

CEREMONIAL SESSION
OF
THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS
IN COMMEMORATION OF
THE TWENTIETH ANNIVERSARY OF
THE FIRST CONVENING OF THE COURT

THE E. BARRETT PRETTYMAN
U.S. COURTHOUSE
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APPENDIX (PAGE 21)
SPECIAL CEREMONIAL COURT EN BANC SESSION
IN COMMEMORATION OF THE
20TH ANNIVERSARY OF THE SIGNING OF
THE VETERANS' JUDICIAL REVIEW ACT OF 1988
WASHINGTON, D.C.
TUESDAY, NOVEMBER 18, 2008

BILL BREW, STAFF DIRECTOR OF THE SENATE VETERANS' AFFAIRS COMMITTEE: Good afternoon. As the Chief Judge indicated, my name is Bill Brew and I'm not entirely sure what I am doing here because I think the real focus is on what the Court accomplished in its 20 years. Talking about the 10 years in the wilderness preceding the founding of the Court is going to shed a lot of light on that. Let me give a quick tap dance through all that happened, touch on a few memories and perhaps set the stage for talking about the Court and what the Court did and what the Court has become. I always start with a quick caveat or two when I am invited to speak in a personal capacity. That is particularly easy in this case because the Senator that I work for was not in the Senate at the time, so his hands are completely clean as far as how it all came to be.

The piece that I am not sure is terribly well known and that I want to talk a little bit about is just setting the stage for the creation of the Court. As the Chief Judge mentioned, the question of accessing a court to review VA decisions had been spotty at best and in 1933 was barred. After receiving the invitation to be here today, I went into my attic and dug through the things I had accumulated over the years and, actually, found a copy of the hearings on the Economy Act.³ I have to tell you that it was really quite remarkable. Remember, it was 1933 and President Roosevelt was struggling to find ways to deal with the economy. One of the things that was done was to give the President the authority to strip veterans of their benefits. That was what the Economy Act did. In order to protect that action, there was language inserted that simply said, whatever the administrator said, whatever the administrator decided, nobody gets to review. That is when the straightforward statutory decision of no judicial review made it into the books and stayed there until we started going forward in the 1970s.

Here, I need to give one small personal anecdote. I came to work for the Senate committee on April 3, 1978. I was hired by the committee because there was a very strong desire by the chairman and the staff to have a Vietnam veteran on staff. The qualifications were the following: (1) A Vietnam veteran, (2) who was an attorney, (3) from California. I hit two of the three and they hired me immediately. On day one when I walked in—of course we all have had day ones and they are the

³ The Economy Act of 1933, officially titled the Act of March 20, 1933 (ch. 3, Pub. L. 73-2, 48 Stat. 8, enacted March 20, 1933, 38 U.S.C. § 701).

worst days—I was trying to figure out how to work the phone, and to turn on the lights, and I figured that it was time to go in and get my assignment. I walked into the General Counsel's office and stood in front of his desk and I said to him: "I'm ready to go to work, boss. What do you want me to do?"

On the front right corner of his desk was a pile of papers that were galley proofs. If you forgive a "back-in-the-day moment," they were lead-set types. Galley proofs were a point in the process. These were galley proofs of five days of hearings that the Committee on Veterans' Affairs had held in the first session of that Congress in 1977. The hearings were held at the end of the prior Congress in 1976, because the junior Senator from Colorado, a fellow by the name of Gary Hart, was interested in the notion of providing for judicial review of VA decisions. It was a very short bill, five or six lines. It provided that VA regulations would be subject to the Administrative Procedure Act (APA),⁴ it basically repealed then-section 211a, which precluded judicial review, and it repealed the provision that said attorneys could only be paid \$10.

Senator Hart brought that bill to the floor of the Senate in late 1976; remember, in 1976 we were not out of Vietnam very long and the Vietnam movement was beginning to get its way. The legislation that was on the floor was legislation that the Senate provide for a significant increase in G.I. Bill benefits.⁵ Senator Hart came to the floor and he said: "I'm going to offer my Judicial Review Bill as an amendment to this pending legislation." Then-Committee Chairman Senator Hartke of Indiana said: "Oh please don't—it will just bog us down. We are running out of time. I will tell you what, if you withhold your amendment I will give you a hearing in the next session." The only problem was that Senator Hartke promptly went home and was not reelected. When Senator Hart

⁴ Administrative Procedure Act (APA), 5 U.S.C. § 500 et seq. (recodified by Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 383).

⁵ The G.I. Bill, an omnibus bill officially titled Servicemen's Readjustment Act of 1944, P.L. 78-346, 58 Stat. 284m, provided returning World War II veterans with college or vocational education and one year of unemployment compensation. In addition, it provided several types of loans to enable returning veterans to buy houses and start businesses. Since it was originally enacted, "G.I. Bill" has come to include other veterans benefits programs to assist veterans of subsequent wars as well those who serve in peacetime.

brought his check back there wasn't anyone there to cash it. But Senator Cranston, in the comity of the Senate, agreed to do it and proceeded to have these five days of hearings.

I want to back up a half a step having mentioned Vietnam veterans. There was a strong push for judicial review driven by Vietnam veterans—just like a lot of baby boomers claim a lot of things that were probably not true. This one was true. I'll get into it a little later but I want to talk about one Vietnam veteran who, I think a few of you will remember, but who is very singularly involved in this process. A fellow by the name of Dean Phillips. I have Dean's obituary in front of me. Dean died in 1985. I want to read you a couple of pieces because it is so critical to understanding how this law was made. How this process got kicked off. The obituary begins that Dean Phillips, 42, a highly decorated veteran of the war in Vietnam, passionate advocate of Vietnam veterans rights died of cancer. Mr. Phillips was a lawyer with the Veterans Administration from 1977 to 1984—and I'll get back to that in a minute. Dean's bio says that he was born in Youngstown, Ohio, he joined the Army after graduating from Ohio University. He completed Ranger and Air Assault Schools and served in Vietnam in 1967. In 1967, with the 101st Paratrooper Division, Dean served as a paratrooper—and this is the key phrase—"on long-range reconnaissance patrols." That meant that Dean was sent out on his own and operated behind enemy lines. That is what he did.

Dean took that life experience and he turned it around. He began working on behalf of Vietnam veterans in Denver. He was active in Colorado working for a veterans task force, the Colorado Board of Veterans' Appeals, and the National Association of Concerned Veterans. He was also an informal advisor to Gary Hart. He went to Gary Hart and said veterans are unable to appeal a decision of the VA. Gary Hart listened, drafted the bill and the games were on. I mention this because Dean was absolutely instrumental at the start. As I was going through some of the hearings, I found the very first hearing after Senator Cranston had introduced the first five bills. The General Counsel of the VA testified and to his right was his special assistant, Dean Phillips, who had gone fully behind enemy lines with the notion that working from inside would get judicial review. Sadly, he didn't live to see it happen, but I think it is very true that he was one of the absolute keys to its success.

I want to talk for a second about the Vietnam veteran issue. I think it is very important and I want to take you back for just a minute to remember the time. I don't want to make too much of it,

but I do not want to make too little of it either. In those early years of Vietnam veterans activism, there was a sharp schism between the young veterans and the older veterans, lovingly referred to by the younger veterans as the "Class of '46." It was not just around issues of specific benefits, but it was much deeper. The Vietnam veterans as a community were outside of what was lovingly known as the Iron Triangle, historically thought to be Congress, VA, and the veterans organizations. The Vietnam veterans were outside of that dynamic and were working very hard to change that process.

That was the theme that I found again and again as this process went forward. A dry recitation of the history of judicial review would show that the Senate passed judicial review legislation five times, in the 96th Congress, the 97th, 98th, and 99th, and in the 100th Congress. In the 100th Congress, there was the compromise that enacted the legislation. That dry recitation suggests that there was a nice buildup and it all came to fruition. I will tell you that it went the other way. In the 100th Congress, the control of the United States Senate changed hands in 1980. The first time judicial review passed, it was with the Democrats in the majority and Senator Cranston as chairman. The next three times it was with the Republicans in the majority with Senator Simpson as the chairman twice and Senator Murkowski as the chairman once. In reading through the transcripts I think it was fair to say that the mood and support for judicial review was as fractured as it ever was during years that I worked there. Understand, I went through a lot of materials and there is a black hole that I can't fill in to this day. In that last Congress, the Senate, once again, passed its legislation.

One of the things that is important to know about the history of the legislation is from the onset there was a discussion and a debate about whether judicial review should be in an Article III Court or in a special Article I Court. That was a theme that was prevalent in the entire discussion. In fact, that was one particular item that I found that I had forgotten. We had a court of appeals judge appear at these hearings in 1988, obviously from an Article III court, counseling strongly against putting judicial review in an Article III court. His name was Stephen Breyer. He went on to other things. He said very expressly: "As an Article III judge if you bring me something that an agency was supposed to do for me to second guess, I won't do a very good job of it. It is far better that you establish an Article I court and build up an expertise where the people who are doing the judging will have expertise and we can effectively judge and oversee the agency."

In any event the Senate passed its version in July of that year and I will tell you that from my perspective as a staffer working on it, I just sat back because I knew nothing was going to happen on it. Nothing had happened in four prior Congresses. Here is where the black hole comes into play. Various people will claim credit for this and I'll let them all claim their respective credit because I truthfully don't know who should get credit. Suddenly, and with very little notice, in October the House of Representatives passed a judicial review bill. The Senate bill always included review in an Article III court. The House passed a bill that abolished the Board of Veterans' Appeals and in its stead created a 65-member court. Well, I will tell you once again, my first reaction was "Forget that and we'll pick it up next time when it comes up." The chairman, Senator Cranston, called and said to start negotiating. My immediate response was, "Negotiate what?" There was nothing to negotiate, these were two totally different concepts. He said, "Start negotiating." So, over the course of 16 days we created the legislation that created the Court.

The one piece I always laugh about when I tell this story is that shortly after enactment, it was pointed out that we had forgotten to create a retirement system. The next year we had to come back and take care of that. It was pretty remarkable to receive an invitation to see the Court, from its first Chief Judge and all his successors. I would say in answer to all rhetorical questions, clearly, the Court has answered the call. It provided in the end an answer to all the veterans who were aggrieved, first by the Administration and then the Department, to have a chance to be heard by a judge and without regard to anything else. That made all the difference. Wonderful to be here 20 years later. Thank you.

CHIEF JUDGE GREENE: Thank you very much. I especially liked the comment about a 65-member court. As the program indicates, Congressman Bob Filner will provide remarks.

CONGRESSMAN BOB FILNER: Good afternoon. It is my honor to be here today to commemorate October 16, 1989, which marks the date that the United States Court of Veterans Appeals, now the U.S. Court of Appeals for Veterans Claims, initially convened as an Article I court of special jurisdiction.

I would like to recognize Chief Judge William P. Greene, and Judges Kasold, Hagel,