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ARTICLE

WHEN TIME IS OF THE ESSENCE: REVERSE, DON'T REMAND

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When Time is of the Essence: Reverse, Don't Remand

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*"Insanity [is] doing the same thing over and over again and expecting different results."*²

Albert Einstein

INTRODUCTION

Deep in the middle of the Nevada desert, one cool January morning in 1951, a B-50 Superfortress thundered toward its target location carrying an atomic bomb, code-named "Able," in its payload.³ Able was dropped approximately 30,000 feet above the Nevada Proving Grounds (NPG), landing with a deafening "thud" that surely awakened the people of Las Vegas from their beds.⁴ When the townspeople raced to their windows to figure out what had caused the ground to shake like an earthquake, they saw a mushroom cloud rising from the point of impact.⁵ The mushroom cloud could be seen from over 100 miles away.⁶ One thousand nuclear detonations later, the NPG would gain the distinction of being the most nuclear-bombed place on the planet.⁷ Private First Class (PFC) Dennis Acheson would soon be stationed at the NPG just in time for one of the largest nuclear tests ever conducted, codenamed "Harry."⁸ This test caused the heaviest contamination of "downwinders" of any U.S. continental test.⁹ As a result of all of the nuclear tests conducted at the NPG between 1951 and 1958, a cumulative total of 85,000 roentgens¹⁰ of external gamma ray exposure occurred.¹¹ "Harry," by itself, contributed 30,000 roentgens to that total.¹² Acheson, along with the other veterans that had once been stationed at the NPG, had a much higher chance of contracting deadly diseases later in life as a result of his exposure to radiation at the NPG.¹³

Let's leave the desert for a moment, and head to Washington, D.C., where the majority of veterans law is developed. We will return to the Nevada desert and PFC Acheson later in this Article. In recent years, the focus of much Congressional oversight has been how to modernize the United States Department

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² *Albert Einstein Quotes*, BRAINYQUOTE, <http://www.brainyquote.com/quotes/quotes/alberteins133991.html> (last visited Sept. 23, 2016).

³ See Keith Rogers, *Scientists Conducted First Atomic Bomb Test in 1951, Last in '92*, L.V. REV. J. (Jan. 11, 2014, 10:53 PM), <http://www.reviewjournal.com/nevada-150/scientists-conducted-first-atomic-bomb-test-1951-last-92>; see generally *Operation Upshot-Knothole*, NUCLEAR WEAPON ARCHIVE [hereinafter *Operation Upshot-Knothole*], <http://www.nuclearweaponarchive.org/Usa/Tests/Upshotk.html> (last modified June 19, 2002) (referencing the Nevada Proving Grounds).

⁴ See Rogers, *supra* note 3.

⁵ *Id.*

⁶ *Id.*

⁷ See *id.*

⁸ *Operation Upshot-Knothole*, *supra* note 3.

⁹ *Id.* "Downwinders" are civilians located downwind from a nuclear test site.

¹⁰ *Roentgen (unit)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Roentgen_\(unit\)](https://en.wikipedia.org/wiki/Roentgen_(unit)) (last modified May 12, 2016).

¹¹ *Operation Upshot-Knothole*, *supra* note 3.

¹² *Id.*

¹³ *Do X-rays and Gamma Rays Cause Cancer?*, AM. CANCER SOC'Y., <http://www.cancer.org/cancer/cancercauses/radiationexposureandcancer/xraysgammaraysandcancerrisk/x-rays-gamma-rays-and-cancer-risk-do-x-rays-and-gamma-rays-cause-cancer> (last modified February 24, 2015) (indicating that exposure to gamma and x-ray radiation increases cancer risk).

of Veterans Affairs (VA) to more efficiently provide our veterans with the benefits they have earned.¹⁴ Not only do our nation's veterans receive an unprecedented amount of benefits for their service,¹⁵ but because of advances in technology, especially in the area of battlefield armor, a higher percentage of veterans are returning home from war.¹⁶ While this is incredible news, it puts more pressure on the VA benefit system as the number of veterans applying for benefits steadily increases.¹⁷ The latest numbers from the VA show that it often takes many years for a veteran to successfully obtain the benefits requested.¹⁸

While there are many proposals for ways to reduce the amount of time it takes to process benefit claims, this Article attempts to work within the court system instead of looking to the overall VA structure. In other words, while there is more structural work that could be done, that is not the goal of this Article. This Article will address one specific way the United States Court of Appeals for Veterans Claims (CAVC) could help reduce the overall amount of time it takes for veterans' claims to be processed.¹⁹ The problem this Article will address is the proclivity for the CAVC to remand cases back to the Board of Veterans' Appeals (BVA) when the CAVC determines the denial of benefits was an error, instead of issuing a straight reversal. This hesitancy to issue complete reversals can add years to the amount of time it takes for a veteran to complete the claims process or result in the veteran never receiving the benefits at all. This Article will discuss this issue, clearly displayed in the case of PFC Acheson, where the CAVC declined to issue a reversal even though the evidence was undisputed and any decision unfavorable to the veteran would be clearly erroneous.²⁰

It has been suggested by some scholars that the CAVC should reverse decisions of the BVA, even if the BVA has failed to make a factual finding, when the CAVC is left with the "definite and firm conviction" that a mistake would be committed by denying the veteran's claim.²¹ Much time could be saved if the CAVC would reverse an erroneous decision, order the benefits to be awarded, and not allow the VA on remand to identify some other basis by which to deny the claim.²² This Article will go a step further and

¹⁴ *Adjudicating VA's Most Complex Disability Claims: Ensuring Quality, Accuracy and Consistency on Complicated Issues: Hearing Before the Subcomm. on Disability Assistance and Memorial Affairs of the H. Comm. on Veterans' Affairs*, 113th Cong. 3 (2013) (statement of Rep. Dina Titus, Ranking Minority Member).

¹⁵ Veterans are able to receive a variety of benefits upon honorable discharge from their service. These benefits include reduced-cost or no-cost health care services, financial assistance in paying for educational programs and assistance in buying a home or car, among many others. See generally *Fact Sheets*, U.S. DEP'T OF VETERANS AFFAIRS, <https://www.benefits.va.gov/benefits/factsheets.asp> (last visited Sept. 23, 2016) [hereinafter *Fact Sheets*].

¹⁶ James Dao, *Veterans Wait for Benefits As Claims Pile Up*, N.Y. TIMES, Sept. 27, 2012, at A1.

¹⁷ In 2012, the United States Department of Veterans Affairs (VA) received over 1 million claims for benefits, but only processed approximately 800,000. This resulted in unresolved claims stacking up while the number of new claims increased, and continues to increase. See *id.*; see also Beth McCoy, *Eliminate the Disability Backlog—Progress Update*, PERFORMANCE.GOV, 1) <https://obamaadministration.archives.performance.gov/content/eliminate-disability-claims-backlog.html> (last visited Sept. 23, 2016) (stating that the Veterans Benefits Administration completed over 1.38 million claims in FY 2015 and 1.32 million in FY 2014).

¹⁸ Michael P. Allen, *Justice Delayed: Justice Denied? Causes and Proposed Solutions Concerning Delays in the Award of Veterans' Benefits*, 5 U. MIAMI NAT'L SEC. & ARMED CONFLICT L. REV. 1, 11-13 (2015).

¹⁹ For nearly 170 years, Congress rejected the idea of providing judicial review of veterans' claims for benefits. But, in 1988, Congress reversed that trend and created the United States Court of Appeals for Veterans Claims (CAVC) "to provide an improved system of review of decisions of the [VA] with respect to claims for veterans' benefits." H.R. REP. NO. 100-963, at 1-9 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5782, 5790.

The authority for the CAVC is found at 38 U.S.C. § 7252 (2012). The CAVC is tasked with reviewing administrative decisions of the Board of Veterans' Appeals (BVA) and has the authority to reverse, affirm, or vacate and remand these decisions for further review.

²⁰ See *Byron v. Shinseki*, No. 09-4634, 2011 WL 2441683, at *6-7 (Vet. App. June 20, 2011).

²¹ Michael P. Allen, *Veterans' Benefits Law 2010-2013: Summary, Synthesis, and Suggestions*, 6 VETERANS L. REV. 1, 26 (2014).

²² *DeLoach v. Shinseki*, 704 F.3d 1370, 1379 (Fed. Cir. 2013) (holding the CAVC should exercise its reversal power when the BVA completes the necessary fact-finding but misweighs the evidence, even if the evidence is not uncontroverted). The U.S. Court of Appeals for the Federal Circuit (Federal Circuit) explained that Congress clearly intended for the CAVC to exercise its power to reverse clearly erroneous factual decisions. *Id.* The Federal Circuit pointed to the changes enacted by the Veterans Benefit Act of 2002 to show that

suggest, based on the jurisdictional language in Congress's mandate, that the CAVC's default position should be a complete reversal, with remand being an option only when the VA makes a showing of necessity.

This Article will follow the stories of three Veterans as they navigate the claims and appeals process, highlighting how the VA benefit system has worked properly, how the system has failed and unnecessarily delayed the award of benefits, and how it could work more efficiently in the future. Our first Veteran is Mr. William Mahlbacher who served in the U.S. Navy. This Article will follow Mr. Mahlbacher's voyage through the VA benefit system and discuss how the appeal process worked properly and culminated in the award of his benefits. The second Veteran is U.S. Army PFC Dennis Acheson. This Article will follow both his and his widow's 43-year march through the VA benefit system's seemingly endless cycle of remands and appeals. The third Veteran is a fictitious Veteran, U.S. Navy Chief Petty Officer John Yossarian (Ret.). This Article will discuss how, using the proper standard of review, the CAVC could have reversed the BVA's denial of Chief Yossarian's claim, ordered the benefits to be awarded, and not forced Chief Yossarian to continue to wait for his benefits.

Section I of this Article will provide an overview of the VA benefit system. This section will explain the process by which veterans apply for benefits and the process for a veteran to appeal a denial of his or her claim. Section II will discuss some of the delays that are present in the VA benefit system. This section will discuss how long it usually takes a veteran to receive the requested benefits and some of the reasons it takes a great deal of time to navigate the claims and appeal process. This section will also highlight some of the positive reasons for the delays currently in the system, such as the extensive protections that exist for our veterans. Section III of this Article will urge the CAVC to reverse more of the cases in which it finds the decision of the BVA to be erroneous. This section will also discuss the jurisdiction of the CAVC, the CAVC's congressional mandate, and Congress's intent for the CAVC to reverse and not remand incorrect decisions of the BVA. Section IV will display how the CAVC could more often reverse decisions of the BVA, instead of remanding cases, and thereby reduce the amount of time it takes for a veteran to get an award of benefits.

I. OVERVIEW OF THE VETERANS' BENEFIT SYSTEM

Well before its official creation, Abraham Lincoln defined the VA's primary goal in his Second Inaugural Address: "to care for him who shall have borne the battle."²³ Many would agree the VA's secondary goal is to provide veterans their benefits as quickly and efficiently as possible.²⁴ A less apparent,

Congress "expect[s] the [CAVC] to reverse clearly erroneous findings when appropriate, rather than remand the case." *Id.* at 1380 (citing 148 Cong. Rec. 22,913, 22,917 (2002) (statement of Sen. Rockefeller)).

²³ President Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), in *LINCOLN: SELECTED SPEECHES AND WRITINGS* 449-50 (Don E. Fehrenbacher ed., The Library of America ed., First Vintage Books 1992). Today, these words are inscribed on the entrance to the VA's central offices in Washington, D.C. The VA selected these words as its motto in 1959, reflecting the VA's unwavering commitment "to care for those injured in our nation's defense and the families of those killed in its service." *The Origin of the VA Motto: Lincoln's Second Inaugural Address*, U.S. DEP'T OF VETERANS AFFAIRS, <http://www.va.gov/opa/publications/celebrate/vamotto.pdf> (last visited June 18, 2016).

²⁴ In 1636, the Pilgrims were the first group in the "Americas" to create a system of awarding benefits to veterans to support those colonists who were injured defending the colony. Rhode Island provided benefits for every officer, soldier, and sailor who served in the colony's armed services, and extended the benefits to the wives, children, parents and other relations who had been dependent upon a slain servicemember. "The physically disabled were to have their wounds carefully tended and healed at the colony's expense, while in the meantime an annual pension was provided him out of the general treasury sufficient for the maintenance of himself and family, or other dependent relatives." U.S. CONG., H. COMM. ON VETERANS' AFFAIRS, 84TH CONG. 1ST SESS., *THE PROVISION OF FEDERAL BENEFITS FOR VETERANS, AN HISTORICAL ANALYSIS OF MAJOR VETERANS LEGISLATION, 1862-1954*, 1-2 (1955). The Continental Congress in 1776 authorized the provision of medical care and pensions for disabled veterans after the Revolutionary War. Following World War I, Congress established

but no less important, structure existing for our veterans came about in 1988, with the creation of the CAVC, when Congress passed the Veterans' Judicial Review Act ("VJRA")²⁵ to ensure veterans were not wrongfully denied, without judicial recourse, the benefits that Congress had intended for them to receive.²⁶

A. The History of the CAVC

The VJRA created a veteran-specific Article I court of appeal²⁷ that gave veterans, for the first time, expanded judicial review of decisions by the BVA.²⁸ Not only did this ensure veterans had recourse against the improper denial of claims, but "[t]he implementation of judicial review caused the BVA to make several significant improvements to its adjudication process."²⁹ All of the liberally awarded benefits given to those who have served (healthcare, education, disability compensation, life insurance, mortgage assistance, just to name a few)³⁰ are not actually beneficial if the veteran must wait for years to receive them.³¹ All of these benefits are excellent and properly reward veterans for their service, but too many veterans are waiting far too long to receive the benefits they have earned.³² Many veterans are stuck in the claims and appeal process, years after filing a claim, still waiting to actually receive the benefits. When this Article talks about benefits, it will be referring to the most common benefit sought by veterans, disability compensation, unless noted otherwise. In order to develop a claim for disability benefits, a veteran must prove: (1) the existence of a present disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship between the present disability and the disease or injury incurred or aggravated during service.³³ The following section describes the process a veteran must use to apply for disability compensation.

the Veterans Bureau to provide those who had served with disability compensation, insurance, and vocational rehabilitation for the disabled. In 1930, President Herbert Hoover elevated the Veterans Bureau to a federal administration, creating what is now known as the VA. But it was not until 1988 that President Reagan elevated the VA to a cabinet-level position. *See VA History*, U.S. DEP'T OF VETERANS AFFAIRS, http://www.va.gov/about_va/vahistory.asp (last visited Sept. 25, 2016).

²⁵ Veterans' Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4105 (1988) (codified as amended in scattered sections of 38 U.S.C.).

²⁶ *See Henderson v. Shinseki*, 562 U.S. 428, 432 (2011). Prior to the Veterans' Judicial Review Act of 1988 (VJRA), a veteran could only seek review of VA decisions on constitutional grounds or challenge the VA's application of a statute if it had been subsequently amended. *See id.* at n.1. The VJRA allowed for judicial review of VA decisions adverse to the veteran on much more expanded grounds. The veteran could now challenge the interpretation of a statute or regulation, the BVA's factual determinations, and the BVA's discretionary decisions. 38 U.S.C. § 7261 (2012).

²⁷ The CAVC is an Article I court, meaning it was given its authority by Congress and does not derive its authority from Article III of the U.S. Constitution. Nevertheless, the CAVC's review, codified at 38 U.S.C. § 7261 (2012), is similar to that of an Article III court reviewing an agency decision under the Administrative Procedure Act (APA), which has its scope of review codified at 5 U.S.C. § 706 (2012).

²⁸ *Court History*, U.S. COURT OF APPEALS FOR VETERANS CLAIMS, <http://www.uscourts.cavc.gov/history.php> (last visited Sept. 25, 2016).

²⁹ Rory E. Riley, *Simplify, Simplify, Simplify—An Analysis of Two Decades of Judicial Review in the Veterans' Benefits Adjudication System*, 113 *W. VA. L. REV.* 67, 68 (2010). "For example, early CAVC decisions required the BVA to include a statement of 'reasons or bases' for its findings and conclusions, eliminate its panel of experts format, and to refrain from using its own medical judgment in rendering BVA decisions." *Id.*; *see Colvin v. Derwinski*, 1 Vet. App. 171 (1991) (preventing the BVA from substituting its own medical judgment); *Gilbert v. Derwinski*, 1 Vet. App. 49 (1990) (requiring the BVA to supply the "reasons and bases" for its findings and conclusions); *see generally* Charles L. Cragin, *A Time of Transition at the Board of Veterans' Appeals*, 38 *FED. B. NEWS & J.* 500, 501-02 (1991) (discussing medical issues under the VJRA).

³⁰ *See Fact Sheets*, *supra* note 15.

³¹ *See generally* Allison Hickey, *VA Expediting Claims Decisions for Veterans Waiting a Year or More*, U.S. DEP'T OF VETERANS AFFAIRS: VANTAGE POINT (Apr. 19, 2013, 2:51 PM) <http://www.blogs.va.gov/VAntage/9217/va-expediting-claims-decisions-for-veterans-waiting-a-year-or-more> (noting that the VA has provided over \$58 billion in disability compensation to 4.3 million veterans and their survivors in 2012).

³² *See, e.g.,* Michelle Ye Hee Lee, *Irate Veterans Complain about VA Benefits Delays*, *THE ARIZ. REPUBLIC* (Aug. 20, 2014), <http://www.azcentral.com/story/news/local/phoenix/2014/08/21/irate-veterans-complain-va-benefits-delays/14375933>; Susan Seliger, *The "Long and Unacceptable" Wait for a Veterans' Benefit*, *N. Y. TIMES*, (May 15, 2013, 6:00 AM), <http://newoldage.blogs.nytimes.com/2013/05/15/the-long-and-unacceptable-wait-for-a-veterans-benefit>; Gregg Zoroya, *VA Struggles with Benefits Paid to Veterans*, *USA TODAY* (July 14, 2014, 12:28 AM), <http://www.usatoday.com/story/news/nation/2014/07/14/va-backlog-committee-hearingveterans/12573043>.

³³ *Hickson v. West*, 12 Vet. App. 247, 252 (1999).

B. How the VA Benefit System Should Work

A veteran begins the process of applying for disability compensation by submitting a claim at one of 57 Regional Offices (ROs).³⁴ If the veteran's claim is approved by the RO, he or she is granted the requested benefits according to the disability ratings tables established by Congress.³⁵ If the veteran is denied, or in some way unsatisfied by any part of the decision, he or she may file a notice of disagreement (NOD) with the RO, and the VA will then create a Statement of the Case (SOC) stating the laws and regulations used as a basis to deny the claim.³⁶ If the veteran is still unsatisfied, he or she may appeal the decision to the BVA by submitting a VA Form 9 to the RO stating the reason(s) the veteran believes the RO's decision is incorrect.³⁷ The BVA will review the RO's decision, affirm the decision if it believes the case was decided correctly, remand the case back to the RO if there is error found in the decision, or reverse the decision and order the RO to award the benefits.³⁸ Because of the pro-veteran nature of the system, the VA is not able to appeal a BVA decision favorable to the veteran.³⁹ If, however, the BVA denies the veteran's claim, the veteran may appeal to the CAVC, the first level of adversarial litigation and the entry point into the federal court system.⁴⁰ When reviewing a decision of the BVA, the CAVC may reverse the decision and award the benefits requested, remand the case to the BVA for additional findings, or affirm the decision of the BVA and deny the request for benefits.⁴¹ The claimant or the VA may appeal a CAVC decision to the United States Court of Appeals for the Federal Circuit (Federal Circuit) by filing a notice of appeal.⁴² Once the Federal Circuit renders a decision, the claimant or the VA has 90 days to petition the U.S. Supreme Court for review.⁴³

As mentioned above, this process can take an extremely long time.⁴⁴ After a veteran files a claim, the VA has a self-imposed deadline of 125 days to complete the claim and either grant or deny the benefits.⁴⁵ Once a decision is mailed from the RO, the veteran has one year to file the NOD. Once the NOD is filed, the RO is required to prepare the SOC. In 2013, on average, it took the VA 295 days

³⁴ The Regional Offices (RO) will assign the claim to a Veterans Service Representative (VSR) who will determine what evidence is needed to process the claim. The VSR will acquire all the evidence necessary to process the claim, and, if needed, ask the veteran to provide evidence in support of the claim. Once the VSR receives all of the evidence necessary, the VSR will recommend a decision for review and final approval. See *Claims Process*, U.S. DEP'T OF VETERANS AFFAIRS, <http://www.benefits.va.gov/compensation/process.asp> (last visited Sept. 25, 2016).

³⁵ Congress establishes the rating tables, which the VA then implements by regulation. These tables are published by the VA in 38 C.F.R. Part 4 (2015).

³⁶ 38 U.S.C. § 7105(a) (2012). A veteran's appeal is initiated by the filing of the notice of disagreement (NOD).

³⁷ After the NOD has been filed and the Statement of the Case (SOC) has been received, the veteran will submit to the RO the VA Form 9, Appeal to Board of Veterans' Appeals ("substantive appeal"), to complete the veteran's part of the process. 38 C.F.R. §§ 20.200, 20.202 (2015). On appeal, the BVA will conduct a de novo review of the findings made by the RO and give no deference to the RO's decision. 38 U.S.C. § 7104(a) (2012).

³⁸ See *Disabled Am. Veterans v. Sec. of Veterans Affairs*, 419 F.3d 1317, 1319 (Fed. Cir. 2005) (giving the BVA the authority to reverse decisions of the RO); see also 38 C.F.R. § 19.9(a) (2015) (giving the BVA the authority to remand cases back to the RO if further factual determinations need to be made).

³⁹ The VA cannot appeal an adverse decision of the RO or the BVA, but can file an appeal to the Federal Circuit after an adverse decision of the CAVC. 38 U.S.C. §§ 7252(a), 7292(a) (2012).

⁴⁰ The CAVC has exclusive jurisdiction to review decisions of the BVA, and the review is limited to the record developed below at the RO and the BVA. *Id.* § 7252(a), (b).

⁴¹ "The [CAVC] shall have exclusive jurisdiction to review decisions of the [BVA]. The Secretary may not seek review of any such decision. The [CAVC] shall have power to affirm, modify, or reverse a decision of the [BVA] or to remand the matter, as appropriate." *Id.* § 7252(a).

⁴² See *id.* § 7292(a), (c). Review of the CAVC's decision by the Federal Circuit is limited by statute. See *id.*

⁴³ *Id.* § 7292(c); 28 U.S.C. §§ 1254(1), 2101(c) (2012).

⁴⁴ Allen, *supra* note 18, at 10-14.

⁴⁵ *Performance and Accountability Report*, U.S. DEP'T. OF VETERANS AFFAIRS, Part II-21 (2014), <http://www.va.gov/finance/afr/index.asp> (follow Fiscal Year 2014 "Archive" hyperlink).

to provide the veteran with the SOC.⁴⁶ Therefore, at this stage in the claim process, assuming the VA meets the 125-day deadline to make an initial decision on the claim, the veteran has already waited 420 days, but has still not even perfected the appeal to the BVA. The next step, after the veteran receives the SOC from the RO, is to submit a Form 9 for the RO to certify the appeal to the BVA. This certification stage leaves the veteran at the mercy of the RO, which in fiscal year 2013 took an average of 725 days to complete.⁴⁷ To do the math, 725 days is just five days shy of two years. This brings the total wait time to 1,145 days just to have the appeal certified to the BVA.

At the BVA, it took approximately 235 days for a decision to be rendered in fiscal year 2013,⁴⁸ bringing the total wait time to 1,380 days. If we assume the veteran is fortunate enough to not receive a remand at the BVA level (which, in fiscal year 2013, occurred in 45.6% of cases),⁴⁹ the veteran may appeal to the CAVC for the first level of judicial review. In fiscal year 2014, it took an average of 286 days from the filing of the appeal for the CAVC to dispose of the case.⁵⁰ So, if the veteran finally received an award of benefits at the CAVC, never having experienced a remand, the process would take 1,666 days, which is over four and a half years. But, that is not a very likely scenario. Since the CAVC remands over 70% of the cases it receives, it is likely the veteran will not receive the requested benefits and will be sent back to suffer through the very cycle that led to review at the CAVC.⁵¹

But, that is not to say that there are not cases where the CAVC does appropriately reverse the BVA and award the requested benefits. The story of Mr. Mahlbacher is a great example of how a veteran can proceed through the benefit claim process, receive a denial to his request for benefits by the RO and the BVA, but obtain a favorable decision after appealing to the CAVC.⁵² In his case, the CAVC appropriately reversed the decision of the BVA and awarded the benefits requested.⁵³ Mr. Mahlbacher applied to the VA for disability benefits for bilateral hearing loss and tinnitus resulting from his service.⁵⁴ Mr. Mahlbacher filed his claim for benefits at his local RO, but his claim was denied.⁵⁵ Mr. Mahlbacher had been assisted by the VA in developing his claim, and was provided with an audiological examination to determine the extent and cause of his disability.⁵⁶ After the first examination, the audiologist determined there was no evidence of a disability, and the RO subsequently denied his claim.⁵⁷ On appeal, the BVA rejected that decision and remanded the case for a new examination.⁵⁸

On remand to the RO, the same audiologist conducted another examination, and this time determined there was no evidence of acoustic trauma during the Veteran's military service; thus, there could be no award of disability benefits.⁵⁹ Based on the audiologist's second report, when evaluating

⁴⁶ BOARD OF VETERANS' APPEALS, DEP'T OF VETERANS AFFAIRS, REP. OF THE CHAIRMAN, FISCAL YEAR 2013, at 21 (2015) [hereinafter BVA FY 2013 REP.], available at http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2013AR.pdf.

⁴⁷ See *id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 25.

⁵⁰ U.S. COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORT, FISCAL YEAR 2014, at 3 (2014), available at <https://www.uscourts.cavc.gov/documents/FY2014AnnualReport06MAR15FINAL.pdf>.

⁵¹ See Allen, *supra* note 18, at 12, 17-19 (discussing the number of remands that occur in the VA system).

⁵² Mahlbacher v. Shinseki, No. 10-0768, 2011 WL 2923720 (Vet. App. July 22, 2011).

⁵³ *Id.* at *1.

⁵⁴ *Id.*

⁵⁵ See *id.*

⁵⁶ *Id.* at *2.

⁵⁷ See *id.*

⁵⁸ *Id.*

⁵⁹ Since there was no acoustic trauma in Mr. Mahlbacher's service, the audiologist determined the nexus requirement could not be established. See *id.*

Mr. Mahlbacher's claim for the three elements required to establish an entitlement to benefits, the RO concluded Mr. Mahlbacher currently suffered from bilateral hearing loss and currently experienced tinnitus, conceded, contrary to the audiologist's report, that the Veteran experienced acoustic trauma in service, but found the nexus between the current disability and active service was not established.⁶⁰ The RO again denied the claim for benefits, and the case was returned to the BVA for further appellate review.⁶¹ On this second review of the claim, the BVA determined "that there [was] no competent evidence of a connection between Mr. Mahlbacher's in-service acoustic trauma and his current bilateral hearing loss and tinnitus."⁶² In years gone by, this is where the story would end. But because of the VJRA and the creation of the CAVC, Mr. Mahlbacher had the opportunity for additional judicial review.

On appeal to the CAVC, Mr. Mahlbacher argued, and the Secretary of the VA (Secretary) agreed, that the audiologist's report that the BVA relied on in denying his claim was based on an inaccurate factual premise.⁶³ It was undisputed that Mr. Mahlbacher had a disability and had suffered acoustic trauma during his service.⁶⁴ The only question remaining was whether a nexus could be established between the Veteran's service and the current disability.⁶⁵ The CAVC determined there were two ways to view the evidence before it: either finding that Mr. Mahlbacher had established his claim since he had submitted evidence of a nexus, or finding that the nexus is incapable of being determined.⁶⁶ The CAVC determined under both views of the evidence that the BVA would be required to award the benefits.⁶⁷ In the event Mr. Mahlbacher's evidence of a nexus was true, it was undisputed the BVA would have to award the benefits.⁶⁸ If the nexus could not be determined, since the BVA must resolve all "ties" in the Veteran's favor,⁶⁹ the BVA would still be required to award the benefits.⁷⁰ Thus, the only dispute remaining was whether the CAVC should reverse the BVA decision and grant the benefits or remand to the BVA for further evaluation of Mr. Mahlbacher's claim.⁷¹ The CAVC reversed the decision of the BVA and remanded the case to the BVA with instructions to award the benefits, holding that "[r]eversal is the appropriate remedy when the only permissible view of the evidence is contrary to the [BVA]'s decision."⁷² For Mr. Mahlbacher, this decision by the CAVC concluded his claim process. Mr. Mahlbacher's entire claim process, from the filing of the claim to the CAVC's decision awarding the benefits, took approximately five years.⁷³ It should be noted that it took five years to complete the process with the benefit of a reversal by the CAVC. One can only imagine how long it would have taken had the CAVC ordered a remand.

⁶⁰ *See id.*

⁶¹ *See id.*

⁶² *Id.* at *1.

⁶³ *Id.* at *2 (stating that the examining audiologist found that Mr. Mahlbacher had not experienced acoustic trauma in his service, although the BVA had already decided this point as a matter of law).

⁶⁴ *Id.*

⁶⁵ *See id.* at *3.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Just as in baseball the "tie" goes to the runner, in veterans' law the "tie" goes to the veteran. *Forshey v. Principi*, 284 F.3d 1335, 1362-63 (Fed. Cir. 2002). "When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant." 38 U.S.C. § 5107(b) (2012).

⁷⁰ *Mahlbacher*, 2011 WL 2923720, at *2. The "benefit of the doubt" standard is distinctly different from standards applicable to most adjudicatory proceedings, where claimants are required to produce a preponderance of evidence so that the weight of the evidence favors their claims. *See Forshey*, 284 F.3d at 1362-1364.

⁷¹ *Mahlbacher*, 2011 WL 2923720, at *3.

⁷² *Id.*

⁷³ *See generally id.*

Looking at the alternatives, this is a nearly ideal scenario for the veteran. After going through the RO claims process and the BVA appellate process, the CAVC provides the appropriate judicial review, reverses erroneous decisions of the BVA, and awards the benefits requested. But sadly, the system does not always work so well.

II. BE CAREFUL WHAT YOU ASK FOR; YOU JUST MIGHT GET IT

It is impossible to listen to or read news reports concerning the VA without finding volumes of information, mostly negative, regarding the delays in the benefit system.⁷⁴ What likely will not be found is information explaining why some of the reasons for the delays in the system are actually positives. This section will address the positive aspects of the VA system that, as an unfortunate byproduct, cause delays.

If one were to just look at the VA system from a distance, one would immediately assume inefficiency and bureaucracy cause the delays in such a large system, and that would be partly correct. But, it is often overlooked that a major cause of the delays in the VA system is because the system is replete with protections for our nation's veterans.⁷⁵ The old saying, "be careful what you ask for, because you just might get it," appropriately describes the VA system, since everyone would agree veterans deserve the protections and benefits they have earned, and, in fact, may even deserve more. But for every additional benefit and protection provided by Congress, the delays and the wait for benefits seems to grow. While many well-intentioned members of Congress press for more and more system-wide protections for veterans, these same protections also tend to lead to more delays in the benefit system.

Instead of putting the priority on processing claims as quickly as possible and outright denying those claims that seem likely to fail, the VA puts a priority on ensuring veterans have a pro-claimant, non-adversarial system in which to apply for benefits.⁷⁶ This is seen in the special protections the VA system provides for veterans not seen in other agencies.⁷⁷ This section will highlight three of the ways Congress has expressed a "special solicitude" for the veteran in the benefit process.⁷⁸

A. The VA Has a Duty to Assist the Veteran

The fundamental duty of the VA in the claims process is to assist the veteran in developing the claim.⁷⁹ This duty even requires the VA to actively acquire all the necessary evidence to support

⁷⁴ There is a seemingly endless supply of news reports discussing the delays in the VA claims system. And it is well documented these delays can cause substantial hardships and endless frustration to veterans. See, e.g., Byron Pitts, *Why the VA Frustrates Veterans*, CBS NEWS (Jan. 1, 2010), <http://www.cbsnews.com/news/why-the-va-frustrates-veterans>.

⁷⁵ See Allen, *supra* note 18, at 17-18; see generally Hensley v. West, 212 F.3d 1255, 1262 (Fed. Cir. 2000) (recognizing that the veterans' benefit system is "uniquely pro-claimant"); see also Nolen v. Gober, 222 F.3d 1356, 1361 (Fed. Cir. 2000) (citing Hayre v. West, 188 F.3d 1327, 1333-34 (Fed. Cir. 1999) (pointing out Congress's intent for the VA system to be a "strongly and uniquely pro-claimant system of awarding benefits to veterans.")).

⁷⁶ The VA benefit system was created by Congress to award benefits "to those who risked harm to serve and defend their country," and the "entire scheme is imbued with special beneficence from a grateful sovereign." Jaquay v. Principi, 304 F.3d 1276, 1286 (Fed. Cir. 2002) (citing Bailey v. West, 160 F.3d 1360, 1370 (Fed. Cir. 1998) (Michel, J., concurring)); see also Rizzo v. Shinseki, 580 F.3d 1288, 1291 (Fed. Cir. 2009) (recognizing that the VA benefits adjudication system is "non-adversarial and paternalistic").

⁷⁷ The VA system provides more than just a non-adversarial system. For example, in *Sims v. Apfel*, 530 U.S. 103, 105 (2000), the United States Supreme Court determined the doctrine of issue exhaustion was relaxed for claimants in the Social Security system because the system is non-adversarial. However, even the non-adversarial Social Security system does not have all the protections of the VA system. The VA system goes beyond non-adversarial to actually a pro-veteran system.

⁷⁸ Shinseki v. Sanders, 556 U.S. 396, 398 (2009).

⁷⁹ From the statutory requirement to assist the veteran in locating pertinent information and records to operating a pro-claimant and

veterans whose claims seem likely to fail. The VA will automatically obtain the veteran's service records, VA medical records, and any service medical records.⁸⁰ Additionally, the VA has a duty to obtain any other relevant records held by any federal department or agency that the claimant adequately identifies and authorizes the Secretary to obtain.⁸¹ The VA must also make reasonable efforts to obtain any other records that the veteran can identify that would assist the veteran in developing his or her claim.⁸² If the records identified cannot be obtained, the Secretary must inform the veteran and allow the veteran to submit additional information that could be used to locate the records.⁸³ This is a key difference between the veterans' claim process and the normal realm of civil litigation. In federal district courts, the denial of a discovery request is likely not grounds for appeal. But the failure of the VA to fulfill its duty to assist in "discovery" is grounds for the BVA or the CAVC to reverse a denial of benefits and remand the case for further proceedings.⁸⁴ Further complicating this duty, the veteran can submit "new and material evidence" after his or her claim has been denied,⁸⁵ in order to have the claim re-evaluated, or even submit new evidence while the claim is still pending.⁸⁶ Anytime a veteran submits new testimony or new evidence supporting his or her claim, the VA's duty to assist the veteran comes into play, and as the VA begins to help develop the claim based on this new evidence, any more evidence the veteran stumbles upon triggers again the duty for the VA to assist the veteran. The image of a hamster wheel springs to mind when one thinks of the VA's duty to assist the veteran develop his or her claim coupled with the ability for the veteran to submit new evidence at any time. While the duty to assist veterans is a fundamental duty of the VA and a cherished right of the veteran, it can certainly be seen how it would add to the time it takes to process a veteran's claim.

B. The BVA Must Provide Adequate "Reasons and Bases"

While the duty to assist affects the VA claims-processing system at every level, the "reasons and bases" requirement protects the veteran at the appellate level of review. The BVA, when reviewing decisions of the RO, reviews the case de novo, but must state the factual and legal reasoning for denying a veteran's claim.⁸⁷ This additional protection, brought about when Congress created the CAVC and simultaneously added this provision to the BVA's governing statute, requires the BVA to produce "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."⁸⁸

pro-veteran system, it is apparent from the entire body of veterans' law that the VA's primary job is to assist the veteran in developing his or her claim. *See generally* 38 U.S.C. § 5103A (2012) (outlining the VA's duty to assist claimants); *see also* 38 C.F.R. § 3.159 (2015).

⁸⁰ 38 U.S.C. § 5103A(c)(1)(A).

⁸¹ *Id.* § 5103A(c)(1)(C). A claim for posttraumatic stress disorder (PTSD) is quickly becoming one of the most common claims among the veterans returning from Afghanistan and Iraq. Unfortunately, it is also one of the hardest claims to prove. To support a claim for PTSD, the veteran must submit evidence of an in-service stressor. In many cases, the stressor is combat-related and must be established through classified unit records stored in federal custody. *See, e.g.,* Moran v. Principi, 17 Vet. App. 149, 152 (2003).

⁸² *See* Moore v. Nicholson, 21 Vet. App. 211, 213-15 (2007).

⁸³ 38 U.S.C. § 5103A(b)(2).

⁸⁴ *See* Lind v. Principi, 3 Vet. App. 493, 494-95 (1992).

⁸⁵ 38 C.F.R. § 3.156(a) (2015). If during the claims process a veteran is denied his or her claim for benefits, the veteran may re-open the claim if he or she is able to produce "new and material evidence" in support of the claim. *See id.* "If new and material evidence is presented or secured with respect to a claim which has been disallowed, the Secretary shall reopen the claim and review the former disposition of the claim." 38 U.S.C. § 5108 (2012); *see also* Jones v. McDonald, No. 13-1712, 2014 WL 3909112, at *4 (Vet. App. Aug. 12, 2014) (holding that the threshold is "low" in regards to the standard of raising a reasonable possibility of substantiating a claim).

⁸⁶ *See* 38 C.F.R. § 3.156(b) (2015).

⁸⁷ 38 U.S.C. § 7104(d)(1) (2012).

⁸⁸ *Id.* The BVA must provide this written statement in order to "enable an appellant to understand the precise basis for the [BVA]'s decision

This was partly to create a complete record for the CAVC to review agency decisions, but it was also important to ensure the BVA was correctly interpreting statutes and regulations and following its duty to assist the veteran develop the claim.

This protection ensures that appellate review of the CAVC is not rendered meaningless by an incomplete record. For instance, if the BVA failed to account for a piece of material evidence that was favorable to the claimant, the CAVC could easily identify the BVA's error and remand the case for the BVA to reconsider that piece of evidence. This added requirement also gives more notice to the veteran of what is occurring at the BVA. Many veterans waive their right to have oral argument in front of the BVA, in the interest of time, and instead rely solely on the BVA's written decision to determine how the VA is handling their appeals.⁸⁹ This protection ensures the veteran understands why the claim was denied, which evidence was found to be credible and persuasive, and what additional evidence is needed to rebut the VA's witnesses or support his or her claim.

While this may seem like an unimportant protection, often it will provide veterans an opportunity to have their case reheard by the BVA in cases where the BVA does not present sufficient evidence to support its conclusion,⁹⁰ or does not display a valid and comprehensive basis for the denial of benefits.⁹¹ Every finding the BVA makes regarding a material issue of law or fact must be supported with an adequate statement of reasons and bases.⁹² This requirement is incredibly important, but understandably, this requirement also leads to many, many more remands. Any failure by the BVA to fulfill its obligation under § 7104(d)(1) will result in an automatic remand back to the BVA, and an opportunity for the veteran to "play again."

C. The BVA Must Address All Theories Reasonably Raised by the Record

After a veteran receives an adverse decision by the RO, he or she may seek review of the decision by the BVA.⁹³ At this stage, the BVA has an affirmative duty to read the veterans' pleadings

as well as to facilitate review in [the CAVC]." *Ashley v. McDonald*, No. 13-2233, 2014 WL 7336898, at *3 (Vet. App. Dec. 23, 2014) (citing 38 U.S.C. § 7104(d)(1)). The BVA must not just list the evidence used, but also analyze the credibility and probative value of the evidence, describe which evidence it finds persuasive and unpersuasive, and explain the rejection of any material evidence favorable to the claimant. *Id.* (citing *Caluza v. Brown*, 7 Vet. App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996)).

⁸⁹ In Fiscal Year 2015, the BVA issued nearly 56,000 decisions but held less than 13,000 hearings. See U.S. BOARD OF VETERANS APPEALS, ANNUAL REPORT, FISCAL YEAR 2015, at 4 (2015), available at https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2015AR.pdf.

⁹⁰ See *Fallo v. Derwinski*, 1 Vet. App. 175, 177 (1991) (remanding a case back to the BVA holding that the BVA's findings and conclusions were so vague that it was impossible to review its decision); *Sammarco v. Derwinski*, 1 Vet. App. 111, 113-14 (1991) (remanding a case back to the BVA for further consideration when the "the incomplete nature of the decision below does not permit proper review by [the CAVC]"). In *Sammarco*, the CAVC remanded the case instructing the BVA "to comply promptly with the requirement of 38 U.S.C. § 4004(d)(1) that its findings and conclusions be accompanied by 'reasons or bases' adequate to explain both to the [appellant] and to this Court its factual findings and its conclusion." *Id.*; see also *Camp v. Pitts*, 411 U.S. 138, 142-43 (1973) (holding that a case before an agency must be vacated and remanded "[i]f that finding is not sustainable on the administrative record made") (citing *SEC v. Chenery Corp.*, 318 U.S. 80 (1943)).

⁹¹ See *Abernathy v. Principi*, 3 Vet. App. 461, 465 (1992) (stating that the mere listing of the relevant evidence is not adequate to fulfill the BVA's obligation to provide a statement of reasons or bases for its decision).

⁹² See, e.g., *Cooper v. McDonald*, No. 13-1993, 2014 WL 6685353, at *3-4 (Vet. App. Nov. 26, 2014). In *Cooper*, the BVA was evaluating whether the veteran was totally disabled due to her service injury and therefore unemployable. But in evaluating her claim, the BVA failed to "address her occupational history and education level [and] the aggregate effect of her multiple service-connected disabilities on her ability to maintain or secure substantially gainful employment." *Id.* Thus, the BVA's decision was vacated and remanded back to the BVA for further consideration. *Id.* at *6.

⁹³ See *Allen*, *supra* note 18, at 6. Historically, there has been a consistent rate of appeal of approximately 10% of initial decisions. *Id.* at 11. As there were approximately 1.3 million claims filed in fiscal year 2014, there were likely 130,000 claims appealed to the BVA. *Id.* at 10-11.

sympathetically⁹⁴ and to address all theories of entitlement either presented by the veteran or reasonably raised by the record.⁹⁵ The CAVC will likely remand a case back to the BVA for further consideration if the BVA fails to address a potential theory of entitlement.⁹⁶ This is a fundamentally different role from the rest of the federal court system. Normally, the BVA, as a quasi-appellant tribunal, should only decide cases on the questions presented by the parties.⁹⁷ But here, the CAVC has defined the BVA's role as exactly the opposite. The BVA must address all claims reasonably raised by the record. In a sense, the BVA becomes both judge and advocate.⁹⁸ The BVA must not only decide the claim, but also carefully examine the record to ensure there is no other theory of entitlement, overlooked by the veteran, that would result in an award of the benefits requested.⁹⁹ As the veteran navigates the claims process, these protections ensure that he or she has every possible resource to be awarded the benefits deserved, but can also make it more difficult for claims to be processed quickly.

III. THE CAVC SHOULD INCREASE THE NUMBER OF REVERSALS

The focus of this Article is not about removing the protections the veteran currently enjoys in order to reduce delays in the VA,¹⁰⁰ but rather targeting a bureaucratic delay affecting approximately 71% percent of the cases that come before the CAVC and eliminating the hamster wheel of remands and appeals by which the VA is able to seemingly endlessly develop new theories to deny a veteran's claim.¹⁰¹ This Article is not suggesting there will never be an instance in which there may be a need for further factual findings or for the BVA to make a determination based on a different legal standard. However, this Article presents the proposition that the burden to show that there is a need for a remand should rest solely on the VA. The default position should be a complete reversal, with remand being an option only when the VA makes a showing of necessity.

⁹⁴ See *Roberson v. Principi*, 251 F.3d 1378, 1384 (Fed. Cir. 2001) (requiring the VA to read sympathetically the veteran's filings to "determine all potential claims raised by the evidence"); see also *Hodge v. West*, 155 F.3d 1356, 1362-63 (Fed. Cir. 1998) (citing H.R. REP. NO. 100-963, at 1-9 (1988), reprinted in 1988 U.S.C.A.N. 5782, 5794-95) ("Congress expects [the VA] to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits.").

⁹⁵ *Brannon v. West*, 12 Vet. App. 32, 34 (1998) (concluding that the BVA must "adjudicate all issues reasonably raised by a liberal reading of the appellant's substantive appeal, including all documents and oral testimony in the record prior to the [BVA]'s decision").

⁹⁶ *Coburn v. Nicholson*, 19 Vet. App. 427, 432-33 (2006) (holding that the failure to clearly explain why favorable evidence was being rejected required a remand); *Sanders v. Principi*, 17 Vet. App. 232, 236 (2003) (remanding a case back to the BVA holding that the failure to discuss statements made at a BVA hearing was an error); *Gaines v. West*, 11 Vet. App. 353, 359 (1998) (remanding the case back to the BVA holding that the failure to discuss a potentially relevant statute required remand); *YR v. West*, 11 Vet. App. 393, 398 (1998) (remanding the case back to the BVA holding that the failure to discuss lay statements submitted by the claimant's family member required remand).

⁹⁷ The normal process in our justice system is that the parties present the arguments for the court or tribunal to consider, and only those issues are considered. As Justice Scalia has written, "[o]ur adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief." *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in judgment); Benjamin Kaplan, *Civil Procedure—Reflections on the Comparison of Systems*, 9 BUFFALO L. REV. 409, 431-32 (1960) ("[T]he American system exploits the free-wheeling energies of counsel and places them in adversary confrontation before a detached judge").

⁹⁸ 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, 126-27 (2009).

⁹⁹ *Robinson v. Peake*, 21 Vet. App. 545, 553 (2008), *aff'd sub nom.* *Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009) ("Accordingly, we conclude that the [BVA] is not required *sua sponte* to raise and reject 'all possible' theories of entitlement in order to render a valid opinion. The [BVA] commits error only in failing to discuss a theory of entitlement that was raised either by the appellant or by the evidence of record.").

¹⁰⁰ See *supra* Section II.

¹⁰¹ In fiscal year 2014, there were 3,686 dispositions of appeals at the CAVC. Approximately 71% of those cases involved at least a partial remand. See BVA FY 2013 REP., *supra* note 46, at 2.

A. PFC Acheson Got Burned by More than Just the Desert Sun

Once PFC Acheson left the Nevada desert, his fight was only just beginning. Acheson, a physicist and mathematician working for the U.S. Army, was assigned to the then-highly classified program called Operation Upshot-Knothole,¹⁰² taking place at the NPG near Las Vegas, Nevada.¹⁰³ This operation, one of many offspring of the all-too-familiar Manhattan Project, was a series of tests of certain nuclear devices for possible inclusion in the U.S. arsenal and of the ability of U.S. military equipment to withstand a nuclear attack.¹⁰⁴ Like the many other men and women assigned to the NPG, Acheson was repeatedly exposed to high levels of radiation, which eventually caused his death in 1971.¹⁰⁵ Shortly before his death, Acheson applied to the VA for disability benefits, but he would not actually receive the benefits in his lifetime since, due to the confidential nature of his work, he was not able to prove the connection between his disability and his service.¹⁰⁶

After Acheson retired from the service, he submitted a claim for VA disability benefits because he had developed non-Hodgkin lymphoma and could no longer work.¹⁰⁷ Acheson believed his development of lymphoma could be traced back to his radiation exposure at the NPG, but, because of the confidential nature of his service, he could not discuss the work he did while in the Army.¹⁰⁸ He was only able to describe where he served and testify that during his service he wore a radiation badge to register his exposure to radiation.¹⁰⁹ This was simply not enough to establish his claim for disability benefits. After Acheson's untimely death, his widow filed a claim with the VA for a death pension and death and indemnity compensation (DIC) benefits.¹¹⁰ The death pension was awarded, but the DIC claim was never processed.¹¹¹ In 1996, Lady Louise Byron (Byron)¹¹² re-opened the claim for the DIC benefits and submitted evidence that her late husband's death was caused by the work he had done while in service, mainly being in the proximity of such high levels of radiation.¹¹³

The problem was that Byron could not prove direct service connection because the records relating to Acheson's service were confidential and not available to be presented to the VA.¹¹⁴ In addition, the VA did not recognize his lymphoma as one of the diseases associated with exposure to ionizing radiation.¹¹⁵ In October 2001, a fellow Veteran, Kenneth R. Kendall, submitted a statement

¹⁰² See Brief for Claimant-Appellant at 7, *Byron v. Shinseki*, 670 F.3d 1202 (Fed. Cir. 2012) (No. 2011-7170), 2011 WL 3797672 (Aug. 3, 2011).

¹⁰³ See *Operation Upshot-Knothole*, *supra* note 3.

¹⁰⁴ *Operation Upshot-Knothole Fact Sheet*, DEF. THREAT REDUCTION AGENCY (May 2015), http://www.dtra.mil/Portals/61/Documents/NTPR/1-Fact_Sheets/14_UPSHOT-KNOTHOLE.pdf.

¹⁰⁵ See *Byron v. Shinseki*, No. 09-4634, 2011 WL 2441683, at *1 (Vet. App. June 20, 2011).

¹⁰⁶ See generally *id.*

¹⁰⁷ See *id.*

¹⁰⁸ See *id.*

¹⁰⁹ See *id.*

¹¹⁰ See *id.* DIC benefits are a tax-free monetary benefit paid to eligible survivors of military service members who died in the line of duty or eligible survivors of veterans whose death resulted from a service-related injury or disease. *Dependency and Indemnity Compensation*, U.S. DEP'T OF VETERANS AFFAIRS, <http://benefits.va.gov/BENEFITS/factsheets/survivors/dic.pdf> (last visited Sept. 25, 2016).

¹¹¹ *Byron*, 2011 WL 2441683, at *1.

¹¹² After Acheson's death, his widow remarried, becoming Lady Louise Byron (Byron).

¹¹³ *Byron*, 2011 WL 2441683, at *2.

¹¹⁴ Acheson first applied for disability benefits under the theory of direct service connection. In order to substantiate his claim, he would have needed to show 1) a current disability; 2) an injury or type of some type of causation during his service; and 3) a nexus between his service and the current disability. *Shedden v. Principi*, 381 F.3d 1163, 1167 (Fed. Cir. 2004). It is easy to understand that, while his disability was easily proven, it would be nearly impossible to prove the cause of his disability, radiation poisoning, without being able to point to the nuclear testing that caused the radiation poisoning.

¹¹⁵ In 1984, Congress passed the Veterans' Dioxin and Radiation Exposure Compensation Standards Act of 1984. See *Veterans' Dioxin*

indicating that he had personal knowledge that Acheson was present during nuclear testing.¹¹⁶ But the statement would prove unnecessary since, in August 2003, the RO granted presumptive service connection after non-Hodgkin's lymphoma was "added to the presumptive list of diseases associated with exposure to ionizing radiation on May 20, 1988."¹¹⁷ The RO assigned an effective date¹¹⁸ of August 14, 1995, to the claim; this was one year prior to the date the claim was submitted. Lady Byron then appealed the effective date issue to the BVA arguing for an earlier effective date.¹¹⁹ The BVA, in its December 11, 2009, decision, granted Byron an effective date of May 1, 1988.¹²⁰ In doing so, the BVA determined Byron submitted an adequate claim on September 10, 1971, for both the death pension and the DIC claim.¹²¹ The BVA noted that the effective date of the appellant's claim should have been set at either the date of the receipt of the claim or the date entitlement arose, whichever was later.¹²² The BVA found that the appellant's entitlement to benefits arose on the date that the Radiation-Exposed Veterans Compensation Act of 1988 went into effect.¹²³ Thus, the BVA set the effective date of the appellant's benefits to match the effective date of the law: May 1, 1988.

Byron appealed to the CAVC again arguing for the entitlement date of 1971.¹²⁴ She asked the CAVC to issue a complete reversal of the BVA's decision because she had submitted the claim in 1971, was ultimately determined by the BVA to be entitled to the benefits, and thus the only proper effective date for the benefits would be 1971.¹²⁵ While a seemingly small detail, a difference of 17 years in the effective date would mean the loss of thousands of dollars. However, despite suffering through nine different appeals in the veterans' system, the CAVC remanded her case again to the BVA and held that "reversal is precluded as a remedy."¹²⁶ The Federal Circuit subsequently upheld the CAVC's decision, finding that the BVA "must make an initial determination of whether Ms. Byron has sufficiently supported"¹²⁷ her claim before it could grant an award of benefits.¹²⁸ Ms. Byron received

and Radiation Exposure Compensation Standards Act of 1984, Pub. L. 98-542, 98 Stat. 2725. This Act was created to help the atomic veterans, those who worked with nuclear testing, obtain benefits for the diseases caused by the extensive exposure to radiation. The list of the diseases included in this initial Act, however, proved to be far too few. In response, Congress in 1988 enacted the Radiation-Exposed Veterans' Compensation Act to expand the list to include thirteen specific types of cancer. *See* Radiation-Exposed Veterans' Compensation Act, Pub. L. 100-321, 102 Stat. 485 (1988). The VA subsequently amended this list and today the list of presumed diseases includes twenty-one types of cancers (bile ducts, bone, brain, breast, colon, esophagus, gall bladder, liver, lung, pancreas, etc.), cataracts, leukemia, lymphomas, and many other disabilities. *Diseases Related to Ionizing Radiation*, U.S. DEP'T OF VETERANS AFFAIRS, <http://www.publichealth.va.gov/exposures/radiation/diseases.asp> (last visited Sept. 25, 2016).

¹¹⁶ *Byron*, 2011 WL 2441683, at *2.

¹¹⁷ *Id.*

¹¹⁸ The effective date is the point in time at which a veteran begins to be entitled to benefits and is a very important aspect of any benefit award that has been litigated. For instance, imagine a veteran applies for benefits in 1980, but is not granted the benefits until 1990. An effective date of 1980 will provide the veteran benefits both going forward into the future and for the ten years that the case was adjudicated. The effective date is not automatically set at the time the veteran submits a claim for benefits. "[T]he effective date of an award based on an original claim for benefits 'shall not be earlier than the date of receipt of application therefor.'" *Crawford v. Brown*, 5 Vet. App. 33, 35 (Vet. App. 1993) (quoting 38 U.S.C. § 5110(a) (1991)). If the VA sets the effective date at a time unfavorable to the veteran, it can be hard to get that decision reversed because an effective date is a factual determination subject to the clearly erroneous standard of review. *Acosta v. Principi*, 18 Vet. App. 53, 57 (2004).

¹¹⁹ No. 09-47 157, 2009 WL 5870274, at *1 (BVA Dec. 11, 2009).

¹²⁰ *Id.*

¹²¹ *Byron*, 2011 WL 2441683, at *1.

¹²² 38 U.S.C. § 5110 (2012); *see also* 38 C.F.R. §§ 3.114, 3.400 (2015).

¹²³ Radiation-Exposed Veterans Compensation Act of 1988, Pub. L. 100-321, 102 Stat. 485 (1988) (codified at various sections of 38 U.S.C.).

¹²⁴ *Byron*, 2011 WL 2441683, at *3.

¹²⁵ *Id.*

¹²⁶ *See id.* at *6.

¹²⁷ *Byron v. Shinseki*, 670 F.3d 1202, 1206 (Fed. Cir. 2012).

¹²⁸ *See generally* Amicus Brief of the Disabled Am. Veterans in Support of Petitioner, on Petition for a Writ of Certiorari to the U.S. Court

a favorable decision from the BVA with regard to the effective date issue on April 19, 2013.¹²⁹ She then again appealed to the CAVC insofar as the decision did not address, and therefore denied, a claim for accrued benefits.¹³⁰ Sadly, her case would not be heard by the CAVC because she died on February 14, 2014, before the case could be heard. This tragic case of remands and appeals ultimately ends without PFC Acheson or Ms. Byron ever receiving the total amount of benefits requested and deserved.¹³¹

B. A Brief History of the CAVC and the Reversal

Nearly all would agree that “the CAVC has struggled with when to reverse the [BVA].”¹³² However, the CAVC has not always struggled with this issue. The CAVC’s view on reversals has evolved even in its very short history. In an early decision, the CAVC reversed a decision of the BVA, denied the request for remand, and ordered the award of benefits.¹³³ In *Hersey v. Derwinski*, the CAVC rejected the request to remand and reversed a decision of the BVA when the BVA failed to consider a number of relevant pieces of evidence.¹³⁴ The CAVC discussed both how the BVA erred in its use of the evidence and how it erred in failing to consider certain other evidence.¹³⁵ The CAVC reversed the BVA’s decision and held the denial of benefits was “clearly erroneous in light of the uncontroverted evidence in appellant’s favor.”¹³⁶ Nevertheless, a few years later in *Hicks v. Brown*,¹³⁷ the CAVC declined to issue a reversal because the BVA had not made a finding on a specific issue in which there was evidence both for and against the claim.¹³⁸ The CAVC refused to reverse because the “lack of adequate reasons or bases in the BVA’s decision frustrates effective judicial review.”¹³⁹ This foreshadowed the direction the CAVC would head in its hesitancy to reverse decisions of the BVA. Using this decision as support,¹⁴⁰ the CAVC often remanded cases rather than order a straight reversal of the BVA’s decision.

of Appeals for the Fed. Cir., *Byron v. Shinseki*, 670 F.3d 1202 (Fed. Cir. 2012) (No. 12-389), 2012 WL 5083399, at *3 (“The Federal Circuit’s *Byron* opinion sanctions the [CAVC]’s practice of needlessly remanding, even in instances where the factual record permits only one outcome as a matter of law, leaving the door open for subsequent administrative decisions that are legally incorrect. This practice risks new errors by the [BVA], as well as by the VA ROs after [BVA] remands, preventing veterans from obtaining timely medical treatment and disability compensation based on their undisputedly meritorious claims.”).

¹²⁹ No. 13-13134, 2013 WL 1313134 (BVA Apr. 19, 2013).

¹³⁰ See Brief for Appellant at 1, *Byron v. Shinseki*, No. 13-2329, 2011 WL 2441683 (Vet. App. Nov. 7, 2013).

¹³¹ *Byron v. Shinseki*, No. 13-2329, 2014 WL 2178244, at *1 (Vet. App. May 27, 2014).

¹³² *Ridgway*, *supra* note 98, at 140.

¹³³ *Hersey v. Derwinski*, 2 Vet. App. 91 (1992).

¹³⁴ *Id.* at 94. The CAVC reviewed the factual determinations of the BVA, found them to be clearly erroneous according to the United States Supreme Court’s standard set forth in *Anderson v. City of Bessemer*, 470 U.S. 564, 573–74 (1985), and determined reversal was the correct remedy.

¹³⁵ *Hersey*, 2 Vet. App. at 94-95.

¹³⁶ *Id.* at 95.

¹³⁷ 8 Vet. App. 417 (1995).

¹³⁸ *Id.* at 422. The CAVC determined that when there is evidence both for and against the claimant’s position, the appropriate remedy is remanding the case back to the BVA instead of reversal.

¹³⁹ *Id.* (citing *Gilbert v. Derwinski*, 1 Vet. App. 49, 57 (1990)).

¹⁴⁰ According to the KeyCite function available on Westlaw, as of July 11, 2016, *Hick*’s proposition that remand is the correct remedy in situations where there has not been sufficient fact-finding done at the BVA has been cited 163 times.

This trend changed, however, when the CAVC decided *Padgett v. Nicholson*.¹⁴¹ In *Padgett*, the CAVC reversed a decision of the BVA and held the evidence need not be uncontroverted in order to be subject to a reversal.¹⁴² The CAVC held that it was bound by its Congressional mandate to reverse all those decisions in which the BVA's finding was contrary to the "only plausible resolution of the key factual issue on the record."¹⁴³ But the CAVC declined to take the next logical step. That is to say, the CAVC has never held that it should reverse erroneous decisions of the BVA when the BVA has failed to make a factual determination and any determination made adverse to the veteran would be clearly erroneous. As discussed previously, the CAVC refused to do so in *Byron*.¹⁴⁴ But as this Article suggests, the next logical step for the CAVC is to reverse all erroneous decisions of the BVA, and place the onus on the Secretary to show why a remand is necessary.

C. The Jurisdiction of the CAVC

The CAVC is a unique protection for our veterans created by Congress as an independent court of appeal, separate from the VA system, with the ability to provide judicial review of the VA's decisions.¹⁴⁵ The CAVC was designed to have exclusive jurisdiction over all appeals concerning requests for benefits from the VA. The CAVC has jurisdiction to review factual, legal, and constitutional questions and has the power "to affirm, modify, or reverse a decision of the [BVA] or to remand the matter, as appropriate."¹⁴⁶ As this new court has developed its unique body of veterans' law, it has taken seriously its mission to protect the interests of the veteran, but as time has progressed, the CAVC has become increasingly reticent to fully exercise its jurisdiction.¹⁴⁷ Instead of being able to use the VA structure and the CAVC to quickly receive benefits, veterans are suffering through seemingly endless cycles of denials, appeals, and remands in order to get the benefits they deserve.¹⁴⁸ This is not the pro-veteran and pro-claimant system Congress intended.¹⁴⁹

¹⁴¹ 19 Vet. App. 133, 145-50 (2005). The CAVC reversed the BVA's decision in regards to Padgett's claim for secondary service connection. The finding regarding secondary service connection was a finding of fact that the CAVC reviewed under the "clearly erroneous" standard. 38 U.S.C. § 7261(a)(4) (2012). Under this standard of review, the CAVC is required to "reverse or set aside any finding of material fact adverse to the claimant . . . if the finding is clearly erroneous." *Padgett*, 19 Vet. App. at 145-46 (internal quotation marks omitted). In *Padgett*, the Secretary of the VA (Secretary) argued the CAVC could not determine a BVA finding was clearly erroneous unless the evidence was uncontroverted against the BVA's finding. The CAVC disagreed. The CAVC held the only plausible view of the evidence was that Padgett's disability was caused by a service-connected disability, proving that the BVA's decision against him was an error and needed to be reversed. The CAVC determined it was not necessary for the evidence to be uncontroverted, but reversal is permissible when the only *plausible* view of the evidence is the view under which the veteran is awarded the requested benefits. *Id.* at 150.
¹⁴² *Padgett*, 19 Vet. App. at 133.

¹⁴³ *Id.* at 150; *see* 38 U.S.C. § 7261(a)(4) (providing that the CAVC must "set aside or reverse" a clearly erroneous finding of material facts); *Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982) (stating that reversal is appropriate where "the record permits only one resolution of the factual issue").

¹⁴⁴ *See supra* Section III.A.

¹⁴⁵ The CAVC was proposed as an "independent Court of Veterans Appeals in lieu of the existing [BVA], similar to the Court of Military Appeals and the United States Tax Court, to rule on all disputes involving the [VA] and veterans." H.R. REP 100-963, at 4 (1988), *reprinted in* 1988 U.S.C.A.N. 5782, 5785. In a significant departure from normal appellate review, a determination concerning any factual decision would not be reviewable by the Federal Circuit or Supreme Court. Legal conclusions have limited review by the Federal Circuit. *See supra* Section I.A.

¹⁴⁶ 38 U.S.C. § 7252.

¹⁴⁷ *Why Are Veterans Waiting Years on Appeal?: A Review of the Post-Decision Process for Appealed Veterans' Disability Benefits Claims: Hearing before the Subcomm. on Disability Assistance and Memorial Affairs of the Com. on Veterans' Affairs*, 113th Cong. 44, 49 (2013) (statements of Michael P. Allen and James D. Ridgway) (illustrating that Congress consistently hears testimony regarding the CAVC's apparent reticence to issue complete reversals, but the VA disagrees with such a contention).

¹⁴⁸ Even the VA acknowledges the backlog of requests for benefits. Allison Hickey, *VA Expediting Claims Decisions for Veterans Waiting a Year or More*, U.S. DEP'T OF VETERANS AFFAIRS (Apr. 19, 2013, 2:51 PM), <http://www.blogs.va.gov/VAntage/9217/va-expediting-claims-decisions-for-veterans-waiting-a-year-or-more>.

¹⁴⁹ *Shinseki v. Sanders*, 556 U.S. 396, 412 (2009) (stating explicitly that the VA system is not truly an adversarial system); *Forshey v. Principi*, 284 F.3d 1335, 1355 (Fed. Cir. 2002) (highlighting the fact that the VA system is non-adversarial and paternalistic).

Much like its sister courts of appeal, there are three primary standards of review under which the CAVC reviews cases: *de novo* (for questions of law),¹⁵⁰ clear error (for questions of fact),¹⁵¹ and abuse of discretion (for discretionary decisions and mixed questions of fact and law).¹⁵² The CAVC seeks legitimacy as a federal court of appeal, but in order to do so it must exercise all the authority of an appellate court, including the authority to reverse any judgment “as may be just under the circumstances.”¹⁵³ The CAVC should properly reverse decisions of the BVA under all three standards of review.

i. Reversal Is Appropriate for Legal Questions

Some may suggest that the standard this Article proposes would be aggrandizing the CAVC and making the BVA practically pointless. But that simply is not the case. There are certainly going to be instances when the VA will show the necessity of a remand, and the CAVC will be required to remand the case back to the BVA for further consideration. For instance, suppose the BVA ruled as a matter of law that a regulation had a certain definition, and consistent with that determination ruled that no evidence on the topic was necessary. The CAVC may later reverse that legal determination, but since the BVA failed to make the necessary underlying factual developments, due to its erroneous legal determination, there is now no evidence on point. Since there is now a complete lack of evidence on point, the Secretary could easily show the necessity of a remand, and the CAVC would need to remand the case back to the BVA for it to make the necessary factual findings.

The scenario more suited for reversal is one in which the facts are undisputed and the only issue on appeal is the validity of a certain statute or regulation.¹⁵⁴ For instance, suppose a veteran applied for benefits under 38 U.S.C. § 1151, and the BVA determined that each of the three elements of the claim had been met.¹⁵⁵ But the BVA still denied the claim because of a VA regulation that determined the way in which the veteran was injured constituted “willful misconduct,” and thus, the disability was not compensable.¹⁵⁶ In this scenario, if the CAVC struck down the VA’s regulation and the veteran’s conduct

¹⁵⁰ *Colvin v. Derwinski*, 1 Vet. App. 171, 174 (1991); *see* 38 U.S.C. § 7261 (2012). As stated above, the CAVC reviews legal decisions of the BVA *de novo*. The CAVC, in the past, has determined that a summary reversal is appropriate if the BVA or RO applies the wrong legal standard and when the outcome of this case is not reasonably debatable. *Heerd v. Derwinski*, 1 Vet. App. 551, 551 (1991) (issuing a summary reversal since the RO and BVA applied the wrong legal standard and incorrectly reduced the veteran’s disability rating); *Johns v. Derwinski*, 2 Vet. App. 346, 350 (1992) (citing *Frankel v. Derwinski*, 1 Vet. App. 23, 25-26 (1990)).

¹⁵¹ Under 38 U.S.C. § 7261(a)(4), the CAVC applies a “clearly erroneous” standard of review to findings of fact made by BVA. The “clearly erroneous” standard has been used to require the CAVC to uphold the BVA’s findings of fact if they are supported by “a plausible basis in the record . . . even if [the CAVC] might not have reached the same factual determinations.” *Wensch v. Principi*, 15 Vet. App. 362, 368 (2001) (affirming the BVA’s denial of service connection where the appellant provided substantial medical evidence in support of the claim).

¹⁵² *See* 38 U.S.C. § 7261(a)(3)(A). The CAVC is required by Congress to hold unlawful decisions by the BVA that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Marrero v. Gober*, 14 Vet. App. 80, 81 (2000) (holding that the CAVC reviews the BVA’s application of the law to the facts under the deferential “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” standard of review); *see also* *Kent v. Principi*, 389 F.3d 1380, 1384 (Fed. Cir. 2004) (reiterating that the ““arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” standard of review . . . contemplates *de novo* review of questions of law”).

¹⁵³ 28 U.S.C. § 2106. The CAVC has the authority to order entry of judgment without remand. *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 322 (1967) (“[T]he statutory grant of appellate jurisdiction to the courts of appeals is certainly broad enough to include the power to direct entry of judgment [notwithstanding the verdict] on appeal”).

¹⁵⁴ This scenario is already an uphill climb for the VA because the Secretary cannot appeal any decision by the BVA favorable to the veteran. Once a veteran obtains a favorable ruling on a factual or legal decision, that decision is *res judicata* for all the future adjudications of that veteran’s claim.

¹⁵⁵ 38 U.S.C. § 1151(a)(1)(a)(2) (establishing the elements of a claim for benefits due to disabilities as a result of treatment or vocational rehabilitation as 1) the disability was caused by the VA’s medical care; 2) the medical care was negligent; and 3) the disability was not reasonably foreseeable).

¹⁵⁶ Willful misconduct prevents a veteran from being compensated for a resulting injury. 38 U.S.C. § 1151(a). It is easy to imagine a VA regulation that would define a particular behavior as “willful misconduct” that may not actually be so. For instance, suppose a VA

was no longer considered “willful misconduct,” the veteran would indisputably be entitled to benefits. The BVA’s determination that the veteran had established each of the elements set out in § 1151 could not be disturbed on appeal, and the CAVC, if choosing to strike down the regulation, could reverse the decision and order the benefits to be awarded.¹⁵⁷

But this will likely not be every situation. There will likely be times when a veteran appeals to the CAVC challenging the validity of a VA rule or regulation and even if the CAVC strikes down that rule or regulation, there will be a need for remand in order for the RO or the BVA to re-evaluate the claim under the correct legal standard. That is why the standard proposed by this Article is logical, preserves court resources, and ensures the veteran receives his or her benefits as quickly as possible.

If, as in the first scenario of the section, the BVA needs to make certain factual findings, the VA can meet its burden and show that remand is the correct option. Conversely, under the second scenario, if the veteran is indisputably entitled to benefits but for the VA’s erroneous legal interpretation, the VA will not be able to meet its burden and the CAVC should properly reverse the BVA’s decision and award the benefits.

ii. Reversal Is Appropriate for Factual Questions

If reversing legal questions did not seem complicated enough, it is even more controversial to argue the CAVC should reverse factual decisions of the BVA.¹⁵⁸ There are three types of factual errors the BVA may make. First, the BVA may make a clearly erroneous factual finding.¹⁵⁹ Second, the BVA may make a factual finding that does not have a plausible basis in the record. Third, the BVA may fail to make a factual finding.

First, an error is made if the BVA has made a clearly erroneous decision.¹⁶⁰ The “clearly erroneous” standard has been used by the CAVC since its inception in 1988, but, looking at the CAVC’s application of this standard, it appears the CAVC is not “consistently performing thorough reviews of BVA findings and the Congressional intent for a broad standard of review has often been narrowed in application.”¹⁶¹ A decision is “clearly erroneous,”¹⁶² as defined by the U.S. Supreme Court, “when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed.”¹⁶³

regulation prohibited veterans from receiving compensation for a disability if, at the time of the injury giving rise to the disability, the veteran tested positive for marijuana or any other controlled substance. In addition, further suppose our veteran lives in Colorado, lawfully uses marijuana, and was injured while driving to a VA doctor’s appointment. While the veteran may test positive for marijuana, and because a person can test positive for marijuana use for up to 30 days, it is possible that the veteran’s conduct did not rise to the level of “willful misconduct.”

¹⁵⁷ This would be similar to the way a district court considers a motion for summary judgment. On a motion for summary judgment, under Fed. R. Civ. P. 56(a), if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law, the party moving for summary judgment should be granted judgment in its favor.

¹⁵⁸ Many would argue the CAVC should not reverse factual decisions of the BVA since it is prohibited from reviewing factual decisions of the BVA de novo. See 38 U.S.C. § 7261(c). To the contrary, this argument ignores the language in § 7252 and § 7261(c), which *requires* the reversal of clearly erroneous decisions. The only debate, then, is what constitutes a “clearly erroneous” factual decision.

¹⁵⁹ A factual finding must be reversed if the finding is clearly erroneous. See, e.g., *Carroll v. Brown*, 5 Vet. App. 208, 210 (1993).

¹⁶⁰ *Gilbert v. Derwinski*, 1 Vet. App. 49, 52-53 (1990) (defining the “clearly erroneous” standard and noting that during the floor debates for the VJRA, the clearly erroneous standard was viewed as the appropriate standard for the CAVC); see also 134 Cong. Rec. S16648 (daily ed. Oct. 18, 1988) (statement of Sen. Cranston); 134 Cong. Rec. H10360 (daily ed. Oct. 19, 1988) (statement of Rep. Edwards) (expressing the view of Congress that the “clearly erroneous” standard of Rule 52(a) was to be used by the CAVC).

¹⁶¹ S. REP. NO. 107-234, at *16, *reprinted in* 2002 U.S.C.C.A.N. 1788, 1803.

¹⁶² *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948) (setting the standard for appellate courts to determine whether a factual finding is clearly erroneous).

¹⁶³ *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) (quoting *U.S. Gypsum Co.*, 333 U.S. at 394-95).

Of course, the CAVC may not reverse a factual finding simply because it would have reached a different decision.¹⁶⁴ But once the CAVC determines the BVA's factual findings are clearly erroneous, it should apply the burden-shifting proposed by this Article. The CAVC would then start in the default position of issuing a reversal, and may only choose to issue a remand if the Secretary makes the showing of the necessity of a remand.¹⁶⁵

Second, the BVA may make a factual error if there is not a plausible basis in the record for the decision.¹⁶⁶ If the BVA has made a factual determination but has not supported the decision with evidence, or there is uncontroverted evidence to the contrary, the CAVC may reverse that finding. Again, when addressing such a factual error, the CAVC should start in the default position of issuing a reversal, and then only choose to issue a remand if the Secretary makes the showing of the necessity of a remand.

Third, a decision may constitute a factual error even when the BVA fails to make a factual finding. It is important to note that the failure of the BVA to make a factual finding does not prohibit the CAVC from looking at the record and determining that any contrary determination would be clearly erroneous and subject to reversal.¹⁶⁷ It is clear the CAVC is most uncomfortable issuing a reversal when the BVA has failed to make a particular factual determination, even if there is no legitimate dispute as to the outcome of the determination the BVA must make.¹⁶⁸ The argument is often made the CAVC does not have the power to make factual determinations and therefore cannot exercise its appellate review if there is not a factual decision made below.¹⁶⁹ However, the reversal of a BVA factual determination by the CAVC does not amount to fact-finding, in the same manner that an appellate court may grant judgment as a matter of law contradicting a jury verdict.¹⁷⁰

¹⁶⁴ *Sanchez-Benitez v. Principi*, 259 F.3d 1356, 1363 (Fed. Cir. 2001) (holding that it “is not the role of the [CAVC] to make such factual determinations *sua sponte*.”); *see* 38 U.S.C. § 7261(a)(3) (2012).

¹⁶⁵ Requiring the CAVC to reverse or affirm, and only remand upon a sufficient showing, will bring the CAVC in line with eight sister courts of appeal that have adopted the Futility Rule. *Seavey v. Barnhart*, 276 F.3d 1, 11-12 (1st Cir. 2001); *Krauss v. Oxford Health Plans, Inc.*, 517 F.3d 614, 630 (2d Cir. 2008); *Hussain v. Gonzales*, 477 F.3d 153, 157-58 (4th Cir. 2007); *Felisky v. Bowen*, 35 F.3d 1027, 1041 (6th Cir. 1994); *Moisa v. Barnhart*, 367 F.3d 882, 887 (9th Cir. 2004); *Nielson v. Sullivan*, 992 F.2d 1118, 1121-22 (10th Cir. 1993); *Davis v. Shalala*, 985 F.2d 528, 534-35 (11th Cir. 1993); *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 1539 (D.C. Cir. 1992). This Rule requires a reversal of the agency's decision when a remand would be a “useless formality.” *Krauss*, 517 F.3d at 630. The Futility Rule would ensure the CAVC reverses decisions of the BVA when it is clear the veteran is entitled to the benefits requested and a remand would merely be a useless formality.

¹⁶⁶ *Gilbert v. Derwinski*, 1 Vet. App. 49, 53 (1990) (holding that the CAVC “is not permitted to substitute its judgment for that of the BVA on issues of material fact; if there is a ‘plausible’ basis in the record for the factual determinations of the BVA, even if this Court might not have reached the same factual determinations, we cannot overturn them.”). This “clearly erroneous” standard of review gives slightly more deference than *de novo* review, but less deference than “substantial evidence” review. Robert L. Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70, 88-89 (1944). A decision does not need to be made explicitly by the BVA in order to be clearly erroneous. A BVA decision may be clearly erroneous, and thus subject to reversal, if the BVA failed to make a factual finding below and if, on the state of the evidence, any determination adverse to the veteran would be clearly erroneous.

¹⁶⁷ *Hicks v. Brown*, 8 Vet. App. 417, 422 (1995) (holding that a lack of factual finding “frustrates effective judicial review”) (citing *Gilbert*, 1 Vet. App. at 57).

¹⁶⁸ In *Byron v. Shinseki*, No. 09-4634, 2011 WL 2441683, at *1 (Vet. App. June 20, 2011), it was undisputed that the BVA had improperly failed to make a determination about whether direct service connection was warranted. However, the CAVC remanded the case back to the BVA for it to make the determination of the effective date. The CAVC should have issued a straight reversal and ordered the VA to award the benefits to Byron with the appropriate effective date.

¹⁶⁹ *Hicks*, 8 Vet. App. at 422 (holding that a lack of factual finding “frustrates effective judicial review”); *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (finding that if the reviewing court cannot evaluate the challenged action on the basis of the record before it, the proper course, except in rare circumstances, is a remand).

¹⁷⁰ *Weisgram v. Marley Co.*, 528 U.S. 440, 457 (2000) (affirming the appellate court's authority to enter judgment in favor of the appellant when the facts presented at trial were insufficient to support the verdict). Further, it is possible for appellate courts to reverse jury verdicts without re-determining the facts. *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 327-28 (1967). In *Neely*, the Court held that the federal courts of appeal may enter judgment as a matter of law if the case that was submitted to the jury was factually insufficient. *Id.*

Some veterans' law scholars have proposed the CAVC use a hypothetical standard of review by which the CAVC would have the authority to reverse erroneous decisions of the BVA, even if the BVA failed to make a factual finding.¹⁷¹ The CAVC could issue a reversal if, on the state of the evidence, any factual finding made against the claimant would have been clearly erroneous.¹⁷² In a perfect world, the CAVC could remand a case in which a factual determination needed to be made, the BVA would make the missing factual finding in favor of the veteran on remand, and the veteran would be quickly awarded the requested benefits, ending the delay for the veteran. But that scenario is unlikely to occur. On remand, it is more likely the BVA would make the factual determination in favor of the VA, and the veteran would once again have to appeal to the CAVC to reverse the clearly erroneous decision of the BVA. Thus, the best option is for the CAVC to start in the default position of issuing a reversal, and only issue a remand if the Secretary makes the showing of the necessity of a remand.

IV. THE BURDEN FOR A REMAND SHOULD LIE SOLELY ON THE VA

As argued above, the CAVC should adopt this rule: Whenever a veteran highlights a reversible error in the BVA's decision, the CAVC must reverse and order the benefits to be awarded, absent a showing by the Secretary that a remand is necessary. This rule follows the clear intent of Congress and properly applies the benefit of the doubt rule.

A. The Statutory Construction Shows Congress Wanted More Reversals

Veteran advocacy organizations have testified numerous times before both the House and Senate Veterans' Affairs Committees arguing that the CAVC has failed to exercise its full appellate review of BVA decisions.¹⁷³ And Congress has expressed concern that the CAVC is giving too much deference to the determinations of the BVA.¹⁷⁴ In response to these concerns, in the Veterans' Benefit Act of 2002, Congress specifically added the phrase "or reverse" to the CAVC's scope of review in regards to "clearly erroneous" factual determinations.¹⁷⁵ Thus, Congress gave the CAVC a clear *command* to reverse cases, as opposed to remanding, when the factual determinations of the BVA are "clearly erroneous."¹⁷⁶

In *Weisgram*, the Court extended the *Neely* holding that a federal appellate court may enter judgment on behalf of the appellant, if, after subtracting improperly admitted evidence that favored the winner, it is clear the verdict should have been entered in favor of the loser at trial. *Weisgram*, 528 U.S. at 457. This is essentially a hypothetical standard of review: if viewing the evidence that *should* have been admitted to trial, would there have been enough evidence to overcome a motion for directed verdict? If the answer is no, the appellate court may enter judgment in favor of the appellant.

¹⁷¹ Michael P. Allen, *Commentary on Three Cases from the Federal Circuit and the Court of Appeals for Veterans Claims as We Approach Twenty-Five Years of Judicial Review of Veterans' Benefits*, 5 VETERANS L. REV. 136, 153 (2013).

¹⁷² The CAVC should issue a reversal when it would have been left with the "definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948).

¹⁷³ S. REP. NO. 107-234, at *17 (2002), *reprinted in* 2002 U.S.C.C.A.N. 1788, 1804. In their testimony before the Senate Committee on Veterans' Affairs, four veteran service organizations argued that the large measure of deference the CAVC affords to the BVA's fact-finding is detrimental to claimants and may result in a failure to follow the "benefit of the doubt" rule established in 38 U.S.C. § 5107(b) (2012).

¹⁷⁴ *See* S. REP. NO. 107-234, at *16-17. The Senate Committee on Veterans Affairs recommended that Congress strengthen the language of the CAVC's jurisdiction to more strongly emphasize the need to reverse incorrect decisions of the BVA. The Committee pointed to the then-recent Federal Circuit decision of *Hensley v. West*, 212 F.3d 1255 (Fed. Cir. 2000), where the Federal Circuit rejected the CAVC's de novo review and characterized the CAVC's decision as a "dissecting [of] the factual record in minute detail." The Committee expressed its displeasure with the Federal Circuit's emphasis on the limited review and deference that the CAVC should afford to the BVA's factual determinations. *See* S. REP. NO. 107-234, at *16-17.

¹⁷⁵ Veterans Benefit Act of 2002, Pub. L. No. 107-330, § 401, 116 Stat. 2820, 2832 (2002).

¹⁷⁶ The American Bar Association Section on Administrative Law and Regulatory Practice has issued a recommendation to amend the jurisdiction of the CAVC to force the CAVC to more often issue complete reversals of erroneous decision of the BVA. *See Report to*

Congress has given the CAVC the “power to affirm, modify, or reverse a decision of the [BVA] or to remand the matter, as appropriate.”¹⁷⁷ The operative phrase in this section is “or to remand the matter, as appropriate.” By starting this phrase with “or,” Congress has signaled that the option to remand is in the alternative to the above options (modifying, reversing, or affirming).¹⁷⁸ Congress has placed an emphasis on the CAVC making a final decision when possible, whether it is to affirm, modify, or reverse. The CAVC should only remand if those options are not appropriate. That leaves the question, which party should bear the burden of showing the appropriateness or the necessity for a remand?

Because the CAVC’s review occurs in the adversarial stage of the litigation, some may argue the burden should be on the veteran. To the contrary, the burden should be on the VA since the veteran has already met the burden of showing error in the BVA’s decision. Once this is done, the CAVC’s default position should be to issue a reversal, and the burden should shift to the VA to show the necessity of a remand. This would occur in the same way burdens are shifted during the normal litigation process. Ordinarily, once a plaintiff has made a prima facie showing of each element of a cause-of-action, the burden shifts to the defendant to prove any applicable defenses. If none can be proven, judgment must be entered in favor of the plaintiff. The same should be true for the veteran. Once the veteran has shown an error in the BVA’s decision, the burden should shift to the VA to show why a remand would be necessary. Failure to show the necessity of a remand should result in the veteran being awarded a reversal. While this may require additional briefing by the CAVC, the amount of time it takes for additional briefing to occur pales in comparison to the amount of time a remand would add to the veteran’s delay getting benefits. The Supreme Court has consistently held that it is “more appropriate, whenever possible, to correct errors reachable by the appeal rather than remit the parties to a new collateral proceeding.”¹⁷⁹

B. The CAVC’s Jurisdictional Statute Should Be Read in Conjunction with the Benefit of the Doubt Rule

As discussed above, veterans’ law is replete with protections for our nation’s veterans.¹⁸⁰ One protection is the “benefit of the doubt rule.”¹⁸¹ The benefit of the doubt rule provides that, “[w]hen there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant.”¹⁸² Many would likely think this rule is not relevant when determining the CAVC’s jurisdiction, but the benefit of the doubt rule could have an application in the CAVC’s decision whether to reverse or remand.

The question that the CAVC faces, after determining there is an error in the BVA’s decision, is whether a reversal is appropriate. If it is not, the CAVC will issue a remand. This is where the benefit

the House of Delegates, AM. BAR ASSOC., SEC. OF ADMIN. & REG. PRACT. (Oct. 19, 2002), https://www.americanbar.org/content/dam/aba/directories/policy/2003_my_102.authcheckdam.pdf; *see generally* 38 U.S.C. § 7252(a) (“The [CAVC] shall have power to . . . reverse a decision of the [BVA] . . . as appropriate.”).

¹⁷⁷ 38 U.S.C. § 7252(a).

¹⁷⁸ *See generally* *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 255 (1994) (noting that the word “or” may be used to indicate the synonymous, equivalent, or substitutive character of two words or phrases when nothing in the legislative history undermines this conclusion).

¹⁷⁹ *Bartone v. United States*, 375 U.S. 52, 54 (1963).

¹⁸⁰ *See supra* Section II.

¹⁸¹ 38 U.S.C. § 5107(b).

¹⁸² *Id.*

of the doubt rule should come into play. When evaluating whether a reversal is appropriate, the CAVC should weigh the evidence, and if there is an approximate amount of positive and negative evidence, decide the issue in favor of the veteran and issue a reversal.

V. HOW THE REVERSAL WOULD WORK IN PRACTICE

This Article is by no means arguing that it is a simple task in determining how the CAVC should decide a case. As one CAVC judge has pointed out, “the standard of judicial review for various [BVA] determinations” is “an exceedingly murky area of our jurisprudence.”¹⁸³ However, when looking at Congress’s intent, there is a clear manifestation of intent for the CAVC to exercise broad review of BVA decisions and reverse, not remand, incorrect decisions of the BVA.¹⁸⁴ This Article has already shown how a failure by the CAVC to reverse decisions of the BVA can cause a veteran to be stuck in an endless loop of remands and appeals, which has even resulted in claimants dying before being able to establish entitlement to benefits.¹⁸⁵ The third and final Veteran’s story will show how the CAVC could dramatically reduce the amount of time it takes for a veteran to get the benefits requested by issuing a straight reversal and ordering the benefits to be awarded.

The third Veteran, a fictitious individual, is Retired U.S. Navy Chief Petty Officer John Yossarian.¹⁸⁶ Chief Yossarian retired from the U.S. Navy in 1989, after twenty years of honorable service. During his career, he had diverse experiences, including eight years at sea, overseas service, ballistic missile defense work, and recruiting service. A few years after his retirement, he began suffering from lower back pain and degenerative disc disease and underwent back surgery to correct the disc disease. The surgery occurred at a VA Medical Center in Washington State in October 2004. Although the surgery was successful, in June 2005—approximately eight months after his surgery—Chief Yossarian began experiencing complications from the surgery including pains at the base of the skull, decreased range of motion, difficulty sleeping, trouble walking, and muscle spasms.

Based on his deteriorating health after the back surgery, in March 2006, Chief Yossarian sued the U.S. government under the Federal Tort Claims Act (FTCA) in the U.S. District Court for the Eastern District of Washington.¹⁸⁷ Applying the Washington standard of care, the Federal District Court found that Chief Yossarian received negligent care from the VA because his doctor provided spinal fusion surgery—an outdated procedure. Thus, the doctor did not provide “the degree of care expected

¹⁸³ *Butts v. Brown*, 5 Vet. App. 532, 542 (1993) (Steinberg, J., concurring).

¹⁸⁴ The Senate Veterans’ Affairs Committee proposed a change to the CAVC’s standard of review in S. 2079, 107th Cong. (2002). That bill would have changed the “clearly erroneous” standard by allowing CAVC reversal of BVA fact-finding whenever that finding was “not reasonably supported by a preponderance of the evidence.” S. 2079, § 2(a). Even though this change was eventually modified before Congress approved the bill, it shows the Congressional intent to have broad judicial review of BVA decisions, including factual decisions. The change eventually settled upon added the phrase “or reverse” to the CAVC’s review of factual decisions, clearly signifying Congress’s intent to increase the number of reversals. *See supra* notes 173-74.

¹⁸⁵ *See* *Byron v. Shinseki*, No. 09-4634, 2011 WL 2441683, at *1-3 (Vet. App. June 20, 2011). This case highlights the worst-case scenario of a claim stuck in the hamster wheel of remands and appeals for 43 years.

¹⁸⁶ This fictitious Veteran’s story originated in the materials of the 2013 National Veterans Law Moot Court Competition hosted by George Washington University School of Law, the CAVC Bar Association, and the CAVC. All of the original material relating to the case of *Yossarian v. Shinseki* was designed by Jonathan Gaffney, with the assistance of Matthew Albanese, Patrick Berkshire, Amanda Blair, Daniel DiLuccia, Bradley Hennings, Susan Janec, Jonathan Krisch, Whitney McBride, Ronen Morris, Victoria Moshiaswili, Anthony Scire, Pat Scully, Margaret Sorrenti, and Aniela Szymanski. The story has been changed slightly to work with the argument this Article is presenting.

¹⁸⁷ Chief Yossarian both applied for VA benefits and filed suit in federal court; however, had he been successful in both, the VA benefits would have been offset by the amount of the Federal Tort Claims Act (FTCA) claim so that he did not receive a double award. *See* 38 U.S.C. § 1151(b)(1) (2012).

of a reasonably prudent” surgeon in Washington as required by Washington law. Chief Yossarian subsequently submitted a claim to his local RO for disability compensation under 38 U.S.C. § 1151(a) (1).¹⁸⁸ The claim arose from complications, Chief Yossarian argued, as a result of the VA’s negligence. The RO in Boise, Idaho, denied the claim, and on review, the BVA also denied the claim.

Because the issue was previously decided by the U.S. District Court for the Eastern District of Washington, as a matter of law, Chief Yossarian received negligent care under the Washington state standard of care. This state-specific standard required doctors to provide more up-to-date types of surgery not required by the “national” standard of care the BVA relied on to deny Chief Yossarian’s claim. The BVA found, in pertinent part, that Chief Yossarian did not have a claim for disability compensation because his disability was not the result of negligent care based on the VA’s national standard of care. Chief Yossarian then appealed to the CAVC. The CAVC ruled in favor of Chief Yossarian, but remanded the case back to the BVA for evaluation under the Washington state standard of care, instead of issuing an outright reversal. The CAVC held that the BVA erred by applying the national standard of care and should have instead applied the Washington state standard of care. On remand, the BVA correctly awarded Chief Yossarian disability benefits and remanded the case to the RO for a disability rating.

For Chief Yossarian, the process should have been complete and the benefits should have been awarded at the CAVC, since the CAVC could have reversed the decision of the BVA instead of ordering a remand. There were two potentially applicable standards of care: a state standard of care and a national standard of care. Under the state standard of care, the VA’s care was negligent.¹⁸⁹ Under the national standard of care, the VA’s care was not negligent. The decision as to whether the VA’s care was negligent is a factual question (reviewed for clear error), but the question of which standard of care to apply is a legal determination (subject to de novo review). Since the CAVC determined that the BVA’s decision was based on an incorrect legal interpretation, the correct outcome would have been a straight reversal. The CAVC was bound by the district court’s determination that the VA provided negligent care under the state standard. Thus, as a matter of law, Chief Yossarian would be entitled to benefits once the BVA was required to apply the state standard of care. Thus, if the CAVC had applied the burden-shifting analysis proposed by this Article, the VA would not have been able to show the necessity of a remand, and the CAVC could have issued a straight reversal instead.¹⁹⁰

CONCLUSION

Just as Able “rocked” the quiet Nevada desert in January of 1951, the CAVC could rock the world of veterans’ law by placing the burden on the VA to show the necessity or a remand and consequently reversing a higher percentage of erroneous decisions of the BVA. Many proposals are

¹⁸⁸ Under this section, a veteran may be entitled to disability compensation if he or she is injured or a disability is worsened by care provided by a VA medical facility.

¹⁸⁹ This was determined in the FTCA case by the United States District Court for the Eastern District of Washington. The doctrine of res judicata would preclude the VA from subsequently arguing that the VA’s conduct was not negligent under the Washington state standard of care.

¹⁹⁰ While seemingly insignificant, the difference between a reversal and a remand could potentially be thousands of dollars. Suppose a veteran has a combined 40% disability rating and no dependents. If a remand caused the effective date of his compensation benefits to be delayed two years, the veteran would go without approximately \$14,000 in benefits during the delay. See, e.g., *Veterans Compensation Benefits Rate Tables - Effective 12/1/13*, U.S. DEP’T OF VETERANS AFFAIRS, http://www.benefits.va.gov/COMPENSATION/resources_comp0113.asp (last visited Sept. 26, 2016). This is particularly poignant considering that many of these claims are on behalf of veterans who are unable to work and rely on the disability compensation as a means of keeping food on the table.

presented to Congress every year presenting ideas for ways to reduce the amount of time it takes to process a veteran's claim for benefits. But instead of waiting for Congress to act, the CAVC could begin today to reduce the amount of time it takes for a veteran's claim to be completed.

The CAVC has the jurisdiction, and a mandate by Congress, to reverse, and not remand, erroneous decisions of the BVA. This ability to reverse applies equally to both legal errors and factual errors. As was seen in the story of PFC Acheson, the cycle of appeals and remands can last for years, with each trip back to the BVA on remand adding months, if not years, of delay to the claims process. If the CAVC had applied the standard suggested by this Article, the Secretary would not have been able to meet its burden of showing a necessity for remand, and the CAVC should have issued a reversal and awarded the benefits.

Once an error has been identified, the CAVC should start in the default position of issuing a complete reversal. If the Secretary cannot show how, on remand, the BVA would likely still reach a result unfavorable to the claimant, the CAVC should reverse and order the award of benefits. The CAVC is becoming increasingly more inclined to issue reversals when the BVA has made an error of law, but the trend concerning factual appeals is to remand the case back to the BVA for further proceedings. As this Article has suggested, the CAVC does not need to automatically remand factual questions back to the BVA. Instead, the CAVC should automatically reverse errors of the BVA if the evidence is uncontroverted and the finding was against the veteran, or if the evidence is not uncontroverted but the only plausible view of the evidence is in favor of the veteran.¹⁹¹ And even in cases where the BVA fails to make a necessary finding, the CAVC should ask whether, "on the state of the record, a finding by the [BVA] against the veteran would leave the CAVC on appellate review with the definite and firm conviction that a mistake has been committed."¹⁹² If so, the CAVC should reverse the decision of the BVA, order the benefits to be awarded, and not allow the VA to work on remand to develop new theories to deny the claim.

The thanks of a grateful nation are not enough to properly repay our nation's veterans. Our nation owes it to its veterans to make sure we fulfill Abraham Lincoln's mandate to "care for him who shall have borne the battle,"¹⁹³ and to do so as quickly and efficiently as possible.

¹⁹¹ Padgett v. Nicholson, 19 Vet. App. 133, 145-46 (2005).

¹⁹² Allen, *supra* note 171, at 152 (internal quotations omitted).

¹⁹³ President Abraham Lincoln, Second Inaugural Address, *supra* note 23.