



by Ephraim Unell

Hon. William S. Greenberg, U.S. Court of Appeals for Veterans Claims

Confirmed in December 2012 at the age of 70, the newest judge appointed to the U.S. Court of Appeals for Veterans Claims (CAVC) is also its oldest. Judge William S. Greenberg brings more than 45 years of public service, military experience, and legal practice to the court.

At his confirmation hearing, senator, now chairman, Johnny Isakson encouraged Greenberg to “[b]e an outspoken judge, just as you have been an outspoken lawyer.”¹ Judge Greenberg’s candor is evidenced by the many separate opinions (concurring or dissenting) he has written, more than any of his colleagues except Chief Judge Bruce Kasold. This profile uses those opinions to sketch a framework of a distinctive judicial philosophy, complementing what the public knows about the judge from a 2009 article about Greenberg the attorney² and his confirmation hearings.³

The CAVC is an Article I tribunal created by Congress in 1988 to provide judicial review of decisions by the Board of Veterans’ Appeals, part of the Department of Veterans Affairs (VA). Most appeals to the court are resolved by single judge decisions.⁴ Decisions of the court may be appealed to the U.S. Court of Appeals for the Federal Circuit, whose jurisdiction is limited to review of constitutional questions, statutory and regulatory interpretation, and rules of law.⁵

Born in New York, Judge Greenberg was raised in New Jersey, and he maintains a strong feeling, bordering on reverence, for the Garden State. Behind his desk



hangs a painting of the U.S.S. *New Jersey*, a poster touting “Woodrow Wilson for Governor,” and photographs of his mentors: New Jersey Superior Court Judge Robert Matthews and former New Jersey Gov. Richard Hughes. Upon being appointed to the court, Judge Greenberg, in compliance with federal law, sold his home in Princeton and moved to the District of Columbia, making his elevation to the bench bittersweet.

Judge Greenberg is a proud and active alumnus of

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Johns Hopkins (A.B., 1964), which honored him in 2010 with its Distinguished Alumnus Award for his sage counsel and sensitivity as a member of a university board. As an undergraduate, he had the opportunity to learn from Professor Carl Brent Swisher, who, in the judge's opinion, was one of America's great constitutional scholars.

Greenberg enlisted in the 5th Squadron, 117th Cavalry, 50th Armored Division of the U.S. Army in 1967, serving as a cavalry scout. He earned a commission in the Judge Advocate General's Corps in 1970. After 27 years of honorable service in the reserve components of the Army, Greenberg retired in 1994 as a brigadier general. Judge Greenberg is proud of his service, although he modestly acknowledges that he was never called upon to serve under fire. However, he credits his long service at all levels of the Army for an understanding of what real life in the military is like, which informs his work as a judge.

For example, Judge Greenberg instructs his law clerks to carefully review the record on appeal for evidence of each veteran's combat experience or injuries, even where a Combat Infantryman Badge or Purple Heart is absent from the DD 214 form, because in his experience service members do not always receive the decorations to which they are entitled.

Greenberg knew from an early age that he wanted to be a specific kind of lawyer. At 12, he was transfixed by the televised Army-McCarthy hearings. Watching Joseph Welch defend the Army ("Have you left no sense of decency?"), he said to his mother, "I want to be *him*" — defending the Army against the likes of McCarthy and Cohn.

Judge Greenberg was taught by professor, now justice, Ruth Bader Ginsburg at Rutgers University, where he completed his J.D. in 1967. He then went on to clerk for the late Judge Robert A. Matthews, who was then sitting by assignment on the prestigious general equity court of the Superior Court of New Jersey, presiding over a busy civil trial docket in Jersey City. Judge Greenberg retains the highest regard for Judge Matthews, a Navy war hero, who remains for Judge Greenberg an inspiration and role model. He credits Judge Matthews with always having his eye on the record, and respects how his mentor applied the law impartially and fairly.

As his clerkship drew to a close, Greenberg was inclined to accept a position as an assistant prosecutor under Essex County prosecutor, later governor, Brendan Byrne, against an offer from storied McCarter and English, the oldest law firm in New Jersey. Greenberg joined the firm as an associate in 1968, heeding the advice of his judicial mentor to learn the right way to practice law.

Greenberg worked as a litigator and trial lawyer for more than 40 years, trying hundreds of cases in state and federal court. Upon his nomination to the court, he was a partner at McCarter and English. Judge Greenberg values his career and emphasizes that he was fortunate to be able to try cases, to have served as president of the New Jersey chapter of the American Trial Lawyers Association, the New Jersey State Bar Association and

chairman of the Committee on Judicial Selection.

Judge Greenberg believes that his long experience in private practice offers a valuable perspective to the Veterans Court. He agrees with Chief Justice William Rehnquist that experience in practice outside of government is important for the judiciary⁶ and feels that the court's composition should reflect a range of backgrounds. He believes that a strength of the current court is the diversity of experience the judges collectively bring.

In 2008 Judge Greenberg taught the first military law course offered at Seton Hall University School of Law. Enrollment grew from nine students that first year to 29 in 2012.⁷ He suggests that Seton Hall should be commended for offering what then was a novel and different class, one that opened new vistas for the students. The judge resumed teaching the course in fall 2014, this time at Georgetown University Law Center in Washington, D.C., with Chief Judge Bruce Kasold as co-professor.

After Sept. 11, Judge Greenberg saw a need among service members and veterans for legal aid and established the New Jersey Military Law Institute and the New Jersey State Bar Association Legal Assistance Program. In addition to his administrative and supervisory role, Judge Greenberg personally represented wounded soldiers in evaluation board hearings at Walter Reed Army Medical Center over their disabilities and entitlement to benefits. Judge Greenberg counts the work he did "to positively influence a situation that, without a lawyer, would have an entirely different outcome" as a highlight of his career.⁸

In 2009 Judge Greenberg was appointed chairman of the Reserve Forces Policy Board (RFPB), a statutory body charged with providing policy advice to the secretary of defense on matters relating to the reserve components. Under his leadership, the RFPB recommended making legal assistance available to wounded personnel undergoing evaluation of their disabilities for discharge and pension purposes, especially early in the process. Judge Greenberg is proud that the RFPB's recommendations "had a direct bearing on the way in which the physical evaluation board process has been administered by the military."⁹

His experiences at Walter Reed and the RFPB made Judge Greenberg a firm believer in the importance to service members and veterans of legal representation in matters related to disabilities.¹⁰ His experience on the Veterans Court has confirmed his conviction that lawyers are "indispensable" for veterans.

These experiences helped shape Judge Greenberg's position on the Equal Access to Justice Act (EAJA). He has characterized the EAJA as a "veteran-friendly, lawyer-friendly, statute, enacted by Congress to encourage worthy litigation" and called on the court to "encourage lawyers to represent veterans."¹¹ He has touched on this theme in remarks to volunteer veterans attorneys, saying that representing those who have served in the armed forces is an "old, honored way to serve."

Before his investiture, Judge Greenberg testified that



“I have come to consider myself, more than any other attribute, a soldier’s lawyer,” and Sen. Robert Menendez described him as “a fierce advocate for the men and women who have served in uniform.”¹² Analyzing one of his judicial opinions, a veteran who writes about the CAVC characterized the judge as “Greenberg the Merciless” for what the writer perceived as the judge’s close and skeptical reading of a record in a decision reversing the VA.¹³

When judging a case, Judge Greenberg is cognizant of his duty to be solicitous toward veterans but “presumes everyone is acting in good faith,” with the ultimate standard being to “apply the law, but see that justice is done.” Regardless of the decision’s ultimate outcome, his opinions always describe the substance of the appellant’s military service, his or her specialty, and important decorations, in order to “recognize their meritorious service.”

Certainly Judge Greenberg, like his colleagues, will review the record with an eye toward overlooked points in favor of the veteran and press the VAs counsel at argument. However, he stresses the distinction between any sort of bias or partiality and the solicitude he shows to veterans, a third of whose appeals are pro se. Judge Greenberg emphasizes that Congress calls for such solicitude, supporting his position with a two-step argument.

First, “[s]ince the founding of the Republic, Congress has provided for disabled veterans”¹⁴ through “veteran-friendly” legislation.¹⁵ In *Hayburn’s Case*, the Supreme Court “adopted an interpretation of the [Invalid Pensions Act of 1792] that permitted circuit court judges to hear the claims of veterans, because ‘the objects of this act are exceedingly benevolent, and do real honor to the humanity and justice of [C]ongress.’”¹⁶ To Judge Greenberg, this expresses a principle “as old as the Republic”—congressional desire to “place a thumb on the scale in the veteran’s favor in the course of ... judicial

review of VA decisions.”¹⁷

Second, “[t]hat same concern for veterans[’] justice extends to the courts,” and the CAVC “follows these noble traditions ... and provides review of Board decisions in that same spirit.”¹⁸ Applying this principle, the judge contends that the statutes and regulations regulating veterans’ benefits, which the CAVC reviews, “should be ... applied” in the veteran’s favor.¹⁹

According to Judge Greenberg, a specific manifestation of congressional intent is the veterans canon, a principle of statutory interpretation in American law providing “that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries’ favor.”²⁰ Judge Greenberg asserts the canon’s continuing force in law, writing that the “Court must be guided foremost by the veterans canon when it applies the law.”²¹ However, Judge Greenberg has not explicitly addressed the tension noted by commentators between this canon and *Chevron* deference, which calls for deference to government interpretations of ambiguous statutes.²²

For example, in *Pacheco v. Gibson* he opened his dissent by stating that “[o]ur Court must not continue to show deference to the Secretary’s interpretations of statutes and regulations where, as here, doing so contravenes the long-applied veterans’ canon.” He “would not reward the Secretary for writing an ambiguous, and unintelligible, regulation,” and therefore he “would give no deference to [VAs] interpretation of [the instant regulation].”²³

Judge Greenberg’s opinions show a strong interest in the Veterans Court’s powers, which in his view are extensive. He has observed that the court was created under Article I and therefore may have more power in some respects than Article III courts. For example, he seems to have called into question the court’s early decision to restrict its own jurisdiction and hold itself bound by the Article III “case or controversy” requirement, despite its status as an Article I court.²⁴ Writing separately in *Leavey*

v. McDonald, he merely “acknowledge[d] the Court’s *voluntary* adoption of the Article III case-or-controversy requirement.”²⁵ His language and emphasis imply that he is open to revisiting that question.

At the same time, he recognizes CAVC’s similarities to Article III courts. In almost every opinion he authors, Judge Greenberg notes the Supreme Court’s statement in *Henderson v. Shinseki* (written for a unanimous Court by Justice Samuel Alito, whom Judge Greenberg is quick to note is a New Jerseyan) that the CAVC’s scope of review is “similar to that of an

Article III court reviewing agency action under the Administrative Procedure Act.”²⁶

To Judge Greenberg, one of the key powers the Veterans Court possesses is the power of equity. Thus, although the CAVC “is a constitutional court, established under Article I, Section 8, Clause 9 of the Constitution[,] it is also a court applying the principles of Article III of the Constitution, and emphatically a court with equitable power.”²⁷ Judge Greenberg contends that “among the earliest judicial decisions in the United States were efforts by early tribunals to resolve important legal and constitutional issues by the application of equitable principles.”²⁸

In *Pacheco*, Judge Greenberg called for reversing the CAVC’s prior case law which held that “this Court is not a court of equity and cannot provide equitable relief.”²⁹ He argued that the CAVC *does* possess “statutory and inherent—that is, constitutional—powers of equity,” explaining that “nothing in the [instant statute] indicates that Congress intended to preclude this Court from granting equitable relief. ... Rather, the continued application of equitable doctrines at this Court without congressional intervention suggests the opposite: that we may ... apply, in the interest of justice, equity.”³⁰

In *Gazaille v. McDonald*, Judge Greenberg’s position on the court’s equitable powers carried the day through a plurality opinion establishing that a statutory minimum time-period requirement was subject to equitable estoppel. Veterans Affairs had denied benefits to the appellant, a veteran’s widow, because the marriage had lasted less than the one-year minimum required by statute to qualify for benefits as a surviving spouse. The appellant alleged that her husband’s death was hastened by treatment mistakes by his VA doctors. She argued that, therefore, VA should be equitably estopped from denying benefits based on the marriage ending by death before one year.

Because the other panel members split on both of the questions in the case, Judge Greenberg’s opinion emerged as the controlling opinion for the court. Judge Greenberg emphasized that CAVC, acting as an Article III court, had available to it “inherent constitutional power to administer equitable remedies,” and that those powers extended to the equitable estoppel claim the appellant was bringing there. However, on the second question (which also split his panel-mates) he felt that the appellant had not made a showing sufficient to trigger VA’s duty to assist veterans in developing evidence,

and he held therefore that remand was unwarranted at the time.³¹

In *Henderson*, the Supreme Court held that, absent evidence of contrary intent from Congress, the procedural rule giving veterans a limit of 120 days in which to appeal decisions by the board to the CAVC can be waived by that court upon equitable grounds.³² Three opinions highlight Greenberg’s philosophy of equitable tolling of statutory time limits like the one for appeals.

In *Ferguson v. Shinseki*, the CAVC applied a Federal Circuit precedent that specifies three situations where equitable tolling may be warranted.³³ The court found that the appellant’s situation fell under one of the three categories. Concurring, Judge Greenberg noted that because equitable tolling is “decided on a ‘case by case basis,’” he “would not have applied [the precedential case] alone” but rather “would utterly eliminate these categorical distinctions” when deciding whether to grant equitable tolling. In Judge Greenberg’s view, “[e]quity aids the vigilant, not those who slumber on their rights.’ If a veteran satisfies the essential inquiry into diligence, the extraordinary—or ordinary—character of the veteran’s circumstances should not influence the application of equity.”³⁴

Judge Greenberg weighed equity through the lens of diligence in *Morrow v. McDonald*, where a veteran’s attorney mistakenly filed a late application for fees under EAJA. Although the merits question became moot when the appellant withdrew his EAJA application, Judge Greenberg addressed the merits in a concurring statement. He would have found that the “appellant in this case was reasonably diligent in pursuing his rights with regard to EAJA.” In light of Congress’ purposes in enacting EAJA and structuring the veterans benefits system, Judge Greenberg “would have held that equitable tolling of the EAJA application period is warranted here.”³⁵

In *Palomer v. McDonald*, the court dismissed a Filipino veteran’s appeal as untimely because it arrived at the court 133 days after the board decision was mailed. The appellant argued, in part, that he was entitled to tolling because it took more than 13 days for the board decision to reach him.

In dissent, Judge Greenberg found that the appellant was diligent because “there is no action that the appellant could reasonably have taken to speed up his receipt of the Board decision,” which was slow to arrive in the post, noting further that he “filed his motion for reconsideration within 120 days of receiving that decision.” Judge Greenberg would have held that “[w]here, as here, the facts indicate that the appellant’s filing was untimely *because* of the mailing delay, not *in addition* to it, equitable tolling is appropriate.”

He concluded by stating that “[t]he principle that equity exists to protect against the failures of narrowly prescribed rules ought to be reflected in this Court’s equitable tolling jurisprudence. ... That jurisprudence must be more inclusive so as to properly discharge the essential duty of equity: to provide relief in light of di-

verse and infinite circumstances for which fixed laws cannot account. *Fiat justitia ruat caelum* [Let justice be done though the heavens fall].³⁶

Judge Greenberg often cites authorities that are old or outside the usual bounds of veterans law. His regular recourse to authorities rarely cited by the CAVC, such as *Marbury v. Madison* and Pomeroy's treatise on equity, reveal a holistic and historical view of veterans law. Perhaps the most noteworthy of these authorities is the heretofore obscure *Hayburn's Case*, mentioned above, which Judge Greenberg first encountered as a student in Professor Ginsburg's civil procedure class.

To Judge Greenberg's surprise, that decision had never been cited by the CAVC before he joined the court. Now, that decision's language, "many unfortunate and meritorious [veterans], whom Congress have justly thought proper objects of immediate relief, may suffer great distress, even by a short delay, and may be utterly ruined, by a long one ..."³⁷ appears in almost all of Judge Greenberg's opinions. Interestingly, the Federal Circuit cited *Hayburn's* on a point of substantive veterans law for the first time only last year, quoting the same language.³⁸

The seat Judge Greenberg holds was added to the court in 2008 in response to a backlog of appeals.³⁹ Although the court has seen its backlog reduced, delay remains one of his chief concerns, reflected in his regular citations to *Hayburn's* warning about delay.

A recent case prompted Judge Greenberg to write separately about an unfortunately common occurrence—the situation where a veteran dies while his claim is pending. In *Leavey v. McDonald*, the appellant died on Nov. 6, 2014. On Nov. 14, 2014, the *en banc* CAVC issued a decision in the appeal. That same day, counsel for the appellant notified the court of his client's death. The court then vacated its decision of Nov. 14, explaining that the court must dismiss the appeal because there was no longer a case or controversy within the court's jurisdiction.

Judge Greenberg dissented, explaining that "[t]his veteran[s] circumstances are a reminder that many veterans are at risk of dying before receiving the full and fair adjudications of their claims to which they are entitled." Judge Greenberg asked that "[a]lthough this veteran has died, his circumstances should be remembered in light of the many future veterans waiting their turns. ... This Court must not lose sight of this veteran's reality and the reality of all veterans who continue to suffer harmful delays as a result of VA error."⁴⁰

Greenberg says that "there is no way to achieve what someone like I have professionally and in public service without a helpmate. My helpmate was my wife." He describes his wife, Tina, as his "best friend, partner, and principal support throughout my professional life," someone who is "absolutely principled, intelligent, and loyal." Wed in 1974, the Greenbergs have three children and two grandchildren.

CAVC judges are appointed for 15-year terms, with the option to retire with benefits at age 80 upon 10 years

of service (the "rule of 80"). Responding to a question about retirement, Judge Greenberg said that he had no interest in the "rule of 80," and would only step down early if someone "pried his hand off the gavel."⁴¹

Today, after more than two years of service on the bench, Judge Greenberg is very happy on the CAVC. "I've always loved being a lawyer; now I love being a judge on this Court, where we are doing important work." Paraphrasing Daniel Webster, whom he contends was the greatest lawyer of the 19th century, Greenberg says that the CAVC is "a small court, a new court, but there are those who love it."⁴² ☉

Endnotes

¹Hearing Before the Committee on Veterans' Affairs: Nominations of the 112th Congress, Second Session, Part 2: S. Hrg. No. 112-730 at 68 (Dec. 12, 2012) [hereinafter Hearing] (statement of Sen. Johnny Isaacson).

²David Taylor, *Marshaling Arguments for the Wounded*, JOHNS HOPKINS UNIVERSITY ARTS AND SCIENCES MAGAZINE, Fall 2009, krieger2.jhu.edu/magazine/f09/a1.html.

³Hearing, *supra* n.1.

⁴In 2014, the CAVC issued approximately 2,000 single judge dispositions, against 32 panel or *en banc* decisions.

⁵38 U.S.C. § 7292.

⁶Linda Greenhouse, *Rehnquist Sees a Loss of Prospective Judges*, NEW YORK TIMES (Jan. 1, 2002), www.nytimes.com/2002/01/01/us/rehnquist-sees-a-loss-of-prospective-judges.html.

⁷Hearing, *supra* n.1, at 40 (supplemental questionnaire of William S. Greenberg).

⁸Taylor, *supra* n.2 (internal quotation marks omitted).

⁹Hearing, *supra* n.1, at 20 (prepared statement of William S. Greenberg).

¹⁰Taylor, *supra* n.2.

¹¹*Morrow v. McDonald*, 27 Vet. App. 92, 92 (2014) (Greenberg, J., concurring).

¹²Hearing, *supra* n.1, at 41, 6 (supplemental questionnaire of William S. Greenberg, statement of Sen. Robert Menendez).

¹³Asknod, *CAVC-TRAORE v. Gibson-Greenberg The Merciless*, Asknod, July 31, 2014, asknod.wordpress.com/2014/07/31/cavc-traore-v-gibson-greenberg-the-merciless/.

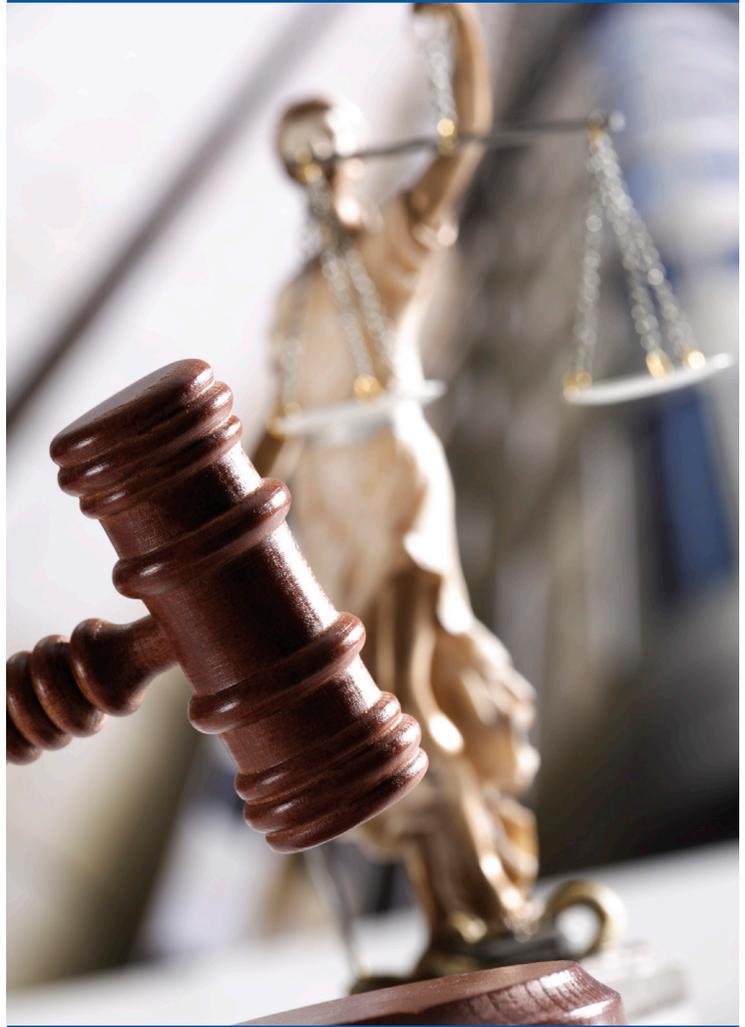
¹⁴*Pacheco v. Shinseki*, 26 Vet. App. 413, 416 (2014) *opinion withdrawn and superseded on reh'g en banc sub nom. Pacheco v. Gibson*, 27 Vet. App. 21 (2014).

¹⁵See *Leavey v. McDonald*, 27 Vet. App. 226, 229 (2015) (Greenberg, J., dissenting).

¹⁶*Romanowsky v. Shinseki*, 26 Vet. App. 289, 295-96 (2013).

¹⁷*Pacheco v. Gibson*, 27 Vet. App. 21, 43 (2014) (Greenberg, J., concurring in part and dissenting in part) (quoting *Henderson ex rel. Henderson v. Shinseki*, 131 S.Ct. 1197, 1205 (2011)).

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¹⁸*Romanowsky*, 26 Vet. App. at 416.

¹⁹*See Pacheco*, 27 Vet. App. at 43 (Greenberg, J., concurring in part and dissenting in part) (citation omitted) (emphasis added).

²⁰*King v. St. Vincent's Hospital*, 502 U.S. 215, 220–21, n.9 (1991).

²¹*Pacheco*, 27 Vet. App. at 43 (Greenberg, J., concurring in part and dissenting in part).

²²*See, e.g.,* Linda D. Jellum, *Heads I Win, Tails You Lose: Reconciling Brown v. Gardner's Presumption That Interpretive Doubt Be Resolved in Veterans' Favor with Chevron*, 61 AM. U. L. REV. 59 (2011); *Johnson v. McDonald*, 762 F.3d 1362, 1367 (Fed. Cir. 2014) (O'Malley, J., concurring) ("Where there is a conflict between an agency's reasonable interpretation of an ambiguous regulation and a more veteran-friendly interpretation, it is unclear which interpretation controls"); James D. Ridgway, *Toward A Less Adversarial Relationship Between Chevron and Gardner*, 9 U. MASS. L. REV. 388 (2014).

²³*Pacheco*, 27 Vet. App. at 43 (Greenberg, J., concurring in part and dissenting in part).

²⁴*See Mokal v. Derwinski*, 1 Vet. App. 12, 13-15 (1990).

²⁵*Leavey*, 27 Vet. App. at 230 (Greenberg, J., dissenting) (emphasis in the original).

²⁶*Henderson*, 131 S.Ct. at 1201, n.2.

²⁷*Ferguson v. Shinseki*, No. 13-1149, 2014 WL 463690, at *1 (Vet. App. Feb. 6, 2014) (Greenberg, J., concurring).

²⁸*Ferguson*, 2014 WL 463690 at *1 (Greenberg, J., concurring) (citations omitted).

²⁹*Pacheco*, 27 Vet. App. at 44 (Greenberg, J., concurring in part and dissenting in part).

³⁰*Id.*

³¹*Gazaille v. McDonald*, 27 Vet. App. 205, 212-15 (2014) (Greenberg J., concurring) *review denied*, No. 12-3170, 2015 WL 369596 (Vet. App. Jan. 28, 2015).

³²*See Henderson*, 131 S.Ct. 1197.

³³*Barrett v. Principi*, 363 F.3d 1316, 1320 (Fed. Cir. 2004).

³⁴*Ferguson*, 2014 WL 463690 at *3 (emphasis in the original) (citations omitted).

³⁵*Morrow*, 27 Vet. App. at 92 (Greenberg, J., concurring).

³⁶*Palomer*, 27 Vet. App. 245, 257 (2015) (Greenberg, J., dissenting) (quoting *Rex v. Wilkes*, (1770) 98 Eng. Rep. 327 (K.B.) 347 (Lord Mansfield); 4 Burr. 2527, 2562).

³⁷*Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n., 1 L.Ed. 436 (1792) (internal quotation marks omitted).

³⁸*Irwin v. Gibson*, 572 F. App'x 974, 976 (Fed. Cir. 2014).

³⁹Veterans' Benefits Improvement Act of 2008, Pub. L. No. 110-389, § 601.

⁴⁰27 Vet. App. at 229-30 (Greenberg, J., dissenting).

⁴¹Hearing, *supra* n.1, at 63 (testimony of William S. Greenberg).

⁴²Paraphrasing Daniel Webster in the oral argument in *Dartmouth College v. Woodward*, 17 U.S. 518 (1819) ("It is, Sir, as I have said, a small college. And yet, there are those who love it!").