

MISUNDERSTANDING *CHENERY* AND THE PROBLEM OF REASONS-OR-BASES REVIEW[†]

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[†] The charts and tables in the article were made by the authors using data from the VACOLS Reports.

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ABSTRACT

The Supreme Court's decision in *SEC v. Chenery Corp. (Chenery II)*¹ has been applied overbroadly by appellate courts. By its own terms, the automatic remand rule of the decision applies only to "the domain which Congress has set aside *exclusively* for the administrative agency."² This exclusive domain encompasses policy determinations and findings of legislative facts.³ However, ordinary adjudicative facts—those that have no application beyond an individual case—are *not* the exclusive domain of agencies.⁴ Although courts owe deference to agency fact finders, they generally have power to reverse adjudicative factual findings that are clearly erroneous.⁵ Therefore, applying *Chenery* to reflexively remand adjudicative findings for additional analysis instead of reviewing such findings on the merits is an extension that is unmoored from the separation of powers theory that animates the opinion.

This problem is far more than academic because the refusal of appellate courts to engage with the merits of agency decisions imposes needless costs and delay on both agencies and those contesting agency actions. In one extreme example, decades of data show that the refusal of the Court of Appeals for Veterans Claims to engage with the merits in eighty percent of the cases it remands to the Board of Veterans' Appeals has dramatically increased processing times and remands at the agency level without changing the rate at which the Board grants claims.⁶ Moreover, such remands do not have a strong correlation to outcome changes in the individual appeals.⁷ As a result, there is little connection between the court's findings of insufficient analysis and actual changes in outcome at either an individual or systemic level.⁸ Therefore, the court should abandon its current approach to review in favor of a traditional approach of reviewing agency findings of adjudicative fact for clear error.

INTRODUCTION

*"We have also come a long way from the time when all [] error was presumed prejudicial and reviewing courts were considered 'citadels of technicality.'"*⁹

1. 332 U.S. 194 (1947).

2. *Id.* at 196 (emphasis added).

3. *Id.* at 201.

4. *See* Roberson v. Principi, 17 Vet. App. 135, 147 (2003).

5. *Id.*

6. *See infra* Figure 12.

7. *See infra* Figure 8.

8. *Id.*

9. McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 553 (1984) (quoting

It is human nature to want to believe that good intentions lead to good results. Certainly, no appellate court wishes to believe that most of its output is wasted effort, nor does it want to believe that its core approach to review is founded on a fundamental misreading of bedrock administrative law. However, that is the present situation at the Court of Appeals for Veterans Claims (CAVC). The vast bulk of cases it decides are remanded to the Board of Veterans' Appeals (the "Board") below,¹⁰ so that the Board can provide additional "reasons or bases" to explain its original decision.¹¹ Unfortunately, years of data on decisions by both the CAVC and the Board indicate that these remands do not translate into either more favorable outcomes for the individual veterans or useful systemic changes.¹² As a result, reasons-or-bases remands fail to fulfill either of the court's core roles: error correction and law giving.¹³

The development of reasons-or-bases review by the court has both practical and doctrinal roots. However, neither justification withstands scrutiny today. First, the dynamics of veterans law have changed from the court's earliest days. Second, and even more importantly, the court's reliance on reasons-or-bases review is rooted in a misreading of the Supreme Court's *Chenery* decisions, which laid out the fundamental separation of powers doctrine between courts and administrative agencies: it is agencies—not courts—that make policy.¹⁴ The application of the *Chenery* doctrine simply does not make sense in routine cases before the CAVC, in which there is no doubt as to the interpretation of the controlling law and the dispute is merely factual.

Accordingly, the CAVC ought to abandon reasons-or-bases review as it is currently practiced in favor of a traditional approach to appellate

Kotteakos v. United States, 328 U.S. 750, 759 (1946)).

10. See James D. Ridgway, *Why So Many Remands?: A Comparative Analysis of Appellate Review by the United States Court of Appeals for Veterans Claims*, 1 VETERANS L. REV. 113, 153 (2009) [hereinafter Ridgway, *Why So Many Remands?*]. The Board of Veterans' Appeals is the final appellate authority within the Department of Veterans Affairs (VA). See JAMES D. RIDGWAY, VETERANS LAW: CASES AND THEORY 36–37 (2015) [hereinafter RIDGWAY, CASES AND THEORY]. It is composed of Veterans Law Judges, who hear appeals of denials of benefits by non-attorney adjudicators at VA's fifty-seven regional offices. See *id.*

11. See *infra* Part II.B. Hostility to the court's high remand rate has long been expressed by both agency officials and veterans' advocates. See Ridgway, *Why So Many Remands?*, *supra* note 10, at 113–14 (citing complaints from both sides).

12. See *infra* Figure 8.

13. See Michael P. Allen, *Significant Developments in Veterans Law (2004-2006) and What They Reveal About the U.S. Court of Appeals for Veterans Claims and the U.S. Court of Appeals for the Federal Circuit*, 40 U. MICH. J.L. REFORM 483, 514–15 (2007) (arguing that Congress intended that the CAVC be both a lawgiver and an error corrector).

14. SEC v. *Chenery Corp. (Chenery I)*, 318 U.S. 80, 88 (1943); SEC v. *Chenery Corp. (Chenery II)*, 332 U.S. 194, 216 (1947).

review of fact finding. Part I of this article reviews the origins of reasons-or-bases review. Part II examines a large volume of empirical data that is inconsistent with the notion that reasons-or-bases review benefits veterans. Part III explores the historical and doctrinal origins of the court's review stance, as well as why those justifications do not withstand scrutiny. Part IV describes what a more productive approach to judicial review by the CAVC would look like. Finally, Part V concludes that the court must abandon its current approach to reasons or bases review if it wishes to make an impact on the current adjudicative process, other than dramatically increasing the time it takes to resolve claims.

I. BACKGROUND

The central question in interpreting “reasons or bases” is: At what point has the agency provided enough detail such that the CAVC can address the merits of the decision?¹⁵ Unfortunately, the legislative history establishing the CAVC does not illuminate this issue, and the court has not offered a coherent answer to this question or applied a consistent approach.¹⁶

Prior to the creation of the CAVC, which is an independent, Article I court, the Department of Veterans Affairs (VA) Board of Veterans' Appeals had been the final arbiter of whether veterans' benefits claims were granted.¹⁷ When the CAVC was created in 1988 under the Veterans Judicial Review Act (VJRA),¹⁸ Congress amended the Board's jurisdictional statute to require that each Board decision contain “a written statement of the Board's findings and conclusions, and the *reasons or bases* for those findings and conclusions, on all material issues of fact and law presented on the record.”¹⁹ The origin of the phrase “reasons or bases” is somewhat murky. It does not appear anywhere else in the United States Code²⁰ and therefore had no established meaning, nor does it appear that the phrase was intended to express any specific vision by the drafters.²¹ However, the VJRA did adopt language broadly parallel

15. Ridgway, *Why So Many Remands?*, *supra* note 10, at 136.

16. *See id.* at 137.

17. *See* James D. Ridgway, *The Splendid Isolation Revisited: Lesson from the History of Veterans' Benefits Before Judicial Review*, 3 VETERANS L. REV. 135, 216 (2011) [hereinafter Ridgway, *The Splendid Isolation Revisited*].

18. Pub. L. No. 100-687, 102 Stat. 4105 (1988) (codified as amended at 38 U.S.C. § 7251 (2012)).

19. *Id.* at 4111 (emphasis added) (codified as amended at 38 U.S.C. § 7104(d)(1)).

20. Search of “reasons or bases” in the United States Code, LEXISNEXIS, <https://advance.lexis.com/search> (last visited Jan. 4, 2018) (producing no additional results in the text of the United States Code).

21. The VJRA was an unexpected, last-minute compromise that created an Article I

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to that of the Administrative Procedure Act (APA).²² Accordingly, it is fair to conclude the reasons or basis requirement was a general recognition that the CAVC could not operate properly unless the underlying Board decisions contained sufficient analysis for review.²³ The legislation left the issue of precisely how the requirement would work in practice to evolve organically.

In one of the CAVC's very first cases, *Gilbert v. Derwinski*,²⁴ the court held that the reasons-or-bases provision required that

the Board must identify those findings it deems crucial to its decision and account for the evidence which it finds to be persuasive or unpersuasive. These decisions must contain clear analysis and succinct but complete explanations. A bare conclusory statement, without both supporting analysis and explanation, is neither helpful to the veteran, nor "clear enough to permit effective judicial review", nor in compliance with statutory requirements.²⁵

The court remanded the matter because "[t]he decision [] contains neither an analysis of the credibility or probative value of the evidence submitted by and on behalf of the veteran in support of his claim nor a statement of the reasons or bases for the implicit rejection of this evidence by the Board."²⁶

Gilbert relied on two Supreme Court cases, *Camp v. Pitts*²⁷ and *Florida Power & Light Co. v. Lorion*.²⁸ Neither case does much to

appellate court when that idea had never been considered in the decades-long debate over establishing judicial review. See generally PAUL C. LIGHT, FORGING LEGISLATION (1992); Laurence R. Helfer, *The Politics of Judicial Structure: Creating the United States Court of Veterans Appeals*, 25 CONN. L. REV. 155 (1992). There is virtually no meaningful legislative history explaining the final text of the VJRA. The primary Senate and House staffers who negotiated the text from two fundamentally irreconcilable bills recalled that there was no involvement by the members in deciding upon the final content, because the details were hashed in the last month of the congressional session and passed with little formal debate. See Bill Brew, former Chief Counsel and Staff Dir. of the S. Comm. on Veterans' Affairs, Patrick Ryan, former Staff Dir. and Chief Counsel of the H.R. Comm. on Veterans' Affairs, and Barton Stichman, Joint Exec. Dir. of the Nat'l Veterans Legal Servs. Program, Panel Discussion on the History of the VJRA presented by the CAVC Historical Society at The United States Court of Appeals for Veterans Claims Courtroom, Washington, D.C. (May 16, 2017).

22. Compare 38 U.S.C. § 7261 (2012), with 5 U.S.C. § 706 (2012) (containing nearly identical subsections).

23. Ridgway, *Why So Many Remands?*, *supra* note 10, at 136.

24. 1 Vet. App. 49 (1990), *aff'd*, 1 Vet. App. 61 (1991).

25. *Id.* at 57 (quoting *Int'l Longshoremen's Ass'n v. Nat'l Mediation Bd.*, 870 F.2d 733, 735 (D.C. Cir. 1989)).

26. *Id.* at 59.

27. 411 U.S. 138 (1973).

28. 470 U.S. 729 (1985).

illuminate the potential meaning of “reasons or bases,” however. The issue presented in *Pitts* was one of remedy: Given that the comptroller of the United States had not provided a justification for denying a charter for a new bank, ought that justification be subject to a hearing at the district court level or offered through an affidavit?²⁹ The issue in *Florida Power* was whether a decision denying an informal citizen petition was a matter subject to review.³⁰ Neither of the cases touched on the core issue of how much detail must be included in an agency decision’s reasoning.³¹

Since *Gilbert*, the CAVC has made numerous broad and contradictory statements in describing the reasons-or-bases requirement. On one hand, the court has elaborated on the foundational statements in *Gilbert* to hold that the Board merely listing all the evidence that it considered is insufficient analysis.³² The court has also held that the Board must sua sponte address all issues raised by the record.³³ Indeed, it is not hard to find examples of cases in which the Board provided a clear reason for its decision supported by a citation to specific evidence, only to have the decision later remanded to provide a more detailed discussion³⁴ or to address an alternative theory identified by the CAVC on appeal.³⁵ Furthermore, the CAVC has even gone as far as to remand a decision for additional reasons or bases even when that issue had been explicitly waived by the veteran through counsel.³⁶ On the other hand, the

29. 411 U.S. at 142–43.

30. 470 U.S. at 734.

31. The CAVC also relied upon a District of Columbia Circuit case, *Occidental Petroleum Corp. v. SEC*, which vacated an SEC action for relying upon a ground without providing notice to the corporation and failing to cite to any specific documentary evidence to support its conclusions. 873 F.2d 325, 347 (D.C. Cir. 1989).

32. See *Abernathy v. Principi*, 3 Vet. App. 461, 465 (1992).

33. See *Solomon v. Brown*, 6 Vet. App. 396, 402 (1994) (citing *Myers v. Derwinski*, 1 Vet. App. 127, 130 (1991)).

34. See, e.g., *infra* note 36. For data on the frequency of such remands, see *infra* Part II.B.

35. See, e.g., *McNeely v. Principi*, 3 Vet. App. 357, 364 (1992) (relying on *Gilbert* to remand a matter for the Board to rule on issues raised by the court).

36. See *Coburn v. Nicholson*, 19 Vet. App. 427, 431 (2006). This result was fiercely criticized in a dissent by Judge Lance, who argued:

I believe that the Board’s statement of reasons or bases was adequate because it is clear that the Board concluded that the only medical nexus opinion of record was based on an inaccurate factual premise. The basis for that conclusion was that the voluminous evidence of record contradicted a reasonable interpretation of the medical opinion’s plain language. The majority places a much higher burden on the Board to meticulously dissect the medical opinion and to explicitly reject every interpretation of it other than the one it clearly chose. As detailed below, I do not believe this failure to explicitly address all other interpretations frustrates our review of whether the evidence supports the Board’s unambiguous conclusion that the medical opinion was based on a faulty premise. Applying an unnecessarily high reasons-or-bases standard

CAVC has held that the Board need not address every favorable piece of evidence,³⁷ that the Board is presumed to have considered all evidence even if it does not mention it,³⁸ and that the Board need not assume the impossible task of imagining and addressing every possible argument.³⁹ The net result is a mixed toolbox of precedent that can justify any outcome in any case.⁴⁰

In practice, “[t]he early case law of the CAVC quickly turned this standard into an extremely probing form of review.”⁴¹ In fact, “the most common type of error the CAVC has found in Board decisions over the years is that the Board’s decision does not contain an adequate statement of the Board’s reasons or bases for a finding of fact or [a] conclusion of law.”⁴² Today, the court remands almost eighty percent of cases.⁴³ Four-fifths of the court’s remands are due to inadequate reasons or bases.⁴⁴ However, a large-scale study showed that the court’s remands exhibit a

rather than deciding the issue presented perpetuates the hamster-wheel reputation of veterans law and ignores the appellant’s pointed argument that “having had his claims in adjudication for ten years, he believes that the evidence of record is adequate for grant of service connection.” Appellant’s Br. at 8.

Id. at 434 (Lance, J., dissenting).

37. See *Robinson v. Mansfield*, 21 Vet. App. 545, 553 (2008), *aff’d sub nom.* *Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009); see also *Dela Cruz v. Principi*, 15 Vet. App. 143, 149 (2001) (citing *Stadin v. Brown*, 8 Vet. App. 280, 285 (1995)) (“The Court has consistently found that a discussion of all evidence is not required when, as in the present case, the Board has supported its decision with thorough reasons or bases regarding the relevant evidence, and further adjudication would not benefit the appellant.”).

38. *Gonzales v. West*, 218 F.3d 1378, 1381 (Fed. Cir. 2000) (“[A]bsent specific evidence indicating otherwise, all evidence contained in the record at the time of the RO’s determination . . . must be presumed to have been reviewed by [VA], and no further proof of such review is needed.”).

39. See *Robinson v. Mansfield*, 21 Vet. App. 545, 553 (2008) (“[T]he Board’s obligation to analyze claims goes beyond the arguments explicitly made. However, it does not require the Board to assume the impossible task of inventing and rejecting every conceivable argument in order to produce a valid decision.”); see also *Sickels v. Shinseki*, 643 F.3d 1362, 1366 (Fed. Cir. 2011) (“[T]he Board [is not required] . . . to give reasons and bases for concluding that a medical examiner is competent unless the issue is raised by the veteran. To hold otherwise would fault the Board for failing to explain its reasoning on unraised issues.”).

40. For a lengthier discussion of this toolbox and the tension in how it has been applied, see WILLIAM F. FOX, JR., *THE LAW OF VETERANS BENEFITS: JUDICIAL INTERPRETATION* 107–14 (3d ed. 2002).

41. James D. Ridgway, *The Veterans’ Judicial Review Act Twenty Years Later: Confronting the New Complexities of the Veterans Benefits System*, 66 N.Y.U. ANN. SURV. AM. L. 251, 274 (2010) [hereinafter Ridgway, *VJRA Twenty Years Later*].

42. Veterans Benefits Manual 1079 (Barton F. Stichman et al. eds., 2016).

43. See *infra* Part II.B, Figure 3, and accompanying text.

44. See *infra* Part II.B, Figure 4, and accompanying text.

very high degree of variance among the judges of the CAVC.⁴⁵ This suggests that the main problem is not the inability of the Board to follow established law, but rather the incoherence of the court's fundamental approach to reasons-or-bases review. Accordingly, a careful, empirical examination of the CAVC's application of reasons-or-bases review is warranted.

II. THE PERFORMANCE OF THE VETERANS BENEFITS SYSTEM IN THE ERA OF JUDICIAL REVIEW

The implicit promise of the CAVC when it was created was that its review would change the behavior of the Board of Veterans' Appeals. By and large, the court's performance has been praised as a good thing.⁴⁶ However, there has never been a full-scale, empirical examination either of whether the performance of the Board has changed under the supervision of the court or of the effects of the court's dominant mode of review—reasons-or-bases remands.

A. *The Court Has Established Problems with Variance and Lack of Precedent*

Initially, there must be a concern about the ability of the court to send clear signals to the Board. The CAVC's limited use of precedential decisions, combined with the wide variance of dispositions between individual judges, has been the subject of previous academic study.⁴⁷ The CAVC's own reporting demonstrates a consistently low utilization of precedential decisions, and recent data gathered by the Board demonstrates that there has been no significant change in judicial

45. James D. Ridgway, Barton F. Stichman & Rory E. Riley, "Not Reasonably Debatable": *The Problems with Single-Judge Decisions by the Court of Appeals for Veterans Claims*, 27 STAN. L. & POL'Y REV. 1, 24 tbl.1 (2016).

46. See, e.g., *Veterans' Disability Compensation: Forging a Path Forward: Hearing Before the S. Comm. on Veterans' Affairs*, 111th Cong. 30 (2009) (statement of Professor Michael P. Allen, Stetson University College of Law, praising the court for bringing more uniformity and predictability to VA decision making); FOX, *supra* note 40, at 251 ("By most measurements, the CAVC is doing a good job."); PARALYZED VETERANS OF AM. ET AL., THE INDEPENDENT BUDGET FOR THE DEPARTMENT OF VETERANS AFFAIRS: FISCAL YEAR 2010, at 33 (2009), http://www.independentbudget.org/pdf/IB_2010.pdf ("Judicial review of VA decisions has, in large part, lived up to the positive expectations of its proponents."); Lawrence B. Hagel & Michael P. Horan, *Five Years Under the Veterans' Judicial Review Act: The VA Is Brought Kicking and Screaming into the World of Meaningful Due Process*, 46 ME. L. REV. 43, 65 (1994) ("[T]he creation of the [CAVC] has begun the restoration of integrity to the adjudication of claims for veterans' benefits.").

47. See generally Ridgway, Stichman & Riley, *supra* note 45 (explaining the study, its results, the possible reasoning for the variances, and potential solutions to the problem).

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variance since a study covering Fiscal Years (FY) 2013 and 2014.⁴⁸ Table 1, below, shows the rate of published to unpublished opinions per Fiscal Year.

Table 1: CAVC Opinion Types

	FY 2013⁴⁹	FY 2014⁵⁰	FY 2015⁵¹	FY 2016⁵²
Published Opinions⁵³	32	38	36	34
Unpublished Opinions⁵⁴	1893	1931	1737	1891
Percent Published	1.7%	2.0%	2.1%	1.8%

As documented in the prior study, this publication rate is far lower than that of other federal appellate courts.⁵⁵

The Board has entered information regarding dispositions on appeals⁵⁶ by the CAVC into a database called the Veterans Appeals Control and Locator System 3 (VACOLS) since the late 1990s.⁵⁷ Beginning in March 2016, the Board began tracking the specific CAVC judge associated with all coded dispositions, and VACOLS data currently contains CAVC judge identifiers for nearly all cases decided by the CAVC since September 1, 2015.⁵⁸ The Board captures information

48. *Id.* at 24 tbl.1.

49. *See* U.S. COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORT FOR FISCAL YEAR 2013, at 1–2 (2013), <http://www.uscourts.cavc.gov/documents/FY2013AnnualReport.pdf>.

50. *See* U.S. COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORT FOR FISCAL YEAR 2014, at 1–2 (2014), <http://www.uscourts.cavc.gov/documents/FY2014AnnualReport06MAR15FINAL.pdf>.

51. *See* U.S. COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORT FOR FISCAL YEAR 2015, at 1–2 (2015), <http://www.uscourts.cavc.gov/documents/FY2015AnnualReport.pdf>.

52. *See* U.S. COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORT FOR FISCAL YEAR 2016, at 1–2 (2016), <http://www.uscourts.cavc.gov/documents/FY2016AnnualReport.pdf>.

53. Single judge dispositions, excluding rulings on requests for reconsideration of a single judge decision.

54. Multi-judge and full court dispositions, excluding requests for panel decisions following a single judge decision/reconsideration and requests for full court decision following a panel decision/reconsideration.

55. *See* Ridgway, Stichman & Riley, *supra* note 45, at 42.

56. The Board does not gather data on rulings on petitions filed with the court for Equal Access to Justice Act applications.

57. *See* U.S. DEP'T OF VETERANS AFFAIRS, M28R VOCATIONAL REHABILITATION AND EMPLOYMENT SERVICES MANUAL, Part III, Sec. C, Ch. 3 ¶ 3.09(a) (2013) (“[VACOLS] was initially released to the ROs in May 1996 . . .”).

58. *See* BD. OF VETERANS' APPEALS, VACOLS REPORTS (2017) [hereinafter “VACOLS REPORTS”] (obtained through Freedom of Information Act request) (on file with authors).

regarding each individual issue, as claims for multiple different benefits can be covered in a single decision. Table 2 below shows all issue dispositions coded in VACOLS for CAVC decisions issued in FY 2016 by the eight CAVC judges active that year. The name of each judge has been redacted for the purposes of anonymity.

Table 2: CAVC FY 2016 Judge Disposition Rates

Judge	Total Issues	Affirmed		Vacate/Remand		Reversed		Abandoned		Dismissed		Other	
		%	#	%	#	%	#	%	#	%	#	%	#
A	430	19.5%	84	60.0%	258	0.7%	3	17.2%	74	2.3%	10	0.2%	1
B	409	22.7%	93	43.5%	178	0.5%	2	16.4%	67	16.1%	66	0.7%	3
C	378	30.2%	114	43.1%	163	0.8%	3	16.7%	63	9.3%	35	0.0%	0
D	365	51.8%	189	26.3%	96	0.5%	2	13.7%	50	7.7%	28	0.0%	0
E	331	37.5%	124	36.0%	119	1.8%	6	16.9%	56	7.9%	26	0.0%	0
F	320	35.3%	113	35.3%	113	0.6%	2	13.4%	43	15.3%	49	0.0%	0
G	273	24.9%	68	37.0%	101	0.0%	0	24.5%	67	12.8%	35	0.7%	2
H	253	28.1%	71	43.5%	110	0.4%	1	14.2%	36	13.4%	34	0.4%	1
Total	2759	31.0%	856	41.2%	1138	0.7%	19	16.5%	456	10.3%	283	0.3%	7

Figures 1 and 2 provide graphical comparisons of these respective disposition rates:

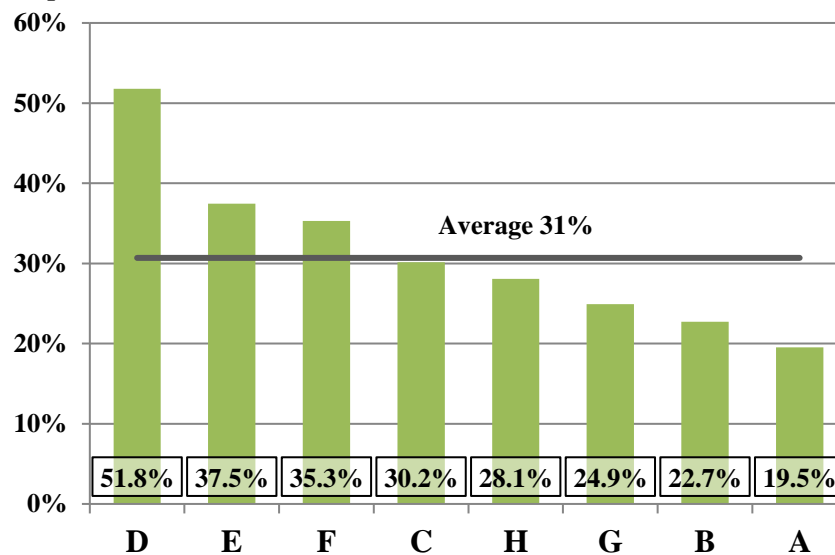


Figure 1: CAVC FY 2016 Judge Affirmance Rate Comparison

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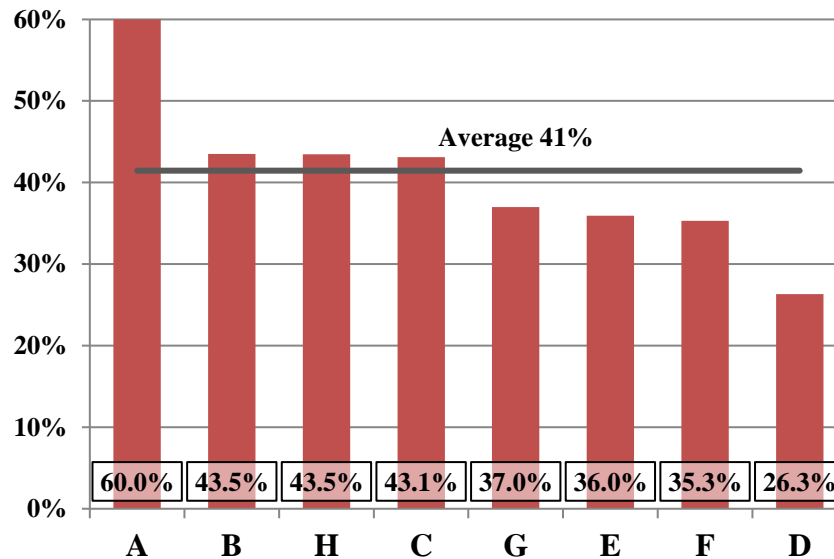


Figure 2: CAVC FY 2016 Judge Vacate/Remand Rate Comparison

This data shows a 32.3% variance between the highest and lowest rates of affirmance, and a 33.7% variance between the highest and lowest rates of vacatur or remand in FY 2016.⁵⁹ This spread is similar to that found in a separate study, in which the affirmance rate variance was found to be 39% in FY 2013 and 38% in FY 2014.⁶⁰ Although the variance range has decreased by approximately five to six percent, that small change could itself simply be due to different methods of coding CAVC dispositions, rather than any improvement in consistency from the remaining CAVC judges.⁶¹ A variance rate this large indicates that there is significant disagreement among the CAVC judges as to the requirements that must be met for a disposition by the Board to withstand judicial scrutiny.⁶²

59. See VACOLS REPORTS, *supra* note 58; Table 2, *supra*.

60. See Ridgway, Stichman & Riley, *supra* note 45, at 25–26.

61. See BD. OF VETERANS' APPEALS, REGIONAL OFFICE USER GUIDE VACOLS VERSION 8.3.0, at 1–2 (2008) (references updates made to VACOLS and emphasizing the need for extreme care when entering data into the system).

62. As noted in the prior study, the magnitude of this variance far exceeds that found in other appellate courts. See Ridgway, Stichman & Riley, *supra* note 45, at 33–35.

B. The Court's Output is Composed Overwhelmingly of Reasons-or-Bases Remands

The clear majority of CAVC dispositions on the merits vacate and remand the Board's determinations:

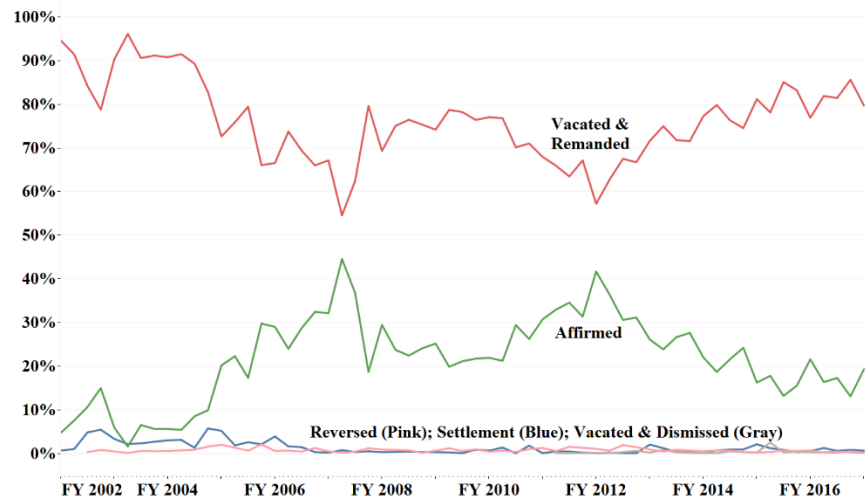


Figure 3: CAVC Disposition Rates by Issue⁶³

In comparison, the vast majority of remands from the CAVC are the result of findings that the Board provided inadequate reasons or bases for the final decision.⁶⁴ The percentage of such remands at the CAVC has never fallen below 50% since FY 2004, and has been increasing consistently since FY 2008.⁶⁵ Figure 4 shows the percentage of all

63. See VACOLS REPORTS, *supra* note 58. In Figure 3, all Abandoned and Dismissed issue dispositions have been omitted for two reasons. First, those dispositions involve situations in which appellants either do not contest a certain portion of the Board decision, or in which they fail to meet some due process aspect of filing their appeal with the CAVC. Accordingly, neither disposition addresses the merits of the Board's underlying determination. Second, CAVC issue disposition data for abandoned issues was not consistently recorded by Board staff prior to FY 2014. Accordingly, long-term projections that include that disposition will appear to show a jump in that rate beginning in FY 2014, which skews the view. VACOLS data show that Abandoned and Dismissed dispositions account for approximately one-third of CAVC dispositions each fiscal year from 2014 through 2016. It is apparent that the rates demonstrated over this time are likely typical for the rest of the period displayed in Figure 3.

64. See *id.*

65. See *id.*

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reasons for remand that fall into a reasons-or-bases category.⁶⁶

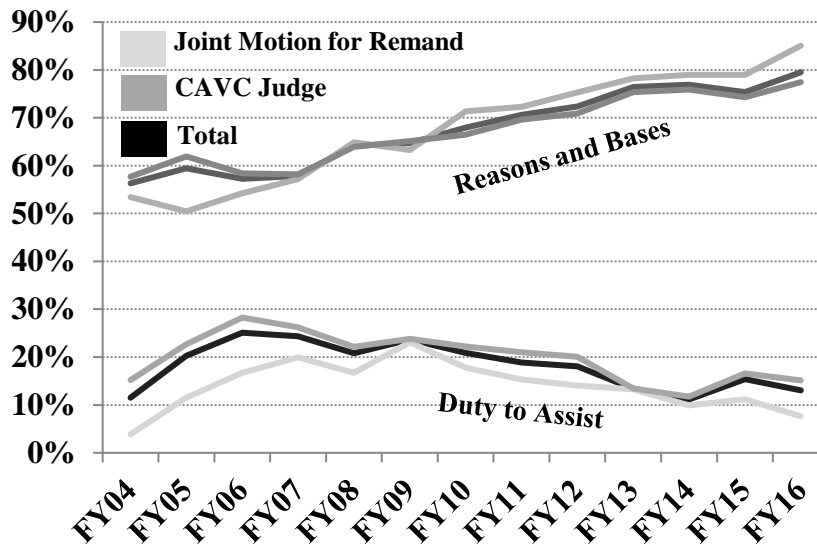


Figure 4: CAVC Remands for Reasons and Bases

The Board's CAVC database generally categorizes reasons-or-bases remands into two types: failure to consider (FtC) errors and failure to adequately address (FtAA) errors.⁶⁷ The former is used in situations in which the Board did not discuss the specific reason for remand in any fashion, whereas the latter is used in situations in which the Board discussed it, but not thoroughly enough to satisfy the CAVC.⁶⁸ FtAA errors consistently dominate the reasons for remand from the CAVC.⁶⁹

66. See *id.* The Board codes all reasons for remands in a database for each issue that was remanded or reversed by the CAVC. See BD. OF VETERANS' APPEALS, REGIONAL OFFICE USER GUIDE VACOLS VERSION 8.3.0, Part 2, at 18 (2008) [hereinafter VACOLS USER GUIDE, PART 2]. Prior to July 2013, the Board's CAVC database had twenty-three separate remand reason categories, of which eight were for reasons and bases. See VACOLS REPORTS, *supra* note 58. In July 2013, the Board's CAVC database was revised to include eighty separate remand reason categories, of which fifty-six were for reasons and bases. See *id.* Because any particular issue can be remanded or reversed for multiple reasons, the Board codes all reasons on each issue, resulting in approximately 1.5 to 2 reasons entered for each remand or reversal. See VACOLS USER GUIDE, PART 2, at 18. Due to the nature of the Board's CAVC database, it is difficult to determine the total number of individual issues that were remanded in specified areas when counting more than one reason for remand. See VACOLS REPORTS, *supra* note 58. Accordingly, the data reported here is the percentage of all reasons for remand coded, not all issues remanded or reversed. See *id.*

67. See VACOLS REPORTS, *supra* note 58.

68. See Ridgway, Stichman & Riley, *supra* note 45, at 31.

69. See VACOLS REPORTS, *supra* note 58.

For example, in FY 2016, FtAA errors accounted for over 64% of all reasons-or-bases reasons for remand, and over 47% of all reasons for remand.⁷⁰ This demonstrates that nearly half of all errors were in situations in which the Board actively discussed the issue or evidence noted by the CAVC, but not in a manner that CAVC found to be sufficient.⁷¹ Additionally, the rate at which appeals have been returned for duty-to-assist errors has been in steady decline since FY 2006, reaching approximately 13% of all reasons for remand in FY 2016.⁷² Of particular note is that CAVC judges consistently remand more for reasons and bases, and less for duty to assist, than joint motions for remand.⁷³

At the same time, the CAVC has consistently demonstrated a significant reluctance to reverse the Board's decisions, with reversals consistently accounting for approximately one percent or less of all issues remanded.⁷⁴ Accordingly, in FY 2016, nearly half of all reasons for remand were in situations in which the Board discussed the issue or evidence in dispute, but the CAVC could not, or would not, conclude that the Board's analysis was wrong.⁷⁵

C. There is Little Evidence that Reasons-or-Bases Remands Translate to Individual Benefits (Error Correction)

The significant prevalence of reasons-or-bases remands would not be of concern if those remands translated into awards of benefits to appellants. However, this does not occur in the vast majority of CAVC remands.⁷⁶ One study reviewed every appeal that resulted in a remand from the CAVC to the Board from January 1, 2011, through March 3, 2011, and tracked what happened to the underlying claims.⁷⁷ Figure 5 shows the immediate disposition of those issues on their return to the Board.

70. *See id.*

71. *See id.*

72. *See id.*

73. *See id.*

74. *See* VACOLS REPORTS, *supra* note 58.

75. *See id.*

76. *See* James D. Ridgway, What Happens to Claims on Remand?, slide 6 (May 28, 2015) [hereinafter Ridgway, What Happens to Claims on Remand?] (unpublished conference presentation) (on file with authors).

77. *Id.*

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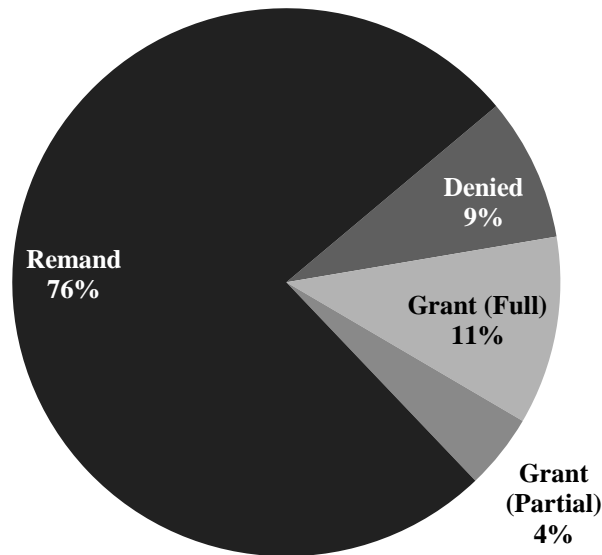


Figure 5: Immediate Disposition Following CAVC Remand

More than three quarters of those issues are remanded by the Board to the local regional office for additional evidentiary development,⁷⁸ which is generally required if the Board becomes aware of any treatment records that were created since its prior final decision, but which had not yet been obtained.⁷⁹ As will be discussed below, this remand rate of 76% is notably higher than the standard remand rate for the Board as a whole, although the combined grant rate of 15% is close to average for any issue adjudicated by the Board.⁸⁰ In addition, the open-record nature of the VA claims system means that even the 15% grant rate is not entirely a direct result of errors that have been identified—and corrected—by the CAVC.⁸¹ For cases that were granted at any point following CAVC remand, 65.2% were granted based on new evidence that was added to

78. As an appellate body, the Board does not develop evidence and, therefore, deficiencies in the record must be corrected by remanding claims to the regional offices to gather records or obtain a medical opinion. *See* 38 U.S.C. § 511(a) (2012); *id.* § 5103A(a)(1); *id.* § 7104(a); RIDGWAY, CASES AND THEORY, *supra* note 10, at ch. 10, 11, 17.

79. *See Moore v. Shinseki*, 555 F.3d 1369, 1374 (Fed. Cir. 2009) (holding that all treatment records pertaining to the claimed condition are presumptively relevant and must be obtained).

80. Ridgway, What Happens to Claims on Remand?, *supra* note 76, at slide 6.

81. *See* James D. Ridgway, *Fresh Eyes on Persistent Issues: Veterans Law at the Federal Circuit in 2012*, 62 AM. U. L. REV. 1037, 1041 (2013) [hereinafter Ridgway, *Fresh Eyes on Persistent Issues*].

the file after the CAVC remand.⁸² Significantly, this indicates that the true benefit of the CAVC remand was simply to keep the record open longer, not to identify an error the Board had made based on the evidence before it at the time of the prior decision.⁸³

This new-evidence disparity itself became even more pronounced when these grants are further separated based on whether they were granted immediately upon return from the CAVC or whether they were granted only after at least one additional Board remand.⁸⁴

Table 3: Evidentiary Basis of Grant Following CAVC Remand

Evidentiary Basis of Grant	Total		Immediate Grant		At Least One Add'l Board Remand	
	%	#	%	#	%	#
Existing Evidence	34.78%	32	80.00%	28	7.02%	4
New Evidence	65.22%	60	20.00%	7	92.98%	53

Of the 15% of cases granted by the Board immediately upon return from the CAVC, 80% were granted based on evidence of record at the time of the prior Board decision.⁸⁵ In contrast, of the 76% of cases that were remanded by the Board upon return from the CAVC, and of those that were eventually granted, an overwhelming 93% were granted based on *new* evidence added to the file.⁸⁶ As noted in Figure 4, the CAVC's remand rate for duty to assist errors in FY 2011 was under 20%.⁸⁷ Accordingly, relatively few of these new evidence grants could have been the result of specific missing evidence identified on appeal to the CAVC.

In final numbers, of all of the 225 issues remanded by the CAVC during the time period studied, only 14.22% resulted in a grant based on the evidence that was already of record at the time of the prior Board decision.⁸⁸ This 14.22% is the approximate rate at which the CAVC's

82. Ridgway, What Happens to Claims on Remand?, *supra* note 76, at slide 5.

83. This is consistent with the historical fact that many veterans do not obtain assistance from an attorney until after they appeal to the CAVC, and therefore the first chance that an attorney has to assist a veteran in presenting a meritorious claim comes after a court remand. See Ridgway, *Fresh Eyes on Persistent Issues*, *supra* note 81, at 1040.

84. See VACOLS REPORTS, *supra* note 58.

85. See *id.*

86. See *id.*

87. See *id.*

88. See *id.*

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remands succeeded in correcting an error made by the Board in denying benefits based on the evidence before it at the time of its prior final decision.⁸⁹ One can then extrapolate from this error correction rate by applying it to the CAVC's workload as a whole. For example, applying that 14.22% rate to the 1,138 issues remanded by the 8 active judges in FY 2016 produces approximately 162 issues for which the court actually identified an error made by the Board in denying benefits based on the evidence before it at the time of its prior final decision. Adding in the 19 issues reversed by those same judges' results in a final total of 181 issues for which an award of benefits was the direct result of an error identified by the CAVC. This number comprises just over 6.5% of the 2,759 issues that came before those judges.⁹⁰ Such a figure suggests that the overwhelming majority of the CAVC's decisions do not change the ultimate outcomes for the veterans appealing their decisions.⁹¹

D. Final Outcomes at the Board Have Not Changed (Law Giving)

Although the VA appeals system has faced numerous challenges over the past decade, the Board's grant rate has held remarkably steady.⁹² The Board Chairman's Annual Reports include yearly disposition data, although that data is based upon a decision hierarchy that attempts to place decisions with multiple outcome types into a single category, in the same manner as the CAVC's own Annual Report.⁹³ This categorization does not provide a complete picture of the Board's disposition rates; for that, the analysis must turn to the disposition rate by issue, not by appeal. Figure 6 shows the Board's monthly disposition rate on an issue-by-issue basis.⁹⁴

89. See VACOLS REPORTS, *supra* note 58. Arguably, it could be that many of these cases may fall in the zone reasonable discretion for fact finding and the remand merely nudged the Board to exercise its discretion differently rather than to change an outcome that was clearly erroneous.

90. See Table 2, *supra*.

91. See Ridgway, *Fresh Eyes on Persistent Issues*, *supra* note 81, at 1057 (citing Ridgway, *Why So Many Remands?*, *supra* note 10, at 113) (discussing why the remand rate is high while the rate of decisions overturned is low).

92. See *infra* Figure 6.

93. See VACOLS REPORTS, *supra* note 58.

94. See *id.*

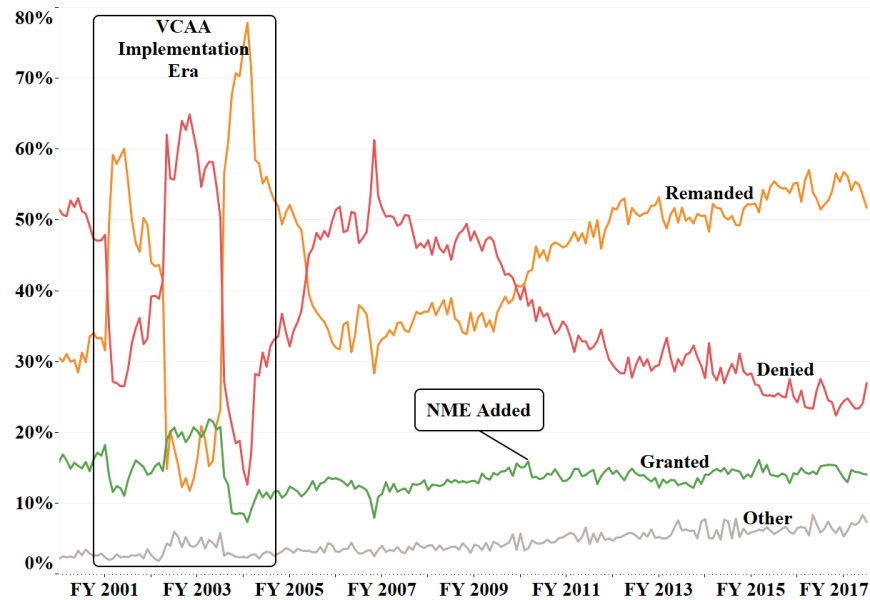


Figure 6: Board Disposition Rates by Issue (Raw)

The Board's grant rate has remained nearly static for over thirteen years, despite significant changes in both the remand and denial rates.⁹⁵ The disposition rates grow even more static once new and material issues are eliminated from the data set, as shown in Figure 7.⁹⁶

95. See Figure 6, *supra*.

96. See *infra* Figure 7. In 2007, the CAVC held "the Board must review the RO's decision to reopen a previously disallowed claim." *Woehlaert v. Nicholson*, 21 Vet. App. 456, 458 (2007). In January 2010, a new issue type was added to VACOLS to allow it to accurately track issues that were adjudicated under new and material evidence standards. See generally U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-213, VETERANS' DISABILITY BENEFITS: FURTHER EVALUATION OF ONGOING INITIATIVES COULD HELP IDENTIFY EFFECTIVE APPROACHES FOR IMPROVING CLAIMS PROCESSING (2010). These reopened appeals are granted at a vastly higher rate than average, with the grant rate remaining between 67.25% and 70.50% every fiscal year since the data has been tracked. See VACOLS REPORTS, *supra* note 58. More importantly, grants of these issues result only in a new evaluation of the issue on the merits and do not actually result in an award of a benefit to an appellant. Indeed, it is possible for a decision to grant the reopening of an issue, and then deny the underlying issue on the merits. VETERANS BENEFITS ADMIN., VA ADJUDICATION PROCEDURES MANUAL M21-1, pt. III(iv), ch. 2, § B(5) (2017). Accordingly, it appears that, in order to accurately capture the rate of Board grants that result in benefits being awarded to appellants, new and material evidence issues must be omitted from the data. See *Shade v. Shinseki*, 24 Vet. App. 110, 124 (2010) (Lance, J., concurring) (referring to a decision that grants only reopening as "a Pyrrhic victory"). Figures 6 and 7 are annotated with "NME Added" for December 2009, to show the inflection point after which new-and-material evidence issue data impacts the view.

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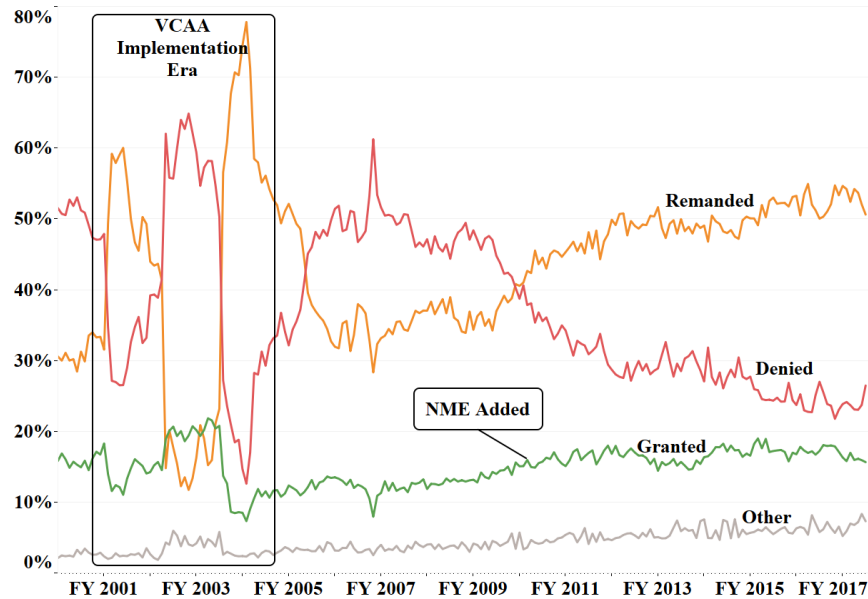


Figure 7: Board Disposition Rates by Issue (New and Material Evidence Issues Omitted)

In this figure, it is clear that the Board's grant rate has remained virtually flat. When viewed as data points for fiscal years, the Board's grant rate has fluctuated in a range of less than 3%, with a low of 11.99% and a high of 14.84%, every year from FY 2005 through FY 2016.⁹⁷

This relatively static disposition rate is even more remarkable when one considers the significant shifts in the rates of denial and remand that began in the summer of 2009.⁹⁸ During that time, the fiscal year denial rate dropped over 20%, from 44.79% in FY 2009 to 24.47% in FY 2016.⁹⁹ The remand rate increased in a near mirror image from 36.83% in FY 2009 to 54.14% in FY 2016.¹⁰⁰ Essentially, the shift in Board dispositions has turned large numbers of denials into remands to the regional offices. Additional data shows that the vast majority of these remands, nearly 80%, will return to the Board.¹⁰¹

Furthermore, the lack of any significant increase in the grant rate over the same period of time indicates another factor that is at work. Ideally, Board remands ought to be based upon VA unreasonably failing

97. See VACOLS REPORTS, *supra* note 58.

98. See *id.*

99. See *id.*

100. See *id.*

101. See *id.*

to obtain evidence that is likely to result in a grant of benefits. However, the correlation turns out to be quite low.¹⁰² These additional remands are not resulting in a corresponding increase in grants.¹⁰³ Although some percentage of remanded issues will be granted by the regional offices and never return to the Board,¹⁰⁴ a certain percentage of these additional grants will themselves be missed, just as with initial claims.¹⁰⁵ Accordingly, if the Board's remands were developing evidence that resulted in benefits to appellants, the Board's grant rate would be rising to some degree as the remand rate increases. However, that is not happening.¹⁰⁶

A separate analysis of Board data supports this conclusion. When appeals are returned to the Board after a remand from the court, they are flagged in a manner that allows them to be identified separately from original appeals.¹⁰⁷ Comparing the disposition rates for issues with a Post-Remand flag, against the Board average over the last five fiscal years, produces the results shown in Figure 8.¹⁰⁸

102. See VACOLS REPORTS, *supra* note 58.

103. See *id.*

104. VACOLS does not track the fate of claims that are not returned to the Board. Although some portion of the 20% of remands that do not return are surely granted, some are also withdrawn (usually because the veteran received a favorable outcome on another claim), some are remands of appeals that were not perfected, which are then abandoned, and some are dismissed due to the death of the veteran. Furthermore, grants will often have nothing to do with the basis of remand. Grants can be based upon evidence that did not exist or was unknown at the time of the original decision or intervening changes in law and medical research that do not indicate the original denial incorrectly weighed the evidence. Furthermore, many remands are of claims for an increased disability rating. Disabilities tend to worsen over time and, therefore, a veteran's condition will often worsen during the years of appellate proceedings even if it did not meet the threshold for additional compensation when the appeal was initiated.

105. See VACOLS REPORTS, *supra* note 58.

106. See *id.*

107. See BD. OF VETERANS' APPEALS, REPORT OF THE CHAIRMAN OF THE BVA FOR FISCAL YEAR 2015, at 6–7 (2016) [hereinafter ANNUAL REPORT 2015], https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2015AR.pdf.

108. See VACOLS REPORTS, *supra* note 58.

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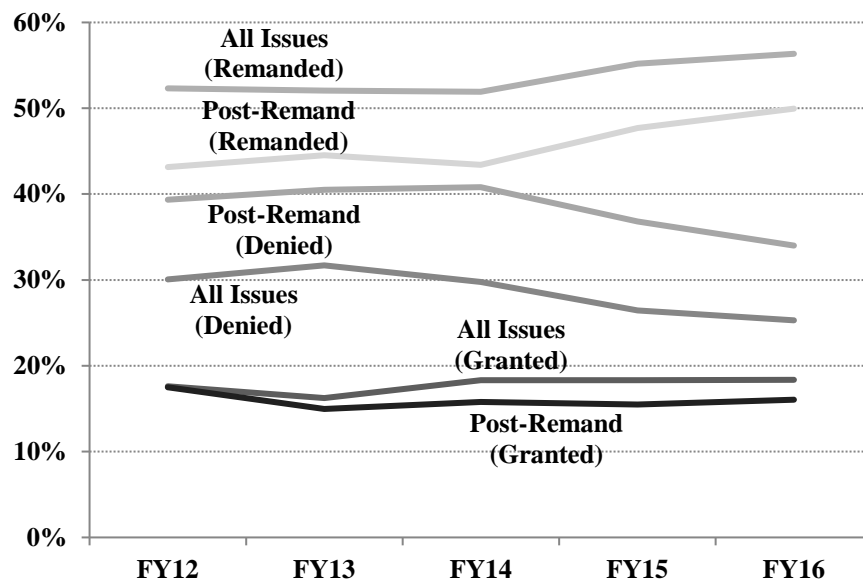


Figure 8: Board Disposition Rates in Post-Remand Cases

This data shows that issues before the Board after a remand do not have a higher grant rate than issues as a whole.¹⁰⁹ In short, remands from the Board do not increase the likelihood that an issue will be granted after the remand actions are completed.¹¹⁰ The significant increase in the rate of Post-Remand denials, and corresponding decrease in Post-Remand remands, shows what is actually occurring: remands only serve to increase the probability of a denial.¹¹¹

Taken together, this data demonstrates a long-term trend in the VA

109. There are two aspects of this data set that warrant commentary. First, the Post-Remand data set does not include dispositions other than Grant, Denied, and Remanded. Accordingly, all issues that were categorized with an “Other” disposition on the previous Board disposition graphs are not factored into this data set, resulting in a small increase in the percentages shown in the Post-Remand set for all disposition types displayed. Second, it is not currently possible to eliminate new and material evidence issues from the Post-Remand data set, so the percentages shown include dispositions on new and material evidence issues. Because the vast majority of new and material evidence issues are granted, there will be relatively few of those issues that will return to the Board after a remand. As such, the new-and-material evidence grants are likely responsible for the majority of the difference between the grant rates for Post-Remand issues versus All Issues. It appears that, if new and material evidence issues were removed from the data set, the grant rates for Post-Remand issues would be nearly identical to that for All Issues.

110. See VACOLS REPORTS, *supra* note 58.

111. See *id.*

appeals system: large numbers of issues that do not warrant benefits under the law are having their final dispositions delayed by remands.¹¹² These remands do not change the final outcome of the case.

E. The Hallmark of the CAVC Era Has Been Churn and Longer Processing Times

The vast majority of the increase in the Board's remand rate is a direct result of the Board's attempts to comply with CAVC precedent and issue decisions that will survive appeal. The scale of the CAVC's impact on the VA appeals system is apparent when the Board's disposition rate is viewed in its entirety, as shown in Figure 9.

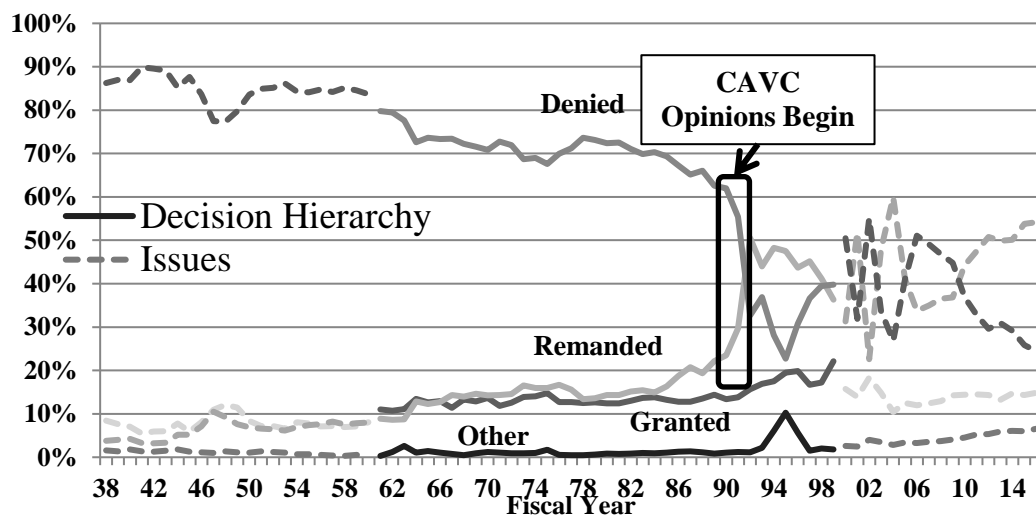


Figure 9: Historic Board Disposition Rates¹¹³

112. *See id.*

113. *See generally*, U.S. DEP'T OF VETERANS AFFAIRS, ANNUAL REPORTS FOR FISCAL YEARS 1938 TO 1987, available at <https://www.va.gov/vetdata/report.asp> (last visited Jan. 4, 2018) [hereinafter ANNUAL REPORTS 1938-1987]; U.S. DEP'T OF VETERANS AFFAIRS, ANNUAL REPORTS FOR FISCAL YEARS 1988 TO 1991, available at <https://www.va.gov/vetdata/report.asp> (last visited Jan. 4, 2018); BD. OF VETERANS' APPEALS, REPORTS OF THE CHAIRMAN OF THE BVA FOR FISCAL YEARS 1991 TO 2015, available at http://www.bva.va.gov/Chairman_Annual_Rpts.asp (last visited Jan. 4, 2018).

Note that VA has reported dispositions in two different formats over time. VA did not report Board disposition data from 1933 through 1937. From 1938 through 1960, VA reported dispositions based on individual issues. Beginning in 1961, VA switched to a reporting format referred to as the "Decision Hierarchy," which reports one disposition per appeal, regardless of the number of issues present in the appeal. *See* ANNUAL REPORTS 1938-1987.

The historical reporting system for Board decisions with multiple issues identifies the

The data shows that, almost immediately following the CAVC's first landmark decision, *Gilbert*, the Board's denial rate plummeted while its remand rate skyrocketed, both to levels that were previously unheard of over the prior fifty years of VA appellate adjudication.¹¹⁴ The Board's disposition rates have never since come close to returning to their pre-CAVC baselines, with one notable exception: the grant rate has remained almost static for eighty years, indicating that all significant changes in the VA appeals system after the creation of the CAVC have come from turning denials into remands, not into grants.¹¹⁵

Some clear examples of the CAVC's impact on the Board's remand rate can be seen in the changes following a few significant precedential CAVC decisions. For example, the Board's remand rate for claims for a total disability rating based on individual unemployability (TDIU) increased significantly in October 2009 (from 54.58% to 68.28%) and has never returned to its previous baseline.¹¹⁶ This increase is almost certainly related to *Rice v. Shinseki*, which made such claims dramatically more complex to analyze.¹¹⁷ Although the remand rate increase came a few

disposition of an appeal based on the following hierarchy: allowance, remand, denial, or other (i.e., dismissals). When there is more than one disposition involved in a multiple issue appeal the 'reported disposition' for Board Statistical Reports will be categorized based on the disposition hierarchy noted above.

ANNUAL REPORT 2015, *supra* note 107, at 28.

Due to the nature of Decision Hierarchy reporting, dispositions do not correspond to the same rates as provided by an issue-by-issue reporting method, and the deviation increases as the average number of issues on appeal increases, particularly for the grant rate. At the time Decision Hierarchy was adopted in 1961, VA averaged 1.28 issues per appeal. *See* VETERANS ADMINISTRATION, ANNUAL REPORT FOR FISCAL YEAR 1960, Tbls.82, 269 (1961), <https://www.va.gov/vetdata/docs/FY1961.pdf>. As the vast majority of decisions at the time were single issue decisions, Decision Hierarchy did not significantly skew the data. However, the number of issues in each appeal has increased over time, reaching an average of 2.8 issues per appeal by FY 2016. *See* Bd. of Veterans' Appeals, Report of the Chairman of the BVA for Fiscal Year 2016, at 34 (2017), <http://www.uscourts.cavc.gov/documents/FY2016AnnualReport.pdf>. To achieve maximum accuracy, VACOLS data has been substituted for Decision Hierarchy reporting in Figure 9 when it is available from FY 2000 onward. It appears that some portion of the increased rate of grants that appear to occur throughout the 1990s is a result of the Decision Hierarchy reporting method, rather than an actual change in Board behavior.

114. *See* VACOLS REPORTS, *supra* note 58.

115. *See id.*

116. *See id.*; *infra* Figure 10.

117. 22 Vet. App. 447, 453–54 (2009). In *Rice*, the CAVC held that a request for TDIU, whether expressly raised by a veteran or reasonably raised by the record, is not a separate claim for benefits, but rather involves an attempt to obtain an appropriate rating for a disability or disabilities, either as part of the initial adjudication of a claim or, if a disability upon which

months after *Rice* was decided in May 2009, the delay is likely due to the time it took for guidance to be distributed among the Board's attorneys and judges.

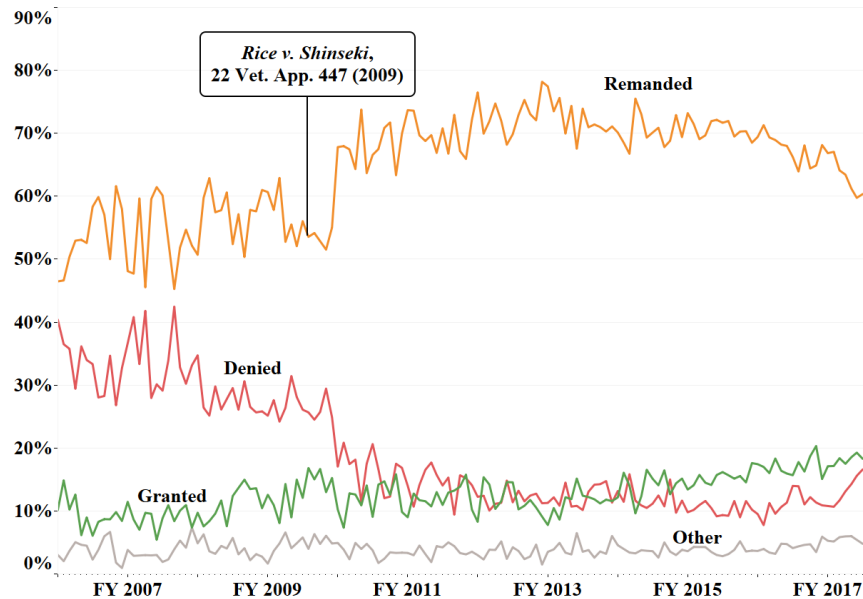


Figure 10: Board Disposition Rates for TDIU Issues

Similarly, a significant increase in the Board's remand rate for issues involving increased ratings for disabilities of the musculoskeletal system is also apparent beginning in July 2016, with the remand rate jumping from 53.67% to 62.15% in one month and then climbing even further from there, as seen in Figure 11.¹¹⁸ This jump is almost certainly related to *Correia v. McDonald*, which increased the complexity of the examinations needed to assign many disability ratings.¹¹⁹ Of particular note is that the increase in the remand rate as a result of *Correia* not only corresponded to a significant decrease in the rate of denials, but also to a

entitlement to TDIU is based has already been found to be service connected, as part of a claim for increased compensation.

Id.

118. See VACOLS REPORTS, *supra* note 58.

119. 28 Vet. App. 158, 168 (2016). In *Correia*, the CAVC held "that the final sentence of [38 C.F.R.] § 4.59 creates a requirement that certain range of motion testing be conducted whenever possible in cases of joint disabilities." *Id.* Section 4.59 applies to rating evaluations of disabilities of the musculoskeletal system, therefore narrowing the impact of *Correia* specifically to claims for increased ratings of musculoskeletal disabilities. 38 C.F.R. § 4.59 (2017).

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small decrease in the grant rate as well.¹²⁰ Accordingly, the practical impact of *Correia* was not only to increase the case churn rate¹²¹ significantly for a large number of appeals, but also to actively delay benefits that would otherwise have been granted to some appellants until additional development could be completed.¹²²

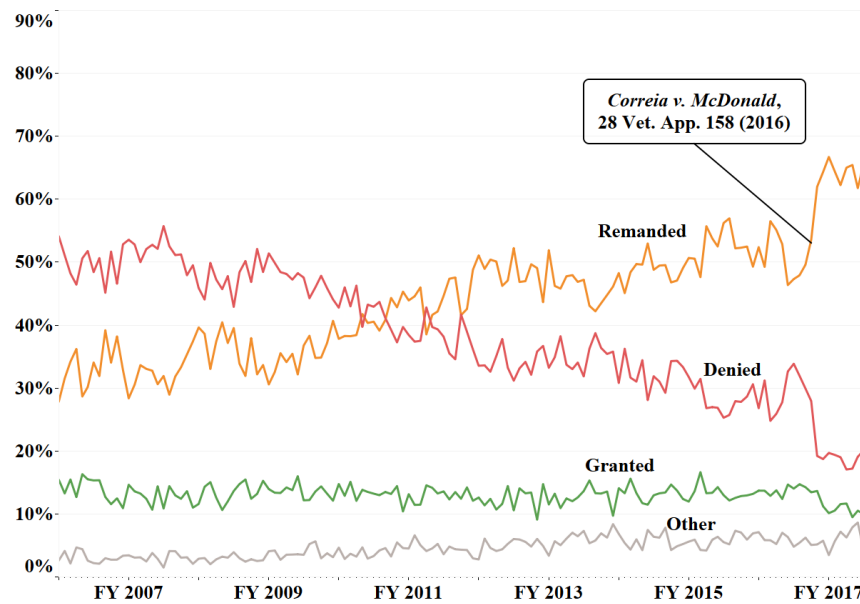


Figure 11: Board Disposition Rates for Musculoskeletal Increased Rating Issues

Although the direct links between CAVC decisions and the Board's remand rate are clearly apparent, the general impact of the CAVC on the VA appellate system is only visible when the system is viewed more broadly. Since the CAVC was created appeals processing times have drastically increased, as shown in Figure 12.¹²³

120. See *infra* Figure 11.

121. The "churn" is a term commonly used within VA to describe the tendency of appeals to move up and down through the process without resolution. Nicholas B. Holtz, *The Churn of Cases Within VA's Appeals Process*, VETERANS L. J. 1, 2 (Spring 2015).

122. See *infra* Figure 12.

123. See VACOLS REPORTS, *supra* note 58.

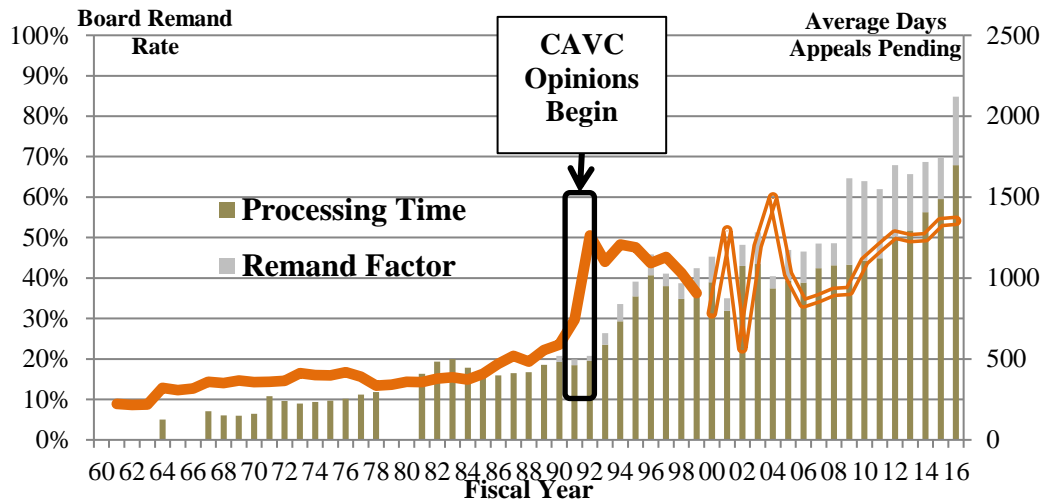


Figure 12: Board Remand Rate & Appeals Processing Time¹²⁴

Of particular note, between FY 1991¹²⁵ and FY 2016, the average time to process an appeal (without the remand factor included)¹²⁶ more

124. See U.S. DEP'T OF VETERANS AFFAIRS, ANNUAL REPORTS FOR FISCAL YEARS 1981 TO 1987, available at <https://www.va.gov/vetdata/report.asp> (last visited Jan. 4, 2018); U.S. DEP'T OF VETERANS AFFAIRS, ANNUAL REPORTS FOR FISCAL YEARS 1988 TO 1990, available at <https://www.va.gov/vetdata/report.asp> (last visited Jan. 4, 2018); BD. OF VETERANS' APPEALS, REPORTS OF THE CHAIRMAN OF THE BVA FOR FISCAL YEARS 1991 TO 2016, available at http://www.bva.va.gov/Chairman_Annual_Rpts.asp (last visited Jan. 4, 2018). As discussed above, see VACOLS REPORTS, *supra* note 58, the remand rate displayed here switches from Decision Hierarchy methodology to issue-by-issue methodology in FY 2000. The Average Days Appeals Pending is as reported in VA and Board Annual Reports. Note that VA reported the average days pending irregularly prior to 1981, sometimes using estimates and sometimes not reporting it at all.

125. Although the VJRA was enacted on November 19, 1988, the first CAVC opinion, *In re Quigley*, 1 Vet. App. 1 (1990), was not issued until January 22, 1990, and the first seminal case, *Gilbert v. Derwinski*, 1 Vet. App. 49 (1990), was not issued until October 12, 1990. "Although the Court was initially established in November 1988 by the VJRA, the effects of judicial review began to impact the system only in the last quarter of calendar year 1990." BD. OF VETERANS' APPEALS, REPORT OF THE CHAIRMAN OF THE BVA FOR FISCAL YEAR 1992, at 10 (1992) [hereinafter ANNUAL REPORT 1992], https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA1992AR.pdf. Accordingly, the CAVC's full influence only began to be felt in FY 1991. *Id.*

126. The remand factor is an estimate of the number of days it takes for an appeal which is remanded by the Board to be returned to the Board. The Board adjusted its methodology of reporting the Remand Factor in FY 2009, "to more accurately reflect the amount of time and effort it takes in the field to re-work remanded cases." BD. OF VETERANS' APPEALS, REPORT OF THE CHAIRMAN OF THE BVA FOR FISCAL YEAR 2009, at 16 (2010), https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2009AR.pdf. Accordingly, the Remand Factor data displayed prior to 2009 is likely an underestimate.

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than tripled, growing from 462 days to 1,698 days.¹²⁷ Moreover, with the remand factor included, the time more than quadrupled, increasing from 498 days to 2,120 days.¹²⁸ This increase is particularly notable when contrasted with the general stability of the average appeal processing time for the decade preceding the establishment of the CAVC, when the average processing time never strayed below 398 days or above 499 days during the ten years from FY 1981 through FY 1990.¹²⁹ There is very strong evidence that the steady increase in the processing time of appeals, which began in the early 1990s and has continued to this day, has been a direct result of the creation of the CAVC.¹³⁰

127. See BD. OF VETERANS' APPEALS, REPORTS OF THE CHAIRMAN OF THE BVA FOR FISCAL YEARS 1991 to 2016, *available at* http://www.bva.va.gov/Chairman_Annual_Rpts.asp (last visited Jan. 4, 2018).

128. See *id.*

129. See *id.*

130. The Board's Annual Reports in the early years after the creation of the CAVC include numerous comments about the difficulties the agency experienced in adapting to the establishment of the CAVC. For example, "[t]hese landmark decisions of the [CAVC] have resulted in re-adjudication of a significant number of the Board's decisions as well as profound change in the Board's decision-making process." BD. OF VETERANS' APPEALS, REPORT OF THE CHAIRMAN FOR FISCAL YEAR 1991, at 4 (1992), https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA1991AR.pdf.

The impact of the changes flowing from the Court's decisions will result in an increase, on average, in the amount of time needed to prepare a Board decision. As a consequence, the productivity and statistical criteria applied by the Board in the past are no longer meaningful. [Board] decisions are now much more complex and longer than in the past. Moreover, the Board is now required to continually alter its product in response to the Court's decisions. Its decisions continue to evolve toward increasing complexity and comprehensiveness. Consequently, the Board's former systems of productivity measurement are of very limited use in accurately measuring or establishing current meaningful standards of productivity.

Id. at 6.

While the extent of the change is not completely quantifiable, it is clear that [Board] decisions have taken and will continue to take appreciably longer to prepare and process. Response time and decision productivity have been degraded by the impact of changes in the law, as interpreted by the Court.

ANNUAL REPORT 1992, *supra* note 125, at 14.

"No decision of the Court has yet resulted in an improvement in decision productivity or timeliness in the entire VA adjudication system." *Id.* at 15.

[A]ll [Board] decisions must be prepared to withstand the scrutiny of judicial review. Preparation of cases according to these standards, which include all notice and due process procedures, has increased the length and complexity of [Board] decisions, added a legalistic and adversarial tone to the decision making process, and

In short, the widespread intuition among the veterans law community is correct. Not only is it true that most of the CAVC's output is comprised of reasons-or-bases remands, but those remands are specifically ordered for the Board to address evidence that it had already identified as relevant and addressed in its initial decision.¹³¹ Beyond confirming this belief, the data shows that these remands have a low correlation with eventual awards of benefits for veterans.¹³² When benefits are awarded, it is typically because of new evidence that was not originally before the Board.¹³³ Systemically, the vast majority of veterans, who never appeal to the CAVC, have felt a profound impact from the creation of the court in the form of a dramatic increase in churn and adjudication times, but not in an increased likelihood of a grant of benefits.¹³⁴ Given these realities, it must be asked why the CAVC conducts its review this way, and whether a more productive approach is possible.¹³⁵

dramatically increased the time it takes the Board to issue a decision.

BD. OF VETERANS' APPEALS, ANNUAL REPORT OF THE CHAIRMAN FOR FISCAL YEAR 1993, at 26 (1993), http://www.bva.va.gov/docs/Chairmans_Annual_Spts/BVA1993AR.pdf.

Another factor that significantly increases the time it takes for final resolution of a claim is the necessity for the Board to remand more cases for additional development than it has in the past. For the decade prior to the passage of the VJRA, the Board's fiscal year remand rates ran from a low of 13.4 percent to a high of 20.7 percent. With the full impact of judicial review, the remand rate hit 50.5 percent in fiscal year 1992.

Id. at 27.

"Compliance with the requirements of the evolving 'veterans' common law' has caused the Board to fall further and further behind as it attempts to do more and more with limited resources, including the current statutory limitation on the number of Board members." *Id.* at 33. "[S]ingle Board member decision authority and other administrative and legislative initiatives will, in time, ameliorate the decline in [Board] decision productivity and average response time. It is unlikely, however, that the average response time realized prior to judicial review will be regained." BD. OF VETERANS' APPEALS, REPORT OF THE CHAIRMAN FOR FISCAL YEAR 1994, at 46 (1994), http://www.bva.va.gov/docs/Chairmans_Annual_Spts/BVA1994AR.pdf.

131. Ridgway, *Why So Many Remands?*, *supra* note 10, at 136–37.

132. *See* VACOLS REPORTS, *supra* note 58.

133. *See id.*

134. *See id.*

135. Exactly what an ideal role for the CAVC would look like depends upon what a reasonable rate of outcome changes would be. This is essentially a cost-benefit analysis. Further consideration always creates a non-zero chance of a more favorable outcome if only because of error in the veteran's favor. However, this must be weighed against the extra time and resources that are consumed not only by cases directly remanded, but by all additional procedures ordered in indirect response to court decisions. In this regard, the court has denied that it should be a "mere procedural reset button," *Bonhomme v. Nicholson*, 21 Vet. App. 40,

III. THE ROOTS OF THE CAVC'S APPROACH TO REASONS OR BASES

The CAVC's approach to reasons or bases has both a realist and a formalist explanation. The court's unique history did not facilitate the development of substantive review of Board decisions and Supreme Court precedent provided an easy avenue for the court to remand most cases without reaching the merits.

A. *The Historical Context for Reasons-or-Bases Review*

That reasons-or-bases review assumed the importance that it did in the early days of the court is not surprising when viewed in historical context. When the court began its operations, substantive review of Board decisions was largely impossible. First, the Board decisions themselves often lacked detail and therefore could be difficult to interpret.¹³⁶ Second, none of the original members of the court were drawn from the Board or had any experience adjudicating claims.¹³⁷ They therefore lacked the ability to read between the lines of Board decisions to tease out the context and unspoken assumptions driving the decisions. Third, there were virtually no attorneys who practiced in the area before the court was created, and most appeals were pro se arguments that failed to present any meaningfully articulated, substantive issues.¹³⁸ Fourth, because only

44 (2007), but has not considered what would be a reasonable probability of outcome change to justify a remand. This can be attributed to lack of data given that the court lacks the experience to do this based upon intuition. *See infra* Part III.A. Nonetheless, the court has expressed concern about ineffective remands:

[T]he Court cautions against remands merely for the sake of remands. Judicial efficiency is not increased when counsel enters into a joint motion for remand before reviewing a client's claims file or record and fails to provide guidance to the Board concerning its responsibilities on remand. Remands of such ilk cause unnecessary delay, waste scarce resources, and are harmful to the entire system, including to the Court, VA, and, most importantly, the veteran.

Carter v. Shinseki, 26 Vet. App. 534, 547 (2014), *vacated and remanded sub nom.* Carter v. McDonald, 794 F.3d 1342 (Fed. Cir. 2015).

136. As noted above, *Gilbert* expressly referred to the lack of analysis in the Board decision on review. *Gilbert v. Derwinski*, 1 Vet. App. 49, 54 (1990); *see Allen, supra* note 13, at 514–15. Similar comments are not hard to find in early cases. *See, e.g., Ohland v. Derwinski*, 1 Vet. App. 147, 149–50 (1991) (“The BVA decision here includes neither an analysis of the credibility or probative value of the evidence . . . nor any explanation of the Board's conclusions.”); *Sammarco v. Derwinski*, 1 Vet. App. 111, 112–13 (1991) (holding that BVA's decision completely lacked a reasonable analysis); *Webster v. Derwinski*, 1 Vet. App. 155, 159 (1991) (critiquing the lack of analysis).

137. *See Ridgway, VJRA Twenty Years Later, supra* note 41, at 271.

138. In the first “State of the Court” speech for the CAVC, then-Chief Judge Nebeker compared reviewing early cases featuring VA attorneys and pro se appellants to watching “a good tennis player who's pitted against a novice. Can't play worth a damn.” Frank Q.

denials of benefits can be appealed to the court, the CAVC never sees the types of claims that are usually granted and, therefore, cannot develop a sense of what cases that are granted usually look like.¹³⁹ Accordingly, remands ordering the Board to provide more detailed decisions were an attractive option because the court lacked the ability to conduct reliable substantive review.

As the court matured, reasons-or-bases review continued to dominate for a number of reasons. First, even though it has now been three decades since the court was created, the court has still never had a member of the Board appointed to serve on it, and it is rare for a judge of that court to have substantial experience litigating veterans claims at the agency level, despite the fact that there is now a mature bar of veterans law practitioners.¹⁴⁰ Second, even though a bar of practicing attorneys has developed, it has historically been the case that attorneys who represent veterans at the CAVC were not involved in the appeal below.¹⁴¹ Because these attorneys had no ability to shape the issues or record below, they are rarely in a position to argue for reversal. Instead, CAVC review can resemble a game of procedural “whack-a-mole,” in which representatives tend to present any argument that can lead to remand just so they can get the record reopened at the agency.¹⁴² In a system in which the goal is usually to obtain a remand on any basis, arguments that a Board decision lacks sufficient detail are a perfect vehicle for returning matters to the agency without any substantive rulings that might impair the claimant’s freedom to develop new evidence and theories on remand. Third, the court’s ability to review the merits of appeals was further eroded in 2008, when the CAVC changed its rules so that it is no longer provided with

Nebeker, Chief Judge, U.S. Court of Veterans Appeals, State of the Court, Address before the U.S. Court of Veterans Appeals First Annual Judicial Conference (Sept. 17, 1992), in 4 Vet. App. XXIII, XXX (1992).

139. See Ridgway, *VJRA Twenty Years Later*, *supra* note 41, at 257 (explaining how the court operates as a one-way ratchet).

140. See Bradley W. Hennings, David E. Boelzner & Jennifer Rickman White, *Now is the Time: Experts vs. the Uninitiated as Future Nominees to the U.S. Court of Appeals for Veterans Claims*, 25 FED. CIR. B.J. 371, 372–73 (2016) (describing the backgrounds of the judges as of that time). At the time of the writing of this article, there were three nominees for four vacancies on the court. None of those nominees has ever worked for the Department of Veterans Affairs, and the direct experience of the nominees with the process is limited, although two have substantial policy experience. See Press Release, White House, President Donald J. Trump Announces Judicial Candidate Nominations (June 7, 2017), <https://www.whitehouse.gov/the-press-office/2017/06/07/president-donald-j-trump-announces-judicial-candidate-nominations>.

141. Ridgway, *Fresh Eyes on Persistent Issues*, *supra* note 81, at 1040.

142. *Id.*

the complete record of proceedings before the agency.¹⁴³

Accordingly, the process today continues to be driven by a dynamic that tends to eschew review of the merits of Board decisions: the judges continue to lack relevant experience, the cases are not litigated below in a manner designed to present the merits on appeal,¹⁴⁴ and the court is not presented with all of the evidence below when trying to understand the decision on review.¹⁴⁵ Nonetheless, given how unhealthy the current reasons-or-bases remands approach is, the court ought to pursue an alternative if it is legally feasible to do so.

B. The Chenery Doctrine

The formal basis for the CAVC's approach to reasons-or-bases remands is the venerable administrative law tradition known as the *Chenery* doctrine. In fact, both Supreme Court cases cited in *Gilbert* trace their lineage to the *Chenery* cases.¹⁴⁶ These cases are routinely cited for the proposition that courts cannot affirm a decision based upon reasoning that is not articulated in the decision itself.¹⁴⁷ Even if a court were to agree with the outcome, it must remand the matter if its reasoning diverges from that offered by the agency. In effect, if the court finds what it deems to be a flaw in the analysis, then it can cease further consideration and remand the matter, regardless of the objective merits of the appeal.

The doctrine comes from two Supreme Court decisions in a single case from the dawn of the Administrative Procedures Act, which are known as *Chenery I* and *II*.¹⁴⁸ The underlying issue was the lawfulness of

143. See *In re Rules of Practice and Procedure*, 22 Vet. App. 87, 87–89 (2008) (en banc) (adopting new Rules 10 and 28.1, effective Apr. 1, 2008); VET. APP. R. PRAC. & P. 10; VET. APP. R. PRAC. & P. 28.1.

144. As the number of attorneys practicing before the Board has grown, the CAVC has applied exhaustion to issues that could have been raised by counsel below. See *Massie v. Shinseki*, 25 Vet. App. 123, 127–28 (2011), *aff'd*, 724 F.3d 1325 (Fed. Cir. 2013).

145. Ridgway, *Why So Many Remands?*, *supra* note 10, at 134.

146. *Gilbert v. Derwinski*, 1 Vet. App. 49, 57 (1990) (citing to both *Fla. Power & Light Co. v. Lorion* and *Camp v. Pitts* which can be traced to *Chenery I*); see *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985) (quoting *Camp v. Pitts*, 411 U.S. 138, 142 (1973)) (“[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.”); *Camp*, 411 U.S. at 143 (citing *Chenery I*, 318 U.S. 80, 95 (1942)) (“If that finding is not sustainable on the administrative record made, then the Comptroller’s decision must be vacated and the matter remanded to him for further consideration.”).

147. See, e.g., Richard Murphy, *Chenery Unmasked: Reasonable Limits on the Duty to Give Reasons*, 80 U. CIN. L. REV. 817, 837–41 (2012) (describing the spread of *Chenery* after it was decided); Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 YALE L.J. 952, 956 n.3 (2007) (discussing examples of cases that utilize the rule established in *Chenery*).

148. *Chenery I*, 318 U.S. at 92; *Chenery II*, 332 U.S. 194, 207 (1947).

management trading in a company's stock during a reorganization.¹⁴⁹ However, the issue presented to the Court was the validity of the process used by the Securities and Exchange Commission (SEC) to announce its policy on that issue.¹⁵⁰ Notably, the facts were undisputed.¹⁵¹ Rather, it was the validity of the policy announcement that was contested.¹⁵²

Initially, the Supreme Court remanded, hinting that such a policy ought to be announced through rulemaking rather than in an adjudication.¹⁵³ However, in the second appeal shortly after the APA was passed, the Court retreated from that position and affirmed the SEC's use of an adjudicative action to make policy.¹⁵⁴ In doing so, the Court pronounced:

[A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency.¹⁵⁵

Accordingly, the eponymous *Chenery* doctrine was born.

Since its inception, the doctrine has driven countless remands by courts to agencies after some flaw or gap in the initial decision was identified.¹⁵⁶ Nonetheless, like many seemingly clear commands, it has

149. *Chenery I*, 318 U.S. at 84–85.

150. *Id.* at 85.

151. *Chenery II*, 332 U.S. at 207.

152. *Id.* at 204.

153. *See Chenery I*, 318 U.S. at 92 (“Had the Commission, acting upon its experience and peculiar competence, promulgated a general rule of which its order here was a particular application, the problem for our consideration would be very different.”).

154. *Chenery II*, 332 U.S. at 203. *See generally* Russell L. Weaver & Linda D. Jellum, *Chenery II and the Development of Federal Administrative Law*, 58 ADMIN. L. REV. 815 (2006) (discussing in detail this important aspect of *Chenery II*).

155. *Chenery II*, 332 U.S. at 196.

156. *Chenery II* alone has been cited more than 2,000 times according to a search of Westlaw. Citing references for *Chenery II*, 332 U.S. 194 (1947), WESTLAW, <https://1.next.westlaw.com/> (last visited Jan. 4, 2018) (Search for *Chenery II*; then follow “Citing References” hyperlink; then select “Cases”). One can only imagine how many additional cases would trace back to *Chenery* through seminal cases within a given jurisdiction like *Gilbert*. Citing references for *Gilbert v. Derwinski*, 1 Vet. App. 49 (1990), WESTLAW, <https://1.next.westlaw.com/> (last visited Jan. 4, 2018) (Search for *Gilbert*; then follow “Citing References” hyperlink; then select “Cases”) (cited 13,556 times); *see infra* note 165 (collecting articles arguing that various areas of law ought to be an exception to the *Chenery* doctrine).

been followed with less than perfect fidelity.¹⁵⁷ The Supreme Court itself has sometimes given conflicting signals on the strength of the doctrine.¹⁵⁸ An early influential article by Judge Henry Friendly found three major situations in which *Chenery* was not followed, and specifically observed that there was a conflict between purists and realists as to how to apply the doctrine.¹⁵⁹ More recently, courts of appeals have asserted that remand under *Chenery* is not universally required,¹⁶⁰ and studies have

157. See Steve R. Johnson, *Reasoned Explanation and IRS Adjudication*, 63 DUKE L. J. 1771, 1782–83 (2014).

158. On a variety of occasions, the Supreme Court has suggested that a remand under *Chenery* is not always required. It has reasoned:

To remand would be an idle and useless formality. *Chenery* does not require that we convert judicial review of agency action into a ping-pong game. In *Chenery*, the Commission had applied the wrong standards to the adjudication of a complex factual situation, and the Court held that it would not undertake to decide whether the Commission's result might have been justified on some other basis. Here, by contrast, the substance of the Board's command is not seriously contestable. There is not the slightest uncertainty as to the outcome of a proceeding before the Board, whether the Board acted through a rule or an order. It would be meaningless to remand.

NLRB v. Wyman-Gordon Co., 394 U.S. 759, 766 n.6 (1969). The Court ruled in another case:

[W]e find inapposite here cases refusing to validate an exercise of administrative discretion because it could have been supported by principles or facts not considered, or procedures not undertaken, by the responsible body. These cases are aimed at assuring that initial administrative determinations are made with relevant criteria in mind and in a proper procedural manner; when a mistake of the administrative body is one that clearly had no bearing on the procedure used or the substance of the decision reached, as in this instance . . . , the sought extension of the cases cited [including *Chenery*] would not advance the purpose they were intended to serve.

Mass. Trs. of E. Gas & Fuel Assocs. v. United States, 377 U.S. 235, 247–48 (1964); see *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)) (“We will, however, ‘uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned.’”).

159. Henry J. Friendly, *Chenery Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 DUKE L.J. 199, 222–23 (1969). He elaborated:

The purists insist that any guessing by a court about what the agency might do when apprised of such an error is an unlawful intrusion into the sanctity of the administrative process, and once such an error is detected, the case must go back so that the agency, as the sole repository of authority, can decide it right. The realists answer that neither the Constitution nor the Administrative Procedure Act forbids judges to exercise common sense.

Id. at 223.

160. For example, the Court of Appeals for the District of Columbia Circuit has held that, “[o]n occasion . . . we find that a remand would be futile on certain matters as only one

shown that lower courts have not applied *Chenery* faithfully.¹⁶¹ The doctrine has been criticized as inefficient and overly formalistic by academics,¹⁶² judges,¹⁶³ and practitioners.¹⁶⁴ Numerous articles have argued that one area or another of administrative law ought to be an exception to the application of *Chenery*, at least for some subset of cases.¹⁶⁵ Accordingly, the history of *Chenery* includes substantial

disposition is possible as a matter of law. In such cases, we retain and decide the issue.” George Hyman Constr. Co. v. Brooks, 963 F.2d 1532, 1539 (D.C. Cir. 1992); see Wilkett v. Interstate Commerce Comm’n, 710 F.2d 861, 865 (D.C. Cir. 1983) (“As the finding of unfitness is clearly in error, the Commission is directed to issue the authority requested.”). Similarly, the Seventh Circuit has held:

[W]e do not agree that *Ventura* stands for the broad proposition that a court of appeals must remand a case for additional investigation or explanation once an error is identified. . . . We are well-within our authority to reverse the IJ’s eligibility determination if manifestly contrary to law, and our decision to do so in no way disregards the agency’s expertise and role as front-line evaluator of evidence. . . . Moreover, if the record evidence *compels* the result that we have reached, then no alternative determination is possible.

Ghebremedhin v. Ashcroft, 392 F.3d 241, 243 (7th Cir. 2004) (citing 8 U.S.C. § 1252(B)(4)(c) (2012)) (proceeding to explicitly recognize that *Ventura* stems from the *Chenery* doctrine).

161. Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 507, 562–75 (1985) (documenting numerous examples of apparent deviations from *Chenery*); Christopher J. Walker, *The Ordinary Remand Rule and the Judicial Toolbox for Agency Dialogue*, 82 GEO. WASH. L. REV. 1553, 1553 (2014) (“Courts that refuse to remand seem to do so when they believe the petitioner is entitled to relief and remand would unduly delay or, worse, preclude relief because the petitioner would get lost in the process.”).

162. See, e.g., Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. 253, 257 (2017) (arguing that the *Chenery* rule is “clumsy” and denies judges the discretion without adequate justification); Murphy, *supra* note 147, at 820 (“*Chenery* is wrong both descriptively and prescriptively. Courts do and should rely on post hoc rationales for agency action under some circumstances—and it would improve administrative law for them to acknowledge it.”).

163. See Friendly, *supra* note 159, at 199 (“Although, when I began my labors, I had the hope of discovering a bright shaft of light that would furnish a sure guide to [applying *Chenery*] in every case, the grail has eluded me; indeed I have come to doubt that it exists.”); Patricia M. Wald, *Judicial Review in a Time of Cholera*, 49 ADMIN. L. REV. 659, 666 (1997) (“If I were to ease up on any aspect of reasoned decisionmaking it would be on [*Chenery*’s] ‘post hoc rationalization’ ban prohibiting government counsel from proffering any additional explanation for the agency action that has not been fully covered in the decision itself, even though the explanation may be a winner and everyone knows that the agency would be happy to accept it.”).

164. See Amy R. Motomura, *Rethinking Administrative Law’s Chenery Doctrine: Lessons from Patent Appeals at the Federal Circuit*, 53 SANTA CLARA L. REV. 817, 895 (2013) (“The application of *Chenery* should instead depend on the type of error made by the agency in reaching its decision and on what grounds the reviewing court proposes to affirm the decision.”).

165. Bryan C. Bond, *Taking It on the Chenery: Should the Principles of Chenery I Apply in Social Security Disability Cases?*, 86 NOTRE DAME L. REV. 2157, 2161 (2011); Matthew

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discontent and resistance.¹⁶⁶IV. RETHINKING THE BROAD APPLICATION OF *CHENERY**A. Recalling *Chenery*'s Core*

Given the serious problems with the practice of reasons-or-bases review and the widespread discontent with *Chenery*, it begs the question of whether the CAVC's approach has become untethered from the values that it must respect. To answer this question, it is helpful to define both what judicial review must do and must not do. What it must do is easy to define (at least in vague terms): It must provide a meaningful forum for reviewing agency actions for error.¹⁶⁷ What it must not do is violate the separation of powers by using this review to usurp "the domain which Congress has set aside *exclusively* for the administrative agency."¹⁶⁸ The fundamental problem with the current application of *Chenery* is that courts apply it with a focus on the remedy rather than the purpose.¹⁶⁹

The proscription in *Chenery* that courts cannot affirm a decision on grounds other than those stated¹⁷⁰ is overbroad. This far-reaching, prophylactic rule prevents the unwanted behavior (usurping decisions committed *exclusively* to the executive branch), but is misapplied when it is extended to decisions that the courts have the right to usurp.

The fundamental distinction is that between policy making and fact finding. Under the separation of powers principle embodied in *Chenery*, policy making is reserved to agencies.¹⁷¹ The rule of *Chenery* is that courts are so completely excluded from this power that they are forbidden

Ginsburg, "A Nigh Endless Game of Battledore and Shuttlecock": *The D.C. Circuit's Misuse of *Chenery* Remands in NLRB Cases*, 86 NEB. L. REV. 595, 601 (2008); Johnson, *supra* note 157, at 1833; Motomura, *supra* note 164, at 822.

166. Nonetheless, the doctrine has its defenders. Fundamentally, it protects the separation of powers by ensuring that policy is made by the executive branch rather than the judicial branch. *See, e.g.*, Johnson, *supra* note 157, at 1782 ("The *Chenery* cases are often thought to sound in the separation of powers."). "Absent *Chenery*, a court might affirm a regulation on grounds that the agency itself, given proper time and procedures for reflection, would reject." Sidney A. Shapiro & Richard W. Murphy, *Arbitrariness Review Made Reasonable: Structural and Conceptual Reform of the "Hard Look"*, 92 NOTRE DAME L. REV. 331, 345 (2016). Furthermore, it "ensur[es] that accountable decision-makers, not merely agency lawyers, have embraced the grounds for the agency's actions, and it promotes the regularity and rationality of agency decision-making by enforcing a practice of reason-giving." Stack, *supra* note 147, at 952.

167. *Chenery II*, 332 U.S. 194, 196 (1947).

168. *Id.* (emphasis added).

169. *See, e.g.*, Michigan v. EPA, 135 S. Ct. 2699, 2711 (2015) (focusing on cost analysis rather than appropriateness of regulation).

170. *Chenery II*, 332 U.S. at 196.

171. *Id.* at 209.

from exercising independent judgment, even to affirm the action of the executive.¹⁷² To the extent that courts can reverse a policy adopted by an agency, it is because the policy is contrary to a higher authority that forbids the result.¹⁷³ Otherwise, the courts may strike down a policy that is insufficiently justified, but cannot dictate what the final policy choice will be when there is discretion delegated to the agency to decide.¹⁷⁴

In contrast, courts can and do disagree with fact finding by agencies.¹⁷⁵ One way in which courts act as bulwarks of freedom and guardians of the democratic system is by reversing factual determinations that are contrary to the evidence on which the decision was based.¹⁷⁶ Courts owe no deference to agency determinations that black is white or night is day.¹⁷⁷ In this regard, the jurisdiction of the CAVC is clear: it is expressly authorized to reverse findings of fact that are clearly erroneous.¹⁷⁸

Accordingly, the relationship that courts have with policy decisions delegated to agencies is fundamentally different than the relationship that courts have with agencies' findings of fact.¹⁷⁹ For the former, agencies enjoy exclusive authority.¹⁸⁰ For the latter, agencies have primary authority, but it is not exclusive.¹⁸¹ It is, therefore, logical that the rules governing review of these two different types of determinations could be different.¹⁸²

172. *Id.* Even under *Chenery*, it is debatable how removed judges are from policy making. See generally Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823 (2006) (arguing that policy judgments are common in judicial review of agency interpretations of the law).

173. See *Chenery II*, 332 U.S. at 207.

174. See *Negusie v. Holder*, 555 U.S. 511, 523 (2009) (“[The *Chenery*] remand rule exists, in part, because ‘ambiguities in statutes within an agency’s jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps . . . involves difficult policy choices that agencies are better equipped to make than courts.’” (quoting *Nat’l Cable Telecomm. Ass’n v. Brand X. Internet Servs.*, 545 U.S. 967 (2005))).

175. See, e.g., *In re Zurko*, 142 F.3d 1447, 1449 (Fed. Cir. 1998).

176. See 38 U.S.C. § 7261(a)(4) (2012).

177. See *id.*

178. *Id.*

179. The observation has also been made elsewhere. See Motomura, *supra* note 164, at 895 (“In large part, the unpredictability of *Chenery*’s application reflects the deeper problem that the distinction between law and fact . . . is a poor guide for distinguishing agency decisions that deserve deference during judicial review from those decisions that should be in judicial hands.”).

180. *Chenery II*, 332 U.S. 194, 196 (1947).

181. *Id.* at 196–97.

182. A narrowing of the *Chenery* doctrine would also be consistent with the growing movement to reduce judicial deference to agency interpretations of statute and regulation under *Chevron* and *Auer*. See, e.g., *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1213–25

Of course, the line between policy determinations and factual determinations is not always bright and can be fraught with semantic confusion. “Policy necessarily involves discretion, the right to choose among alternative courses of action.”¹⁸³ In this regard, the type of “facts” that courts traditionally review for clear error are “adjudicative” facts—the facts and circumstances of the case at hand—as opposed to “legislative” or “social” facts—global facts, predictions, and qualitative judgments that are the foundation of policy choices.¹⁸⁴ In practice, “facts do not come labeled ‘adjudicative’ on the one hand or ‘social’ or ‘legislative’ on the other. Courts must look to the function those facts play in the legal system to classify them properly.”¹⁸⁵ Many agency determinations are based upon findings about what is reasonable, necessary, or otherwise a matter of judgment that may be specific to an individual matter or broadly applicable.¹⁸⁶ In such cases, there is a zone

(2015) (Thomas, J., concurring); Note, *The Rise of Purposivism and Fall of Chevron: Major Statutory Cases in the Supreme Court*, 130 HARV. L. REV. 1227, 1245 (2017) (describing recent case law suggesting the decline of deference). However, deference to agencies still has vocal defenders. See, e.g., Jonathan H. Adler, *Restoring Chevron’s Domain*, 81 MO. L. REV. 983, 985 (2016) (arguing for the continued application of *Chevron* “when confined to its proper domain”); Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of Auer*, 84 U. CHI. L. REV. 297, 297 (2017).

183. JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 280 (2d ed. 2000).

184. See Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402–03 (1942) (setting forth the distinction between adjudicative facts and legislative facts). The influence of this distinction has been recognized in the federal courts. See *Broz v. Schweiker*, 677 F.2d 1351, 1357 (11th Cir. 1982) (citing *Ass’n of Nat’l Advertisers Inc. v. FTC*, 627 F.2d 1151, 1161–62 (D.C. Cir. 1979)) (“The legislative/adjudicative fact distinction, first articulated by Professor Davis . . . has become a cornerstone of modern administrative law theory and has been widely accepted in the federal appellate courts.”), *vacated*, *Heckler v. Broz*, 461 U.S. 952 (1983); see also *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992) (citing *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981)) (invoking the concept of “legislative facts” to adjudicate an equal protection claim); *United Air Lines v. Civil Aeronautics Bd.*, 766 F.2d 1107, 1118 (7th Cir. 1985) (quoting *Alaska Airlines, Inc. v. Civil Aeronautics Bd.*, 545 F.2d 194, 200 (D.C. Cir. 1976)) (citing *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 244–46 (1973)) (observing the “well established” line between “‘legislative’ facts—the kind that can be found reliably without an evidentiary hearing—and ‘adjudicative’ facts, which cannot be”). Furthermore, this distinction has also been recognized in the Federal Rules of Evidence. See FED. R. EVID. 201(a) (specifying that the federal rule for judicial notice applies only to adjudicative facts and not to legislative facts).

185. John O. McGinnis & Charles W. Mulaney, *Judging Facts Like Law*, 25 CONST. COMMENT. 69, 124 (2008).

186. For example, the question in *Camp*, the issue of whether another bank was necessary in the city of Hartsville, South Carolina, may naturally be described as a factual issue, but it would clearly be a matter of judgment rather than indisputable reality, except in the most extreme cases. See 411 U.S. 138, 138–39 (1973).

of policy discretion for the agency to exercise, but there is, also, a zone beyond the pale in which courts ought to intervene.¹⁸⁷ The concern, however, that the line between fact and policy is not perfectly clear does not mean that the distinction is meaningless nor that the separation of powers requires a uniform approach to all review of agency action in order to correctly balance the interests at stake.¹⁸⁸

B. Application to the CAVC

Whatever the line-drawing difficulties are, large swaths of CAVC remands for additional reasons or bases do not fall in this grey zone. Instead, the relevant policies are not disputed as to the application of the alleged facts.¹⁸⁹ The only question is what set of adjudicative facts about the individual should be accepted for purposes of determining entitlement.¹⁹⁰

For example, suppose a widow of a veteran were to seek benefits, asserting that her husband's death from cancer had been related to his service. The Board denies her claim, based upon a finding that the veteran was never exposed to radiation. On appeal, the widow obtains a lawyer for the first time, who points out to the CAVC that there was substantial medical evidence in the record supporting a finding that symptoms of the cancer first manifested while the veteran was still in service. Should the CAVC have discretion to consider this overlooked evidence in the first instance?

A strict reading of *Chenery* would suggest not, and the Federal Circuit has likewise held as much.¹⁹¹ The policy, however, of awarding benefits for conditions that manifest in service is not disputed, and the weighing of this evidence is not a matter within the exclusive province of VA.¹⁹² There is no dispute that the CAVC reviews such fact finding and may reverse it for clear error.¹⁹³ Requiring a remand in the face of overwhelming evidence that would result in the reversal of any contrary

187. *See id.* at 140–41, 143.

188. For an interesting discussion on different theories of how power ought to be divided in the administrative state, *see* Adrian Vermeule, *Bureaucracy and Distrust: Landis, Jaffe and Kagan on the Administrative State*, 130 HARV. L. REV. 2463 (2017) (discussing different theories of how power ought to be divided in the administrative state).

189. *See* *Byron v. Shinseki*, 670 F.3d 1202, 1205 (Fed. Cir. 2012) (citing 38 U.S.C. § 7292(d)(2) (2012)) (stating that the court may not review challenges to the regulations).

190. *See id.* at 1206.

191. The facts of the hypothetical are based upon the Federal Circuit's decision in *Byron*. *See id.* at 1204.

192. *See id.* at 1205 (citing *Hensley v. West*, 212 F.3d 1255, 1263 (Fed. Cir. 2000)).

193. *Hensley*, 212 F.3d at 1263 (citing *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986)).

outcome does little to advance the principle that *Chenery* protects.¹⁹⁴

C. Toward a Healthy Approach to Reasons or Bases

So, what precisely should the CAVC's approach to reasons or bases look like? First, the court should treat factual disputes differently from arguments involving policy matters. In the vast bulk of cases in which the issue is what happened to the veteran in service or whether a particular condition was caused by a particular in-service injury, the court should review Board decisions for clear error. If the Board articulated a plausible rationale and cited a non-frivolous amount of evidence in support of that rationale, then the court should consider whether it has a definite and firm conviction that the factual determination was incorrect.¹⁹⁵ In doing so, the court should consider all evidence it deems relevant, even if the Board did not explicitly discuss it. If the issue on appeal is whether the evidence supports a finding of entitlement under established interpretations of law, then the CAVC should affirm or reverse the case, unless the Board's rationale is so cursory as to not demonstrate a good faith effort to explain itself.¹⁹⁶ In fact, there is some precedent for doing this stemming even from the court's early days.¹⁹⁷ If the issue were whether the agency's duty to develop additional evidence was satisfied, the CAVC should rule directly on the matter rather than remanding to the Board to further consider whether additional records need to be obtained or whether a

194. Again, the argument here is limited to adjudicative facts involving only the claim at hand. The Supreme Court has expressly rejected the Ninth Circuit's application of this approach to resolving facts with "potentially far-reaching legal" implications. *INS v. Ventura*, 537 U.S. 12, 17 (2002) (per curiam) (reversing the lower court's failure to remand a factual issue regarding "the significance of political change in Guatemala, a highly complex and sensitive matter" that could affect numerous other cases). It should be noted, however, that

since the Supreme Court's *Ventura* decision a line of jurisprudence has evolved in the immigration context concerning whether remand would be futile and thus the court should dispose of the relevant issue in the first instance, despite the fact that the agency has not rendered a decision as an initial matter, or has not been provided with the opportunity to render a decision free of any errors identified by the court on review.

Patrick J. Glen, "To Remand, or Not to Remand": *Ventura's Ordinary Remand Rule and the Evolving Jurisprudence of Futility*, 10 RICH. J. GLOBAL L. & BUS. 1, 3–4 (2010).

195. The CAVC has ostensibly followed this standard since its earliest days. See Ridgway, *Why So Many Remands?*, *supra* note 13, at 140.

196. In this regard, the CAVC's focus should be on ensuring that the Board does not abdicate its role as the primary fact-finder, rather than judging its satisfaction with the reasoning provided.

197. See *Hersey v. Derwinski*, 2 Vet. App. 91, 95 (1992) (reversing a Board decision as clearly erroneous based upon evidence not discussed by the Board).

medical opinion was adequate.¹⁹⁸

Second, when presented with a theory not considered by the Board, the court should treat this in the same manner as courts of general jurisdiction would do in deciding whether a particular factual issue must be presented to a jury or whether the evidence is so strong in one direction that the issue can be resolved without trial.¹⁹⁹ In some cases, this would lead to the court rejecting an unaddressed theory without remand when the appellant asserts that it was raised by the record. In other cases, this would allow the court to reverse and award benefits without subjecting the appellant to years of delay and, potentially, another appeal to the court when the record supports a determination that any unfavorable decision would be clear error.²⁰⁰

Third, the court must actively abandon the approach to reasons or bases that requires a “better” analysis of findings that already have a clearly expressed bottom line. This final point is simultaneously esoteric and intensely practical. Untold amounts of ink have been spilled on epistemology questioning how it is that we know what we know and what level of certainty can justify action.²⁰¹ One can always question how certain we are about what we think we know and whether there might be

198. To put this in another context, the EPA’s choice to cap the emission of a certain pollutant at X parts per million based upon conflicting scientific opinions would be a policy decision subject to *Chenery*. However, the determination that a particular facility was emitting a level higher than X would be a factual determination that a court could affirm or reverse for clear error, based upon reasoning not articulated by the decision on or review or by reference to evidence in the record not explicitly relied upon in the agency decision. This respects the authority of the agency to make policy, while giving the court a meaningful role in ensuring that individual agency actions are based upon substantial evidence and resolved without undo delay.

199. See *Weisgram v. Marley Co.*, 528 U.S. 440, 457 (2000) (affirming an appellate court’s authority to enter a final decision in favor of the party that lost the jury verdict); see also *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 331 (1967) (Black, J., dissenting).

200. The Federal Circuit’s decision in *Byron v. Shinseki* would have to be expressly overruled to make this possible. However, its application of *Chenery* merits reversal by the en banc court for the reasons articulated in this article. The Federal Circuit is no stranger to sidestepping *Chenery* in patent cases. See *Motomura*, *supra* note 164, at 880 (discussing tactics that the Federal Circuit uses to avoid applying *Chenery* in patent cases). Therefore, it should be open to accepting that over application of the doctrine is inappropriate in veterans law as well.

201. See Robert Greenleaf Brice & Katrina L. Sifferd, *Domestic Drone Surveillance: The Court’s Epistemic Challenge and Wittgenstein’s Actional Certainty*, 77 LA. L. REV. 805, 815 (2017); Louis Kaplow, *Information and the Aim of Adjudication: Truth or Consequences?*, 67 STAN. L. REV. 1303, 1350 (2015); Kenneth S. Klein, *Truth and Legitimacy (In Courts)*, 48 LOY. U. CHI. L.J. 1, 9 (2016). See generally RUSSELL HARDIN, *HOW DO YOU KNOW?: THE ECONOMICS OF ORDINARY KNOWLEDGE* (2009) (addressing the knowledge base of the ordinary person making choices); Ronald J. Bacigal, *Making the Right Gamble: The Odds on Probable Cause*, 74 MISS. L.J. 279 (2004) (discussing how we know probable cause exists).

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reasons for skepticism about a particular conclusion. However, appellate courts are not philosophers; they are officials within a system of government that exists to serve the citizens that support and legitimize its existence.

[S]ystem engineers concerned with social welfare need to aim explicitly at consequences. This message is not one opposed to truth per se but rather a strong admonition: it is dangerous to be attached to the alluring view that adjudication is primarily about generating results most in accord with the truth of the matter at hand.²⁰²

“Truth” is a will-o-the-wisp that can be chased endlessly. In the meantime, hundreds of thousands of veterans are awaiting answers,²⁰³ and more than a few will die without ever receiving them.²⁰⁴

Ultimately, the CAVC should spend far less energy remanding matters to the Board with open-ended instructions to consider additional evidence and arguments when the decision on appeal has already articulated several—or even dozens—of pages of analysis. Endless orders to provide additional reasons or bases simply do not develop a coherent body of law to guide adjudications, nor do they represent the correction of outcome-determinative errors. Instead, the CAVC should focus on pervasive, substantive questions of evidence, such as developing clear and coherent frameworks for determining credibility, the competence of lay evidence on medical issues, and the weighing of expert opinions.²⁰⁵

Now is a particularly opportune time for the Federal Circuit and the

202. Kaplow, *supra* note 201, at 1303.

203. As of October 2017, there were over 471,000 veterans with appeals pending before VA, including over 140,000 with appeals pending before Board. U.S. DEP’T OF VETERANS AFFAIRS, COMPREHENSIVE PLAN FOR PROCESSING LEGACY APPEALS AND IMPLEMENTING THE MODERNIZED APPEALS SYSTEM 6 (2017), <https://benefits.va.gov/benefits/docs/90-Day-Plan-CMR-PL-115-55.pdf>; see VACOLS REPORTS, *supra* note 58. These numbers dwarf the Board’s recent annual production of about 50,000 decisions per year. See BD. OF VETERANS’ APPEALS, REPORT OF THE CHAIRMAN OF THE BVA FOR FISCAL YEAR 2016, at 25 (2017), https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2016AR.pdf.

204. See Aaron Glantz, *Number of Veterans Who Die Waiting for Benefits Claims Skyrockets*, REVEAL FROM CTR. INVESTIGATIVE REPORTING (Dec. 20, 2012), <https://www.revealnews.org/article-legacy/number-of-veterans-who-die-waiting-for-benefits-claims-skyrockets/>.

205. Despite the centrality of these issues to veterans’ benefits determinations, the case law on these topics is appallingly thin. Although a few general statements have been articulated over the last decade, the courts have largely failed to apply those statements in precedential decisions so as to create a concrete body of law around the abstract ideals. See generally RIDGWAY, CASES AND THEORY, *supra* note 10, at ch. 8.

CAVC to revisit this hamster wheel²⁰⁶ that they have created. The recently enacted Veterans Appeals and Modernization Act of 2017 makes major structural changes effective in 2019.²⁰⁷ The driving force behind this legislation has been a recognition that much of the present dysfunction is driven by effective-date rules that have turned Board decisions into high-stakes events, in which a negative outcome can cost a veteran years of benefits, even if the claim were later reopened and granted.²⁰⁸ The Veterans Appeals and Modernization Act not only fixes the incentive problem at the agency level, but also extends this protection to the CAVC.²⁰⁹ Accordingly, the Board and the courts could then focus on the substance of whether the evidence proves entitlement, secure in the knowledge that a veteran whose claim had been denied could still ultimately prevail if the unfavorable decision alerted him or her to a gap in the evidence that could be filled.

CONCLUSION

Reasons-or-bases review by the CAVC is failing veterans. It constitutes the vast bulk of the output of the court, but does not contribute to either law giving or frequent correction of outcome-determinative errors. Rather, remands by the CAVC are often disconnected from the proceedings on remand and the data shows that the probability of an issue being granted by the Board has remained unchanged during the entire existence of the court, despite the large volume of appeals returned to the Board for readjudication.

To play a meaningful role in improving the adjudication process, the court must abandon the practice of wholesale reasons-or-bases remands, in favor of a traditional appellate approach of reviewing factual determinations. To do so, it must recognize that its typical review of Board decisions is not governed by the *Chenery* doctrine because judicial review of adjudicative facts in individual cases is fundamentally different from judicial review of policy making. Although policy making is the exclusive province of agencies, ordinary fact finding in an individual case is not. If the CAVC chooses to right its course, it has the opportunity to

206. The metaphor of the veterans benefits appeals process as a hamster wheel was first used in the CAVC by Judge Lance in a dissent to a reasons-or-bases remand. *See Coburn v. Nicholson*, 19 Vet. App. 427, 435 (2006) (Lance, J., dissenting).

207. Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115-55, 131 Stat. 1105 (to be codified in scattered sections of 38 U.S.C.).

208. *See H.R. 2288: Veterans Appeals Improvement and Modernization Act of 2017*, GovTRACK, <https://www.govtrack.us/congress/bills/115/hr2288> (last visited Jan. 4, 2018).

209. Veterans Appeals Improvement and Modernization Act § 5109B(l) (to be codified at 38 U.S.C. § 5110).

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not only improve the veterans benefits system, but also demonstrate to the larger world of administrative law that a proper understanding of *Chenery* can greatly improve the value that judicial review brings to improving the operation of executive agencies.