PETITIONERS REQUEST FOR CHANGE IN COURT RULES

UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

NO.

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PETITIONER

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Request for the court to formally adopt Fed. R. Civ. P. 11.

QUESTION PRESENTED

"How do we make certain the court is fully appraised of the history of the Secretary's legal position in a given matter?"

SUMMARY

In Costanza v. West, 12 Vet. App. 133 (1999), this court held: *"The filing of a petition before this Court is a serious matter and not a step to be taken lightly*. Cf. *Fed. R. Civ. P. 11(b)."* Under Fed. R. Civ. P. 11(b), every pleading and motion, or position advocated must – at the District Courts – be certified as being true to the best of the submitter's knowledge, information, and belief and formed after an inquiry reasonable under the circumstances. While this court has not published a truthfulness in the pleading requirement, it is the established precedent of the court to look to the Fed. R. Civ. P. 11(b) when considering the appropriateness of any filing presented. Unfortunately, this Court has not formally implemented its version of the truthfulness in pleading requirement mandated by Fed. R. Civ. P. 11. This is an unfortunate and significant oversight.

Sadly, I have caught the U.S. Department of Veterans Affairs in a spoliation scheme that lasted decades. Most disturbingly it wasn't evidence that disappeared, instead, the Secretary spoliated his own case law. The decision to spoliate the Secretary's prior case law undermined the ability of the veteran's bar to present cases from a historical perspective.

This in turn deprived this court of the benefit of contemplating the full scope of the Secretary's positions before rendering a final decision. I have recovered the spoliated volumes and provided them to the court. I further humbly request the Court to formally adopt Fed. R. Civ. P. 11 to assure that all litigants provide a full and candid accounting of their positions going forward.

STATEMENT OF INTEREST

My name is Eric Lee Hughes. I have been an Accredited Claims Agent since July 16, 2013. My accreditation number is 28162. I am not an attorney. Additionally, I am a disabled veteran. I am currently compensated at the statutory housebound rate for total and permanent disability under 38 U.S.C. 1114(s)(1). Due to the limiting nature of my disabilities, I work part-time.

In or about 2013, I was conducting some legal research related to my case. As I did not have access to Lexis or Westlaw at that time, I was using commonly available internet resources to conduct this research. Not finding what I was looking for, I entered my search terms into books.google.com. Curiously, a single volume of veterans' case law from the 1800s came up. Knowing that this court wasn't formed until 1989, I wondered "what gives?" Over the next 10 years, I would spend over 3,000 hours of my spare time (about 5 hours per week on average) tracking down these lost primary sources. Eventually, I obtained a complete set of the lost history in late July 2022. This petition arises out of the discovery of that lost body of knowledge.

JURISDICTION

This court has inherent authority under the All Writs Act – 28 U.S.C. § 1651 to preserve the judiciary's authority and enforce judicial candor and decorum in the administration of veterans benefits. This court's ability to exercise authority under the All Writs Act has been recognized since this court's founding. This is particularly true when the Secretary's action, or refusal to act, frustrates the appellate jurisdiction of the court. *Ref*. In Re. Quigley, 1 Vet. App. 1 (1989); Erspamer v. Derwinski, 1 Vet App. 3 (1990). Further, the Supreme Court recognized in Chambers v. Nasco, Inc., 501 U.S. 32, 43 (1991) that *"[i]t has long been understood that 'certain implied powers must necessarily result to our Courts of Justice from the nature of their institution', powers 'which cannot be dispensed with in a Court, because they are necessary to the exercise of all others'" citing* United States v. Hudson, 7 Cranch 32, 34 (1812) *see also* Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980) . The Supreme Court also stated in Chambers:

> [I]f a court finds "that fraud has been practiced upon it, or that the very temple of justice has been defiled," it may assess attorney's fees against the responsible party, Universal Oil Products Co. v Root Refining Co. 328 U.S. 575, 580 (1946) as it may when a party "shows bad faith by delaying or disrupting the litigation or by hampering enforcement of a court order," Hutto et. Al. v. Finney et al., 437 U.S. 678, 689 (1978) n. 14 The imposition of sanctions in this instance transcends a court's equitable power concerning relations between the parties and reaches a court's inherent power to police itself, thus serving the dual purpose of "vindicat[ing] judicial authority without resort to the more drastic sanctions available for contempt of court and mak[ing] the prevailing party whole for expenses caused by his opponent's obstinacy." *Ibid*

When there is bad faith conduct in the course of litigation that can be sanctioned under existing rules, the Court should rely on those rules. However, when there are no adequate

means through statute, or rules to provide a proper sanction, the Court may safely rely on its inherent power. This inherent power also extends to situations created with innocent intentions that never-the-less undermine the judicial process. This petition will illustrate what has occurred in this court's jurisdiction in the absence of Fed. R. Civ. P. 11 and it's signing requirements.

OMINIA PRESUMUNTU CONTRA SPOLIATOREM

THE SPOLIATION STANDARD

Spoliation of evidence is the "*Destruction or significant alteration of evidence, or the failure to preserve properly for another's use as evidence in pending or reasonably foreseeable litigation.*" *See* West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999). When litigation is 'reasonably foreseeable' is a flexible fact-specific standard that grants the lower courts flexibility into the spoliation inquiry. *See* Micron Technology, Inc. v. Rambus Inc., 645 F. 3d 1311, 1320 (Fed. Cir. 2011). A spoliation sanction is proper if the spoliator:

> 1) had a duty to preserve evidence because it knew, or should have known, that litigation is imminent, and
> 2) the adverse party was prejudiced by the destruction of the evidence,
> *See* Burlington Northern and Santa Fe. Ry. Co. v Grant, 505 F. 3d 1013, 1032 (10 Cir. 2007).

Whatever sanction a court may choose within its sound discretion, must be geared towards action to "rectify improper conduct by litigants." Micron at 1326. Rectifying misconduct must include the full scope of bad faith conduct, and must have a preventative, or deterrent effect that insures decorum and proper conduct in the future. Regardless the offending party

should not gain any advantage from their actions. It is important to note that the above requirements contain absolutely no *mens rea* requirement. A failure to preserve because of an inadvertent keystroke is treated the same as an intentional act. This is because the act of spoliation is presumed to be intentional. As the Latin title of this heading says "all things are presumed against the spoiler".

HISTORY RECOVERED

Veterans have had a right to access this court since 1989 and the passage of the Veterans Judicial Review Act, P.L. 100-687 (1988). It will be surprising to learn that there exists an uninterrupted history of veterans' caselaw spanning the years 1636 to 1974. This administrative case law was generated by the US Department of Veteran's Affairs and its predecessors from the outset of the country.

The citations that follow are not currently available on any legal search engine or database catering to the legal industry by the design of the Secretary. But thanks to a consortium of libraries called HathiTrust, the case law recently became digitally scanned and made accessible to academics who both know it exists and know where to look. Additionally, my research shows no library in the country has a complete set of these printed works. Therefore, the only way for anyone to access this case law is to use the HathiTrust digital library system. That system – and the digitally scanned books it holds – has only come into being in the past few years. It has taken me thousands of hours of research that began with a fluke discovery in 2013 to piece together what the Secretary buried in history. This petition seeks to make right that wrong.

THE SPOLIATED VOLUMES

In 1854 a compilation of U.S. law and decisions about veterans' revolutionary war claims was published by the Government Printing Office by Frank Curtis and William Webster under then-Secretary of Interior L.Q.C. Lamar.[1] A newly updated publication of the Army and Navy pension laws would be issued by Holcomb Webster, and F.B. Curtis in 1885. These publications spanned the era from 1775 to 1885. (Veterans caselaw before 1775 was generated by the colonies exclusively)

Moving forward, the Government Printing Office began publishing the Secretary's Precedent Decisions relating to veterans' claims in 22 volumes spanning from 1887 to 1930.[2] These were referred to as the "Precedent Decisions" and were cited as "[vol#] P.D. [Page#]."

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[1] United States, Ferdinand Moulton, and Robert Mayo. Army And Navy Pension Laws, And Bounty Land Laws of the United States: Including Sundry Resolutions of Congress From 1776 to 1854 Inclusive, Executed At the Department of the Interior: With an Appendix Containing the Opinions of Attorneys General of the United States, With the Decisions, Rules, And Regulations Adopted by Different Secretaries, Relative to the Execution of Those Laws. 2nd ed. Baltimore: Lucas Bros., 1854.

See also: United States. Pension Bureau., Webster, W. Holcomb., Curtis, F. B. (1885). A digest of the laws of the United States: governing the granting of army and navy pensions and bounty-land warrants; decisions of the Secretary of the Interior, and rulings and orders of the commissioner of pensions thereunder. Washington: Govt. print. off.

[2] United States. Department of the Interior., United States. Department of the Interior. Office of the Solicitor., The United States. Board of Pension Appeals. (18871930). Decisions of the Department of the Interior: In Appealed Pension and Retirement Claims, also a table of cases reported, cited, distinguished, modified, and overruled and of statutes cited and construed. Washington: U.S. Govt. Print. off.

When President Herbert Hoover consolidated the various executive branch organizations serving veterans in Executive Order 5398, the new Administrator of Veterans Affairs continued the practice of publishing precedent-setting decisions through the Government Printing Office under a new title.[3] These decisions span from 1931 to 1955. Then in 1974 the Agency again printed a consolidated volume of its precedent authority for the years between 1955 to 1974.[4]

The following year judicial review of VA decisions would first gain steam. So, the 95th Congress held the first hearings on establishing judicial review.[5] During the period between 1974 and 1989, the Secretary published the holdings of his precedent opinions in the Federal Register but did not publish the dicta, rationale, or argument. Curiously the decision to stop printing these legal opinions coincided with the veteran's movement toward judicial review on Capitol Hill.

From 1989 to 2019, the Secretary took to publishing his Precedent Opinions on the Office of General Counsel website. As of the date of writing, the Office of General Counsel

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3 United States. Veterans Administration. Decisions of the Administrator of Veterans' Affairs, Veterans Administration.

4 United States. Veterans Administration. (19471974). Decisions of the Administrator of Veterans' Affairs, Veterans Administration. Washington, D.C.: U.S. G.P.O..

5 United States. Congress. Senate. Committee on Veterans' Affairs. (1977). VA administrative procedure and judicial review act: hearings before the Committee on Veterans' Affairs, United States Senate, Ninety-fifth Congress, first session, on S. 364 and related bills ... Washington: U.S. Govt. Print. Off

has not published its Precedent Decisions since 2019. Instead, publication of the Secretary's interpretations of the law is published is in a publicly accessible database on the Secretary's website: va.ebenefits.va.gov. But again, the fact pattern leading to the policy change, the rationale, and the dicta to the policy change are not published in these policy manuals.

DUTY TO PRESERVE AND THE FREEDOM OF INFORMATION ACT

When authority is not published, no one may be adversely affected by the unpublished law. This requirement for notice and publication is laid out in 5 U.S.C. § 552(a). In 54 Fed. Reg. 5611 the Secretary wrote:

> The VA concludes that opinions designated as precedential pursuant to new 38 C.F.R. 14.507(b) will fall within the scope of 5 U.S.C. 552(a)(1) and be subject to its terms concerning publication and actual notice. New 38 C.F.R. 14.507(b) has thus been modified to recognize the applicability of 5 U.S.C. 552(a)(1) to opinions designated as "precedent opinions" pursuant to that regulation, and such opinions will be treated by the Agency in accordance with the referenced statute.

The Secretary therefore agrees with my interpretation that veterans may not be adversely impacted by unpublished law.

The Supreme Court held in NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 148 (1975) *"that Exemption 5 [Of The Freedom of Information Act] does not apply to any document which falls within the meaning of the phrase "final opinion . . . made in the adjudication of cases*." 5 U.S.C. § 552(a)(2)(A)." The long list of final opinions cited above is not exempt from disclosure under the Freedom of Information Act. The Supreme Court continued: *"…it is reasonable to construe Exemption 5 to exempt those documents, and*

only those documents, normally privileged in the civil discovery context…". The Agency's own publications made through the Government Printing Office – no matter how difficult to obtain – are public records. As public records, they are therefore not exempt from 5 U.S.C. § 552(a) precisely because they are subject to civil discovery.

Instead of complying with the law to make the Secretary's prior rulings available, the Secretary revised the Code of Federal Regulations in 38 C.F.R. § 3.101 and 38 C.F.R. § 19.103 to remove from the Board's jurisdiction consideration of prior binding authorities just mentioned. *Ref*, 54 Fed. Reg. 5611 (1989). The Secretary did this without any change being made in the language of the Board of Veteran's Affair's underlying jurisdictional charge, *Ref* 38 U.S.C. § 7104, the Secretary in 54 Fed. Reg. 5611 (1989) wrote:

> The Administrator of Veterans Affairs has long since discontinued the practices of approving and adopting as the Administrator's Decisions legal opinions prepared by the General Counsel and of issuing "instructions" for the implementation of statutes. Although such documents are largely of historical interest at this time, Board of Veterans Appeals regulations continues to contain a provision binding the Board to follow decisions and instructions of the Administrator in its consideration of appeals. A similar antiquated reference to Administrator's Decisions and opinions approved by the Administrator and to defined policies as enunciated by the Administrator also appears in Agency adjudication regulations. In order to update the regulations and simplify the classification system for legal opinions, the Agency is amending 38 C.F.R. §§ 3.101 and 19.103 to delete reference to Administrator's Decisions, opinions approved by the Administrator, and instructions and enunciated policies of the Administrator. Pursuant to this change, such decisions, opinions, instructions, and policy statements will be without precedential or conclusive effect in future Agency adjudications.

The Secretary rationalized that its prior Agency holdings were not subject to 5 U.S.C. § 552(a), because Secretary claimed it would no longer refer to those holdings when adjudicating veterans' claims.

The idea to ignore *stare decisis* and the Secretary's own case law belies the very nature of the law the Secretary attempts to discard. Every single one of these volumes contains legal precedent that the Secretary himself determined would be subject binding in the future. As stated in Kisor v Wilkie, 139 S. Ct. 2400, 2406 (2019) any deviance from *stare decisis* and established precedent requires "special justification". There is no such special justification here.

Admittedly the Secretary's view of what is in the public interest may change, either with or without changing circumstances. But when the Secretary changes his course, he must supply a reasoned analysis to support the change. Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 57 (1983), *Citing* Greater Boston Television Corp. v. FCC, 444 F. 2d 841, 852 (1970). No such rational basis occurred here either. Further still, this case law represents the collective wisdom garnered by the agency over centuries of experience and expertise. When the Secretary comes to Court seeking deference he does so based on institutional knowledge. This spoliated case law is the very institutional knowledge upon which the Secretary asks the court to defer to. How is the court or the veteran to respond when the Secretary refuses to disclose his understanding of the law? Or how is the court to respond when the Secretary says in one breath, 'rely on our institutional knowledge, but our institutional knowledge is of no concern to you or the veteran?'

LITIGATION WAS FORESEEABLE

Occurring after the Veteran's Judicial Review Act was passed by Congress, but before it took effect**,** Secretary's decision to eliminate the spoliated volumes could not have

been more advantageous to the Agency. As a result, the Court of Veterans Appeals would never obtain jurisdiction over these precedents – unless the veterans advocate somehow obtained long out-of-print works that no single library in the country has a complete set of - prior to a BVA ruling. In that rare occurrence, BVA could simply moot the issue to stave off judicial eyes. This freed the Secretary from the burden of having to follow his own sense of justice. But more importantly, it blocked the courts from holding the Secretary to his word. It is a classic case of arbitrary action because like facts leads to different outcomes under this scheme without distinction.

THE SECRETARY STILL RELIES ON THESE OPINIONS

Consider now the Precedent Opinions of the VA General Counsel. These Precedent Opinions are binding on all Secretary subdivisions when adjudicating veterans' claims. Multiple references to the opinions issued as "A.D. [#]" are contained therein. These are citations to the very administrative precedents the Secretary tried to spoliate from history. For example, "A.D. 101" refers to the 101st precedent decision of the Administrator. I have used the phrase "Administrator Decision" as a citation substitute for A.D. for clarity as "A.D." is also the Blue Book Citation for the "Appellate Division Reports" which contains decisions of the New York Supreme Court.

> Vet. Aff. Op. Gen. Counsel Prec. 4-90 *Cites* Administrator Decision No. 931 (1953) and Administrator Decision No. 772 (1947)
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> Vet. Aff. Op. Gen. Counsel Prec. 18-90, *Cites* Administrator Decision No. 715 (1946)
>
> Vet. Aff. Op. Gen. Counsel Prec. 70-90, *Cites* Administrator Decision No. 688 (1946)

Vet. Aff. Op. Gen. Counsel Prec. 74-90, *Cites* Administrator Decision No. 607 (1944)

Vet. Aff. Op. Gen. Counsel Prec. 17-91, *Cites* Administrator Decision No. 702 (1946)

Vet. Aff. Op. Gen. Counsel Prec. 32-91, *Cites* Administrator Decision No. 702 (1946)

Vet. Aff. Op. Gen. Counsel Prec. 58-91, *Cites* Administrator Decision No. 979 (1962)

Vet. Aff. Op. Gen. Counsel Prec. 68-91, *Cites* Administrator Decision No. 963 (1959)

Vet. Aff. Op. Gen. Counsel Prec. 69-91, *Cites* Administrator Decision No. 976 (1961)

Vet. Aff. Op. Gen. Counsel Prec. 04-92, *Cites* Administrator Decision No. 760 (1947)

Vet. Aff. Op. Gen. Counsel Prec. 21-92, *Cites* Administrator Decision No. 498 (1942)

Vet. Aff. Op. Gen. Counsel Prec. 22-92, *Cites* Administrator Decision No. 181 (1933)

Vet. Aff. Op. Gen. Counsel Prec. 3-93, *Cites* Administrator Decision No. 201 (1933)

Vet. Aff. Op. Gen. Counsel Prec. 16-94, *Cites* Administrator Decision No. 280 (1934)

The "Administrator's Decisions" respected the "Precedent Decisions" issued by the Secretary's predecessor the Bureau of Pensions, and the Department of the Interior. The format for citation is "vol. 'P.D.' page#".

Administrator Decision No. 101 (1932), *Cites* In Re. Vinal, 9 P.D. 19 (1897), In Re. Ames, 8 P.D. 171 (1896), In Re. Showalters, 7 P.D. 478 (1895)

Administrator Decision No. 130 (1933), *Cites* In Re. Graham, 18 P.D. 461, 463 (1911)

Administrator Decision No. 219 (1934), *Cites* In Re. Landon, 14 P.D. 83 (1903)

Administrator Decision No. 242 (1934), *Cites* In Re. Tallman, 6 P.D. 261 (1893), In Re. McGregor, 22 P.D. 51 (1925), In Re. Widow of Pillsbury, 21 P.D. 145 (1921)

Administrator Decision No. 375 (1936), *Cites* In Re. Apgar, 14 P.D. 7 (1903)

Administrator Decision No. 436 (1938), *Cites* In Re. Mary W., as Widow as Edgar Chadwick, 22 P.D. 136 (1926), In Re. Moore, 21 P.D. 443 (1924)

Administrator Decision No. 561 (1944), *Cites* In Re. Gleeman, 15 P.D. 54 (1904), In Re. Macentee, 12 P.D. 464 (1902)

Administrator Decision No. 646 (1945), *Cites* Davis v. Davis, 10 P.D. 403, 408 (1899)

Administrator Decision No. 661, *Cites* (1945), In Re. Bice, 9 P.D. 21 (1890), In Re. Graham, 18 P.D. 461, 464 (1911)

Administrator Decision No. 975 (1961), *Cites* In Re. Dudley, 6 P.D. 205 (1893); In Re. Dempsey, 9 P.D. 149 (1897); In Re. Dees, 9 P.D. 455 (1898); In Re. Hill, 14 P.D. 57 (1903);

As demonstrated by the plethora of Secretary Office of General Counsel's citations to this spoliated body of case law, the Agency believes it is controlling authority when it is aligned with management's policy positions. But it is not controlling when it is aligned with a veteran's case. This has occurred at least twice in this court. In Lorenzano v. Brown, Vet. App. 446 (1993), the court held that the 90-day requirement to qualify for veterans benefits meant "90 days of continuous service" and the court relied upon Vet. Aff. Op. Gen. Counsel Prec. 4-80, which in turn relied upon Administrator Decision No. 247.

After spending more than 10 years researching the VA's historical case law, I have been unable to locate any General Counsel Opinions between 1974 and 1989. They are ephemeral.

Lorenzano was decided without oral argument. The party's briefs are not available on the CAVC website. However, from the nature of the ruling, it seems the court relied heavily on the Secretary's reliance on his own unpublished history and opinion.

In Sizemore v Principi 18 Vet. App. 262, 272 (2004), the court pointed out that the Board of Veterans Affairs failed to follow Vet. Aff. Op. Gen. Counsel Prec. 12-99 which cited Administrator Decision No. 100 (1932) for the Secretary's rationale. In both

Lorenzano and in Sizemore, it was the Secretary who introduced the old body of law, not the veteran. As such my assertion that the Secretary spoliated his decision history to his own advantage is supported. *Also, this demonstrates that the Secretary's attorneys have maintained knowledge of this history and used it to the veteran's disadvantage when it suited management objectives*.

THE PERPETUAL FRUSTRATION OF VETERANS CASES

In George v. McDonough, 142 S. Ct. 1953 (2022) The Supreme Court stated, "*Where Congress employs a term of art "obviously transplanted from another legal source*" it '*brings the old soil with it*", *Citing* Taggart v. Lorenze, 587 S. Ct. 1795, 1798 (2019). This "old soil" is the spoliated case law I refer to in this brief. For example, a veteran's attempt to reopen a finally adjudicated claim, hinges upon what the definition of "New and Material" evidence means in 38 C.F.R. § 3.156, As of December 28, 2022, a search of this courts search engine notes that the interpretation of 38 C.F.R. § 3.156 was a subject of 3917 separate decision (published and unpublished). This does not include joint motions for remand that depended on the same regulation.

Consider now the administrative history of "new and material evidence". In Order No. 65 (October 3, 1881) The Secretary stated:

> "No case should be rejected until every available source of information has been examined unless the rejection be clearly upon legal points.
> No claim hereafter rejected will be reopened except upon new and material evidence going to the cause of rejection."

Had the Secretary disclosed this spoliated history thousands of cases would likely have settled at the AOJ long before petitioning the BVA or this court. Curiously, many of those

cases would have resolved in the Secretary's favor if this body of knowledge was known prior to appeal to this court.

The first case in which the Secretary discussed "new and material" was In Re. Gordon, 1 P.D. 188 (1887) where the Secretary first set forth the principle of reopening a previously decided claim as well as the principle of *res judicata*. In that case, the actual term used was "new, material and important". The Secretary of the Interior held that the necessity of requiring new, material, and important evidence to reopen a finally adjudicated claim was needed to prevent the then-existent appeals process from becoming clogged with resubmitted claims that had no merit. The Secretary would expand on the logic of In Re. Gordon in In Re. Colnor, 2 P.D. 21, 22 (1888), thusly:

> If the appellant believed that injustice was done him by the former decision, or has come into possession of new and material evidence which he was unable to produce in the previous adjudication of his claim —such evidence as would have warranted a favorable decision in the first instance—or could point out any mistake of fact, or error of law, committed in the said decision, evidence which, if known at the time, would have changed the status of his claim, he should have applied to the Department by a motion for a rehearing and review of said decision, seeking to have the same set-aside and annulled before again appealing from the action of your office, and upon the same points. The rule of the Department has been clearly and well expressed in the case of Gordon, Morgan (I. P. D., p. 188).

The above remained good law for centuries. The sentiment that "New and Material Evidence" was deemed to be important if that evidence would alter the outcome of the prior claim was carried forward in a case discussing vested rights: In Re. Martin, 7 P.D. 265 (1893).

In Re. Brock (widow), 8 P.D. 460 (1897) states:

> The claimant appealed, claiming that upon the evidence your rejection of the claim was contrary to the law. I reversed your action, not upon the ground that the claim should be admitted, but upon the sound principle of law that a claim should not be adjudicated upon presumptions, so long as it is apparent that material facts have not yet been brought out; for facts are the basis of presumptions of law, and an important fact in the case at bar was wanting.

The principle of "new and material evidence" continued into the 1900's unchanged as expressed by In Re. Mathers, Formerly Miller (Widow) 14 P.D. 318 (1904) *Citing* In Re. Martin; 7 P.D. 265 (1893). The old principle of "new and material evidence" laid out in 1881, was again carried forward In Re. Henley, 15 P.D. 483 (1905).

On March 7, 1949, Administrator Decision No. 807 (1949) continued the long-established history of the term "new and material evidence" when deciding the effective date of a widow's award of death benefits if based on a Board of Correction of Naval Records decision.

In Administrator Decision No. 970 (1960) the Secretary cited then 38 U.S.C. § 3004 which read in part "*Where a claim has been finally disallowed, a later claim on the same factual basis if supported by new and material evidence, shall have the attributes of a new claim..".*

In Vet. Aff. Op. Gen. Counsel Prec. 9-97, Secretary held in part and building upon the above-mentioned history (but by truncating "new and material evidence to simply "material evidence"):

> 2. If VA receives additional material evidence within the time permitted to perfect an appeal, 38 U.S.C. § 7105(d)(3) requires VA to issue a supplemental statement of the case even if the one-year period following the mailing date of notification of the determination being appealed will expire before

> VA can issue the supplemental statement of the case. Furthermore, 38 C.F.R. § 3.156(b) requires that such evidence be considered in connection with the pending claim.

Here, the Secretary carries forward the logic first proposed in 1881. Specifically, when Secretary has not considered all of the evidence available the claim will not be considered complete, and *res judicata* will not apply. Subsequently, in Vet. Aff. Op. Gen. Counsel Prec. 37-97 the Secretary tilled absolutely no new soil when making a determination regarding attorney fees based on the submission of new and material evidence.

THIS COURT HAS PREVIOUSLY BEEN A VICTIM

Philip Cushman is a United State Marine who served during the Vietnam War. While working on his fighting position, a sandbag fell on his back injuring his spine. He was honorably separated from service and underwent four surgeries to treat his back. In October of 1974, Mr. Cushman filed for disability with the Secretary. After three years of exams and internal debate, the Secretary awarded Mr. Cushman a 60% disability rating. He secured a job for a short while, but ultimately his doctor determined he could not work. With a doctor's order in hand, Mr. Cushman filed for total disability. The Secretary refused the claim. Years later, Mr. Cushman received a copy of his claims file and noted that the Secretary had altered his doctor's note in such a way as to indicate he could work. The altered document was the only basis for the denial. Following decades of appeal, in which the Secretary argued Mr. Cushman had no 'Due Process Rights", he would finally prevail at the Federal Circuit. In Cushman v Shinseki, 576 F.3d 1290 (Fed. Cir. 2009) the Federal Circuit held that applications for veterans' benefits carried with them a due process

property interest because veterans have more than an abstract need or desire for the benefits and veterans' benefits are granted on a facts-found basis and not on a purely discretionary basis. While not cited by the Federal Circuit in Cushman, this logic was consistent with the finding centuries earlier in Innis v. Roane, 4 Call 379, 8 Va. 379 (1797), which found that veterans have a contract right to their benefits and thus have a property right should they fulfill the contract. But notably, the Secretary never mentioned Innis in its Cushman briefs.

I now call the Court's attention to In Re. H.S. Berlin, 9 P.D. 471 (1898). H.S. Berlin was an attorney representing a veteran before the Bureau of Pensions. He sought access to his client's record and was denied that request administratively. He appealed ultimately to then-Secretary of the Interior, C.N. Bliss. After an extensive on-the-record 'discussion' between the Commissioner of Pensions and his superior, Secretary Bliss ordered the Commissioner of Pensions to allow attorneys and claimants to review and inspect the C-File. Quoting Secretary Bliss:

> [T]he claimant is entitled to be present, or to be represented by an attorney throughout the examination, and to cross-examine witnesses if he desires. In other words, it is his right to hear or know every word of testimony in his case, whether favorable or unfavorable. No Court in the land would deny him this privilege. It is a Constitutional right, which cannot be abridged. In Re. H.S. Berlin, 9 P.D. 471, 477 (1898)

The context makes it clear. Secretary Bliss was referring to the U.S. Const. Amend. V., and the right of due process. In doing so, Secretary Bliss had to find that the veteran had a property interest in the benefits he was seeking.

Secretary Bliss closed his ruling by stating:

> I am led to the conclusion that the practice which prevails in your Bureau of denying to claimants or their authorized attorneys the right to examine the evidence obtained by special examination, except that contained in "reports of special examiners relating to criminal charges and investigations," is unjust to claimants and unwarranted by law. It is therefore directed that all orders or instructions which have that effect shall be revoked. - In Re. H.S. Berlin, 9 P.D. 471, 477 (1898)

This old ruling by the Secretary from 1898 starkly contrasts with the Secretary's position in Cushman. Remember, in Cushman, the Secretary proceeded to argue in both briefs, and at oral argument a veteran did not have a due process interest in benefits applied for. But the Secretary had previously recognized that right as early as 1898. The holding from 1898 is one of tens of thousands of prior Agency holdings the Secretary spoliated in 1989.

Phil Cushman's case took 35 years to get his claim properly adjudicated. Mr. Cushman was a victim of the Secretary's falsification of Federal Records (the altered document), the Secretary's spoliation of its case law (In Re. H.S. Berlin), and the Secretary's lack of disclosure of case law favorable to Mr. Cushman, (Innis). In the process, the Secretary trotted through this court and the Federal Circuit a position the Agency knew to be frivolous. How many other veterans' lives have such conduct touched?

THE CONTENTIOUS NATURE UNDER WHICH THE COURT WAS FORMED

Mr. Cushman did not just sit idol when he discovered VA's forgery in his claims file. He found other veterans who had legally meritorious claims which VA denied. His letter to the editor of Stars and Stripes on April 1, 1982, became the rallying cry upon which this court was formed.[6] He believed his oath of enlistment created a moral obligation to

[6] "Veterans Due Process", Blackwell, Morton Files Box 49, Ronald Reagan Presidential Library, Pres. Doc. (April 1, 1982.)

'defend and protect the constitution against all enemies foreign and domestic' meant what it said. This obligation included a requirement to call out the government when it trampled on the constitution and the inalienable rights mentioned in the Declaration of Independence. Veterans Administration representative Donald L. Ivers (who would later become Chief Judge of this Court) took great offense at the rhetoric of Mr. Cushman and Veterans for Due Process Legislative Director Sidney Cooper.[7] Consider this interchange which occurred midway through Philp Cushman's testimony.

> **Senator DeConcini:** Thank you Mr. Cooper, very much for your testimony. You may have an opportunity to answer questions. We have questions from Counsel, and they will be directed to Mr. Cushman; and if Mr. Cushman wants to yield to you to answer those questions, that would be most appropriate.
>
> Now, Mr. Ivers, because of time constraints, would you come forward and present your statement; and then you can sit back and we will do these questions, and the we will submit questions to you.
>
> **Mr. Ivers:** Mr. Chairman, I would prefer not to share a table with these people. You have heard the comments that they have made, and you have heard the direction that it has taken.
>
> **Mr. Cooper:** You have not heard our comments sir.
>
> **Mr. Ivers:** I would ask, Senator, if I may submit my statement for the record? And we will be glad to respond to any questions in writing.
>
> **Senator DeConcini:** Mr. Ivers, this is not a personal matter. There is nobody personally hostile to you. All I want to do is have your have a chance

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[7] "Statement of Philip Cushman", United States. Congress. Senate. Committee on Veterans' Affairs., United States. (1989). *Judicial review legislation: hearing before the Committee on Veterans' Affairs, United States Senate, One Hundredth Congress, second session, on S. 11, the proposed Veterans' Administration Adjudication Procedure and Judicial Review Act, and S. 2292, Veterans' Judicial Review Act, April 28, 1988.* Washington: U.S. G.P.O. at 52-66

to present your 3 minutes, and then you can get up and leave if you like.

You know, Senator Kerry sat here with a panel with whom he didn't agree. Maybe you would be like to sit over here on the side and give me your statement so we can put it in the record.

Mr. Ivers: You put me in a very awkward position, Senator.

Senator DeConcini: Why don't you sit over here on the side then?

Mr. Cooper: I am willing to move, sir, if that is your problem.

Mr. Ivers: I will sit here.

Senator DeConcini: That will be fine. Just summarize your statement and then get up and sit back in the audience. Then, after the questions are given to this panel, then you can be called back up. I just wanted you to have an opportunity to present a summary of your statement.

Then Mr. Ivers presented the position of the VA that the Agency's relationship with veterans was above reproach, that judicial review was unnecessary because collectively veterans were treated fairly, and that any judicial review action would needlessly create an adversarial relationship with the veteran population.

I argue the Agency's sworn position was to not sit at the same table with veterans who questioned the accuracy of VA decisions. I also argue that the definition of adversarial requires there to be two sides to the discussion. The Secretary is correct that giving veterans a voice in their own benefit determinations is adversarial. The alternative is for only the Secretary's voice to be heard. Such a "non-adversarial" relationship is the goal of every dictator in history. I'm sure this was King George's thought process when he received the Declaration of Independence. If only those pesky founding fathers agreed with everything King George did, an adversarial relationship with the Crown wouldn't have developed. I say Mr. Ivers took offense not at the testimony of Mr. Cooper and Mr. Cushman. Instead,

Mr. Ivers took offense because Mr. Cooper and Mr. Cushman were allowed to testify at all. Compare and contrast the written statements for the record submitted by Veterans for Due Process[8], and Donald L. Ivers.[9] Philip Cushman and Veterans for Due Process would eventually win, and this court was formed. Furthermore, after serving as a judge, and ultimately as chief judge, of this court, Judge, Ivers changed his position, and came out in support of expanded attorney involvement in veterans claims after he retired from the bench.[10]

THE QUEST FOR JUSTICE

Consider now Berger v. U.S., 295 U.S. 78 (1935). Mr. Berger was indicted in Federal District Court for conspiracy to counterfeit notes used by the Federal Reserve Banks. He was convicted only of the conspiracy count, and not the act of counterfeiting. At trial, the prosecutor misstated facts in the cross-examination of witnesses. The prosecutor put words in the mouths of witnesses that they had not said. The prosecutor's questions

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8 "Veterans Due Process", United States. Congress. Senate. Committee on Veterans' Affairs., United States. (1989). *Judicial review legislation: hearing before the Committee on Veterans' Affairs, United States Senate, One Hundredth Congress, second session, on S. 11, the proposed Veterans' Administration Adjudication Procedure and Judicial Review Act, and S. 2292, Veterans' Judicial Review Act, April 28, 1988.* Washington: U.S. G.P.O. at 397-424

9 "Statement of Donald L. Ivers" United States. Congress. Senate. Committee on Veterans' Affairs., United States. (1989). *Judicial review legislation: hearing before the Committee on Veterans' Affairs, United States Senate, One Hundredth Congress, second session, on S. 11, the proposed Veterans' Administration Adjudication Procedure and Judicial Review Act, and S. 2292, Veterans' Judicial Review Act, April 28, 1988.* Washington: U.S. G.P.O. at 490

10 Letter to Honorable Larry E. Craig, Chairman Veteran's Affairs Committee", Donald L. Ivers, (May 10, 2006)

suggested statements by witnesses and the accused were made to him out of court. The prosecutor acted "indecorous and improperly" before the bench and jury. This court sided with Mr. Berger's contention that the prosecutor had proceeded before the trial court and jury unfairly and to Mr. Berger's detriment when it held:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. Berger v. U.S., 295 U.S. 78, 88 (1935)

As stated in Berger, Federal attorneys are representatives of the sovereign and engage in the national quest for justice, not victories. This duty to seek justice is demanded of all Federal attorneys and in all controversies. *See* Freeport-McMoRan Oil & Gas Co. v. FERC, 962 F.2d 45, 47 (D.C. Cir. 1991). This duty to justice should be heightened by the "pro-veteran canon." Not mitigated by it.

The entire premise of the pro-veteran canon is based on the idea that the grateful sovereign will benevolently conduct itself in carrying out its duties toward veterans. Consistent with this canon, "*Accordingly, just as the government must provide the Veterans Court (and the veteran) all records in its possession relevant to the merits of a case, so too must it provide all records in its possession relevant to contested jurisdictional issues.*" Barrett v. Nicholson, 466 F.3d 1038, 1043-1044 (Fed. Cir. 2006) (internal quotations omitted); *see also* Gambill v. Shinseki, 576 F.3d 1307, 1316 (Fed. Cir. 2009) (Bryson, J., concurring). This requirement of disclosure by the Secretary, must by extension include those rules and laws by which the Secretary operates. *Ref* 5 U.S.C. § 552(a). Further, *"[S]ystemic*

justice and fundamental considerations of procedural fairness carry great significance" under the pro-veteran canon. *See* Hayre v. West, 188 F.3d 1327, 1334 (Fed. Cir. 1999). Accordingly, the Supreme Court has long applied the pro-veteran canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiary's favor. *See* Henderson v. Shinseki, 562 U.S. 428, 441 (2011) (*quoting* King v. St. Vincente Hosp., 502 U.S. 215, 220–21 n.9 (1991).

Consider now this brief excerpt from the oral argument at the Supreme Court in Astrue v. Ratliff, No. 08-1322 (2010). Regarding the Secretary litigating substantially unjustified positions.

> **CHIEF JUSTICE ROBERTS**: [t]hat's really startling, isn't it? In litigating veterans, the government more often than not takes a position that is substantially unjustified?
> **Mr. YANG:** It is an unfortunate number, Your Honor, And it is – Accurate"[11]

If the Chief Justice was startled that the government pursues substantially unjustified positions against veterans, I wonder how he would react to this fact pattern.

IN MARBURY, THE SUPREME COURT FORESAW THIS TYPE OF CONDUCT

The Supreme Court would rely on the importance of judicial review in the most important case in American Jurisprudence - Marbury v. Madison, 5 U.S. 137 (1803). In setting forth its findings in Marbury, the Supreme Court relied on a statute passed on June 7, 1794, to provide disabled veterans of the Revolutionary War compensation benefits to

[11] Oral Arg. Tr. 52, Astrue v Ratliff, No. 08-1322 (2010)

illustrate its thought process. At that time in history, compensation benefits were referred to as "pensions" and the eligible veteran was called an "invalid." Quoting from Marbury:

> "By the act concerning invalids, passed in June 1794, vol. 3. p. 112. the Secretary at War is ordered to place on the pension list all persons whose names are contained in a report previously made by him to Congress. If he should refuse to do so, would the wounded veteran be without remedy? Is it to contend that where the law in precise terms, directs the performance of an act, in which an individual is interested, the law is incapable of securing obedience to its mandate? Is it on account of the character of the person against whom the complaint is made? Is it to contend that the heads of departments are not amenable to the laws of their country?" Marbury at 164

As you can see, the Marbury Court was gravely concerned about the enforceability of the laws and the protections afforded by the Constitution. This was particularly true when the failures of the Executive impacted veterans. The Marbury court believed that denying Mr. Marbury's petition on the merits would set a precedent that the Executive may ignore laws and rights it found inconvenient. Further, the Marbury Court was concerned the Executive would devolve into uncontrolled despots unless restrained by common law. I argue the Marbury court's concerns were justified.

COMPARED TO THE PAST, SANCTIONS ARE JUSTIFIED

The CAVC has seen fit to impose sanctions upon the Secretary in the past. In Jones v. Derwinkski, 1 Vet. App. 596 (1991), the court-imposed sanctions on the Secretary for failing to correct an inaccurate statement before the court. In Adamski v. Derwinski, 2 Vet App. 46 (1991) imposed sanctions for continued delay and procrastination when complying with a court order. In Massey v. Brown, 9 Vet. App. 134 (1996), the court restrained itself from issuing sanctions when the Secretary made serious accusations without a factual basis during an oral argument. But the court made clear that such conduct is unacceptable. In

Pousson v. Shinseki, 22 Vet. Ap 432, 437 (2009), the court-imposed sanctions for "gross negligence and a gross lack of diligence in fulfilling the requirements of the court's rules." In Harvey v. Shinseki, 24 Vet. App. 284 (2011), the court-imposed sanctions for failure to comply with the court's order expeditiously. In Groves v. McDonald, 27 Vet. App. 168, 178 (2014), the court-imposed sanctions for failure to address a remand expeditiously.

Quoting the court, in Groves:

> Although sanctions are undebatably warranted here, sanctioning the taxpayer is less than satisfying. As demonstrated above, the malfeasance of individual actors throughout the agency—and not the taxpayer—is responsible for the parade of errors that ensued following the court's remand, resulting in unnecessary and avoidable delays. Perhaps, should such conduct persist in the future, the court will be forced to explore sanctioning individual actors whose gross negligence and lack of diligence results in unwarranted delays in processing this court's orders. *See* 38 U.S.C. § 7265(a); NLRB v. Blevins Popcorn Co., 659 F.2d 1173, 1184 (D.C.Cir.1981).

The court made good on its threat in Veterans Legal Advocacy Group v. McDonough, _ Vet. App. _ (No. 20-8291) (2021) required that VA General Counsel, Mr. Richard Sauber; the Board of Veterans' Appeals (Board) Chairperson, Ms. Cheryl Mason; and the Acting Under Secretary for Benefits of the Veterans Benefits Administration, Mr. Thomas J. Murphy, submit under threat of perjury affidavits explaining the agency's conduct.

Sanctions typically range from monetary fines, forfeiture of the individual case, or even contempt charges. But finding the Secretary only amounts to fining the taxpayer who is wholly innocent in this matter. Forfeiture of a case is impractical as it would logically require the court to vacate every case the Secretary ever argued. That would violate *res judicata* and it would again ultimately place an unreasonable burden on the taxpayer. Holding the Secretary in contempt is at best a slap on the wrist in a separation of powers tiff.

Holding individual actors in contempt is also problematic. The actors originally responsible are by now either dead or infirm. None of these solutions are useful here because Secretary will just recalculate the sanction as the cost of doing business as usual. Thus, I argue that the traditional remedies available to the court to curtail misconduct are unsatisfying.

BUT ALL OF THIS UNETHICAL CONDUCT IS ALLOWED

Had this court adopted Fed. R. Civ. P. 11 and incorporated the truthfulness in pleading and argument requirement in the court's own rules, the Secretary would have been prevented from concealing all this history from the court. But in the absence of any truthfulness in the pleading requirement, the Secretary's attorneys have been unrestrained. In the absence of a requirement to truthfully report his historical interpretation of regulations and statutes thousands of cases have come before this court that need not have.

Philip Cushman's case is but one example. To get the due process he so desperately sought, Mr. Cushman had to build a non-profit, launch a national movement, testify before congress, make multiple appeals before the Board, eventually appeal to this court, then finally to the Federal Circuit. Why? The Secretary falsified a federal document. Furthermore, when Donald L Ivers had his spat with Mr. Cushman on the Senate floor, Judge Ivers was well appraised for Mr. Cushman's assertion that his medical records were altered by the Secretary. How is all of this "Pro-Veteran?" More importantly, how is it judicial?

SO HOW CAN THIS BE SOLVED?

To find the solution look to criminal law by analogy. In Brady v. Maryland, 373 U.S. 83 (1963), the Supreme Court held that the government must disclose exculpatory evidence to the accused in addition to the evidence the state uses to build its case. This is

ultimately well within the Congressional intent behind 5 U.S.C. § 552(a). After all, the public has a right to know the laws under which the citizenry must live. Further, such a requirement is consistent with Berger because it holds government attorneys accountable to the law and justice itself, not to the government managers who forced the issue to litigation. Finally, this solution is consistent with judicial efficiency. This will eliminate frivolous litigation by extending Brady disclosures to civil litigations and making government attorneys certify those disclosures to the court. Additionally, *substantially unjustified* positions will further be reduced if government attorneys are prohibited from prosecuting the fickle decisions of unelected appointees in court. Ultimately the taxpayer will win through the reduction in the costs and time of needless litigation. The veteran will win through a timelier and more just conclusion of his case. This court will win as more cases will be resolved without the need for the court's intervention. By extending the Berger requirement that the Secretary's attorneys are obligated to seek justice, not victory the Congressional charge that prompted the creation of this court can be fulfilled. Finally, reworking the damage done to *stare decisis* can only be done by the prompt publication of the Secretary's full case law history.

REQUESTED ACTION

Therefore, I humbly ask the court to hold:

The Court formally adopts Fed. R. Civ. P. 11 *and expands the rule as follows:*

The Court shall henceforth only defer to the Secretary's expertise after the Secretary has fully convinced all judges hearing the case that his position including his pleadings, written motions, oral representations, and other papers dutifully developed and represent

the full extent of the Secretary's knowledge base under both law and fact as required by Fed. R. Civ. P. 11. Even in that event, deference will be consistent with the plurality decision in Kisor v. Wilkie, 139 S. Ct. 2400 (2019).

Consistent with the duty of candor and 5 U.S.C. §. 552(a) the Secretary must publish its own extensive regulatory and case law history from 1775 to the present day. This case law history must be available on the Secretary's website, and he must make them available through both Lexis and Westlaw within 90 days.

Finally, the Secretary's attorneys are reminded that as government officials, their first duty is to see that justice is done in every case that reaches this court.

CLOSING REMARKS

The judiciary lacks both the sword and the purse. Its only power is the pen. The basis of that power is built solely upon the public trust. To maintain that power, the public must trust that the laws will be fairly and truthfully applied to the litigant's cause. The keepers of this trust are the officers of the court who come to the bench with candor and an honest belief that the position they advocate is true and lawful.

When the Executive or Legislative branches make an appearance, they do so as guests. They must conduct themselves as such. The political branches must set aside rancor and hyperbole. They must forswear partisan allegiances. Opinion polls and mercurial policy pronouncements have no place here. The only pronouncements allowed are facts. The only argument allowed is how the law applies to those facts. The integrity of the court – and its public trust – is the integrity of the parties themselves. When that integrity is

violated by anyone be it a litigant, an attorney, or the bench itself, discipline to uphold the court's public trust must be swift and firm.

In my opinion, the foundations of judicial review were attacked even before this court took its first case. The court was blind to this attack for decades. It should not have taken an eDiscovery specialist ten years of diligent research to uncover what the Secretary has known all along. How could any less informed veteran – even one with Philip Cushman's zeal –argue their case fairly without the records I have presented here?

In closing consider George Washington's response when given command of the Continental Army. He replied to his congressional commission directly:

> "When we assumed the soldier, we did not lay aside the citizen and we shall most sincerely rejoice with you in that happy hour when the establishment of American liberty, on the most firm and solid foundations, shall enable us to return to our private stations in the bosom of a free, peaceful, and happy country."

In Marbury, SCOTUS stated *"The government of the United States has been emphacally termed a government of laws, and not of men*." But until now veterans have been governed by laws kept in secret and by men who would forever prevent the soldier from once again enjoying the rights of citizens.[12]

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[12] "George Washington to New Yew York Provincial Congress, 26 June 1775, The Writing of George Washington from the original Manuscript Sources, 1745-1799, ed. John C. Fitzpatrick, (Washington, D.C. Government Printing Office