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ADMINISTRATIVE DUE PROCESS—WOUNDED WARRIORS AND
DUE PROCESS: THE *CUSHMAN V. SHINSEKI* ANALOGY

ABSTRACT

*Military service members and veterans receive various benefits arising from their military service. The Department of Veterans Affairs acts as the trustee for distribution of these benefits upon veterans' transition to civilian society. Among these benefits is disability compensation for medical conditions incurred or aggravated by the veteran in the course of their military service. This compensation makes the veteran whole for each condition that can be traced back to the veteran's service. In many cases, this compensation is the veteran's sole source of subsistence when they return to civilian life. Until 2009, these benefits were not considered property interests under the Due Process Clause. But the Court of Appeals for the Federal Circuit changed that in *Cushman v. Shinseki*, which stands for a rather simple proposition: veterans' benefits are constitutionally protected property interests.*

*The author takes the proposition presented in *Cushman* and seeks to expand it to another scheme that provides disability benefits to service members still in the military. The Department of Defense may separate with severance pay or medically retire a member who suffers from a medical condition which renders him or her unfit for further military duty. The military disability benefits available to members under this scheme lack any judicially recognized constitutional protection—despite many shared characteristics with disability compensation provided to veterans. The unspoken doctrine of judicial non-interference with national defense and military matters—the military deference doctrine—has stymied opinions like *Cushman* from appearing in the military disability benefits context. The author argues this doctrine does not apply where the military is acting as an administrator of benefits instead of providing for the national defense. Classifying military disability benefits as property interests does not imply national security issues. Rather, it recognizes that the government cannot arbitrarily deprive service members of disability benefits. The end sought by the *Cushman* analogy is as simple as the proposition the case stands for: disabled service members ought to be guaranteed a fundamentally fair adjudication—no matter the circumstances.*

INTRODUCTION

Over the last forty years, the meaning of “property” under the Fifth Amendment’s Due Process Clause has broadly expanded to include intangible interests.¹ Concurrent to the expansion of “property” was the extension of due process protections² to various classes of individuals, including enemy combatants,³ corporations,⁴ public school students,⁵ welfare applicants⁶ and recipients,⁷ convicted felons,⁸ debtors,⁹ and government employees.¹⁰

However, efforts to extend due process protections have fallen short of reaching the members of the United States military.¹¹ Military adjudications have historically proceeded unabated by the specter of

1. See *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 571-72 (1972) (“The Court has [clarified] that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money.”); see also Jeffrey S. Lubbers, *Giving Applicants for Veterans’ and Other Government Benefits Their Due (Process)*, 35 ADMIN. & REG. L. NEWS 16 (Spring 2010) (noting the interpretation of “property” was historically limited to tangible items such as money and real estate).

2. This note is limited to discussing *procedural due process* in the administrative law context. *Substantive due process*, a topic well beyond the scope of this note, generally focuses on the fairness of a *result*, in contrast to *procedural due process* which focuses on the fairness of *procedures*. See Michael Serota & Michelle Singer, *Veterans’ Benefits and Due Process*, 90 NEB. L. REV. 388, 405-06 (2011).

3. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (holding that Guantánamo Bay detainees are afforded certain procedural due process rights); see also 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 (2010) (noting that enemy combatants have a right to an attorney, but veterans do not).

4. *Noble v. Union River Logging R. Co.*, 147 U.S. 165, 176 (1893) (bestowing Fifth Amendment Due Process protections upon the plaintiff corporation).

5. *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 158 (5th Cir. 1961) (holding that public schools must observe procedural due process when seeking to expel a student).

6. *Kapps v. Wing*, 404 F.3d 105, 115 (2d Cir. 2005) (holding “that applicants for benefits, no less than current benefits recipients, may possess a property interest in the receipt of public welfare entitlements”).

7. *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970).

8. *Haines v. Kerner*, 404 U.S. 519, 521 (1972) (requiring State of Illinois to provide prisoner with “opportunity to offer proof”).

9. *Connecticut v. Doehr*, 501 U.S. 1, 23-24 (1991) (striking down a Connecticut statute permitting a prejudgment deprivation without a hearing).

10. Compare *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-39 (1985) (holding that a state employee is entitled to a pre-termination hearing where state law provided that civil servants could only be terminated with cause), with *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577-79 (1972) (holding that a state employee working under a one-year contract had no property interest in continued employment and therefore nothing to trigger due process protections).

11. Captain Arthur G. Haessig, *The Soldier’s Right to Administrative Due Process: The Right to Be Heard*, 63 MIL. L. REV. 1, 43 (1974).

judicial intervention haunting most government agencies. This apparent anomaly is, in large part, a result of the military deference doctrine.¹² The doctrine is an otherwise necessary and legitimate exception to the general principles of administrative law. But the legitimacy of the military deference doctrine is not absolute. Rather, justifiable application of the doctrine is limited to a narrow construct. This Note argues that when the military ceases functioning as our nation's sword and shield, the military deference doctrine should not apply. This argument is premised on the proposition that *carte blanche* application of the military deference doctrine operates to the exclusion of procedural due process guarantees for military service members facing disability benefit adjudications.

This Note argues that the military deference doctrine has no place in military disability benefit determinations. These determinations do not implicate the military's traditional national security functions. Rather, these adjudications are analogous to functions performed by the Department of the Veterans Affairs, the Social Security Administration, and other social welfare programs outside the national defense apparatus.

From a statistical perspective, military disability adjudications are a relatively common occurrence. Between 2001 and 2009, approximately 170,000 Soldiers, Sailors, Airmen, and Marines were processed through the military's disability evaluation system.¹³ Of these 170,000 service members,¹⁴ approximately 139,000 were determined to be medically unfit for further military duty and involuntarily discharged prior to the expiration of their military service obligation.¹⁵ These service members, subject to the rigors and potentially life-altering determinations of the military's disability evaluation process, have perpetually lacked "judicial recognition" of basic due process protections.¹⁶ The military deference doctrine commands the judiciary to exercise significant, if not outright,

12. See *infra* Part I. See generally John F. O'Connor, *The Origins and Application of the Military Deference Doctrine*, 35 GA. L. REV. 161, 161-63 (2000). "[I]t is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. The responsibility for determining how best our Armed Forces shall attend to that business rests with Congress and with the President." *Id.* at 240 (quoting *Schlesinger v. Ballard*, 419 U.S. 498, 510 (1975)).

13. ACCESSION MED. STANDARDS ANALYSIS AND RESEARCH ACTIVITY, WALTER REED INST. OF RESEARCH, TRI-SERVICE DISABILITY EVALUATION SYSTEMS DATABASE REVIEW, ANNUAL REPORT 2010 13 tbl.3 (Janice K. Gary ed., 2010).

14. The term "service members," as used herein, refers to Soldiers, Sailors, Airmen, Marines, and all other members of the United States Armed Forces.

15. WALTER REED INST. OF RESEARCH, *supra* note 13, at 39 tbl.14A.

16. Haessig, *supra* note 11, at 43.

deference to the findings and conclusions of military administrators.

Without any threat of meaningful judicial review, military disability adjudications are plagued by unfairness. Michael Parker, a noted advocate for service members, has observed “there are only two things [the military] will do when it come[s] to [the disability evaluation system]: [w]hat they want to do and what Congress makes them do.”¹⁷ This Note argues that a logical and long-overdue first step in curing the unfairness of the military disability evaluation system is classifying Department of Defense (DOD) disability benefits as property interests under the Due Process Clause. The due process argument is premised on the contention that the military deference doctrine does not apply to military benefits determinations.

In order to justify this initial step, this Note turns its attention to the recent opinion of *Cushman v. Shinseki*.¹⁸ *Cushman* stands for the proposition that veterans’ benefits administered by the Department of Veterans Affairs are property interests under the Due Process Clause.¹⁹ This 2009 decision was the first time veterans’ benefits were recognized as property interests, allocating disabled veterans a cause of action under the United States Constitution.²⁰ This Note argues by analogy that *Cushman* justifies classification of military disability benefits as property interests.

This Note is organized by concept: Parts I-III provide background material, while Part IV presents the argument of this Note. Part I provides an overview of procedural due process jurisprudence, the military deference doctrine, and the inherent conflict between the two. Part II discusses *Cushman v. Shinseki*, its progeny, and its implications. Part III discusses the military’s disability benefits system. Part IV presents the argument of this Note. First, *Cushman* justifies classifying military disability benefits as property interests. Second, military disability determinations do not implicate the military deference doctrine. Third, counter-arguments to the propriety of classifying military disability benefits as property interests are discussed. Finally, the policy implications of procedural due process in military disability

17. Michael Parker, *DoD Finds Yet Another Way to Deny Benefits for PTSD*, PHYSICAL EVALUATION BOARD FORUM, <http://www.pebforum.com/site/threads/des-outrage-of-the-week-1-dod-finds-yet-another-way-to-deny-benefits-for-ptsd.6172/> (last visited May 13, 2013).

18. *Cushman v. Shinseki*, 576 F.3d 1290 (Fed. Cir. 2009). *Cushman* has been referred to as a “bellwether case,” Collier & Early, *supra* note 3, at 20, indicative of a new “constitutional journey” in the evolution of veterans’ law and due process. *Id.* at 22.

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

20. *Id.* at 1298; Collier, *supra* note 3, at 20-21.

determinations are examined.

I. THE STARTING POINT: DUE PROCESS & THE MILITARY DEFERENCE DOCTRINE

The Fifth Amendment to the United States Constitution states, in relevant part, “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.”²¹ Attempts to encapsulate the precise contours of “due process of law” embody some of the more colorful commentary among American jurists.²² Some have rejected “due process of law” as a mere “myth”²³ or relic of the Magna Carta.²⁴ Despite the cloud of ideological uncertainty that has descended upon the Due Process Clause, its practical function as a constitutional bulwark against arbitrary government adjudication remains relatively undisputed.²⁵

Indeed, the courts have unequivocally interpreted the Fifth Amendment Due Process Clause as guaranteeing a fundamentally fair adjudication: “[w]hatever disagreement there may be as to the scope of the phrase ‘due process of law’ there can be no doubt that it embraces the fundamental conception of a fair trial, with opportunity to be heard.”²⁶ But where does the guarantee to a “fair trial” and an “opportunity to be heard” arise? Are all persons, under all

21. U.S. CONST. amend. V. This Note addresses deprivations effectuated by the federal government, not any state government. Accordingly, the Fourteenth Amendment’s Due Process Clause is omitted.

22. Writing for the plurality in *Arnett v. Kennedy*, 416 U.S. 134 (1974), Justice (later Chief Justice) Rehnquist observed “where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a [Due Process claimant] must take the bitter with the sweet.” *Id.* at 153-54. Justice Cardozo has opined that “[i]n whatsoever proceeding . . . the [Due Process Clause] commands the observance of that standard of common fairness, the failure to observe which would offend men’s sense of the decencies and proprieties of civilized life.” *Snyder v. Mass.*, 291 U.S. 97, 127 (1934), *abrogated by Malloy v. Hogan*, 378 U.S. 1 (1964).

23. Jane Retherford, *The Myth of Due Process*, 72 B.U. L. REV. 1, 4 (1992) (“Due process, like Robin Hood, is a myth. It is a set of stories, texts, and values which have been handed down over 700 years to regulate the relationships between people and government.”). *Id.* at 4.

24. *Id.* at 8. Chapter 39 of the Magna Carta, the forerunner to the Due Process Clause, provided “[n]o freeman shall be taken or imprisoned or disseised or outlawed or banished or in any way destroyed, nor will we pass upon, nor will we send upon him, unless by the lawful judgment of his peers or by the law of the land.” MAGNA CARTA ch. 39 (1215).

25. *See supra* notes 1, 3-10.

26. *Frank v. Magnum*, 237 U.S. 309, 347 (1915) (Holmes, J., dissenting); *see also In re Murchison*, 349 U.S. 133, 136 (1955) (“A fair trial in a fair tribunal is a basic requirement of due process.”); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (requiring a “full opportunity to appear and be heard”).

circumstances, assured that they will not be deprived of life, liberty, or property without an “opportunity to be heard?” The Supreme Court of the United States has explicitly rejected the notion that due process guarantees extend to all conceivable deprivations.²⁷ To the extent these prudential limitations have refined the scope of the Due Process Clause, the Court has effectively outlined the elements necessary to establish a cognizable due process claim.²⁸

Where an individual is deprived, by government action, of life, liberty, or property, the Due Process Clause may give rise to a constitutional challenge. This framework leaves us with several questions: (1) what is a “deprivation?”; (2) what is “government action?”; and (3) what is “life, liberty, and property?” For purposes of this Note, the discussion is limited to what constitutes “property” and the level of process “due” when one is deprived of “property.”²⁹

A. *What is a Property Interest?*

Turning to the first question, “property” is loosely conceptualized as a “bundle of sticks . . . a collection of individual rights which, in certain combinations, constitute property.”³⁰ Characterizing a *thing* as a property interest³¹ is the first step in the due process inquiry. After all, in order to be deprived of property, “one must presumably possess it

27. Justice Holmes, writing for the Supreme Court nearly a century ago, explained that broad-ranging government actions do not afford each and every affected individual an opportunity to be heard: “[t]here must be a limit to individual argument . . . if government is to go on.” *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915). Legislatures regularly enact laws of every genus that deprive someone, somewhere, of *something*. Permitting all affected individuals an opportunity to be heard following, for example, the enactment of a law increasing taxes for all persons with an income greater than one dollar, is simply inefficient. *See id.*

28. *Compare id.* at 446 with *Londoner v. City & County of Denver*, 210 U.S. 373 (1908). *Londoner* concerned “[a] relatively small number of persons . . . who were exceptionally affected, in each case upon individual grounds, and it was held that they had a right to a hearing.” *Bi-Metallic Inv. Co.*, 239 U.S. at 446. “But [*Londoner*] is far from reaching a general determination dealing only with the principle upon which all the assessments in a county had been laid [in *Bi-Metallic*].” *Id.* Thus, the “opportunity to be heard” arises from government *adjudication*, insofar as specific facts are decided with respect to a particular group of individuals. *See Londoner*, 210 U.S. at 386.

29. The Department of Defense and Department of Veterans Affairs are cabinet-level agencies of the United States Government. Where either agency “deprives” someone of a due process interest, the Fifth Amendment’s Due Process Clause is implicated—there is no state-level deprivation which would otherwise trigger the Fourteenth Amendment’s Due Process Clause.

30. *United States v. Craft*, 535 U.S. 274, 278 (2002) (emphasis added).

31. The term “property interest” is used interchangeably with the term “property” in this Note.

first.”³²

After a bevy of due process challenges in the 1970s, the Supreme Court began recognizing property interests in “legal entitlements” to a *thing*, in contrast to a mere expectation or actual possession thereof.³³ Determining whether one is “legally entitled” to a *thing* generally depends on whether there is a source of law containing explicit criteria for entitlement to that *thing*.³⁴ To illustrate, the welfare benefits at issue in *Goldberg v. Kelly* were payable to individuals meeting a certain statutory criteria.³⁵ The moment the *Goldberg* plaintiff was determined to have satisfied the statutory criteria, a “legal entitlement” to welfare benefits was acquired.³⁶ It is important to emphasize that the individual satisfying the statutory criteria enjoyed “legal entitlement” to welfare benefits *before* actually receiving the benefit.³⁷ However, the Court’s broad reading of “legal entitlements” as a property interest is qualified by *Goldberg*’s progeny.

In cases following *Goldberg*, the Supreme Court stopped short of extending the “entitlement” premise to a logical extreme: “a protected [due process] interest [is created] by placing substantive limitations on official discretion.”³⁸ Accordingly, to the extent a source of law provides that, if certain criteria are satisfied, then “specific directives to the decision-maker . . . [mandate that] a particular outcome must follow,” a due process interest is created.³⁹ Consequently, if a statute

32. Lubbers, *supra* note 1, at 16.

33. *Id.* at 17 (quoting Professor Michael Herz). See *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 571-72 (1972) (“[P]roperty interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money.”); *Goldberg v. Kelly*, 397 U.S. 254, 277 (1970) (“It may be realistic today to regard welfare entitlements as more like ‘property’ than a ‘gratuity.’ Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property . . . [modern society] is built around entitlement.”).

34. “[E]ntitlements are . . . ‘not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.’” *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 756 (2005) (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972)).

35. See *Atkins v. Parker*, 472 U.S. 115, 128 (1985); *Goldberg*, 397 U.S. at 277.

36. “[T]he welfare recipients in [*Goldberg*] had a claim of entitlement to welfare payments . . . grounded in the statute defining eligibility The recipients had not yet shown that they were . . . within the statutory terms of eligibility. [Nonetheless,] they had a right to a hearing at which they might attempt to do so.” *Roth*, 408 U.S. at 577.

37. See *supra* note 35.

38. *Ky. Dep’t. of Corr. v. Thompson*, 490 U.S. 454, 462 (1989) (quoting *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983)).

39. *Thompson*, 490 U.S. at 463.

requires all persons over the age of twenty to be paid fifty dollars from the state treasury, all persons acquire a property interest in those fifty dollars (*i.e.* entitlement) when they turn twenty. In contrast, “a benefit is not a protected entitlement if government officials may grant or deny it in their discretion.”⁴⁰ Thus, if an individual’s legal entitlement to a *thing* is at the complete mercy of government discretion, a protected property interest does not exist.⁴¹ For example, a statute providing for a tax credit when, in the sole opinion of the governor, a residential homeowner has maintained the “prettiest” lawn in their municipality, does not bestow a cognizable property interest.

There are, of course, sources of law creating entitlements that do not neatly fit in to either end of the spectrum.⁴² These sources are analyzed under a sliding scale where the court examines the level of particularity under which officials must exercise their discretion.⁴³ In any case, establishing the existence of a property interest is, relatively speaking, “the easy part.”⁴⁴ Even where an individual enjoys a property interest in a *thing*, one must then resolve the matters of “deprivation” and the level of process that may be “due.”

B. *How Much Process is Due?*

The second question brings us back to the fundamental purpose of the Due Process Clause: ensuring individuals have “the opportunity to be heard at a meaningful time and in a meaningful manner”⁴⁵ *before* “being condemned to suffer grievous loss of any kind.”⁴⁶ Consequently, the “process due” inquiry can arise before an actual “deprivation” of a property interest occurs.⁴⁷ Of course, the extent of “process due” is the

40. *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 756 (2005).

41. “To have a property interest in a benefit,” one must “have a legitimate claim of entitlement to it.” *Roth*, 408 U.S. at 577. If entitlement is premised on government discretion in the relevant source of law, the “legitimacy” of any “claim of entitlement” falls within that discretion. However, statutes containing particular discretionary guidelines *and* mandatory action under those guidelines may create a due process interest. *See Thompson*, 490 U.S. at 463-64 (1989).

42. *See supra* note 40.

43. *See supra* note 40.

44. Interview with Bruce K. Miller, Professor of Law, Western New England University School of Law, in Springfield, Mass. (Fall 2011).

45. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)) (internal quotations omitted).

46. *Mathews*, 424 U.S. at 333 (quoting *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)) (internal quotations omitted).

47. “This Court consistently has held that some form of hearing is required *before* an individual is finally deprived of a property interest.” *Mathews*, 424 U.S. at 333 (emphasis added).

central question in this context—and it is a deceptively simple one—has the government followed constitutionally adequate procedures? While the construct of the due process analysis is rather straightforward, “much else remains uncertain.”⁴⁸

This uncertainty primarily arises from the Supreme Court’s opinion in *Mathews v. Eldridge*.⁴⁹ In *Mathews*, the court introduced a three-pronged test for determining the level of “process due.”⁵⁰ At the threshold, the Court stated that the proper extent of process due is an *ad hoc* determination: “[d]ue process is flexible and calls for such procedural protections as the particular situation demands.”⁵¹ Hence, resolution of the issue requires balancing (1) “the private interest that will be affected by the official action;”⁵² (2) “the risk of . . . erroneous deprivation of such interest through the procedures used, and the probable value . . . of additional or substitute procedural safeguards;”⁵³ and (3) “the Government’s interest, including the function involved . . . the fiscal and administrative burdens that . . . additional or substitute [procedures] would entail.”⁵⁴ It is the outwardly *ad hoc* nature of *Mathews* balancing, coupled with the inherent subjectivity of the factors considered, that create an aura of uncertainty with respect to the “how much process is due” inquiry.⁵⁵ However, the *Mathews* opinion and extant progeny have carved out some general principles which purport to quell some of this uncertainty.⁵⁶

First, the gravity of the “private interest that will be affected by the official action” is the major premise upon which the other two factors are considered.⁵⁷ The *Mathews* opinion framed this concept as the “the degree of potential deprivation.”⁵⁸ *Goldberg* is illustrative: the Court

48. Erwin Chemerinsky, *Procedural Due Process Claims*, 16 *TOURO L. REV.* 871, 893 (1999).

49. *Mathews*, 424 U.S. at 319 (1976).

50. *Id.* at 334-35.

51. *Id.* at 334.

52. *Id.* at 335.

53. *Id.*

54. *Id.*

55. “When there is a three-part balancing test like [*Mathews*], courts have enormous discretion and in all likelihood different factors will point in varying directions.” Chemerinsky, *supra* note 48, at 889.

56. Most importantly, the Supreme Court has held that while the federal and state governments effectively create property interests, the level of process due is a purely constitutional issue decided as a matter of law. See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985).

57. *Mathews*, 424 U.S. at 321.

58. *Id.* at 341.

found the “private interest” in welfare benefits as paramount, emphasizing how the disabilities following termination of the benefits effectively precluded the claimant from seeking meaningful redress.⁵⁹ Thus, as a general matter, “[t]he more important the interest to the individual, the more procedural protections the court is going to require.”⁶⁰

The second and third prongs of *Mathews* balancing are discussed in tandem due to their varying case-specific applications. The second prong, the “risk of erroneous deprivation” through current procedures and the probability that other procedures will lead to more accurate results is, both numerically and conceptually, “[c]entral to the evaluation of any administrative process.”⁶¹ The third prong involves considering the “[g]overnment’s interest” to be free from unreasonable administrative burdens.⁶² Here, the question is in the nature of a cost-benefit analysis.⁶³

Mathews balancing is the current standard employed to determine the level of process that ought to be afforded before a person may be deprived of a property interest. However, *Mathews* balancing has proved to be a difficult standard for many courts to apply.⁶⁴

C. *Due Process & the Military Deference Doctrine*

The functional application of the Due Process Clause has perpetually shifted with the ebb and flow of our society. Unsurprisingly, changes in our society have collided, on many occasions, with the cornerstones of our Constitution. Nowhere has a collision been more announced, in the procedural due process context, than in the conflict between due process and administrative law, where the judiciary is brought to bear on the expertise of specialized government agencies.⁶⁵ The principal question underlying this debate is: how can the courts tell an agency, concededly experts in their vested functions, what procedures

59. *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (emphasis omitted).

60. Chemerinsky, *supra* note 48, at 888-89.

61. *Mathews*, 424 U.S. at 343. See Chemerinsky, *supra* note 48, at 889.

62. *Mathews*, 424 U.S. at 348-49.

63. “At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost.” *Id.* at 348.

64. See *infra* Part IV.

65. See generally Administrative Procedure Act of 1946, 5 U.S.C. §§ 500-96 (2012) (Congress enacted the APA in 1946 in response to the vast expansion of federal power following “New Deal” legislation. Specifically, the APA sought to address the growing number and powers of federal agencies).

they must utilize? After all, judges and lawyers are not learned in the idiosyncrasies of operating social welfare programs, providing public education, or engaging in military operations—to name a few examples.

Both the legislature and judiciary have purported to resolve this systemic gap.⁶⁶ Much like the *ad hoc* due process analysis in *Mathews*, courts engage in varying levels of deference when reviewing agency decisions or procedures—contingent on the agency function or determination at issue.⁶⁷ Congress has outlined several specific standards of review in the Administrative Procedure Act; while case law, policy, and history have also served as sources to balance the judiciary’s prerogative “to say what the law is”⁶⁸ with an agency’s expertise in any particular area.⁶⁹

However, constitutional issues arising in administrative controversies introduce a unique circumstance where the *court*, not the agency, is the expert.⁷⁰ This general principle has been reflected in numerous judicial decisions involving challenges to agency actions.⁷¹ But one particular “agency,” the Armed Forces of the United States,⁷² has enjoyed an exceptional level of deference *even where constitutional questions are implicated*. This inertia arises from the force of the military deference doctrine, which obstructs any meaningful application of the procedural due process apparatus by a court engaging in judicial review of a military action or determination.⁷³

66. See, e.g., 5 U.S.C. § 706; *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978).

67. Cf. *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915); *Londoner v. City & Cnty. of Denver*, 210 U.S. 373 (1908) (providing a fundamental distinction between legislative facts and adjudicative facts).

68. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

69. 5 U.S.C. § 706. Prudential examples are found throughout relevant literature, for instance: “[c]ourts . . . recognize an exception when exhaustion [of administrative remedies] would be futile because the agency apparently will not grant relief. The appearance of futility may come from evidence of bad faith on part of the agency [or] past patterns of an agency’s decision making.” Marcia R. Gelpe, *Exhaustion of Administrative Remedies: Lessons from Environmental Cases*, 53 GEO. WASH. L. REV. 1, 40 (1984) (footnotes omitted).

70. “[C]onstitutional questions . . . present the strongest argument that the agency lacks credentials or authority to decide an issue.” *Id.* at 44.

71. See *supra* notes 1, 3-10.

72. This is the official designation for describing all military forces of the United States. See U.S. NAVY STYLE GUIDE, http://www.navy.mil/submit/view_styleguide.asp?sort=A (last visited May 13, 2013).

73. “At the risk of oversimplification, the military deference doctrine requires that a court considering certain constitutional challenges to military legislation perform a more lenient constitutional review than would be appropriate if the challenged legislation were in the civilian context.” O’Connor, *supra* note 12, at 161.

1. The Military Deference Doctrine Explained

The guarantees of due process, and arguably the law as a whole, have been perpetually tempered by the threat or existence of armed conflict. “The life of the law has not been logic: it has been experience The substance of the law at any given time pretty nearly correspond[s] . . . with what is then understood to be convenient.”⁷⁴ What is “convenient,” in this context, seems to be inextricably connected with the nation’s “[s]afety from external danger.”⁷⁵ Alexander Hamilton observed:

The violent destruction of life and property incident to war, the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty to resort for repose and security to institutions which have a tendency to destroy their civil and political rights. To be [safer], they at length become willing to run the risk of being less free.⁷⁶

There has been considerable scholarly debate surrounding the “crisis thesis,” which constitutes the conceptual foundation of the military deference doctrine.⁷⁷ Overall, the doctrine’s premise is simple: during times of war, national security is the paramount concern of all branches of government.⁷⁸ The doctrine requires the government to presume that national security rests on the swift and efficient administration of the military. Consequently, as a branch of government, the judiciary has acquiesced to this command by manifesting reluctance, if not clear refusal, to interfere in military affairs—especially during times of conflict.⁷⁹

74. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1-2 (1881).

75. *THE FEDERALIST* NO. 8 (Alexander Hamilton).

76. *Id.*

77. “[T]he thesis is not so much about [the Supreme Court’s] treatment of alleged infringements of rights and liberties made by all types of parties but rather about deference strictly in cases when the U.S. government is a party.” Lee Epstein et al., *THE SUPREME SILENCE DURING WAR* 14 (2003) (unpublished manuscript, on file with New York University), available at <http://www.nyu.edu/classes/nbeck/q2/king.propensity.pdf>.

78. “[T]he power to wage war is the power to wage war successfully . . . [resulting in] deference to the government . . . in areas of military judgment, such as the establishment of military tribunals, [and] also [in] broad forms of general regulation that are seen to be relevant, however peripherally, to the war effort.” *Id.* at 16.

79. The Supreme Court has explained the exceptional level of judicial deference it affords the military: “[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments.” *Rostker v. Goldberg*, 453 U.S. 57, 65 (1981) (alteration in original)

However, the doctrine's significant level of deference does not lack absolute justification.⁸⁰ Affording the military the ability to wage war, effectively unimpeded by judicial scrutiny, allows the necessary flexibility to conduct military operations successfully. Prior to World War II, notions of military deterrence and force projection were of relatively little concern to the United States.⁸¹ Incidents of armed conflict were isolated and otherwise unique to our national experience. But after the surrender of the Axis Powers in 1945, the new balance of power necessitated the United States to maintain a "standing army" for the first time in the country's relatively short existence.⁸²

Proliferation of the military establishment was well received, as the country faced a perceived, if not actual threat, of "[f]requent war and constant apprehension, [that required] a state of constant preparation."⁸³ The threat of war with the Soviet Union resulted in the existence of a vast military establishment.⁸⁴ The military deference doctrine, historically limited to application as an exception in times of war and national emergency, now took on the form of a "convenient" general rule.⁸⁵ The doctrine's functional shift was justified on the simple premise that the nation was now in a perpetual state of war—judicial

(quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)). See *Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953) ("But judges are not given the task of running the Army . . . [t]he Military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters.").

80. See generally O'Connor, *supra* note 12, at 161. "[T]he military deference doctrine remains a viable, omnipresent part of the Supreme Court's constitutional jurisprudence, despite the best efforts of litigants and legal commentators to convince the country otherwise." *Id.* at 163.

81. See Neutrality Act of 1935, Pub. L. No. 74-76, 49 Stat. 1081 (amended 1937, 1939), *repealed* by Lend-Lease Act, Pub. L. No. 77-11, 55 Stat. 3034 (1941).

82. Hamilton warned of standing armies: "The continual necessity for their services enhances the importance of the soldier, and proportionably [sic] degrades the condition of the citizen." THE FEDERALIST NO. 8 (Alexander Hamilton).

83. *Id.*

84. See generally MICHAEL S. SHERRY, IN THE SHADOW OF WAR: THE UNITED STATES SINCE THE 1930S, 176-77 (Yale University, 1995).

85. At the conclusion of World War II the United States turned to a policy of military deterrence, principled on maintaining a military force to an extent that "no potential aggressor may be tempted to risk his own destruction." President Dwight D. Eisenhower, Farewell Address (Jan. 17, 1961). In a sense, the country was now in a perpetual state of war. An obvious example of "war-time deference" is found with habeas corpus. Habeas corpus was wholly suspended during the Civil War, Habeas Corpus Suspension Act, Pub. L. No. 37-81, 12 Stat. 755 (1863), partially suspended in World War II, *Ex parte Quirin*, 317 U.S. 1 (1942), and effectively suspended shortly after the 9/11/01 attacks, Military Order—Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 16, 2001).

interference could compromise national security.

2. The Point of Impact—The Due Process Clause and Military Deference

The Due Process Clause analytical framework contemplates three fundamental questions.⁸⁶ Of those three questions, asking “how much process is due” in military cases precipitates an immediate conflict with the military deference doctrine. Application of the doctrine in the procedural due process context is easily vindicated by the principle announced in *Mathews*: “[d]ue process is flexible and calls for such procedural protections as the particular situation demands.”⁸⁷ The military deference doctrine manifested itself in *Hamdi v. Rumsfeld*, a recent due process case.⁸⁸ In *Hamdi*, the Court engaged in *Mathews* balancing to determine whether the petitioner, an American citizen detained by United States military personnel during combat operations in Afghanistan, was essentially deprived of “liberty . . . without due process of law.”⁸⁹

Under the first *Mathews* prong, the Court stated “Hamdi’s ‘private interest . . . affected by the official action,’ is the *most elemental* of liberty interests—the interest in being free from physical detention by one’s own government.”⁹⁰ Despite the exceptional characterization of the due process interest, the Court meshed the military deference doctrine with the second *Mathews* prong: “the exigencies of the circumstances may demand that . . . enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict.”⁹¹ On this premise, the Court utilized the second *Mathews* prong to limit the extent of process due in enemy-combatant determinations by the military.⁹² Specifically, the Court effectively waived the ban on hearsay evidence in such proceedings, as well as creating “a [rebuttable] presumption in favor of the Government’s evidence.”⁹³ Not only was the military deference

86. See *supra* text accompanying note 29.

87. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

88. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (Souter, J. and Ginsburg, J., concurring in part and dissenting in part; Scalia, J., Stevens, J., and Thomas, J., dissenting) (plurality opinion).

89. *Id.* at 529 (citing U.S. CONST. amend. V).

90. *Hamdi*, 542 U.S. at 529 (emphasis added) (internal citation omitted).

91. *Id.* at 533.

92. *Id.* at 554.

93. *Id.* at 534.

doctrine utilized as a premise to limit procedural due process, but also to expand the scope of military deference itself.

It can hardly be said that judicial invocation of the military deference doctrine, even in the *Hamdi* case, was a new or surprising development.⁹⁴ Extension of procedural due process protections to numerous classes of individuals in the 1970s⁹⁵ did not meaningfully affect the military's administration of anything, even in the face of legal challenges made by service members during peacetime.⁹⁶ To the extent Cicero warned *inter arma silent leges* (during war law is silent),⁹⁷ it is ironic that the law seems to have been "silent" only for those *fighting in war*.

D. *Moving Forward*

The military deference doctrine is a self-fulfilling prophecy insofar as the courts neither engage in any substantive analysis of the doctrine nor can the courts meaningfully review any claim tangentially classified as "military."⁹⁸ It is probably unwise to sit idly by and wait for the second coming of *Pax Americana*, where peace and the absence of conflict will allow us to revisit this doctrine.⁹⁹ Analytically speaking,

94. "[T]hose law review writers who opine that the military deference doctrine has somehow eroded . . . are engaging in wishful thinking more than anything. The Supreme Court's military deference jurisprudence has remained essentially static since [the 1970s]." O'Connor, *supra* note 12, at 308.

95. See *supra* text accompanying notes 1-12.

96. *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981) ("[J]udicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged.").

97. Epstein, et al., *supra* note 77, at 3.

98. The doctrine finds its roots in history. One would be hard pressed to discover its origin in the United States Constitution, statutes, or common law. Instead, the military deference doctrine is a historical principle underpinning the very fabric of all human affairs, arguably since time immemorial. If one were to accept Thomas Hobbes's idea of the *social contract*, it follows that when two or more humans made peace, the legal "consideration" was that both parties could escape their state of nature and perpetual war. The benefits of the social contract are evident from the basic societal apparatus—laws, government, and civilization itself—that we enjoy today. The "transaction cost" of this contract stems from the fundamental reason humans entered it in the first place—to avoid the state of nature (*e.g.* war). Just as the law, physical science, and morality have developed as a contractual "benefit," the manner in which we ensure the social contract's performance—beginning with simple bands of warriors to modern military forces—has always been a function which takes priority over all else. Every instance where the benefits of the social contract have been sacrificed to ensure "contractual performance" over all of human history is where one can "find" the military deference doctrine. The doctrine stems from the "transaction cost" we must pay to ensure performance of the social contract.

99. *Pax Americana* (American Peace) was a term used by President John F. Kennedy in his commencement address to American University's class of 1963:

military due process claimants must negotiate the obstacle created by the doctrine in order to receive any favorable finding under *Mathews* balancing. Without doing so, judicial review will likely be futile. To accomplish this task, this Note argues that where the military is not wearing its “military hat,” the doctrine ought not to apply.¹⁰⁰ It is one thing to protect military decision-makers from making good-faith efforts to ensure personnel readiness. But, turning to the immediate concern of this Note, disability benefits administered by the military do not implicate personnel readiness issues—and certainly do not implicate national security concerns.

In fact, military disability benefits share much in common with benefits administered by the Department of Veterans Affairs (DVA).¹⁰¹ *Cushman v. Shinseki*, discussed in the following part, provides an important starting point for the eventual analogy argued for by this Note.¹⁰² As discussed *infra*, Part I.A, the threshold question under the Due Process Clause is whether or not one holds a property interest in a *thing*. *Cushman* stands for the proposition that DVA disability benefits *are* protected property interests.¹⁰³ The military deference doctrine does not apply to determinations made by the DVA, but was introduced at this point to conceptually illustrate its connection to procedural due process. This Note will now turn to a discussion of *Cushman* in detail, returning to discussion of the military deference doctrine in connection with DOD adjudications.

What kind of peace do I mean? What kind of a peace do we seek? Not a *Pax Americana* enforced on the world by American weapons of war. Not the peace of the grave or the security of the slave. I am talking about genuine peace, the kind of peace that makes life on earth worth living, the kind that enables men and nations to grow and to hope and to build a better life for their children—not merely peace for Americans but peace for all men and women, not merely peace in our time but peace in all time.

President John F. Kennedy, Commencement Address at Am. Univ. (June 10, 1963) (transcript available at <http://www.jfklibrary.org/Asset-Viewer/BWC7I4C9QUmLG9J6I8oy8w.aspx>).

100. See *infra* Part IV.

101. See *infra* Part III.

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

103. *Id.*

II. ONE GIANT LEAP: *CUSHMAN V. SHINSEKI*

A. *The Story of Philip Cushman*

*Rules of Engagement*¹⁰⁴ contains a memorable scene where Tommy Lee Jones, playing the part of Marine Corps Colonel Hayes Hodges, coldly stares at the President's National Security Advisor and inquires: "You ever had a pissed-off Marine on your ass?" Insulted, the National Security Advisor asks: "Is that a threat?" Colonel Hodges poignantly replies: "Oh, yes sir."¹⁰⁵ *Cushman v. Shinseki* is about a "pissed-off Marine" named Philip Cushman. Like Colonel Hodges's client in *Rules of Engagement*, Mr. Cushman was the victim of fraud perpetrated by government officials.¹⁰⁶ Once this fraud was discovered, Mr. Cushman—also a Marine—sought to remedy the injustice with a persistence rarely observed in the civilian world. His determination paid off, creating a well-overdue precedent for military veterans and vindicating the oft-quoted maxim that there is "no better friend, no worse enemy" than a United States Marine.¹⁰⁷

Cushman's story began during the Vietnam War. While serving in Vietnam with the United States Marine Corps, he suffered a back injury.¹⁰⁸ In 1974, four years after his discharge, Cushman was still suffering from the effects of his back injury.¹⁰⁹ That same year, he filed an application for disability compensation with the DVA, citing his back injury as the basis for his claim.¹¹⁰ After several bouts of Compensation

104. The film was released in 2000. Unbeknownst to the screenwriters at the time of the film's production, the subject matter of their story was a grim foreshadowing of problems to come.

105. *RULES OF ENGAGEMENT* (Paramount Pictures 2000).

106. *Cushman*, 576 F.3d at 1295.

107. *Did He Go Too Far?*, TIME (Feb. 28, 2005),

<http://www.time.com/time/magazine/article/0,9171,1032357-1,00.html>. See *Cushman*, 576 F.3d at 1294.

108. *Cushman*, 576 F.3d at 1295. The court noted that Cushman served in a "combat infantry battalion," *id.*, a superfluous description considering the primary purpose of an infantry battalion *is* combat: "[t]he primary . . . mission of the Infantry battalion . . . is to close with the enemy by means of fire and maneuver. To destroy or capture him, to repel his assaults by fire, close combat, or counterattack." *Id.* See UNITED STATES ARMY FIELD MANUAL FM 3-21.20, THE INFANTRY BATTALION, § 1-1 (2006).

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

110. *Id.* Veterans who served during war or a national emergency may file a claim for disability compensation with the DVA under 38 U.S.C. § 1110. The disability compensation claim prevails if there is preponderance of a "nexus" between (1) the veteran's current disability and (2) their military service. See *id.* Justice Antonin Scalia has indicated it may be

and Pension examinations,¹¹¹ the DVA classified his back condition as “service connected”¹¹² and awarded Cushman a 60% disability rating.¹¹³ However, his victory was short-lived.

Cushman had secured civilian employment as manager of a flooring store, a job which required some manual labor.¹¹⁴ By 1976, his back condition deteriorated to a point where he had to “lie flat on his back” in the rear of the store and “fill out paperwork.”¹¹⁵ That same year, Cushman was asked to resign his job, at which point he sought re-assessment of his back condition at a local DVA clinic.¹¹⁶

On the date of the re-assessment, the examining DVA clinician wrote what would become the last comment in Cushman’s medical record: that Cushman’s back condition “[i]s worse + must stop present type of work.”¹¹⁷ Under the Veterans Affairs Schedule for Rating Disabilities (VASRD), Cushman carried the maximum schedular rating for his particular back condition.¹¹⁸ Stated differently, despite his deteriorating prognosis, he could not request a higher rating under the VASRD. However, because his back condition prevented him from gainful employment, Cushman was eligible for Total Disability based on Individual Unemployability (TDIU) benefits.¹¹⁹ TDIU compensation would allow Cushman to collect disability compensation beyond the schedular limit of 60% for his back condition.¹²⁰

wise to avoid using “*nexus*” in any petitions for certiorari: “[a]nother one of my *bêtes noires* of legalisms is *nexus*. Yeah, *nexus*. What is it? It’s Latin for ‘connection.’ You don’t make it more scientific at all by calling it a *nexus*.” THE AMERICAN SOCIETY OF LEGAL WRITERS, THE SCRIBES JOURNAL OF LEGAL WRITING 58 (Bryan A. Garner ed., 2010).

111. Informally referred to as “C and P exams” in the veterans’ community, these evaluations determine the scope and degree of the veteran’s purported disability. The DVA publishes examination worksheets outlining procedures for evaluating different medical conditions.

112. Classification of a veteran’s condition as “service connected” indicates a connection between their current disability and military service. In some cases, the classification gives rise to a rebuttable presumption in favor of the veteran. 38 C.F.R. § 3.102 (2011).

113. *Cushman*, 576 F.3d at 1292. Both the DVA and DOD utilize the Veterans Affairs Schedule for Rating Disabilities to determine appropriate disability awards for service members and veterans. The schedule is found in 38 C.F.R. ch. 1, pt. 4 (2011).

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

115. *Id.*

116. *Id.*

117. *Id.* at 1292-93.

118. *Id.* at 1292.

119. *Id.* at 1293. TDIU is generally available to veterans “unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities.” 38 C.F.R. § 4.16 (2011).

120. See 38 C.F.R. § 4.16. TDIU awards operate as equivalent to a 100% disability

From 1977, the year the TDIU claim was initially filed, until 1994 when the DVA finally acquiesced, Cushman went without TDIU compensation.¹²¹ His TDIU claim and subsequent appeals were denied in 1978, 1980, and 1982.¹²² In 1997, twenty years later and likely to Cushman's complete astonishment, he discovered a substantial alteration to his 1976 assessment.¹²³ Cushman immediately sought relief from the DVA, but *again* was denied.¹²⁴ Cushman appealed to the Court of Appeals for the Federal Circuit, essentially arguing that he was denied a "fundamentally fair adjudication of his claim" in violation of the Due Process Clause.¹²⁵

B. *An Opportunity To Be Heard (Finally)*

Mr. Cushman presented a Fifth Amendment claim, arguing that he was deprived of his interest in DVA disability benefits without due process of law.¹²⁶ In considering whether veterans' benefits are classifiable as property interests, the *Cushman* court began its analysis by observing that such benefits are not "granted on the basis of need," but instead are mandated by statute.¹²⁷ Analogizing DVA benefits with Social Security benefits, the court noted that DVA benefits are mandated by statutes "independent [of] . . . DVA proceedings."¹²⁸ To the extent that statutory provisions set forth the eligibility criteria for veterans' benefits, "an absolute right of benefits to qualified individuals" exists.¹²⁹ On this reasoning, the court determined that DVA benefits are a protected property interest and, therefore, applicants demonstrating

rating. *Id.*

121. *Cushman*, 576 F.3d at 1293.

122. *Id.*

123. *Id.* at 1294. Cushman's original medical record had been changed from "[i]s worse + must stop present type of work" to "[i]s worse + must stop present type of work, *or at least [] bend [] stoop lift.*" *Id.* (emphasis in original) (brackets indicate illegible stray marks).

124. *Id.*

125. *Id.* at 1296.

126. See U.S. CONST. amend. V. As discussed *supra* Part I.A, the Fifth Amendment applies because Cushman argues that his veterans' benefits constitute a property interest and the DVA, a federal agency, has deprived him of such benefits without a fair hearing. See *Cushman*, 576 F.3d at 1290. As discussed *supra* Part I.A, a colorable due process claim requires establishing the existence of a property interest: to briefly review, a benefit is a property interest if an individual has (1) "a legitimate claim of entitlement to [the benefit]," and (2) government officials cannot "grant or deny [the benefit] in their discretion. *Id.* at 1297.

127. *Cushman*, 576 F.3d at 1297

128. *Id.*

129. *Id.*

eligibility for DVA benefits cannot be deprived without due process.¹³⁰ Turning to the instant case, the court explained that under § 1110 of Title 38, Cushman acquired a “legitimate claim of entitlement” for DVA benefits when he was injured in Vietnam.¹³¹ Only where a veteran fails to establish a connection between his purported disability and military service does the DVA have the absolute authority to deny a claim.¹³²

Now that DVA disability benefits were characterized as protected property interests, satisfying the threshold procedural due process inquiry, the court proceeded to consider the question of “how much process is due?”¹³³ On behalf of Secretary Shinseki,¹³⁴ the government argued that the DVA did not violate the mandates of procedural due process.¹³⁵ Specifically, the government argued: (1) due process is satisfied when a claim has been appealed and reviewed multiple times, and (2) because DVA procedures provide sufficient due process to veterans’ claims as a general matter, an issue in one case does not demonstrate a lack of fairness to DVA procedures as whole.¹³⁶ The court quickly rejected the government’s first argument, stating that the sheer number of appeals is irrelevant in determining the extent of process due.¹³⁷ Instead, the proper question is whether any of Cushman’s appeals, with the presence of the falsified record, ever permitted a fair consideration of his claim.¹³⁸ The court also rejected the government’s second argument, noting that Cushman was not challenging the fairness of the DVA procedural framework as whole.¹³⁹

Cushman’s argument, foreshadowing the ultimate decision of the court, was well received.¹⁴⁰ Cushman argued that the DVA “failed to fairly apply existing procedures [to] his case.”¹⁴¹ Holding in favor of Cushman, the court stated “[a]lterations of evidence are material for due

130. *Id.* at 1298.

131. *Id.*

132. *See* 38 U.S.C. § 1110. Upon application for benefits, the DVA must make a finding of fact that the veteran’s disability did not arise from his military service. *Cushman*, 576 F.3d at 1298-99.

133. *Id.* at 1298.

134. Eric K. Shinseki, the Secretary of Veterans Affairs at the time of this writing, is a former four-star General in the United States Army. Secretary Shinseki served as the Army Chief of Staff from 1999 until 2003, when General George W. Casey, Jr. succeeded him.

135. *Cushman*, 576 F.3d at 1299.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 1300.

141. *Id.* at 1299.

process purposes if there is a ‘reasonable probability of a different result’ absent those alterations.”¹⁴² It was obvious that Cushman’s TDIU claim would have been adjudicated quite differently absent the altered document. The court’s ultimate holding observed that the fairness of Cushman’s TDIU claims were compromised and ordered a new hearing without the presence of the altered document.¹⁴³

C. *Distilling Cushman*

Cushman v. Shinseki was hailed by some as precipitating “an exciting time and a time of change,”¹⁴⁴ and others as “[opening] Pandora’s Box.”¹⁴⁵ Two cases following *Cushman* refine its implications: *Gambill v. Shinseki*¹⁴⁶ and *Edwards v. Shinseki*.¹⁴⁷ In the aggregate, the *Cushman* progeny refines two issues: (1) when does a veteran acquire a property interest in DVA benefits?; and (2) once a veteran acquires a property interest in DVA benefits, how much process is due?

1. When Does a Veteran Acquire a Property Interest in Benefits?

One of the broader implications of *Cushman* is that it effectively stands for the proposition that *applicants* for veterans’ benefits hold a property interest in those benefits.¹⁴⁸ The *Cushman* court stated “[a] veteran is entitled to disability benefits *upon a showing that he meets the eligibility requirements set forth in the governing statutes and regulations*. We conclude that such entitlement to benefits is a property interest.”¹⁴⁹ The court’s conclusion is based on a distillation of Supreme Court opinions addressing the temporal implications of determining *when* an individual acquires a property interest in benefits.¹⁵⁰

Generally, the court begins by revisiting the principles announced in *Goldberg* and its progeny: that “a legitimate claim of entitlement” and

142. *Id.* at 1300 (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)).

143. *Id.*

144. Collier & Early, *supra* note 3, at 22.

145. Emily Woodward Deutsch & Robert James 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, 220 (2011).

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

147. *Edwards v. Shinseki*, 582 F.3d 1351 (Fed. Cir. 2009).

148. Insofar as “applicants” are those “who have not yet been adjudicated as entitled to [benefits].” *Cushman*, 576 F.3d at 1296.

149. *Id.* at 1298 (emphasis added).

150. *See id.* at 1296-97.

the discretionary nature of the benefit are central to whether a property interest exists.¹⁵¹ Veterans' benefits, the court explains, are neither granted on the basis of need nor awarded on a discretionary basis.¹⁵² Rather, governing statutes¹⁵³ grant an "an absolute right of benefits to qualified individuals."¹⁵⁴

The significance of these principles is evident from a practical comparison. Where the government may grant or deny a benefit on a discretionary basis, the "entitlement" determination is subjective and vested in the official. On the other hand, where benefits are absolutely vested in individuals meeting explicit statutory criteria, the power of "entitlement" is objective—the applicant either meets the criteria or does not meet the criteria. Thus, in the case of non-discretionary benefits, "the current holder of the entitlement and the applicant are identically situated."¹⁵⁵ This distinction is the basis for *Cushman's* proposition that applicants for benefits hold a property interest therein.

The court's conclusion on this issue comports with the view that an individual acquires a property interest in a non-discretionary benefit upon gaining *legal entitlement* to the benefit.¹⁵⁶ Legal entitlement does not arise from adjudication, but from the statute conferring the non-discretionary benefit. Veterans, therefore, acquire a property interest in veterans' benefits as an incident to their military service, not the DVA's characterization thereof.¹⁵⁷

The day after *Cushman* was decided, the Court of Appeals for the Federal Circuit penned another opinion in *Gambill v. Shinseki*.¹⁵⁸ The *Gambill* opinion tacitly concurs with the *Cushman* proposition that mere applicants hold a property interest in veterans' benefits, but states that harmless error review applies to due process challenges of veteran-applicants.¹⁵⁹ Thus, *Gambill* effectively places a requirement of

151. *Id.* at 1297.

152. *Id.*

153. *See* 38 U.S.C. § 1110.

154. *Cushman*, 576 F.3d at 1297.

155. Lubbers, *supra* note 1, at 17.

156. *See supra* Part I.A.

157. *See* 38 U.S.C. § 1110 ("[T]he United States will pay to any veteran . . . disabled and . . . discharged . . . under conditions other than dishonorable from the period of service in which . . . injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter.").

158. *Gambill v. Shinseki*, 576 F.3d 1307, 1307 (Fed. Cir. 2009). *Gambill* was decided on August 13, 2009. *Cushman* is dated August 12, 2009.

159. *Id.* at 1311 ("Harmless error is fully applicable to veterans' claims cases, subject to the same principles that apply generally to harmless error analysis in other civil and administrative cases.").

establishing prejudicial error by the DVA in procedural due process challenges.¹⁶⁰ In contrast, a concurring opinion by Judge Rader in *Edwards v. Shinseki* explicitly rejected the notion that veteran-applicants hold a property interest in veterans' benefits.¹⁶¹ But Judge Rader's concurrence is of debatable consequence in considering whether DVA benefits are protected property interests for applicants or those already in receipt of benefits.

2. How Much Process is Due?

The inevitable question that will follow a newly-minted property interest is the extent and degree of "process" that must be afforded to the individual prior to any final deprivation of the interest.¹⁶² *Cushman* did not thoroughly address how much process is required when the DVA purports to deprive a veteran of his or her entitlement to veterans' benefits.¹⁶³ *Mathews* balancing was not necessary because all of *Cushman's* post-1976 proceedings were plagued by the existence of a fraudulent record—precluding consideration of specific DVA procedures.¹⁶⁴ The exact boundaries of process due to veterans (and veteran-applicants) in DVA adjudications remain essentially undefined. Some commentators predict an extension of additional procedural requirements into veterans' benefits cases.¹⁶⁵ While others, as discussed below, argue that the imposition of additional procedural due process safeguards in the DVA framework is an unnecessary and perhaps imprudent intervention. In either case, it is beyond doubt that *Mathews* balancing will determine the extent of process due in DVA benefits

160. Veterans already in receipt of DVA benefits must also comply with the prejudicial error requirement. *Id.*

161. "I perceive that this court has run before the Supreme Court sounded the starting gun on property rights for applicants. Before demonstrating an entitlement to benefits, a veteran must first prove an injury or condition sustained as a result of their service. Without such a showing, no 'entitlement' arises." *Edwards v. Shinseki*, 582 F.3d 1351, 1358 (Fed. Cir. 2009) (Rader, J., concurring).

162. "[The Supreme Court] consistently has held that some form of hearing is required before an individual is finally deprived of a property interest." *Edwards*, 582 F.3d at 1355 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)).

163. But the *Cushman* court did provide some guiding principles: "The procedural framework for adjudicating claims must be sufficient for the large majority of a group of claims in order to be constitutionally adequate for all . . . [a] fundamentally fair adjudication within that framework, however, is constitutionally required in all cases, and not just in the large majority." *Cushman v. Shinseki*, 576 F.3d 1290, 1299-300 (Fed. Cir. 2009) (citations omitted).

164. *Id.* at 1299.

165. "Due process will play a larger role in VA decisions; the exact nature of that role will only be determined through case law." *Collier & Early*, *supra* note 3, at 22.

adjudications. As of the writing of this Note, *Mathews* balancing has not been squarely applied to a DVA disability case. However, *Gambill* and *Edwards* provide some possible examples of what is to come.

Cushman's novel holding instigated trepidation among the Court of Appeals for the Federal Circuit, concededly due to the inherent difficulties of applying *Mathews* balancing. Judge Bryson, in *Gambill v. Shinseki*¹⁶⁶ and Judge Rader, in *Edwards v. Shinseki* both manifested disagreement with *Cushman*.¹⁶⁷ Both disagreed on the premise that "the difficulties of extending due process to applicants," especially considering the issue of how much process applicants are due, were not thoroughly considered.¹⁶⁸ These alleged "difficulties" are a reflection of the problems incident to applying *Mathews* balancing to the exceptionally complex framework manufactured by Congress for adjudicating veterans' claims.

First, in *Gambill*, Judge Bryson presented his primary gripe with *Cushman* through the lens of *Walters v. National Association of Radiation Survivors*.¹⁶⁹ *Walters*, argued before the Supreme Court, involved a challenge to a statute limiting attorney's fees to ten dollars in veterans' cases.¹⁷⁰ Judge Bryson outlined the Supreme Court's application of the *Mathews* test in *Walters*, noting that under the first *Mathews* prong, veterans' benefits are not granted on the basis of need.¹⁷¹ Thus, the value of a veteran's "private interest" requires less process than is afforded to welfare recipients and the like.¹⁷² With respect to the second *Mathews* prong, Judge Bryson observed the Court's deference to the statutory safeguards already existing in the DVA framework.¹⁷³ Under the third *Mathews* prong, Judge Bryson observed that imposing additional procedural requirements would amount to a dereliction of Congress's intent to create a paternalistic, informal, and non-adversarial framework for adjudicating veterans' benefits.¹⁷⁴

In sum, Judge Bryson implies that current DVA procedures,

166. *Gambill v. Shinseki*, 576 F.3d 1307, 1313 (Fed. Cir. 2009) (Bryson, J., concurring).

167. *Edwards*, 582 F.3d at 1356 (Rader, J., concurring).

168. *Id.* at 1357.

169. *Gambill*, 576 F.3d at 1313-24; see *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305 (1985).

170. *Walters*, 473 U.S. at 308.

171. *Gambill*, 576 F.3d at 1314.

172. *Id.*

173. *Id.*

174. *Id.* at 1314-15.

considered in light of “the informal and uniquely pro-claimant nature of the veterans’ disability compensation system,” are more than sufficient to pass constitutional muster.¹⁷⁵ Gambill’s attorney argued that allowing the veteran to test the medical opinions of DVA clinicians in a formal setting would produce more accurate adjudications.¹⁷⁶ Judge Bryson rejected this argument, stating that the mere probability a particular procedure “is likely to produce [] accurate results . . . [does not permit us to] invalidate the system devised by [the DVA] and blessed by Congress.”¹⁷⁷

Second, in *Edwards*, Judge Rader’s pithily written concurrence warned “in *Cushman*, this court stepped beyond the bounds set by the Supreme Court for property rights and due process protections.”¹⁷⁸ Judge Rader’s opinion, referred to by one law professor as “cert. bait,”¹⁷⁹ advocates a completely hands-off approach to procedural due process in the veterans’ benefits context. However, the *Edwards* majority opinion hinted that additional procedural safeguards may be appropriate for veterans suffering from mental disabilities under *Mathews* balancing.¹⁸⁰ Judge Rader effectively sidestepped *Mathews* balancing by refusing to acknowledge that veterans’ benefits are due process property interests.¹⁸¹

Despite the shaky ground upon which *Cushman* seems to have rested, it is otherwise certain that veterans’ benefits *are* property interests under the Due Process Clause. Procedural due process challenges will, over time, delineate exactly how much process is due by way of *Mathews* balancing.

III. WHY IT ALL MATTERS: WOUNDED WARRIORS & THE MILITARY

Thus far, this Note has introduced three major ideas: (1) procedural due process, (2) the military deference doctrine, and (3) the various propositions in the *Cushman v. Shinseki* opinion. As discussed *supra*, Part I.D, the military deference doctrine has no bearing on the DVA disability benefits at issue in *Cushman*.¹⁸² However, the doctrine bears heavily on disability determinations made by the DOD. This Note now turns to the DOD’s disability compensation scheme—which has been

175. *Id.* at 1315.

176. *Id.* at 1319-20.

177. *Id.* at 1320.

178. *Edwards v. Shinseki*, 582 F.3d 1351, 1357 (Fed. Cir. 2009).

179. Lubbers, *supra* note 1, at 19.

180. *Edwards*, 582 F.3d at 1355.

181. *Id.* at 1357.

182. *See supra* Part I.D.

insulated from procedural due process developments by the military deference doctrine since inception.

The first proposition posed by this Note is that DOD disability benefits are protected property interests under the Due Process Clause.¹⁸³ This is where *Cushman* comes in. As discussed *ad nauseum*, the threshold inquiry for any procedural due process analysis is determining whether any property interest exists at all.¹⁸⁴ As we also know, the governing statutes determine whether or not there is a property interest—not constitutional law.¹⁸⁵ Thus, the following section presents the baseline explanation of DOD disability benefits.

A. *DOD Disability Benefits Explained*

First, a general explanation of DOD disability benefits is in order. The DOD has promulgated what is commonly known as a “disability evaluation system” to adjudicate disability claims. This system is promulgated under Chapter 61 of Title 10, United States Code, which provides for the separation or retirement of military service members “[u]pon a determination by the Secretary concerned that [the] member . . . is unfit to perform the duties of [his/her] office, grade, rank, or rating because of physical disability” aggravated or incurred during military service.¹⁸⁶ The Secretary of each military branch administers the provisions of Chapter 61 and regulations promulgated by the Secretary of Defense.¹⁸⁷ Service members found unfit for duty are involuntarily discharged from military service and, depending on their assigned disability rating, may receive either severance pay or disability retirement pay.¹⁸⁸

The DOD awards severance pay to those service members with a disability rating of 20 percent or less.¹⁸⁹ Severance pay is a one-time, lump sum payment based on the service member’s length of service and base pay.¹⁹⁰ Retirement pay is awarded to those service members with a

183. *See supra* Part I.

184. *See supra* Part I.A.

185. *See supra* Part I.A.

186. *See* 10 U.S.C. §§ 1201, 1203, 1204, 1206 (2006).

187. *See Id.* §§ 1201-22.

188. *See Id.* § 1201 (permitting disability retirement pay if “the disability is at least 30 percent under the standard schedule of rating disabilities in use by the [DVA] at the time of the determination”); *Id.* § 1203 (permitting disability severance pay if “the disability is less than 30 percent under the standard schedule of rating disabilities in use by the [DVA] at the time of the determination”).

189. *Id.*

190. *Id.*

disability rating of 30 percent or more.¹⁹¹ When a service member is awarded retirement pay, he or she is entitled to what is effectively a lifetime pension, health insurance, privilege to enter military bases, and utilize duty-free facilities located on military bases.¹⁹² In the vast majority of cases, service members stand to gain much more from retirement than they do from severance pay. It is important to note that these benefits are *separate* and *distinct* from those provided by the DVA.

1. Why are There Two Systems of Compensation?

The DOD and DVA separate systems of compensation can be explained by the different functions of each agency. The DOD expressly operates to “provide the military forces needed to deter war and protect the security of [the United States].”¹⁹³ An obvious corollary to the DOD’s express mission, what service members call an “implied task,” is ensuring the medical readiness of military personnel.¹⁹⁴ The functional byproduct of the DOD’s objectives, providing security to the United States and maintaining personnel readiness, is the need to prematurely discharge service members who, by virtue of some medical condition, can no longer meet the requirements of military service. To facilitate this function, the DOD implemented its own disability evaluation system.¹⁹⁵

On the other hand, the DVA purports to compensate veterans for the impairments caused by service-connected disabilities.¹⁹⁶ The DVA exists solely for the benefit of veterans, and accordingly the DVA disability process is more paternalistic than the DOD process.¹⁹⁷ For example, the DVA has a statutory duty to assist the veteran in developing any claims for benefits.¹⁹⁸ Individuals who were awarded DOD disability benefits are eligible for DVA disability compensation, but are generally prohibited from “double-dipping.”¹⁹⁹ As a result, there

191. *Id.* § 1201.

192. CNA CORPORATION, FINAL REPORT FOR THE VETERANS’ DISABILITY BENEFITS COMMISSION: COMPENSATION, SURVEY RESULTS, AND SELECTED TOPICS 177 (2007).

193. *About the Department of Defense (DOD)*, THE OFFICIAL HOME OF THE DEPARTMENT OF DEFENSE, <http://www.defense.gov/about/> (retrieved Oct. 5, 2011).

194. *Id.*

195. *See infra* Part III.A.3.

196. *See* 38 U.S.C. § 1110 (2006). The DVA rates disabilities based on “the average impairment in earning capacity resulting from such diseases and injuries and their residual conditions in civil occupations.” 38 C.F.R. § 4.1 (2011).

197. The DVA is more “veteran-oriented” as they do not share the DOD’s burden of ensuring the national security of the United States.

198. *See* 38 C.F.R. § 3.159 (2011).

199. *See* 38 U.S.C. § 5305 (2006) (requiring the veteran to waive military disability

is significant overlap between DOD and DVA disability determinations.²⁰⁰ This raises a question as to why the DOD and DVA have separate systems at all.²⁰¹

2. The Primary Difference Between the DOD & DVA Systems

The primary difference between the DOD and DVA disability evaluation schemes is the distinct methods used for determining when a disability is “compensable”—a threshold determination prior to the actual “rating” of a disability. Generally, the DOD will only rate those conditions which render a service member “unfit for duty,” while the DVA rates *all* conditions where the veteran can show existence of a current disability, the aggravation or onset of which is related to their military service.²⁰² Thus, the DOD only compensates service members for conditions which impact their ability to perform their military duties, a substantially higher bar than the DVA standard of compensating for all military-related injuries. However, after the initial determination of compensability, both departments utilize the same rating schedule to award a disability percentage.²⁰³

Regardless of commands to utilize the same schedule, the two agencies tend to reach different results in many instances.²⁰⁴ Consider this question: of the service members receiving a 20 percent or less

retirement pay to receive DVA disability compensation). *But see* 10 U.S.C. § 1414 (2006) (allowing concurrent receipt of DVA disability compensation and DOD disability retirement pay where the member has at least twenty years of service).

200. CNA CORPORATION, *supra* note 192, at 178-80.

201. However, this question is well beyond the scope of this Note. For more on this topic, see Thomas J. Reed, *Parallel Lines Never Meet: Why the Military Disability Retirement and Veterans Affairs Department Claim Adjudication Systems Are a Failure*, 19 WIDENER L.J. 57 (2009).

202. 10 U.S.C. § 1201; 38 U.S.C. § 1110 (2006). The DOD defines “physical disability” as:

Any impairment due to disease or injury, regardless of degree, that reduces or prevents an individual’s actual or presumed ability to engage in gainful employment or normal activity. The term “physical disability” includes mental disease, but not such inherent defects as behavioral disorders, adjustment disorders, personality disorders, and primary mental deficiencies. A medical impairment or physical defect standing alone does not constitute a physical disability. To constitute a physical disability, the medical impairment or physical defect must be of such a nature and degree of severity as to interfere with the member’s ability to adequately perform his or her duties.

DEPARTMENT OF DEFENSE, DEPARTMENT OF DEFENSE INSTRUCTION 1332.38 E2.1.25 (2006) [hereinafter DOD INSTRUCTION 1332.38] (implementing policies and procedures for service member disability evaluation).

203. 10 U.S.C. § 1216a (2006 & Supp. 2011).

204. *Id.*

rating from the DOD, how many received a 30 percent or greater rating from the DVA? In 2007, a private contractor found that 61 percent of service members receiving a rating of 20 percent or less received a rating of 30 percent or more from the DVA.²⁰⁵

The rating discrepancy is only one example of apparent unfairness in the DOD's disability system. Further perusal of the Chapter 61 framework reveals a system that few, if any, service members could navigate without specialized counsel.

3. The DOD Disability Framework

The DOD disability process begins with referral, by the proper authority,²⁰⁶ of a service member to a local Military Treatment Facility.²⁰⁷ As a general matter, members are referred "when a question arises as to the [member's] ability to perform the duties of his or her office, grade, rank, or rating because of physical disability."²⁰⁸ The member is then subject to a full medical evaluation by the local medical facility, referred to as a Medical Evaluation Board (MEB).²⁰⁹ The member cannot apply for disability evaluation in the sense that a veteran would apply for veterans' benefits. Referral to the PDES is involuntary and the member has almost no control over the timing of such referral.²¹⁰ In this infant stage of the process, the service member is effectively quarantined from anything recognizable as a "combat unit."²¹¹

205. CNA CORPORATION, *supra* note 192, at 184.

206. Usually a physician is the referring authority, but a service member's commander can also order a "fit-for-duty" exam if the commander believes the member is unable to perform the duties of his/her rank, grade, or rating. *See* Army Regulation 635-40, Physical Evaluation for Retention, Retirement, or Separation, §§ 4-6 to 4-8 (2006). This Note uses the Physical Disability Evaluation System (PDES) regulations promulgated by the Department of the Army to illustrate how the process operates at the service-level, in contrast to the broader requirements imposed by Congress and DOD. The Department of the Navy promulgates their own PDES regulations, *see* Department of the Disability Evaluation Manual 1850.4E (2002), which is binding upon members of the U.S. Navy and U.S. Marine Corps. The Department of the Air Force also promulgates their own PDES regulations, *see* Air Force Instruction 36-3212 (2006), binding upon members of the U.S. Air Force.

207. Generally, "MTFs" are fully functional hospitals or medical clinics located on military installations. MTFs operate under the command of a military officer.

208. Army Regulation 635-40 § 4-6.

209. *Id.* at §§ 4-9 to 10.

210. Army Regulation 40-400, Patient Administration, § 7-1 (2010).

211. In 2004, the Army instituted "Warrior Transition Units" to assist wounded and disabled Soldiers. These units are a classic example of the Army's affinity for centralizing and isolating a particular "problem" group from the population of deployable units. Many of these Soldiers suffer from PTSD and other combat-related ailments. Upon approval of transfer to a Warrior Transition Unit, Soldiers are assigned new housing arrangements and duties they are capable of performing despite their medical ailments. In what is easily

Additionally, service members are seldom afforded counsel and are rarely briefed on the gravity of the determination.²¹²

Following referral, the MEB evaluates the service member's medical status. MEBs function to (1) document all of the service member's medical conditions and (2) determine if any of those conditions fail medical retention standards.²¹³ Each military service²¹⁴ promulgates retention standards which delineate medical conditions that *may* render the member unfit for military service.²¹⁵ Generally, each service's medical retention standards contain a list of conditions that will likely hinder a member's ability to perform their military duties.²¹⁶

The MEB does not make any determinations concerning the member's fitness or unfitness for duty.²¹⁷ Rather, they "document a

classifiable as a commonplace oversight, the Warrior Transition Unit in Fort Benning, Georgia housed Soldiers suffering from combat-related PTSD in barracks directly across the street from a Basic Combat Training rifle range that was in use on a near-daily basis. *New Director: WTU Population Doubles in First Year*, THE UNITED STATES ARMY (June 18, 2008), <http://www.army.mil/article/10168/new-director-wtu-population-doubles-in-first-year/>. Many service members housed in Warrior Transition Units also find themselves in the equivalent of a "holding pattern," where their referral to PDES processing is delayed because they have not reached an "optimal" level of treatment. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-1137, MILITARY DISABILITY SYSTEM: INCREASED SUPPORT FOR SERVICE MEMBERS AND BETTER PILOT PLANNING COULD IMPROVE THE DISABILITY EVALUATION PROCESS 8 (2008) [hereinafter 2008 GAO REPORT].

212. 2008 GAO REPORT *supra* note 211, at 17-18.

213. See Army Regulation 635-40 § 4-10; Army Regulation 40-400 § 7; Army Regulation 40-501, Standards of Medical Fitness, § 3 (2010).

214. The term *military service* encompasses one branch of the "armed forces." See 10 U.S.C. § 101(a)(4) ("The term "armed forces" means the Army, Navy, Air Force, Marine Corps, and Coast Guard.").

215. This Note utilizes chapter 3 of Army Regulation 40-501 to illustrate how retention standards operate in the MEB setting.

216. See Army Regulation 40-501 § 3. Military retention standards identify certain medical conditions that are likely to:

- a. Significantly limit or interfere with the Soldier's performance of their duties.
- b. May compromise or aggravate the Soldier's health or well-being if they were to remain in the military Service. This may involve dependence on certain medications, appliances, severe dietary restrictions, or frequent special treatments, or a requirement for frequent clinical monitoring.
- c. May compromise the health or well-being of other Soldiers.
- d. May prejudice the best interests of the Government if the individual were to remain in the military Service.

Id. § 3-1. Thus, the retention standards are in line with PDES's overall aim of ensuring the medical readiness of military personnel and mitigating force protection issues.

217. "MEBs shall not state a conclusion of unfitness because of physical disability, assignment of disability percentage rating, or the appropriate disposition under Chapter 61 of 10 U.S.C." DOD INSTRUCTION 1332.38, *supra* note 202, at E3.P1.2.3. Cf. Army Regulation 40-400 § 7-1 ("Decisions regarding unfitness for further military duty because of physical or mental disability are prerogatives of [Physical Evaluation Boards]."). *But cf.* Reed, *supra* note

[member's] medical status and duty limitations insofar as duty is affected by the [member's] status."²¹⁸ To accomplish this task, the member receives a general physical examination²¹⁹ and then, depending on the member's conditions, one or more specialized examinations by medical specialists.²²⁰

The results of MEB threshold examinations are then summarized in a document entitled the "Narrative Summary."²²¹ These documents represent the culmination of the MEB stage and are arguably the most important document produced in the process.²²² Dictated by a physician in the presence of the service member, the Narrative Summary provides a medical snapshot of the service member to the Physical Evaluation Board for purposes of determining fitness and, if applicable, proper disability ratings. If a service member disagrees with the contents of the NARSUM, they have a relatively new right to request impartial review of the medical evidence.²²³

The MEB stage concludes with a classification of each of the member's conditions evaluated as either (1) failing or (2) not failing medical retention standards.²²⁴ If none of the member's conditions fail medical retention standards, the MEB returns the member to duty.²²⁵ If any conditions do fail medical retention standards, the MEB forwards the case to the Physical Evaluation Board (PEB) for a determination of fitness.²²⁶

The PEB is the second, and for some service members, the final stage of the process.²²⁷ As a threshold observation, there are two types

201, at 113-14 (2009) ("[A] MEB votes on whether or not the service member's physical or mental issues make the service member unfit for further military duty.").

218. Army Regulation 635-40 § 4-10.

219. The initial MEB physical is akin to the physical examination required for entry in to the military, known as an "accessions physical."

220. Army Regulation 40-400 § 7-9.

221. *Id.*

222. "The Narrative Summary (NARSUM) . . . is the heart of the disability evaluation system. Incomplete, inaccurate, misleading, or delayed NARSUMs may result in injustice to the [service member] or to the [military]." Army Regulation 635-40 § 4-11.

223. Wounded Warrior Act, Pub. L. No. 110-181, § 1612(a)(2)(D), 122 Stat. 430, 441 (2008).

224. Army Regulation 40-400 § 7-22; Army Regulation 635-40 § 4-13.

225. *See* Army Regulation 40-400 § 7-1 (clarifying that not all MEBs result in referral to the PEB). It is important to note the distinction between determining a member is fit for duty and determining a member does not have any conditions which fail retention standards.

226. Army Regulation 635-40 § 4-13.

227. Service members whom are found unfit for duty and do not wish to challenge the determinations of the informal Physical Evaluation Board are subsequently discharged in accordance with applicable regulations. On the other hand, members found fit for duty may

of PEBs: (1) the informal PEB, and (2) the formal PEB.²²⁸ “The first and most important determination made by the PEB is whether the [service member] is physically fit or unfit to perform the duties of the [member’s] office, grade, rank, or rating.²²⁹ All other actions are directly or indirectly tied to this one finding.”²³⁰

The PEB is composed of a three-member panel, at least one of which is a medical officer.²³¹ The informal PEB component which considers a member’s case in the first instance, is intended to provide for administrative efficiency in PDES determinations.²³² Upon receipt of a case, the informal PEB performs a multi-factor analysis of the member’s case with respect to each medical condition found to fail retention standards by the MEB.²³³

First, the informal PEB determines whether a particular medical condition renders the member “physically fit or unfit to perform the duties of [his or her] office, grade, rank, or rating.”²³⁴ If the condition is

attempt to appeal to a formal Physical Evaluation Board, but Congress has not guaranteed these members any right to a full and fair hearing. The right to a formal Physical Evaluation Board is only guaranteed for members facing separation or disability retirement. *See* 10 U.S.C. § 1214.

228. IPEBs can be summarized by their namesake, they are informal determinations to foster administrative efficiency: “[Informal PEBs] conduct a documentary review without the presence of the Service member for providing initial findings and recommendations.” DOD INSTRUCTION 1332.38, *supra* note 202, at E3.P1.3.2. Formal PEBs, on the other hand, are more trial-like. Formal PEBs are operate to fulfill the statutory requirement of 10 U.S.C. § 1214, which requires a member to be granted a full and fair hearing if facing separation or retirement for disability. *See* 10 U.S.C. § 1214.

229. Army Regulation 635-40 § 4-19(d)(1).

230. *Id.* The DOD and services have gone to great lengths to outline the precise role of the PEB. *Id.* § 4-17.

231. *Id.* § 4-17b.

232. Administrative efficiency in the PDES is paramount for ensuring military personnel readiness. With too many service members in limbo, the DOD would find itself dedicating too many resources to disability evaluation determinations. But this need for administrative efficiency is tempered by the need for complete evaluation: “[i]nformal procedures reduce the overall time required to process a case through the disability evaluation system. *The rapid processing intended by the use of informal boards must not override the fundamental requirement for detailed and uniform evaluation of each case.*” *Id.* § 4-20 (emphasis added).

233. *Id.* § 4-19.

234. *Id.* “Fitness for duty” is contingent on factors such as the member’s military occupation, current duty assignment, rank, age, years of service, potential for limited duty assignments, and commander’s recommendations. To illustrate:

One day, two Soldiers board an aircraft for a jump. The first is an [enlisted infantryman]. The second . . . is [a finance officer]. They both hit hard on landing and both twist their right knee. They are taken to the [local medical facility] where they are found to have both torn the same ligaments in their right knee. The orthopedist is amazed because they have the exact same condition. Well, after a

not unfitting, the inquiry ends with respect to that condition. However, if the condition is unfitting, the second question is whether the unfitting condition is “compensable.”²³⁵ If the condition is not compensable, the member will be discharged without benefits with respect to that condition. However, if the condition is compensable, the informal PEB will determine whether the disability is subject to various enhancements²³⁶ as well as provide a disability rating for that condition presumably in accordance with the corresponding VASRD provision.²³⁷

If the member does not agree with the findings of the informal PEB, he or she is permitted to provide an informal rebuttal to the findings.²³⁸ Moreover, if the member is found unfit for duty and does not agree with the informal PEB findings, he or she has a statutory right to a formal PEB.²³⁹ The formal PEB is composed of the same individuals that considered the member’s case during the informal PEB.²⁴⁰ To satisfy the “full and fair hearing” requirement of section 1214, the formal PEB is a trial-type proceeding and performs the same analysis as the informal PEB.²⁴¹

year of rehab after surgery, they both have recovered to the exact same degree. They both still have painful knees that result in profile limitations on their duty performance to include a “no” for the ability to carry a fighting load at least two miles. For the . . . infantryman this is very likely an unfitting condition because he needs to be able to carry a fighting load over more than 2 miles to reasonably perform the duties of his grade and [military occupation]. However, the [finance officer] has no such duty requirement. He can reasonably do his job without rucking any distance whatsoever. . . . [h]e is likely to be fit. Two Soldiers, same condition, but based on their grade and [military occupation], two different outcomes as to fitness at the PEB.

Attorney Jason E. Perry, *available at Fitness vs. Unfitness*, PHYSICAL EVALUATION BOARD FORUM (June 18, 2007), <http://www.pebforum.com/site/threads/fitness-vs-unfitness.13/#post-212> (last visited May 13, 2013).

235. Army Regulation 635-40 § 4-19. This question is where the informal PEB reviews whether the condition was incurred during or aggravated by military service, was not the result of willful neglect, intentional misconduct, etc. Essentially, the informal PEB is confirming the member’s condition does not fall within any provision which would preclude award of disability severance or retirement under Chapter 61.

236. *Id.* Conditions that are classified as “combat-related” may permit a federal income tax exemption on disability severance or retirement pay received by the member. *DOD Instruction 1332.38*, *supra* note 202, at E3.P5.2.2.

237. 10 U.S.C. § 1216a.

238. Army Regulation 635-40 § 4-20(f).

239. 10 U.S.C. § 1214.

240. The standard of review, as one can imagine, is highly deferential. In the judicial setting, recusal would be in order. *See* 28 U.S.C. § 455 (“Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.”).

241. Army Regulation 635-40 § 4-21(m).

Once a member receives the formal PEB findings, the same options are available as with the informal PEB: accept or deny the findings. Where the member does not concur with the formal PEB determination, a limited option of rebuttal is available.²⁴² Any further relief sought by the member is technically outside the DOD disability process.

IV. CALLING A SPADE A SPADE: *CUSHMAN*, MILITARY DEFERENCE, AND DOD DISABILITY BENEFITS

This Note now proposes the following argument: (1) DOD disability benefits, in the wake of *Cushman*, are properly classifiable as property interests; (2) procedural due process challenges are, therefore, permissible to challenge DOD disability determinations in certain instances; (3) the military deference doctrine should not operate with respect to these challenges, especially under the *Mathews* analysis of “how much process is due?”

A. *Why DOD Disability Benefits are Protected Property Interests*

Cushman stands for the proposition that not only veterans currently in receipt of veterans’ benefits hold a property interest therein, but that *applicants* for veterans’ benefits also enjoy a property interest in benefits.²⁴³ Precisely *when* an applicant acquires a property interest in benefits is contingent on the statute authorizing the benefit, specifically, “when” the applicant gains “legal entitlement” under the statute. Generally, the degree of discretion allotted to an agency in awarding a benefit is an important indicator in determining the existence of a property interest.²⁴⁴ As Judge Calabresi has observed, “[t]o the extent that . . . [the] law imposes ‘substantive predicates’ that limit the decision-making of [program] officials, it . . . may confer a constitutionally protected property right.”²⁴⁵ While the foregoing is tempered by Supreme Court precedent,²⁴⁶ non-discretionary benefits definitely inure a property right for applicants of benefits.

242. Formal PEB rebuttals are limited to: (1) alleging the findings were “based upon fraud, collusion, or mistake of law,” (2) that the member “did not receive a full and fair hearing,” and (3) “[s]ubstantial new evidence exists which . . . by due diligence, could not have been presented before disposition of . . . the PEB.” Army Regulation 635-40 § 4-21(t).

243. *Cushman v. Shinseki*, 576 F.3d 1290 1297-98 (Fed. Cir. 2009).

244. *See supra* Part I.A.

245. Lubbers, *supra* note 1, at 19 (quoting *Kapps v. Wing*, 404 F.3d 105, 113 (2d Cir. 2005)).

246. *Cushman*, 576 F.3d at 1297 (“[A] benefit is not a protected entitlement if government officials may grant or deny it in their discretion.”) (internal citations and quotations omitted).

It is not surprising then that a statute conferring “an absolute right of benefits to qualified individuals” was also found to vest a property interest in *Cushman*.²⁴⁷ This is a common-sense interpretation of the law. When an applicant gains legal entitlement to a benefit, a corresponding acquisition of a property interest *must* follow, otherwise summary denial of benefits without any meaningful level of process would be the order of the day.²⁴⁸ Indeed, the justification for this principle is best illustrated by *Cushman*: “When Mr. Cushman was injured while serving in a United States combat infantry battalion in Vietnam, he acquired a legitimate claim of entitlement to veteran’s disability benefits under 38 U.S.C. § 1110.”²⁴⁹

Detractors of *Cushman* have presented a counter-argument to the “absolute acquisition” argument—primarily in response to the proposition that *mere applicants* enjoy a property interest. They have proffered that “the Due Process Clause only applies to a VA benefit that the claimant has already been awarded, as prior to such a determination there is no property to take.”²⁵⁰ This is nothing short of slothful induction—just as social security claimants “have paid into the retirement system with an expectation of recovery of investments,”²⁵¹ “veterans have . . . contributed their blood, sweat, and tears to defending this country.”²⁵² It follows then, that where social security claimants enjoy “a legitimate expectation and reliance upon contributions . . . as entitlements,”²⁵³ veterans ought to be able to expect a similar return on their investment—an investment that is arguably beyond measure.²⁵⁴

While the Supreme Court may have explicitly reserved consideration of the *mere applicant* issue,²⁵⁵ the government did not seek

247. *Id.*

248. “[T]hat due process does not apply at all to applicants for statutory benefits—would . . . mean . . . it would be constitutional for the government to treat some applications unfairly, shred half of them, throw some in the trash unread, or subject them to a process tainted with corrupt practices.” Lubbers, *supra* note 1, at 17.

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

250. Deutsch & Burriesci, *supra* note 145, at 221.

251. Edwards v. Shinseki, 582 F.3d 1351, 1358 (Fed. Cir. 2009).

252. Lubbers, *supra* note 1, at 19.

253. Edwards, 582 F.3d at 1358.

254. George Washington stated “[t]he willingness with which our young people are likely to serve in any war, no matter how justified, shall be directly proportional to how they perceive the Veterans of earlier wars were treated and appreciated by their nation.” U.S. Senate Committee on Veterans’ Affairs, S.13, *Fulfilling Our Duty to America’s Veterans Act of 2005* (2005).

255. *Cushman v. Shinseki*, 576 F.3d 1290, 1296 (Fed. Cir. 2009) (“The Supreme Court has not . . . resolved . . . whether applicants for benefits, who have not yet been adjudicated as entitled to them, possess a property interest in those benefits.”).

certiorari in *Cushman* and Judge Rader's "cert. bait" in *Edwards* became a nullity when the plaintiff in that case decided against appeal.²⁵⁶ Suffice it to state, the overwhelming majority of courts faced with the question of whether mere applicants harbor a property interest in benefits have answered in the affirmative.²⁵⁷ Indeed, the fact that "[e]very [regional] circuit to address the question . . . has concluded that applicants for benefits . . . may possess a property interest in the receipt of [benefits],"²⁵⁸ leads to an obvious conclusion that "*Cushman* seems to be in the mainstream."²⁵⁹

However, whether a *mere applicant* enjoys a property interest is a question not necessarily material in determining whether DOD disability benefits are property interests—but it is certainly instructive. Chapter 61 of Title 10, the statute creating entitlement to DOD disability benefits, established an absolute right to benefits.²⁶⁰ However, military disability benefits are awarded only for medical conditions deemed to render a service member "unfit" for further military service.²⁶¹ As discussed *supra*, Part III, the military has tremendous discretion in determining a service member's "fitness for duty"—how does this discretion bear on the proposition that DOD disability benefits are property interests?²⁶²

It is arguably beyond doubt that the "fitness for duty" discretion carries little weight in this context. Unilateral PEB discretion only exists

256. "In any event, neither *Cushman* nor *Edwards* will be making it to the Supreme Court." Lubbers, *supra* note 1, at 19.

257. See *Cushman*, 576 F.3d at 1297-98; see also *Kapps v. Wing*, 404 F.3d 105, 115 (2d Cir. 2005); *Hamby v. Neel*, 368 F.3d 549, 559 (6th Cir. 2004); *Mallette v. Arlington Cnty. Employees' Supplemental Ret. Sys. II*, 91 F.3d 630, 634 (4th Cir. 1996); *Nat'l Ass'n of Radiation Survivors v. Derwinski*, 994 F.2d 583, 588 (9th Cir. 1992); *Gonzalez v. Sullivan*, 914 F.2d 1197, 1202 (9th Cir. 1990); *Daniels v. Woodbury County, Iowa*, 742 F.2d 1128, 1132 (8th Cir. 1984); *Ressler v. Pierce*, 692 F.2d 1212, 1214-15 (9th Cir. 1982); *Kelly v. R.R. Ret. Bd.*, 625 F.2d 486, 489 (3d Cir. 1980); *Griffeth v. Detrich*, 603 F.2d 118, 120-21 (9th Cir. 1979); *Wright v. Califano*, 587 F.2d 345, 354 (7th Cir. 1978).

258. *Kapps*, 404 F.3d at 115.

259. Lubbers, *supra* note 1, at 19.

260. The United States Court of Appeals for the Federal Circuit has held:

Despite the presence of the word 'may' in [Chapter 61], in *Sawyer* we determined that the Secretary has no discretion whether to pay out retirement funds once a disability is found qualifying. Thus, we held that the statute is money-mandating because when the requirements of the statute are met—*i.e.*, when the Secretary determines that a service member is unfit for duty because of a physical disability, and that disability is permanent and stable and is not the result of the member's intentional misconduct or willful neglect—the member is *entitled* to compensation.

Fisher v. United States, 402 F.3d 1167, 1174-75 (Fed. Cir. 2005) (emphasis added) (internal citations omitted).

261. DOD INSTRUCTION 1332.38, *supra* note 202, at E3.P1.3.1.

262. See Army Regulation 635-40 § 4-19(d)(1).

at the “fitness for duty” inquiry.²⁶³ Determining the *degree, extent*, and *ultimate disposition* of the disabled service member must be in accordance with the objective criteria in Chapter 61, Title 10 United States Code and the applicable provision of the VASRD.²⁶⁴ Where a service member has been found to be unfit for duty, the necessary implication is that he or she has at least one medical condition which renders him or her unfit for duty. Thus, at least following an unfit for duty determination, service members and veterans become identically situated to the extent that adjudication of their benefits is subject to non-discretionary statutory rules. Apart from the criteria of Chapter 61, the rating schedule—by application of § 1216a of Title 10, United States Code—is effectively another statutory criterion in the DOD disability scheme. In a sense, the DOD disability determination ought to be perceived as binary: (1) fitness for duty (absolute discretion) (2) rating and award (no discretion).

It seems that some “unfit” service members are undoubtedly beyond *mere applicants* in the procedural due process context.²⁶⁵ There is no *per se* application for military disability benefits; rather, initial referral to the military disability evaluation system is involuntary.²⁶⁶ To the extent a service member is facing disability discharge as the result of a *discretionary* determination, it can hardly be argued that they harbor a mere “abstract need . . . desire . . . or unilateral expectation” of benefits.²⁶⁷ If anything, these service members are more akin to veterans *already in receipt* of benefits, as the threshold determination of entitlement has already been established. This characterization likely satisfies *Cushman* critics.²⁶⁸

The inevitable conclusion of this comparison is that DOD disability benefits ought to be classified as property interests, acquired by a service

263. The term “compensable disability” is defined by the DOD as “[a] medical condition determined to be unfitting by reason of physical disability and which meets the statutory criteria under Chapter 61 of reference (b) for *entitlement* to disability retired or severance pay.” DOD INSTRUCTION 1332.38, *supra* note 202.

264. *See* 10 U.S.C. §§ 1201-1222 (2006); 10 U.S.C. § 1216a (Supp. 2011) (requiring the Secretary concerned to utilize VASRD).

265. However, the *mere applicant* argument is material where a member, for example, receives a 20% rating—which creates an entitlement to severance pay under Chapter 61. If the member disagrees, the question becomes whether the member has a property interest in military retirement pay, which requires a 30% disability rating. In this scenario, the service member is similarly situated to the *mere applicant*.

266. *See* Army Regulation 40-400, Patient Administration, § 7-1 (2010).

267. *Cushman v. Shinseki*, 576 F.3d 1290, 1297 (Fed. Cir. 2009) (internal citations and quotations omitted).

268. *See supra* text accompanying note 256.

member once they are adjudicated as “unfit” for further military service. Deeming a service member unfit for duty is functionally equivalent to removing them from the military. Thus, these service members hold what can be characterized as a “greater” property interest in benefits than the veteran-applicants at issue in *Cushman* and its progeny.

Of course, classifying DOD benefits as property interests is the “easy part.”²⁶⁹ Presuming DOD disability benefits are property interests, there is still the proverbial “elephant in the room”—the military deference doctrine—as it may affect *Mathews* balancing.

B. *Military Deference, Mathews balancing, & DOD Disability Benefits*

The extent of process due to disabled service members is arguably greater than that of veteran-applicants: “[t]he extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be condemned to suffer grievous loss.”²⁷⁰ Service members facing involuntary disability discharge are facing not only loss of livelihood, but the loss of their *way of life*. While Congress has expressly provided for “fairness” in military disability adjudications, “process which is a mere gesture is not due process.”²⁷¹

1. Abdicating the Military Deference Doctrine

This Note has illustrated how the military deference doctrine presents an obstacle for any due process challenge addressing a military determination, especially in times of conflict.²⁷² The author acknowledges that military determinations concerning “fitness for duty” neatly fall within the realm of personnel decisions implicating force readiness and national security.²⁷³ However, once a service member is adjudged “unfit for duty” he or she is effectively removed from the military.²⁷⁴

Consider this: let us presume that DOD disability determinations are—for purposes of discretion and purpose—binary and distinct. The second determination, implicating Chapter 61 and the disability rating schedule, is a *mere benefits determination*. Coupled with the

269. Miller, *supra* note 44.

270. *Goldberg v. Kelly*, 397 U.S. 254, 262-63 (internal citations and quotations omitted).

271. *Cushman*, 576 F.3d at 1297 n.1. “No member . . . may be retired or separated for physical disability without a full and fair hearing if he demands it.” 10 U.S.C. § 1214 (2006).

272. See *supra* Part I.C.

273. See *supra* Part I.C.

274. See *supra* Part III.

observations that “unfit” members are no longer part of the national defense apparatus and the DOD utilizes the *same criteria* for rating disabilities as the DVA, there is simply no basis to assert that the military is performing some vital national security function. Where is the need to “alleviate [an] uncommon potential to burden the Executive at a time of ongoing military conflict[?]”²⁷⁵ How does a disability rating implicate “[t]he complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force[?]”²⁷⁶

Simply put, DOD disability benefits are awarded in the same manner as DVA benefits and Social Security benefits. The military, when making such determinations, is not performing one of its traditional functions—which would otherwise implicate the military deference doctrine. There is a counter-argument that *some* “unfit” service members are still within the military corpus, namely those who are challenging the determination of “unfitness” itself. However, a challenge to the discretionary determination of “fitness” is distinct from the benefits inquiry that follows the “fitness” question.

Where a service member challenges the disability rating assigned *after* a determination of unfitness, he or she has conceded his or her ultimate fate with respect to military service: that it has ended. If DOD disability benefits are property interests, the only issue is whether a member was deprived of a property interest without due process of law. The nature of the property interest is contingent on the member’s assigned disability rating—objective criteria under the statute. Accordingly, the procedural due process inquiry should proceed to *Mathews* balancing *without* the military deference doctrine pervading the analysis.

2. *Mathews* balancing & DOD Disability Benefits

One notable downfall of *Mathews* balancing is “its focus on questions of technique rather than on questions of value.”²⁷⁷ This focus arguably “generates an inquiry that is incomplete [and] unresponsive to the full range of concerns embodied in the due process clause.”²⁷⁸ This downfall may likely exacerbate due process challenges of disabled service members to an extent greater than that of the military deference

275. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004).

276. *Rostker v. Goldberg*, 453 U.S. 57, 65 (1981) (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)).

277. Jerry L. Mashaw, *The Supreme Court’s Due Process Calculus for Administrative Adjudication: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 30 (1976).

278. *Id.*

doctrine. Acknowledging the shortcomings of *Mathews* wholly questions the propriety of vindicating DOD disability benefits as protected property interests. There is a germane proposition in Judge Bryson's proposed doctrine of judicial non-interference in the veterans' benefits context: both veterans and military disability benefits are governed by a massively complex and congressionally authorized statutory scheme. The DOD scheme is concededly littered by rules facially advantageous to the service member. Under what circumstances can procedural due process challenges "fix" these systems?

Subjecting DOD disability determinations to *Mathews* balancing in the face of an orderly system may be completely futile—at least to the extent a reviewing court focuses on "technique."²⁷⁹ Consider § 1216a—a statute requiring the military to utilize the DVA's rating schedule as interpreted by the DVA, and more importantly, prohibiting deviation from the schedule.²⁸⁰ Additionally, 10 U.S.C. § 1214 commands that no member may be separated from service without a "full and fair hearing" if demanded.²⁸¹ The procedural safeguards are already in place—under *Mathews*, what can the court do?

Mathews balancing is, of course, an *ad hoc* determination. The ultimate result will likely depend on the particular facts of the case, the relief sought, and the forum considering the case. Perhaps refinement of *Mathews* in the post-*Cushman* world of veterans' benefits will provide a meaningful analogy for procedural due process in the military disability context. Whatever the case, a paradigm shift is in order.²⁸²

C. Policy Justifications

The practical operation of the DOD disability evaluation system has been the source of several problems requiring patchwork legislative remedy in the past few years.²⁸³ The DOD has long enjoyed "[a] strong, but rebuttable, presumption that administrators of the military . . .

279. *Id.*

280. 10 U.S.C. § 1216a.

281. 10 U.S.C. § 1214.

282. "Any standard premised simply on preexisting legal rights renders a claimant's quest for due process . . . either unnecessary or hopeless." Mashaw, *supra* note 277, at 50. Additionally, the court's recognition of "individual dignity" in procedural due process challenges seems proper: "those who obtain [benefits] have encountered one of the politically legitimate hazards to self-sufficiency in a market economy. The recipients . . . are entitled to society's support. Conversely, the denial of [a] . . . claim implies that the claim is socially illegitimate, and the claimant, however impecunious, is not excused from normal work force status." *Id.* at 51.

283. These remedies are of questionable utility in a procedural due process context.

discharge their duties correctly, lawfully, and in good faith.”²⁸⁴ This presumption has created over-confidence in the military’s ability to properly adhere to law. While Congress has purported to act, its reactive approach to these problems simply does too little, too late.

Consider § 1216a, codified in 2008.²⁸⁵ Section 1216a requires the DOD to utilize the DVA’s rating schedule when rating a service member’s disability.²⁸⁶ Until the enactment of § 1216, the military utilized its own, unauthorized, rating criteria,²⁸⁷ despite explicit instructions to utilize the DVA rating schedule for nearly half a century.²⁸⁸ In 2007, a private research firm found that of 849 service members rated by the DOD at 20% or less for Post-Traumatic Stress Disorder (PTSD), 749 received a rating of 30 percent or greater from the DVA.²⁸⁹ Thus, had the military properly followed the DVA rating schedule, nearly 90 percent of those 849 service members would have been awarded disability retirement pay for their PTSD. Under a *Mathews* analysis, these findings arguably evidence the type of inaccurate results prompting judicial intervention.²⁹⁰

Another example is found in § 1214a. Section 1214a was another reactive measure to a DOD practice colloquially characterized as “they are fit for duty, but unsuitable for military service.”²⁹¹ This practice occurred when a service member, despite suffering from a disability, was found *fit* for duty by the PEB. When the service member returned to duty with medical limitations—namely, the inability to deploy outside the United States—he or she was simply a liability.²⁹² During the height of the wars in Iraq and Afghanistan, the DOD needed individuals able to deploy to the Middle East. In order to “clear the rolls,”²⁹³ the DOD

284. *Sanders v. United States*, 594 F.2d 804, 813 (1979).

285. 10 U.S.C. § 1216a.

286. *Id.*

287. The Department of the Army used “Issue and Guidance” documents which “summarized” the VASRD for application in disability determinations.

288. *See Hordechuck v. United States*, 144 Ct. Cl. 492, 495 (1959).

289. CNA CORPORATION, *supra* note 192, at 189. Under 38 C.F.R. § 4.129, a provision of the VASRD, if the PTSD is severe enough to render a member unfit for military duty, then a minimum temporary rating of 50% must be assigned.

290. While DVA ratings are not binding on the DOD, the inconsistencies discovered in this report would likely play a powerful role under the second *Mathews* prong.

291. 10 U.S.C. § 1214a.

292. While members found fit for duty have no statutory right to a FPEB under 10 U.S.C. § 1214, they must still have their conditions accommodated by the military once they are returned to duty.

293. “Clear the rolls” is military lingo most relevant to a commander’s perpetual duty to ensure his or her entire military unit is able to deploy. All service members are “on the rolls” (that is, on the official list of individuals composing a given unit), but those facing disability

administratively discharged service members with duty limitations precluding deployment. These discharges were rationalized on the basis that these service members were “unsuitable” for military service. This practice was manifestly contrary to the DOD’s own regulations²⁹⁴ and occurred for over a decade before Congress enacted § 1214a.²⁹⁵ Needless to say, these members were certainly deprived of *something* without due process of law.²⁹⁶

The third and final example considered is the enactment of the Physical Disability Board of Review (PDBR) under § 1554a.²⁹⁷ The PDBR is nothing less than a governmental concession of the military’s inability to lawfully adhere to statutes and regulations. The board was specifically established to review PEB ratings of 20% or less for service members discharged between September 31, 2001 and December 31, 2009.²⁹⁸ The PDBR functions to ensure that such cases were decided on the basis of “accuracy and fairness,” carrying the obvious implication that at least *some* of the covered PDES ratings are either inaccurate, unfair, or both.²⁹⁹ Government officials have stated that 77,000 service members are eligible to have their cases reviewed by the PDBR.³⁰⁰ At current staffing levels, the PDBR will need over 200 years to adjudicate all eligible cases.³⁰¹ The PDBR itself seems vulnerable to a procedural due process challenge, aside from the implied violations precipitating its creation.³⁰²

evaluation are automatically barred from deployment. Junior officers charged with company-sized units receive tremendous pressure from their superiors to clear their “rolls” of any non-deployable members.

294. The ability of a member to deploy, standing alone, cannot serve as a basis for a finding of unfitness for duty. DOD INSTRUCTION 1332.38, *supra* note 202, at E3.P3.4.1.3.

295. Board for the Correction of Naval Records (BCNR) decision 8271-98 (1998). Section 1214a provides that the military may not administratively discharge a member for the same condition for which he was evaluated for by the PEB during PDES processing. *See* 10 U.S.C. § 1214a.

296. 10 U.S.C. § 1216.

297. 10 U.S.C. § 1554a.

298. *See* 10 U.S.C. § 1554a. “The Physical Disability Board of Review, or PDBR, was legislated by Congress and implemented by the Department of Defense to ensure the accuracy and fairness of combined disability ratings of 20% or less assigned to service members who were discharged between September 11, 2001 and December 31, 2009.” *About PDBR*, PHYSICAL DISABILITY BOARD OF REVIEW (PDBR), http://www.health.mil/About_MHS/Organizations/MHS_Offices_and_Programs/PDBR.aspx (last visited May 13, 2013).

299. *About PDBR*, *supra* note 298.

300. 2008 GAO REPORT, *supra* note 211, at 78.

301. *Id.*

302. “[T]he possible length of wrongful deprivation of . . . benefits [also] is an important factor in assessing the impact of official action on the private interests.” Mathews

CONCLUSION

Introducing procedural due process to military disability adjudications is a difficult, but necessary, course of action. The reactive whims of Congress and judicial inability to alter the status quo under the military deference doctrine have proved ineffective. The relative indifference of the legislature to the constitutional rights of service members requires immediate judicial intercession.

Simply put, the judiciary's present threshold for pain in the context of military regulations exceeds that of the political branches or of the public. *If that equilibrium were to change*, and the political branches became unconcerned with protecting the legitimate liberty interests of military personnel, the existence of a doctrine that involves a substantive review of the challenged regulations might result in an occasional legal victory for the individual litigant.³⁰³

The equilibrium *has* changed. *Cushman* presents a clear analogy for taking the first step in the right direction: classifying military disability benefits as protected property interests. Such classification would at least confirm the service member's ability to enjoin any unconstitutional conduct perpetrated by the military.³⁰⁴

But acquiring *meaningful* relief is another question.³⁰⁵ If the military deference doctrine does not apply to DOD disability benefits,³⁰⁶ a cognizable *Bivens* action may arise with a characterization of DOD disability benefits as property interests.³⁰⁷ At the least, threat of a *Bivens* action may deter the Secretary of Defense from testing the boundaries of service members' constitutional rights in disability adjudications.³⁰⁸ At

v. Eldridge, 424 U.S. 319, 341 (1976) (quoting *Fusari v. Steinberg*, 419 U.S. 379, 389 (1975)).

303. O'Connor, *supra* note 12, at 310-11 (emphasis added).

304. "This Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service." *Chappell v. Wallace*, 462 U.S. 296, 304 (1983).

305. This question is beyond the scope of this Note.

306. Recall the proposed bifurcation of the PEB's determination. *See supra* Part IV.B.

307. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). *Bivens* actions have been held to be unavailable "for injuries that arise out of or are in the course of activity incident to [military] service." *United States v. Stanley*, 483 U.S. 669, 684 (1987) (quoting *Feres v. United States*, 340 U.S. 135 (1950)). However, the unavailability of *Bivens* actions, in this context, is premised on the availability of alternative remedial schemes provided by Congress—veterans' benefits—and a proposition that smacks of the military deference doctrine: "the insistence . . . with which the Constitution confers authority over the Army, Navy, and militia upon the political branches . . . counsels hesitation in our creation of damages remedies in this field." *Stanley*, 483 U.S. at 682.

308. *Bivens* actions are filed against the federal official, not the United States. Punitive damages are available.

the most, damages may be sought. Broadly speaking, judicial recognition of due process in DOD disability adjudications would spark a long-overdue departure from prioritizing military autonomy above the constitutional rights of service members.

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* J.D., Western New England University School of Law, 2013. I dedicate this Note to my mother Kimmarie, who taught me, in life, the virtue of humility, and in death, that adversity is the vehicle for realizing potential. Thank you Meredith, my wife and loyal opposition, for always being there to challenge and support me. You continually inspire me to be a better person.