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*Rendering To Caesar: A Response to Professor O'Reilly*

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Abstract by Janet C. Goldberg

In the last issue of the Administrative Law Review, Professor James O'Reilly provided a critique of the veteran's appeals system in "*Burying Caesar: Replacement of the Veteran's Appeals Process is Needed to Provide Fairness to Claimants.*" Although O'Reilly deserves praise for focusing on this important area of administrative law, his critique was flawed in numerous respects.

To understand O'Reilly's article (Article), an explanation of the veterans benefit system is helpful. There are three types of benefits that make up the vast majority of claims and appeals: (1) monthly compensation for service-related disabilities; (2) non-service connected pension benefits (*i.e.*, needs-based benefits that are not based on earnings amount or number of years worked for totally disabled veterans with war-time service); and (3) Dependency and Indemnity Compensation (DIC) available to certain spouses and dependants of veterans deceased due to a service-related disability. The benefits claims process begins when a person seeking benefits files a claim with the Veterans Affairs (VA) regional office. If the regional office renders an adverse decision, the person may appeal to the Board of Veterans' Appeals (Board). Board decisions can be appealed to the Court of Appeals for Veterans Claims (CVAC), which is an Article I Federal Court. CVAC decisions can be appealed to the (Article III) United States Court of Appeals for the Federal Circuit and, ultimately, the United States Supreme Court. Following final denial of a claim, the person may seek to "reopen" a claim by presenting "new and material evidence" or seek "revision" of a prior final decision by establishing "clear and unmistakable error."

O'Reilly's opinions expressed in the Article are unfounded for at least three reasons. First, the Article claims that veterans typically do not have representation when they appeal to the Board and CVAC. However, O'Reilly incorrectly distinguishes between representation and having an attorney. Although few claimants have attorneys, most are represented by veterans' service organizations. Second, O'Reilly incorrectly implies that the CVAC failed to follow VA statutes when the CVAC required veterans to meet a "threshold burden of proof," such that the government had a "duty to assist" the veteran with uncovering information necessary for presentation of the veterans' case. Third, O'Reilly praises the Federal Circuit for applying general administrative law principles to veterans benefit cases, but this praise may be unwarranted because application of such principles does not necessarily benefit veterans.

O'Reilly offers two proposals to address alleged problems with the benefits appeals system. Both proposals are problematic. O'Reilly's first proposal is to replace the current veterans' benefits appeals system with the Social Security benefits appeals system. This proposal is flawed because it involves replacing decisionmakers, as opposed to amending inadequate laws that the decisionmakers apply. O'Reilly's second proposal is to have the CVAC and Federal Circuit impose deadlines on the VA to force the agency to make decisions more quickly, and to have Congress adopt a "statutory hammer" (*i.e.*, deem claims "granted in full" when the court does not render a decision within a statutorily defined time frame). This second proposal is flawed because it would impose on the veterans' benefits appeals system "competing goals of timeliness, accuracy, and consistency."

