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## DUE PROCESS AND THE AMERICAN VETERAN: WHAT THE CONSTITUTION CAN TELL US ABOUT THE VETERANS' BENEFITS SYSTEM

*Michael P. Allen\**

### INTRODUCTION

There are currently approximately 23 million American military veterans.<sup>1</sup> The United States Department of Veterans Affairs (the VA) administers a host of benefits Congress has established to provide for these veterans and their families.<sup>2</sup> In fiscal year 2010 alone, over \$41 billion was spent on benefits for veterans, and their spouses and dependants, for injuries or death related to military service.<sup>3</sup> These service-connected benefits allow for compensation when a current disability can be connected with an accident or injury incurred while in service.<sup>4</sup> Applications for service-connected disability compensation account for the great majority of non-medical benefits veterans seek.<sup>5</sup>

All of this activity and the resources associated with it are, in some sense, our collective contemporary response to President Abraham Lincoln's famous call to honor those who served our country, including those who make the ultimate sacrifice.<sup>6</sup> Suffice to say, the system for

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1. DEPARTMENT OF VETERANS AFFAIRS, ANNUAL BENEFITS REPORT FISCAL YEAR 2010, at E1 (2011) [hereinafter ANNUAL BENEFITS REPORT 2010], available at [http://www.vba.va.gov/REPORTS/abr/2010\\_abr.pdf](http://www.vba.va.gov/REPORTS/abr/2010_abr.pdf). In this Article, I will generally use the term "veteran" to refer to the person seeking benefits from the VA. See 38 U.S.C. § 101(2) (2006) (defining "veteran" for purposes of receipt of veterans' benefits). However, the class of persons eligible to receive benefits from the government based on military service is broader, including certain family members. See VETERANS BENEFITS MANUAL ch. 7 (Barton F. Stichman & Ronald B. Abrams eds., 2010) (providing an overview of various benefits available to spouses and children of veterans).

2. See, e.g., *Benefits Fact Sheets*, DEP'T OF VETERANS AFFAIRS (July 19, 2011), available at <http://www.vba.va.gov/VBA/benefits/factsheets/index.asp>.

3. See ANNUAL BENEFITS REPORT 2010, *supra* note 1, at 6.

4. 38 U.S.C. § 1110 (2006). The classic entitlement to service-connected disability benefits requires that the veteran establish (1) a current disability; (2) medical or competent lay evidence of in-service occurrence or aggravation of the disability; and (3) medical evidence of a "nexus" between the in-service event and the current disability. See, e.g., *Hickson v. West*, 12 Vet. App. 247, 253 (1999); *Caluza v. Brown*, 7 Vet. App. 498, 506 (1995).

5. See James D. Ridgeway, *Why So Many Remands?: A Comparative Analysis of Appellate Review by the United States Court of Appeals for Veterans Claims*, 1 VETERANS L. REV. 113, 148-49 (2009) (noting that approximately 80% of filed claims concern service-connection matters).

6. See President ABRAHAM LINCOLN, *Second Inaugural Address*, in ABRAHAM LINCOLN:

the award of veterans' benefits is both culturally important and a significant financial obligation of the federal government.

Until 1988, the VA operated in what has been termed "splendid isolation."<sup>7</sup> During this period, the VA's decisions concerning veterans' entitlement to benefits were not reviewable by any court.<sup>8</sup> This state of affairs changed dramatically with the enactment of the Veterans' Judicial Review Act of 1988 (the VJRA).<sup>9</sup> The VJRA created an Article I court, today known as the United States Court of Appeals for Veterans Claims (the CAVC),<sup>10</sup> to review claims by veterans dissatisfied with a VA benefits determination, and to provide for further review in the Article III judiciary.<sup>11</sup> For essentially the first time in the history of the United States, courts were involved in the process of assuring that America's veterans received the benefits to which they were entitled.

This Article concerns a recent and important development in the area of veterans' benefits determinations, one that has significant implications for both the practical workings of the process as well as for how we consider that system at a fundamental level. The CAVC's decisions may be appealed to the United States Court of Appeals for the Federal Circuit.<sup>12</sup> In 2009, the Federal Circuit held in *Cushman v. Shinseki*<sup>13</sup> that applicants for veterans' benefits have a constitutionally protected property interest in their application for benefits.<sup>14</sup> Accordingly, such applicants are entitled to constitutionally prescribed procedures in connection with their claims for benefits under the terms of the Fifth Amendment to the United States Constitution.<sup>15</sup>

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SELECTED SPEECHES AND WRITINGS 449 (Vintage Books/The Library of America ed., 1992) (calling on Americans "to care for him who shall have borne the battle, and for his widow, and his orphan").

7. *Brown v. Gardner*, 513 U.S. 115, 122 (1994) (quoting H.R. Rep. No. 100-963, pt. 1, at 10 (1988)). For an excellent discussion of the history of the award and review of veterans' benefits in the United States, see James D. Ridgeway, *The Splendid Isolation Revisited: Lessons from the History of Veterans' Benefits Before Judicial Review*, 3 VETERANS L. REV. 135 (2011); see also Ihor Gawdiak, et al., Fed. Research Div., Library of Cong., VETERANS BENEFITS AND JUDICIAL REVIEW: HISTORICAL ANTECEDENTS AND THE DEVELOPMENT OF THE AMERICAN SYSTEM (Mar. 1992).

8. See 38 U.S.C. § 211(a) (1988 ed.). There was a narrow exception for constitutionally based claims. *Johnson v. Robison*, 415 U.S. 361, 366-74 (1974).

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

10. The CAVC was originally named the United States Court of Appeals for Veterans Appeals. Veterans Judicial Review Act § 4051, 102 Stat. 4105, 4113 (1988). Its name was changed in 1998. Veterans Programs Enhancement Act of 1988, Pub. L. No. 105-368 § 511(b), 112 Stat. 3315, 3341 (1998).

11. I describe in detail the court and the system by which benefits are awarded and reviewed below. See *infra* Part I.

12. 38 U.S.C. § 7292 (2006).

13. *Cushman v. Shinseki*, 576 F.3d 1290 (Fed. Cir. 2009).

14. *Id.* at 1292 ("[W]e find that a veteran alleging a service-connected disability has a due process right to fair adjudication of his claim for benefits.").

15. In relevant part, the Fifth Amendment provides that a person may not "be deprived of life, liberty or property without due process of law." U.S. CONST. amend. V.

*Cushman* is an immensely important constitutional decision on its own. The Federal Circuit addressed a constitutional question the Supreme Court had expressly left unsolved, namely whether mere applicants for a government benefit have constitutionally protected property interests.<sup>16</sup> Much could be written about the appropriate answer to that question. But this Article takes *Cushman* at its word that the law is as it was stated in that decision. Instead, the Article's aim is to address the implications of that decision for the system by which veterans' benefits are awarded and reviewed. Those implications have the potential to be as significant as the nature of the decision itself.

Part I describes the current structure by which veterans' benefits are awarded and reviewed. An understanding of that structure, and how it developed, is critical to an appreciation of *Cushman*'s impact. As described below, the benefits process begins with frontline VA employees resolving claims, then proceeds through an administrative review process, culminating in possible judicial review by the CAVC, the Federal Circuit, and the Supreme Court. The VA process is designed to be non-adversarial, while the judicial portion of the system is traditional in its adversarial nature. After describing the relevant features of the benefits system, Part II then discusses *Cushman* and decisions of the Federal Circuit and the CAVC applying that case's rule.

Parts III and IV turn to *Cushman*'s implications. Part III discusses the ways in which *Cushman* has the potential to alter the functions of the various actors in the process, including the VA adjudicators, the CAVC and the Federal Circuit. *Cushman* has the potential to affect how each level of the process of adjudication and review of benefits determinations is conducted. In addition, Part III considers how *Cushman* could affect both the development of the system's procedures, as well as how veterans approach their claims.

Part IV turns to a more conceptual matter. Specifically, it considers

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16. *Cushman*, 576 F.3d at 1296 (“The Supreme Court has not, however, resolved the specific question of whether applicants for benefits, who have not yet been adjudicated as entitled to them, possess a property interest in those benefits.”). The Supreme Court had left the issue unresolved in its 1985 decision in *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 320 n.8 (1985). The Federal Circuit’s decision was, however, in accord with the other circuit courts to have addressed the issue, albeit not in the context of veterans’ benefits. *Cushman*, 576 F.3d at 1297–98 (citing cases). The question of an applicant’s constitutional rights when seeking a benefit is distinct from whether a person already receiving a benefit has such a constitutionally-protected property interest. She does. See, e.g., *Walters*, 473 U.S. at 320 n.8 (“[T]his Court has held that a person receiving such benefits has a ‘property’ interest in their continued receipt.”); *Cushman*, 576 F.3d at 1296 (“It is well established that disability benefits are a protected property interest and may not be discontinued without due process of law.”); *Lamb v. Peake*, 22 Vet. App. 227, 231 (2008) (“An essential principle of due process is that deprivation of a protected interest must ‘be preceded by notice and opportunity for hearing appropriate to the nature of the case.’”) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)).

what *Cushman* and its holding reveal about the fundamental nature of the system by which veterans' benefits determinations are made. *Cushman* forces one to address the critical question of whether the VA administrative system remains truly non-adversarial. As discussed below, that basic question remains a controversial one. *Cushman's* due process holding both reveals the uncertainty in the area as well as provides an opportunity to address this critically important matter head-on. Part V briefly concludes, and discusses some preliminary thoughts for ways to improve the system suggested by reflections on *Cushman*.

### I. THE CURRENT VETERANS BENEFITS SYSTEM<sup>17</sup>

This Part describes the process by which veterans seek benefits from the VA and how they challenge VA decisions with which they disagree. Subpart A provides a roadmap for what the Supreme Court has termed the "unique administrative scheme" existing in the veterans' benefits context.<sup>18</sup> Subpart B focuses on the differing natures of the administrative and judicial aspects of the system.

#### A. *The Nuts and Bolts of the Veterans' Benefits System*

A veteran wishing to receive a benefit, to which she believes she is entitled based on her military service, begins by submitting an application with one of the VA's regional offices (RO) around the country.<sup>19</sup> If the veteran is awarded the benefit sought, the process ends. But the process can continue to another administrative level in certain cases because, as the Supreme Court has recently recognized, "[t]he VA has a two-step process for the adjudication of . . . claims [for service-connected benefits]."<sup>20</sup>

Should the veteran be dissatisfied with any aspect of the RO's decision on her claim, she may avail herself of an administrative review process. The veteran begins by filing a "Notice of Disagreement"

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17. I have also described the process in prior writings. See, e.g., Michael P. Allen, *The United States Court of Appeals for Veterans Claims at Twenty: A Proposal for a Legislative Commission to Consider its Future*, 58 CATH. U. L. REV. 361, 365–72 (2009) [hereinafter Allen, *Legislative Commission*]; Michael P. Allen, *Significant Developments in Veterans Law (2004–2006) and What They Reveal about the U.S. Court of Appeals for Veterans Claims and the U. S. Court of Appeals for the Federal Circuit*, 40 U. MICH. J. L. REFORM 483, 488–96 (2007) [hereinafter Allen, *Significant Developments: 2004–2006*].

18. *Henderson v. Shinseki*, 131 S. Ct. 1197, 1204 (2011).

19. See BOARD OF VETERANS' APPEALS, HOW DO I APPEAL? 3 (2002) [hereinafter HOW DO I APPEAL], available at <http://www.bva.va.gov/docs/Pamphlets/010202A.pdf>; VETERANS BENEFITS MANUAL, *supra* note 1, at 843; see also *Henderson*, 131 S. Ct. at 1200.

20. *Henderson*, 131 S. Ct. at 1200.

(NOD) with the RO.<sup>21</sup> The NOD triggers the RO's obligation to prepare a "Statement of the Case" (SOC), setting forth the bases of the decision being challenged.<sup>22</sup> If the veteran wishes to pursue an appeal after receiving the SOC, she files a form with the RO indicating her desire for administrative review by the Board of Veterans' Appeals (Board).<sup>23</sup> "The Board is a body within the VA that makes the agency's final decision in cases appealed to it."<sup>24</sup>

The Board bases its decision "on the entire record of the proceeding and upon consideration of all evidence and material of record and applicable law and regulation."<sup>25</sup> In addition to the material developed at the RO, the Board may also conduct personal hearings with the veteran, during which new evidence may be introduced in the record.<sup>26</sup> The Board processes an extraordinarily large number of appeals. For example, in fiscal year 2010, the Board received 52,526 cases and issued 49,127 decisions.<sup>27</sup>

Since the enactment of the VJRA in 1988, if a veteran is dissatisfied with a final decision of the Board, she may elect to appeal that decision to the CAVC, which has exclusive jurisdiction to review such matters.<sup>28</sup> The Secretary of the Department of Veterans Affairs (the Secretary) may not appeal an adverse Board decision.<sup>29</sup> Congress created the CAVC under its Article I powers as a court entirely independent of the VA.<sup>30</sup> The court is comprised of nine judges appointed for fifteen-year

21. See 38 U.S.C. § 7105(a) (2006); see also HOW DO I APPEAL, *supra* note 19, at 4.

22. See 38 U.S.C. § 7105(d); see also HOW DO I APPEAL, *supra* note 19, at 5. The veteran also has the option to seek review by a "Decision Review Officer" at the RO before seeking a SOC. 38 C.F.R. § 3.2600 (2010). This optional process is discussed in the VETERANS BENEFIT MANUAL, *supra* note 1, ch. 12.8 at 924–27. Pursuing this course is merely a way in which to receive an additional level of review at the RO. It does not affect the right to appeal to the Board of Veterans' Appeals.

23. See 38 U.S.C. § 7105(d)(3); see also HOW DO I APPEAL, *supra* note 19, at 6.

24. *Henderson*, 131 S. Ct. at 1200. The Board is led by a Chairperson, appointed by the President and confirmed by the Senate, and a Vice-Chairperson, designated by the Secretary. See 38 U.S.C. § 7101(b)(1) (2006) (describing appointment of the Chairperson); 38 U.S.C. § (b)(4) (2006) (describing appointment of the Vice-Chairperson). There are also approximately 60 Board members, also referred to as Veterans Law Judges. See BOARD OF VETERANS' APPEALS, REPORT OF THE CHAIRMAN, FISCAL YEAR 2010, at 3 (2011) [hereinafter 2010 BOARD REPORT], available at [http://www.bva.va.gov/docs/Chairmans\\_Annual\\_Rpts/BVA2010AR.pdf](http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2010AR.pdf); see also VETERANS BENEFITS MANUAL, *supra* note 1, at 972 n.8. They are appointed to undefined terms and are subject to performance reviews conducted by a panel of other members of Board. *Id.* Board members are appointed by the Secretary with the approval of the President. See 38 U.S.C. § 7101A(a)(1) (2006).

25. See 38 U.S.C. § 7104(a) (2006).

26. See HOW DO I APPEAL, *supra* note 19, at 8–10.

27. 2010 BOARD REPORT, *supra* note 24, at 24. This figure is the more conservative one the Board reports. During the same period, there were actually 57,925 appeals perfected at the RO level. *Id.* at 16.

28. 38 U.S.C. § 7252(a) (2006).

29. *Id.*

30. 38 U.S.C. § 7251 (2006); see also *Watson v. Shinseki*, 23 Vet. App. 352, 352 (2010) ("[T]his

terms by the President with the advice and consent of the Senate.<sup>31</sup> The CAVC is an appellate body that Congress specifically precluded from making factual determinations.<sup>32</sup> Congress also provided that the CAVC could decide cases in panels of not less than three judges or by a single judge acting alone.<sup>33</sup> This ability to decide cases by a single judge is unique in the federal system and is also subject to debate in the realm of veterans law<sup>34</sup>—a matter that will be discussed later in this Article.<sup>35</sup> The CAVC processes a large number of cases. For example, in fiscal year 2009 (the last year for which an annual report was available when this Article was written), there were 4,725 new cases filed at the court with 4,379 decisions rendered.<sup>36</sup>

Any aggrieved party may appeal a final CAVC decision to the Federal Circuit.<sup>37</sup> Review of Federal Circuit decisions is available by writ of certiorari to the Supreme Court of the United States.<sup>38</sup> Review in the Federal Circuit is limited by statute. In the absence of a constitutional issue, the Federal Circuit may review only legal questions; the Federal Circuit is specifically precluded from ruling on a factual determination or on the application of law to the facts in a particular case in the absence of a constitutional question.<sup>39</sup> In fiscal year 2010, 13% of the Federal Circuit's caseload concerned appeals from the

Court is an independent Federal Court. This Court is not part of the VA, and it is wholly separate from the VA and the Board." (citing 38 U.S.C. § 7251)).

31. The statute creating the CVAC provides that the court shall have between three and seven members serving 15 year terms. See 38 U.S.C. § 7253(a), (c). Congress authorized two additional judgeships on a temporary basis through January 1, 2013. 38 U.S.C. § 7253(i).

32. 38 U.S.C. § 7261(c) (2006).

33. 38 U.S.C. § 7254(b) (2006).

34. For discussions of the use of single judge authority, see Allen, *Significant Developments: 2004–2006*, *supra* note 17, at 515–21; Sarah M. Haley, Note, *Single-Judge Adjudication in the Court of Appeals for Veterans Claims and the Devaluation of Stare Decisis*, 56 ADMIN. L. REV. 535 (2004); Ronald L. Smith, *The Administration of Single Judge Decisional Authority by the United States Court of Appeals for Veterans Claims*, 13 KAN. J.L. & PUB. POL'Y 279 (2004).

35. See *infra* Part III.A.2.

36. UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORTS 2000–2009 [hereinafter CAVC ANNUAL REPORTS], available at [http://www.uscourts.cavc.gov/documents/Annual\\_Report\\_FY\\_2009\\_October\\_1\\_2008\\_to\\_September\\_30\\_2009.pdf](http://www.uscourts.cavc.gov/documents/Annual_Report_FY_2009_October_1_2008_to_September_30_2009.pdf) (last visited May 29, 2012).

37. See 38 U.S.C. § 7292 (2006). The Federal Circuit was created by Congress as an Article III tribunal in 1982. See Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (codified as amended in scattered sections of 28 U.S.C.). Unlike the other federal circuit courts of appeals, the Federal Circuit's jurisdiction is subject specific not geographic. See 28 U.S.C. § 1295 (2006) (setting forth Federal Circuit's appellate jurisdiction). In the veterans law context, in addition to hearing appeals from the CAVC's decisions, the Federal Circuit also has exclusive jurisdiction "to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof" under Title 38. See 38 U.S.C. § 7292(c).

38. See 28 U.S.C. § 1254 (2006) (providing for Supreme Court appellate jurisdiction concerning decisions of the courts of appeals).

39. See 38 U.S.C. § 7292(d)(2).

CAVC.<sup>40</sup>*B. The Natures of the Administrative and Judicial Systems*

As described above, the award and review of veterans' benefits determinations is a hybrid system. There is both an administrative component at the VA and a judicial component independent of the agency. But there is more of a difference than simply proceeding before two different types of governmental actors. There is a fundamental distinction in the nature of the processes that are purportedly utilized in the differing portions of the system. This state of affairs is perhaps unsurprising given the grafting of judicial review onto the system for the first time in 1988. This subpart describes the fundamentally different natures of the administrative and judicial systems. Its focus is on the way in which these systems, in particular the administrative one, are purported to operate. I return to questions of how the system may actually operate later in the Article.<sup>41</sup>

As the Supreme Court has recently noted, the veterans' benefits process is a "unique administrative scheme."<sup>42</sup> A defining aspect of this unique system is that it is purported to be non-adversarial, pro-claimant, and informal.<sup>43</sup> This fundamental reality has been recognized by every court in the system of review Congress established from the Supreme Court,<sup>44</sup> to the Federal Circuit,<sup>45</sup> to the CAVC.<sup>46</sup> Congress also

40. See UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, APPEALS FILED BY CATEGORY: FY 2009-10, available at [http://www.cafc.uscourts.gov/images/stories/the-court/statistics/Caseload\\_by\\_Category\\_Appeals\\_Filed\\_2010.pdf](http://www.cafc.uscourts.gov/images/stories/the-court/statistics/Caseload_by_Category_Appeals_Filed_2010.pdf).

41. See *infra* Part IV.

42. *Henderson v. Shinseki*, 131 S. Ct. 1197, 1204 (2011).

43. For example, the VA has promulgated regulations describing Board hearings explicitly as being nonadversarial. 38 C.F.R. § 20.700(c) (2010) ("Hearings conducted by the Board are ex parte in nature and nonadversarial.").

44. See, e.g., *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 309 (1985) (noting that as of 1985, "[T]he process prescribed by Congress for obtaining disability benefits does not contemplate the adversary mode of dispute resolution utilized by courts in this country."); *Henderson*, 131 S. Ct. at 1205–06 (recognizing that Congress "place[d] a thumb on the scale on the side of veterans") (quoting *Shinseki v. Sanders*, 129 S. Ct. 1696, 1707 (2009) (Souter, J., dissenting)); *id.* ("When a claim is filed, proceedings before the VA are informal and nonadversarial."). *Henderson* was, in many respects, a reaffirmation of the Court's understanding of the nature of the administrative system evinced over 25 years before in *Walters*. Whether changes in the past quarter century have, in reality, changed the nature of the system is a topic to which I return below. See *infra* Part IV.

45. See, e.g., *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998) (describing how the court and the Supreme Court "both have long recognized that the character of the veterans' benefits statutes is strongly and uniquely pro-claimant" and characterizing the process as a "historically non-adversarial system of awarding benefits to veterans").

46. See, e.g., *Trilles v. West*, 13 Vet. App. 314, 326 (2000) (characterizing VA system as one that is a "pro-claimant nonadversarial claims adjudication process"); *Littke v. Derwinski*, 1 Vet. App. 90, 91 (1990) ("VA takes pride in operating a system of processing and adjudicating claims for benefits

indicated that it believed the system was non-adversarial when it created the current process for judicial review.<sup>47</sup> There is no question that there have been debates about the utility of a non-adversarial system as well as whether such a characterization is accurate as a descriptive matter.<sup>48</sup> For present purposes, however, I focus on the aspects of the administrative system that are often cited as evidence of its non-adversarial, pro-claimant nature.<sup>49</sup>

The following aspects of the veterans' benefits system demonstrate the facially non-adversarial and pro-claimant nature of the process:

- The VA is required to provide notice to claimants concerning what must be done to establish entitlement to benefits. Such notice includes “any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim.”<sup>50</sup>
- Significantly, the VA has a statutory duty to assist claimants in developing evidence to establish their claims.<sup>51</sup> The Supreme Court specifically noted this requirement in contrasting the administrative system from a traditional adversarial process.<sup>52</sup>
- There is no statute of limitations to file an application seeking benefits based on a service-connected disability.<sup>53</sup>
- Principles of *res judicata* have far less purchase in the administrative system than they do in general civil litigation because veterans seeking to revisit rejected claims have the

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that is both informal and nonadversarial.”).

47. *See, e.g.*, H.R. Rep. No. 100-963, at 12 (1988) (“Congress has designed and fully intends to maintain a beneficial non-adversarial system of veterans benefits. This is particularly true of service-connected disability compensation where the element of cause and effect has been totally by-passed in favor of a simple temporal relationship between incurrence of the disability and the period of active duty.”).

48. *See, e.g.*, Allen, *Significant Developments: 2004–2006*, *supra* note 17, at 526 n.244 (collecting sources); *see also infra* Part IV (discussing issues Cushman raises concerning the nature of the administrative system).

49. The Supreme Court recently noted many of these features. *Henderson v. Shinseki*, 131 S. Ct. 1197, 1200–01, 1205–06 (2011).; *see also* Rory R. Riley, *The Importance of Preserving the Pro-Claimant Policy Underlying the Veterans’ Benefits Scheme: A Comparative Analysis of the Administrative Structure of the Department of Veterans Affairs Disability Benefits System*, 2 *VETERANS L. REV.* 77, 83–92 (2010) [hereinafter Riley, *Pro-Claimant*] (cataloguing non-adversarial, pro-claimant features of the veterans’ benefits system).

50. 38 U.S.C. § 5103(a) (2006); *see also* 38 U.S.C. § 3159(b). (adopting regulations implementing the statutory duty to assist).

51. 38 U.S.C. § 5103A (2006).

52. *Henderson*, 131 S. Ct. at 1206; *see also* *Shinseki v. Sanders*, 556 U.S. 396, 407 (2009) (Souter, J., dissenting) (“The VA differs from virtually every other agency in being itself obligated to help the claimant develop his claim . . .”).

53. *Henderson*, 131 S. Ct. at 1200–01 (“A veteran faces no time limit for filing a claim . . .”); *Id.* at 1206, 1222 (“[A] veteran seeking benefits need not file an initial claim within any fixed period after the alleged onset of disability or separation from service.”). For a further discussion of issues concerning statutes of limitations, *see* Riley, *Pro-Claimant*, *supra* note 49, at 87–89.

ability to reopen claims based on the submission of new and material evidence<sup>54</sup> or to attack the earlier decision by alleging that it was the product of “clear and unmistakable error.”<sup>55</sup>

- “[W]henver positive and negative evidence on a material issue is roughly equal,” the VA is required to give to the veteran the “benefit of the doubt” with respect to proof of that issue.<sup>56</sup>
- The VA is required to “sympathetically read” a veteran’s claim documents.<sup>57</sup>
- In terms of statutory interpretation, the Supreme Court has adopted a “rule that interpretative doubt is to be resolved in the veteran’s favor.”<sup>58</sup>

In addition to the way in which the system is described based on the procedures on the books, the non-adversarial nature of the administrative aspect of the process is supported by the percentage of cases at the CAVC in which veterans proceed *pro se*. For example, in fiscal year 2009, 68% of appeals filed at the CAVC were from *pro se* litigants.<sup>59</sup> And even at the time of disposition, veterans remained *pro se* in 28% of cases.<sup>60</sup>

It is not surprising that so many cases the CAVC hears, especially when assessed at the time of filing, are *pro se*. This is because veterans have been in the uniquely pro-claimant, non-adversarial administrative system.<sup>61</sup> In at least partial recognition of the purported nature of the administrative process, lawyers have been disfavored. During the Civil War, Congress imposed a limit of \$10 on fees a lawyer could charge for assisting a veteran in obtaining most veterans’ benefits.<sup>62</sup> Regarding

54. 38 U.S.C. § 5108 (2006). The ability to reopen a claim is not merely hypothetical; it is a significant way in which veterans seek benefits. For example, in fiscal year 2007, the VA received 838,141 claims for benefits. Veterans for Common Sense v. Peake, 563 F. Supp. 2d 1049, 1070 (N.D. Cal. 2008). 612,968 of these filings were claims to re-open previously denied claims. *Id.*

55. 38 U.S.C. §§ 5109A, 7111 (2006). To establish clear and unmistakable error in a decision, which can be done after the time to appeal has passed, the veteran must show that (1) the decision was incorrect because either the facts known at the time were not before the adjudicator or the law then in effect was applied incorrectly, and (2) the outcome would have been manifestly different if that error had not been made. Russell v. Principi, 3 Vet. App. 310, 313 (1992) (en banc).

56. *Henderson*, 131 S. Ct. at 1201 (citing 38 U.S.C. § 5107(b)). The classic CAVC case on the benefit of the doubt doctrine is *Gilbert v. Derwinski*, 1 Vet. App. 49 (1990).

57. *See e.g.*, *Robinson v. Shinseki*, 557 F.3d 1355, 1359-60 (Fed. Cir. 2009) (citing *Comer v. Peake*, 552 F.3d 1362, 1369-70 (Fed. Cir. 2009)); *Szemraj v. Principi*, 357 F.3d 1370, 1373 (Fed. Cir. 2004).

58. *Brown v. Gardner*, 513 U.S. 115, 118 (1994).

59. CAVC ANNUAL REPORTS, *supra* note 36.

60. *Id.*

61. There are risks to veterans in the transition from the non-adversarial administrative system to the more traditional form of litigation before the CAVC and the Federal Circuit. I have discussed these risks elsewhere. *See Allen, Significant Development: 2004-2006, supra* note 17, at 526-28.

62. Act of July 4, 1864, §§ 12-13, 13 Stat. 387, 389. Two years earlier, Congress had limited the fees that could lawfully be charged to \$5. Act of July 14, 1862, §§ 6-7, 12 Stat. 566, 568.

claims before the VA, this fee limitation remained in place, without adjustment for inflation, until 2007.<sup>63</sup> But even today, a veteran may employ a lawyer for a fee only after she has filed a notice of disagreement with respect to an RO decision.<sup>64</sup> Such limitations on the right of veterans to employ lawyers when seeking benefits are strong evidence, if more were needed, that the administrative process is not meant to mirror traditional adversary litigation.<sup>65</sup>

Unlike the purportedly non-adversarial nature of the administrative system, proceedings before the federal courts concerning veterans' benefits matters are unquestionably traditional and adversarial.<sup>66</sup> Indeed, the CAVC takes the unusual step—at least unusual in other contexts—of specifically reminding veterans that they have entered an adversarial process. The CAVC's Website provides: "The Court's review of an appeal is an adversarial process and pro-veteran rules under which the VA decides claims do not apply to the Court."<sup>67</sup>

In sum, when one considers the nature of the current process for the award and review of veterans' benefits, one is confronted with an amalgam. The administrative process is descriptively one that is non-adversarial and pro-claimant. In contrast, the judicial process is one that

63. See Pub. L. No. 109-461, § 101, 120 Stat. 3405, 3407-08 (2006). Fee limitations were not imposed on work before judicial bodies when the VJRA first provided for such review. See Steven K. Berenson, *Legal Services for Struggling Veterans—Then and Now*, 31 HAMLIN J. PUB. L. & POL'Y 101, 114 n.63 (2009). This provision is now codified in the final section of 38 U.S.C. § 5904(c)(1) (2006) providing that the general fee limitations set forth in that provision "do[] not apply to fees charged, allowed or paid for services provided before a court."

64. 38 U.S.C. § 5904(c)(1) (Providing that except in certain specific matters related to loans, guarantees or insurance, "[A] fee may not be charged, allowed, or paid for services of agents and attorneys with respect to services provided before the date on which a notice of disagreement is filed with respect to the case."). Veterans are, however, often assisted by non-lawyer Veterans' Service Officers (VSOs) associated with veterans' advocacy groups such as the Vietnam Veterans of America and the American Legion. For a discussion of the role of VSOs, see VETERANS BENEFITS MANUAL, *supra* note 1, at 1403-04.

65. There has been much written about the appropriate role of lawyers in the system. For background on this issue, see, for example, Michael P. Allen, *The Law of Veterans' Benefits 2008-2010: Significant Developments, Trends, and a Glimpse into the Future*, 3 VETERANS L. REV. 1, 62-63 (2011) [hereinafter Allen, *Significant Developments: 2008-2010*]; Berenson, *supra* note 63 at 112-122; Victoria L. Collier & Drew Early, *Cracks in the Armor: Due Process, Attorney's Fees, and the Department of Veterans Affairs*, 18 ELDER L.J. 1, 3-9 (2010); James D. Ridgway, *The Veterans' Judicial Review Act Twenty Years Later: Confronting the New Complexities of the Veterans Benefits System*, 66 N.Y.U. ANN. SURV. AM. L. 251, 260-63 (2010) [hereinafter Ridgway, *Twenty Years*].

66. *Henderson v. Shinseki*, 131 S. Ct. 1197, 1201 (2011); see also John J. Farley, III, *The New Kid on the Block of Veterans Law*, 38 FED. B. NEWS & J. 488, 489 (1991) (describing the CAVC as a "traditional appellate court"); Ridgway, *Twenty Years*, *supra* note 65, at 257 ("Whereas the VA system is non-adversarial and claimant-friendly, the CAVC is an adversarial forum that favors neither side in a case.").

67. See *Court Process*, U.S. CT. APPEALS VETERANS CLAIMS, [http://www.uscourts.cavc.gov/about/how\\_to\\_appeal/HowtoAppealWithoutCourtProcess.cfm](http://www.uscourts.cavc.gov/about/how_to_appeal/HowtoAppealWithoutCourtProcess.cfm) (last visited May 29, 2012).

is more traditionally adversarial. The next Part describes the Federal Circuit's decision in *Cushman*. Thereafter, the Article considers how that decision might affect this truly odd system, including how one views the administrative process.<sup>68</sup>

## II. *CUSHMAN* AND VETERANS' DUE PROCESS RIGHTS

### A. *Cushman*

Philip *Cushman* was a Vietnam veteran who served in the United States Marine Corps and was honorably discharged.<sup>69</sup> He injured his back in service and, after leaving the service, was assigned a disability rating of 60% based on his back injury.<sup>70</sup> Over time, Mr. *Cushman*'s back conditions worsened to the point that he could not perform the duties associated with his job at a warehouse.<sup>71</sup> He eventually sought VA benefits and claims to be entitled to a 100% rating based on a classification of "total disability based upon individual unemployability" or TDIU.<sup>72</sup> A veteran claiming TDIU essentially asserts that even though his disability standing alone does not merit a 100% rating, his condition or combination of conditions is such that he or she is unable to be meaningfully employed.<sup>73</sup> After a series of remands within the VA, the Board denied Mr. *Cushman* a TDIU 100% rating in the early 1980s.<sup>74</sup> Because there was no judicial review at the time, Mr. *Cushman*'s case ended.

Mr. *Cushman* again sought a 100% rating based on TDIU in 1994 based on a reassessment of his medical condition.<sup>75</sup> The VA granted him such benefits effective on the date of his 1994 claim.<sup>76</sup> However, Mr. *Cushman* then sought an earlier effective date for his TDIU.<sup>77</sup> His

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68. See *infra* Parts III–IV.

69. *Cushman v. Shinseki*, 576 F.3d 1290, 1292 (Fed. Cir. 2009).

70. *Id.* Once a veteran is service-connected for a disability, the disability must be rated in terms of its impact on the veteran's earning capacity. 38 U.S.C. § 1155 (2006). The ratings are in ten percent increments from 0% to 100%. *Id.* Congress has directed that the VA adopt a ratings schedule assigning a monetary amount for the different levels of ratings. *Id.* For further information on ratings, see VETERANS BENEFITS MANUAL, *supra* note 1, at 261–430.

71. *Cushman*, 576 F.3d at 1292.

72. *Id.* at 1293.

73. See 38 C.F.R. § 4.16 (2010) (defining conditions for TDIU).

74. *Cushman*, 576 F.3d at 1293. The claim was originally denied in 1980 and was denied again on reconsideration in 1982. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 1293–94. The concept of effective date concerns the point from which the VA must pay a veteran the compensation to which she is entitled. Congress has provided explicit rules for determining the effective date for certain types of claims. 38 U.S.C. § 5110 (2006). In most

argument was that he discovered that the medical records that had been utilized to deny his claim in the early 1980s had been altered.<sup>78</sup> The Board eventually denied his request for an earlier effective date and the CAVC affirmed that decision.<sup>79</sup>

Mr. Cushman next appealed to the Federal Circuit claiming, in part, that he was denied due process of law because of the VA adjudicators considered these altered medical records.<sup>80</sup> The Federal Circuit first acknowledged that it was an open question whether an applicant for veterans' benefits had a property interest subject to constitutional protection.<sup>81</sup> Whether such a property interest existed was a threshold question because the Constitution's Due Process Clause applies only if there is a "life, liberty or property" interest at stake.<sup>82</sup> The circuit court answered the question: "[w]e conclude that such entitlement to benefits [for service-connected disabilities] is a property interest protected by the Due Process Clause of the Fifth Amendment to the United States Constitution."<sup>83</sup>

The Federal Circuit reached its conclusion by reasoning that the benefits to which veterans are entitled are "nondiscretionary, [and] statutorily mandated."<sup>84</sup> As such, upon a showing that a veteran meets the statutory requirements, she is absolutely entitled to receipt of benefits.<sup>85</sup> This was enough to convince the court that Congress had created the requisite property interest to which the Constitution's Due

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circumstances, the effective date can be no earlier than the date on which the claim for benefits was filed. 38 U.S.C. § 5110(a) (2006).

78. *Cushman*, 576 F.3d at 1294.

79. *Id.* The procedural history of Mr. Cushman's claim is actually more complicated on a technical level. In the veterans' benefits system, res judicata principles have less force than in other areas of the law. A veteran may return to an earlier administrative decision and argue that the decision should be revisited even though the time to appeal has lapsed. She can do so either by alleging that she possesses "new and material evidence" on the matters decided, 38 U.S.C. § 5108 (2006), or that the earlier decision was the product of "clear and unmistakable error" known as CUE. 38 U.S.C. §§ 5109A, 7111 (2006). CUE is an extremely complicated area of veterans' law practice. For present purposes, however, all that is necessary to know is that after several stops in the system, Mr. Cushman eventually properly presented his claims that the Board's 1980 decisions denying him TDIU were the product of CUE based on the consideration of the altered medical records. *Cushman*, 576 F.3d at 1294. The Board rejected those assertions as did the CAVC. *Id.* at 1294–95.

80. *Cushman*, 576 F.3d at 1296.

81. *Id.*; see also *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 320 n.8 (1985). (noting that the Supreme Court had left unresolved whether applicants for government benefits have a property interest under the Due Process Clause).

82. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985); see also *Cushman*, 576 F.3d at 1296 ("To raise a due process question, the claimant must demonstrate a property interest entitled to such protection.").

83. *Cushman*, 576 F.3d at 1298.

84. *Id.*

85. *Id.*

Process Clause applied.<sup>86</sup>

Having concluded that the requisite property interest was implicated, the court next addressed what process the veteran was due. The answer to that question was contextual, assessed under the Supreme Court's familiar test announced in *Mathews v. Eldridge*.<sup>87</sup> In that case, the Court instructed courts to consider (1) "the private interest that will be affected by the official action;" (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;" and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."<sup>88</sup> In *Cushman*, the Federal Circuit concluded that Mr. Cushman's due process rights were violated by the consideration of altered documents in the administrative process.<sup>89</sup>

*Cushman* has proved to be a controversial decision on the Federal Circuit in the short time it has been on the books. For example, now-Chief Judge Rader wrote a concurrence to his own majority opinion in a case in which *Cushman* was applicable, noting colorfully: "I perceive that this court has run before the Supreme Court sounded the starting gun on property rights for applicants."<sup>90</sup> And Judges Bryson and Moore

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86. In a recent law review article, two associate counsels for the Board have taken the position that *Cushman* should be read narrowly such that the Due Process Clause applies only after the veteran has demonstrated an entitlement to receive benefits. See Emily Woodward Deutsch & Robert Jame Burriesci, *Due Process in the Wake of Cushman v. Shinseki: The Inconsistency of Extending a Constitutionally-Protected Property Interest to Applicants for Veterans' Benefits*, 3 VETERANS L. REV. 220, 249, 251–52 (2011). Such a reading of *Cushman* is not tenable. First, if this reading were correct, *Cushman* would have effectively added nothing to the law. It was already clear at the time of that decision that the due process clause applied once one had established an entitlement to benefits. *Cushman*, 576 F.3d at 1296. The Federal Circuit noted that it was addressing a question of first impression, namely "whether applicants for benefits, who have not yet been adjudicated as entitled to them, possess a property interest in these benefits." *Id.* Thus, if the reading of *Cushman* that Deutsch and Burriesci advocate were correct, all the *Cushman* court did was answer a question that had already been resolved. That seems quite unlikely. Moreover, the reading of *Cushman* they advocate is belied by post-*Cushman* decisions I discuss later in this Part. See, e.g., *Gambill v. Shinseki*, 576 F.3d 1307, 1310–11 (2009) ("Although the Supreme Court has declined to address the question whether due process protections apply to the proceedings in which the [VA] decided whether veteran-applicants are eligible for disability benefits, . . . we have recently held that the Due Process Clause applies to such proceedings.") (citations omitted). Finally, the view these authors advance is inconsistent with others who have discussed *Cushman*. See, e.g., Collier & Early, *supra* note 65, at 20–22; Miguel F. Eaton, Sumon Dantiki, & Paul R. Gugliuzza, *Ten Federal Circuit Cases from 2009 that Veterans Benefits Attorneys Should Know*, 59 AM. U. L. REV. 1155, 1172–74 (2010). At the end of the day, Deutsch and Burriesci appear to be arguing for what the law should be as opposed to what the Federal Circuit said that it is.

87. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

88. *Id.* at 335.

89. *Cushman*, 576 F.3d at 1300.

90. *Edwards v. Shinseki*, 582 F.3d 1351, 1358 (Fed. Cir. 2009) (Rader, J., concurring); see also *id.* at 1357 ("[I]n *Cushman*, this court stepped beyond the bounds set by the Supreme Court for property

have engaged in a debate in another case concerning the need for due process protection in the veterans' benefits system.<sup>91</sup> But the Federal Circuit has not revisited the issue and *Cushman* remains the law.

### B. Post-Cushman Developments

Since *Cushman* was decided, the Federal Circuit and the CAVC both began to cautiously explore the newly articulated application of due process principles to the veterans' benefits system. The remainder of this subpart briefly canvasses the post-*Cushman* developments through June of 2011. This subpart begins with the four cases in which the Federal Circuit has considered *Cushman* and then considers the CAVC's decisions dealing with due process.<sup>92</sup>

#### 1. Federal Circuit

In *Gambill v. Shinseki*,<sup>93</sup> the Federal Circuit addressed whether the Due Process Clause requires that a veteran have the opportunity to use interrogatories or some other device to challenge written medical opinions on which the Board relies when adjudicating an appeal.<sup>94</sup> This question is particularly important because medical evidence is often critical when considering service-connection claims.<sup>95</sup> The court, however, declined to address the due process issue because the panel concluded that any error in Mr. Gambill's case was harmless.<sup>96</sup> Thus, this critically important issue remains unresolved.

The Federal Circuit next returned to *Cushman* in *Edwards v. Shinseki*.<sup>97</sup> The due process issue in *Edwards* concerned what the Due Process Clause requires of the VA specifically regarding veterans who

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rights and due process protections.”).

91. Compare *Gambill v. Shinseki*, 576 F.3d 1307, 1315-20 (Fed. Cir. 2009) (Bryson, J., concurring) (expressing skepticism about the need for due process protections), with *id.* at 1327-29 (Moore, J., concurring) (generally supporting the application of due process protections). I discuss the views of Judges Bryson and Moore in more detail below when considering *Cushman*'s implications. See *infra* Part IV.

92. The cases considered in the remainder of this subpart are through the end of June 2011.

93. *Gambill v. Shinseki*, 576 F.3d 1307 (Fed. Cir. 2009).

94. *Id.* at 1311-12.

95. This issue is discussed further in Part III.B, *infra*.

96. *Gambill*, 576 F.3d at 1311-12. Two panel members concurred expressing competing views on the ultimate constitutional question. *Id.* at 1313-24 (Bryson, J., concurring) (concluding that due process did not require means to confront adverse medical opinions); *id.* at 1324-30 (Moore, J., concurring) (concluding that due process did require such means to confront adverse medical opinions). I discuss these concurring opinions in greater detail below. See *infra* Part IV.

97. *Edward v. Shinseki*, 582 F.3d 1351 (Fed. Cir. 2009).

claim to suffer from a psychiatric disorder.<sup>98</sup> The court indicated that *Cushman* might indeed require certain additional procedural protections for such veterans.<sup>99</sup> However, the court once again declined to make a definitive ruling because it concluded that Mr. Edwards had not established that the VA was on sufficient notice of any such condition requiring enhanced procedures.<sup>100</sup> Again, a significant constitutional issue was left in limbo.<sup>101</sup>

The other two cases in which the Federal Circuit considered *Cushman* are less important than *Edwards* and *Gambill*. In *Guillory v. Shinseki*,<sup>102</sup> the Federal Circuit concluded that a veteran who asserted that his rights under *Cushman* had been violated because the VA did not “properly address[]” his claims and did not establish a constitutional violation.<sup>103</sup> The court reasoned that “unlike the situation in *Cushman*, the statutes and regulations provide an adequate remedy for any error that occurred in prior proceedings.”<sup>104</sup> In *Davis v. Shinseki*,<sup>105</sup> the veteran argued that he, like the veteran in *Cushman*, suffered a constitutional violation because adjudication was based on a falsified document.<sup>106</sup> The court rejected the claim, however, because unlike in *Cushman* there was no credible evidence that there was in fact a falsification.<sup>107</sup>

## 2. CAVC

The CAVC has also explored *Cushman*. Through June 2011, the CAVC has cited *Cushman* twenty-one times.<sup>108</sup> Ten of these citations were non-substantive with CAVC ruling in favor of the veteran on other grounds and avoiding the constitutional issue, merely citing *Cushman*

98. *Id.* at 1353, 1355.

99. *Id.* at 1355 (“In some circumstances, a mentally disabled applicant, known to be so disabled by VA, may receive additional protections while pursuing an application for benefits.”).

100. *Id.* at 1355–56.

101. The issue is significant because of the large number of veterans claiming to suffer from some type of mental condition purportedly entitling them to benefits. For example, in fiscal year 2010 there were nearly 800,000 veterans receiving service-connected compensation for “mental disorders.” *See ANNUAL BENEFITS REPORT 2010, supra* note 1, at 14. That was a 9.4% increase from fiscal year 2009. *Id.*

102. *Guillory v. Shinseki*, 603 F.3d 981 (Fed. Cir. 2010).

103. *Id.* at 987–88.

104. *Id.*

105. *Davis v. Shinseki*, 401 Fed. App'x 533 (Fed. Cir. Nov. 5, 2010).

106. *Id.* at 534.

107. *Id.* at 535–36.

108. This figure was derived by using the “Shepards” function on LEXIS. In one case, the CAVC issued an initial decision that was later superseded by one issued in response to a motion for reconsideration. *See Poole v. Shinseki*, No. 08-3681, 2011 U.S. App. Vet. Claims LEXIS 1002 (Vet. App. May 4, 2011), *substituted for* *Poole v. Shinseki*, No. 08-3681, 2011 U.S. App. Vet. Claims LEXIS 46 (Vet. App. Jan. 11, 2011). These cases are counted as one for purposes of this analysis.

generally for its basic holding, or ruling in Mr. Cushman's own case in the wake of the Federal Circuit's decision.<sup>109</sup> In eleven decisions, the CAVC wrestled to some degree with *Cushman*'s substantive issues. In none of these decisions did the CAVC find a constitutional violation, but it did occasionally suggest that under the correct set of facts, there would be a serious question concerning due process. In the balance of this subpart, I briefly summarize the CAVC's substantive exploration of *Cushman*, which can be generally grouped into four categories.

The court considered several cases concerning documents used in the claims process. It applied *Cushman*'s specific holding dealing with an altered document, although it found in both situations in which this issue was addressed that the claimed alteration was not material in that case.<sup>110</sup> The court also faced situations in which veterans claimed the VA had lost or destroyed records. The CAVC held that in both situations the veteran had not established the factual predicate for the loss or destruction.<sup>111</sup> Significantly, however, the court also suggested that if the facts were different, there could be a serious constitutional question under *Cushman*.<sup>112</sup>

The CAVC also rejected constitutional challenges concerning purported VA failures to provide hearings or other matters associated with administrative appeals processes. The court underscored that due process requires a meaningful opportunity to be heard but concluded in

109. See *Gettler v. Shinseki*, No. 09-2257, 2011 U.S. App. Vet. Claims LEXIS 944 (Vet. App. Apr. 29, 2011) (avoiding issue by ruling in favor of veteran on other grounds); *Rhone v. Shinseki*, No. 09-2061, 2011 U.S. App. Vet. Claims LEXIS 436 (Vet. App. Mar. 2, 2011) (same); *Cushman v. Shinseki*, No. 08-3255, 2010 U.S. App. Vet. Claims LEXIS 2171 (Vet. App. Nov. 29, 2010) (applying *Cushman* pursuant to Federal Circuit's mandate to follow on case to Mr. Cushman's claims); *Hires v. Shinseki*, No. 10-1347, 2010 U.S. App. Vet. Claims LEXIS 1863 (Vet. App. Oct. 13, 2010) (avoiding issue by ruling in favor of veteran on other grounds); *Chabebe v. Shinseki*, No. 09-0114, 2010 U.S. App. Vet. Claims LEXIS 1484 (Vet. App. Aug. 16, 2010) (same); *Newgard v. Shinseki*, No. 08-0249, 2010 U.S. App. Vet. Claims LEXIS 844 (Vet. App. Apr. 30, 2010) (same), *aff'd in part and appeal dismissed in part*, No. 08-0249, 2011 U.S. App. LEXIS 2180 (Fed. Cir. Feb. 2, 2011); *Presley v. Shinseki*, No. 08-1717, 2010 U.S. App. Vet. Claims LEXIS 822, at \*9 n.3 (Vet. App. Apr. 30, 2010) (citing generally to *Cushman* for proposition that the Constitution requires adequate notice and an opportunity to be heard); *Rickett v. Shinseki*, 23 Vet. App. 366, 372 (2010) (Kasold, J., dissenting) (citing generally to *Cushman* for point that the Due Process Clause applies to veterans seeking benefits); *Cushman v. Shinseki*, No. 05-3207, 2009 U.S. App. Vet. Claims LEXIS 2178 (Vet. App. Dec. 15, 2009) (deciding on remand from Federal Circuit); *Harris v. Shinseki*, No. 07-2882, 2009 U.S. App. Vet. Claims LEXIS 2023 (Vet. App. Nov. 18, 2009) (avoiding issue by ruling favor of veteran on other grounds).

110. *Easter v. Shinseki*, No. 08-4003, 2010 U.S. App. Vet. Claims LEXIS 1990, at \*3-\*5 (Vet. App. Oct. 29, 2010); *Demps v. Shinseki*, No. 08-1945, 2010 U.S. App. Vet. Claims LEXIS 65, at \*9-\*11 (Vet. App. Jan. 15, 2010).

111. *Watson v. Shinseki*, No. 08-3816, 2010 U.S. App. Vet. Claims LEXIS 992, at \*6 (Vet. App. May 28, 2010); *Alexce v. Shinseki*, No. 06-3559, 2009 U.S. App. Vet. Claims LEXIS 1663, at \*2 (Vet. App. Sept. 22, 2009).

112. *Watson*, No. 08-3816, 2010 U.S. App. Vet. Claims LEXIS 992, at \*6-\*7; *Alexce*, 2009 U.S. App. Vet. Claims LEXIS 1663, at \*2.

each case that the veteran had been afforded such an opportunity.<sup>113</sup> In a related situation, the court also held that the VA had not violated a veteran's due process rights when it did not specifically inform him of a deadline within which he needed to respond to a request for information.<sup>114</sup> The court concluded that the veteran had constructive knowledge of the deadline because it was contained in a specific regulation.<sup>115</sup>

The CAVC also considered two constitutionally-based challenges to the types of evidence the VA considered in the claims adjudication process. In one case, a veteran argued that the VA violated his due process rights by basing its decision in part on a medical journal article that was not provided to the veteran.<sup>116</sup> In the other case, a veteran's widow claimed that her due process rights were violated when the VA interviewed her ex-husband's mother without the widow or her counsel being present.<sup>117</sup> In both cases, the CAVC rejected the constitutional argument because of a lack of showing of any harm even assuming there was a constitutional violation.<sup>118</sup>

Finally, the court dealt with the intersection of the Due Process Clause and two important doctrines in veterans' benefits law. First, the CAVC discussed *Cushman's* implications concerning the so-called implicit denial doctrine.<sup>119</sup> That doctrine dictates that a veteran's claim for benefits will be deemed denied even if the VA does not expressly so state when the VA adjudicates any other claim that is sufficiently similar to the one deemed denied that a veteran would be on notice of the intent of the VA's action.<sup>120</sup> The doctrine is significant for a number of reasons, perhaps most significantly because a finally adjudicated claim for which the veteran has not filed an appeal within the allotted time may only be attacked by claiming that the earlier decision was the result

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113. *Poole v. Shinseki*, No. 08-3681, 2011 U.S. App. Vet. Claims LEXIS 1002, at \*19-\*22 (May 4, 2011); *Easter*, 2010 U.S. App. Vet. Claims LEXIS 1990 at \*3-\*6. In a related vein, the court rejected an argument that a veteran had a right to have a particular RO respond to a NOD. See *Mathis v. Shinseki*, No. 11-1063, 2011 U.S. App. Vet. Claims LEXIS 864, at \*3-\*5 (Vet. App. Apr. 25, 2011).

114. *Boening v. Shinseki*, No. 08-0475, 2010 U.S. App. Vet. Claims LEXIS 1405, at \*8-\*11 (Vet. App. July 30, 2010).

115. *Id.* at \*8-\*10.

116. *Ramold v. Shinseki*, No. 08-1609 2010 U.S. App. Vet. Claims LEXIS 735, at \*14-\*15 (Vet. App. Apr. 23, 2010).

117. *Winsett v. Shinseki*, No. 08-0210, 2010 U.S. App. Vet. Claims LEXIS 95, at \*22-\*25 (Vet. App. Jan. 26, 2010), *aff'd in part and appeal dismissed in part*, No. 08-0210, 2010 U.S. App. LEXIS 20830 (Fed. Cir. Oct. 8, 2010).

118. *Ramold*, 2010 U.S. App. Vet. Claims LEXIS 735, at \*15-\*17; *Winsett*, 2010 U.S. App. Vet. Claims LEXIS 95, at \*23-\*25.

119. *Cogburn v. Shinseki*, 24 Vet. App. 205 (2010).

120. See, e.g., *Williams v. Peake*, 521 F.3d 1348, 1350 (Fed. Cir. 2008); *Ingram v. Nicholson*, 21 Vet. App. 232, 243-51 (2007).

of clear and unmistakable error or by the submission of new and material evidence.<sup>121</sup> The CVAC held that the implicit denial doctrine does not facially violate the Due Process Clause<sup>122</sup> and was not applied in an unconstitutional manner with respect to the veteran at issue.<sup>123</sup>

Second, the CAVC considered the intersection between *Cushman* and the presumption that the VA follows its regular procedures.<sup>124</sup> The so-called “presumption of regularity” is one under which the court will presume that “government officials properly discharge their official duties in good faith and in accordance with law and governing regulations.”<sup>125</sup> It applies to matters such as establishing a prima facie case that a notice was mailed to a veteran concerning a VA action or the scheduling of an examination.<sup>126</sup> The presumption can be overcome by a veteran’s submission of “clear evidence” that the particular procedure was not followed.<sup>127</sup>

Although the court described the argument as “confusing,” the veteran in *Kyhn* argued that the CAVC’s reliance on the presumption of regularity regarding the mailing of a notice for a medical examination was a violation of due process.<sup>128</sup> The court declined to rule whether reliance on the presumption raised a constitutional issue because it concluded that any such error was harmless.<sup>129</sup> Thus, the court again left the contours of due process in the veterans’ benefits system hazy.

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This Part has described the Federal Circuit’s important holding in *Cushman* as well as the interpretation of that decision in the Federal Circuit and the CAVC. A review of these decisions shows that these courts are moving cautiously in their exploration of the contours of the due process requirements in the context of veterans’ benefits determinations. But these decisions also show the potential power of that decision with respect to important parts of the system by which veterans’ claims are considered. The next two Parts consider such implications in greater detail.

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121. See VETERANS BENEFITS MANUAL, *supra* note 1, at 845 (providing overview of ways to challenge previously adjudicated denials for which the veteran did not appeal).

122. *Cogburn*, 24 Vet. App. at 213.

123. *Id.* at 213–18.

124. *Kyhn v. Shinseki*, 24 Vet. App. 228 (2011).

125. *Id.* at 232.

126. *Id.*

127. *Id.*

128. *Id.* at 236 n.1.

129. *Id.*

### III. *CUSHMAN*'S STRUCTURAL IMPLICATIONS FOR THE SYSTEM

*Cushman* is a significant decision standing alone in the area of constitutional due process. As discussed in Part II, the Federal Circuit has joined the debate in the circuit courts about an open issue of American constitutional law, an issue that has the potential to affect millions of Americans. But the decision also has profound implications on the structure of the system by which veterans' benefits are awarded and reviewed. This Part considers those structure implications. Part IV then turns to what *Cushman* reveals concerning an underlying tension regarding the very nature of that system.

The next subpart begins with a consideration of what *Cushman* may mean for the various governmental actors in the system. I then turn to *Cushman*'s implications for the more general development of the law by which veterans' benefits are awarded.

#### A. Governmental Adjudicators

##### 1. Impact on the Federal Circuit

As discussed above, Congress put into place a unique structure of judicial review for veterans' benefits determinations.<sup>130</sup> Congress created a specialized Article I court designed to develop expertise in this area of law.<sup>131</sup> At the same time, Congress recognized the value of Article III judicial review by providing for an appeal as a right to the Federal Circuit.<sup>132</sup> Importantly, however, Congress did not provide for plenary review in the Federal Circuit. Instead, Congress provided that only pure questions of law would be subject to Article III review.<sup>133</sup> The only exception to this restriction is for cases presenting a "constitutional issue."<sup>134</sup>

One can certainly debate the wisdom of creating a system with two-levels of appellate appeal as of right. Also, one can debate whether having done so, it makes sense to limit one layer of such review, as Congress did, with the Federal Circuit.<sup>135</sup> But the fact of the matter is

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130. See *supra* Part I.

131. The CAVC is only the sixth court of national jurisdiction Congress created in the history of the United States. See *History*, U.S. CT. APPEALS VETERANS CLAIMS, <http://www.uscourts.cavc.gov/about/History.cfm> (last visited May 30, 2012). I have written elsewhere about the monumental task the CAVC faced in developing a body of law where none existed as well as establishing the CAVC as an institution. See Allen, *Legislative Commission*, *supra* note 17, at 372–75.

132. 38 U.S.C. § 7292 (2006).

133. 38 U.S.C. § 7292(d)(2).

134. *Id.*

135. I have discussed this issue as well as the tension it creates between these courts in other

that this is the system Congress elected to design. The Federal Circuit's role to review run of the mill disputes concerning factual determinations and the application of legal principles to facts is sharply constrained. *Cushman* affects this congressional choice in a significant respect.

After *Cushman* every time a veteran makes an assertion that some procedure the VA employs (or does not employ) results in a violation of due process, the Federal Circuit will no longer be subject to the limits on its jurisdiction because there will be a "constitutional issue" presented.<sup>136</sup> The Federal Circuit's role in the process will thereby be enhanced because there will be a broader range of matters on which it will exercise judgment.

This point is not trivial. First, the scope of potential issues implicated by due process claims is potentially large and intersects with major aspects of the veterans' benefits system. For example, medical evidence is often critical in service-connection benefits cases.<sup>137</sup> Issues concerning the quality of the evidence the VA adjudicators consider as well as the procedures in place to allow the veteran to test that evidence are central to many cases.<sup>138</sup> Those matters can easily be framed around the constitutional requirement of due process.

Indeed, in the short time since *Cushman* was decided, there have already been claims made arguing that the manner by which the medical evidence was considered require reversal.<sup>139</sup> Because these claims can now be couched in constitutional terms, the Federal Circuit will have a much broader role in shaping the means by which the VA carries out its duties in individual cases. For example, in *Gambill v. Shinseki*, a veteran claimed he was constitutionally entitled to submit interrogatories to doctors providing medial opinions to the Board.<sup>140</sup> As discussed *supra*,<sup>141</sup> the Federal Circuit avoided answering the question because it concluded that even if there was such a right, any error in Mr. Gambill's case was harmless.<sup>142</sup> For present purposes, what is significant about *Gambill* is that the Federal Circuit reached its conclusion concerning the harmlessness of any error by considering whether the Board had correctly determined that the evidence the veteran submitted was

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writings. See, e.g., Allen, *Significant Developments: 2008–2010*, *supra* note 65, at 55–56; Allen, *Significant Developments: 2004–2006*, *supra* note 17, at 523–26.

136. 38 U.S.C. § 7292(d)(2).

137. I discuss the importance of medical evidence in service-connection cases below. See *infra* notes 185–88 and accompanying text.

138. *Id.*

139. See, e.g., *Edwards v. Shinseki*, 582 F.3d 1351 (Fed. Cir. 2009); *Gambill v. Shinseki*, 576 F.3d 1307 (Fed. Cir. 2009).

140. *Gambill*, 576 F.3d at 1310.

141. See *supra* Part II (discussing *Cushman* and its progeny including *Gambill*).

142. *Gambill*, 576 F.3d at 1311–13.

insufficient to establish service connection.<sup>143</sup> Such an analysis is the application of law to fact, something over which the Federal Circuit would normally not have jurisdiction.<sup>144</sup> It did so in *Gambill* because of the presence of a constitutional issue.<sup>145</sup>

All of this is not to say that such a result is normatively undesirable. Rather, the point is that *Cushman* has altered in a significant way the appellate balance Congress likely thought it had enacted through the VJRA.

A second point goes to institutional competence. The CAVC was designed to be the primary expert in the area of veterans law. That body has exclusive jurisdiction over all claims by veterans dissatisfied with the VA's administrative benefits determinations.<sup>146</sup> Moreover, those are the only claims over which the CAVC has jurisdiction.<sup>147</sup> The Supreme Court has recognized that the structure of appellate review Congress established might often make the CAVC a better court to make certain factually-based determinations under the system Congress created.<sup>148</sup> Of course, this statement does not mean that the Federal Circuit does not play a role; it does as Congress provides. This statement further suggests that the CAVC sees far more veterans law cases than does the Federal Circuit.<sup>149</sup> *Cushman* means that the Federal Circuit is now poised to take a more active role in assessing the often fact-bound assessments of what process is due under *Mathews v. Eldridge*. This

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143. *Id.* at 1312.

144. 38 U.S.C. § 7292(d)(2) (2006).

145. One could make a similar point concerning *Edwards*. In that case, the Federal Circuit specifically noted that because the veteran was asserting a constitutional claim the court was able to review factual determinations "to the extent necessary to ensure compliance with due process." *Edwards v. Shinseki*, 582 F.3d 1351, 1354 (Fed. Cir. 2009).

146. 38 U.S.C. § 7252(a) (2006).

147. 38 U.S.C. § 7252.

148. *Shinseki v. Sanders*, 556 U.S. 396, 411 (2009). The issue in *Sanders* concerned how to determine whether certain VA errors were "harmless" to veterans. The Supreme Court rejected the Federal Circuit's rule, noting that "the Federal Circuit is the wrong court to make such [harmless error] determinations." *Id.* It continued by commenting that "[i]t is the Veterans Court [i.e., the CAVC], not the Federal Circuit, that sees sufficient case-specific raw material in veterans' cases to make empirically-based, nonbinding generalizations . . ." about the types of errors that are likely to be harmless. *Id.* at 412. In a more amusing vein, Justice Breyer, the author of the Court's opinion in *Sanders*, extended this line of reasoning to the Supreme Court when he said at oral argument in the case: "Between me and the Veterans Court, as to who knows best how to work this system, it's ten to one it's not me." Transcript of Oral Argument, *Shinseki v. Sanders*, 556 U.S. 396 (2009) (No. 07-1209), 2008 WL 5129089, at \*39.

149. For example, in fiscal year 2009 the CAVC decided a total of 4379 cases. See CAVC ANNUAL REPORTS, *supra* note 36. In contrast, in that fiscal year the Federal Circuit decided 173 cases originating in the CAVC. See U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT, APPEALS FILED, TERMINATED AND PENDING DURING THE TWELVE-MONTH PERIOD ENDED SEPTEMBER 30, 2009, available at <http://www.cafc.uscourts.gov/images/stories/the-court/statistics/b08sep09.pdf> (last visited May 30, 2012).

shift is a significant one in the system Congress implemented.

## 2. Impact on the CAVC

*Cushman* also has a potential impact on the CAVC. Clearly, *Cushman* will require the CAVC to address additional issues that were not implicated prior to the application of constitutional due process principles to the benefits application process. I discussed some such decisions above.<sup>150</sup> However, the judges of that court are diligent and certainly more than competent to address these matters.

*Cushman* will have an additional implication for the CAVC if the judges of that court treat the matter in accordance with the formal rules of that body. As mentioned earlier,<sup>151</sup> Congress provided that the CAVC could hear cases either in panels of at least three judges or by single judge adjudication.<sup>152</sup> Single-judge adjudication raises significant issues because when that procedure is utilized, it results in a decision for the court from one judge acting alone. The benefits of appellate decision-making in which one has collegial interchange between judicial actors are reduced.<sup>153</sup> The CAVC apparently understands this consequence of such single-judge adjudication because it limits its use to cases in which, in theory at least, the issues at play do not involve the breaking of new legal ground.<sup>154</sup> Single-judge disposition is not appropriate if a case establishes a new rule of law,<sup>155</sup> modifies or clarifies an existing rule of law,<sup>156</sup> or applies an established rule of law to a novel factual situation.<sup>157</sup> Moreover, the court precludes its single-judge decisions from being cited as precedent.<sup>158</sup>

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150. *See supra* Part II.B.2.

151. *See supra* Part I.A.

152. 38 U.S.C. § 7254(b).

153. *See* Allen, *Significant Developments: 2004–2006*, *supra* note 17, at 518 n.208 (collecting sources concerning the importance of collegial decision-making in the appellate context). To be sure, the CAVC's Internal Operating Procedures provide that single judge decisions must be circulated to all judges, and those judges do have the authority to request a panel for a case, if those judges choose to do so. *See* UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS, INTERNAL OPERATING PROCEDURES pt. II(b), at 2, [hereinafter CAVC IOP] available at [http://www.uscourts.cavc.gov/court\\_procedures/InternalOperatingProcedures.cfm](http://www.uscourts.cavc.gov/court_procedures/InternalOperatingProcedures.cfm). But one is certainly left to wonder whether, given the court's caseload, the same type of collegial decision-making takes place in such a situation.

154. *See* CAVC IOP, *supra* note 153, at pt. I(b)(2) (adopting the standard set out in *Frankel v. Derwinski*, 1 Vet. App. 23 (1990) to determine whether a case is appropriate for resolution by a single judge).

155. *Id.* at pt. I(b)(2), adopting the standard set forth in *Frankel v. Derwinski*, 1 Vet. App. 23, 25–26 (1990) (outlining standard for single judge adjudication).

156. *Id.*

157. *Id.*

158. *See Rule 30: Citation of Certain Authority*, U.S. CT. APPEALS VETERANS CLAIMS (Feb. 3,

I have been critical of the extent to which the CAVC utilizes single-judge opinions, largely because such decisions do not allow the law to grow, at least not transparently.<sup>159</sup> Of course, the counter-argument is that the crushing caseload the court faces requires out of necessity that the court use the procedure in a large percentage of its cases.<sup>160</sup> If the CAVC is to be true to its stated standards for utilizing the single judge authority, one would expect that the court will need to hear more cases than it otherwise would have done through judicial panels. After all, since *Cushman* broke new ground, one would expect that a great many challenges would either clarify what the flexible due process standard requires or, at the very least, apply a newly established legal principle to a novel factual circumstance. This result would mean that *Cushman* would have altered the procedural way in which the CAVC processes its caseload. While the Federal Circuit is certainly a superior court in the hierarchy Congress created, this outcome is at least somewhat surprising given the independent nature of the CAVC.

A more disturbing consequence of *Cushman* may be its effect on what the CAVC actually does in terms of complying with its own procedures for utilizing the single-judge approach. Since *Cushman* through June 2011, the CAVC has decided eleven cases in which the court engaged in a substantive discussion of constitutional due process issues under *Cushman*.<sup>161</sup> In over 80% of those cases, the court decided the case using the single-judge procedure.<sup>162</sup>

To the extent these CAVC cases concerned claims of altered documents, single-judge disposition was clearly appropriate since that was the issue in *Cushman*.<sup>163</sup> However, the CAVC's single-judge

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2012), available at [http://www.uscourts.cavc.gov/court\\_procedures/Rule30a.cfm](http://www.uscourts.cavc.gov/court_procedures/Rule30a.cfm). Cases decided by single judges bear a legend beneath the caption noting that “[t]his action may not be cited as precedent” citing to Rule 30(a). See, e.g., *Rhone v. Shinseki*, No. 09-2061, 2011 U.S. App. Vet. Claims LEXIS 436 (Vet. App. Mar. 2, 2011). I am unaware of any single-judge memorandum decision in which this citation restricted is not included.

159. See, e.g., Allen, *Significant Developments: 2004–2006*, *supra* note 17, at 515–21.

160. See *supra* Part I (discussing workload of the CAVC).

161. See *supra* Part II.B.2 (discussing post-*Cushman* developments in the CAVC).

162. The CAVC decided two cases by panel opinion. See *Kyhn v. Shinseki*, 24 Vet. App. 228 (2011); *Cogburn v. Shinseki*, 24 Vet. App. 205 (2010). The CAVC decided nine cases under the single-judge procedure. See *Poole v. Shinseki*, No. 08-3681, 2011 U.S. App. Vet. Claims LEXIS 1002 (Vet. App. May 4, 2011); *Mathis v. Shinseki*, No. 11-1063, 2011 U.S. App. Vet. Claims LEXIS 864 (Vet. App. Apr. 25, 2011); *Easter v. Shinseki*, No. 08-4003, 2010 U.S. App. Vet. Claims LEXIS 1990 (Vet. App. Oct. 29, 2010); *Boening v. Shinseki*, No. 08-0475, 2010 U.S. App. Vet. Claims LEXIS 1405 (Vet. App. July 30, 2010); *Watson v. Shinseki*, No. 08-3816, 2010 U.S. App. Vet. Claims 992 (Vet. App. May 28, 2010); *Ramold v. Shinseki*, No. 08-1609, 2010 U.S. App. Vet. Claims LEXIS 735 (Vet. App. Apr. 23, 2010); *Winsett v. Shinseki*, No. 08-0210, 2010 U.S. App. Vet. Claims LEXIS 95 (Vet. App. Jan. 26, 2010); *Demps v. Shinseki*, No. 08-1945, 2010 U.S. App. Vet. Claims LEXIS 65 (Vet. App. Jan. 15, 2010); *Alexce v. Shinseki*, No. 06-3559, 2009 U.S. App. Vet. Claims LEXIS 1663 (Vet. App. Sept. 22, 2009). I discussed each of these decisions above. See *supra* Part II.B.2.

163. Both *Easter* and *Demps* concerned this issue. See *Easter*, 2010 U.S. App. Vet. Claims

decisions have gone far beyond what could reasonably be described as variations on *Cushman*'s facts. For example, in *Boening* the issue was whether the VA had violated a veteran's due process rights by failing to inform him that if he did not respond to the VA's request for information within one year the VA would deem his claim abandoned.<sup>164</sup> In a single-judge memorandum decision, the CAVC held that there was no violation of due process because a person is charged with knowledge of the law.<sup>165</sup> This conclusion may very well be correct as a matter of law.<sup>166</sup> The point is that the question was new under *Cushman* and, as such, should have been the subject of panel consideration under the court's rules. Similarly, in *Winsett*, the claimant—purportedly a veteran's widow—argued that her due process rights were violated because the VA had conducted an interview of the veteran's mother without the widow or her representative being present.<sup>167</sup> The court also rejected this argument for numerous reasons.<sup>168</sup> Again, however, while the conclusion may be correct, the issue presented was not one that fell within the parameters fit for single-judge adjudication.

In the end, one of *Cushman*'s more significant effects may be exposing what some believe is already happening: the CAVC uses single-judge adjudication to resolve many more appeals than one would expect on the face of the court's Internal Operating Procedures. It is possible that the court's caseload simply makes it impracticable to assign panels to decide all cases. But if so, *Cushman* may provide an opportunity for the court to more forthrightly describe the cases for which it will utilize the single-judge procedure.

### 3. Impact on VA Adjudicators

*Cushman* will also have an impact on VA adjudicators. *Cushman* at least implicitly requires that all levels of adjudicators within the VA consider the constitutionality of the procedures employed in the process. This reality poses, and could lead to, several issues. First, the frontline adjudicators in the ROs are not required to be lawyers, and most are not.<sup>169</sup> These are diligent men and women who process a great many

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LEXIS 1990, at \*3–5; *Demps*, 2010 U.S. App. Vet. Claims LEXIS 65, at \*8–9.

164. *Boening*, 2010 U.S. App. Vet. Claims LEXIS 1405, at \*7–8.

165. *Id.* at \*8–9.

166. For example, as the court points out, *see id.*, the Supreme Court has held generally that people are assumed to know the law. *See Federal Crop. Ins. Corp. v. Merrill*, 332 U.S. 380, 384–85 (1947).

167. *Winsett*, 2010 U.S. App. Vet. Claims LEXIS 95, at \*22.

168. *Id.* at \*22–25.

169. Jeffrey Parker, *Two Perspectives on Legal Authority Within the Department of Veterans*

claims per year.<sup>170</sup> But these hardworking civil servants are, quite simply, not trained in the intricacies of constitutional law.<sup>171</sup> It seems unfair to ask them to make these assessments.

It is also unwise to entrust untrained civil servants with making such constitutional decisions, even if they have the authority to do so (which is not at all clear). Systemically, we should not favor developing systems based on the judgments of RO adjudicators who are supposedly focused on assessing veterans' substantive claims for benefits. This is especially the case when these adjudicators—no matter their level of commitment to veterans—may not have the basic educational background to provide confidence in their abilities.<sup>172</sup>

In addition, even if one were only to require these frontline RO adjudicators to apply constitutional principles articulated by other actors, the prospects for success would not be good. One commentator has noted that RO adjudicators were far less likely to implement judicial decisions than were Board members.<sup>173</sup> The reality is that *Cushman* poses significant structural challenges at the RO level of the system.

Moving from the frontline of VA adjudication, the same general types of concerns pertain to adjudication at the Board, although they are not as pronounced. Board Members, or veterans law judges, are all lawyers.<sup>174</sup> Thus, in comparison to RO adjudicators, the training concern is not so pronounced. But the concern remains nonetheless. Board Members are experts in the law of veterans' benefits.<sup>175</sup> They are not, however, experts in constitutional law, nor should they be. Yet *Cushman* requires the Board Members to address constitutional claims as part of their duties.

In addition, there is a potential anomaly introduced into this area as a

*Affairs Adjudication*, 1 VETERANS L. REV. 208, 216 (2009).

170. For example, nearly 350,000 people began to receive either a pension or service-connected disability or death compensation during fiscal year 2010 alone. See ANNUAL BENEFITS REPORT 2010, *supra* note 1, at 5.

171. Cf. Rory E. Riley, *Simplify, Simplify, Simplify—An Analysis of Two Decades of Judicial Review in the Veterans' Benefits Adjudication System*, 113 W. VA. L. REV. 67, 87 (2010) [hereinafter Riley, *Simplify*] (“Non-attorney adjudicators at the RO fall under this category of individuals who do not have specialized knowledge of the law. Although RO adjudicators are frequently praised for their ‘vast institutional knowledge’ of the VA system, the fact of the matter is that many do not possess the analytical abilities to ‘think like a lawyer.’”).

172. For example, in addition to not requiring a law degree, a recent study indicated a quarter of RO adjudicators do not even have a college degree. See James D. Ridgway, *Lessons the Veterans Benefits System Must Learn on Gathering Expert Witness Evidence*, 18 FED. CIR. B.J. 405, 408 n.24 (2010) [hereinafter Ridgway, *Expert Evidence*].

173. Riley, *Simplify*, *supra* note 171, at 85–86.

174. Veterans Programs Enhancement Act of 1998, Pub. L. No. 105-368, § 1002, 112 Stat. 3315, 3363 (1998) (mandating that all members of the Board be lawyers).

175. See, e.g., VETERANS BENEFITS MANUAL, *supra* note 1, at 972 (“Due to the specialized nature of [the Board’s] work, nearly all Veterans Law Judges are former BVA attorneys.”).

result of the congressional prohibition on appeal from a Board decision adverse to the Secretary.<sup>176</sup> The Board could potentially make a constitutional decision favorable to the veteran that is not appealable to any court.<sup>177</sup> That state of affairs seems inconsistent with the notion of judicial review at the heart of the VJRA. This form of decision-making could also lead to instability in the system. If the Board were to make such a decision, it would be binding on RO adjudication. Yet in some case down the road, the constitutional issue could be a component part of a matter in which a veteran is able to appeal. At that point, the judiciary would be in a position to address the issue. The courts could do so in a way that is at odds with the Board's earlier position, leading to perhaps unnecessary variance in the law.

### *B. Impact on the VA Systemically*

In addition to its significant impact on adjudicators, *Cushman* has a significant effect on how the procedures governing the award of veterans' benefits are developed more systemically. To understand how this is so, first recognize that before *Cushman*, there were procedures in place to assure that veterans seeking benefits had "fair" procedures.<sup>178</sup> Such procedures were not insignificant.<sup>179</sup> The reality, however, was that in the absence of *Cushman*, such procedures were the result of legislative or administrative grace. If there were to be additional procedures, they would need to come through these processes.

This is no longer the case. A decision from the Federal Circuit or the CAVC under the rule laid down in *Cushman* has the ability to create procedures as surely as the administrative process. In fact, the procedures dictated under *Cushman* will be far more powerful because they are the result of constitutional interpretation and the judicial department's duty to "say what the law is."<sup>180</sup>

Certain examples underscore this point. As I will discuss in more detail below, one recurrent complaint about the current system is that the

176. See 38 U.S.C. § 7252(a) (2006) (providing that the Secretary may not seek review of an adverse Board decision).

177. One wonders the extent to which the Board would be inclined to make such a decision. For example, as discussed above, two associate general counsels of the Board have taken a position that essentially negates *Cushman*'s impact. See *supra* note 69. At the very least, the article is suggestive that at least some lawyers associated with the Board are unlikely to read *Cushman* expansively.

178. See, e.g., *Gambill v. Shinseki*, 576 F.3d 1307, 1315–16 (Fed. Cir. 2009) (Bryson, J., concurring) (discussing statutory and regulatory procedures provided to veterans in connection with the claims process); see also *Thurber v. Brown*, 5 Vet. App. 119, 126 (1993) (concluding that statutory scheme required that veterans have notice of the evidence the VA uses to address their claims).

179. See, e.g., *Gambill*, 576 F.3d at 1315–16 (Bryson, J., concurring).

180. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

delays associated with receiving benefits to which veterans are entitled are much too extensive.<sup>181</sup> Aware of this serious concern, the VA, among other actions, adopted a pilot program called the Expedited Claims Adjudication Initiative (ECA).<sup>182</sup> The ECA was designed to test a number of streamlining features at a small number of ROs with the goal of determining how to reduce delays in the system.<sup>183</sup> I will not comment here on the efficacy or wisdom of the ECA. Nor do I suggest that any part of that initiative raises due process concerns. My point is that *Cushman* is an ever-present backdrop to the ECA as well as any other innovations the VA may elect to implement in the system. All such initiatives will be subject to the ultimate touchstone of the Fifth Amendment's Due Process Clause. This is not to say that *Cushman* is incorrect. Rather, it indicates a fundamental shift at some level of the responsibilities for crafting the fundamental nature of the veterans' benefit system.

One can also see *Cushman*'s impact on a more detailed issue that is central to many claims for service-connected disability compensation. Because of the nature of service-connection claims, issues concerning medical evidence and judgments are often critical.<sup>184</sup> In other words, while there are other ways to do so,<sup>185</sup> a veteran will often need to have medical evidence demonstrating that there is a connection between an in-service injury and a current disability.<sup>186</sup> Recognizing the centrality of this type of evidence, Congress specifically provided that the VA's duty to assist encompasses arranging for medical examinations in

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181. See *infra* Part IV.

182. See Board of Veterans' Appeals: Expedited Claims Adjudication Initiative—Pilot Program, 73 Fed. Reg. 20,571–72 (Apr. 16, 2008) (codified at 38 C.F.R. §§ 20.1500-10 (2008)).

183. For a description of the ECA, see Marcy W. Kreindler & Sarah B. Richmond, *Expedited Claims Adjudication Initiative (ECA): A Balancing Act Between Efficiency and Protecting Due Process Rights of Claimants*, 2 VETERANS L. REV. 55 (2010).

184. See, e.g., *Gambill*, 576 F.3d at 1322–23 (Bryson, J., concurring) (“In the [VA’s] system for determining whether particular disabilities are service-connected, the decision frequently turns on a medical judgment.”); VETERANS BENEFITS MANUAL, *supra* note 1, at 9 (discussing the important of medical evidence in the context of claims for service-connected disability compensation).

185. For example, in some situations a veteran’s lay testimony can provide the relevant evidence. See, e.g., *Jandreau v. Nicholson*, 492 F.3d 1372, 1377 (Fed. Cir. 2007) (“Lay evidence can be competent and sufficient to establish a diagnosis of a condition when (1) a layperson is competent to identify the medical condition, (2) the layperson is reporting a contemporaneous medical diagnosis, or (3) lay testimony describing symptoms at the time supports a later diagnosis by a medical professional.”) (footnote omitted).

186. See *supra* note 4 (describing elements for service-connected disability benefits); Ridgway, *Expert Evidence*, *supra* note 172, at 407 (noting that in most cases medical evidence is necessary to establish the “nexus” between a veteran’s current disability and an in-service injury). The CAVC has made clear that the Board may not use its own medical judgment. See, e.g., *Coburn v. Nicholson*, 19 Vet. App. 427, 433 (2006) (“[W]e caution the Board that, although it may reject medical opinions, it may not then substitute its own medical judgment for those rejected.”); *Colvin v. Derwinski*, 1 Vet. App. 171, 172 (1991) (holding that Board decisions needed to be based on “independent medical evidence.”).

service-connection disability claims.<sup>187</sup>

The process by which medical opinions are obtained and evaluated provides fertile ground for arguments that could be framed under the rubric of due process. I consider only one to make the point about *Cushman*'s potential systemic implications. The issue is the one the Federal Circuit faced, but did not resolve, in *Gambill*: what rights does a veteran have under the Constitution to "confront" a doctor on whose examination the Board or RO relies?<sup>188</sup> This question is highly significant precisely because medical evidence is often dispositive.

Before *Cushman*, the way in which the VA adjudicators considered medical evidence, including any rights a veteran had to address that evidence, were the creature of statute and regulation. To be sure, there was judicial review of these medically related matters.<sup>189</sup> But the fundamental reality was that if a veteran received some sort of protection or process, it ultimately came through these regulatory sources.

After *Cushman*, this is no longer the case. Take the specific question that divided Judges Moore and Bryson in their concurrences: should a veteran have the ability to use a limited number of interrogatories to probe the opinion a doctor rendered.<sup>190</sup> If Judge Moore's view prevailed, it would mean that as a matter of constitutional law, a veteran would be entitled to use such interrogatories. And as a consequence of this conclusion, the VA, or the courts, would be forced to take action in order to implement the constitutional requirement.

The questions that follow such a holding are numerous. How many interrogatories would the veteran be able to propound? What form should the interrogatories and the answers thereto take? What would be the scope of such interrogatories or, in other words, what information would be fair game?<sup>191</sup> Would a doctor be able to object to the

187. 38 U.S.C. § 5103A(d) (2006).

188. *Gambill*, 576 F.3d at 1311.

189. Decisions of both the Federal Circuit and the CAVC concerning medical matters are legion. See, e.g., *Rizzo v. Shinseki*, 508 F.3d 1288 (Fed. Cir. 2009) (concerning lack of requirement for VA to provide evidence concerning a doctor's credentials unless the veteran raises the issue); *Hogan v. Peake*, 544 F.3d 1295 (Fed. Cir. 2008) (concerning level of confidence to which a medical opinion must rise); *Nieves-Rodriguez v. Peake*, 22 Vet. App. 295 (2008) (providing guidance concerning means to assess the reliability of medical evidence); *Kowalski v. Nicholson*, 19 Vet. App. 171 (2005) (discussing authority of VA to schedule a medical examination even over the veteran's objection). One could literally fill pages of this Article with nothing but citations to cases dealing with matters concerning medical issues.

190. Compare *Gambill*, 576 F.3d at 1324 (Bryson, J., concurring) (rejecting need for interrogatories to test a medical opinion), with *id.* at 1330 (Moore, J., concurring) (concluding that interrogatories were required to satisfy due process). I discuss these concurring opinions in more detail below. See *infra* Part IV.

191. Perhaps the interrogatories would take the form of those under Rule 33 of the Federal Rules of Civil Procedure, but there is no need that this would be the case. FED. R. CIV. P. 33.

interrogatory? If not, would the VA adjudicator be able to sua sponte strike an interrogatory? After all, there is purportedly no adversary in the VA's proceedings.<sup>192</sup>

My point is not that these questions are ones incapable of being answered. Nor is it that the questions are ones that would otherwise not be on the table. Rather, the point is two-fold. First, *Cushman* means that the answers to these questions are now potentially matters of constitutional law over which the judiciary has ultimate control. Second, the manner in which these issues are addressed may be piecemeal. It is true that the VA could elect to conduct a stem-to-stern review of adjudicatory procedures with an eye toward what the Due Process Clause requires. If so, *Cushman* would still force action but the VA could assess each situation systemically. However, if the VA does not take this approach, individual lawyers will raise these issues in individual cases. There may not be a single entity concerned with the systemic view, other perhaps than the courts. But if so, then what *Cushman* effectively does is shift the locus of responsibility for the construction of important parts of the system to the third branch of government.

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As should be clear from the discussion in this Part, *Cushman's* implications for the various actors in the process by which veterans' benefits are awarded and reviewed are significant. The next Part considers what *Cushman* might mean for a consideration of the very foundation of that system.

#### IV. *CUSHMAN'S* IMPLICATIONS FOR THE FUNDAMENTAL NATURE OF THE SYSTEM

Beyond its implications on the adjudicators in the system and the related matters discussed in Part III, *Cushman* is also significant on a more fundamental level. As I described above, on its face the VA administrative process is non-adversarial and pro-claimant.<sup>193</sup> The decision to apply constitutional due process protections in the administrative process from the moment a veteran applies for benefits underscores a very real question about the true nature of the current system. Specifically, the decision highlights the extent to which the administrative process remains, if it ever was, one that is actually pro-

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192. See *supra* Part I.B (discussing non-adversarial nature of the administrative system).

193. See *supra* Part I.B (discussing contrasting descriptions of the natures of the administrative and judicial systems involved in the process of the receipt and review of veterans' benefits).

claimant and non-adversarial. If one sees the system as truly being pro-claimant and non-adversarial, *Cushman*'s rules seem redundant at best; the system will take care of claimants. If, on the other hand, one questions whether the system truly is pro-claimant and non-adversarial, implementing due process protections makes more sense. Considering *Cushman* allows one to step back and assess the system that currently serves our nation's veterans.

Correctly identifying the true nature of the administrative process is no mere technicality. A proper identification has real world significance for the men and women who agree to defend our collective liberty. This nation's recent conflict in Iraq provides just one example. The great majority of troops involved in that conflict were young men and women with relatively little formal education.<sup>194</sup> As a United States district judge noted recently, "[M]any of these soldiers, once they separate and become veterans, may have difficulty navigating complex benefit application procedures unless they are provided with substantial assistance."<sup>195</sup> If the system these veterans have to "navigate" is one in which the VA is actually acting in their interest in a pro-claimant, non-adversarial manner, the district judge's concern is misplaced. If, on the other hand, the process is non-adversarial in name only, the judge's concern is one we should all share.

This concern is not merely a prediction of what could happen. It is descriptive of a divide that already exists in the Federal Circuit. I have discussed earlier *Gambill v. Shinseki*.<sup>196</sup> Recall that in *Gambill* the Federal Circuit declined to decide whether a veteran is entitled to propound interrogatories to doctors on whose medical opinion the Board relies.<sup>197</sup> The court held that even if due process required such interrogatories, any error in Mr. Gambill's case was harmless.<sup>198</sup>

Despite the Federal Circuit's panel's avoidance of the issue of what due process requires in a situation such as Mr. Gambill's, two judges on that panel wrote concurrences in which they reached starkly different conclusions on the substantive constitutional question. Judge Bryson

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194. These statistics come from the findings of fact entered by the district judge in *Veterans for Common Sense v. Peake*, 563 F. Supp. 2d 1049, 1070 (N.D. Cal. 2008), *aff'd in part and rev'd in part sub nom. Veterans for Common Sense v. Shinseki*, 2012 U.S. App. LEXIS 9230 (9th Cir. May 7, 2012) (en banc). Specifically, 82% of Army personnel and 89% of Marines had a high school education or less. *Id.* I discuss the Ninth Circuit's important decision in *Veterans for Common Sense* in the post-script to this Article.

195. *Id.* at 1070.

196. *Gambill v. Shinseki*, 576 F.3d 1307 (Fed. Cir 2009); *see supra* Parts II–III (discussing *Gambill* both in terms of one of the Federal Circuit's decisions applying *Cushman*, Part II, and as an example of the far-reaching implications of the decision in the critical area of medical evidence, Part III).

197. *Gambill*, 576 F.3d at 1311.

198. *Id.* at 1311–13.

argued that a right to confront a medical opinion through interrogatories was not required under the Due Process Clause.<sup>199</sup> In contrast, Judge Moore concluded due process principles did require opportunity for confrontation.<sup>200</sup>

Significantly, the debate between Judges Bryson and Moore exposes their respective views of the nature of the VA's administrative process. In concluding that due process does not require the right to confront medical testimony on which the Board relies, Judge Bryson placed great weight on the non-adversarial and pro-claimant nature of the administrative process.<sup>201</sup> For example, he noted that "the use of interrogatories would undermine, at least to some extent, the non-adversarial nature of the veterans' compensation system by forcing medical personnel into an adversarial posture with regard to veteran claimants."<sup>202</sup> For Judge Bryson because the system is, in fact, non-adversarial, interrogatories would be fundamentally inconsistent with its design.<sup>203</sup>

Judge Moore reached a fundamentally different conclusion than Judge Bryson, largely because she started at a very different point. Judge Moore did not assert that the veterans' benefits system is adversarial like traditional courts proceedings.<sup>204</sup> However, unlike Judge Bryson, Judge Moore argued that the system has become more adversarial than in the past.<sup>205</sup> Importantly, she noted that holding that due process requires a means to test medical opinions would not make the system adversarial precisely because "by the time a veteran has the need to question a doctor, that doctor has already provided an opinion *adverse* to the veteran's interests—the system has already become adversarial."<sup>206</sup> This dispute between Judge Moore and Judge Bryson is illustrative of the old adage: where one sits dictates where one stands. In other words, their respective conclusions about what the Constitution requires flow in large part from their competing understandings of the nature of the administrative process. *Cushman* merely drove this

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199. *Id.* at 1324 (Bryson, J., concurring).

200. *Id.* at 1330 (Moore, J., concurring).

201. *See, e.g., id.* at 1313–16, 1320–22 (Bryson, J., concurring).

202. *Id.* at 1320.

203. *Id.* at 1320–21 ("I cannot lightly disregard the interest in maintaining the nonadversarial nature of the system. When that interest is balanced against the limited benefits of allowing interrogatories, I conclude that the availability of interrogatories is not constitutionally mandated.")

204. *See, e.g., id.* at 1324 (noting the system has "paternalistic attributes") (Moore, J., concurring).

205. *See, e.g., id.* at 1328 ("For better or worse, we have noted the increasingly adversarial nature of the veterans' benefits system . . ."); *see also id.* at 1327–28 (discussing how increased presence of lawyers in the system has made it more adversarial, a topic to which I return later in this Part).

206. *Id.* at 1326–27; *see also id.* at 1324 ("I posit that because a veteran only needs interrogatories to challenge an opinion that contradicts his claims of entitlement, the process is already adversarial by virtue of the opinion.")

judicial dispute to the surface.<sup>207</sup>

There have long been debates about the true nature of the VA's benefits system as well as what the ideal system might look like.<sup>208</sup> Indeed, even before the debate between Judges Moore and Bryson, the Federal Circuit has itself appeared somewhat schizophrenic about the true nature of the system. On the one hand, one can cite opinions in which the Federal Circuit has repeated the mantra that the VA's system is non-adversarial and pro-claimant.<sup>209</sup> On the other hand, the Federal Circuit has also discussed how the administrative system has become more traditionally adversarial.<sup>210</sup> Perhaps it has; nevertheless, *Cushman* comes at a time in which other factors are—or should be—focusing decision-makers' attention on the critical issue of the true system veterans face.

In the years before *Cushman*, several developments had either highlighted questions concerning the nature of the system or altered the system in a way that increases its adversarial nature. First, certain groups of dissatisfied veterans turned away from the VA process and

207. One could also see this point at play in the Supreme Court's decision prior to the VJRA in *Walters*. The Court there upheld the limitations on fees lawyers could charge in connection with veterans' benefits matters. See, e.g., *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 334 (1985). A significant reason the Court ruled as it did was that it did not see the need for counsel in a system that was non-adversarial. *Id.* at 333–34 (“This case is further distinguishable from our prior decisions because the process here is not designed to operate adversarially. While counsel may well be needed to respond to opposing counsel or other forms of adversary in a trial-type proceeding, where as here no such adversary appears, and in addition a claimant or recipient is provided with substitute safeguards such as a competent representative, a decision-maker whose duty it is to aid the claimant, and significant concessions with respect to the claimant's burden of proof, the need for counsel is considerably diminished.”).

208. See, e.g., Allen, *Significant Developments: 2004–2006*, *supra* note 17, at 526–28; Kenneth M. Carpenter, *Why Paternalism in Review of the Denial of Veterans Benefits Claims is Detrimental to Claimants*, 13 KAN. J.L. & PUB. POL'Y 285 (2004); Richard E. Levy, *Of Two Minds: Charitable and Social Insurance Models in the Veterans Benefits System*, 13 KAN. J.L. & PUB. POL'Y 303 (2004); Gary E. O'Connor, *Rendering to Caesar: A Response to Professor O'Reilly*, 53 ADMIN. L. REV. 343 (2001); James T. O'Reilly, *Burying Caesar: Replacement of the Veterans Appeals Process is Needed to Provide Fairness to Claimants*, 53 ADMIN. L. REV. 223 (2001); Ridgway, *Twenty Years*, *supra* note 65, at 251–53, 295–98; Riley, *Pro-Claimant*, *supra* note 49, at 80–92, 114–16. In fact, these disputes pre-date the enactment of the VJRA. In its 1985 decision in *Walters*, the Supreme Court noted and ultimately rejected the district judge's conclusions that the administrative system was in reality more adversarial than it appears. See, e.g., *Walters*, 473 U.S. at 314 n.6.

209. See, e.g., *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998) (explaining that “This court and the Supreme Court both have long recognized that the character of the veterans' benefits statutes is strongly and uniquely pro-claimant” and characterizing the process as a “historically non-adversarial system of awarding benefits to veterans”).

210. See, e.g., *Bailey v. West*, 160 F.3d 1360, 1365 (Fed. Cir. 1998) (commenting that after enactment of the VCRA, “[I]t appears that the system has changed from a nonadversarial, *ex parte*, paternalistic system for adjudicating veterans' claims, to one in which veterans . . . must satisfy formal legal requirements, often without the benefit of legal counsel, before they are entitled to administrative and judicial review.”) (internal quotes omitted).

sought relief from federal district courts.<sup>211</sup> These veterans complained of systemic faults in the system, including a lack of appropriate procedures,<sup>212</sup> as well as lengthy delays in having claims resolved,<sup>213</sup> that the veterans claimed demanded judicial intervention. While these veterans were unsuccessful,<sup>214</sup> their claims have created pressure on those charged with serving veterans to re-evaluate current procedures.<sup>215</sup>

At the same time, the VA has engaged in conduct that at least raises eyebrows if one assumes that the administrative process is a pro-claimant non-adversarial one. For example, in 2007, the VA issued so-called “Fast Letter 07-19” to its ROs.<sup>216</sup> A Fast Letter is a means by which changes in procedure are communicated to line adjudicators in the system.<sup>217</sup> Fast Letter 07-19 provided that for any award an RO issued that either involved a lump sum award of \$250,000 or more or which involved a retroactive award of any amount for a period of eight years or more, the RO was to follow a special procedure.<sup>218</sup> With respect to these so-called “Extraordinary Awards,” the RO was to transmit its decision to the director of the Compensation and Pension Service for “final determination.”<sup>219</sup> Significantly, the Fast Letter also instructed the RO that it was not to inform the veteran or any representative of the veteran that the RO had reached a decision or that the director would be involved in the process.<sup>220</sup> After becoming aware

211. See, e.g., *Viet. Veterans of Am. v. Shinseki*, 599 F.3d 654 (Fed. Cir. 2010); *Veterans for Common Sense v. Peake*, 563 F. Supp. 2d 1049 (N.D. Cal. 2008); see also *Phillips v. Dep't of Veterans Affairs*, No. 10 C 1698, 2011 U.S. Dist. LEXIS 25959 (N.D. Ill. Mar. 9, 2011) (concerning individual veteran challenge).

212. See, e.g., *Veterans for Common Sense*, 563 F. Supp. 2d at 1086–89 (discussing plaintiffs' claims concerning defects in VA adjudicatory procedures); *Phillips*, 2011 U.S. Dist. LEXIS 25959, at \*1 (noting that veteran complained of VA failure to provide a hearing on his claims for benefits).

213. See, e.g., *Viet. Veterans of Am.*, 599 F.3d at 657 (discussing plaintiffs' claims concerning unreasonable delays in deciding claims); *Veterans for Common Sense*, 563 F. Supp. 2d at 1083–86 (discussing plaintiffs' claims concerning delays in adjudicating claims); *Phillips*, 2011 U.S. Dist. LEXIS 20959, at \*1 (noting that veteran complained of “40-plus years” of delay in adjudication). Delays in the system have also been the subject of academic discussion. See, e.g., Jacob B. Natwick, *Unreasonable Delay at the VA: Why Federal District Courts Should Intervene and Remedy Five-Year Delays in Veterans' Mental-Health Benefits Appeals*, 95 IOWA L. REV. 723 (2010); Riley, *Pro-Claimant*, *supra* note 49, at 92–96.

214. *Viet. Veterans of Am.*, 599 F.3d at 662 (upholding dismissal of lawsuit based on lack of standing); *Veterans for Common Sense*, 563 F. Supp. 2d at 1091–92 (dismissing claims for lack of jurisdiction after bench trial); *Phillips*, 2011 U.S. Dist. LEXIS 25959, at \*1 (dismissing lawsuit for lack of subject matter jurisdiction).

215. See, e.g., *Viet. Veterans of Am.*, 599 F.3d at 657 (discussing congressional action, including General Accounting Office reports, concerning delays in VA resolution of claims for benefits).

216. See *Military Order of the Purple Heart of the USA v. Sec'y of Veterans Affairs*, 580 F.3d 1293, 1294 (Fed. Cir. 2009).

217. See *Veterans for Common Sense*, 563 F. Supp. 2d at 1076 (discussing Fast Letter procedure).

218. *Military Order of the Purple Heart*, 580 F.3d at 1294.

219. *Id.*

220. *Id.* at 1294–95.

of this Fast Letter, several veterans' advocacy groups challenged the VA's actions in the Federal Circuit.<sup>221</sup> The Federal Circuit held that the rule was invalid.<sup>222</sup> One could forgive veterans and their advocates for questioning the VA's commitment to pro-claimant procedures given the way in which it approached Fast Letter 07-19.<sup>223</sup>

Congress has also elevated the importance of the issue concerning the fundamental nature of the administrative system by increasing the role of lawyers in the veterans' benefits process. As lawyers become more involved in the system, it will, by definition, become more complex and formal.<sup>224</sup> Judge Moore in her concurring opinion in *Gambill* specifically noted how the increased presence of lawyers in the system pursuant to various congressional actions had reshaped the way in which that system operates.<sup>225</sup>

In sum, then, tensions between the avowed nature of the administrative process and the way that process works on the ground have been recognized for some time; and they have been building. *Cushman* brings those tensions into only starker focus. Given that reality, *Cushman*—whether normatively correct or not—should be embraced as an opportunity. Those involved in the important work on behalf of America's veterans should seize this opportunity to consciously consider how they can best serve those who have borne the battle. In the brief conclusion that follows in Part V, I discuss the conscientious consideration that *Cushman* should prompt.

## V. CONCLUSION

Two things should be apparent at this point. First, the system by

221. *Id.* at 1294. The Federal Circuit has exclusive jurisdiction to determine the lawfulness of rules and regulations the VA promulgates. 38 U.S.C. § 7292(c) (2006).

222. *Military Order of the Purple Heart*, 580 F.3d at 1297–98.

223. One could also refer in this regard to certain of VA's actions in response to CAVC decisions favorable to veterans. For example, the CAVC held the VA Secretary in contempt for failing to comply with the court's mandate to expeditiously address a remanded claim. *Harvey v. Shinseki*, 24 Vet. App. 284, 290 (2011). And in earlier years the CAVC had to admonish the VA for attempting to unilaterally suspend CAVC decisions while the VA pursued an appeal to the Federal Circuit. *See Ribaudo v. Nicholson*, 20 Vet. App. 552 (2007) (en banc); *Ramsey v. Nicholson*, 20 Vet. App. 16 (2006). I have discussed the importance of *Ribaudo* and *Ramsey* in prior writings. *See Allen, Legislative Commission, supra* note 17, at 381–83; *Allen, Significant Developments: 2004–2006, supra* note 17, at 512–14.

224. The Supreme Court has recognized this reality. *See, e.g., Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 323–24 (1985) (“A necessary concomitant of Congress' desire that a veteran not need a representative to assist him in making his claim was that the system should be as informal and nonadversarial as possible. . . . The regular introduction of lawyers into the proceedings would be quite unlikely to further this goal.”).

225. *Gambill v. Shinseki*, 576 F.3d 1307, 1327–28 (2009) (Moore, J., concurring); *but see id.* at 1313–16 (Bryson, J., concurring) (implicitly rejecting that the increased presence of lawyers in the system had altered its fundamental nature).

which we as a nation ensure that the men and women who have served honorably in the military receive what they have been promised is important. Commitments have been made to these veterans. Procedures must be in place to ensure that they receive prompt, accurate, transparent, and fair resolution of their claims.

Second, the system currently in place to achieve the goal of living up to these commitments has flaws. One can debate how serious those flaws might be, but it is beyond serious dispute that deficiencies exist.

*Cushman* provides the opportunity—perhaps even the necessity—to address the way in which the veterans' benefits system is constructed at a fundamental level. I have advocated for such a comprehensive review of the system even before *Cushman*.<sup>226</sup> Other serious scholars have done so as well.<sup>227</sup> We should not lose the opportunity *Cushman* provides to step back and consider how the system should operate. The answers to the serious questions at play are not easy, but the need to engage in this conversation is clear.

This conclusion is not the place in which to engage in the conversation *Cushman* requires. I have generally avoided taking positions about what the system should be because of the need to ensure that all relevant constituencies have a voice.<sup>228</sup> For now, then, I will conclude with the provocative thought that perhaps at the end of the day we need to face the reality that, no matter how well-meaning, paternalism to our veterans has served its purpose and may now be doing more harm than good.<sup>229</sup> If that is the case, we need to reorient the current system in a way that recognizes its more adversarial nature and builds processes that are based more on current realities and less on ideals that may no longer exist. At a minimum, we owe it to the women and men who have served this country to consciously consider this issue no matter how one ultimately resolves it.

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226. See Allen, *Legislative Commission*, *supra* note 17.

227. See, e.g., Ridgway, *Twenty Years*, *supra* note 65; Riley, *Simplify*, *supra* note 171; Riley, *Pro-Claimant*, *supra* note 49.

228. See, e.g., Allen, *Legislative Commission*, *supra* note 17, at 393.

229. Cf. *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting) (“Experience should teach us to be most on our guard to protect liberty when the Government’s purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.”). Justice Stevens quoted this passage from Justice Brandeis over twenty-five years ago in his dissent in *Walters*. *Walters*, 473 U.S. at 367 n.14 (Stevens, J., dissenting).