibiting compensation "of any nature").

that are straightforward and well supported.¹¹⁶ Despite familiarity with the VA system, however, the vast majority of VSO employees have no legal training and are thus largely incapable of developing the record with an eye toward the legal details that might secure a claim's success on appeal.¹¹⁷ This lack of legal training is one basis for the courts' recognition that veterans represented by VSOs are still essentially proceeding *pro se*.¹¹⁸

Even the *Walters* Court, which was extremely complimentary of VSOs, recognized that there would likely be some circumstances where legal experience would be necessary.¹¹⁹ The limitations of VSOs factored into Congress's decision to enact the VJRA.¹²⁰ Conversely, Congress cited the success of VSOs as a justification for discouraging attorney participation at the agency level.¹²¹

By 2006, however, Congress recognized that despite quality guidance from VSOs, attorney representation needed to be available much earlier in the benefits decision process.¹²² Complex claims, often involving multiple

116. *See, e.g.*, *Comer v. Peake*, 552 F.3d 1362, 1369 (Fed. Cir. 2009) (appreciating the "invaluable assistance" provided by aides from VSOs).

117. *Id.* (asserting that VSOs cannot offer the same services as an attorney).

118. *See id.* at 1369–70 (concluding that the assistance provided by a VSO officer, who is styled an "organizational aide," is "not the equivalent" of legal representation). *Comer* also notes that the purpose of a VSO "is to cooperate with the VA in obtaining benefits for disabled veterans," which makes their role "fundamentally different from attorneys who represent clients in adversarial proceedings." *Id.* In a rather tentative and recent development in veterans law, courts are modifying veterans' obligations and VA duties to assist in order to fit the style of representation. *See, e.g.*, *Andrews v. Nicholson*, 421 F.3d 1278, 1283 (Fed. Cir. 2005) (reinforcing that there is no requirement for sympathetic reading of pleadings filed by counsel); *Comer*, 552 F.3d 1362, 1369–70 (contrasting the abilities of VSOs and licensed attorneys).

119. *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 330 (1985) ("The availability of particular lawyers' services in so-called 'complex' cases might be more of a factor in preventing error in such cases . . .").

120. *See* S. REP. NO. 100-418, at 30–31 (1988) ("The combination of no judicial review and a statutory limit of \$10 on the amount an attorney is permitted to receive for [representation] . . . has led many claimants over the years to believe that they have been denied their 'day in court.'").

121. *Id.* at 63–65 (reflecting the Committee's belief that "there is no compelling justification for attorney representation at the initial level" because in most cases a veteran simply needs to file a claim and the agency will handle the record-gathering).

122. *See generally* Wright, *supra* note 39, at 445–47 (noting that while some statistics show the number of remands and grants of benefits broken down by type of representation, no statistics show the differences between the amount of benefits finally won by *pro se* claimants, those represented by VSOs, and those represented by the attorneys). Also of concern was the VSO caseload and its effect on quality of representation—for example, as of 2006, the Los Angeles VA's office had only nine service officers handling the cases of 9,000. *See Benefits Hearing, supra* note 113, at 47 (concluding that "no matter how well trained," no VSO officer can effectively handle that many claims) (statement of Barton F.

or related disabilities, had the potential to become stuck in a revolving door of remands, mistakes, and appeals. Veterans saw attorneys as a positive force for change: legal expertise and development of the record were needed to hold VA accountable for proper and prompt resolution of claims.

F. The Veterans Benefits Act of 2006: Representation Before the Agency

Under the Veterans Benefits, Health Care, and Information Technology Act of 2006 (Veterans Act of 2006),¹²³ a veteran can hire¹²⁴ legal representation once an NOD is filed.¹²⁵ This permits legal representation prior to a BVA final decision—essentially, as soon as VA first says no. VA recognized that allowing attorneys to be compensated for work done before the agency much earlier in the process was a significant change to the statutory scheme, an “expression of congressional intent to remove all restrictions on paid representation” so long as an RO has made a decision and the veteran has filed an NOD.¹²⁶

The modern requirements of the benefits system demand increased attorney involvement. Although the VA process is still intended to be paternalistic,¹²⁷ it is uncertain if the system can adequately and timely

Stichman, Co-director, National Veterans Legal Services Program).

123. Veterans Benefits, Health Care, and Information Technology Act of 2006 (Veterans Act of 2006), Pub. L. No. 109-461, 120 Stat. 3403 (codified throughout 38 U.S.C.).

124. Although this Comment extensively discusses contingency fees, by no means are such agreements the only way in which an attorney can receive compensation for work done before the agency. Attorneys and their clients can agree on a flat fee, an hourly rate, a contingency fee, some combination, or perhaps something different entirely, so long as the fee is “reasonable.” Payment of Fees, 38 C.F.R. § 14.636(e) (2010). This Comment focuses on the legal representation available to impoverished and indebted veterans, and has largely assumed that with such limited means these veterans can only compensate attorneys through contingency fee agreements.

125. 38 U.S.C. § 5904 (2006). The Veterans Act of 2006 responds to fears, such as those articulated in *Walters*, 473 U.S. at 321–33, that attorneys will look for easy cases and thereby provide mostly meaningless “assistance.” By setting the point for attorney representation at the filing of an NOD, lawyers will not be able to assist claimants unless VA first denies their claim. This means that the *Walters* fears are only realized if VA messes up first—which obviously should not happen if the claim truly is easy to prove and simple to resolve.

126. See Accreditation of Agents and Attorneys; Agent and Attorney Fees, 73 Fed. Reg. 29,852, 29,868–69 (responding to comments accompanying the final rule issued May 22, 2008) (codified throughout 38 C.F.R. pts. 1, 4, 19, 20 (2010)).

127. See, e.g., *Henderson v. Shinseki*, 131 S. Ct. 1197 (2011) (noting the obviously paternalistic attitude of VA as evidenced by many statutory provisions relaxing procedural requirements for filing and appealing claims, and holding that a missed deadline is not in every case a bar to appellate jurisdiction).

respond to the increasing complexity of modern claims.¹²⁸ It is also becoming more apparent that VSOs, which prior to the Veterans Act of 2006 were primarily responsible for handling claims before the agency, might be unable to keep up their current workload without deleterious effects on the adequacy of their representation. It is more common to see claims that require outside medical opinions, private evaluations, extensive legal research, and more importantly, exhaustive record-checking.¹²⁹ As the process for achieving disability compensation benefits becomes more complicated, attorneys will become a more necessary part of the system.

The extent of attorney involvement and its perceived value have greatly changed since the Civil War. Congress now recognizes that veterans must have the option of hiring an attorney as soon as VA has denied their claims. As the benefits process has evolved to encourage legal representation, new issues, such as administrative offset, have emerged as complications in the relationship between VA and attorneys. VA's responses to these recent developments have often landed it in court.

II. JUDICIAL INTERPRETATION OF ATTORNEY FEE AGREEMENTS

The judicial history of VA's attempts to curtail attorney involvement illustrates why VA's decision to mix attorney fee regulations and administrative offset provisions is problematic. Despite its long-standing statutory mandate to uphold—and enforce through direct payment—attorney fee agreements, VA has historically attempted to skirt these obligations. This Part first outlines judicial decisions regarding fee

128. Traumatic brain injury, for example, is an increasingly tricky issue for veterans and advocates. See, e.g., Gregg Zoroya, *360,000 Veterans May Have Brain Injuries*, USA TODAY, Mar. 5, 2009, http://www.usatoday.com/news/military/2009-03-04-braininjuries_N.htm (remarking that traumatic brain injury science is so new that it cannot yet fully distinguish whether symptoms are attributable to a psychological post-traumatic stress disorder or a physical concussive injury). VA's handling of these cases reflects the unique difficulties they pose. See VA FY 2010 P&A REP., *supra* note 7, at II-165 (documenting VA's inability to correctly process 26% of the traumatic brain injury claims reviewed; about half of these errors occurred because VA did not order traumatic brain injury examinations or incorrectly evaluated the disability claims).

129. See Carpenter, *supra* note 1, at 294–95 (listing the vast expenditure of resources, including time, necessary just to adequately review a veteran's claim file, which is rarely arranged chronologically and often composes thousands of pages). From her time with a veterans law firm, the Author vividly recalls the above difficulties that Mr. Carpenter mentions. Most notably, the claims files from Puerto Rico were often almost entirely in Spanish. Of course, difficulties only accrue if VA can find the records in the first place: one audit disclosed that approximately 296,000 claims folders were in locations different than that displayed in the tracking system, and 141,000 folders were lost altogether with no effective process for locating them. VAFY 2010 P&A REP., *supra* note 7, at II-157 to -158.

agreements as to (a) whether enforcement is mandatory or discretionary, (b) whether VA may forego enforcement when the veteran has already been paid the entirety of his award, and (c) whether VA must pay attorney fees as a percentage of the total award or the actual payment to the veteran. This Part concludes with an analysis of *Ratliff*, which sets forth the Supreme Court's analysis for when an attorney is entitled to direct payment prior to any offset of the claimant's award.

A. VA Enforcement of Fee Agreements

In re Smith sought to address a recurrent issue that plagued direct payment fee agreements: VA enforcement.¹³⁰ The CAVC attempted to simplify the issue to an if-then analysis: if the veteran and the attorney have entered into a fee agreement that provides for direct payment from the Secretary, the payment is contingent upon successful resolution of the claim and does not exceed 20% of the past-due benefits award, and all or part of the relief sought is granted, then the Secretary may direct that payment be made.¹³¹ The analysis depended completely on satisfaction of the statutory requirements.¹³² The CAVC also noted that it is VA's regulation that goes one step farther by requiring that the award of past-due benefits results in a cash payment.¹³³

Instead of relying on the regulations, the CAVC turned to the statutory language to determine if the Secretary's enforcement of fee agreements was obligatory or discretionary. The court remained mindful that it was bound to look not only at the specific language at issue but at the statute's overall structure as well.¹³⁴ The CAVC found there was "no question" that Congress contemplated an obligatory direct payment to the veteran's attorney.¹³⁵ Beyond statements of congressional intent, however, the CAVC read the language of § 5904(d)(3) providing the Secretary "may direct payment" as referring to § 5904(d)(2)(A) language that the fee "is to be paid" to the attorney directly.¹³⁶ The Secretary thus did not have

130. *In re Smith*, 4 Vet. App. 487 (1993), *vacated in part on other grounds sub. nom. In re Wick*, 40 F.3d 367 (Fed. Cir. 1994).

131. *Id.* at 492 (recognizing that in no event may attorney fees be paid out of future benefits).

132. *Id.*

133. *Id.*

134. *Id.* at 493 ("If the statutory language is plain, and its meaning clear, no room exists for statutory construction [because] [t]here is nothing to construe.") (citing *Gardner v. Derwinski*, 1 Vet. App. 584, 587-88 (1991)).

135. *Id.* at 494 (quoting Congress's language as anticipating the Secretary "will pay the attorney's fees directly out of past-due . . . benefits").

136. *Id.*

discretion to withhold direct payment because *may* in this direct payment context was permissive rather than discretionary.¹³⁷ As to why Congress did not just make things easy and write *shall*, the CAVC decided that the permissive aspect was needed in light of the blanket prohibition against the assignment of any portion of past-due benefits found in § 5301(a).¹³⁸ The CAVC therefore concluded that VA “is under a legal duty to comply with a § 5904(d) fee agreement” with “no discretion to refuse.”¹³⁹

Under the CAVC’s analysis in *In re Smith*, so long as a fee agreement meets the statutory requirements VA is obligated to provide direct payment of attorney fees. By finding that Congress intended mandatory direct payment to attorneys, the CAVC limited VA’s discretion to add requirements for valid fee agreements and to forego enforcement of those fee agreements. Nevertheless, VA continued its attempts to read direct payment out of the statute in certain situations where past-due benefits were awarded.

B. The “Fund” Argument

VA has repeatedly tried to work “fund” language into its arguments regarding awards of past-due benefits.¹⁴⁰ This position essentially attempts to relate the attorney’s entitlement to the fund of benefits VA owes the veteran. For example, *In re Smith* found the Secretary in the unenviable position of having mistakenly paid the veteran the entire sum of past-due benefits awarded rather than withholding 20% for his attorney as requested by the fee agreement on file with VA—meaning there were simply no benefits left from which to direct payment to the attorney.¹⁴¹ The Secretary unsuccessfully argued that when a fund was not available from which to deduct the attorney’s fee, VA was immune from claims for attorney fees.¹⁴²

137. *Id.*

138. *Id.* The CAVC also found support in *Aronson v. Derwinski*, which found that “38 U.S.C. § 5301 does not constitute a limitation on the Secretary’s obligation” to provide direct payment from past-due benefits. 3 Vet. App. 162, 163–64 (1992). Pursuant to *In re Smith*’s characterization of attorney fee agreements as an exception to the general prohibition against assignment, VA could argue that *Ratliff* does not apply, since it rejected assignor–assignee relationships as exempting attorney fees from administrative offset. *Astrue v. Ratliff*, 130 S. Ct. 2521, 2528–29 (2010). However, given the overall statutory scheme and the judicial development of attorney entitlement in *Snyder*, it seems clear that the entitlement is not in the nature of an assignment. *See infra* Part II.C.

139. *In re Smith*, 4 Vet. App. at 494. The court emphasized that VA’s obligation was not one of liability, which would require a waiver of sovereign immunity, but of statutory origin. *Id.* at 497.

140. *See* Precedent Opinion 12-93, *supra* note 18 (expanding the fund argument).

141. *In re Smith*, 4 Vet. App. at 494–95.

142. *Id.* at 495.

Although VA has persistently argued this line of reasoning, it has continued to be unsuccessful in the courts. *In re Smith* rejected the depleted-fund argument by finding that a “necessary corollary” of the Secretary’s obligation to honor a § 5904(d) fee agreement was the attorney’s “corresponding right” to receive payment.¹⁴³ Though VA had mistakenly dispersed the entire fund of benefits to the veteran, that error had no bearing on the attorney’s entitlement to direct payment from VA of 20% of the past-due benefits awarded.¹⁴⁴

The CAVC thus expressly rejected the fund argument when it came to enforcement of fee agreements. Yet VA, still intent on utilizing the argument, decided to interpret *In re Smith* as only pertaining to situations where VA mistakenly depleted the fund by paying the entirety of the award to the veteran.¹⁴⁵ This led to VA’s assertion that when the fund was depleted through administrative offset, it was not obligated to pay attorneys directly through enforcement of fee agreements.¹⁴⁶

C. Attorney Entitlement Tied to the “Award of Past-Due Benefits”

The Federal Circuit’s 2007 decision in *Snyder v. Nicholson* diminished the validity of VA’s argument that attorney fees in some way depend upon the actual payment of benefits to the veteran.¹⁴⁷ *Snyder* presents an excellent example of the type of case that attracts lawyers: perpetual mismanagement and interminable appeals prevented resolution and ratcheted up the veteran’s past-due benefits to a final award of \$93,044.¹⁴⁸ The veteran was incarcerated, and pursuant to the governing statute,¹⁴⁹ the VA dispensed past-due benefits at a 10% level of compensation.¹⁵⁰ His counsel’s attorney fees were likewise calculated as 20% of the post-withholding past-due

143. *Id.* (noting that a § 5904(d) fee agreement creates a “joint entitlement” whereby the attorney is entitled to 20% of the fund and the veteran to 80%).

144. *Id.* In a fabulous remark, the CAVC found the Secretary’s argument that its error gave it immunity to have “all the appeal of the plea of the apocryphal felon who, upon having been found guilty of murdering his parents, sought mercy from the court because he was now an orphan.” *Id.* at 496.

145. Precedent Opinion 12-93, *supra* note 18, at cmt. 6.

146. *Id.* at cmt. 10.

147. *See Snyder v. Nicholson*, 489 F.3d 1213 (Fed. Cir. 2007) (distinguishing between actual payment to veterans and attorney entitlement to a portion of the veteran’s award).

148. *Id.* at 1214–15. Although *Snyder* involved an incarcerated veteran, its language is broad and interprets 38 U.S.C. § 5904 as it applies to all veterans subject to withholding. *See id.* at 1219.

149. 38 U.S.C. § 5313 (2006).

150. *Snyder*, 489 F.3d at 1216 (explaining that the maximum amount received in such a situation is “computed as if [the veteran’s] disability rating were only 10 percent”).

benefits, not as 20% of pre-withholding past-due benefits.¹⁵¹

The Federal Circuit in *Snyder* found resolution to be quite simple: the veteran may only get 10% of his award, but that does not change the attorney's entitlement to 20% of the claimed benefits that were awarded prior to offset and withholdings.¹⁵² The court thereby eschewed the CAVC's willingness to accept the VA's perception of "ambiguity" between the statutes authorizing a withholding of an incarcerated veteran's benefits and those providing for direct payment from past-due benefits.¹⁵³ The Federal Circuit then continued on to resolve the "primary dispute," which concerned the meaning of "total amount of any past-due benefits awarded on [the claim]."¹⁵⁴ Observing that the language of VA regulations respects a difference between the amount awarded and the amount payable,¹⁵⁵ the court summed up the law with succinct elegance: "the word 'award' is clear and unambiguous, and in the parlance of veterans' benefits it means the amount stated as the award for success in pursuit of a claim for benefits."¹⁵⁶

The Federal Circuit concluded by holding that, specifically in reference to § 5904, the "total amount of any past-due benefits awarded on the basis of the claim" means the sum of each month's unpaid compensation.¹⁵⁷ So long as a fee agreement was made pursuant to the statute, the agreement is entitled to protection by the Secretary and the fee "is to be paid to the attorney by the Secretary directly from any past-due benefits awarded on the basis of the claim."¹⁵⁸

D. Ratliff and Statutory Entitlement to Fees: A Matter of Direct Payment

In 2010, the Supreme Court used *Ratliff v. Astrue* to set forth the analysis for determining when statutory language acts to bar attorney fees from being lumped with a claimant's award and subjected to administrative offset.¹⁵⁹ In *Ratliff*, a Social Security claimant prevailed in her claim for

151. *See id.* at 1214–15 (reporting the long procedural history of *Snyder* and the calculation of attorney fees).

152. *See id.* at 1217 ("Literal application of these two statutes . . . seems to permit of no result other than reduced compensation for [the veteran] during his incarceration and a payment, per the attorney fee agreement, to [his attorney] equal to 20 percent of the total past-due benefits awarded . . .").

153. The CAVC had compared the statutes to "two ships passing in the night." *Snyder v. Nicholson*, 19 Vet. App. 445, 450 (2006), *rev'd* 489 F.3d 1213 (Fed. Cir. 2007).

154. *Snyder*, 489 F.3d at 1217 (quoting 38 U.S.C. § 5904(d)).

155. *Id.* at 1219.

156. *Id.*

157. *Id.* at 1218.

158. *Id.* at 1216 (quoting 38 U.S.C. § 5904(d)(2)(A)(i)).

159. *Astrue v. Ratliff*, 130 S. Ct. 2521 (2010).

benefits but a government debt was discovered that predated the effective date of the award.¹⁶⁰ This prompted the agency to apply the entirety of the award, including attorney fees, to reduce the amount of the claimant's debt.¹⁶¹ The claimant's attorney protested the proposed administrative offset, asserting the EAJA fees belonged to him and thus could not be applied to his client's debt.¹⁶²

The Court found the EAJA statute clear: fees are awarded "to a prevailing party."¹⁶³ Noting that certain other Social Security statutory provisions allow "for payment to *such attorney* out of" the benefits award,¹⁶⁴ the contrast showed the Court "that Congress knows how to make fees awards payable directly to attorneys where it desires to do so."¹⁶⁵ Thus, in keeping with the EAJA's clear entitlement scheme, EAJA attorney fees are primarily payable to the litigant and subject to administrative offset.¹⁶⁶

The *Ratliff* Court was careful to steer clear of theories espousing contractual and assignment-based rights as the basis for entitlement determinations.¹⁶⁷ It reasoned that even though the "practical reality" was that attorneys are the ultimate recipients of fees awarded by statute, it is the EAJA litigant that is technically the recipient of the award.¹⁶⁸ Indeed, the Court proposed that assignment agreements would be wholly unnecessary if there was simply a statutory right to direct payment to attorneys.¹⁶⁹ This attention to what does *not* create entitlement further underlines the Court's preoccupation with the statutory language. *Ratliff* decided that it is the statute that creates the entitlement to direct payment of attorney fees, and it is to the statute that courts must look.¹⁷⁰ It is not practice or policy that

160. *Id.* at 2524.

161. *Id.*

162. *Id.* at 2525. This position reflects one side of the circuit split. *See id.* (tallying the various decisions among the courts of appeals).

163. *Id.* at 2524 (emphasis added) (quoting 28 U.S.C. § 2412 (d)(1)(A) (2006)).

164. *Id.* at 2527 (quoting 42 U.S.C. § 406(b)(1)(A) (2006)).

165. *Id.*

166. *Id.* at 2524.

167. *See id.* at 2530 (explaining that these nonstatutory rights usually confer upon the attorney the entitlement that the statute confers on the prevailing litigant).

168. *Id.* at 2529. Justice Sotomayor explained somewhat more clearly that because the attorney fee award under EAJA is "payable to the prevailing litigant," EAJA does not obligate the government to pay the litigant's attorney. *Id.* at 2529–30 (Sotomayor, J., concurring). Any obligation on the part of the claimant to pay her attorney is thus not controlled by EAJA, but by contract law. *Id.* at 2530.

169. *Id.* at 2529 (majority opinion).

170. *See generally* Joseph A. Fischetti, Comment, *Ratliff v. Astrue: The Collision of the Equal Access to Justice Act and the Debt Collection Improvement Act*, 40 SETON HALL L. REV. 723 (2010) (presciently outlining what the Supreme Court eventually decided to do). Justice Sotomayor's concurring opinion reflected her additional concern for the policy implications

creates the basis for entitlement to attorney fees.¹⁷¹ Further, *Ratliff* made clear that if the direct payment of fees to attorneys is called for, those fees cannot be usurped by the government through administrative offset to pay the claimant's debt.¹⁷²

III. ADMINISTRATIVE OFFSET AND ATTORNEY FEES: INTERSECTING LAWS

While the intricacies of administrative offset are not within the parameters of this Comment,¹⁷³ the basics are discussed here to provide a backdrop for understanding the problematic intersection of administrative offset provisions with attorney fees statutes. In the most general of descriptions, claimants who have been granted government benefits might not actually receive them if they are in debt to the government.¹⁷⁴ Instead, those benefits will be applied to reduce the amount owed.¹⁷⁵ Essentially, administrative offset flows from the idea that it makes no sense for the government to pay its debtor.

In slightly more technical language, funds payable by the United States may be used to offset particular types of federal debt unless exempted by statute.¹⁷⁶ To utilize administrative offset, VA participates in the Treasury Offset Program (TOP),¹⁷⁷ a centralized collection program administered by the Department of the Treasury under the Debt Collection Improvement Act of 1996 (DCIA).¹⁷⁸ Until 2005, the portion of a claimant's award

of the decision. *Ratliff*, 130 S. Ct. at 2530 (Sotomayor, J., concurring). She expressed regret that the Court's enforcement of the statutory provision would operate to thwart the EAJA's central aim of creating incentives for lawyers to take on the cases of financially needy citizens with legitimate claims. *Id.*

171. See *Ratliff*, 130 S. Ct. at 2527 (majority opinion) ("Even accepting [the statute] as ambiguous . . . the provisions and practices [claimant] identifies do not alter our conclusion that EAJA fees are payable to litigants and are thus subject to offset where a litigant has outstanding federal debts.").

172. *Id.*

173. See Paras N. Shah, Comment, *Lockhart v. United States: Decapitating the New Deal & Ignoring the Plain Language of the Social Security and Debt Collection Improvement Acts*, 58 ADMIN. L. REV. 455 (2006), for a discussion of administrative offset in the more general realm of Social Security benefits.

174. See 31 U.S.C. § 3711 (2006) (giving an agency the power to collect a debt through administrative offset and listing proper notice requirements and other procedural issues).

175. *Id.*

176. *Id.* §§ 3701(a)–(b), 3716(h)(2).

177. 38 C.F.R. § 1.910 (2010).

178. 31 U.S.C. § 3701. See generally *Oversight of the Implementation of the Debt Collection Improvement Act: Hearing Before the Subcomm. on Gov't Mgmt., Info., and Tech. of the H. Comm. on Gov't Reform and Oversight*, 105th Cong. 89–99 (1999) (statement of Mark Catlett, Chief Financial Officer, Dep't of Veterans Affairs) (presenting VA's first efforts to utilize the

designated as attorney fees was not subject to administrative offset—only when Treasury modified its TOP regulations to include “miscellaneous payments” were attorney fees brought within its purview.¹⁷⁹

Unless attorney fees are in some way statutorily exempted from falling within the DCIA, they are subject to administrative offset as miscellaneous payments. This statutory exemption is satisfied by an indication that Congress intended attorneys to receive payment directly.¹⁸⁰ If direct payment is specified, an agency may not lump attorney fees together with claimants' awards; only the claimant's portion may be applied to reduce his or her debt. If not, then the entire award, including the attorney fees, qualifies for offset in accordance with the DCIA.¹⁸¹

Unlike Social Security benefits, which are subject to general administrative offset,¹⁸² VA can only collect on debts resulting from participation in VA programs.¹⁸³ In fiscal year 2010, VA referred \$860 million to TOP, 99% of its eligible debt.¹⁸⁴ Although there is no report detailing how many veterans are in debt beyond the value of their compensation claims, 366,000 veterans are currently in debt to VA.¹⁸⁵

Administrative offset happens often enough to be of concern to veterans and their lawyers. Almost all attorneys hired by veterans are compensated either through EAJA fees for work before the court or other fees for work before the agency.¹⁸⁶ After *Ratliff* decided that attorney fees awarded under

Treasury Offset Program (TOP)).

179. This recent development weakened the attorney's argument in *Ratliff* that the government's extensive past practice of providing for direct payment, even when the claimant was in debt, was evidence that attorney fees were not subject to offset. *See Astrue v. Ratliff*, 130 S. Ct. 2521, 2528–29 (2010) (declining to interpret past payment practices as estopping the government from conforming its current practices to the revised Treasury regulations).

180. *Id.* at 2527–28.

181. *See Astrue v. Ratliff*, 130 S. Ct. 2521 (2010).

182. *See, e.g., Shah, supra* note 173 (thoroughly explaining the administrative offset process for Social Security benefits and the theory behind the principle of offset in general).

183. *See, e.g., 38 U.S.C. §§ 5301, 5314* (2006) (exempting VA benefit payments from offset to collect any debt other than those owed to VA); *see also* DEP'T OF VETERANS AFFAIRS, VA HANDBOOK 4800.7: TREASURY OFFSET PROGRAM AND TREASURY CROSS SERVICING 5 (2003), available at http://www.va.gov/vapubs/viewPublication.asp?Pub_ID=161&FTType=2 (providing VA employees an explanation of the Secretary's implementation of administrative offset).

184. VA FY 2010 P&A REP., *supra* note 7, at I-94.

185. E-mail from David Sturm, Assistant Dir., VA Debt Mgmt. Ctr., to Author (Jan. 24, 2011, 12:19 PM) (on file with Author).

186. *See, e.g., Wright, supra* note 39, at 445–46 (explaining that very few attorneys represent veterans pro bono because the opportunity cost is “tremendous,” and noting that contingency fee agreements and EAJA fees are the only meaningful compensation available).

the EAJA's language could be applied to offset debt through administrative offset, the statutory entitlement scheme for attorney fees earned before VA has become much more important. If contingency fee agreements are not protected by VA, few indebted veterans will be able to secure legal representation.

IV. VA HAS NO AUTHORITY TO SHIFT THE ENTITLEMENT SCHEME

A. Congress Envisioned Direct Payment

Legislative intent, expressed through the plain language of the statute, decides the entitlement scheme involving attorney work before the agency.¹⁸⁷ While Congress is somewhat permissive with veterans' fee agreements in general, requiring only that they be "reasonable," there are two important restrictions for agreements an attorney is seeking to be enforced by VA: the fees cannot exceed 20% of the total amount of past-due benefits awarded on the basis of the claim, and the fee agreement must be contingent on resolution of the claim in favor of the veteran.¹⁸⁸ Additionally, the agreement itself must specify the fee will be paid to the attorney "directly from any past-due benefits awarded on the basis of the claim."¹⁸⁹

If past-due benefits are awarded and such a fee agreement is in place, the Secretary will then "direct that payment of any fee . . . be made [from] past-due benefits."¹⁹⁰ The language shows Congress's intention to allow attorneys to be paid directly so long as the fee agreement meets statutory requirements. It thus sets up an unambiguous entitlement scheme very unlike the EAJA at issue in *Ratliff*.¹⁹¹ VA's regulations and opinions must be analyzed in light of both the statutory text and the importance placed on that text by *Ratliff*—an analysis that shows that VA has erected a regulatory scheme that distinctly differs from what is set forth by statute.

187. See *Astrue v. Ratliff*, 130 S. Ct. 2521 (2010).

188. 38 U.S.C. § 5904(d)(1), (d)(2)(ii) (2006).

189. *Id.* § 5904(d)(2). A fee agreement that does not specify the veteran's wish to pay the attorney directly leaves the agreement without statutory entitlement to enforcement. See *supra* note 8.

190. 38 U.S.C. § 5904(d)(3). VA has no discretion in the matter because it has "acknowledged [its] obligation" to pay directly to the attorney fees that comport with § 5904. *Aronson v. Derwinski*, 3 Vet. App. 162, 164 (1992); see *supra* notes 130–140 and accompanying text.

191. See *Ratliff*, 130 S. Ct. at 2527–28 (showing the Court's attention to the contrast between Social Security statutory language that allows for payment to attorneys and EAJA language that provides for payment to the prevailing party).

B. VA's Regulation

38 C.F.R. § 14.636 differs from 38 U.S.C. § 5904 by adding the requirement that a veteran receive a cash payment before VA will uphold and enforce an attorney fee agreement.¹⁹² It does not necessarily follow that the regulation is an impermissible expansion of authority. In fact, the extra language of 38 C.F.R. § 14.636, when viewed outside of the administrative offset context, makes good sense.

Congress has always been committed to ensuring that veterans are the final recipients of their disability benefits—not creditors, agents, or attorneys.¹⁹³ If the VA benefits maze had not become such a complicated mess with all the trappings of arbitrariness, it is possible Congress might never have enacted the VJRA.¹⁹⁴ Even as it loosened restrictions on attorney participation, Congress retained its provisions that compensated attorneys could only get involved once VA has first denied a claim and then be compensated only if the claim was ultimately successful.¹⁹⁵ This shows that Congress intended to permit attorneys to be compensated only when their services were actually necessary to properly resolve a claim and gain veterans the fullest benefits to which they are entitled.

The regulation, when interpreted as merely prohibiting attorneys from collecting fees when the veteran receives no tangible benefit from the representation, fits within Congress's overall statutory scheme for veterans' benefits. For example, the regulation mentions situations where a veteran is entitled to benefits but elects instead to receive a pension.¹⁹⁶ It is not difficult to see why an attorney should not receive 20% of a disability compensation award that is of no benefit to the veteran. Another example would be a veteran who is already considered 100% disabled and receiving the highest level of compensation but files a claim for hearing loss—even though the veteran's claim may be successful, the attorney has not actually gained anything for the veteran because benefits were already being received at the highest level available. If the regulation's language is interpreted to preclude attorneys from being compensated for largely moot work, 38 C.F.R. § 14.636 poses no threat to needy veterans' ability to retain legal representation.

Nonetheless, the regulation's language states "results in a cash payment,"

192. See *In re Smith*, 4 Vet. App. 487, 492 (1993) (recording the CAVC's awareness that the regulation imposes requirements beyond the statute).

193. See, e.g., 38 U.S.C. § 5301 (prohibiting assignment of veterans' benefits).

194. See *supra* notes 120–129 and accompanying text.

195. See *supra* notes 108–110 and accompanying text.

196. Payment of Fees, 38 C.F.R. § 14.636(h)(iii) (2010).

not “results in monetary benefit.”¹⁹⁷ In cases involving administrative offset, a successful attorney has unquestionably gained something of value for his client. Further, even though the claimant might not receive his past-due benefits award in cash, he has still in some sense been compensated—the payment was simply applied to reduce his debt to the government. Such a veteran has still received something of value, making it difficult to see why his attorney does not deserve compensation for the work done on the claim.

The validity of 38 C.F.R. § 14.636 has yet to be tested in courts,¹⁹⁸ but if it were simply VA’s decision to interpret “results in a cash payment” so as to keep attorneys from claiming portions of benefits awards that are of no use to a veteran, it is unlikely a court would find the regulation troubling. This, however, is not the case. VA has taken a different direction with its regulation by using it to change the statutory entitlement scheme for direct payment of attorneys.¹⁹⁹ Precedent Opinion 12-93 declares that 38 C.F.R. § 14.636 precludes the payment of attorney fees when administrative offset applies the entirety of a veteran’s award to offset debt to the government—even though affected veterans still receive something of financial value.²⁰⁰

C. Precedent Opinion 12-93: The Real Hurdle

Precedent Opinion 12-93 is the clearest statement of VA’s position regarding administrative offset and attorney fees.²⁰¹ It establishes that VA will only enforce fee agreements if they fit 38 U.S.C. § 5904 and 38 C.F.R. § 14.636(h), meaning the claimant must, at the end of VA proceedings, receive a payment of some amount, however nominal.²⁰² If the claimant is paid nothing, neither is the attorney. The set of facts that prompted the

197. *See id.*

198. *See Snyder v. Nicholson*, 489 F.3d 1213, 1220 n.2 (Fed. Cir. 2007) (postponing the discussion of whether 38 C.F.R. § 14.636 is valid).

199. Precedent Opinion 12-93, *supra* note 18.

200. *Id.*

201. *Id.* (resolving whether VA must enforce a fee agreement “when the claimant would not be entitled to payment of any portion of the past-due benefit award because his outstanding indebtedness to the United States exceeded the amount of the past-due benefits”). If an agency interpretation is delivered in policy statement, rather than a regulation, the interpretation is not entitled to full *Chevron* deference. *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (holding that interpretations such as opinion letters are entitled to respect to the extent they have “power to persuade”). *See generally* Robert A. Anthony, *Three Settings in Which Nonlegislative Rules Should Not Bind*, 53 ADMIN. L. REV. 1313 (2001) (dissecting various precedents that dictate the proper level of deference in a given regulatory situation).

202. Precedent Opinion 12-93, *supra* note 18. VA focuses on “payment” language, which further distinguishes it from *Snyder*’s “awarded” language. *Cf. Snyder*, 489 F.3d 1213.

decision clarifies the issue. In Precedent Opinion 12-93, the veteran owed \$8,041.10 to VA after his participation in a loan program, which exceeded the amount of past-due benefits the RO awarded after finding his disability rating should be increased.²⁰³ His attorney had filed a fee agreement with VA that in every respect comported with statutory requirements. The attorney argued that he was entitled to 20% of the past-due benefits awarded, which left only the remainder subject to administrative offset.

Instead, VA decided that because the entirety of the debt would not satisfy the veteran's debt obligations, it must all be offset and 38 C.F.R. § 14.636 acted to preclude the attorney from claiming his portion.²⁰⁴ If, after all the dust has settled, the veteran owes more to VA than he is due to receive, there is no fund from which the fee can be deducted and paid out directly to the attorney.²⁰⁵ There must be a payment made, however small, for an attorney fee agreement to be enforced by VA. *Snyder* brings out a potential absurdity in this result—if at the conclusion of offset a claimant receives \$1 of a \$100,000 award, the attorney is entitled to 20% of the amount awarded on the claim (\$20,000), not 20% of the \$1 actually received by the veteran. But if at the conclusion of offset the claimant's debt is exactly settled, with nothing left over for the veteran—a mere \$1 difference in the final cash result—the attorney will receive nothing because the veteran received nothing. VA can sustain this position only by contending that the attorney's entitlement is inextricably linked to the veteran's cash payment.²⁰⁶

Precedent Opinion 12-93 struggled to prove VA's interpretation of attorney fee regulations was in accord with *In re Smith*.²⁰⁷ It largely relied on what VA perceived as the CAVC's favorable use of fund language.²⁰⁸ However, this reliance is misguided. It is true that the CAVC referred to the fund of past-due benefits awarded, but it did not use *fund* to refer to the amount of what would actually be paid to the veteran, as VA does.²⁰⁹ Instead, it saw the fee agreement as an instrument to "divide and define" the fund of past-due benefits—there was a fund for the attorney and a fund

203. Precedent Opinion 12-93, *supra* note 18, at cmt. 2.

204. *Id.* at cmt. 5.

205. *Id.* at cmt. 9.

206. See *supra* notes 147–148 and accompanying text (explaining how *Snyder* undermines this position by holding that *awarded* means amount awarded on the claim, not actually received).

207. *In re Smith*, 4 Vet. App. 487 (1993).

208. See Precedent Opinion 12-93, *supra* note 18, at cmts. 8 & 9 (arguing CAVC's quotation of the regulatory requirements shows there is "no reason to believe" that VA is precluded from collecting attorney fees in cases involving total administrative offset).

209. See *In re Smith*, 4 Vet. App. at 494.

for the veteran.²¹⁰ This supports the attorney as being directly entitled to his contingent fee; indeed, it mirrors the attorney's argument at issue in Precedent Opinion 12-93.²¹¹ VA either missed or ignored the CAVC's explanatory statement and instead decided no fund of past-due benefits is created in situations of offset.

Further, Precedent Opinion 12-93 overlooks the CAVC's discussion of the important congressional purpose behind § 5904(d) fee agreements, which was to assist all veterans in gaining legal assistance by enabling them to pay for it out of past-due benefits.²¹² VA policy instead makes it impossible for certain veterans to pay for representation. It does so by twisting a statute granting authority to set the amount of fees into a permit to alter the entitlement scheme providing for direct payment of attorney fees.

D. VA's Abuse of Its Limited Authority

The Federal Circuit interprets § 5904 as authorizing the VA to issue regulations and opinions that conform strictly to its language but go no further. For example, *Snyder* mentions that “[§] 5904 makes no mention of special provisions for attorneys who . . . undertake representation of incarcerated veterans.”²¹³ Likewise, § 5904 makes no mention of administrative offset, meaning that under *Snyder*'s statute-based analysis VA has no authority to make special rules attempting to merge administrative offset rules with those governing attorney fees. The Federal Circuit has also asserted plainly that certain and direct payment is a crucial part of the system as an “offsetting benefit” to make up for the lower contingency fees that are found in other practices.²¹⁴ Certainty of payment is part of the plan; by altering the statute beyond its authority, VA is discouraging attorneys from representing veterans with doubtful financial situations.²¹⁵

In enacting the VJRA, Congress envisioned attorney fee agreements in which the total “amount of the fee payable to the attorney is to be paid to

210. *Id.* at 495.

211. *See* Precedent Opinion 12-93, *supra* note 18, at cmts. 3 & 9 (asserting that if the veteran's fund is depleted, there is no fund for the attorney).

212. *See In re Smith*, 4 Vet. App. at 496 (highlighting importance of paid legal representation).

213. *Snyder v. Nicholson*, 489 F.3d 1213, 1216 (Fed. Cir. 2007).

214. *See Scates v. Principi*, 282 F.3d 1362, 1366 (Fed. Cir. 2002) (discerning congressional intent to provide incentive to take cases that are far less profitable than the average claim in practice).

215. *See Astrue v. Ratliff*, 130 S. Ct. 2521, 2529–30 (2010) (Sotomayor, J., concurring) (believing there to be no question that without economic incentives lawyers will not take on needy clients).

the attorney by the Secretary directly from any past-due benefits awarded on the basis of the claim.”²¹⁶ While the Veterans Act of 2006 changed the timeline for when attorneys can become involved, Congress did not alter its “is to be paid . . . directly” language.

Congress gave the Secretary the power to prescribe “reasonable restrictions on the *amount* of fees [an attorney] may charge a claimant,” and then further limited the power by declaring that a fee that does not exceed 20% of the past-due benefits awarded on the claim is presumptively reasonable.²¹⁷ This shows the Secretary’s ability regarding fee agreements is merely to regulate the amount that can be charged—not determine ultimate ownership of the contingent fee.²¹⁸ Although the Secretary may review a fee agreement filed with VA, the review power is simply for reduction if the fee is “excessive or unreasonable.”²¹⁹ Indeed, even VA recognizes that Congress’s intent in enacting § 5904 was to grant VA the power to regulate the amount charged—i.e., the fee percentage.²²⁰

So long as the attorney follows the procedures to file a fee agreement with VA, the VA is required to uphold and honor that agreement—with direct payment of fees.²²¹ Congress has established attorney ownership of such fees; there is nothing for VA to do. There is simply no ambiguity as to ownership.

Beyond setting reasonable restrictions on the amount of fees an attorney may charge, Congress intended to give the Secretary the authority to require attorneys practicing before VA to have minimum levels of experience and training, to collect from attorneys a periodic registration fee to defray the costs of attorneys practicing before VA, and to review fee agreements and reduce fees that are excessive and unreasonable.²²² No mention was made of VA’s ability to change an attorney’s entitlement to direct payment. In the Senate hearing, VA recognized the limited grant of authority, repeating that it would be authorized to “restrict the amount of fees attorneys may charge, and subject fee agreements . . . to review by the

216. 38 U.S.C. § 5904(d)(2)(A)(i) (1988).

217. 38 U.S.C. § 5904(a)(5) (2006) (emphasis added).

218. The Secretary is also permitted to regulate VA’s requirements for recognition and qualification of attorneys. *Id.* § 5904 (a)–(b).

219. *Id.* § 5904(c).

220. Accreditation of Agents and Attorneys; Agent and Attorney Fees, 73 Fed. Reg. 29,852, 29,866–68 (preamble to final rule issued May 22, 2008) (to be codified at 38 C.F.R. § 14.636) (stating Congress authorized VA to “prescribe in regulations reasonable restrictions on the amount of fees that an agent or attorney may charge a claimant” and that Congress “intended that claimants would have [a] choice in representation with respect to all claims for benefits”).

221. 38 U.S.C. § 5904(d)(2).

222. *Id.* § 5904.

Secretary.”²²³ Congressional intent is clear: it is important for the Secretary to have some latitude in deciding who can practice and how much they can charge, but VA has no authority to alter the statutory scheme of direct payment out of past-due benefits.²²⁴

Moreover, stripping an attorney of ownership of a contingency fee goes directly against Congress’s broader intent. It is important to remember that attorneys have never been completely locked out of the VA benefits system. Under no statutory scheme were attorneys absolutely prohibited from representing veterans; the representation just had to be essentially pro bono.²²⁵ And yet in enacting the Veterans Act of 2006, Congress was concerned with a veteran’s right to hire an attorney—which, given the history, must mean the ability to pay one.²²⁶

The ability to pay an attorney is integral to the statutory scheme of the Veterans Act of 2006, which intended to enable all claimants to have the benefit of legal counsel during VA administrative proceedings.²²⁷ This “benefit” in reality only accrues when the veteran can pay the attorney—and under the current law, the only way a veteran can “pay” an attorney is through a contingent cut from past-due benefits.²²⁸ If the entirety of an indebted veteran’s past-due benefits must go to reduce the government debt, VA has eliminated that veteran’s ability to pay and hire an attorney.

E. *An Anticipated VA Response*

VA’s most successful attempt to downplay the importance of attorneys and circumscribe their rights came in *Walters*, and it is reasonable to expect VA to rely on *Walters* if it opposes any regulatory changes promoting attorney participation in veterans law.²²⁹ *Walters* dealt with due process

223. See *Benefits Hearing*, *supra* note 113, at 12–13 (prepared statement of VA).

224. Courts have freely admitted that without economic incentive for attorney involvement most veterans will be forced to forego legal representation. See *Snyder v. Nicholson*, 489 F.3d 1213, 1216 (Fed. Cir. 2007) (remarking that because at the time attorneys were prohibited from collecting compensation before the BVA issued a final decision, “[a]s a practical matter, this means that veterans will not be represented by attorneys until their claims for benefits have been rejected by the Board”).

225. See *supra* Part I (tracking the progression of attorneys fees from the low limits established during the Civil War to the VJRA, which prohibited attorneys from charging any fee prior to a final BVA decision).

226. See, e.g., *Benefits Hearing*, *supra* note 113, at 1–3 (statement of Sen. Larry E. Craig, Chairman, S. Comm. on Veterans Affairs) (expressing Congress’s overwhelming agreement that veterans needed to have the ability and choice to hire an attorney).

227. *Id.*

228. See 38 U.S.C. §§ 5901, 5904 (2006) (limiting compensation to payment out of past-due benefits, a statutory exception to the general rule against assignment of benefits).

229. *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305 (1985).

challenges to restrictions on legal representation and is thus largely irrelevant to the issue of statutory entitlement to direct payment of attorney fees.²³⁰ But it nonetheless merits some attention because it is the only case involving a veteran's right to counsel to reach the Supreme Court.

The VJRA, enacted only a few years after *Walters* and superseding its holding, pretty well proves the importance that Congress places on veterans' access to legal representation—an importance that is only heightened by the Veterans Act of 2006. Further, the issue in *Walters* was a veteran's constitutional due process right to a lawyer—and the present issue is a lawyer's *statutory* entitlement to a portion of the veteran's award.²³¹ Thus, *Walters* provides no real support for a potential VA position that attorneys are unnecessary and the claimants that would be affected by attorney fee policies have adequate access to VSOs.

Moreover, the accessibility of VSOs does nothing to change the statutory entitlement scheme and does not negate Congress's intent to allow veterans to compensate an attorney for work done on claims. Congress recognized the quality service offered for free by VSOs but widely felt that it could not limit veterans' options.²³² This concern was specifically about a veteran's ability to compensate attorneys at the agency level, as attorneys were already able to get EAJA fees for representation once in court.²³³ By foreclosing the ability for certain veterans to pay an attorney, VA is eliminating that class of veterans' ability to exert the freedom Congress intended to afford them. As Congress noted, not being able to hire a lawyer results in a “de facto bar [on legal representation] because the lawyer cannot get compensated for their time.”²³⁴ VA's regulatory scheme thus defeats a cherished principle of VA adjudication of veterans benefits: that the merits of a case, and not financial standing, would dictate a veteran's ability to retain legal representation.

230. For analysis on the future of due process challenges to VA's lawyering rules, see John W. Egan, Note, *The Department of Veterans Affairs and the Constitutional Implications of Judicial Review: Veterans' Due Process Right to Hire Counsel*, 16 FED. CIR. B.J. 31 (2006).

231. As to the state of a veteran's due process right to a lawyer, the scene has changed since *Walters*. *Cushman v. Shinseki*, 576 F.3d 1290, 1290–92 (Fed. Cir. 2009), displayed the Federal Circuit's initiative in holding “a veteran alleging a service-connected disability has a due process right to fair adjudication of his claim for benefits.” VA did not seek certiorari in *Cushman*, which has led Professor Jeffrey Lubbers to conclude that it represents the agency's current view. See Jeffrey S. Lubbers, *Giving Applicants for Veterans' and Other Government Benefits Their Due (Process)*, ADMIN. & REG. L. NEWS, Spring 2010, at 16, 19.

232. See *Benefits Hearing*, *supra* note 113, at 2 (acknowledging veterans may conclude that the free VSO services are a better deal, but deciding against limiting their options).

233. *Benefits Hearing*, *supra* note 113.

234. *Id.* at 23.

CONCLUSION

Unlike awards of attorney fees under EAJA, Congress did express its intent to provide for the direct payment of veterans' attorney fee agreements that comport with the requirements of § 5904(d). The Federal Circuit, as previously mentioned, sees certainty of collection as a congressionally created perk to compensate for the low fee percentage attorneys are allowed to charge when representing veterans who could not otherwise hire at attorney. In addition, *Snyder* works to discredit VA's "results in a cash payment" rule as grounds for the entitlement shifting promulgated in Precedent Opinion 12-93: once fee agreements meet the requirements of § 5904, VA is obligated to enforce them.²³⁵ If Congress did not specifically mention a special scheme for certain veterans regarding the payment of their attorneys, the Federal Circuit's opinion in *Snyder* suggests that there simply is not supposed to be one and VA cannot make one up. Likewise, *In re Smith* discounts VA's emphasis on the existence of the fund argument by explaining that a fee agreement "divides and defines" two separate funds with two separate entitlements.²³⁶ Given the Supreme Court's recognition in *Ratliff* that Congress knows how to provide for direct payment when it wants to,²³⁷ VA should work to either conform its regulatory interpretations to the statutory language or simply change the regulations themselves.

Congress provided for judicial review of VA decisions to ensure veterans were treated fairly and that all veterans received the benefits to which they were entitled.²³⁸ Later, perceiving that legal representation only before the courts was not enough, Congress expanded its statutes to promote legal representation before the agency. To this end, Congress allowed veterans to hire attorneys, who are compensated by a percentage of past-due benefits ultimately awarded. It likewise provided for direct payment of these fees to give attorneys incentives—namely, that of certain collection. Precedent Opinion 12-93 has stepped beyond VA's statutory power and has frustrated Congress's intent by eliminating an indebted veteran's ability to hire and pay an attorney. This opinion flouts the Supreme Court's decision in *Ratliff* by relying on regulations, rather than the underlying statute, to justify its administrative offset provisions for attorney fees.

If it does not amend its regulations, VA will force the most needy veterans to navigate one of the most complex benefits systems in the world without legal representation. VA must abandon its resistance to direct

235. *Snyder v. Nicholson*, 489 F.3d 1213, 1216 (Fed. Cir. 2007).

236. *See supra* note 28 and accompanying text.

237. *Astrue v. Ratliff*, 130 S. Ct. 2521, 2527 (2010).

238. *Barrett v. Nicholson*, 466 F.3d 1038, 1044 (Fed. Cir. 2006).

payment of attorney fees. The statute is clear and Congress's intent even clearer.

Congress knows how to specify direct payment when it wants to; it is time for VA to give force to Congress's intention to allow every veteran legal representation. VA is missing the point when it comes to attorneys' involvement in veterans law. The government's interest in veterans' cases is "not that it shall win, but rather that justice shall be done"²³⁹—an interest that is surrendered under the current regulatory scheme. The business of lawyers is justice, and every veteran who desires legal representation should be able to meaningfully seek it.

239. *Id.*