VETERANS LAW JOURNAL

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Winter 2013-14

Fifth Annual National Veterans Law Moot Court Competition Sees Greatest Turnout Yet

by Aniela Szymanski

On November 16 and 17, 2013, the U.S. Court of Appeals for Veterans Claims and the Bar Association co-sponsored the fifth annual National Veterans Law Moot Court Competition. Sixteen teams comprised of two students each from 10 law schools competed by addressing two issues in a fictional veterans law case before the U.S. Supreme Court. The legal issue involved the proper standard of care applicable to physicians accused of medical malpractice in claims for disability compensation under 38 U.S.C. § 1151, and whether the Secretary's regulation prohibiting compensation under § 1151 when a veteran fails to follow medical instructions is valid.

The final round consisted of teams from the Stetson University College of Law and the University of Detroit Mercy School of Law. The Stetson team of Jeremy Bailie and Kevin Crews won the award of overall champion. Stetson University's team also won Best Petitioner's Brief, while Best Respondent's Brief went to Germese Gee and Nathan Chan of the Thomas M. Cooley Law School. Dustin Karrison of Chicago-Kent College of Law was named Best Oral Advocate.

Jonathan Gaffney from the CAVC managed and directed the competition. The competition was supported entirely by volunteers from VA, the CAVC, and private practitioners, who drafted the problem and supporting documentation, and judged the preliminary and semi-final rounds. Volunteer judge Daniel Krasnegor, a partner at Goodman Allen & Filetti, PLLC, explained he was excited to participate:

Overall winning team: Jeremy Bailie and Kevin Crews of Stetson University College of Law with Judge Bartley and Jonathan Gaffney

"I volunteered as a judge for last year's competition, and enjoyed it so much that I came back this year. I think it's a great way to give back to the veterans law community." Special thanks to Judges Greene, Schoelen, and Bartley for their participation in the final round judging!

Kevin Crews of the Stetson finalist team, stated: "The competition was a great way to gain working knowledge of general administrative law, and develop an understanding of key issues in veterans law." Jeremy Bailie, also of the Stetson finalist team, explained that, before this competition, he had very little knowledge of veterans law. After the competition, he commented: "I was fascinated by the intricate 'pro-veteran' system," and, "I was most impressed with the Court of Appeals for Veterans Claims. I think it is incredible that there is a court specifically geared towards our veterans. I would love to one day practice in front of the court representing veterans."

NVLMCC, continued on page 7.

COURT OF APPEALS FOR VETERANS CLAIMS BAR ASSOCIATION

Message from the President

The Bar Association hopes that you are staying warm this winter! So far, 2014 is shaping up to be a busy year for the Association, with two well-received programs already completed. We also have a number of additional programs in the works for our members. Our biggest upcoming event will be a day-long veterans law conference and CLE at the Washington Navy Yard on June 6, 2014. The details on that program are not quite ready for release, but should be available in the coming months.

In addition, we have two interesting programs that we will be holding prior to our conference. The first will be a program connected with the Veterans History Project of the Library of Congress's American Folklife Center. This group preserves and makes accessible the personal accounts of American war veterans so that future generations may hear directly from veterans and better understand the realities of war. The program will feature an archivist discussing items from the Center's collection.

The second program will address practice before the Court of Appeals for Veterans Claims. As the community of veterans law attorneys grows, it is more crucial than ever to understand how to effectively handle cases at the Court. There are important rules of practice and procedure that must be followed in order to facilitate efficient processing of cases. This program will look at some of the current challenges facing practitioners at the Court. Thanks to our continued partnership with the Federal Circuit Bar Association, the second of these programs will be available on WebX for those who wish to participate remotely in a more robust fashion.

Aside from educational programs, we will have another happy hour at Washington's City Club on March 13. Our December event had an excellent turn-out from across the entire spectrum of our membership, including attorneys from the CAVC, VA General Counsel, the private bar, members of the Board, veterans service organizations, and law students.

Also, continuing our public service efforts, we will again volunteer to wash either the Vietnam Vietnam Memorial Wall or the Korean War Veterans Memorial this summer. The National Park Service will start making assignments in March. If you were not able

to participate when we washed the Korean War Veterans Memorial last June and August, you should definitely join us this year for what is sure to be a memorable event.

Finally, our student outreach efforts continue. In addition to the number of recurring visits to local law schools, we have been working to get out to schools in the western part of the United States. The Bar Association also recently provided panelists to discuss careers in veterans law.

So, if you have not yet joined or renewed for this year—or if you know someone who needs to—now is the time. For the membership form and rates, visit http://cavcbar.net/html/membership.html.

Bradley W. Hennings
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. . . and more!

A Message from the Chief Judge

By Hon. Bruce E. Kasold

Dear Bar Association Members,

On Wednesday, November 20, 2013, the Court convened in ceremonial session to celebrate the 25th anniversary of the creation of the Court as part of the Veterans Judicial Review Act of 1988. The Court's nine current Judges were joined on the bench by our first Chief Judge, Senior Judge Nebeker, as well as Senior Judges Ivers and Greene. Also in attendance was retired Judge Farley. The Court was also pleased to welcome many special guests, including several members of the Bar Association who so faithfully serve the Court.

Our ceremonial session coincided with the 150th anniversary of President Abraham Lincoln's now famous Gettysburg Address. It was then that President Lincoln dedicated 17 acres of a field in Gettysburg, Pennsylvania, to the thousands of brave men who had died there while nobly advancing the cause of a new birth of freedom. He eloquently noted that, although it was "altogether fitting and proper" that the country should consecrate that ground, it already was hallowed by the brave actions of those who "gave their lives that [our] nation might live."

The Court's 25th anniversary.ceremonial session.

How fitting and proper that exactly 125 years after President Lincoln spoke those words, and after a decades-long effort by those who supported judicial review for veterans, Congress guaranteed to every veteran the right to have a court of law review the decisions made on their claims for benefits. At the first convening of the Court, then-Chief Justice of the United States William Rehnquist declared that "whatever the rights and wrongs of that long dispute" leading up to judicial review for veterans, "our Congress has now acted," and the Court was poised to "engage, I dare say, in some very important work." And engage we have.

Twenty-five years later, we have decided over 60,000 appeals and our bar has grown to over 4,500 members, resulting in more and more of our veteran-appellants receiving legal assistance in pursuing their appeals. Thank you all for your part in this incredible legacy.

I speak for the entire Court when I state that we are honored to serve our Nation and its veterans in this way. It is my hope that as we begin the new year, the Court and the Bar Association may together strive to further the successes of the past 25 years and continue this important work for all of our nation's veterans. Best wishes in 2014!

Regards,

Chief Judge Kasold

(L-R) Jeff Luthi, Dave Boelzner, Daniel Krasnegor, and Jennifer Dowd enjoy the post-ceremony reception.

A Message from the Clerk

by Gregory O. Block

Dear Colleagues:

As the Court celebrates its 25th anniversary, I would like to thank the Court's Bar for your contributions to ensuring effective and efficient judicial review. We continue to see a large number of appeals and petitions being filed with the Court and, although total filings are down slightly from last year, we remain focused on being ready to respond to the expanded workload we anticipate will come from increased hiring at the Board of Veterans'Appeals.

Your support and professionalism helps facilitate the prompt processing of appeals. As I discussed at the 2013 Judicial Conference, in addition to issuing notices of noncompliance in response to nonconforming documents filed in individual cases, the Clerk's Office, on an ongoing basis, is monitoring overall practitioner efforts to comply with our Rules of Practice and Procedure. As part of this effort, which is nondisciplinary in nature, we send notices in the form of emails and, if necessary, letters of noncompliance if problems persist. We are pleased that to date we have issued very few notices. We appreciate the heightened effort all practitioners have been making to comply with the Court's Rules, particularly when it means cases before the Court are more expeditiously processed.

Rule 33 conferences continue to contribute immeasurably to the Court's mission, and counsel have consistently demonstrated a level of preparation for these conferences that is commendable. A critical component of the conference is the summary of the issues prepared by appellant's counsel, and counsel's focus on succinctly stating issues and highlighting references has been noteworthy. When parties do reach agreement and submit joint motions for remand (JMR), we have also seen counsel committed to clearly defining the relief being requested in a way that provides guidance for future adjudications. Counsel can further enhance clarity of JMRs by identifying claims that should not be disturbed as clearly as they identify claims that should be remanded.

Many of you who are tech savvy will be happy to know that the Court has just activated a mobile version of our website that is designed to enhance access from smart phones. When smart phone users go to the Court's current website, www.uscourts.cavc.gov, the website will recognize that it is being accessed by a smart phone and automatically redirect the smart phone to the optimized, mobile version of our website. Tablets will continue to use the standard version of our website because they are capable of providing the full website experience.

Finally, some of you may remember my mentioning our efforts to bring "pay.gov" on line as part of our Court's Case Management/Electronic Case Filing software. Pay.gov is a central monetary processing program that will speed up payment acceptance, facilitate reconciliation, and minimize the use of paper checks. We planned to have this up and running by now and, despite some challenges, we remain aggressively engaged to completing this project as soon as possible.

It is a privilege for me to support the important work done by the Court and the Court's Bar. Thanks to the entire Bar for your dedication and cooperation, and a special thanks to the many of you who have taken the time to reach out to me to share your thoughtful and constructive comments.

I look forward to working with all of you in 2014.

Regards,

Greg

Gregory O. Block is the Clerk of the CAVC.

VA Simplifying Its Regulations to Improve Claims Processing for Disabled Veterans

by William F. Russo

Shortly after Secretary of Veterans Affairs Anthony J. Principi took office in 2001, he appointed a VA Claims Processing Task Force to find ways to reduce the backlog of veterans' disability claims. In its report to the Secretary, the Task Force stated that VA regulations "are in dire need of updating and reorganizing to allow easier access to information that is vital in providing a timely, correct decision on a veteran's claim." It recommended that VA "[f]irst rewrite and organize the [compensation and pension] Regulations in a logical and coherent manner . . . ." Secretary Principi endorsed that recommendation and launched the effort to rewrite VA's regulations.

In the largest and most comprehensive such project ever attempted by a federal agency, the "VA Compensation and Pension Regulation Rewrite Project" has been reorganizing and rewriting since 2002. VA's goal has remained the same all along: produce a set of regulations that users can locate, read, understand, and apply. To achieve that goal, VA has reorganized the regulations in a logical way, reworded them in plainer language, and removed obsolete provisions, such as those about Spanish-American War veterans. VA also incorporated many years of statutes, court holdings, and VA policy changes into the regulations, which will allow our staff to find all the rules for claims processing in one place.

VA has used its top experts on VA benefits to produce these improved regulations. Dozens of staff from its Veterans Benefits Administration, Board of Veterans' Appeals, and Office of the General Counsel have worked on the project. Talented law clerks also worked on the project, many of whom went on to careers in the veterans benefits field. In addition, the public has contributed to the regulation project by sending VA hundreds of suggestions on how to improve them. This includes extensive comments by the Veterans Service Organizations, who represent disabled veterans in their VA claims.

President Obama embraced the goal of improving federal regulations in 2011 when he issued Executive Order 13563, "Improving Regulation and Regulatory Review." It requires federal agencies to make regulations "accessible, consistent, written in plain language, and easy to understand." It also requires "retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them. . . ." The VA Compensation and Pension Regulation Rewrite Project is the cornerstone of VA's compliance with this order (www.whitehouse.gov/21stcenturygov/actions/21st-century-regulatory-system).

Based on public comments, VA revised the regulations and combined them into one comprehensive rulemaking, which was published in the Federal Register on November 27, 2013. http://www.regulations.gov/#!docketDetail;D=VA-2013-VACO-0025. Due to the size of the document, VA is providing 120 days for more public comments rather than the usual 60 days. VA will then begin the next phase of the Project: drafting the final rule and keeping the regulations up to date until the Secretary of Veterans Affairs determines the best way to transition VA adjudication staff to using the new regulations. Although this may be challenging, VA's dedicated employees can achieve a successful transition.

VA claims processing, and the resolution of veterans' appeals up through the courts, are rules-based tasks. Therefore, better organized and more clearly stated regulations should help VA staff decide claims more promptly and accurately, as stated by the VA Claims Processing Task Force in 2001. Given the surge in veterans' claims over the past decade, and the President's goal of improving federal regulations, VA will continue striving to improve its regulations.

William F. Russo is Deputy Director of VA's Office of Regulation Policy & Management. The views expressed in this article are those of the author and do not necessarily represent the views of the Department of Veterans Affairs or the United States.

CONTRIBUTORS WANTED

The publications committee is looking for contributions to upcoming editions of the *Veterans Law Journal*. Participants do not need to be located in the Washington, DC area. Please contact David E. Boelzner at Dboelzner@goodmanallen.com for more information.

VIEWPOINT

Should References Cited by VA Medical Experts Be Included in the RBA?

by Vicki Franks

Perhaps it is because I practice patent litigation—regularly embroiled in "battles between the experts" on scientific issues—and am new to the practice of veterans law that I asked: where is that article? Where in the Record Before the Agency ("RBA") is the article cited by the VA's medical expert who opined against service connection? Though mindful of the expertise possessed by others, as an advocate I nevertheless want to evaluate the article for myself. I want to analyze what data the VA medical expert based the opinion on. The article is important—the Board of Veterans' Appeals denied a veteran her benefits based upon the opinions expressed by the VA medical expert, which in turn relied upon the medical literature. But the article is absent from the RBA.

Armed with a law firm's resources, I send what little bibliographic material is present in the VA medical opinion to a library-services department, which tracks down the article. Lo and behold, I discover that the support on which the expert relies is, at least arguably, not supportive at all. The veteran's case involves radiation and its effect on one particular bodily region, the chest. But the article only discusses radiation's effect on another bodily region, the brain. And it states—in an inconspicuous footnote—that its conclusions cannot be extrapolated to other bodily regions. Yet it is the expert medical opinion, with its allegedly "detailed rationale," that identifies this irrelevant reference as its singular and strongest support, that the Board of Veterans' Appeals relies upon to deny my client her benefits. How can I address this problem?

If the case were on appeal before the U.S. Court of Appeals for Veterans Claims, I could not effectively do so. By statute, appeals are to be decided on the record before the Secretary and the Board. 38 U.S.C. § 7252(b). The article cited by the VA expert cannot be attached as an exhibit and its content cannot be analyzed to discredit the basis for the Board's decision, i.e. the expert medical opinion itself, because that article was not before the Board, nor is it part of the RBA.

Where a VA medical expert cites alleged authoritative support, e.g. a journal or scientific article, that article arguably becomes part of the medical opinion, and neither the Board nor the veteran can accurately assess the opinion without access to the article. This is particularly true when a medical expert extrapolates technical data from a reference and then applies it directly to a veteran's case.

When considering a veteran's claim for benefits, the Board of Veterans' Appeals typically does not independently obtain, analyze, and incorporate into the RBA studies or literature cited in a VA medical expert's opinion. Instead, there is an implicit assumption that the expert's reliance on any particular reference was correct. But as the above example shows, that assumption may be misplaced. Even if there were no misstatement or error, experts can disagree significantly about the meaning of a scientific study. Inclusion of the study or article itself in the RBA would provide an opportunity for both the veteran and the Board to consider its substance and whether the VA medical expert has properly relied on it.

It is also of practical concern that a veteran may not have the resources or know-how to locate scientific articles. Not every veteran has legal representation, and not all attorneys representing veterans have access to library-research departments. Cited articles are not always referenced in their full bibliographic format, sometimes making it difficult for even seasoned library-research departments to locate them. Yet, these very articles might be the principal reason a veteran's benefits are ultimately denied.

As just noted, *pro se* veterans may have difficulty obtaining scientific articles or recognizing the importance of doing so. Even a veteran's attorney will be disadvantaged on appeal to the Veterans Court if he or she cannot make valid, substantive arguments challenging a denial of benefits because a basis for the challenge—an article cited by a medical expert that arguably fails to support the opinion—is absent from the RBA.

Viewpoint, continued on page 7.

Viewpoint, continued from page 6.

One possible remedy to this dilemma is by requiring VA medical experts to include any cited references with their opinions, thus making them part of the RBA and record on appeal.

By way of comparison, Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure requires an expert to identify all facts and data considered in forming the expert's opinions and the exhibits that will be used to summarize or support them. District courts have held that this includes technical data supporting the opinion. *See Glielmi v. Raymond Corp.*, No. 09–5734, 2013 WL 209131, at *2, *4 (D.N.J. Jan. 17, 2013). VA could draw on such civil litigation rules to address this problem. For example, local patent rules in the Eastern District of Texas require parties to "identify each . . . item of extrinsic evidence by production number [if previously produced] or *produce a copy of any such item not previously produced*." E.D. Tex. Civ. R. App. M at 4-2(b) (emphasis added).

VA medical opinions are provided because, at times, specialized medical expertise is needed to analyze relevant claims issues. Under current rules, claimants are disadvantaged in the optimal development of their claims before the agency—and they are absolutely precluded from making certain crucial arguments on appeal—by the omission from the claims file of studies and articles cited by experts. Inclusion of cited references would allow for transparency, accountability, and fairness about evidence that may directly bear upon a veteran's claim. Moreover, inclusion would further serve as a check against potential blind acceptance by the Board of a misguided medical opinion drawn from an inapplicable reference.

Vicki Franks is an associate who practices patent litigation in the New York office of Frommer Lawrence & Haug, LLP, and represents veterans through the Veterans Consortium Pro Bono Program. The opinions expressed in this article are solely those of the author and do not necessarily reflect the views of Frommer Lawrence & Haug, LLP, its clients, the CAVC Bar Association, or any other entity. This article is for general information only and is not intended to be and should not be taken as legal advice.

Do you have a viewpoint to share? Please contact David E. Boelzner at Dboelzner@goodmanallen.com for more information.

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The complete list of law schools follows: John Marshall Law School, Thomas M. Cooley Law School, Stetson University College of Law, South Texas College of Law, the University of Detroit Mercy School of Law, George Washington University Law School, Georgetown University Law Center, the University of Missouri School of Law, Chicago-Kent College of Law, and Drexel University Earle Mack School of Law.

The competition information for 2014 will be posted on www.nvlmcc.org later this year. If you know of another law school interested in participating in next year's competition, please e-mail the bar association at cavcbarassoc@cavcbar.net.

Save the Date:

Tuesday, May 6, 2014

Best Practices and Common Pitfalls at the Court of Appeals for Veterans Claims

featuring

Cynthia Brandon-Arnold
Chief Staff Attorney/Deputy Clerk
Central Legal Staff
U.S. Court of Appeals for Veterans Claims

Anne Stygles
Chief Deputy Clerk of Operations
U.S. Court of Appeals for Veterans Claims

Joan E. Moriarty
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Office of the General Counsel - Professional Staff Group VII
U.S. Department of Veterans Affairs

Zachary M. Stolz
Attorney
Chisholm, Chisholm, & Kilpatrick

Webcast from the offices of the Federal Circuit Bar Association.

University of Richmond School of Law Hosts Veterans Law Symposium

by David E. Boelzner

The University of Richmond's Veterans and Military Law Association and its *Journal of Law and the Public Interest* co-sponsored the school's first Veterans Law Symposium, "Serving Those Who Served," on November 8, 2013. The Journal also plans a volume dedicated to veterans issues, to be issued in the spring.

The symposium began with a keynote address by Virginia's junior senator, Tim Kaine, who serves on the Armed Services and Foreign Relations committees and therefore has significant involvement in veterans affairs (and who also teaches at the law school). Senator Kaine identified three veteran-related issues that are currently challenging Congress, and he discussed the challenges they present and what Congress is seeking to do about them: the VA claims adjudicatory backlog, the problem of sexual assaults in the military, and the tendency of presidents to circumvent Congress in carrying out war powers. He also spoke about some legislation he has introduced to address problems of veterans returning from their military tours to a tough civilian job market.

The first of two substantive sessions focused on the VA claims system was moderated by David E. Boelzner, a lawyer with Goodman, Allen & Filetti, who represents veterans and who is a member of the CAVC Bar Association Board of Governors. He began by explaining the claims and appeals processes overall and describing some of the problems and challenges that they present veteran claimants. American Legion representative Michael Higgins then addressed VA's Fully Developed Claims initiative, noting that it did help to speed claims along, essentially because the claimants were doing VA's work for it. John Paul Cimino, who works with the College of William & Mary's law school veterans clinic program, described law school clinical programs and other activities in which students can assist veterans.

The second substantive session was moderated by Robert Barrett of the Virginia Bar Association's Veterans Issues Task Force, with assistance from Heather Hays Lockerman. It focused on various avenues to assist veterans with many needs outside the VA claims system, ranging from homelessness issues to the need for divorce counsel. It included a discussion of the use of specialized courts impaneled to address veteran issues both outside the ordinary litigation system and through cooperation among judges and social assistance organizations.

The audience of mostly students then enjoyed a reception in the atrium of the law school and an opportunity to mingle and talk informally with the presenters.

Senator Tim Kaine (D-VA) addresses the symposium.

Quarterly Happy Hour at
the City Club of Washington

Thursday, March 13, 2014,
at 5:30 P.M.

Just Steps from Metro Center
555 13th Street, N.W., Washington, DC 20004

Prospective members welcome!

The Federal Circuit Rejects Factual, Due Process Attacks on Decision Severing Service Connection

by Selket Nicole Cottle

Reporting on *Prinkey v. Shinseki*, 735 F.3d 1375 (Fed. Cir. 2013).

On November 19, 2013, the Federal Circuit held, in *Prinkey v. Shinseki*, 735 F.3d 1375 (Fed. Cir. 2013), that (1) it had no jurisdiction to consider the sufficiency of a medical opinion and (2) the Board of Veterans' Appeals (Board) did not violate the due process clause in severing a veteran's service connection as a result of clear and unmistakable error.

In July 2003, a VA regional office (RO) granted the Veteran, Robert D. Prinkey, service connection for diabetes mellitus claimed as secondary to in-service Agent Orange exposure. In April 2006, a VA nurse practitioner reviewed Mr. Prinkey's full claims file and concluded that more likely than not Mr. Prinkey's diabetes resulted from a 1994 surgery that Mr. Prinkey underwent to remove most of his pancreas rather than Agent Orange exposure. She explained that this pancreatectomy more likely than not resulted in pancreatic insufficiency and inadequate insulin secretion, which caused Mr. Prinkey to develop diabetes.

In an addendum opinion, a VA endocrinologist stated that Mr. Prinkey did not have diabetes mellitus type II, but, rather had diabetes secondary to pancreatectomy and alcohol abuse. The endocrinologist stated that Mr. Prinkey's "pancreatic failure and pancreatic resection have nothing to do with Agent Orange exposure." *Id*. at 1378.

On the basis of the April 2006 opinions, the RO notified Mr. Prinkey in July 2006 that it proposed to sever his service connection. When Mr. Prinkey did not respond to this notice, in September 2006, the RO notified him that it was severing service connection for diabetes and related injuries because the evidence showed that his diabetes was not caused by Agent Orange exposure. All such ratings were severed effective December 1, 2006.

In an August 2010 decision, the Board addressed the issue of whether, under 38 C.F.R. § 3.105(d), the evidence established that Mr. Prinkey's July 2003 grant of service connection for diabetes mellitus was clearly and unmistakably erroneous, such that the severance was appropriate. The Board found that a June 2003 examination report, on which the grant of service connection was based, was inadequate because the examiner did not have sufficient facts before him to allow him to render a correct statement of etiology, because the examiner did not refer to Mr. Prinkey's pancreatectomy or alcohol-induced pancreatic disease. Conversely, the Board found that April 2006 endocrinologist was unequivocal in her assessment that Mr. Prinkey's diabetes was caused by his pancreatectomy and had nothing to do with exposure to Agent Orange and, further, that she supported her opinion with relevant clinical findings.

The CAVC affirmed on appeal the Board's decision affirming the severance of service connection under § 3.105(d). The Court held that the Board did not commit clear error in finding that the June 2003 examination was inadequate because the examiner was not sufficiently informed or in finding that the April 2006 opinion was adequate and based on sufficient rationale.

In his appeal to the Federal Circuit, Mr. Prinkey again challenged the adequacy of the April 2006 medical opinion that led to the severance of his service connection. The Federal Circuit noted that, in meeting its burden of proof to establish under § 3.105(d) that a grant of service connection was clearly and unmistakably erroneous, VA may consider medical evidence that post-dates the original award of service connection. However, the Federal Circuit held that it lacked jurisdiction to judge the sufficiency of any such medical evidence because the underlying question is one of fact. Rather, the Federal Circuit held that it must accept as correct the CAVC's judgment in this case that the April 2006 medical opinion was sufficient. *Id*. at 1383.

The Federal Circuit also addressed Mr. Prinkey's argument that his constitutional rights were violated, but found such contention meritless. The Federal Circuit explained that, in adjudicating his claim, the Board afforded Mr. Prinkey repeated opportunities to challenge the April 2006 medical opinion or to submit his own contrary evidence, and that the Board scrutinized the medical evidence of record and,

Prinkey, *continued on page* 10.

Prinkey, *continued from page*9.

thereafter, evaluated the weight of such opinions. Whatever due process requires, the Federal Circuit held, "it requires no more than that." *Id*. at 1384.

Selket Nicole Cottle is a Senior Appellate Attorney in the U.S. Department of Veterans Affairs Office of General Counsel, Staff Group VII, and a former law clerk at the U.S. Court of Appeals for Veterans Claims.

Tyrues v. Shinseki: Requiring Immediate Appeal from a "Clear Definitive Denial of Benefits"

By Joseph M. Cappola

Reporting on *Tyrues v. Shinseki*, 732 F.3d 1351 (Fed. Cir. 2013).

The U.S. Court of Appeals for the Federal Circuit recently addressed, and perhaps settled for now, whether a claimant must appeal the denied part of a "mixed Board decision," that is, one in which the Board "definitively denies benefits on one statutory ground while remanding for consideration of entitlement to benefits on another ground." *Tyrues v. Shinseki*, 732 F.3d 1351, 1355 (2013). The Federal Circuit, in a 2-1 decision affirming the U.S. Court of Appeals for Veterans Claims, held that "[w]hen the Board renders a clear definitive denial of benefits as part of a mixed decision . . . the veteran not only can appeal immediately, but must bring any appeal from the denial portion within the 120-day period allowed by statute." *Id.* at 1357. However, although the claimant must appeal the denied portion, "the Veterans Court may decline to review the decision based on prudential or similar considerations," such as whether the issues are sufficiently separable. *Id.* at 1356; *see id.*at1357 ("[T]he appellate tribunal may decide not to proceed with the appeal . . . but the appeal must be filed."). Following this decision, litigators and the Veterans Court will need to further define what constitutes "a clear definitive denial of benefits," and the Federal Circuit's decision provides important guidance in this regard. This article will summarize the Federal Circuit's decision and offer some thoughts on future litigation in this area based on the facts that shaped its decision.

In 1995, Mr. Tyrues, a U.S. Army veteran of the Persian Gulf War, sought disability compensation benefits for a lung condition. *Id.* at 1353. In September 1998, the Board of Veterans' Appeals denied his claim on a direct basis under 38 U.S.C. § 1110. *See id.* In the same decision, however, the Board remanded to the Department of Veterans Affairs Regional Office the issue of entitlement to benefits under 38 U.S.C. § 1117, which provides a presumption of service connection for Persian Gulf War veterans with a qualifying chronic disability. *Id.* Mr. Tyrues did not appeal the denial under § 1110 within 120 days. *Id.*

In April 2004, the Board denied Mr. Tyrues benefits under § 1117. *Id.* He appealed that decision to the Veterans Court and sought review of the Board's 1998 denial under § 1110 and its 2004 denial under § 1117. Ultimately, after appeals to the Federal Circuit and the U.S. Supreme Court resulted in vacatur of its original decision, the Veterans Court held that the Board's 1998 denial under § 1110 was final as to entitlement to service connection on a direct basis, and dismissal of Mr. Tyrues's 2004 appeal of that decision was appropriate because he did not assert that the 120-day filing deadline should be equitably tolled. *Id.* at 1354-55; *Tyrues v. Shinseki*, 26 Vet.App. 31, 34 (2012) (en banc). Mr. Tyrues appealed that decision to the Federal Circuit.

In affirming the Veterans Court, the Federal Circuit first addressed whether a claimant *may* immediately appeal a mixed Board decision. *Tyrues*, 732 F.3d at 1355-57. It noted that it has "long held that a decision definitively denying certain benefits . . . is a 'final' decision under [38 U.S.C. §] 7266(a)." *Id.* at 1355-56. Therefore, it reasoned, "where the Board makes clear the finality of that denial" in a mixed decision, the denial is a final decision ripe for review by the Veterans Court. *Id.* at 1356. In support of its analysis, the Federal Circuit found Rule 54(b) of the Federal Rules of Civil Procedure to supply an instructive model. *Id.* That rule allows a district court to "direct entry of a final judgment as to one or more, but fewer than all, claims or parties," which in turn allows a litigant to appeal a decision prior to the entry of a final decision on the entire action.

Next, the Federal Circuit discussed whether a claimant *must* appeal a mixed Board decision within the 120-day period provided by § 7266(a). *Id.* at 1357-58. It reasoned that §7266(a)'s plain directive, "shall file . . . within 120 days," is mandatory absent a

Tyrues, *continued on page* 11.

Tyrues, *continued from page* 10.

demonstration of the need for equitable tolling. *Id.* In doing so, the Federal Circuit distinguished its holding in *Brownlee v. DynCorp.*, 349 F.3d 1343 (Fed. Cir. 2003), which allowed an appeal from the Armed Services Board of Contract Appeals to proceed either immediately upon the determination of liability or later after the adjudication of damages. *Tyrues*, 732 F.3d at 1358. The court found that, in addition to the difference between the permissive language regarding appeals found in the Contract Disputes Act and the "stark" commands of § 7266(a), the context of the different adjudicatory systems was important. *Id.* The fact that the Federal Circuit received 17 appeals from the Board of Contract Appeals in the 2012 fiscal year, while the Veterans Court received 3,649 appeals during the same period, suggested that "[t]he policies relevant to handling a trickle of appeals that involve commercial entities do not readily carry over to a large-scale system of adjudication that involves individual claimants and affirmatively seeks to provide benefits authorized by law as quickly as possible." *Id.*

In both parts of its discussion, the Federal Circuit noted that the Veterans Court could, on request or *sua sponte*, dismiss the appeal of a mixed Board decision. *Id.* at 1356, 1357. It could do so "on the ground that immediate review would disrupt orderly adjudication, as where the denial portion is 'inextricably intertwined' with the portion ordering a remand" or based on "prudential or similar considerations." *Id.* at 1356 (citations omitted).

The Federal Circuit thus affirmed the Veterans Court's decision on the basis of its interpretation of § 7266(a) and its finding that there was no basis to equitably toll that provision's 120-day rule. *Id.* at 1358. As noted at the outset, the Federal Circuit panel was divided 2-1. The dissenting judge found the rule mandating immediate appeals of mixed decisions adopted by the majority to be an "illogical and prejudicial requirement." *Id.* at 1362 n.1 (Newman, J., dissenting).

Following *Tyrues*, litigation of this issue will likely shift to whether the Board provided "a clear definitive denial of benefits" that obligated a claimant to appeal a mixed decision within the 120-day period. The majority opinion provides important guidance in this regard.

Although the Federal Circuit relied on the Veterans Court's finding that the Board made a clear definitive denial of benefits, and although the issue was undisputed, the Federal Circuit set forth the facts supporting that characterization of the 1998 decision. *Id.* at 1356; *see id.*at 1355 ("[H]ere, it is undisputed that the Board definitely denied benefits under section 1110."). First, the 1998 Board decision contained a distinct "Order" section that expressly denied benefits for a lung condition on a direct basis, and it contained a "distinct 'Remand' portion" addressing entitlement under the statutory presumption. *Id.* at 1354. Second, the 1998 decision informed Mr. Tyrues of his appellate rights and informed him that he had 120 days to file a Notice of Appeal. *Id.* Third, attached to the decision was a separate notice of appellate rights that informed him that "[t]he attached decision by the Board . . . is the final decision for all issues addressed in the 'Order' section of the decision." *Id.* While these three facts are not an exhaustive list, they do provide guidance for claimants, for those who counsel them, and for those who decide whether a mixed Board decision contains a clear definitive denial of benefits.

Joseph M. Cappola is an Appellate Attorney in the U.S. Department of Veterans Affairs Office of the General Counsel, Staff Group VII, and a former law clerk at the U.S. Court of Appeals for Veterans Claims.

Editor's Note: Mr. Tyrues has filed a petition for certiorari in the U.S. Supreme Court.

A Peek Inside . . . VA's Office of Regulation Policy & Management

By William F. Russo

VA engages in rulemaking for various reasons, including implementation of new statutes or policy decisions, in response to a public petition, or in response to a court holding. The Office of Regulation Policy and Management (ORPM), within VA's Office of the General Counsel, has a two-fold mission. First, the office provides centralized management and monitoring for the drafting and publication of all VA regulations, establishing responsibility and accountability for VA's regulatory efforts. Second, the office provides the General Counsel and the Secretary with a focal point for the comprehensive review, reorganization, and rewrite of existing VA regulations.

Major Programs and Initiatives

Improving the Rulemaking Process. ORPM was established in the Office of the Secretary in 2003 to remedy long-standing deficiencies in VA's decentralized rulemaking process. It provides centralized supervision and coordination for all VA regulatory development, and facilitates early, senior-level policy decisions at the outset of the regulatory development process. ORPM maintains effective regulatory tracking databases and reports on the progress of all regulations under development.

Producing Timely Regulations. During the first few years of operation, ORPM's staff helped cut VA's historical average processing times for regulations by 50%, from 33 months to fewer than 17 months. This was accomplished through active monitoring, reporting, and providing training and technical assistance to regulation drafters. ORPM continues to ensure that the rulemaking process is as efficient as possible.

Public Participation in Informal Rulemaking Procedures. President Obama's Executive Order 13563, *Improving Regulation and Regulatory Review* (January 18, 2011) encourages such interaction with the public *before* proposing rules: "Before issuing a notice of proposed rulemaking, each agency, where feasible and appropriate, shall seek the views of those who are likely to be affected, including those who are likely to benefit from and those who are potentially subject to such rulemaking." ORPM encourages

The Office of Regulation Policy & Management staff.

program offices to collaborate with stakeholders, especially the Veterans Service Organizations, who represent millions of veterans seeking benefits and provide a layer of oversight on VA's operations.

Supervising Regulation Rewrite Projects. For the past 12 years, ORPM has supervised the work of special regulation analysis and drafting teams as part of VA's Compensation and Pension Regulation Rewrite Project. This project has been staffed by subject matter experts and legal advisors detailed to ORPM from the Board of Veterans' Appeals, the Veterans Benefits Administration, and OGC. They have completely reorganized, updated, and revised 280 C&P adjudication regulations in Part 3 of the Code of Federal Regulations. We reached a major milestone last November with the publication of a comprehensive, consolidated 21st proposed rule responding to prior comments and allowing the public to read and comment on the entire body of regulations. The new regulations will apply to new claims submitted after a date to be designated by VA.

In addition to the C&P Regulation Rewrite Project, ORPM has supported smaller regulation rewrite projects of VA's regulations on Vocational & Rehabilitation benefits, procurement, and FOIA.

These regulation rewrite projects support another goal of 13563: to make regulations "accessible, consistent, written in plain language, and easy to

A Peek Inside, continued on page 13

A Peek Inside, continued from page 12

understand." It also requires "retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them . . . ."

Support of VA Litigation

In addition to "as-applied" and "facial" regulation challenges at the CAVC, the Federal Circuit has jurisdiction to hear direct challenges of newly published VA regulations. 38 U.S.C. 502. A large amount of VA litigation at both courts involves interpretation of VA regulations. ORPM often supports OGC litigators by providing regulatory histories, sometimes dating back to the 1930s. When a VA regulation is invalidated by a court, ORPM coordinates the revision process.

ORPM Staff

ORPM was established under the leadership of Maj. Gen. Walter Huffman (U.S. Army, Ret.). From 2002 to 2005, the Director was Maj. Gen. William A. Moorman (U.S. Air Force, Ret.) who left to serve on the U.S. Court of Appeals for Veterans Claims. Since 2005, the Director has been Robert C. (Bob) McFetridge. Bob served as Deputy Director from 2002 to 2005 after he retired as a Colonel from the U.S. Army. Most of Bob's 28-year career was in the Army Judge Advocate General Corps, with previous service as an infantry officer. Bob is a 1981 graduate of the University ofSanta Clara School of Law and a 1974 graduate of the U.S. Military Academy.

Since 2006, William F. (Bill) Russo has served as Deputy Director of ORPM where he manages VA's Regulation Rewrite Project. Previously, Bill was a regulation writer in VA's Compensation & Pension Service. Before joining the VA in 1999, he held several positions with veterans service organizations, representing veterans before the VA and the courts.

Since 2002, Janet J. Coleman, has served in several positions in ORPM and was recently made Acting Chief, Regulations Development, Tracking and Control. From 2006 to 2013, she was Chief, Regulations Special Projects, where she established a system for VA responses to scientific reports on Agent Orange and Gulf War Illness, and managed VA's transformation to electronic publication of proposed rules and online submission of public comments.

Since 2007, Michael P. (Mike) Shores,has served as ORPM's Chief Impact Analyst, where he works with VA's program offices to ensure that VA accurately calculates and communicates the fiscal costs of every new regulation. He has coordinated cost estimates for more than 200 rulemakings including several multi-billion dollar rules. Mike is a U.S. Marine Corps veteran and previously served in positions of increasing responsibility in VA's Vocational & Rehabilitation Service.

Jeffrey (Jeff) M. Martin, joined ORPM as our Office Manager in 2012 following a 22-year career in the U.S. Army with the Judge Advocate General's Corps as a Legal Noncommissioned Officer and as a Legal Administrator. Jeff retired in 2012 in the grade of Chief Warrant Officer Four.

William F. Russo is Deputy Director of VA's Office of Regulation Policy & Management.

Save the Date:

Tuesday, April 8, 2014, at 2pm

in the CAVC Courtroom

The Veterans History Project of the American Folklife Center collects, preserves, and makes accessible the personal accounts of American war veterans so that future generations may hear directly from veterans and better understand the realities of war. The program will feature an archivist discussing items from the project's collection.

Bar Association Presentation: Understanding Practice before the Board of Veterans' Appeals

by Aniela Szymanski

On February 5, 2014, the Bar Association presented a panel discussion addressing the unique aspects of practice before the Board of Veterans' Appeals (Board). The panel included Steven D. Reiss, Veterans Law Judge at the Board, Sonnet Gorham, Chief of Litigation Support at the Board, and Lee Becker, Chief of the Administrative Support Division at the Board.

The panel presented insights from the Board, including an explanation of the roles of the four parts of the Board, the varied responsibilities of the Administrative Support Division, and highlights of a Board hearing.

Some key take-aways for practitioners included tips on making Freedom of Information Act (FOIA) Requests, hearing transcripts, and motions to advance cases on the Board's docket. The presenters also discussed how practitioners can assist the Veterans Law Judge address the most important issues in an appeal, and new initiatives to reduce case backlogs at the Board. The following useful numbers were also provided:

Board Status Hotline, staffed with representatives who have access to the Veterans Appeals Control and Locator System (VACOLS) Monday through Friday, 8:30 a.m. until 4:30 p.m. (Eastern Time zone):
800-923-8387

Board Administrative Support fax (where motions may be submitted to the Board, as well as FOIA requests):
202-632-5843

Board Office of Litigation Support status line (for the status of cases remanded by the Court):
202-632-4628

Board Office of Litigation Support fax (for submissions on cases that have been remanded by the Court, including additional evidence):
202-243-1419

The panel discussion was webcasted, and the panelists fielded several questions from callers participating via webcast. An audio file recording of the presentation, and accompanying materials, is available on www.cavcbar.net.

Geib, *Floore*, and the Need for Combined-Effects Expert Opinions in TDIU Cases

By Matthew J. Ilacqua

Reporting on *Geib v. Shinseki*, 733 F.3d 1350 (Fed. Cir. 2013), and *Floore v. Shinseki*, 26 Vet.App. 376 (2013).

Two recent precedential decisions concern VA's duty to assist, specifically by providing medical examinations in adjudicating TDIU under 38 C.F.R. § 4.16. In both cases, the Appellant argued that the Secretary had a duty to provide an expert opinion on the combined effects of service-connected disabilities on the ability to secure or follow a substantially gainful occupation.

The Federal Circuit addressed this question in a case involving a veteran service connected for bilateral hearing loss, right and left trench foot, and tinnitus. *See Geib v. Shinseki*, 733 F.3d 1350, 1351-52 (Fed. Cir. 2013). The Board had relied principally on two VA examinations in denying entitlement to TDIU. *Id*. at 1352. In May 2010, a VA audiologist opined that Mr. Geib's "currently diagnosed hearing loss and tinnitus do not prevent him from seeking or maintaining gainful physical or sedentary employment," finding that, although he would suffer some difficulty understanding speech in noisy settings or over the phone, employment "would be more than feasible in a loosely-supervised situation, requiring minimal interaction with the public." *Id*. The Board also relied on a June 2010 evaluation regarding trenchfoot, in which the examiner found that Mr. Geib should be able to obtain and maintain a sedentary job, although it was noted that "Mr. Geib's employment would certainly be affected by his trenchfoot, and the fact that he could not do a mildly or moderately physical job that would include standing or walking for long periods of time." *Id*. The Court of Appeals for Veterans Claims affirmed the Board's decision.

Geib, Floore, *continued on page* 15.

Geib, Floore, *continued from page 14.*

On appeal to the Federal Circuit, Mr. Geib argued that, in developing and adjudicating his entitlement to TDIU, VA was obligated to provide a single expert opinion addressing the aggregate effect of all of his service-connected disabilities on employability. *Id*. at 1353-54. The court, however, did not agree, noting that "regulations place responsibility for the ultimate TDIU determination on the VA, not the medical examiner," and that medical opinions were only required when "necessary to make a decision on the claim." *Id*. at 1354 (*citing* 38 C.F.R. § 4.16(a); 38 U.S.C. § 5103A(d)(1)). The court concluded that "[w]here, as here, separate medical opinions address the impact on employability resulting from independent disabilities, the VA is authorized to assess the aggregate effect of all disabilities, as it did."

Six days later, the Court of Appeals for Veterans Claims clarified its understanding of *Geib*, when it decided *Floore v. Shinseki*, 26 Vet.App. 376 (2013), which had been argued the previous September. Citing *Geib*, the Court found that combined-effects expert opinions were not required as a matter of law for veterans with multiple service-connected disabilities. *Id*. at 379. However, the Court made clear that, although such an examination is not necessarily required in every case, "the need for a combined-effects medical examination report or opinion with regard to multiple-disability TDIU entitlement decisions is to be determined on a case-by-case basis, and depends on the evidence of record at the time of decision by the regional office (RO) or the Board." *Id*. at 381. In a footnote, the Court emphasized this case-by-case determination in explaining why it was appropriate to issue a precedential panel decision notwithstanding the *Geib* decision having issued between the assignment of Mr. Floore's case to panel and the final decision. *Id*. at 378 n.1.

The Court still remanded the case due to multiple reasons-or-bases errors. The Court found that the Board failed to adequately address the cumulative functional impairment of all of the veteran's service connected disabilities, failed to adequately address favorable evidence, and failed to consider all of the service-connected disabilities in rendering its decision. *Id*. at 382-83. The Court was further troubled by the appearance that "the Board was influenced in its decision by the fact that Mr. Floore terminated his employment as a result of non-service-connected disabilities." *Id*. at 383.

After *Floore* and *Geib*, it seems clear that while a combined-effects medical opinion is not required as a matter of law in every TDIU case presenting multiple service-connected disabilities, a determination must be made on a case-by-case basis, depending on the evidence in the case. What the Court is looking for is whether the expert opinions of record present evidence as to the functional effects of service-connected disabilities on employment which is adequate for the Board or the RO to make a decision on the claim. In some cases, such an opinion might still be necessary, although what these circumstances would be is not entirely clear. One can imagine a situation in which there is some evidence that the disabilities magnify one another such that independent examinations regarding separate service-connected disabilities may not provide the adjudicator with enough information to make its decision.

The decisions reaffirmed a number of well-settled principles of law that apply in TDIU cases. While the Board may not need to get a combined-effects medical opinion in every case, it needs to perform the duty assigned to it under VA regulations by looking at all of the service-connected disabilities and determining the combined functional impairment. It is not enough to simply obtain a collection of medical opinions addressing separate disabilities and deny the claim because there is no opinion saying the veteran cannot work. In making this determination, the Board may determine that such a combined opinion would be helpful, or the veteran may decide it would be useful to submit such an opinion on his or her own behalf. Moreover, the Board cannot deny TDIU on the sole basis that a veteran has severe non-service-connected disabilities. *See Pratt v. Derwinski*, 3 Vet.App. 269, 272 (1992).

Together, what *Floore* and *Geib* make clear is that, while an expert opinion on combined effects is not required in every case to adjudicate TDIU, an analysis of the combined effects of all service-connected disabilities certainly is.

The author is an attorney at Chisholm, Chisholm, and Kilpatrick, LTD, which represented the appellants in both cases.

Book Reviews:

The Secret War for the Middle East: The Influence of Axis and Allied Intelligence Operations During World War II,
Youssef Aboul-Enein and Basil Aboul-Enein
(Naval Inst. Press, Annapolis, MD, 2013), 263 pp.;

Iraq in Turmoil: Historical Perspectives of Dr. Ali Al-Wardi, From the Ottoman Empire to King Feisal,
Youssef H. Aboul-Enein
(Naval Inst. Press, Annapolis, MD, 2012), 188 pp.; and

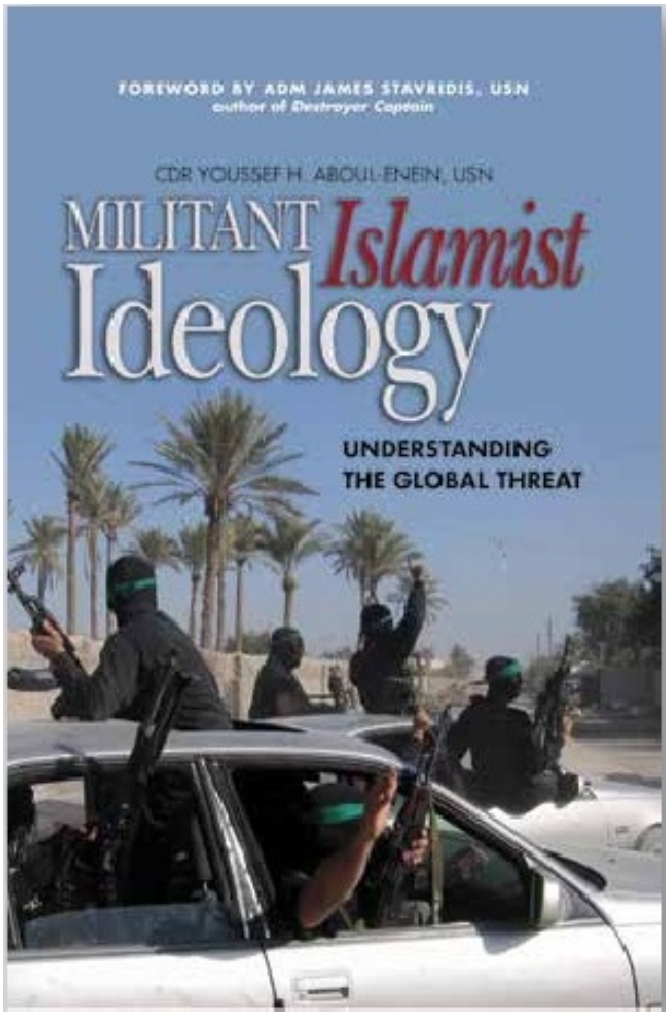
Militant Islamist Ideology: Understanding the Global Threat,
Youssef H. Aboul-Enein
(Naval Inst. Press, Annapolis, MD, 2010), 252 pp.

by Alice A. Booher

In delving into any material endeavoring to explain or assess the long, convoluted and explosive history of the Middle East, it is reasonable first to address the individual(s) offering foundation for the analyses. If information is to be relied upon, it must be from a trusted source, the vetting of which may take on myriad factors of both author and substance.

Primary author Youssef Aboul-Enein[1] is on the faculty of the Dwight D. Eisenhower School for National Security and Resource Strategy.[2] He unites a remarkable U.S. Navy career with a fascinating personal journey, and reflects both personal passion and professional authority for the subject.[3] His younger brother and co-author for the most recent volume, Basil Aboul-Enein of the U.S. Air Force, bears similar authority.[4]

As for these three volumes, it may seem a cumbersome and weighty challenge, but they might be most constructively studied as a singular teaching unit. The specific order in which they are read is a personal choice, and probably relatively unimportant so long as the full impact is received from investigating all three.



Militant Islamist Ideology was written seven years after the September 11th attacks. The articulate and well considered foreword by Admiral James Stavridis describes the book as one that "will clearly stimulate debate and contribute directly to the national discussion of an important challenge ahead," including defending U.S. interests globally in the context of undermining al-Qaida ideologically. It is a monumental task to help us all understand one of the most complicated forces shaping our world. Aboul-Enein expects his work to provoke thought and elicit understanding, with readers encouraged to formulate their own lessons learned.

Book Reviews, *continued on page 17.*

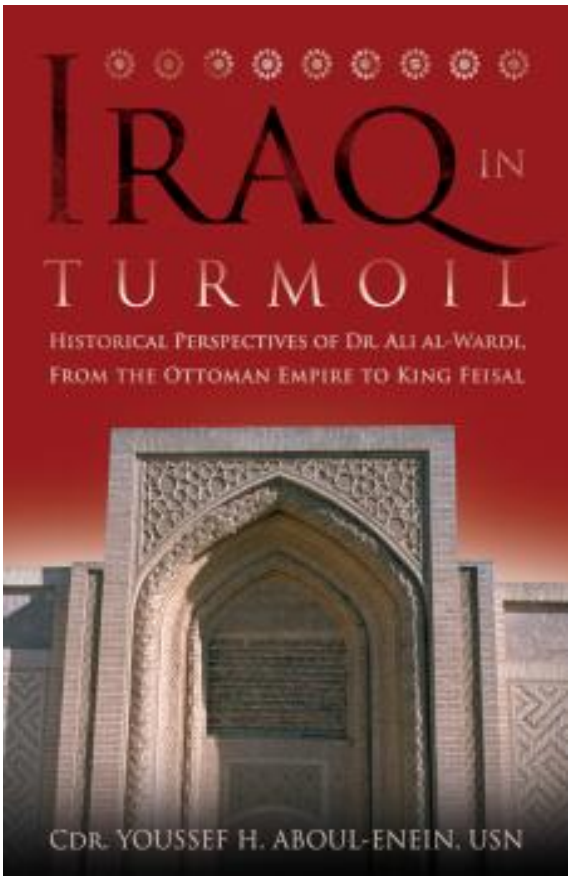
Book Reviews, *continued from page 16.*

The book provides abundant substantive history, of greater or lesser impact depending on the need of the reader, who is assumed to have one of many backgrounds of, in, and/or outside the Middle East. The effort has a wide scope. For the incredibly bewildered, one enlightening chapter is on *Jihad*, a word and concept bandied about indiscriminately by many but understood by few. Simply put, but in a context that is anything but simple, *Jihad* is a broad Islamic term that means to struggle or exert effort; the author endeavors with considerable success to sort out what that means to various pertinent players -- those who believe, those who would cloak themselves in a given belief, and many falling in between.

The *Militant Islamic Ideology* volume further addresses wide-ranging topics, such as the Qur'an and militants' abuse of it; the succession to Muhammad; Islamic governments; militant rhetoric and counteracting it pragmatically versus theoretically; the Soviets; Osama bin Laden and other assorted recent figures; the practical problems to be faced, including marginalizing al-Qaeda; and an articulate, thoughtful, yet candid concluding chapter on the mindsets that hinder American capacities to address the problems. It envisages a heady target and Aboul-Enein covers it well.

For a reader to grasp all of his works, the glossary segment in *Militant Islamic Ideology* and comparable lists of definitions and abbreviations in each book serve as good basic reference tools, some elements simple and others esoteric, ranging from names of pivotal persons and legends to agents called by acronym and reverse Arabic acronyms.

Iraq In Turmoil: Historical Perspectives of Dr. Ali Al-Wardi, from the Ottoman Empire to King Feisal (Iraq in Turmoil), is totally different in structure and context from the other two books, as it constitutes the author's understanding, in English, of a select few of a vast collection of essays by the late renowned Arabic scholar, Dr. Al-Wardi (1913-1995). These essays covered Iraq's social, military, and cultural history in the political context. Published in coordination with the U.S. Army journal *Armor*, portions of *Iraq in Turmoil* were run in an 11-installment series, which served as required reading for many dealing with Iraq, both civilians and military. In sum, the body of work serves as a basis for both Iraqis and non-Iraqis to

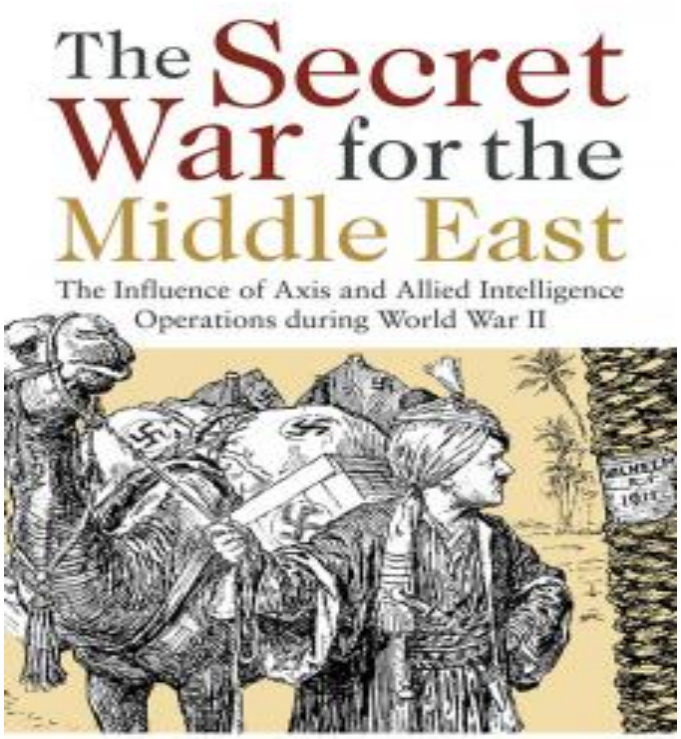


understand how and why things are the way they are. This represents a task as extraordinary as was Dr. Al-Wardi himself. Born in 1913 in the Ottoman Empire's Baghdad, a teacher in Iraq before and after an American education, he specialized in what might be generically classified as sociology, to include everything from socioeconomics and history to tribal customs and the supernatural, all contained in his huge 8-volume Arabic history of Iraq (and pertinent tangential areas). *Iraq in Turmoil* is Aboul-Enein's daunting attempt to translate, comment, interpret, summarize, simplify, and synthesize Al-Wardi's work primarily for the military audience. That said, the segments share flavorful elements suggesting Herodotus, *Tales of Ali Baba*, and a liberal sprinkling of literal *Arabian Nights*. The segments could not possibly tell the entire story, but they certainly give the English reader a solid foundation to start the search for truth. Each chapter is briefly introduced by a senior officer, civilian, or academic, lending credence and analytical heft. It is an extraordinary and dedicated effort.

The Secret War for the Middle East is yet another perspective on which to base a better understanding

Book Reviews, *continued on page 18.*

Book Reviews, *continued from page 17.*



of how this complex area operates, with a primary focus on WWII-intelligence operations. It is a tight, candid, and abbreviated dissection of a vast array of "players," from Turkey to Iran and Vichy to Palestine, some of the most complicated areas of the world, with an infinite variety of historical context and notoriety. With the stipulation that comprehension of WWII is mandatory for understanding 21st century national security, the volume does an admirable job of splicing the integral parts so that the story of the Middle East today is more comprehensible, still at best an elusive goal. In his introduction, Ed Mornston, Director of the Joint Intelligence Task Force for Combating Terrorism for DIA, asserts that it is "our business to analyze and assess the nuances and psychology of our adversaries, understand the root causes of their grievances, and cultivate empathy for a region and its people." Aboul-Enein focuses on the mindsets, decisions, and operational choices of Churchill to Speer, Gandhi to Goebbels, Hitler to Mussolini, with a significant focus on the latter two, from Berlin to Bari. The subjects remain inexorably multifaceted and awash in the intrigues of, and propaganda from, myriad participants, for many reasons. Though the book clearly requires concentration on the part of the serious reader, the author makes genuine headway into making sense of it all and applying it to what is going on now, and that is nearly miraculous.

Considering the body of these three works, it must be said that the Aboul-Enein's contribution is academically excellent and yet sustains cultural compassion; it undoubtedly profits from the need to explain one's own background for those who neither understand it nor know how to deal with it, but also a simple sharing of the extraordinary, deep, and caring wisdom of one's venerable grandparents.[5] It can only be hoped that he continues to share his understanding and insights. [6]

Alice A. Booher is a former Foreign Service officer, and was Counsel, Board of Veterans' Appeals (1969-2011). She long has been an independent book reviewer and journalist for national print media, including Stars and Stripes, The Pentagram*, the* OSS Society Newsletter and Journal*, the* American Ex-POW Bulletin, Joint Force Quarterly, Proceedings*, and* On Point.

Endnotes:

[1] Youssef H. Aboul-Enein, Commander, U.S. Navy Medical Service Corps, Middle East Foreign Area Officer, was Country Director for North Africa and Egypt, Asst. Country Dir., Arabian Gulf, and Special Advisor on Islamist Militancy, Office of the Secretary of Defense for International Security Affairs (2002-2006). Since 2006, he has been Senior Counter-Terrorism Advisor and Subject Matter Expert on Militant Islamist Ideology at the Joint Intelligence Task Force for Combating Terrorism (JITF-CT) in Washington, D.C. He prepares Defense Department officials for ministerial level talks with counterparts ranging from Morocco to the Persian Gulf, advises Combatant Commands, the House Homeland Security Committee, the NYPD, and the Department of Homeland Security on Violent Islamist radicalization, and serves as Military Adjunct Faculty for Middle East Counter-Terrorism Analysis at the National Intelligence University. He is rated proficient in the Egyptian, Peninsular, Levantine, Modern Standard (Upper Level), and Iraqi dialects of Arabic by the Defense Language Institute (DLI). His education consists of a BBA from the University of Mississippi, an MBA and Masters in Health Services Administration from the University of Arkansas, and an MS in Strategic Intelligence from the National Intelligence University, as well as an MS in National Resource Strategy from the

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Book reviews, continued from page 18.

Industrial College of the Armed Forces. He has published numerous articles on Islamist militancy, Arab affairs, and Middle East military tactics for military magazines, and is author of *Ayman Al-Zawahiri: The Ideologue of Modern Islamic Militancy*, published by the U.S. Air Force Counter Proliferation Center (2004). His operational tours include Liberia, Bosnia, and the Persian Gulf.

[2] The Dwight D. Eisenhower School for National Security and Resource Strategy is a senior service school providing graduate level education to senior members of the U.S. armed forces, government civilians, foreign nationals, and private industry. As a primary component college of the National Defense University, located at Ft. McNair, Washington, D.C., upon successful completion, graduates are awarded a master's of science degree in national resource strategy; military students may also earn Joint Professional Military Education II credit.

[3] E-mail from Judy A. Heise, Publicist, Naval Inst. Press, to Youssef Aboul-Enein & Alice A. Booher (Nov. 20, 2013, 09:21 EST) (on file with author); e-mail from Youssef Aboul-Enein to Judy A. Heise & Alice A. Booher (Nov. 20, 2013, 10:13 EST) (on file with author). To clarify his personal journey, Aboul-Enein clarifies that his parents left Egypt to attend the University of Mississippi in the late 1960s and that he how he came to be an American by birth. When his parents, Dr. Hassan Y. Aboul-Enein and Nagla Mousa al-Mojaddadi, completed their education, they returned to the Middle East to be near family. (In *Iraq in Turmoil*'s acknowledgements, he reports that in 2011, his parents joined thousands of Egyptians in Tahrir Square in Cairo, partaking of liberty and cleaning up after the 18-day protest that ended the rule of Egyptian dictator Hosni Mubarak, at which point his mother said, "I think I will vote now!") From about 5 years old, Aboul-Enein grew up in the Saudi capital of Riyadh. When it came time for him to attend university, he gravitated to a good education coupled with available financing, namely the University of Mississippi, where he attended undergraduate school on an alumni scholarship. He also attended the University of Arkansas for graduate school, and with research assistance, was able to attend graduate school debt-free.

[4] Basil Aboul-Enein, the author's younger brother, was born in Cairo, Egypt, and grew up in Riyadh, afterward becoming a naturalized citizen of the United States. Serving from 2007-2012 in the USAF, he attended the University of Central Arkansas, and has a dual masters in clinical nutrition and public health from Texas Women's University and the University of Texas Health Science Center, and a masters in military history from Norwich University. Prior to entering the USAF, he worked in academic and medical facilities, including Baylor College of Medicine and the USDA WIC program. He has widely taught in Texas and now at East Mississippi Community College, while working his doctorate under the GI Bill. His last duty station with the U.S. Air Force was in Columbus AFB, MS. He has published widely on both public health and Islamist militancy, Arab political history, and WWII Near East military campaigns. On active duty, he tested proficient in the Egyptian, Iraqi and Levantine dialects of Arabic by the DLI. Both Youssef and Basil Aboul-Enein have a third brother in U.S. military service, Lt. Cdr. Faisal H. Aboul-Enein, USPHS.

[5] In the acknowledgements in *Militant Islamist Ideology*, he thanks parents for a childhood exposure to the love of Arabic, the eloquence of English, and immersion in Middle Eastern history; and grandparents, particularly his maternal grandmother, who steeped him in Ottoman heritage and taught him many things of the Middle Eastern intricacies. In *The Secret War for the Middle East,* the brothers dedicate their work to their parents, who instilled in them the gift of education and critical thinking, and introduced them to a wider world; and to their late grandparents, who bequeathed oral histories forming their earliest memories of the Near East.

[6] Aboul-Enein's next book, *Reconstructing a Shattered Egyptian Army,* is due out from Naval Institute Press in June 2014. E-mail from Youssef Aboul-Enein to Alice A. Booher (Jan. 5, 2014, 16:44 EST) (on file with author).

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_____	**GOVERNMENT/ORGANIZATIONAL MEMBERSHIP:** I am an attorney or non-attorney practitioner in government practice designated for government/organizational membership by my supervisor.	N/C**
_____	**COURT MEMBERSHIP:** I am an employee of the Court and have been designated as eligible to participate in Bar Association activities. (Non-voting Membership)	N/C***
_____	**STUDENT MEMBERSHIP:** I am enrolled in an accredited law school.	$25.00
_____	**TRIAL MEMBERSHIP:** I am a newly-admitted attorney seeking a trial membership for the remainder of the membership year, ending September 30th. (Non-voting Membership)	**FREE!**

Membership fees are payable by check to the **Court of Appeals for Veterans Claims Bar Association**.
Please mail your completed application to the address above.

_____ _____
(Date) (Signature)

* An organizational/group rate of $75 per membership is available for 5 or more members of an organization or group applying for (or renewing) their membership.

**Government organizational members do not need to individually remit fees with this form. The organization will make one dues payment at the rate of $75 per membership.

***Court employees do not need to individually remit fees with this form. The Court will make one annual dues payment to the Bar Association.