

1           IN THE SUPREME COURT OF THE UNITED STATES

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3   JAMES B. PEAKE, SECRETARY                                 :

4   OF VETERANS AFFAIRS,   :

5                                 Petitioner                                 :

6                                 v.   :   No. 07-1209

7   WOODROW F. SANDERS.   :

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  Washington, D.C.

  Monday, December 8, 2008

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12                                 The above-entitled matter came on for oral  
13 argument before the Supreme Court of the United States  
14 at 10:04 a.m.

15 APPEARANCES:

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17 General, Department of Justice, Washington,  
18 D.C.; on behalf of the Petitioner.

19 CHRISTOPHER J. MEADE, ESQ., New York, N.Y.; on behalf of  
20 the Respondent Simmons.

21 MARK R. LIPPMAN, ESQ., La Jolla, Cal.; on behalf of the  
22 Respondent Sanders.

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4	On behalf of the Petitioner
5	CHRISTOPHER J. MEADE, ESQ.
6	On behalf of the Respondent Simmons
7	MARK R. LIPPMAN, ESQ.
8	On behalf of the Respondent Sanders
9	REBUTTAL ARGUMENT OF
10	ERIC D. MILLER, ESQ.
11	On behalf of the Petitioner
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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 07-1209, Peake v. Sanders et al.

Mr. Miller.

ORAL ARGUMENT OF ERIC D. MILLER

ON BEHALF OF THE PETITIONER

MR. MILLER: Mr. Chief Justice, and may it please the Court.

Congress has directed the Veterans Court to take due account of the rule of prejudicial error in reviewing administrative determinations of veterans benefits. For four reasons, the court of appeals erred in holding that the Veterans Court should presume the existence of prejudice whenever it finds that the VA has erred in providing notice to a claimant.

First, section 7261, the Veterans Court prejudicial error statute, uses language that is essentially identical to that of the APA's prejudicial error provision. And when Congress adopted that language in 1988, it was understood to place upon the party challenging an agency's action the burden of showing that any error was prejudicial.

Second, a notice error of the kind at issue

1 here does not have the natural --

2 JUSTICE SCALIA: Why do you say that? That  
3 it was understood so? Because of the Attorney General's  
4 commentary on the APA?

5 MR. MILLER: The principal reason that it  
6 was understood is because the uniform practice in the  
7 courts of appeals as of 1988 was to place upon  
8 challengers to agency action the burden of showing  
9 prejudice from the error. And the Congress was well  
10 aware of that, and in particular the Senate Veterans  
11 Affairs Committee, in explaining its choice of the rule,  
12 cited the Ninth Circuit's decision in *Seine & Line*  
13 *Fishermen's Union*, which expressly stated that the  
14 burden --

15 CHIEF JUSTICE ROBERTS: You basically have  
16 four cases in the courts of appeals to support that  
17 proposition, right?

18 MR. MILLER: Well, Your Honor, it's  
19 considerably more than that. And the only -- and the  
20 only cases that even suggest -- that lend any support to  
21 a contrary rule are in the very different context of  
22 notice and comment rulemaking under rule -- under  
23 section 553.

24 And the reason that that's different is  
25 really for two reasons, and that is that the -- the

1 interest that section 553 is intended to protect is not  
2 the interest of any particular commenter or any  
3 particular outcome of the rulemaking. It's the interest  
4 of the public in having the agency's decisionmaking  
5 fully informed by all of the relevant comments.

6 CHIEF JUSTICE ROBERTS: Well, but this is --  
7 I mean, it's kind of the -- it's the first notice. It  
8 gets the ball rolling. I mean, I think it's like you  
9 have two teams and you don't tell one of the teams when  
10 the game starts, and then you say, well, it doesn't  
11 matter because they would have lost anyway, there's no  
12 prejudice.

13 MR. MILLER: The reason that in a great many  
14 cases there's not going to be prejudice from error of  
15 the kind at issue here is that the VA has an informal  
16 nonadversarial system that provides multiple layers of  
17 review and many opportunities to correct the effect of  
18 any official notice error. And that's illustrated by  
19 the procedural history of these cases. To take Ms.  
20 Simmons's case for an example --

21 JUSTICE GINSBURG: Well, can we go back to  
22 the question that was first posed? We have never held  
23 that every agency -- you know, agencies come in many  
24 sizes and shapes -- that in all cases, the APA places  
25 the burden on the appellant or the petitioner. But this

1 Court has never held that across the board, no matter  
2 what agency we are talking about, that's the rule.

3 MR. MILLER: That's correct. This Court has  
4 not held that. But Congress was aware that the uniform  
5 practice, certainly in agency adjudications in the  
6 courts of appeals, was to place the burden on the  
7 challengers, and Congress --

8 JUSTICE STEVENS: When was Congress aware of  
9 this, when the Administrative Procedure Act was passed,  
10 you mean?

11 MR. MILLER: No, the statute at issue here  
12 is part of the Veterans Judicial Review Act of 1988.  
13 And so the relevant time we're looking at what the  
14 practice was is as of 1988 when Congress incorporated  
15 the language from the APA and placed it in section 7261.  
16 And as of 1988, it was clear that the burden was on  
17 challengers.

18 JUSTICE ALITO: Can I -- can I ask you to  
19 clarify exactly what you mean by the "burden" of showing  
20 prejudice? Is it correct that neither of the following  
21 -- to borrow the terminology that you would use in  
22 formal litigation, and I understand this is not formal  
23 litigation before an agency, but to borrow that  
24 terminology, is it correct that the issue here doesn't  
25 concern either the burden of production or the risk of

1 nonpersuasion before the administrative agency, before  
2 the regional office? In other words, if there's -- if  
3 there is evidence that the veteran as opposed to the VA  
4 has to produce, that doesn't change, and whatever the  
5 standard is that has to be met to show an entitlement to  
6 benefits, that doesn't change either, so that all that's  
7 involved here is whether -- whatever showing needs to be  
8 made is to be made on appeal or on remand?

9 MR. MILLER: That's -- that's correct. We  
10 are talking about what showing needs to be made on  
11 appeal. And as this Court suggested in O'Neal, you  
12 know, the burden language is perhaps more appropriate  
13 for the context where there's -- you know, people are  
14 presenting competing evidentiary submissions to a  
15 factfinder, and that's not what we have here.

16 JUSTICE BREYER: That's in O'Neal. It says  
17 that --

18 MR. MILLER: That's right.

19 JUSTICE BREYER: -- which most of the Court  
20 joined, and the reason that it says it is because it  
21 just confuses everybody, at least me, to talk about  
22 "burden" in this context. I think if O'Neal is right,  
23 it says what this is, is not involving a jury, not  
24 involving -- it's just what Justice Alito says, and  
25 following that through, what you'd -- you say to the

1 judge: Judge, your job is to decide this. Decide.  
2 Decide whether you think that the one side -- whether  
3 there is error or whether the error is harmless or  
4 whether it isn't. Decide it.

5 Now, it could be in a rare instance the  
6 judge just can't decide. He's in grave doubt. And so  
7 what we are talking about is what to do in that -- what  
8 should be a very, very rare instance.

9 Now, when I read this case, I thought that  
10 the Veterans Affairs is absolutely common sense on this.  
11 It says: When you really don't know what to do, Judge,  
12 if the veteran got no notice at all, then probably the  
13 error was harmful. But if he got the basic notice, and  
14 all that's at issue is who should produce what or  
15 whether he thinks that he didn't know that he's supposed  
16 to produce a lot of information, well, there, you know,  
17 it would be pretty rare that it was harmful. And so  
18 you'd better say to him: Veteran, why did this hurt  
19 you?

20 That's all common sense, and it seemed to me  
21 that that's what the Veterans Court was saying, and then  
22 the Federal Circuit unfortunately, like I might have  
23 done, too, got it all mixed up with this burden of proof  
24 language. Now, you tell me, legally, is that result  
25 which I am talking about sensible, and if so, how do I



1 get there legally?

2 MR. MILLER: To clarify, the reason that we  
3 have used the language of "burden" is simply --

4 JUSTICE BREYER: I'm not criticizing you for  
5 that. I'm not -- it's not a criticism. I'm just really  
6 trying to figure out how to get to what I see as common  
7 sense legally.

8 MR. MILLER: I appreciate that. I -- the  
9 point that we're trying to emphasize is that, in the  
10 ordinary course, the Veterans Court, like any court, is  
11 going to act on the basis of arguments that are  
12 presented to it by the parties. And so when we -- when  
13 we speak of a "burden," we mean that the challenger has  
14 the obligation, if it wants the Veterans Court to find  
15 prejudice, to articulate some theory of how there was  
16 prejudice. And that --

17 JUSTICE BREYER: The theory is he didn't  
18 know anything about this, got no notice whatsoever, so  
19 he didn't know that he's supposed to produce some more  
20 information or he'll lose. That's the theory.

21 MR. MILLER: But in order to -- in order to  
22 connect that error -- I mean, that's -- that's an  
23 identification of an error under the Veterans Claims  
24 Assistance Act. But to connect that error to some --

25 JUSTICE BREYER: But you connect it by

1 saying normally a veteran who isn't that knowledgeable  
2 -- not everybody is a genius in law -- when he doesn't  
3 get a notice that tells him you got to produce something  
4 more or you lose, he might forget to produce something  
5 more. That's the theory.

6 MR. MILLER: If he has something more. And  
7 what we are saying is that in order to get a remand, the  
8 claimant who, by the time they get to the Veterans  
9 Court, has already identified the error, has made an  
10 argument to explain to the court that there was in fact  
11 an error, at that point they ought to explain how the  
12 error affected them. If it prevented them from putting  
13 some piece of evidence, they ought to tell the court:  
14 Here's the piece of evidence that I would have put in.

15 CHIEF JUSTICE ROBERTS: Well, usually, when  
16 you have an appellate court -- you know, it's a hard  
17 question, they're easily divided, the case is resolved  
18 on the basis of the standard of review. What is the  
19 presumption, if it's a close case? And why isn't that  
20 all sort of what we are talking about here? It's a  
21 close case, and the judge -- the panel says, well, this  
22 side has the burden of persuasion, so we're going to  
23 come out the other way.

24 MR. MILLER: Because I think in a case where  
25 the -- like these, where plaintiff has not identified

1 anything that they would have done differently, it isn't  
2 a close case with respect to the question of prejudice.

3 Now, we have to be clear: If a claimant can  
4 articulate something they would have done differently,  
5 we are not saying they have the obligation of showing  
6 that the outcome definitely would have been different or  
7 even, more likely than not, it would have been  
8 different. It would be sufficient after identifying  
9 with some particularity what they would have done  
10 differently, if they could show that there's some  
11 reasonable --

12 CHIEF JUSTICE ROBERTS: Well, what if what  
13 they would have done differently is get a different  
14 medical test, or done something like that, or had the  
15 doctor in the prior testing who prepared the diagnosis  
16 look at something that they didn't have them look at  
17 before? In other words, it's not simply the absence of  
18 documents that they know they can submit or could have  
19 submitted. It's that type of question. And nobody  
20 knows. I mean, you don't know what would have happened  
21 if they had the doctor look at this issue that now turns  
22 out to be critical, but if they had gotten the right  
23 notice they might have had time to do that.

24 MR. MILLER: Well, depending on the state of  
25 a record -- the record in a particular case, that might

1 be sufficient to show a reasonable probability that the  
2 outcome would have been different. But in a lot of  
3 cases it won't be, and I think Ms. Simmons's case is a  
4 good example of that.

5 JUSTICE GINSBURG: But if the government has  
6 the obligation at the very first to tell the veteran  
7 what the veteran must produce to substantiate the claim  
8 and the government doesn't do that, why shouldn't it be  
9 the responsibility of the government to say to the  
10 court: This is what -- if we had done what we were  
11 supposed to do, this is what we would have included in  
12 our notice. And looking at that, the court can tell  
13 whether there's anything the veteran might have done.  
14 But why shouldn't the government at least have the  
15 obligation to say what it would have done had it  
16 complied with the statute, what it would have said  
17 specifically in this case?

18 MR. MILLER: Well, I mean, had the  
19 government complied -- to take Simmons's case as an  
20 example, when the VA sent her the notice letter, her  
21 claim was for an increased rating. She had a hearing  
22 loss that had already been determined to be  
23 service-connected but was not sufficiently severe to be  
24 compensable, and she said: My hearing has gotten worse.  
25 It now is severe enough to be a compensable disability.

1           The notice letter that was sent to her,  
2    which is at page 43 of the joint appendix, was incorrect  
3    in that it simply described the general requirements for  
4    establishing a service connection. It didn't  
5    specifically say, to make out an increased rating claim,  
6    you have to show that your hearing has become worse.

7           But as soon as she got a decision from the  
8    regional office, which is the first-line decisionmaker  
9    in the VA system, she was told that the reason her claim  
10   had been denied was because her hearing loss was not  
11   sufficiently severe under the table, and there's a  
12   fairly mechanical application of a certain number of  
13   decibels and a certain -- in each ear yields a certain  
14   disability rating, and the notice that she got from the  
15   regional office explained all of that and cited the  
16   regulation that reproduced the tables.

17           So at that point she was aware of why her  
18   claim had been denied and what was missing, namely,  
19   evidence that her hearing had become worse. And she had  
20   been given at that point a series of hearing  
21   examinations -- examinations for hearing by the -- by VA  
22   doctors, and the results of those were all reproduced in  
23   the decision that she got. And yet, the Veterans Court  
24   found that the government had failed to carry its burden  
25   of showing a lack of prejudice, because we hadn't -- we

1 couldn't show as a matter of law that there was no way  
2 she could obtain additional evidence.

3 JUSTICE BREYER: So -- so fine. If I get  
4 that record and if it is the way you describe, I'm not  
5 in grave doubt. No problem. If the record's the way  
6 you describe it, she knew everything she was supposed to  
7 know, so there's no harmful error, okay? We are only  
8 talking about cases where there is real doubt in the  
9 judge's mind about whether this failure of the agency  
10 did or did not hurt the woman or man. Now, when in  
11 doubt, we have the Veterans Court telling us the best  
12 way to administer this stuff is when they get no notice  
13 at all, and you are really in doubt, Judge, you don't  
14 know if it was harmful or not, here's what you do:  
15 Assume it was harmful. They're the ones who know. I  
16 don't know.

17 MR. MILLER: With respect, Your Honor, I  
18 don't think that that's a fair description of the effect  
19 of the rule adopted by the court below.

20 JUSTICE BREYER: Well, but suppose then we  
21 look at O'Neal, we read the first paragraph. It was  
22 what this court said, and we all held it and, therefore,  
23 we say, those are the cases we're talking about where  
24 you're in doubt, and when you're in doubt, go proceed as  
25 the Veterans Court told you in terms of who has to show

1 what.

2 MR. MILLER: I think in this case is a good  
3 illustration about why that sort of grave doubt you are  
4 describing doesn't arise in a case like this, where at  
5 no stage of the proceedings has the claimant offered  
6 anything that they would have done any differently. If  
7 they can't say, you know, here's what would have  
8 happened differently, than there really isn't any doubt  
9 as to what will happen on remand. If there's a remand  
10 and they don't do anything different, the result is not  
11 going to be any different. And so --

12 JUSTICE STEVENS: Maybe I'm not following as  
13 well as I should, but it seemed to me you are suggesting  
14 there was no error here.

15 MR. MILLER: No, that there -- there  
16 certainly -- there was an error.

17 JUSTICE STEVENS: And what was the error?

18 MR. MILLER: The error was that the initial  
19 letter that was sent to her describing what the evidence  
20 needed to -- that she needed to submit in order to  
21 establish her claim, misidentified that evidence; it  
22 described the elements of a general claim for service  
23 connectedness; it didn't specifically explain what was  
24 needed to establish an increased rating claim.

25 JUSTICE STEVENS: Are you saying that that

1 error was not prejudicial because the earlier  
2 information she had received gave her everything she  
3 needed?

4 MR. MILLER: The principal reason why that  
5 error was not prejudicial is because the only way that  
6 she could have received benefits for an increased rating  
7 claim is if there were evidence that her hearing had  
8 become worse. And she had a VA hearing test that said  
9 that her hearing did not meet the schedule or criteria  
10 for being a compensable disability.

11 JUSTICE STEVENS: Well, if that's the case,  
12 why wasn't that statement you just made sufficient to  
13 discharge your burden of showing no prejudice?

14 MR. MILLER: The -- the fact -- I mean, I --  
15 we believe that it should have been, but under the rule  
16 as imposed by the courts below, it clearly wasn't.

17 Under the decision of the Federal Circuit,  
18 the VA has the burden of showing that there was no way  
19 that benefits could have been awarded as a matter of  
20 law. And that, in effect, requires the VA to prove a  
21 negative by demonstrating the nonexistence of any  
22 evidence anywhere that might have been material to the  
23 claim.

24 CHIEF JUSTICE ROBERTS: You know, it's easy  
25 -- it's easy to look back and view this in sort of



1 abstract legal terms, but we are dealing with lay people  
2 who are trying to get something from the government,  
3 which is always a difficult thing. And they get one  
4 notice saying you have got to show that this was during  
5 the service. Then they get another notice or decision  
6 saying it wasn't severe enough. Why is it so difficult,  
7 when the government made a mistake in dealing with this  
8 layperson who is just trying to get benefits to which  
9 they are entitled, to say that the government has to  
10 show that it didn't make any difference, rather than  
11 requiring the -- the layperson to do that?

12 MR. MILLER: Well, because -- there are two  
13 responses to that: The first is it's important to keep  
14 in mind the stage of the proceedings at which this  
15 inquiry was relevant. The prejudicial error is only an  
16 issue once the claimant has reached the Veterans Court,  
17 which is an adversarial judicial proceeding where  
18 claimants do have counsel, and they've identified an  
19 error, and they've explained to the court, you know,  
20 here's what the error was. So that's the stage at which  
21 it would be incumbent upon them to articulate how the  
22 error might have affected them.

23 And I think the other point to be made is  
24 that, under the rule of the court of appeals, it's going  
25 to be very, very difficult in many cases for the

1 government to discharge the burden of showing that there  
2 was no evidence that could possibly have been produced.  
3 And what's -- what that is going to result in is a large  
4 number of remands --

5 JUSTICE KENNEDY: And as between the two  
6 courts, the Court of Appeals for Veterans Claims and the  
7 Court of Appeals for the Federal Circuit, do we owe  
8 either of them -- maybe not deference in the Chevron  
9 sense -- but some deference just because of their  
10 expertise in dealing with these claims? And if that is  
11 so, do we owe more deference to the Court of Appeals for  
12 the veterans' claims?

13 THE WITNESS: I'm not -- not aware that this  
14 Court has ever suggested that it would be --

15 JUSTICE KENNEDY: I mean, would -- it's --  
16 it's an issue of law, so I take it it's de novo.

17 MR. MILLER: Yes, it is -- and it's  
18 certainly that, and it is --

19 JUSTICE KENNEDY: But in -- in the exercise  
20 of that review, don't we have to give some weight to the  
21 determination of the Court of Appeals for Veterans  
22 Claims which sees these claims all the time? I -- I  
23 actually thought that that's where you were going to  
24 start out because you cited 7261, which says that the  
25 Court of Appeals for the Federal Claims shall, what,

1 give due effect to -- take due account of the rule of  
2 prejudicial error. And I think you could get from that  
3 that they have a certain amount of latitude in  
4 determining what the best rule is. But you're not going  
5 to -- you don't tell us that?

6 MR. MILLER: No, and I think that by  
7 adopting language from the APA, using the same language  
8 that applies to all kinds of judicial review of agency  
9 actions, Congress strongly suggested that it didn't want  
10 a unique rule for judicial review of VA determinations.  
11 And so I think there's -- there's no reason to defer to  
12 either the Veterans Court or the Federal Circuit on this  
13 general question of the standard of prejudicial review  
14 --

15 JUSTICE STEVENS: May I ask a factual  
16 question? You said most of these people were  
17 represented by counsel. There used to be a rule that  
18 they could only be paid \$10 a case. Is that still in  
19 effect?

20 MR. MILLER: When I said they were  
21 represented by counsel, I meant in the Court of Appeals  
22 for Veterans Claims, not at the administrative --

23 JUSTICE STEVENS: I see. But not during the  
24 nisi prius proceeding.

25 MR. MILLER: In the -- in the administrative

1 proceeding, the restrictions on payment of counsel have  
2 now been relaxed at the Board of Veterans' Appeals  
3 stage. So there generally -- there is not counsel at  
4 the regional office, but once the case reaches the  
5 board, there can be counsel. And --

6 JUSTICE STEVENS: There can be counsel, but  
7 is it really typical?

8 MR. MILLER: I -- the don't know the  
9 statistics on that, because that -- the statute is quite  
10 recent.

11 JUSTICE STEVENS: That would be a dramatic  
12 change, because years ago, I remember a case in which  
13 the Court upheld a \$10 fee limit on the notion that  
14 these people didn't need lawyers at all, which struck me  
15 as a little strange.

16 (Laughter.)

17 MR. MILLER: Well, in any event, that is no  
18 longer the case at the board level, and even those  
19 claimants who do not have counsel, the great majority of  
20 them, I think about three-quarters at the regional  
21 office level and 98 percent at the board level, are  
22 represented by some sort of non-attorney representative,  
23 either service organizations like the American Legion,  
24 or many States have organizations that assist claimants.  
25 Like Ms. Simmons, for example, was represented by a

1 North Carolina State agency before the VA. So there is  
2 some assistance to claimants there, but --

3 JUSTICE SOUTER: Mr. Miller, could you help  
4 me out on how the system works in -- in practice in a  
5 different way? One of your answers a few moments ago  
6 was that when -- I think it was Ms. Simmons was told why  
7 she lost, she in effect got as much notice as she would  
8 have needed to have to in effect do better on a remand.  
9 My first question is: Is there an automatic right to a  
10 remand?

11 MR. MILLER: There -- if you're talking  
12 about after the initial decision from the regional  
13 office, there is not an automatic right to a remand, but  
14 there is an automatic right to a de novo review by a  
15 more senior official at the regional office --

16 JUSTICE SOUTER: With new evidence?

17 MR. MILLER: Yes. You can get a hearing.  
18 You can present new evidence to the -- it's a decision  
19 review officer. And then if you are still dissatisfied  
20 with the resolution after that, you can go to the board,  
21 and you can get a hearing before the board. The board's  
22 review is de novo.

23 JUSTICE SOUTER: Okay. But even on the --  
24 on the functioning of the system as you have explained  
25 it, at the -- at the very least, the person has -- let's

1 assume Ms. Simmons says: Oh, now I understand, and I  
2 will get the following piece of evidence, which I didn't  
3 realize was my responsibility.

4 Even on that explanation, it means that the  
5 -- that the claimant is going to have to go through  
6 another stage in the administrative litigation process.  
7 So I assume that ought to count as -- as some sort of  
8 prejudice, and I assume it's something that -- as it  
9 were, the burden of which the VA ought to bear rather  
10 than the claimant.

11 MR. MILLER: Well, I guess to the extent  
12 that the delay in adjudicating the claim is a kind of  
13 prejudice, it's not a prejudice that would in any sense  
14 be cured by a remand for further proceedings, which will  
15 just result in further delay.

16 JUSTICE ALITO: If the -- I'm sorry. I  
17 didn't mean to interrupt.

18 MR. MILLER: I would just add that the --  
19 the effective date of the claim, which is the date as of  
20 which benefits are awarded, is the date that the claim  
21 was filed, so there wouldn't -- you wouldn't be losing  
22 money when you -- except for the --

23 JUSTICE SOUTER: No, but you are going to  
24 have to go through another stage of litigation. I mean,  
25 one of the functions of the burden rule -- and it might

1 be too subtle a function to worry much about -- but one  
2 of the functions is to put the party with the burden on  
3 -- on notice that if you fail in your obligation, you're  
4 the one who is going to have to pay, unless you can  
5 convince everybody that there was in fact no harm done  
6 by this. And this induces the party with the burden to  
7 do what the primary obligation says the party ought to  
8 do.

9           And on your -- and on your analysis, since  
10 the government would not have that obligation, the  
11 government has less of an inducement to follow the  
12 statutory obligation.

13           MR. MILLER: The -- the government has a  
14 very strong inducement to follow the statutory  
15 obligation. I mean, like every agency --

16           JUSTICE SOUTER: Well, it may have a strong  
17 inducement, but I'm talking about a stronger one.

18           (Laughter.)

19           JUSTICE SOUTER: If the government knows  
20 that it is going to bear the burden of any doubt about  
21 the significance of its failure, to some extent I  
22 suppose that is -- that is going to induce the  
23 government to be on its toes.

24           MR. MILLER: Well, I suppose that's right,  
25 but I think in a lot of cases -- I mean, the VA in all

1 cases strives conscientiously to comply with its  
2 statutory obligations. The notice requirements as  
3 described in section 5103 are fairly vague. They have  
4 -- the notice has to be tailored, at least to some  
5 extent, to the nature of the claim that's presented.  
6 And every time, you know, the Veterans Court or the  
7 Federal Circuit elaborates on exactly what kind of  
8 notice is required, to the extent that the VA wasn't  
9 aware of that elaboration before, there are going to  
10 have to be remands in all those pending cases. And --

11 JUSTICE SOUTER: Well, that's -- I mean,  
12 that's the essential problem with common law  
13 adjudication. And I -- there's not much we can do about  
14 that.

15 MR. MILLER: But it's a problem that is  
16 particularly acute here, given the volume of claims that  
17 the VA has to --

18 JUSTICE GINSBURG: What is the experience?  
19 When -- when a case is remanded, it goes back to the --  
20 does it go back to the regional? Suppose the -- the  
21 veteran is now given an opportunity to present whatever  
22 additional substantiation.

23 MR. MILLER: The claim, when remanded from  
24 the Court of Appeals for the Veterans -- for Veterans  
25 Claims, goes back to the board. In most instances, the



1 board would then send it back to the regional office for  
2 further development.

3 If I could reserve the remainder of my time.

4 CHIEF JUSTICE ROBERTS: Thank you, Mr.

5 Miller.

6 Mr. Meade.

7 ORAL ARGUMENT OF CHRISTOPHER J. MEADE

8 ON BEHALF OF THE RESPONDENT SIMMONS

9 MR. MEADE: Mr. Chief Justice, and may it  
10 please the Court:

11 I would like to make three points: First,  
12 because notice is integral to the system that Congress  
13 designed, the VA's failure to provide notice is likely  
14 to prejudice the veteran.

15 Second, it would be difficult for the  
16 veteran and comparatively easy for the government to  
17 carry a burden. It would be difficult for the veteran  
18 because under the government's rule the veteran would  
19 need to engage in a speculative exercise, identifying  
20 what evidence would have been developed had the veteran  
21 been notified and had he received the full assistance of  
22 the agency.

23 JUSTICE ALITO: Well, why is that -- why is  
24 it a speculative enterprise? It's -- if the -- if you  
25 are correct, and the proper resolution in a case like

1 this is a remand, let's say all the way back to the  
2 regional office, and if before the regional office it's  
3 the veteran who will need to come forward with some  
4 evidence supporting the claim, why does it make sense to  
5 remand the case to the regional office if there is no  
6 possibility that when the case gets back there the  
7 veteran can come forward with medical evidence that's  
8 needed?

9 MR. MEADE: Two reasons, Justice Alito:  
10 First, it's not clear even in the Veterans Court that  
11 the veteran will have notice of what's required, a point  
12 I would like to address.

13 But, second, if it's remanded, the process  
14 will develop as it should have in the first place,  
15 because under the statutory scheme there is both the VA  
16 and the veteran, the informed veteran, who have joint  
17 duties, and together during an interactive process they  
18 develop the evidence together. And during this  
19 interactive process, to answer Justice Stevens's  
20 question, the veteran is prohibited from hiring a  
21 lawyer. Without having the most basic notice of what's  
22 required, the veteran cannot participate in this  
23 process. And the only way we can know how the process  
24 would really work would be to give the veteran the  
25 notice that he is entitled to in the first place and

1 then allow the process to unfold as it should have.

2 JUSTICE ALITO: What if you have the  
3 situation -- and I think actually your -- your  
4 co-Respondent's case illustrates this better than yours.  
5 But you have a situation where the record as it has  
6 developed contains some evidence that supports the --  
7 the veteran's position, some evidence that supports the  
8 position in favor of denial of benefits. The -- the  
9 Veterans Administration, all the way up through the  
10 process, finds that the evidence contrary to the  
11 veteran's position is much stronger and denies the claim  
12 on that basis. The veteran says: I didn't get notice  
13 of what exactly I needed to prove.

14 Now, if on remand to the regional office  
15 it's still going to be -- it's going to be up to the  
16 veteran to come forward with medical evidence showing  
17 hearing loss or vision -- connecting the vision loss to  
18 something that happened in the service, why does it make  
19 sense to send it back if there's no possibility that the  
20 veteran is going to be able to do that when the case  
21 gets back?

22 MR. MEADE: Well, the answer is, first of  
23 all, that we don't know how the process would unfold  
24 once the veteran has notice. Even if there's evidence  
25 in the record, we don't know what evidence would have

1 been developed had the veteran had proper notice.

2 In addition, veterans often are not --

3 JUSTICE SCALIA: Excuse me. Why -- why is  
4 that? I'm not sure I follow you on that point. Once  
5 he's gone up to the next level and finds what the notice  
6 should have told him, why can't he come up with it then?

7 MR. MEADE: Well, for a few reasons. First  
8 of all --

9 JUSTICE SCALIA: You say it's a de novo,  
10 right, at this next level?

11 MR. MEADE: First of all, it's unclear  
12 whether the veteran would even have notice even at that  
13 point. None of the other requirements that the agency  
14 is required to give are the same as the notice  
15 requirement. However, if in appropriate cases they have  
16 given the actual notice by the time it reaches the  
17 Veterans Court, they can use that to rebut the  
18 prejudice. And that's what the Veterans Court said in  
19 Vazquez-Flores.

20 JUSTICE KENNEDY: In your case, did the --  
21 your client attend the initial hearing?

22 MR. MEADE: There was a medical examination  
23 that she didn't attend. There was a question of where  
24 the notice was sent, and this is at 70a of the  
25 petition's appendix. There was confusion. Apparently,

1 notices were sent to the wrong address by the agency.

2 JUSTICE KENNEDY: Well, what's the first  
3 time that your client knew that this claim was going to  
4 be processed at a particular time or the first time your  
5 client knew it had been denied? I just was never clear  
6 on the facts of what happened here. The notice was lost  
7 in the mail. So how did she know there was a hearing at  
8 all, or did she?

9 MR. MEADE: She was -- she later informed  
10 the agency that she had changed her address. But even  
11 it appears that further notices were sent to the wrong  
12 address. For --

13 JUSTICE KENNEDY: I'm just trying to -- it  
14 seems to me, at the first hearing, if she in fact is  
15 there, they say, well, now you have to give us some  
16 notice. And then at that point -- or some documentation  
17 -- and at that point, at the initial hearing, everybody  
18 knows who has to produce what.

19 MR. MEADE: Well, there's not necessarily a  
20 hearing. There was a medical examination that was  
21 supposed to be scheduled that she didn't attend, partly  
22 because of confusion of where the notice was sent. The  
23 hearing --

24 JUSTICE KENNEDY: Is there usually an  
25 initial hearing?

1           MR. MEADE: No. There's only a hearing if  
2 the veteran requests it.

3           JUSTICE KENNEDY: Okay.

4           MR. MEADE: So there's no hearing unless the  
5 veteran requests it. So here we have a situation where  
6 the veteran did not know what she needed to provide.  
7 She has two sets of claims, one for her left ear, one  
8 for her right ear. Neither claim was intuitive, and she  
9 couldn't figure out what she needed to do without he  
10 notice --

11           JUSTICE BREYER: And so, why not just say  
12 that? What's the big problem of saying, Judge -- and  
13 then you say just what you said?

14           MR. MEADE: Well --

15           JUSTICE BREYER: And then the judge again  
16 won't be in doubt anymore. So there's no need for this  
17 case because, either -- either -- either the veteran's  
18 agency will say: Look, I walked that veteran through  
19 the process, I walked him through the process; walking  
20 him through the process, he was told everything he  
21 needed to know, and there's no real problem here. It's  
22 just a formality that he didn't get the notice. And if  
23 that's true, I'm not in any doubt, unless the veteran  
24 tells me that that's wrong, and here was something,  
25 okay?

1           On the other hand, we have your case. In  
2 your case, she didn't go to the doctor. If she went to  
3 the doctor, maybe she would have found something out.

4           Again, I have no doubt, there's harmful  
5 error. So this case is a theoretical law professor's  
6 case that's never going to come up, because there's  
7 never any doubt. Either the VA did walk him through it  
8 and there's no deal -- big deal, because she can't come  
9 up with anything, or she can come up with something.

10           MR. MEADE: I agree that burdens only matter  
11 in a handful of cases, but it makes sense to put the  
12 burden on the government for a number of reasons.

13           JUSTICE BREYER: It certainly does because  
14 it makes sense to tell the government: Government, you  
15 have to come up with every possible, conceivable factual  
16 scenario and prove there wasn't a man from Mars who came  
17 in, and -- you know, that doesn't make sense.

18           MR. MEADE: But that's not what we ask for  
19 here. First of all, if the -- the veteran actually  
20 received notice during this dialogue that the government  
21 describes, then the government can point to that as a  
22 way to disprove prejudice.

23           Second of all, veterans are often  
24 vulnerable. They are often unrepresented in the  
25 Veterans Court. Under the latest statistics, 64 percent

1 are unrepresented at the beginning of the Veterans  
2 Court, 24 percent at the conclusion of the Veterans  
3 Court. Many have psychological and mental disabilities  
4 like post-traumatic stress disorder. Twelve percent of  
5 those who currently receive disabilities receive  
6 benefits for PTSD.

7 And it's not clear -- this is not lawyers;  
8 this is not doctors trying to receive benefits. This is  
9 not just lay people. They are veterans who served the  
10 country --

11 JUSTICE BREYER: I know all this, and why  
12 don't you just tell the judge that and say: Look at my  
13 client, Judge, look at my client. My client obviously  
14 isn't going to understand what to do unless the client  
15 is told. And here my client wasn't told.

16 I'm the judge, I'm not in any doubt, you're  
17 going to win, okay?

18 So what I can't figure out is how to deal  
19 with this case, which, as I said, strikes me as a law  
20 professor's case that shouldn't make any difference in  
21 any real situation.

22 MR. MEADE: The reason is that it's helpful  
23 to have presumptions to deal with the typical case where  
24 we have in our case a first element notice error, a  
25 question where the veteran does not even know what



1 evidence he needs to put forward. That -- in that case,  
2 it makes sense, because of the high likelihood of  
3 prejudice, to have a general rule that the burden should  
4 be on the government and not on the veteran.

5 CHIEF JUSTICE ROBERTS: No court is going to  
6 accept as a showing of prejudice the idea that, here,  
7 look at my client, you know, as a layperson didn't know  
8 what to do. That's not going to be adequate, is it?

9 MR. MEADE: I don't think it would be, and  
10 that's why it makes sense to have a general presumption.  
11 In cases where the government can either show that the  
12 process worked as it should have or that the veteran  
13 actually received notice during the process, it can  
14 rebut that prejudice.

15 In fact, in 2008 alone, the government has  
16 been able to do so. And it has done so at least a dozen  
17 times in a number of cases, rebutting the burden of  
18 prejudice that was established by the Veterans Court.

19 CHIEF JUSTICE ROBERTS: What's wrong with  
20 Mr. Miller's response that, at the very first level of  
21 review, you can start all over; at that point you know  
22 precisely why your claim was denied?

23 MR. MEADE: Well, again, there are various  
24 levels of review, but the notice to start that first  
25 level of appellate review does not necessarily give the

1 veteran the notice that she is entitled to. It --

2 CHIEF JUSTICE ROBERTS: Well, that was my  
3 question. Is it -- is it -- I take it it's more than  
4 just a stamp saying "denied," right? There's some  
5 explanation in every case?

6 MR. MEADE: Exactly. There is a statutory  
7 requirement that a statement of reasons need to be  
8 provided, but the statement of reasons don't necessarily  
9 correlate with the detailed requirements under the  
10 notice statute. Under Vazquez-Flores, what the Veterans  
11 Court said was that the notice needs to be quite  
12 detailed and the denial letter in a particular case  
13 might not map onto those particular requirements.

14 In October of this year, Congress went  
15 farther and said: We want these notice letters to be  
16 even more detailed. We want to give the veterans more  
17 notice, which shows that Congress is concerned about  
18 these notice -- these notice letters and wants to make  
19 it clear to the veteran what is required.

20 I want to answer a point that Justice Alito  
21 raised before. We are not asking here for a presumption  
22 of benefits. All we are asking for is a remand so that  
23 the veteran can get notice and have the process proceed  
24 as it was meant to in the original circumstance.

25 JUSTICE GINSBURG: Does the -- notice can be

1 given -- skipped entirely, as it was in Simmons' case,  
2 or notice could be given but it's defective. It can be  
3 defective in a major way. It can leave out -- you said  
4 Congress recently required a more detailed notice. Do  
5 we treat all those like -- as long as the notice doesn't  
6 measure up fully to the statutory requirement, then the  
7 veteran goes back to square one? And so, you wouldn't  
8 make any distinction between whether the notice was not  
9 given at all, and the case where the notice was given,  
10 but it was incomplete?

11 MR. MEADE: The question of whether the  
12 notice is okay or not, is a question for the Veterans  
13 Court, a factual finding.

14 Generally, though, I would agree with you  
15 that either no notice or incomplete notice are the same  
16 and would trigger a first notice error. There would be  
17 cases, I suspect, where the notice was erroneous, but  
18 only on a technical ground, that the Veterans Court  
19 would not think of as being a first-level notice error.

20 One final point I would like to make, Your  
21 Honor, is that in passing the statute, Congress made it  
22 clear that it wanted to assist all veterans, including  
23 those whose claims did not appear meritorious on their  
24 face, and it did so by overruling the decision of Morton  
25 v. West from the Veterans Court.

1           That case had said that a veteran needs to  
2 meet a certain minimal threshold before receiving the  
3 VA's assistance, that first the veteran needs to show  
4 that the claim is well grounded. Congress rejected that  
5 in passing the statute and said: Congress wants to help  
6 all veterans, including those whose claims don't seem  
7 meritorious on their face and including those who can't  
8 make a threshold requirement. And Congress specifically  
9 rejected the policy rationale of the Veterans Court and  
10 said that they want -- Congress wants to use resources  
11 to help all veterans, including those whose claims are  
12 not meritorious on its face.

13           Thank you, Your Honor.

14           CHIEF JUSTICE ROBERTS: Thank you, Mr.  
15 Meade.

16           Mr. Lippman.

17           ORAL ARGUMENT OF MARK R. LIPPMAN

18           ON BEHALF OF THE RESPONDENT SANDERS

19           MR. LIPPMAN: Thank you. Mr. Chief Justice,  
20 and may it please the Court:

21           Justice Breyer, I'd like to address one of  
22 the observations you made applying O'Neal and Kotteakos  
23 and the "grave doubt" standard.

24           The problem here is that those standards  
25 assume a fully developed record. And that's why it's

1 not a perfect fit here because the very notice -- or  
2 failure or defective notice prevents a fully developed  
3 record. So --

4 JUSTICE BREYER: It seems -- what I was  
5 trying to get to, which I don't see how to quite get  
6 there -- it seems to me that if something really went  
7 wrong, if there's -- there's no notice, that, veteran,  
8 you have to put in some material, or you are going to  
9 lose, if there's no notice of that, and he really didn't  
10 get any notice during all this cooperative process, then  
11 I think the Veterans Court is right. At that point, I  
12 think it's fair to assume that he's hurt.

13 But if he got the notice -- I mean, there  
14 will be a few cases where he had nothing to produce, but  
15 a lot of them he would have had something to produce.  
16 So that's -- they know it. We don't know. The Veterans  
17 Court knows.

18 Now, the other three matters -- who is  
19 supposed to produce what, and do you have general  
20 knowledge, you could produce whatever you want -- I  
21 would think it would be very rare that a veteran was  
22 hurt, if he knows the first, by not knowing the second,  
23 third, and fourth. And, therefore, I'd think he better  
24 come forth to explain in the brief, in the brief, why  
25 this mattered.

1                   Now, that's what it seemed to me the  
2 Veterans Court set up. They know about it. They set  
3 that up. It's common sense. So, how do I get to a  
4 legal result that says just that? Or can I or should I?

5                   MR. LIPPMAN: I don't believe you should,  
6 and if my case could be used as an example --

7                   JUSTICE GINSBURG: Your case is one where  
8 the veteran did get what they call the first-level  
9 notice?

10                  MR. LIPPMAN: Correct.

11                  JUSTICE GINSBURG: So if Justice -- the  
12 implication of Justice Breyer's question is that your  
13 client would lose because your client did get the  
14 first-level notice. And you say, but that's not good  
15 enough.

16                  MR. LIPPMAN: That's correct. He did not  
17 get the second- and third-element notices; that is, what  
18 the government said it will get and what he was required  
19 to get.

20                  This is the letter or part of the letter,  
21 critical part of the letter he got. It said: "We are  
22 making reasonable efforts to help you get private  
23 records or evidence necessary to support your claim."  
24 So he had every reason to assume that the -- that the VA  
25 would get the evidence that was necessary, which is the

1 second- and third- --

2 JUSTICE ALITO: But why doesn't it make  
3 sense in your case? I think this illustrates what is  
4 troubling to me about the Federal Circuit's decision,  
5 but maybe I am missing a point.

6 Your client was denied benefits for failure  
7 to show a causal connection, to show that his -- his  
8 vision loss is service-related. He provided evidence  
9 from two private ophthalmologists or optometrists  
10 providing very weak causes -- evidence of causation.  
11 One said it was not inconceivable that this was the  
12 cause of it. He was examined by two VA doctors, who  
13 said it was more likely that this was caused by a  
14 post-service infection rather than by an explosion while  
15 he was in -- while he was in the service.

16 Now, if the case -- if the notice was  
17 defective, why does it not make sense to say to your  
18 client, show us that you can come up with some medical  
19 evidence that shows that this is service-related,  
20 something more than a doctor who says it's not  
21 inconceivable?

22 Then it makes sense to remand it. But if  
23 you can't do it on appeal, what sense does it make to  
24 remand it, where the same failure to provide evidence is  
25 going to doom his claim?

1 MR. LIPPMAN: Well, two answers to that,  
2 Your Honor: The first is the government makes a  
3 proposition that all we need to do is offer an  
4 explanation. But in legal terms, that's a proffer on  
5 appeal, and that is every bit as evidential as the  
6 actual evidence itself. Now, if we -- if we are to have  
7 a whole practice of proffers, it opens up a Pandora's  
8 box. I mean, where -- where do you stop if you make an  
9 exception for extra-record evidence, when the statutes  
10 make it clear that the evidence or whatever you are  
11 using has to be before the agency.

12 JUSTICE BREYER: Why is that such a tough  
13 thing to do? It sounds like it's sort of -- is there  
14 some law out there that stops you from saying in the  
15 brief, in a paragraph: We would just like you to know,  
16 Judge, that we had some evidence here. Or we have some  
17 now that we want to present to them. That's all.

18 And then if I see that, I'd say, my  
19 goodness. And you describe it in three sentences. Now,  
20 what is -- the Constitution doesn't stop you from doing  
21 that, does it? I mean, what stops you from doing that?

22 MR. LIPPMAN: The statutes stop you from  
23 doing that.

24 JUSTICE BREYER: Stop you? But the Veterans  
25 Court said to do it. So they're -- they're the ones who



1 know this area and they said you should have to do it.

2 MR. LIPPMAN: Yes, but in all due respect, I  
3 think the Veterans Court got it wrong. I mean, the  
4 Veterans -- if you look at the line of authority of --

5 JUSTICE BREYER: Between me and the Veterans  
6 Court, as to who knows best how to work this system,  
7 it's 10 to 1, and it's not me.

8 (Laughter.)

9 MR. LIPPMAN: Okay. Let's look at it this  
10 way. Let's take it outside the VCAA context. A veteran  
11 has a right to a hearing, an evidentiary hearing, upon  
12 request. Let's say he requests the hearing, and for  
13 whatever reason the VA doesn't schedule one. He loses  
14 that right even though he requests it. Are we then now  
15 to have proffers on the court of appeals saying, well, I  
16 would have said this, I would have said this, I would  
17 have said --

18 JUSTICE BREYER: What they've decided there  
19 is if there's no notice at all, no, you don't have to  
20 have a proffer, because it's up to the agency to do just  
21 what you want. But if it's one of these other three far  
22 more technical things, which occur far more rarely, on  
23 that one, you better tell the judge in the brief how it  
24 makes a difference.

25 That's their conclusion. What's wrong with

1 that?

2 MR. LIPPMAN: Well, there's -- there's  
3 really no analysis to it. I mean, it's sort of an  
4 intuitive distinction, and in my case, it doesn't work.

5 And I think --

6 JUSTICE KENNEDY: Well, the -- the statute  
7 says -- and this is consistent with Justice Breyer's  
8 line of questioning -- that the Veterans Court, the  
9 Court of Appeals, the Veterans Court of Appeals, shall  
10 give due account to the notice -- to the rule of  
11 prejudicial error. That seems to me to indicate that it  
12 has some discretion in how to decide the harmless error  
13 rules that it will apply, and that it knows more about  
14 it, in Justice Breyer's terms, than either we or the  
15 Court of Appeals for the Federal Circuit. Why can't I  
16 get that out of this statute?

17 MR. LIPPMAN: Well, I guess you would have  
18 to reconcile the more specific statute that -- that  
19 deals with only being able to submit evidence or any  
20 other material at the time -- at the time of the agency  
21 adjudication. In other words, I don't see that statute  
22 allowing post-agency adjudication proffers or even  
23 submitting evidence. I mean, just by the very line of  
24 your questioning, it seems to me that you find it  
25 interchangeable, whether you assert it in -- in your

1 brief that this is what I would have gotten or whether  
2 you would have submitted the evidence itself. They are  
3 both evidential.

4 And another problem, which is really --

5 JUSTICE ALITO: Your position -- your  
6 position seems to be not that the government should have  
7 to show prejudice, but as applied to a case like yours,  
8 that there's an irrebuttable presumption of prejudice.  
9 What could the government show? That there -- they  
10 would have to show that there is not a single  
11 ophthalmologist in the country who, if he or she  
12 examined Mr. Sanders, would find that the -- that the  
13 vision loss was attributable to a bazooka explosion in  
14 World War II?

15 MR. LIPPMAN: No, Your Honor. The -- the --  
16 what the government must show is -- is well set forth in  
17 the Federal Circuit's opinion. It must show that the  
18 claimant had either actual knowledge of what he needed  
19 to submit; second, the fact that he had sort of  
20 constructive knowledge, in other words a reasonable  
21 claimant would have had notice; or, three, that the  
22 claim couldn't be entitled to benefits as a matter of  
23 law.

24 So that's the beauty --

25 JUSTICE BREYER: Yes, but I don't understand

1 that. You mean -- let's suppose, contrary to your  
2 wishes, that the client was not hurt. He was hurt by  
3 some other thing, nothing to do with the bazooka.  
4 That's not your client -- that's the imaginary client.  
5 But everything else is the same.

6 Well, does that mean because they forgot to  
7 tell the client that the client has to go and produce  
8 some evidence, and she thought the Veterans  
9 Administration would produce all the evidence? Because  
10 they forgot that, your client wins and gets the money?

11 MR. LIPPMAN: Well --

12 JUSTICE BREYER: I mean, that doesn't seem  
13 --

14 MR. LIPPMAN: -- he wouldn't get the money,  
15 okay, because all -- we are talking about a remand, not  
16 an --

17 JUSTICE BREYER: I know. Now you're going  
18 to be back in the remand, and you now have to produce  
19 some evidence, don't you, or you lose?

20 MR. LIPPMAN: Correct. Correct, but why  
21 shouldn't --

22 JUSTICE BREYER: So then why is it a big  
23 deal that you summarize what you're going to produce in  
24 the brief? We're back where we started.

25 MR. LIPPMAN: Well, Let me answer it this

1 way: Let's assume we do make proffers, as you suggest,  
2 at the Veterans --

3 JUSTICE BREYER: If you want to call them "a  
4 proffer." I just want to say a description in the brief  
5 of how you're hurt.

6 MR. LIPPMAN: Well, in a legal sense I  
7 consider it the same thing. Maybe Your Honors don't,  
8 but I do. And -- let -- let's say he proffers or  
9 describes in his brief, you know, what medical evidence  
10 he needs to submit.

11 Now, how could he in good faith make a --  
12 make a proffer and speculate on what the doctor -- let's  
13 say he is seeing a treating doctor. And on page 49 in  
14 the footnote, there's a discussion of what I'm going to  
15 explain to you now. But let's say he alleges, well, if  
16 I had gotten notice, I would have gone to my treating  
17 doctor, and I would have submitted questions and I would  
18 have submitted the claims file, but I can't know in good  
19 faith what the doctor would say. It's inherently  
20 speculative. And that's one good policy reason, apart  
21 from the clear categorical language of the statute.

22 CHIEF JUSTICE ROBERTS: You started earlier,  
23 at one point, to say how this actually worked out in  
24 your case. Could you just spend a minute to explain  
25 that?

1 MR. LIPPMAN: How --

2 CHIEF JUSTICE ROBERTS: How it makes a  
3 difference in your case.

4 MR. LIPPMAN: Sure. It was a little unclear  
5 until a case -- if I may answer it this way, Your Honor.

6 My -- the Board of Veterans' Appeals decided  
7 there was only one medical evidence it would follow, and  
8 that was a 2000 VA exam. And that exam really denied  
9 the veteran because there was no corroborating medical  
10 evidence contemporary with his injury and the  
11 symptomology thereafter. If I could have it go back  
12 down, what I would do is try to find what we call "buddy  
13 statements," lay statements, that would corroborate that  
14 he had symptoms from the time of service and well on,  
15 which would -- which under a case called Buchanan is  
16 sufficient evidence to base a finding of service  
17 connection.

18 CHIEF JUSTICE ROBERTS: So why wasn't that  
19 enough for you to establish prejudice, regardless of who  
20 had the burden?

21 MR. LIPPMAN: To make that allegation on --  
22 at the court of appeal that I would have gotten this?

23 CHIEF JUSTICE ROBERTS: Uh-hmm.

24 MR. LIPPMAN: Quite frankly, I don't know if  
25 I would have gotten it. I mean, I would try.

1 CHIEF JUSTICE ROBERTS: Well, you would  
2 phrase the prejudice in terms of what you would have  
3 done but you weren't able to do and what you can now go  
4 back and do if it's remanded. You don't have to have  
5 the evidence that three people would say he was  
6 complaining about the vision loss at the time. It just  
7 seems a reasonable thing to -- you know, maybe it is  
8 reasonable, maybe it's not; but the Veterans  
9 Administration has more knowledge about that.

10 MR. LIPPMAN: Your Honor, in a way, the --  
11 the third prong of the Federal Circuit's analysis does  
12 that. It tells the government: Look, if the veteran  
13 could -- could not prove his claim, no matter what the  
14 facts -- evidentiary development was, then the veteran  
15 loses.

16 So really it's all contained in the third  
17 prong. And that's why the Federal Circuit's analysis in  
18 my opinion is so good. It's because it doesn't make you  
19 go outside of the record to reach these issues, and it  
20 allows the government a lot of room to prove that it's  
21 not worthwhile, this claim's not worthwhile, to remand.

22 I ask the Court to really carefully look at  
23 that because I know the Federal Circuit spent -- must  
24 have spent a lot of time in coming up with that  
25 analysis.

1 JUSTICE GINSBURG: Do you know where this  
2 first level, second level -- I'm looking at the statute  
3 on page 98a of the petition. And it seems to me all  
4 part of one -- it is one notice. It doesn't seem to  
5 specify a second and a third. It's describing the  
6 contents.

7 MR. LIPPMAN: Well --

8 JUSTICE GINSBURG: "As part of that notice,  
9 the Secretary shall indicate which portion of the  
10 information and evidence is to be provided by the  
11 claimant and which portion by the Secretary." The  
12 statute seems to be talking about one notice, not "first  
13 level," "second level."

14 MR. LIPPMAN: Well, they haven't enumerated  
15 it, Your Honor, as such, but analytically it breaks down  
16 to that. But the fourth element -- because it says:  
17 Look, you'll have to tell the claimant what the  
18 contents, you know, what you need. Then it says: well,  
19 what we are going to get for you, and then that's the  
20 second. And third one is what you have to get. The  
21 fourth one was engrafted upon it because in the -- in  
22 the regs -- 3.159 has a more generalized advisement in  
23 addition to this --

24 JUSTICE GINSBURG: I thought that was taken  
25 out, the fourth one. No?



1 MR. LIPPMAN: Not to my knowledge, Your  
2 Honor.

3 JUSTICE GINSBURG: And tell me what that is.  
4 That's not in the statute?

5 MR. LIPPMAN: No, it's in 3.159. I don't  
6 recall the exact -- it's 38 C.F.R. 3.159. I don't  
7 recall offhand the exact subdivision, Your Honor.

8 JUSTICE KENNEDY: Well, it just tells that  
9 -- that the Secretary requests the claimant provide any  
10 evidence in the claimant's possession that pertains to  
11 the claim.

12 MR. LIPPMAN: Correct.

13 JUSTICE KENNEDY: That's fairly  
14 straightforward.

15 MR. LIPPMAN: It's not as important as -- as  
16 the first, second, and third elements of the statute,  
17 for sure, Your Honor.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 MR. LIPPMAN: Thank you.

20 CHIEF JUSTICE ROBERTS: Mr. Miller, you have  
21 four minutes remaining.

22 REBUTTAL ARGUMENT OF ERIC D. MILLER

23 ON BEHALF OF THE PETITIONER

24 MR. MILLER: Thank you, Mr. Chief Justice.

25 I would like to make just three points:

1 First, on the question of what is provided to the  
2 claimant after the denial in the regional office.  
3 Before they get to the Board of Veterans' Appeals, the  
4 regional office issues them a statement of the case, and  
5 that's described at 38 C.F.R. 19.29, and that regulation  
6 has fairly detailed requirements about what has to be in  
7 there in terms of a description of the evidence, a  
8 description of the applicable laws and regulations, and  
9 an analysis of the board's conclusions, or the regional  
10 office's conclusions and its application of the law to  
11 the evidence.

12 The second point --

13 CHIEF JUSTICE ROBERTS: So you think it's  
14 perfectly clear from that what gaps need to be filled  
15 in?

16 MR. MILLER: In many cases, it would be.  
17 But perhaps there would be some where it wouldn't, and  
18 of course in those cases if there can be some  
19 articulation of why it wasn't, then we would agree that  
20 --

21 JUSTICE SOUTER: Now, at that point, is the  
22 claimant disentitled to have a lawyer?

23 MR. MILLER: No. Once -- once they've filed  
24 the notice of disagreement in the regional office and  
25 received the statement of the case, they can then have a

1 lawyer in the board --

2 JUSTICE SOUTER: But at the point they get  
3 the notice and they are trying to evaluate the  
4 significance of the notice, they are not entitled to a  
5 lawyer?

6 MR. MILLER: If you are referring to the  
7 statement of the case, by the time they receive the  
8 statement of the case they would be at a stage of the  
9 proceedings where they could get a lawyer.

10 JUSTICE SOUTER: Well, no -- I --

11 JUSTICE KENNEDY: But what about the notice,  
12 the original notice?

13 MR. MILLER: They --

14 JUSTICE KENNEDY: They don't have a lawyer  
15 at that point? That was Justice Souter's question. I  
16 didn't -- I --

17 MR. MILLER: Oh, if you meant the original  
18 notice required by the -- the statute, no.

19 JUSTICE SOUTER: No, at the point -- at the  
20 point where the statute requires original notice, they  
21 are not entitled to a lawyer.

22 MR. MILLER: Correct.

23 JUSTICE SOUTER: We -- we agree on that.  
24 Now, they've gone through stage one of litigation and  
25 they've lost. And they are getting a statement of

1 reasons. At that point, are they entitled to have a  
2 lawyer?

3 MR. MILLER: Yes.

4 JUSTICE SOUTER: But whether -- I -- I guess  
5 the -- the situation that I am concerned with is, the  
6 person up to that moment not only does not have, but is  
7 not entitled to have, a lawyer. The person then gets a  
8 piece of paper in the mail that says: You lost; these  
9 are the reasons. If the person -- if the claimant then  
10 says, I don't know what they are talking about, I will  
11 go get a lawyer, then I can understand at that point a  
12 relatively sophisticated mind is going to come in to  
13 understand it. But if the client simply reads it and  
14 says, I really don't know what they are talking about  
15 here or at least I think I know what they are talking  
16 about, and I guess it's hopeless, the person is not  
17 likely to have legal advice.

18 And what I'm getting at is that the person  
19 at that stage, at the moment the notice arrives, is in a  
20 position, I would think, of -- of extreme relative  
21 disadvantage.

22 MR. MILLER: I think that --

23 JUSTICE SOUTER: You can see where I am  
24 going with the argument.

25 MR. MILLER: Yes. Yes. But the -- the

1 important point is that the only way that prejudicial  
2 error becomes an issue -- and really the paradigmatic  
3 case of what we're talking about is where the veteran  
4 does get counsel and has reached the Veterans Court and  
5 has identified the error in a way that's persuasive to  
6 the Veterans Court, but nonetheless identifies no  
7 additional evidence that they would have presented.

8 JUSTICE SOUTER: No, but there's -- it seems  
9 to me that there are two points at which the veteran is  
10 at a disadvantage. And -- and you're talking about the  
11 second of the two. I'm talking about the first of the  
12 two. And the first of the two is the point at which the  
13 veteran -- I mean, following the hearing, the veteran  
14 gets the notice and the veteran is not in a very  
15 sophisticated position to evaluate what the veteran is  
16 being told.

17 MR. MILLER: Yes, and a -- and a claimant  
18 who in the Veterans Court can say, you know, I didn't  
19 understand and as a result I failed to present the --  
20 because of the defective notice and my lack of  
21 understanding of the statement of the case, I didn't  
22 present this important piece of evidence, and here's how  
23 it would have been material, in that case, they would be  
24 entitled to a remand. But a remand --

25 CHIEF JUSTICE ROBERTS: When you have been

1 saying "entitled to a lawyer," do you mean entitled to a  
2 lawyer or allowed to have a lawyer?

3 MR. MILLER: Allowed to retain counsel. The  
4 --

5 CHIEF JUSTICE ROBERTS: You can finish  
6 your --

7 MR. MILLER: I was just going to say that,  
8 given the volume of cases that the VA confronts, there  
9 is a serious harm to the system in unnecessary remands  
10 that have to be given priority over other cases and that  
11 divert resources from the adjudication of meritorious  
12 claims.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
14 The case is submitted.

15 (Whereupon, at 11:03 a.m., the case in the  
16 above-entitled matter was submitted.)

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