



HONOR OF A NATION: AGAINST THE VETERANS' LEGAL DISABILITY

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Law has long regarded veterans' benefits as mere gratuities affording no right of entitlement. On the foundation of this proposition, congresses and courts, one way or another, have closed the doors to judicial review, resulting in what this Article refers to as the veterans' legal disability. The foundational proposition that veterans' benefits are mere gratuities demands to be tested. This Article examines that proposition. It narrates episodes of history relevant to the beginnings of veterans' benefits law, then traces the foundational precepts that follow into and through the era of national security. In the end, this Article shows that veterans' benefits are more than mere gratuities for at least two reasons. One, leaders and lawmakers have long sought to provide for veterans' benefits not only to reward but also to encourage service. Two, leaders and lawmakers have time and again urged veterans' care as the nation's duty. Thus, testing the foundational proposition of the veterans' legal disability is a matter of more than mere antiquarian or academic interest. A consideration of first principles is necessary to restore integrity to the administration and adjudication of veterans' benefits.

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I. INTRODUCTION

With the words “to care for him who shall have borne the battle,” President Abraham Lincoln affirmed the nation’s obligation to war veterans.¹ Other presidents have also affirmed the nation’s obligation to war veterans, notably George Washington² and Franklin Delano Roosevelt.³ Yet far from respecting veterans’ care as the nation’s obligation, the law has long regarded veterans’ benefits as

¹ *The Origin of the VA Motto: Lincoln’s Second Inaugural Address*, DEP’T OF VETERANS AFFAIRS, <https://www.va.gov/opa/publications/celebrate/vamoto.pdf> (“With the words, ‘To care for him who shall have borne the battle and for his widow, and his orphan,’ President Lincoln affirmed the government’s obligation to care for those injured during the war and to provide for the families of those who perished on the battlefield.”) [hereinafter *The Origin of the VA Motto*].

² Circular from George Washington, Commander in Chief, Cont’l Army, to States on Farewell to the Army (June 8, 1783), <https://www.loc.gov/item/mgw434172>.

³ President Franklin D. Roosevelt, Fireside Chat 25: On the Fall of Mussolini (July 28, 1943), <https://millercenter.org/the-presidency/presidential-speeches/july-28-1943-fireside-chat-25-fall-mussolini> [hereinafter *Fireside Chat*].

mere gratuities affording no right of entitlement.⁴ On the foundation of this proposition, congresses and courts, one way or another, have closed the doors to judicial review.⁵

This Article examines the proposition that veterans' benefits are mere gratuities.⁶ It narrates episodes of history relevant to the beginnings of veterans' benefits law, then traces the foundational precepts that follow into and through the era of national security. In the end, this Article shows that veterans' benefits are more than mere gratuities for at least two reasons. One, leaders and lawmakers have long sought to provide for veterans' benefits not only to reward but also to encourage service. Encouragement of service implicates recruitment and retention, the two pillars of the all-volunteer force.⁷ This suggests that veterans' care is a practical imperative at the heart of the all-volunteer force and the national defense.⁸ Two, leaders and

⁴ In 1857, eight years before President Lincoln affirmed the government's obligation to war veterans, the U.S. Supreme Court characterized veterans' pensions as government bounties. *Walton v. Cotton*, 60 U.S. 355, 358 (1857). Courts transmuted this characterization into the proposition that all veterans' benefits are mere gratuities that afford no right of entitlement. *See, e.g., Pate v. United States*, 78 Ct. Cl. 395, 400 (1933) ("Retirement pay and compensation for injuries received in line of duty, like 'Pensions are bounties of the Government, which Congress has the right to give, withhold, distribute, or recall, at its discretion.' All are gratuities bestowed by Congress in recognition of services rendered.") (quoting *United States v. Teller*, 107 U.S. 64, 68 (1882)); *see also Schism v. United States*, 316 F.3d 1259, 1274 (Fed. Cir. 2002) (same); *Estrada v. Shinseki*, No. 11-3439, 2013 U.S. App. Vet. Claims LEXIS 29, *10-12 (Jan. 7, 2013) (unpublished) (same).

⁵ *See* WILLIAM F. FOX, JR., *THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS: AN ANALYSIS OF THE JURISPRUDENCE, ORGANIZATION, AND OPERATION OF THE NEWEST ARTICLE ONE COURT* 5 (2d ed. 1998).

⁶ *See* Martha Minow, *Archetypal Legal Scholarship: A Field Guide*, 63 J. LEGAL EDUC. 65, 67 (2013) (noting among the "varieties of legal scholarship" works that "[t]est a proposition about society or the economy or about human beings that is used by lawyers or assumed in legal sources.").

⁷ *See, e.g., MOAA Resolutions 2020-2022*, Mil. Officers Ass'n Of Am. 1 (Oct. 23, 2020)

<https://www.moaa.org/contentassets/ade31a4b85064b429b10ba1618695157/moaa-2020-resolutions-final-oct-23-2020.pdf> ("[R]ecruiting and retention of personnel is the backbone of our All-Volunteer Force.").

⁸ *See, e.g.,* Phillip Carter, *What America Owes Its Veterans: A Better System of Care and Support*, 96 FOREIGN AFF. 115, 115 (2017),

<https://www.foreignaffairs.com/system/files/pdf/articles/2017/96515.pdf> ("Service members are an irreplaceable component of U.S. national security. And because the

lawmakers have time and again urged veterans' care as the nation's duty.

Duty correlates to *right*.⁹ A right, a *legal* right, is "a claim against the state to recognition and enforcement."¹⁰ However, a federal law passed in 1933 provided that veterans would have no right or even ability of judicial review of their benefits claims.¹¹ In addition, the doctrine of domestic sovereign immunity forecloses claims against the United States.¹² And although lawmakers have waived domestic sovereign immunity for certain personal injury and wrongful death actions, the *Feres* doctrine stands out as an exception to the waiver, foreclosing actions for personal injury or death sustained in the line of duty in the armed forces.¹³

To be sure, the Veterans' Judicial Review Act of 1988 established the Court of Appeals for Veterans Claims and opened the doors to judicial review for personal injury sustained in the line of duty. However, claims against the U.S. government for recognition and enforcement of veterans' benefits are subject to the strictures of the system of veterans' benefits administration and adjudication.¹⁴ This system is broken.

According to former Department of Veterans Affairs ("VA") Secretary David Shulkin, "[t]he VA's disability compensation

United States relies on an all-volunteer force, how the country treats its troops during and after their service matters when it comes to sustaining this critical component of national strength.").

⁹ Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30 (1913).

¹⁰ JOEL FEINBERG, SOCIAL PHILOSOPHY 56 (1973).

¹¹ Act of Mar. 20, 1933, Pub. L. No. 73-2, tit. I, § 5, 48 Stat. 8, 9 ("All decisions rendered by the Administrator of Veterans' Affairs under the provisions of this title, or the regulations issued pursuant thereto, shall be final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review by mandamus or otherwise any such decision.").

¹² Of course, there is a distinction between a moral duty and a legal duty. Although leaders' and lawmakers' rhetoric on the moral duty of veterans' care does not necessarily confer a legal right enforceable in U.S. courts, it should.

¹³ *Feres v. United States*, 340 U.S. 135, 139 (1950).

¹⁴ Codified in Title 38 of the Code of Laws and Title 38 of the Code of Federal Regulations.

structure is a patchwork resulting from decades of legislation that has created a system where veterans often become locked in a complicated and adversarial process to obtain the benefits they have earned and need.”¹⁵ Thus, many doors remain closed.

Just as *duty* correlates to *right*, *immunity* correlates to *disability*.¹⁶ Therefore, this Article conceives the combined effect of *Feres* immunity (immunity in law), and the VA’s broken system of administration and adjudication (immunity in effect), as *the veterans’ legal disability*.

Underlying the veterans’ legal disability is the “mere gratuities” proposition. This Article examines this foundational proposition on the notion that—borrowing a metaphor from French writer René Descartes—“Once the foundations of a building are undermined, everything built upon them collapses of its own accord.”¹⁷ In testing the proposition on this notion, following

¹⁵ David Shulkin, *Ten Essential Reforms Needed for VA*, THE SHULKIN BLOG (Dec. 7, 2020), <https://shulkinblog.com/f/ten-essential-reforms-needed-in-the-va>. For a similar observation, see Robert N. Davis, Senior Judge, Court of Appeals for Veterans’ Claims, *Keynote Address at The Veterans Consortium Pro Bono Program & Georgetown University Law Center’s Center on National Security and the Law Webinar Symposium All Hands on Deck: Veterans Justice Imperative* (Sept. 24, 2020), <https://vimeo.com/462873353/4a4e0f08c6> (“The statutory and regulatory framework that we call the present system has historically been cobbled together piecemeal . . . [I]t is a complex, difficult, and antiquated system that inefficiently administers veterans’ disability benefits.”). (The author added these remarks here only after Senior Judge Davis’s review of an earlier draft of this Article; the judge had nothing to do with its inclusion.). Also consider VA’s problems of mass adjudication. David Ames, Cassandra Handan-Nader, Daniel E. Ho & David Marcus, *Due Process and Mass Adjudication: Crisis and Reform*, 72 STAN. L. REV. 1, 5 (2020) (“An onslaught of cases threatens the capacity of [the VA and other agencies] to render accurate decisions. This crisis of decisional quality has major policy implications for . . . the rights of veterans to just compensation for their service.”).

¹⁶ Hohfeld, *supra* note 9.

¹⁷ RENÉ DESCARTES, *MEDITATIONS ON FIRST PHILOSOPHY: WITH SELECTIONS FROM THE OBJECTIONS AND REPLIES* 12 (John Cottingham, ed., trans., Cambridge 1986) (1641). By the time Descartes published his *Meditations* in 1641, he had earned a reputation as a mathematician and philosopher, and those who knew of him had little reason to know that he had once been a mercenary soldier in the army of Maurice of Nassau in the time of the Dutch Revolt. *Id.* at xxi.

Descartes' approach, it will be enough to find reasons for doubt. Therefore, this Article is not intended as a historical survey of veterans' benefits laws; it does not account for the various veterans' benefits that the law now provides. Rather, this Article goes straight for basic principles.

Part II offers a narrative overview of the history of Old England, beginning in 1588 and ending in 1688.¹⁸ This history shows that the first laws for veterans' benefits, from Elizabeth the First to Charles the Second, had among their purposes to reward and encourage service.

Part III offers a narrative overview of the history of the New World, from the colonies' first veterans' benefits provision in 1636 to the enactment of the U.S. Constitution. This history shows that provisions of veterans' benefits throughout the colonial period and the Revolution also had among their purposes to reward and encourage service.

Part IV continues that history into and through the era of national security, ending with the Veterans' Judicial Review Act of 1988.¹⁹ Throughout this history, presidents have again and again affirmed the fulfillment of the promise of veterans' benefits as the nation's obligation.

Finally, Part V offers a summary of the results. In the end, this Article argues that veterans' benefits are much more than mere

¹⁸ The years 1588 (as a start) and 1688 (as an end) of this history seem appropriate. England's 1593 statute on state-funded veterans' benefits, which parliament passed for those who defeated the Spanish Armada in 1588, was the first of its kind. WILLIAM HENRY GLASSON, *FEDERAL MILITARY PENSIONS IN THE UNITED STATES* 13 (1918) ("It was in the reign of Elizabeth, not long before the beginning of English colonization in America, that the problem of caring for poor, sick, and maimed soldiers first compelled definite national recognition and action in England. . . . In the session of 1592-3 was passed the first statute 'for reliefe of Souldiers.'"). The year 1688 marked the end of the second period of the (mostly unwritten) English constitution, WALTER BAGEHOT, *THE ENGLISH CONSTITUTION* 310 (1867), and "ended the divine-rule of monarchs," KERMIT L. HALL AND PETER KARSTEN, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 54 (2d ed., 2009).

¹⁹ Of course, there is much that must be left out of an overview of a history spanning 400 years.

gratuities. Not only that, but testing the foundational proposition of the veterans' legal disability is a matter of more than mere antiquarian or academic interest. A consideration of first principles is necessary to restore integrity to the administration and adjudication of veterans' benefits.²⁰

Several themes arise.²¹ The Second Continental Congress led the Revolutionary War on the clarion call of *liberty or death*. For a nation founded on freedom from tyranny, involuntary conscription is antithetical, and the concept of the infallibility of the Executive is anathema. What follows is that the separation of powers and "checks and balances," including judicial review of Executive action, are imperatives of the administration and adjudication of veterans' benefits, the all-volunteer force, and the national defense.

II. OLD ENGLAND

In 1585, the new United Provinces of the would-be Dutch Republic, in hopes of casting off the authoritarian rule of the Kingdom

²⁰ See, e.g., T. Nelson Collier, *Let's Not "Fight Like Hell" Without a Strategy: At the VA, Put First Principles First*, JUST SEC. (Dec. 22, 2020), <https://www.justsecurity.org/73980/lets-not-fight-like-hell-without-a-strategy-at-the-va-put-first-principles-first>.

²¹ Perhaps the most prominent theme is money. Recall an axiom attributed to Thucydides (and Cicero): Money is the sinews of war. See, e.g., GEOFFREY PARKER, *THE ARMY OF FLANDERS AND THE SPANISH ROAD: 1567-1659* 107 (2d ed., 1972) ("War is waged not so much with arms as with money, which is the sinews of war," attributed to Thucydides). Machiavelli counters that "good soldiers" constitute the sinew [sic] of war, while "money is quite necessary in second place." NICCOLO MACHIAVELLI, *DISCOURSES ON LIVY* 149 (Harvey C. Mansfield & Nathan Tarcov, trans., Univ. of Chicago 1998) (1531). Machiavelli has the truer view. Still, Thucydides' precept echoed in Elizabethan England, SIR JOHN HAYWARD, *ANNALS OF THE FIRST FOUR YEARS OF THE REIGN OF ELIZABETH* 96 (1840) ("[M]onie, the very sinewes and hartstrings of warre."), and the American Revolution, ALLAN R. MILLETT, PETER MASLOWSKI & WILLIAM B. FEIS, *FOR THE COMMON DEFENSE: A MILITARY HISTORY OF THE UNITED STATES FROM 1607 TO 2012* 55 (2012) ("War was never cheap: As General Jedediah Huntington observed [during the American Revolution], 'Money is the Sinews of war.'"). Truer still is the following passage from British writer Charles Davenant, writing in 1695: "[N]owadays that Prince, who can best find Money to feed, cloath, and pay his Army . . . is surest of Success." CHARLES DAVENANT, *AN ESSAY UPON THE WAYS AND MEANS OF SUPPLYING THE WAR* 27 (1695), <https://quod.lib.umich.edu/e/eebo/A37167.0001.001>.

of Spain, allied with England, and Queen Elizabeth the First sent English troops to reinforce the Dutch contingents.²² This, of course, meant war with Spain.

Few could censure Britons who regarded the defeat of the Spanish Armada as Providence. The ships of the Queen's navy were half Spain's numbers, its naval forces ill-equipped and underpaid. It was this state of affairs that set conditions for the first veterans' benefits law.

A. *After the Armada*

The English fleet's fire ships broke the Armada's formation in August 1588.²³ With the next day came the last battle and the Armada's defeat. Yet England's naval forces still faced the risk of casualties—not of warfare, but of starvation.

The day of the Armada's defeat, Admiral Charles Howard, commander of the English fleet and the navy's Lord Admiral, wrote to the secretary of state: "Sir, if I hear nothing of my victuals [provisions] and munitions this night here, I will gallop to Dover to see what may be [got] there, or else we shall starve."²⁴

Two days after the Armada's defeat, Howard wrote the treasurer: "Sickness and mortality begins wonderfully to grow amongst us [i]t would grieve any man's heart to see them that have served so valiantly to die so miserably."²⁵ By then, Admiral Howard had landed his men but managed to get "only barns and such

²² JONATHAN I. ISRAEL, *THE DUTCH REPUBLIC: ITS RISE, GREATNESS, AND FALL 1477-1806* 220 (1995).

²³ For a relatively short (and compelling) story of the defeat of the Spanish Armada, see MAX BOOT, *WAR MADE NEW: WEAPONS, WARRIORS, AND THE MAKING OF THE MODERN WORLD* 26-45 (2007).

²⁴ JOHN KNOX LAUGHTON, *STATE PAPERS RELATING TO THE DEFEAT OF THE SPANISH ARMADA, ANNO 1588* 61 (2d ed. 1894). Admiral Howard was also Lord Admiral, the principal officer of Britain's navy, second only, in naval affairs, to the Queen herself. Still, he had to draw money for provisions from the treasury. ROBERT W. KENNY, *ELIZABETH'S ADMIRAL: THE POLITICAL CAREER OF CHARLES HOWARD, EARL OF NOTTINGHAM 1536-1624* 37-40 (1970).

²⁵ LAUGHTON, *supra* note 24, at 96.

outhouses” for their lodging, some men, according to Howard, left to “die in the streets.”²⁶

A week after the Armada’s defeat, back aboard the flagship, Admiral Howard wrote another privy councilman on behalf of the men who “served in her Majesty’s service of late against the Spaniards . . . wherein she and her company have performed their duties very well, and that now, in reward of their good service, they look for payment and satisfaction.”²⁷

By month’s end, Howard reached Dover and from there wrote the secretary of state: “[F]or we are to look to have more of these services; and if men should not be cared for better than to let them starve and die miserably, we should very hardly get men to serve.”²⁸

Getting men to serve had been of paramount concern to Howard. As Lord Admiral, it was his responsibility to recruit. Of the many letters Howard wrote, the one in December 1588 is of profound importance. When he rewarded his men with “wine, cider, sugar, oil, and certain fish,” he noted, in the letter to yet another privy councilman, that “these provisions were used for the relief and encouragement of such upon whose forwardness and valours the good success of the service did much rest.”²⁹

Considering the miserable conditions of their men, and without good prospects for provisions, Howard and his vice admirals John Hawkins and Francis Drake provided for the men out of their own pay. Before long, Hawkins and Drake would set up a sailors’ fund and, later, a clinic of sorts at the Chatham Dockyard for sick and injured men.³⁰ The fund became known as the Chatham Chest.³¹

²⁶ *Id.*

²⁷ *Id.* at 117.

²⁸ *Id.* at 183.

²⁹ *Id.* at 303-04.

³⁰ Shirley Burgoyne Black, *The Chest at Chatham, 1590-1803*, 111 *ARCHAEOLOGIA CANTIANA* 263, 264 (1993),

<https://www.kentarchaeology.org.uk/Research/Pub/ArchCant/111-1993/111-12.pdf>.

³¹ *Id.*

It was against this background that Parliament passed modernity's first veterans' benefits law, which left no mystery as to its purposes:

[S]uch as have . . . adventured their lives and lost their limbs or disabled their bodies, or shall hereafter adventure their lives, lose their limbs, or disable their bodies, in defence and service of Her Majesty and the State, should at their return be relieved and rewarded to the end that they may reap the fruit of their good deservings, and others may be encouraged to perform the like endeavors; Be it enacted³²

From the first then, two purposes of veterans' care were to reward and encourage service.³³

³² Reproduced in GLASSON, *supra* note 18, at 9-10.

³³ These were the two purposes noted in the statute, but there were other purposes. For example, there was also, of course, Christian charity; in fact, this was the paramount purpose noted in the first motion made in parliament in March 1593. Simonds d'Ewes, *Journal of the House of Commons: March 1593*, in THE JOURNALS OF ALL THE PARLIAMENTS DURING THE REIGN OF QUEEN ELIZABETH 479-513 (1682), <https://www.british-history.ac.uk/no-series/jrnl-parliament-eliz1/pp479-513> ("Sir Robert Cecill moved for some course of necessary relief to be had and devised, for the great number of poor people pressing every where in the streets to beg: And dividing them into three parts and sorts, all of them, he said, in Christian Charity ought to be relieved though in sundry degrees, forting the maimed and lame Souldiers for the first and best kind of those people and meetest to be relieved."). Still, while Christian charity may have inspired the first motion, there were other more practical purposes. See GEOFFREY LEWIS HUDSON, THE ENGLISH PRIVY COUNCIL AND DISABLED SOLDIERS, 1558-1625 243 (Sep. 1988) (unpublished Master of Arts thesis, McMaster University), <https://macsphere.mcmaster.ca/bitstream/11375/8942/1/fulltext.pdf> (summarizing historians' views on the purposes of the Elizabethan law, and noting, according to these views, "The measures were adopted in order to: encourage Englishmen to fight and fight well; reward their services (rather than grant them charity); help relieve the tension created by demobilized soldiers around London in the late 1580's and early 1590's. It is clear that these arguments are sound. The Council in its attempts to relieve disabled soldiers from 1589 to 1593 demonstrated that it agreed with the comments made by the Lord Admiral in 1588 - England's soldiers needed to be treated decently so that others would be willing to serve. In addition, the Council sought relief for maimed ex-servicemen in order to improve the morale of those still in active service."). Drake, Member of Parliament for Plymouth, served on the committee. d'Ewes, *supra* note 33, at 479-513 ("Sir Francis Drake [and others] are

Even if Drake had been the mastermind against the Armada, Howard had been in command. And, as Elizabeth lay dying in 1603, according to one account, it was Howard who, standing by her bedside, pressed her on the issue of succession.³⁴ King James the Sixth of Scotland would be king of England.

B. *The Stuarts & Divine Right*

King James the First of England believed the king could do no wrong, which followed from the doctrine of divine right and meant that “no action at law could ever lie against him.”³⁵ Yet only a generation later, Parliament and the people would seek to repudiate the notion of divine right, and by the only means then appropriate: war.

1. Charles the First and the English Civil Wars

“Our honor is ruined, our ships are sunk, our men perished; not by the sword, not by the enemy, not by chance, but . . . by those we trust.”³⁶ When Member of Parliament John Eliot uttered these words in the House of Commons in February 1626, his allusion had been to the courtiers of the new king, King Charles the First.³⁷ Few could have foreseen the revolution that would follow. Yet, also remarkable was what had come before.

Eliot had been present when a war fleet sailed out from Plymouth at the southeast coast of Britain in October 1625. He was there, too, when the ships returned.³⁸ The horrors he witnessed would

appointed to join with the Lords in the joint disposing of the Contribution of both Houses collected towards the relief of poor maimed Souldiers.”)

³⁴ KENNY, *supra* note 24, at 257.

³⁵ EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 17 (1988).

³⁶ SIR JOHN ELIOT, *AN APOLOGY FOR SOCRATES AND NEGOTIUM POSTERORUM* 155 (1881).

³⁷ *Empire of the Seas: How the Navy Forged the Modern World; Episode 1, Heart of Oak* (BBC television broadcast Jan. 15, 2010) [hereinafter *Heart of Oak*].

³⁸ Eliot was vice admiral of Plymouth’s county, Devon. JOHN FORSTER, *SIR JOHN ELIOT: A BIOGRAPHY* 28 (1864). He bore the responsibility to recruit (often, force) men of Devon into the naval service of the royal government. *Id.* So when the ships

change the course of England's history and the history of the British colonies in America. The expedition had been a miserable failure.³⁹ Worse, hundreds of men had fallen dead with starvation and disease—their bodies heaved overboard.⁴⁰

Eliot hurried a letter to the secretary of state. "The miseries before us are great," he wrote, "and great the complaints of want and illness of the victual. . . . [The soldiers] are in great numbers continually thrown overboard; and yesterday fell down here seven in the streets."⁴¹ An emergency tax was levied to remedy the situation, but the people widely regarded the tax as unlawful. They resisted. It had become necessary to bring the matter to Parliament.

The point of Eliot's speech was clear: No money should be voted until an inquiry was made into the failed expedition.⁴² The speech was the strongest charge against royal government ever heard in Parliament.⁴³ King Charles had Eliot imprisoned. It was too late. Eliot's speech had set a fire to the Commons.

[T]here had been a plain assertion of the right of the Commons to ascertain by every means in their power whether the money for which they were asked would be used for the benefit of the country. No doubt such an inquiry contained within itself the germs of a mighty revolution.⁴⁴

Charles the First was also a proponent of divine right.⁴⁵ He demanded deference, even if that meant war with his own subjects.

returned to Plymouth Sound in December, Eliot, as much as anyone, had hoped for triumph—what he witnessed was disaster.

³⁹ SAMUEL RAWSON GARDINER, HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES I TO THE OUTBREAK OF THE CIVIL WAR: 1603-1642, Vol. 6, 1625-1629 16-23 (1884) (2005).

⁴⁰ *Id.* at 60-61.

⁴¹ FORSTER, *supra* note 38, at 270.

⁴² GARDINER, *supra* note 39, at 63.

⁴³ *Heart of Oak*, *supra* note 37.

⁴⁴ GARDINER, *supra* note 39, at 63.

⁴⁵ MORGAN, *supra* note 35, at 18 ("In England in the first half of the seventeenth century the doctrine of the divine right of kings, as expounded by James [the First] and acted out by his son Charles [the First], reached a culmination.").

Among Charles's many blunders in the English Civil Wars, one was his belief, apparent from his behaviors, that he could prosecute a military campaign without the pay and supplies necessary to man and equip an army.⁴⁶ Without pay and supplies, and with a cause few wanted to support, many of Charles's men deserted, and those who remained refused to fight.⁴⁷ Charles struggled against this "dead weight of disaffection" and, in the end, met defeat.⁴⁸

Parliament had raised its army on the notion that the people were the origin of political authority and that Parliament represented the people.⁴⁹ This was the inception of popular sovereignty, intended to replace the notion of the King's divine right, embodied by Charles the First and his father before him.⁵⁰ Thus, the army had become the vanguard of the people's freedom from tyranny.

The army saw it this way, at least. "We were not a mere mercenary army, hired to serve any arbitrary power of state, but called forth and conjured by the several declarations of Parliament, to the defence of our own and the people's just rights and liberties."⁵¹ No surprise then that when the war ended Parliament's army became "a key political force."⁵² It charged the King with bloodguilt, demanded retribution, and, in a military coup, purged Parliament by force of its remaining royalists and moderates.⁵³ This set conditions for the trial and execution of the former king, now "Charles Stuart, man of blood."⁵⁴

⁴⁶ CLIVE HOLMES, *WHY WAS CHARLES I EXECUTED?* 7-8 (2006) ("Groups of unwilling conscripts were moved to the north, but they were ill paid, and lacked both supplies and equipment, partly because their officers dared not trust them with weapons. They expressed their disaffection en route by large desertion—").

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 109.

⁵⁰ MORGAN, *supra* note 35, at 50.

⁵¹ C. H. FIRTH, *CROMWELL'S ARMY: A HISTORY OF THE ENGLISH SOLDIER DURING THE CIVIL WARS* 354 (3rd ed. 1921).

⁵² HOLMES, *supra* note 46, at 107.

⁵³ *Id.*

⁵⁴ This was the first time in modern history that a head of state was impeached. *See, e.g.,* Michael Paradis, *Three Lessons From the First Time a Head of State Was*

More than that, the claim to pay and pensions compelled the army's postwar union: "Men already disbanded, those disabled in war and war widows had already experienced difficulties . . . of collecting arrears and pensions. The army therefore required more money upfront and cast-iron guarantees before it would disband."⁵⁵ This was the first time in modern history that soldiers asserted a right to a role as political actors.⁵⁶ In the end, Parliament, in another first, "recognized the moral obligation of the State to those who suffered in its service."⁵⁷

2. Charles the Second

After Britain's brief republic and the restoration of the monarchy, Charles the Second and his court immediately saw that veterans were still very much a political force.⁵⁸ Of note, "Parliament, and later the restored monarchy, recognized that they had a duty of care to the soldiers who had been wounded or killed in their service and made funds available Veterans, widows and orphans were entitled to petition for pensions and gratuities from the state."⁵⁹

Yet, veterans' benefits were more than mere gratuities. When in 1674 Louis the Fourteenth of France founded the Hôtel Nationales des Invalides, as historian John A. Lynn notes, "contemporaries [argued] that provision for old and infirm soldiers would make young and able men more willing to enlist."⁶⁰ This too became the motivation of Charles the Second, as his own words would soon confirm.

Impeached, LAWFARE (Oct. 3, 2019, 4:47 PM), <https://www.lawfareblog.com/three-lessons-first-time-head-state-was-impeached>.

⁵⁵ HOLMES, *supra* note 46, at 107.

⁵⁶ *Id.* at 109.

⁵⁷ FIRTH, *supra* note 51, at 270.

⁵⁸ See David J. Appleby, *Veteran Politics in Restoration England, 1660–1670*, 28 THE SEVENTEENTH CENTURY 323, 323 (2013), <https://www.tandfonline.com/doi/pdf/10.1080/0268117X.2013.823101>.

⁵⁹ Cardiff University, *Counting the cost of Britain's most damaging conflict* (July 27, 2018), <https://www.cardiff.ac.uk/news/view/1238870-counting-the-cost-of-britains-most-damaging-conflict>.

⁶⁰ JOHN A. LYNN, *GIANT OF THE GRAND SIÈCLE: THE FRENCH ARMY 1610-1715* 430 (1997).

In 1677, Scotsman Roger Boyle, a veteran of the English Civil Wars and a Member of Parliament, wrote *A Treatise of the Art of War*, which he dedicated to the King.⁶¹ It included a passage that, although almost a hundred years after the fact, was reminiscent of Admiral Howard and his exhortations on the need to encourage service:

It is the Duty of a Governor also to have an Hospital. . . . For besides the just charity of such Care, who can expect the Soldiery shall frankly hazard themselves, if due provision be not made for the wounded and sick, so that it is as much the Interest, as the Duty of a Governor, to provide such an Hospital.⁶²

In 1680, the King founded the Royal Hospital Kilmainham in Ireland⁶³ and, two years later, the Royal Hospital Chelsea in Britain. In funding the construction of the Royal Hospital Chelsea, Charles the Second met resistance in Parliament and instead attempted to raise money from the church. In a letter to a clergyman from 1684, the King made some profound pronouncements on the purposes of the veterans' home:

[M]any of our loyal subjects, who formerly took up arms for us. . . are now by old age, or wounds or other accidents befalling them in [that] service, & disabling them for all other, reduced to so extreme poverty, [that] some of them have been forced to beg bread. . . . And farther foreseeing . . . there will be many from time to time, who by reason of age, or sickness, or other disabilities will unavoidably fall under the same miserable circumstances with the former: We therefore . . . being desirous (as much as in us lies) to remove this also among other

⁶¹ ROGER BOYLE, *A TREATISE OF THE ART OF WAR* (1677), <http://downloads.it.ox.ac.uk/ota-public/tcp/Texts-HTML/free/A53/A53478.html>.

⁶² *Id.*

⁶³ FIRTH, *supra* note 51, at 270 (“In 1680, three years after Orrery’s book was published, the foundation-stone of Kilmainham Hospital for old soldiers, in Dublin, was laid, and in 1681 that of Chelsea Hospital.”); *About Us*, ROYAL HOSPITAL KILMAINHAM, <https://rhk.ie/about-us> (last visited Oct. 29, 2021) (“It was built in 1680 by royal command . . . and was based on Les Invalides in Paris.”). *But see* CHARLES E. LITTLE, *CYCLOPEDIA OF CLASSIFIED DATES WITH AN EXHAUSTIVE INDEX* 894 (1900) (“1675. * * * *Dublin*. The Royal Hospital, Kilmainham, for aged and disabled soldiers in Ireland, is founded by Arthur, [Earl of Granard], marshal-general of the army in Ireland. [1679. Improved by the Duke of Ormonde.]”).

discouragements which else may hinder even men of courage from entering into this kind of service to the Crown; have . . . resolved to found & erect at Chelsey . . . a perpetual hospital.⁶⁴

Here, again, were the tandem purposes to reward and encourage service.⁶⁵

III. NEW WORLD

Providing veterans' benefits to reward and encourage service continued into the New World. In 1624, a law passed in the British colony of Virginia provided "[t]hat at the beginning of July next the inhabitants of every corporation shall fall upon their adjoining Salvages, as we did last year . . ."—to *fall upon their adjoining Salvages* meant to make war with the local natives—and that "[t]hose that shall be hurte upon service to be cured at the publique charge; in case any be lamed to be maintained by the country according to his person and quality."⁶⁶ Other colonies passed provisions that were similar.

The militias of the colonies of British America took the form of those of Queen Elizabeth.⁶⁷ Perhaps a more profound inheritance was the aversion to a standing army.⁶⁸ Less certain was the inheritance of Britain's longstanding policy of impressment. As it happened, conscription did not take hold in the New World. From the beginning, the colonies depended on volunteers and provided veterans' benefits to encourage them.

⁶⁴ ROYAL HOSPITAL CHELSEA, PAPERS ILLUSTRATIVE OF THE ORIGIN AND EARLY HISTORY OF THE ROYAL HOSPITAL AT CHELSEA 14 (1872).

⁶⁵ To be sure, the issue of sailors' pay and veterans' benefits in Britain was far from settled. When war broke out with the Dutch in 1665, "the navy was terribly in debt, and sailors went unpaid. In the dockyards, [Lord Admiral of the navy Samuel Pepys (pronounced *peeps*)] heard the lamentable moans of sailors that lay destitute in the street." *Heart of Oak*, *supra* note 37. Pepys wrote a desperate letter to the king asking for more money, which never came. *Id.*

⁶⁶ GLASSON, *supra* note 18.

⁶⁷ MILLETT ET AL., *supra* note 21, at 1.

⁶⁸ See *Stuart's War*, ENGLISH HERITAGE, <https://www.english-heritage.org.uk/learn/story-of-england/stuarts/war> (last visited Oct. 28, 2021).

A. *Before Revolution*

By the time of the English Civil Wars, settlers of New England were at war with peoples native to North America.⁶⁹ In 1636, Plymouth Colony passed a law providing veterans' benefits to encourage service against the Pequots: "if any man shall be sent forth as a soldier and shall return maimed he shall be maintained competently by the Colony during his life."⁷⁰ This was the colonies' first veterans' benefits law (the Virginia law of 1624 did not get ratified).⁷¹ As law scholar William Henry Glasson observes, "[t]his promise of relief was meant to encourage the colony's soldiers against the Pequod Indians [sic] who were then at war with the English settlers of New England."⁷² Similar laws to encourage service sprang up in Maryland,⁷³ New York, and Rhode Island.⁷⁴

Meanwhile, in keeping with the state of affairs then common throughout Europe, Swiss writer Emer de Vattel⁷⁵—spoken of as a forgotten "founding father" of the United States⁷⁶—had this to say in 1758 on States' duty to war veterans:

⁶⁹ James Drake, *Restraining Atrocity: The Conduct of King Philip's War*, 70 *NEW ENG. Q.* 33–34 (1997).

⁷⁰ GLASSON, *supra* note 18, at 14.

⁷¹ *Id.*

⁷² *Id.*

⁷³ "The colonial laws of Maryland also illustrate the way in which pensions were promised to disabled soldiers in order to encourage enlistment against the Indians." *Id.* at 15.

⁷⁴ "Seeking to secure enlistments in military expeditions against the Indians, or against the French, the colonies promised to care for those who should be disabled and be left without means of obtaining a livelihood." *Id.* at 17. "Pension provisions came to be included commonly in acts organizing the militia or in levying soldiers for some particular military expedition." *Id.*

⁷⁵ "It is to the praise of Vattel that he did much to popularise among the highest and most powerful classes of society, ideas of humanity in warfare, and of rights and obligations of nations." M. Campbell Smith, Translator's Introduction to *IMMANUEL KANT, PERPETUAL PEACE: A PHILOSOPHICAL ESSAY* 28 (M. Campbell Smith trans., Macmillan 1903).

⁷⁶ J. M. Opal, *The Founding Father you've never heard of*, *WASH. POST* (July 3, 2019, 6:00 AM), <https://www.washingtonpost.com/outlook/2019/07/03/founding-father-youve-never-heard/> ("He never lived to see the new United States—he died in 1767—

In France and England, magnificent establishments have been made in favor of invalids, which, while they discharge a debt of a sacred nature, do honor to the sovereign and the nation. The care of those unfortunate victims of war is the indispensable duty of every state, in proportion to its ability. It is repugnant, not only to humanity, but to the strictest justice, that generous citizens, heroes who have shed their blood for the safety of their country, should be left to perish with want, or unworthily forced to beg their bread.⁷⁷

By the “magnificent establishments” in France and England, Vattel alluded to the Les Invalides in Paris and Britain’s Royal Hospital Chelsea. Yet, although Vattel’s work was familiar to many of the Constitution’s framers,⁷⁸ one nuance of the history of veterans’ benefits up to that time was particularly contrary to American ideals—the idea of veterans as victims deserving of charity. Anyway, sentiments of goodwill in time would prove irrelevant. The events of the Revolutionary War would reestablish the provision of veterans’ benefits as a practical imperative.

B. *Revolution*

The willingness with which our young people are likely to serve in any war, no matter how justified, shall be directly proportional as to how they perceive the veterans of earlier wars were treated and appreciated by their nation. Some have imputed this passage to George Washington.⁷⁹ Yet “there is no evidence that Washington wrote or said

but his influence on American thinking was as deep and direct as it is now forgotten.”)

⁷⁷ EMER DE VATTEL, *THE LAW OF NATIONS* (Béla Kapossy & Richard Whatmore, eds. 2008) (1758).

⁷⁸ Opal, *supra* note 76.

⁷⁹ Of those who have attributed this passage to Washington, most notable is the late U.S. Senator and Vietnam War veteran John McCain. In a presidential campaign speech in 2008, Senator McCain said: “We’ve got a problem in American today my friends and it’s called veterans’ healthcare. We all know what happened at Walter Reed, we all know that the condition in which those veterans were kept is unacceptable, we all know that we have to improve our treatment of veterans. And I’d like to quote to you very quickly something I carry with me all the time: George Washington in 1789 said—.” *McCain Campaign Event*, C-SPAN (Feb. 1, 2008), <https://www.c-span.org/video/?203891-1/mccain-campaign-event>. Beto O’Rourke, former U.S. Representative, has also made the attribution. *VA: The Human Cost of*

it.”⁸⁰ Still, the words and their attribution endure because of the related history.

In June 1775, on John Adams' urging, the Second Continental Congress established the Continental Army and, on Adams' nomination, put Washington in command.⁸¹ The Congress also appointed the generals, including eight brigadiers, among them Nathanael Greene.⁸² From then on, the Continental Army was a “dual army” of regulars and militia.⁸³

As preparations began for what would become the Battle of Long Island, General Greene sought to address the issue of recruitment bounties with the Continental Congress. Thus, from New York, on 26 May 1776, General Greene wrote to Adams:

From the Approaching danger recruiting will grow more and more difficult. If the Congress was to fix a certain support upon every Officer and Soldier that got maim'd in the service or upon the families of those that were kild it would have as happy an influence towards engaging people in the service and inspire those engagd with as much courage as any measure that can be

War (PBS television broadcast Nov. 6, 2017). (It was also featured in the first minutes of an introductory video for the Court of Appeals for Veterans Claims.) This is not to point out the errors but to stress Americans' mythic reverence of Washington and the sentiment's enduring resonance.

⁸⁰ Yuval Levin, *Misquoting Washington*, NAT'L REV. (Feb. 4, 2008, 4:37 PM), <https://www.nationalreview.com/corner/misquoting-washington-yuval-levin>.

⁸¹ *The American Revolution: A timeline of George Washington's military and political career during the American Revolution, 1774-1783*, LIBRARY OF CONG., <https://www.loc.gov/collections/george-washington-papers/articles-and-essays/timeline/the-american-revolution> (noting, on 14 June 1775, “Debate begins in Congress on the appointment of a commander in chief of Continental forces. John Hancock expects to be nominated but is disappointed when his fellow Massachusetts delegate, John Adams, suggests George Washington instead as a commander around whom all the colonies might unite. June 15, Washington is appointed commander in chief of the Continental Army.”) (last visited Nov. 3, 2021).

⁸² TERRY GOLWAY, *WASHINGTON'S GENERAL: NATHANAEL GREENE AND THE TRIUMPH OF THE AMERICAN REVOLUTION* 56 (2006).

⁸³ MILLETT ET AL., *supra* note 21, at 50.

fixt upon. I think it is nothing more than common Justice neither.⁸⁴

On 2 June, General Greene sent a second letter, stressing that “if there was a support establish’t what confidence would it give to those engag’d, what encouragement to those that are not. Good Policy points out the measure, Humanity calls for it, and Justice claims it at your Hands,” and that “if the present Offers should not be sufficient to induce People to engage in the Army—You will be oblig[e]d to Augment the bounty.”⁸⁵

Meanwhile, the Congress set up the Board of War and Ordnance, with Adams as its chairman.⁸⁶ Adams took the lead at once on the issue of bounties and benefits. On 20 June, eighteen days after General Greene’s second letter, the Congress had begun to prepare a plan for invalid pensions.⁸⁷ On 22 June, Adams wrote to General Greene:

Your Reasoning, to prove the Equity, and the Policy of making Provision for the Unfortunate Officer, or soldier, is extremely just, and cannot be answered, and I hope that when We get a little over the Confusions arising from the Revolutions which are now taking Place in the Colonies, and get an American Constitution formed, Something will be done.⁸⁸

⁸⁴ Letter from Nathanael Greene, Brigadier General, Cont’l Army, to John Adams, Second Cont’l Cong. (May 26, 1776), <https://founders.archives.gov/documents/Adams/06-04-02-0092>.

⁸⁵ Letter from Nathanael Greene, Brigadier General, Cont’l Army, to John Adams, Second Cont’l Cong. (June 2, 1776), <https://founders.archives.gov/documents/Adams/06-04-02-0100>.

⁸⁶ MILLETT ET AL., *supra* note 21, at 55 (“Not until June 1776 did [the Congress] form a five-member Board of War and Ordnance to give continuity to army administration.”).

⁸⁷ GLASSON, *supra* note 18, at 20.

⁸⁸ Letter from John Adams, Second Cont’l Cong., to Nathanael Greene, Brigadier General, Cont’l Army (June 22, 1776), <https://founders.archives.gov/documents/Adams/06-04-02-0129>. Adams had longed to be but had never been a soldier. JOHN FERLING, JOHN ADAMS: A LIFE 132-33 (1992). Yet he spoke like a man of experience when he said, in the same June 22nd letter, “Fighting, is not the greatest Branch of the Science of War. Men must be furnished with good and wholesome Provisions in Sufficient Plenty. They must be well paid—

Greene's reply did not come until 14 July.⁸⁹ Even if it had come sooner, Adams might have been too coopted to respond. Discussions had begun about the terms of independence. In large part, the Declaration of Independence was a remonstrance on behalf of the people. In addition to its well-known passages ("When in the Course of human Events, it becomes necessary—"; "We hold these truths to be self-evident—") the Declaration catalogued a list of grievances on the many tyrannies of King George the Third.⁹⁰ After John Hancock, among the delegates to sign was Adams.

Secretary Adams and General Greene then continued their correspondence on veterans' benefits, both writing on the imperative as a matter of "justice."⁹¹ The last letter was from Adams to Greene on 4 August and, on 26 August 1776, the Continental Congress passed a provision for veterans' benefits, the bounty provision, which "promised half pay for life or during disability to every officer, soldier, or sailor losing a limb in any engagement or being so disabled in the service of the United States as to render him incapable of earning a livelihood."⁹² This too was meant to encourage enlistments.⁹³

In the day's business of 26 August 1776, the Congress had adopted the nation's first national pension law. That night, British forces began their approach to Long Island and, in the darkest hours, attacked Brooklyn.⁹⁴ Many of Washington's men turned and ran, forcing retreat.⁹⁵ Discouraged, on 8 September, Washington wrote Hancock: "On every side there is a choice of difficulties, & every

they must be well clothed and well covered, with Barracks and Tents—they must be kept Warm with Suitable Fuel."

⁸⁹ Letter from Nathanael Greene, Brigadier General, Cont'l Army, to John Adams, Second Cont'l Cong. (July 14, 1776), <https://founders.archives.gov/documents/Adams/06-04-02-0161>.

⁹⁰ THE DECLARATION OF INDEPENDENCE (U.S. 1776).

⁹¹ Letter from Nathanael Greene, *supra* note 89; Letter from John Adams, Second Cont'l Cong, to Nathanael Greene, Brigadier General, Cont'l Army (Aug. 4, 1776), <https://founders.archives.gov/documents/Adams/06-04-02-0193>.

⁹² GLASSON, *supra* note 18, at 20.

⁹³ *Id.* at 21.

⁹⁴ DAVID MCCULLOUGH, 1776 171 (2005).

⁹⁵ *Id.*; see also Charles Francis Adams, *The Battle of Long Island*, 1 AM. HIST. REV. 650 (1896), <https://www.jstor.org/stable/pdf/1833753.pdf>.

measure on our part . . . to be formed with some apprehension that all our Troops will not do their duty.”⁹⁶

What Washington meant was that men would not stand and fight.⁹⁷ In some respects, this was to be expected. The men of the militia and the Continental Army had been volunteers on short enlistments.⁹⁸ If they should be maimed, killed, or captured, what could they have done then to see to the care of their wives and families?⁹⁹ It became necessary to have men who were committed to the war until the end.¹⁰⁰

Reluctance and refusal among the men to stand and fight was also to be expected for another reason. “Washington’s explanation . . . was that they were free men. Their freedom brought them to revolution and, paradoxically, made them incapable of fighting it well,”¹⁰¹ hence Washington’s exhortation that “nothing but a good bounty can obtain them upon a permanent establishment.”¹⁰²

⁹⁶ Letter from George Washington, Commander in Chief, Cont’l Army, to John Hancock, President, Second Cont’l Cong. (Sept. 8, 1776), <https://founders.archives.gov/documents/Washington/03-06-02-0203>.

⁹⁷ ROBERT MIDDLEKAUFF, *THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION 1763-1789* 342 (2007) (“What he meant . . . was that they lacked the responsibility—or loyalty—that made professional soldiers continue to fight when they knew they were about to die or be captured.”).

⁹⁸ MILLETT ET AL., *supra* note 21, at 55.

⁹⁹ That this became an important consideration for Washington is clear from his letter of 25 September: “A Soldier reasoned with upon the goodness of the cause he is engaged in and the inestimable rights he is contending for, hears you with patience, & acknowledges the truth of your observations; but adds, that it is of no more Importance to him than others—The Officer makes you the same reply, with this further remark, that his pay will not support him, and he cannot ruin himself and Family to serve his Country.” Letter from George Washington, Commander in Chief, Cont’l Army, to John Hancock, President, Second Cont’l Cong. (Sept. 25, 1776), <https://founders.archives.gov/documents/Washington/03-06-02-0305>.

¹⁰⁰ As McCullough observes, for Washington, “Short enlistments would no longer answer. There must be an army built on a ‘permanent footing,’ a standing army.” DAVID MCCULLOUGH, *JOHN ADAMS* 159 (2001).

¹⁰¹ MIDDLEKAUFF, *supra* note 97, at 342; *see also* Letter from George Washington, *supra* note 99 (“Men accustomed to unbounded freedom, and no controul, cannot brooke the Restraint which is indispensably necessary to the good Order and Government of an Army.”).

¹⁰² Letter from George Washington, *supra* note 99.

So, Washington wrote the Congress on 25 September to express his opinion

[T]hat a good Bounty be immediately offered, aided by the proffer of at least 100 or 150 Acres of Land . . . If this encouragement then is given to the Men, and such Pay allowed the Officers as will induce Gentlemen of Character & liberal Sentiments to engage . . . we should in a little time have an Army able to cope with any that can be opposed to it.¹⁰³

Yet Adams and the Board had already issued a new plan offering bounty lands and pensions, which the Congress adopted on 16 September.¹⁰⁴ Still, this and other bounty proposals had been only plans. Under the Articles of Confederation, the Congress had only the powers that the states agreed to grant.¹⁰⁵ While some states carried out the plan—and numbers began to improve—other states did not.

Making matters worse was the army's unfitness for duty. By 1778, after the march to Valley Forge, the troops began to starve.¹⁰⁶ Soldiers continued to desert, and more and more officers resigned. By April, Washington had come to realize, as reflected in a passage reminiscent of the time of Queen Elizabeth, that, "a great and lasting War can never be supported on ['patriotism'] alone—It must be aided by a prospect of interest or some reward."¹⁰⁷ That is, "[t]hey will not be persuaded to sacrifice all views of present interest, and encounter the numerous vicissitudes of War, in the defence of their Country, unless she will be generous enough on her part, to make a decent

¹⁰³ *Id.*

¹⁰⁴ MCCULLOUGH, *supra* note 100, at 160.

¹⁰⁵ MIDDLEKAUFF, *supra* note 97, at 623.

¹⁰⁶ *Id.* at 419 ("The time in February was perhaps the worst, with Washington describing the troops as 'starving' on February 6, 1778, and their condition as one of 'famine' on February 16.").

¹⁰⁷ Letter from George Washington, Commander in Chief, Cont'l Army, to John Banister, Cont'l Army (Apr. 21, 1778), <https://founders.archives.gov/documents/Washington/03-14-02-0525>.

provision for their future support.”¹⁰⁸ Washington’s words conveyed veterans’ care as necessary to encourage service.¹⁰⁹

The war went on for several years, culminating in the Battle of Yorktown in 1781,¹¹⁰ followed by the first articles of peace and independence.¹¹¹ As the war came to an end, it became appropriate to disband the army. Yet, with no power to tax, the Confederation could not fulfill the promises of bounty lands and pensions.¹¹² Many saw the need for a stronger federal government, and when the framers of the Constitution of the United States set out to replace the Articles of Confederation, one among the several purposes noted in the Preamble would be “to provide for the common defence.”¹¹³

Alongside the disbanding of the army was Washington’s resignation as Commander in Chief. Before resigning, Washington prepared a letter of farewell that included the following passage:

Before I conclude the Subject of public justice, I cannot omit to mention the obligations this Country is under to that meritorious class of veteran non Commission’d Officers and

¹⁰⁸ *Id.* Among the “numerous vicissitudes” were not only the dangers but also the various privations of food, clothing, and adequate shelter.

¹⁰⁹ MILLETT ET AL., *supra* note 21, at 53 (“Most American recruits served willingly . . . Financial benefits simply reinforced the primary motivation to serve, which was probably ideological.”).

¹¹⁰ MIDDLEKAUFF, *supra* note 97, at 593-4.

¹¹¹ In a work entitled *Sentiments On a Peace Establishment* of 1 May 1783, five months after the signing of the first articles of peace and independence, Washington said: “It may be laid down, as a primary position, and the basis of our system, that every Citizen who enjoys the protection of a free Government, owes not only a proportion of his property, but even of his personal services to the defence of it.” <https://founders.archives.gov/documents/Washington/99-01-02-11202>. As scholar Russell Weigley has observed, “This idea, proclaiming a universal military obligation as the concomitant of the ballot, is the foundation of the modern mass army.” RUSSELL F. WEIGLEY, *TOWARDS AN AMERICAN ARMY: MILITARY THOUGHT FROM WASHINGTON TO MARSHALL* 12 (1962).

¹¹² ROBERT MIDDLEKAUFF, *WASHINGTON’S REVOLUTION* 301 (2015).

¹¹³ When Adams wrote to General Greene on 22 June 1776, he said he had hoped that something might be done, in the forming of “an American Constitution,” to provide for war veterans. Letter from John Adams, *supra* note 88. Yet although Adams himself was one of the framers of the Constitution, nothing in the Constitution provides for veterans’ care.

Privates who have been discharged for inability . . . nothing could be a more melancholy and distressing sight, than to behold those who have shed their blood or lost their limbs in the service of their Country, without a shelter, without a friend and without the means of obtaining any of the necessaries of life or comforts of life compelled to beg their daily bread from door to door!¹¹⁴

Not long after the United States won independence and the U.S. Constitution came into force, the First Congress passed a law in favor of supporting war veterans (Washington signed the law as the nation's first president).¹¹⁵ Thus, "[f]rom the very beginning of our government, it has been usual for Congress, in passing laws to raise men for the army and navy, to promise pensions to those who should be wounded or disabled in the military service."¹¹⁶ And as law scholar Lawrence Friedman has noted, "[t]he unspoken premise and promise was that men who could expect help from a grateful nation would be that much more likely to enlist."¹¹⁷

IV. FROM THE EARLY REPUBLIC TO THE NATIONAL SECURITY ERA

Over the course of the generation that followed the Revolutionary War, opinions of the war changed, and with them, opinions of the war's veterans.¹¹⁸ On the earlier view, it was a "virtuous citizenry" that had won the war; on the later view, soldiers.¹¹⁹ As historian John Resch notes,

This new memory of the war was fostered by the romantic image of the suffering soldier. That image portrayed regulars as heroic warriors who embodied the republican ideals of militant

¹¹⁴ Circular from George Washington, Commander in Chief, Cont'l Army, to States on Farewell to the Army (June 8, 1783), <https://www.loc.gov/item/mgw434172>.

¹¹⁵ Act of Sept. 29, 1789, 1 Stat. 95 ("Be it enacted . . . That the military pensions which have been granted and paid by the states respectively, in pursuance of the acts of the United States in Congress assembled, to the invalids who were wounded and disabled during the late war, shall be continued and paid by the United States.").

¹¹⁶ GLASSON, *supra* note 18, at 2.

¹¹⁷ LAWRENCE FRIEDMAN, *A HISTORY OF AMERICAN LAW* 151 (3d ed., 2005).

¹¹⁸ JOHN RESCH, *SUFFERING SOLDIERS: REVOLUTIONARY WAR VETERANS, MORAL SENTIMENT, AND POLITICAL CULTURE IN THE EARLY REPUBLIC*, at x (1999).

¹¹⁹ *Id.*

patriotism and civic virtue. It also portrayed aging veterans as infirm, impoverished, and disadvantaged benefactors to whom the nation owed a debt of gratitude.¹²⁰

With this observation in mind, it seems that President Lincoln caught the national mood of gratitude in his famous passage “to care for him who shall have borne the battle.” However, according to the VA, the passage also affirmed the nation’s obligation to veterans and their families.¹²¹ Later, in the era of national security, Franklin Delano Roosevelt reaffirmed veterans’ care as the nation’s obligation.¹²² While president after president reaffirmed veterans’ care as the nation’s obligation, congresses and courts more and more regarded veterans’ benefits as mere gratuities and, one way or another, closed the doors to judicial review of veterans’ benefits claims.

The advent in America’s government of the judicial power was a profound improvement on the framework of the Confederation. Consider a point from Alexander Hamilton (writing as Publius) in Federalist 22: “A circumstance which crowns the defects of the Confederation [is] the want of a judiciary power. Laws are a dead letter without courts to expound and define their true meaning and operation.” This was 1787. In 1803, the U.S. Supreme Court lent its imprimatur to the principle, announcing, in *Marbury v. Madison*,¹²³ “[i]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.”¹²⁴

¹²⁰ *Id.*

¹²¹ *The Origin of the VA Motto*, *supra* note 1.

¹²² *Fireside Chat*, *supra* note 2.

¹²³ 5 U.S. 137, 177.

¹²⁴ Of note, Chief Justice John Marshall’s opinion in *Marbury* was based, in part, on cases concerning invalid pensions for veterans of the Revolutionary War, cases that were, as it turns out, notional. Susan Low Bloch & Maeva Marcus, *John Marshall’s Selective Use of History in Marbury v. Madison*, 1986 WIS. L. REV. 301, 303 (1986) (“[Marshall] discussed an unnamed case dealing with [Congress’s pension programs for wounded Revolutionary War veterans], but it appears that he in fact merged several different proceedings to create this single case. Thus, the only American precedent the Chief Justice relied on in the entire *Marbury* opinion apparently did not exist as he described it.”) (internal cites omitted).

As the image of the suffering soldier portrayed veterans as benefactors to whom the nation owed a debt of gratitude, for some, veterans' care was still a matter of duty and justice. By the time John Quincy Adams became the nation's sixth president, he had much to say on the "duties" of the office, noting among them "the debt, rather of justice than gratitude, to the surviving warriors of the Revolutionary war," and "the extension of the judicial administration of the Federal Government to those extensive and important members of the Union."¹²⁵ This was in 1827. Still, as time went on, United States' laws on veterans' benefits strengthened the Executive and weakened the courts.

A. *Walton and Teller*

In 1857, eight years before President Lincoln affirmed the government's obligation to war veterans, the U.S. Supreme Court, in *Walton v. Cotton*, first announced veterans' pensions as government "bounties." In 1883, almost twenty years after the Civil War, the Supreme Court, in *United States v. Teller*, again held veterans' benefits to be "bounties" and established the bar to entitlement: "No pensioner has a vested legal right to his pension. Pensions are the bounties of the government, which Congress has the right to give, withhold, distribute, or recall, at its discretion."¹²⁶ Yet one is left to wonder what in each case the Court meant by *bounty*.¹²⁷

Walton was a case on the administration of the estate of Thomas Cotton, a Revolutionary War veteran.¹²⁸ In referring to veterans' pensions as government bounties, counsel for the government characterized the provision as "arising from personal considerations of gratitude for services rendered."¹²⁹

¹²⁵ President John Quincy Adams, Third Annual Message (Dec. 4, 1827), <https://www.presidency.ucsb.edu/node/206800>.

¹²⁶ *United States v. Teller*, 107 U.S. 64, 68 (1882).

¹²⁷ It is not clear in either opinion whether the Court meant recruitment bounty or the more colloquial conception of a bounty as some kind of wondrous blessing, like *the Lord's bounty* or *nature's bounty*.

¹²⁸ *Walton v. Cotton*, 60 U.S. 355 (1857).

¹²⁹ *Id.* at 357.

The government's characterization suggests it interpreted the provision of veterans' pensions as intended only to reward. Neither the government nor the Court mentioned the provision of the Continental Congress of 26 August 1776 that expressly sought to encourage service.

Similarly, when the Supreme Court issued its decision in *Teller* in 1883, it relied exclusively on *Walton* in support of its proposition that “[p]ensions are the bounties of the government, which Congress has the right to give, withhold, distribute, or recall, at its discretion.”¹³⁰ Although Teller had served in the Mexican-American War, the Court's characterization did not consider that Congress had promised veterans' care to volunteers. The act of 13 May 1846, which declared war against Mexico, provided, after the provisions authorizing the use of military force,

That the volunteers who may be received into the service of the United States by virtue of the provisions of this act, and who shall be wounded or otherwise disabled in the service, shall be entitled to all the benefit [sic] which may be conferred on persons wounded in the service of the United States.¹³¹

In the cases of *Walton* and *Teller*, the Supreme Court overstated the gratuitous nature of veterans' benefits. In this respect, each passage is set apart from the history that shows veterans' benefits have long had as their purposes to reward and encourage service. Obscuring this issue is each court's characterization of veterans' benefits as “bounties.” Remember General Greene's remark to Adams

¹³⁰ Teller, 107 U.S. at 68. Of note, the Justice who wrote the majority's opinion, William Woods, was himself a war veteran. *William Burnham Woods (Aug. 3, 1824 - May 14, 1887)*, SUP. CT. OF OHIO AND OHIO JUD. SYS., <http://www.supremecourt.ohio.gov/MJC/places/wbWoods.asp> (“He saw combat at Fort Donelson, Shiloh, Chickasaw Bayou, Arkansas Post, Jackson and Vicksburg. . . . Appointed by President Rutherford B. Hayes to the Supreme Court on Dec. 21, 1880, . . . he took the oath of office on Jan. 5, 1881.”).

¹³¹ An Act Providing for the Prosecution of the Existing War Between the United States and the Republic of Mexico, ch. XVI § 7, 9 Stat. 9 (1846) (terminated 1848).

that “if the present Offers should not be sufficient to induce People to engage in the Army—You will be oblig[e]d to Augment the bounty.”¹³²

Recruitment by bounties continued into the American Civil War. As historian James McPherson observes in *Battle Cry of Freedom*, the conscription of the Civil War “was not conscription at all, but a clumsy carrot and stick device to stimulate volunteering. The stick was the threat of being drafted and the carrot was a bounty for volunteering.”¹³³ Especially curious is that the Supreme Court itself had recognized the concept of recruitment bounties not even a decade before *Walton*. In the case of *Wilkes v. Dinsman* (1849), the Supreme Court took up a matter concerning, in part, “the bounty given to the seamen and marines on their reenlisting or contracting to serve.”¹³⁴ All

¹³² Letter from Nathanael Greene, *supra* note 85.

¹³³ JAMES MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 605 (1988). During the Civil War, there was also the issue of the recruitment of slaves. Lincoln believed that recruiting slaves was a matter of military necessity (and therefore necessary to save the Union), and knew as well that an inescapable consequence would be emancipation. JOHN FABIAN WITT, *LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY* 240 (2012). Thus the most profound recruitment incentive was that held out to the slaves who would fight: In escaping enslavement to join the Union army, slaves would at once be free. *Id.*; see also, e.g., W. E. B. DU BOIS, *THE SOULS OF BLACK FOLK* 10 (Dover ed. 1994) (1903) (“[Lincoln] saw the inevitable, and emancipated the slaves of rebels on New Year’s, 1863. A month later, Congress called earnestly for the Negro soldiers whom the act of July, 1862, had half grudgingly allowed to enlist. . . . The stream of fugitives swelled to a flood.”). For those enslaved, what could be more of an incentive to fight than the prospect of freedom?

¹³⁴ 48 U.S. 89, 123. Consider also the following detail on the U.S. government’s perspective on recruitment bounties. In 1915 the Chief of Staff of the War Department directed the War College Division “to make a complete and exhaustive study of a proper military policy for the United States.” Memorandum from the Chief of the War Coll. Div., War Dep’t, to the Chief of Staff, War Dep’t (Sept. 11, 1915), included in *WAR COLL. DIV., WAR DEP’T, A PROPER MILITARY POLICY FOR THE UNITED STATES*, at II (1915). Six months later the Chief of the War College Division submitted his report. *Id.* According to the report, “each war of importance has been followed by an official investigation of our military system The reports of these investigations give a startling picture of . . . costly overhead charges augmented by payment of bounties to keep up voluntarily enlistments.” *WAR COLL. DIV., WAR DEP’T, Introduction to A PROPER MILITARY POLICY FOR THE UNITED STATES* 1-2 (1915).

this notwithstanding, it was on the precedent of these cases, *Walton* and *Teller*, that courts regarded veterans' benefits as mere gratuities.¹³⁵

B. The Bonus March and the Economy Act

When Congress sought to award "bonuses" to veterans of World War One, President Calvin Coolidge said, "[s]olicitude for the disabled veterans and the dependents of those who lost their lives is the nation's solicitude. To minister to their every need is a sacred obligation which will be generously and gratefully met."¹³⁶ "But," as the message continued, "that is not the object of this bill."¹³⁷ The message had come in a veto. What stands out is the president's reaffirmation of veterans' care as a national obligation.

It stands out not least because the veto failed. Congress overrode it, passing the World War Adjusted Compensation Act.¹³⁸ However, the problem for many veterans was that the bonuses were not redeemable until 1945. This was 1924.

By the time of the stock market crash of 1929, Herbert Hoover had succeeded Coolidge as president.¹³⁹ Veterans began to demand immediate cash payment of their service bonuses. President Hoover resisted, stoking the fire, until, in 1932, veterans organized the Bonus March.¹⁴⁰ Tens of thousands of protestors flooded the nation's capital in support of immediate cash payment of the veterans' bonus.¹⁴¹ American veterans—like the veterans of the English Civil Wars 300 years before—had become a key political force.

¹³⁵ *E.g.*, *Pate v. United States*, 78 Ct. Cl. 395, 400 (1933); *Schism v. United States*, 316 F.3d 1259, 1274 (Fed. Cir. 2002).

¹³⁶ President Calvin Coolidge, Message to the House of Representatives Returning without Approval a Bill Providing for Adjusted Compensation for War Veterans (May 15, 1924), <https://www.presidency.ucsb.edu/node/329322>.

¹³⁷ *Id.*

¹³⁸ World War Adjusted Compensation Act, Pub. L. No. 68-120, §§ 401-501, 43 Stat. 121, 125 (1924); *see also* PAUL DICKINSON & THOMAS B. ALLEN, *THE BONUS ARMY: AN AMERICAN EPIC* 29 (2004).

¹³⁹ DICKINSON & ALLEN, *supra* note 138, at 31-32.

¹⁴⁰ STEPHEN R. ORTIZ, *BEYOND THE BONUS MARCH AND GI BILL: HOW VETERAN POLITICS SHAPED THE NEW DEAL ERA I* (2010).

¹⁴¹ *Id.*

Part of President Hoover's resistance was his veto of a new bill that sought to add to the bonus.¹⁴² Still, like Coolidge, in his veto message President Hoover spoke on the nation's "sense of obligation and generosity, and its readiness at all times to aid those of its veterans in need."¹⁴³

The Depression and the administration's handling of the "Bonus Army" doomed Hoover's reelection.¹⁴⁴ The majority of voters in 1932 turned out in favor of Franklin Delano Roosevelt ("FDR").

As the Depression worsened, Congress passed a series of emergency bills, the first of FDR's New Deal framework. One was the Economy Act. Among its provisions, the Economy Act said, "the President is hereby authorized to prescribe by regulation the minimum degrees of disability . . . if any, as in his judgment should be recognized and prescribe the rate of pension payable for each," such regulations to be administered by the Administrator of Veterans' Affairs. The Act also said, "[a]ll decisions rendered by the Administrator of Veterans' Affairs . . . shall be final and conclusive on all questions of law and fact" and "no other official or court of the United States shall have jurisdiction to review . . . any such decision."¹⁴⁵ This was the *no-review clause*.¹⁴⁶

Armed with the no-review clause, on 28 July 1933—ten years to the day before he too reaffirmed the nation's obligation to veterans—FDR, by Executive Order, created the Board of Veterans' Appeals, set up to make final decisions on veterans' benefits claims.¹⁴⁷

In the Economy Act, Congress delegated to the President the power not only to make regulations but also to decide disputes as to regulations applied. No surprise then that some thought to object. One was Congressman Everett Dirksen. In a letter from March of 1933, of

¹⁴² President Herbert Hoover, Veto of the Emergency Adjusted Compensation Bill (Feb. 26, 1931), <https://www.presidency.ucsb.edu/node/207374>.

¹⁴³ *Id.*

¹⁴⁴ DICKINSON & ALLEN, *supra* note 138, at 184.

¹⁴⁵ Act of Mar. 20, 1933, Pub. L. No. 73-2, tit. I, § 5, 48 Stat. 8, 9.

¹⁴⁶ *E.g.*, Johnson v. Robison, 415 U.S. 361, 368 n.9 (1974).

¹⁴⁷ Exec. Order No. 6230 (July 28, 1933).

the law's giving to the president the power to prescribe degrees of disability and rates of pensions, Dirksen said, "[h]ere then is a first[-]class dictatorship conferred on the President."¹⁴⁸ Of the no-review clause, he said,

Here then is a usurpation of judicial power that stops any veteran from taking his case to court if he believes that he is not receiving fair treatment. Yet the Congress voted to take away from a defender of the flag, the right to go into court if he so sees fit.¹⁴⁹

Later, Dirksen emphasized the point by saying, "the act provides that even [though] you think you have a grievance against the U.S., it takes away your Constitutional right to bring suit."¹⁵⁰

And if there had been any mystery as to what the Supreme Court had meant in *Walton* and *Teller* (on service pensions as government bounties), the U.S. Court of Claims case of *Pate v. United States* in 1933 sought to make it clear. In that case, the Court of Claims broadened the *Teller* dictum to comprise retirement pay and service-connected compensation: "Retirement pay and compensation for injuries received in [the] line of duty, like 'Pensions are bounties of the Government, which Congress has the right to give, withhold, distribute, or recall, at its discretion.' All are gratuities bestowed by Congress in recognition of services rendered."¹⁵¹

In a matter of years, Congress restored much of what it had scaled back in the Economy Act. Yet the no-review clause remained, in the words of the Supreme Court, "substantially unaltered" through the Vietnam era, the era of national security.¹⁵² Thus, it became appropriate for a law scholar to observe, in 1975, that "[t]he Veterans Administration stands in splendid isolation as the single federal

¹⁴⁸ Letter from Everett Dirksen, Representative, U.S. House of Representatives, to Ralph Warren (Mar. 13, 1933) (copy with author).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Pate v. United States*, 78 Ct. Cl. 395, 400 (1933) (citing *Walton v. Cotton*, 60 U.S. 355, 358 (1856) and *United States ex rel. Burnett v. Teller*, 107 U.S. 64, 68 (1882)).

¹⁵² *Johnson v. Robison*, 415 U.S. 361, 368 n.9 (1974).

administrative agency whose major functions are explicitly insulated from judicial review.”¹⁵³

C. *Feres and the Era of National Security*

By 1940, proponents of military preparedness began to broaden national defense to national security, with national defense at its heart.¹⁵⁴ By 1941, the United States was embroiled in two wars. On 28 July 1943, FDR delivered a radio address on the nation’s obligation to those serving:

[W]e are, today, laying plans for the return to civilian life of our gallant men and women in the armed services. . . . I hope that the Congress will help in carrying out this assurance, for obviously the executive branch of the Government cannot do it alone. May the Congress do its duty in this regard. The American people will insist on fulfilling this American obligation to the men and women in the armed forces who are winning this war for us.¹⁵⁵

With this expression, FDR communicated what leaders have learned and relearned, that “rewarding this generation’s soldiers was vital for recruiting the next.”¹⁵⁶ Yet, more and more, Congress and the courts, in one way or another, continued to close the doors to judicial review of veterans’ benefits claims. A prominent example is the *Feres* case.

Feres v. United States consolidated the appeals of three wrongful death actions under the Tort Claims Act alleging government negligence on behalf of service members killed in the line

¹⁵³ Robert L. Rabin, *Preclusion of Judicial Review in the Processing of Claims for Veterans’ Benefits: A Preliminary Analysis*, 27 STAN L. REV. 905, 905 (1975).

¹⁵⁴ See, e.g., Dexter Fergie, *Geopolitics Turned Inwards: The Princeton Military Studies Group and the National Security Imagination*, 43 DIPLOMATIC HIST. 644, 644 (Sep. 2019) (noting the origins of “national security.”).

¹⁵⁵ *Fireside Chat*, *supra* note 2.

¹⁵⁶ MICHAEL S. SHERRY, IN THE SHADOW OF WAR: THE UNITED STATES SINCE THE 1930S 109 (2d ed. 1997).

of duty.¹⁵⁷ In adjudicating the appeals, the Supreme Court had this to say on the purpose of the Act:

The Tort Claims Act was not an isolated and spontaneous flash of congressional generosity. It marks the culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit. While the political theory that the King could do no wrong was repudiated in America, a legal doctrine derived from it that the Crown is immune from any suit to which it has not consented was invoked on behalf of the Republic and applied by our courts as vigorously as it had been on behalf of the Crown.¹⁵⁸

In divining the scope of the Act, the Supreme Court reasoned that, considering VA's systems of compensation, Congress must not have intended the Act to include remedies for service members' injuries sustained in the line of duty or deaths resulting from such service.¹⁵⁹ The point was that "[t]he compensation system, which normally requires no litigation," allowed recoveries that "compare[d] extremely favorably with those provided by most workmen's compensation statutes."¹⁶⁰

In the end, the Supreme Court in *Feres* declined to interpret the Tort Claims Act as allowing a remedy for service members injured or killed in the line of duty.¹⁶¹ In doing so, the Supreme Court in effect compounded the Economy Act's no-review clause and strengthened

¹⁵⁷ 340 U.S. at 136-37.

¹⁵⁸ *Id.* at 139.

¹⁵⁹ "The primary purpose of the Act was to extend a remedy to those who had been without." *Id.* at 140. "This Court," so the reasoning went, "in deciding claims for wrongs incident to service under the Tort Claims Act, cannot escape attributing some bearing upon it to enactments by Congress which provide systems of simple, certain, and uniform compensation for injuries or death of those in armed services." *Id.* at 144.

¹⁶⁰ *Id.* at 145.

¹⁶¹ The opinion established the *Feres* doctrine. *See, e.g.*, *United States v. Johnson*, 481 U.S. 681, 687-88 (1987) ("[T]he *Feres* doctrine has been applied consistently to bar all suits on behalf of service members against the Government based upon service-related injuries.").

the notion of the infallibility of the Executive with respect to the administration and adjudication of veterans' benefits claims.

Finally, in 1988, Congress elevated what was then the Veterans Administration to the cabinet-level Department of Veterans Affairs and, with the Veterans' Judicial Review Act, created what is now the Court of Appeals for Veterans Claims, which (ostensibly) opened the doors to judicial review.¹⁶²

V. SUMMARY

“Our nation’s debt extends not just to the veterans who served, but to the families who supported them in war and depend on them today.”¹⁶³

- George W. Bush, 43rd President of the United States, speech to the Veterans of Foreign Wars Convention, August 16, 2004

“You and your families have done your duty – now a grateful nation must do ours.”¹⁶⁴

- Barack Obama, 44th President of the United States, speech to U.S. Marines at Camp Lejeune, February 27, 2009

The statements of Presidents Bush and Obama on the nation’s obligation to veterans echoed those of Washington and FDR, no less those of Secretary Adams and General Greene on “justice.” They also echoed Lincoln’s sentiments on the nation’s obligation “to care for him who shall have borne the battle,” VA’s motto.¹⁶⁵

These statements are important. After all, “presidential statements are political acts.”¹⁶⁶ Thus, as political scientist Harold Lasswell has urged, “[w]hen the president delivers a memorial eulogy

¹⁶² FOX, *supra* note 5, at 11.

¹⁶³ http://www.presidentialrhetoric.com/campaign/speeches/bush_aug16.html.

¹⁶⁴ <https://obamawhitehouse.archives.gov/the-press-office/remarks-president-barack-obama-ndash-responsibly-ending-war-iraq>.

¹⁶⁵ *The Origin of the VA Motto*, *supra* note 1.

¹⁶⁶ F. M. KAIL, *Foreword* by Harold D. Lasswell, *WHAT WASHINGTON SAID: ADMINISTRATION RHETORIC AND THE VIETNAM WAR: 1949-1969* ix (1973).

in Arlington National Cemetery, he performs a ceremonial act of respect and gratitude, yet the political overtones are unmistakable. Clearly the nation's power in the world arena is contingent on the support of those who put their lives on the line."¹⁶⁷

With these political acts, presidents have spoken with the same voice on the nation's obligation to veterans, often in terms of "duty." However, *duty* correlates to *right*.¹⁶⁸ What may be said of a so-called right that cannot be enforced? Hamilton would call it a dead letter.¹⁶⁹ Just as *duty* correlates to *right*, *immunity* correlates to *disability*.¹⁷⁰ The nation's obligation with respect to veterans goes unfulfilled, causing a disability in law. This, the veterans' legal disability, is not compatible with the United States' founding principles.

The Constitution's framers sought to repudiate the notion that a king can do no wrong. Opposite of the parliamentary model of the Articles of Confederation, the framers premised the Constitution on the framework of the separation of powers complete with checks and balances.¹⁷¹ However, with Congress having delegated to the president the power to make final decisions on veterans' claims through the Board of Veterans' Appeals, plus the no-review clause, the powers of the president with respect to veterans' benefits became more compatible with the notion of the infallibility of the Executive. In time, the idea that a king can do no wrong found new life in United States' jurisprudence, as the U.S. Supreme Court noted in *Feres*, resurrected in the spirit of domestic sovereign immunity.¹⁷²

Also, as the Supreme Court intimated in *Feres*, the reasoning against a remedy for service members injured or killed in the line of duty relied in part on the appraisal of the VA benefits system as

¹⁶⁷ *Id.*

¹⁶⁸ Hohfeld, *supra* note 9.

¹⁶⁹ THE FEDERALIST NO. 22 (Alexander Hamilton).

¹⁷⁰ Hohfeld, *supra* note 9.

¹⁷¹ On separation of powers, see, for example, ARTHUR SCHLESINGER, THE IMPERIAL PRESIDENCY 2 (1973); on checks and balances, see, for example, HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 69 (1990).

¹⁷² 340 U.S. at 139.

effective and efficient.¹⁷³ However, even now, the Board of Veterans' Appeals is ineffective and inefficient, leaving many cases to languish and die inside the agency.¹⁷⁴ Judicial review helps,¹⁷⁵ but with so few cases ever getting out of the agency to the Court of Appeals for Veterans Claims (let alone to the Federal Circuit and the Supreme Court), the value of judicial review to veterans at large remains in question.¹⁷⁶

Before concluding, some final remarks are appropriate on the veterans' legal disability. In 1918, law scholar William Henry Glasson, relying on the *Teller* dictum,¹⁷⁷ prefaced his study of *Federal Military Pensions* by saying:

¹⁷³ *Id.* at 135, 145. In 1987, the Court stated this point more affirmatively: "Those injured during the course of activity incident to service not only receive benefits that compare extremely favorably with those provided by most workmen's compensation statutes, but the recovery of benefits is swift and efficient, normally requiring no litigation." *United States v. Johnson*, 481 U.S. 681, 690 (1987).

¹⁷⁴ A couple examples support this point. One, an observation noted in a VA news release from 2016 characterized the VA appeals process as "complicated and ineffective, and Veterans on average are waiting about 5 years for a final decision on an appeal that reaches the Board of Veterans' Appeals, with thousands waiting much longer." Office of Pub. & Intergovernmental Affairs, *Care and Benefits for Veterans Strengthened by \$182 Billion VA Budget*, DEP'T OF VETERANS AFFAIRS (Feb. 9, 2016, 1:40 PM), <https://www.va.gov/opa/pressrel/pressrelease.cfm?id=2746>. Two, in its 2019 annual report, VA boasted that the Board of Veterans' Appeals was "able to achieve a high quality rate" based on its system of quality review. BD. OF VETERANS APPEALS, DEP'T OF VETERANS AFFAIRS, ANNUAL REPORT: FISCAL YEAR (FY) 2019, 15 (2019), https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2019AR.pdf. Yet a July 2019 report from the Stanford Institute for Economic Policy Research found "no appreciable benefit of [the Board's] quality review." Daniel E. Ho, Cassandra Handan-Nader, David Ames & David Marcus, *Quality Review of Mass Adjudication: A Randomized Natural Experiment at the Board of Veterans Appeals, 2003-16*, 4 (Stanford Inst. for Econ. & Policy Research, Working Paper No. 19-005, 2019), <https://siepr.stanford.edu/sites/default/files/publications/19-005.pdf>.

¹⁷⁵ *See, e.g.*, *Cushman v. Shinseki*, 576 F.3d 1290, 1298 (Fed. Cir. 2009) ("Veteran's disability benefits are nondiscretionary, statutorily mandated benefits. A veteran is entitled to disability benefits upon a showing that he meets the eligibility requirements set forth in the governing statutes and regulations. We conclude that such entitlement to benefits is a property interest protected by the Due Process Clause of the Fifth Amendment to the United States Constitution.").

¹⁷⁶ "Roughly 6% of [Board of Veterans' Appeals] decisions are appealed to [the Court of Appeals for Veterans Claims]." Ho, et al., *supra* note 174.

¹⁷⁷ *United States v. Teller*, 107 U.S. 64, 68 (1882).

Even when the benefits of pension provisions have been promised in order to secure voluntary enlistments in the army, soldiers must rely solely upon the good faith of the government for the fulfillment of such promises. In the performance of his duty, a soldier may become the victim of wounds, casualties, or disease, but these incidents of warfare give him no right to a pension enforceable [sic] against an unwilling government. Whether a military pension be granted in recompense of injuries or as a mark of gratitude, it is in law the bounty of the [S]tate.¹⁷⁸

Veterans' benefits are far from mere gratuities. They have long had as their purposes to reward and encourage service. Presidents of the United States have urged the provision of veterans' benefits as the nation's obligation. Notwithstanding this history, Glasson's observation, however unfortunate, is true. Even when the U.S. government has promised veterans' benefits to secure voluntary enlistments, the law has left veterans to rely only on the government's good faith in the fulfillment of such promises. The government's good faith has failed.

We, the people of the United States, established the Constitution, in part, to provide for the common defense. Thus, the duty to defend the country derives from the people.¹⁷⁹ What follows is that, far from being only a government obligation, the imperative of veterans' care is the nation's obligation, an obligation of the people. And "the consequences associated with failing in our collective obligation to the nation's veterans are high; such a failure will have adverse implications for the sustainability of an [all-volunteer force] and thus our national security."¹⁸⁰ Law should not leave veterans to rely only on the good faith of the government. Above all, the nation

¹⁷⁸ GLASSON, *supra* note 18, at 1.

¹⁷⁹ JAMES E. BAKER, IN THE COMMON DEFENSE: NATIONAL SECURITY LAW FOR PERILOUS TIMES 177 (2006).

¹⁸⁰ NICHOLAS J. ARMSTRONG & J. MICHAEL HAYNIE, SYRACUSE UNIV., INST. FOR VETERANS AND MIL. FAM. AND INST. FOR NAT'L SEC. AND COUNTERTERRORISM, A NATIONAL VETERANS STRATEGY: THE ECONOMIC, SOCIAL AND SECURITY IMPERATIVE 5 (2013), <https://securitypolicylaw.syr.edu/national-strategy-publicationfinal>.

must do away with the notion that veterans' benefits are mere gratuities. History reveals the error.

VI. CONCLUSION

Law has long regarded veterans' benefits as mere gratuities. This proposition has set the foundation of the administration and adjudication of veterans' benefits since at least as early as *Walton* and *Teller*, maybe earlier. However, veterans' benefits going back to the time of Queen Elizabeth and the British colonies in America had among their purposes to reward and encourage service. In the United States, presidents have time and again affirmed veterans' care as the nation's obligation.

Far from being only a matter of antiquarian or academic interest, upending the foundational premise of the veterans' legal disability, a work in progress, is sure to have lasting consequences. "The history of previous wars shows that the cost of caring for war veterans rises for several decades and peaks in 30 to 40 years or more after a conflict. This will be especially true for veterans of the [wars in Iraq and Afghanistan]."¹⁸¹ This is one among several reasons in favor of a national veterans' strategy.¹⁸² But developing a national veterans' strategy will require a reckoning of first principles.¹⁸³ A good place to start would be to do away with the notion of the sympathetic veteran and replace it with the honor of a nation.



¹⁸¹ LINDA J. BILMES, CURRENT AND PROJECTED FUTURE COSTS OF CARING FOR VETERANS OF THE IRAQ AND AFGHANISTAN WARS I (2011), <https://www.hks.harvard.edu/centers/mrcbg/publications/fwp/2011-06>.

¹⁸² Mike Haynie & Nicholas Armstrong, *A Call for a National Strategy on Veterans*, N.Y. TIMES: VOICES (Mar. 6, 2013, 2:33 PM), <https://atwar.blogs.nytimes.com/2013/03/06/a-call-for-a-national-strategy-on-veterans>.

¹⁸³ T. Nelson Collier, *supra* note 20.