Backwards and in Heels: *Butts v. McDonald* and VA's EAJA Problem

Thomas E. Duncombe[1]

INTRODUCTION

Imagine you've been subpoenaed to federal court. You wake up on the day set for the court appearance and find yourself surrounded by state troopers. The ranking trooper informs you that they're conducting a statewide crime sweep, and you're not free to leave until you've answered their questions. Being a law-abiding citizen, you comply. At 4:30 PM, they finally leave, with the head trooper informing you on his way out the door that you're free to go. However, just as the state officials are filing out, federal officials file past them in the other direction. You are under arrest, they inform you. The charge? Failing to appear in federal court.

On a later date, appearing before a federal judge to explain your absence, you recount the events of your day, and the judge believes every word. But, he finds your explanation unreasonable. The problem, says the judge, is that the state officials were incorrect when they told you that you didn't have the freedom to leave. If you had asked, you *might* have been released and allowed to make your scheduled court appearance. Those direct instructions you were given by the state officials: dead wrong. So wrong, in fact, that the judge can think of no justification behind the instructions. And how could you, honest citizen though you are, follow instructions that were so clearly wrong? The judge informs you that the standard is whether a reasonable person would have missed the court date under these circumstances. And no reasonable person, he opines, would have done so under these circumstances.

In a final coup de grace, while you are being led away from the courtroom, you see the judge remove his moustache, glasses, and hairpiece (all part of a disguise, it turns out), revealing himself to be none other than the head trooper from your home interrogation. "But," you cry out, "Why did you tell me I wasn't free to leave?" He answers with a dismissive wave of the hand, "We all get things wrong sometimes. Call the next case, please!"

Unfair, you say? Far-fetched? Yes, both. But the above scenario makes for a useful analogy to what transpired in *Butts v. McDonald*,[2] a determination by the Court of Appeals for Veterans Claims ("CAVC" or "veterans court") regarding the Equal Access to Justice Act ("EAJA"). EAJA is the mechanism by which litigants who prevail in suits against the federal government may recover their attorney fees.[3] Replace the "you" in the story with the Secretary of Veterans Affairs, the state police with the CAVC at the merits stage of a case involving regulatory interpretation, and the federal court with the CAVC (in a dual role!) at the attorney-fee stage of the same litigation, and the above fact-pattern is roughly analogous to the situation in which VA found itself in *Butts*.

---

[1] Assistant United States Attorney, United States Attorney's Office for the Northern District of Oklahoma. Former senior law clerk to The Honorable Bruce E. Kasold and former law clerk to The Honorable Margaret Bartley, United States Court of Appeals for Veterans Claims. J.D., Georgetown University Law Center; B.A. and B.S., Boston University. I would like to extend sincere thanks to Laura Duncombe, my wife, and Teddy Duncombe, my son, who each put up with many absences and much cantankerousness on my part to help bring this article to fruition. I would also like to thank Laura Duncombe and VA attorneys Ellen Brandau and Jonathan Krisch for their moral support and brutally honest feedback, and the Georgetown University Law Library for invaluable research assistance.

[2] 28 Vet. App. 74 (2016).

[3] 28 U.S.C. § 2412 (2012).

The CAVC is the only federal court devoted solely to veterans law.[4] The CAVC's decisions are directly appealable to the United States Court of Appeals for the Federal Circuit. This Article explores the ways in which EAJA jurisprudence at the CAVC and the Federal Circuit have evolved over the years to produce the above result. Specifically, the Article discusses how EAJA jurisprudence at the CAVC and the Federal Circuit has evolved from a remarkably government-friendly landscape to a decidedly government-skeptical one, in which the government now pays litigants' attorneys fees in just about every case it loses. The Article will next explain how this jurisprudence differs from EAJA jurisprudence in administrative law generally. The Article will opine that EAJA fees are more likely to be granted when sought in veterans law than in any other area, and this article will identify several distinguishing qualities about the veterans benefits system that help explain why.

In doing so, the Article will focus on the portion of the EAJA inquiry that asks whether the government's position in the underlying litigation was "substantially justified."[5] The article does this for two reasons. First, recent decisions have crystalized some long-forming trends in the CAVC and the Federal Circuit about substantial justification in veterans law. Second, substantial justification is an inquiry that has few clearly defined contours and has been described as a "judgment call" that is "quintessentially discretionary" in nature.[6] It therefore serves as a judicial Rorschach test, revealing as much about how a court views the reasonableness of the government's positions as the reasonableness of those positions itself.

The Article will discuss possible benefits and detriments from the course the veterans court and the Federal Circuit have taken with regard to EAJA fees in veterans law. To the extent reforming EAJA jurisprudence at the CAVC and the Federal Circuit is deemed desirable, this Article will explore possible reforms, available to both the courts and Congress, to bring EAJA jurisprudence in veterans law into line with the EAJA jurisprudence in other areas of administrative law.

I. EAJA AND "SUBSTANTIAL JUSTIFICATION" EXPLAINED

The default rule in American civil litigation is that parties pay their own legal fees.[7] EAJA, enacted in 1980, provides a limited exception.[8] Intended to encourage private individuals and small businesses to seek redress for government abuse, EAJA requires the government in certain cases to cover a private litigant's legal fees in suits brought against the government, when the private litigant is a "prevailing party."[9]

To obtain "prevailing party" status, a litigant must achieve either "(1) the ultimate receipt of a benefit that was sought in bringing about the litigation, i.e., the award of a benefit, or (2) a court remand

---

4 *See* 38 U.S.C. § 7252(a) (2012) ("The Court of Appeals for Veterans Claims shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals."); Tobler v. Derwinski, 2 Vet. App. 8, 11-12 (1991) ("Congress has made the United States Court of Veterans Appeals the national 'statutory court of review' of decisions on veterans' benefits by the Secretary and the Department of Veterans Affairs.").

5 28 U.S.C. § 2412(d)(1)(A).

6 Chiu v. United States, 948 F.2d 711, 715 & n.4 (Fed. Cir. 1991).

7 *See* Pierce v. Underwood, 487 U.S. 552, 575 (1988) (Brennan, J., concurring) (discussing the origins of EAJA, including its status as an exception to the traditional "American Rule").

8 H.R. Rep. No. 1418, 96th Cong., 2d Sess. 12 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4991.

9 28 U.S.C. § 2412(d)(1)(A); *see* Ardestani v. INS, 502 U.S. 129, 138 (1991) ("[A] clearly stated objective of the EAJA is to eliminate financial disincentives for those who would defend against unjustified governmental action and thereby to deter the unreasonable exercise of Government authority.").

predicated upon administrative error."[10] In the context of administrative law, a court remand directing that relief be granted by the agency qualifies the plaintiff as a prevailing party.[11] Where "further agency proceedings" are necessary on remand, "the plaintiff qualifies as a prevailing party (1) without regard to the outcome of the agency proceedings where there has been no retention of jurisdiction by the court, or (2) when successful in the remand proceedings where there has been a retention of jurisdiction."[12]

EAJA's fee-shifting provision is not without limitation.[13] First, the statute's benefits can only be claimed by individuals whose net worth does not exceed certain defined amounts.[14] This income limitation ensures that EAJA does not create a windfall to deep-pocketed litigants, who require less incentive to initiate litigation.[15] Second, attorney fees under EAJA cannot exceed $125 per hour, subject to cost-of-living adjustments applicable to particular geographic areas.[16] Third, recognizing that the government may be dissuaded from pressing even reasonable arguments in court if forced to pay legal fees in every case it lost,[17] Congress included the proviso that the government would not be liable for fees if it could demonstrate that, even though it lost the case, it had been "substantially justified."[18]

Just what "substantially justified" means is the pivotal question in most actions for EAJA fees.[19] And, just as Justice Potter Stewart once famously struggled to define "obscenity," scholars have struggled to define "substantial justification" with specificity.[20] Congress did not define substantial justification in the EAJA statute, even though Congress did define several other key terms.[21] Courts have studiously avoided announcing any particular "test" for substantial justification and have been similarly careful in stating that the existence of substantial justification depends on an examination of the "totality of the circumstances."[22]

---

10 Zuberi v. Nicholson, 19 Vet. App. 541, 544 (2006).
11 Former Emps. of Motorola Ceramic Prods. v. United States, 336 F.3d 1360, 1366 (Fed. Cir. 2003).
12 *Id.*
13 *See* Morgan v. Perry, 142 F.3d 670, 685 (3d Cir. 1998) ("The EAJA is not a 'loser pays' statute.").
14 28 U.S.C. § 2412(d)(2)(B) (defining "party" under the statute as limited to individuals whose net worth does not exceed $2,000,000 and, with certain exceptions, owners of business entities the net worth of which does not exceed $7,000,000 and which does not have more than 500 employees).
15 *See* Comm'r v. Jean, 496 U.S. 154, 163 (1990) ("[T]he specific purpose of the EAJA is to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions.").
16 28 U.S.C. § 2412(d)(2)(A)(ii).
17 *See* Harold J. Krent, *Fee Shifting Under the Equal Access to Justice Act—A Qualified Success*, 11 YALE L. & POL'Y REV. 458, 507 (1993) (noting that EAJA is "the product of an uneasy compromise" between the desire to "encourage meritorious litigation" to "deter government wrongdoing" and the competing desire to "prevent overdeterring vigorous government policymaking and vigilant enforcement initiatives," and calling the "substantial justification" standard an important "safeguard" to help maintain the balance between the two).
18 28 U.S.C. § 2412(d)(1)(A). The statute provides:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action . . . brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

19 *See* Gregory C. Sisk, *The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct (Part Two)*, 56 LA. L. REV. 1, 18 (1995) (defining "substantial justification" as "the cardinal element in determining entitlement to an award under the EAJA").
20 *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (concluding, simply, "I know it when I see it").
21 Ann C. Chalstrom, *Collecting Attorney's Fees in Social Security Disputes: Procedures, Analysis, and Retroactive Application of Equal Access to Justice Act Timing Requirements*, 5 ELDER L. J. 117, 132 & n.90 (1997) (noting that the statute does define "fees and other expenses," "party," "position of the United States," "final judgment," and "prevailing party").
22 *See* Essex Electro Eng'rs, Inc. v. United States, 757 F.2d 247, 253 (Fed. Cir. 1985) ("The reasonableness of the government's litigation position is determined by the totality of the circumstances, and we eschew any single-factor approach.").

The Supreme Court has directed that "substantially justified" be interpreted broadly, holding that the term does not mean "justified to a high degree" but rather "justified in substance or in the main."[23] Specifically, the government can avoid paying fees if it took a position that was "justified to a degree that could satisfy a reasonable person."[24] In other words, the government should be able to defeat a request for attorney's fees if it can show that the government's position, though wrong, was reasonable.[25] The Court has observed that "Congress did not want the 'substantially justified' standard to 'be read to raise a presumption that the Government position was not substantially justified simply because it lost the case.'"[26]

The Supreme Court's interpretation, along with later interpretations, recognizes that Congress created EAJA to reward challenges to truly abusive policies, not to disincentivize the government from making reasonable arguments in defense of government (i.e., taxpayer) money.[27]

II. *JOHNSON* INTERPRETS "SUBSTANTIAL JUSTIFICATION" NARROWLY

The case of *Butts v. McDonald*,[28] in which the CAVC adopted a definition of "substantial justification" that is particularly unfavorable to the government, is best described by first discussing another case, *Johnson v. McDonald* ("*Johnson III*"),[29] also issued in 2016. As explained below, the EAJA litigation in *Butts* sprung from the events in the *Johnson* cases.

In *Johnson v. Shinseki* ("*Johnson I*"),[30] the veterans court took up the task of interpreting VA regulation 38 C.F.R. § 3.321(b)(1). In this regulation, the Secretary of Veterans Affairs provided an additional layer of veteran compensation over and above the compensation typically provided for service-connected injuries through the "rating schedule."[31]

The rating schedule is the primary method for compensating veterans for their service-connected injuries.[32] Using the rating schedule, The Department of Veterans Affairs (VA) compensates veterans in increasing amounts as a disability manifest particular symptoms of ascending severity.[33] In creating § 3.321(b)(1), the Secretary recognized that a veteran may have a serious condition that is not

---

[23] Pierce v. Underwood, 487 U.S. 552, 565 (1988). The short citation format for *Underwood* is often given as "*Pierce*," in briefs as well as judicial decisions, *see, e.g.*, White v. Nicholson, 412 F.3d 1314, 1315 (2005), but "*Underwood*" is the more appropriate abbreviation. "Pierce" in the case caption refers to Samuel R. Pierce, Jr., the then-Secretary of Housing and Urban Development (HUD) who would have been the named defendant in all actions brought against HUD. Myrna Underwood is the name of the individual litigant on whose behalf EAJA fees were sought. *See Underwood*, 487 U.S. at 552.

[24] *Underwood*, 487 U.S. at 565.

[25] *See Essex*, 757 F.2d at 252; *see also* H. R. REP. No. 96-1434, at 22 (1980) (Conf. Rep.) (Committee Report prepared in connection with original EAJA passage, noting that "[t]he test of whether the Government position is substantially justified is essentially one of reasonableness in law and fact").

[26] Scarborough v. Principi, 541 U.S. 401, 415 (2004) (quoting H. R. REP. No. 96-1005, at 10 (1980)).

[27] *See* Roanoke River Basin Ass'n v. Hudson, 991 F.2d 132, 139 (4th Cir. 1993) ("While the EAJA redresses governmental abuse, it was never intended to chill the government's right to litigate or to subject the public fisc to added risk of loss when the government chooses to litigate reasonably substantiated positions, whether or not the position later turns out to be wrong.").

[28] 28 Vet. App. 74 (2016).

[29] 28 Vet. App. 136 (2016).

[30] 26 Vet. App. 237 (2013) (en banc), *rev'd sub nom.* Johnson v. McDonald ("*Johnson II*"), 762 F.3d 1362 (Fed. Cir. 2014).

[31] *See Butts*, 28 Vet. App. at 105 (Bartley, J., dissenting) (noting that Congress did not require the Secretary to create "any type of extraschedular evaluation" and that applicable statutes simply do not contemplate the type of evaluation provided by § 3.321(b)(1)).

[32] *See* 38 U.S.C. § 1155 (2012) ("The Secretary shall adopt and apply a schedule of ratings of reductions in earning capacity from specific injuries or combination of injuries. The ratings shall be based, as far as practicable, upon the average impairments of earning capacity resulting from such injuries in civil occupations."); 38 C.F.R. § 4.10 (2018) ("A basis of disability evaluations is the ability of . . . [an] organ of the body to function under the ordinary conditions of daily life including employment.").

[33] *Id.*

manifested by the symptoms normally associated with that disability and therefore is not included in the rating schedule.[34] The regulation allows veterans to receive compensation for unlisted symptoms, if they can show that their disability picture is "exceptional" and exhibits factors such as "marked interference with employment" or "frequent periods of hospitalization."[35] The regulation states, in relevant part, that, although disability ratings "shall be based, as far as practicable, upon the average impairments of earning capacity," in order to "accord justice to the exceptional case where the schedular evaluation is inadequate, [VA] is authorized to approve . . . an extra-schedular evaluation commensurate with the average impairment of earning capacity due exclusively to the disability."[36] In other words, VA has to decide how debilitating your particular knee injury, tinnitus, or PTSD is with reference to defined standards; but, even if your injury doesn't meet those defined standards, VA will still find a way to compensate you if you can show that your disability is exceptionally debilitating.

It is useful to pause here and emphasize that there was no mandate from Congress for VA to create 38 C.F.R. § 3.321(b)(1), or anything like it.[37] Congress gave VA no mandate other than to create a rating schedule for compensating injuries. VA chose to create section 3.321(b)(1) as an act of beneficence.[38] However, for all the good that § 3.321(b)(1) has done for veterans, varying interpretations of § 3.321(b)(1) have caused headaches for courts and VA alike.[39]

The case of *Johnson I* raised the novel issue of whether the Secretary's regulation authorized an "extraschedular" award based on each individual disability, as the Secretary argued, or based on examining all of a veteran's disabilities collectively, as the Veteran argued.[40] In other words, did the plural noun language "disability or disabilities" in the regulation require VA to view all of the Veteran's disabilities collectively and compare them collectively against the rating criteria of individual diagnostic codes in the schedule? Or, rather, was the Secretary's use of plural language in the regulation simply a nod to the fact that a veteran may have one disability or several disabilities which he or she may seek to compare against the individual rating criteria for the particular disabilities?[41]

---

[34] *See* Thun v. Peake, 22 Vet. App. 111, 115 (2008), *aff'd sub nom.* Thun v. Shinseki, 572 F.3d 1366 (Fed. Cir. 2009) (noting that application of § 3.321(b)(1) is appropriate where "either a claimant or the evidence of record suggests that a schedular rating may be inadequate").

[35] *See Johnson I*, 26 Vet. App. at 242-43.

[36] 38 C.F.R. § 3.321(b)(1) (2018).

[37] *See supra* note 32. Congress's mandate for the rating schedule itself is posed in general terms and does not direct how or to what degree of specificity the Secretary shall determine the severity of a disability and thus the level of compensation a veteran will receive. *See* 38 U.S.C. § 1155.

[38] The congressional authority that the regulation cites for its creation is 38 U.S.C. § 501(a) (2012), which simply provides the Secretary with "authority to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by [VA]."

[39] *See* Brambley v. Principi, 17 Vet. App. 20, 24-25 (2003) (noting the "ambiguity within the disability ratings regulations" relating to extraschedular consideration and total disability based on individual unemployability and the "need to streamline and clarify" these regulations); *see also Thun*, 22 Vet. App. at 115 (explaining the regulation in terms of a "three-step inquiry," beginning with determining whether "the evidence before VA presents such an exceptional disability picture that the available schedular evaluations for that service-connected disability are inadequate" and next moving on to the separate "step" of "determin[ing] whether the claimant's exceptional disability picture exhibits other related factors," such as marked interference with employment and frequent periods of hospitalization); Anderson v. Shinseki, 22 Vet. App. 423, 427 (2009) (clarifying that, although *Thun* spoke of 38 C.F.R. § 3.321(b)(1) in terms of separate "steps," the regulation instead contains various "elements" to be applied to a claimant's disability picture).

[40] *See Johnson I*, 26 Vet. App. at 239-40.

[41] *See id.* at 243 (noting the appellant's argument based on the plural nouns in the regulation and the Secretary's argument that the use of the plural "is a recognition that a veteran may receive extraschedular ratings for one or more individual disabilities").

The question proved so exceptional that the CAVC took the unusual step of deciding the case en banc.[42] Before the en banc court, in support of his argument for a disability-by-disability approach to extraschedular evaluation, the Secretary noted the unworkability of comparing a disability picture that included injuries to multiple bodily functions to individual diagnostic codes designed to address only one bodily function or system at a time.[43] He also noted that the Board of Veterans' Appeals ("the Board"), the agency's highest appellate body, had long been applying the regulation the way the Secretary now read it.[44] Finally, he noted that the VA Adjudication Procedures Manual instructed administrative law judges at VA to apply the regulation by evaluating whether the rating schedule was adequate for individual disabilities, not disabilities collectively.[45] By a 5 to 3 margin, the CAVC sided with the Secretary, deferring to VA's interpretation of the regulation VA itself had written and spent years applying.[46]

In *Johnson v. McDonald* ("*Johnson II*"), the Federal Circuit reversed, holding that the "plain language" of the regulation required that all "disabilities" of a veteran be analyzed, collectively.[47] The Federal Circuit interpreted this language to mean that extraschedular evaluation (and thus extraschedular compensation) must be undertaken collectively.[48] The Federal Circuit stated that, even if it were to consider policy justifications, there would be "no policy justification" behind the Secretary's interpretation.[49]

On the issue of public policy, the Federal Circuit found dispositive the beneficent language in what might be called the regulation's "prefatory clause": the regulation states at the outset that it has

---

[42] The CAVC's Rules of Practice and Procedure state that "[m]otions for full Court review are not favored. Ordinarily they will not be granted unless such action is necessary to secure or maintain uniformity of the Court's decisions or to resolve a question of exceptional importance." U.S. VET. APP. R. 35(c), https://www.uscourts.cavc.gov/documents/Rules0716.pdf. Unique among federal appellate courts, the CAVC may issue decisions by single judges. 38 U.S.C. § 7254 (2012). This it does quite often. As frequent veterans law commentators have noted, "single-judge decisions (issued as 'memorandum decisions') have come to completely dominate the resolution of appeals by veterans seeking independent judicial review of decisions by the Department of Veterans Affairs . . . ." James D. Ridgway et al., *"Not Reasonably Debatable": The Problems with Single-Judge Decisions by the Court of Appeals for Veterans Claims*, 27 STAN. L. & POL'Y REV. 1, 3 (2016). In fiscal year 2015, 4,506 appeals were filed with the CAVC; the court decided 26 of those appeals by a panel decision and five appeals by the full court. U.S. COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORT: OCTOBER 1, 2014 TO SEPTEMBER 30, 2015 (FISCAL YEAR 2015) 1-2 (2016), https://www.uscourts.cavc.gov/documents/FY2015AnnualReport.pdf. In fiscal year 2014, the numbers were 3,745 appeals, with 34 decided by a panel and one case decided by the full court. U.S. COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORT: OCTOBER 1, 2013 TO SEPTEMBER 30, 2014 (FISCAL YEAR 2014) 1-2 (2015), https://www.uscourts.cavc.gov/documents/FY2014AnnualReport06MAR15FINAL.pdf. In fiscal year 2013, there were 3,531 appeals, with 27 decided by a panel and again one lone case decided by the full court. U.S. COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORT: OCTOBER 1, 2012 TO SEPTEMBER 30, 2013 (FISCAL YEAR 2013) 1-2 (2014), https://www.uscourts.cavc.gov/documents/FY2013AnnualReport.pdf. During this three-year period, the court decided seven of the 11,782 appeals en banc, or approximately 0.06 percent.

[43] *Johnson I*, 26 Vet. App. at 244 (noting that "under the VA disability compensation scheme, disability ratings are assigned for each disability separately based on the level of severity and the unique symptoms associated with the particular disability . . . . Thus, VA's disability-by-disability approach is consistent with . . . the overall disability compensation scheme"); *see also* Martinak v. Nicholson, 21 Vet. App. 447, 451-52 (2007) (noting that the VA rating schedule provides compensation through a list of "diagnostic codes and rating tables applicable for a specific disease or injury").

[44] *See Johnson I*, 26 Vet. App. at 256 n.13 (Kasold, C.J., dissenting).

[45] *Id.* at 243-44 (quoting VA ADJUDICATION PROCEDURES MANUAL, pt. III, subpt. iv, ch. 6, sec. B.5.c (noting that claims were to be submitted for extraschedular consideration "if the schedular evaluations are considered inadequate for an individual disability").

[46] *Johnson I*, 26 Vet. App. at 243; *see* Auer v. Robbins, 519 U.S. 452, 461-62 (1997) (holding that in cases of regulatory interpretation, the Supreme Court defers to the Secretary's interpretation of his own regulation unless that interpretation is plainly erroneous or inconsistent with the language of the regulation).

[47] Johnson v. McDonald ("*Johnson II*"), 762 F.3d 1362, 1365 (Fed. Cir. 2014).

[48] *Id.* at 1365 ("The plain language of [38 C.F.R.] § 3.321(b)(1) provides for referral for extra-schedular consideration based on the collective impact of multiple disabilities.").

[49] *Id.* at 1366.

been enacted "to accord justice" to exceptional cases.[50] Seizing on the phrase "to accord justice," the Federal Circuit held, "there is no logic to the idea that it is only necessary to accord justice based on a veteran's individual disabilities and not also on the collective impact of all of the veteran's disabilities."[51]

After the Federal Circuit reversed, the Veteran sought EAJA fees, in what became *Johnson III*.[52] The Secretary argued that fees were not appropriate because VA's position – interpreting its own regulation – had been reasonable.[53] Stunningly, the CAVC disagreed.[54] In a sharply divided decision, the CAVC, which in *Johnson I* had held the Secretary's position to be not only reasonable but also *meritorious*, in *Johnson III* determined that not only had the Secretary gotten the question wrong, he had not even been close.[55]

The CAVC's reasoning in *Johnson III* rested in large part on the Federal Circuit's decision in *Johnson II*, and specifically that decision's citation to the "plain language" canon. In the "plain language" canon, a court looks to the language of a statute or a regulation itself, or "on its face," rather than factors such as public policy or legislative history.[56] If the meaning can be derived from this "plain" reading, the interpreting court stops there.[57] Because the Secretary had lost at the "plain language" phase of interpretation, the CAVC determined that the VA's position was "plainly" unreasonable, no matter how strongly any of the other factors in the totality of the circumstances analysis weighed against this result.[58]

The majority in *Johnson III* cited dicta from a Federal Circuit decision in *Patrick v. Shinseki*.[59] In *Patrick*, where the Federal Circuit held that the CAVC had improperly focused on only one factor in analyzing substantial justification, the Federal Circuit added the observation that, when a court determines that the government has misread the "plain language" of a statute *and* acts contrary to legislative history, the government will have a "difficult" time establishing substantial justification.[60]

The decision in *Johnson III* struck a hard blow against VA, for several reasons. First, the VA regulation at issue had been notoriously difficult to interpret.[61] Second, even though the Federal Circuit stopped its analysis at the "plain language" canon of regulatory interpretation, the plain language "disability or disabilities," as suggested above, had two plausible meanings.[62] Third, *Johnson* was a case of first impression, where the courts typically give the government leeway in the EAJA context.[63] Fourth,

---

50 *Id.* (quoting 38 C.F.R. § 3.321(b)(1)).
51 *Id*.
52 Johnson v. McDonald ("*Johnson III*"), 28 Vet. App. 136, 138 (2016) (en banc), *amended by* Johnson v. McDonald, 2016 U.S. App. Vet. Claims LEXIS 1016 (2016) (en banc).
53 *Id.* at 139.
54 *Id.* at 143.
55 *Id.*
56 *See* Wash. Legal Found. v. U.S. Sentencing Comm'n, 17 F.3d 1446, 1449-50 (D.C. Cir. 1994) (noting that the "'[p]lain meaning' analysis is merely a tool of construction" and "does not perform a talismanic function in statutory interpretation").
57 *See* Cacciola v. Gibson, 27 Vet. App. 45, 52 (2014) ("If the meaning of the regulation is clear from its language, that is the end of the matter.").
58 *See Johnson III*, 28 Vet. App. at 143 ("[W]e find little, if any, persuasive value in the factors set forth by the Secretary in support of his argument that he was substantially justified in his interpretation and application of [38 C.F.R.] § 3.321(b)(1). Indeed, the factors he presents do not overcome the significant hurdle imposed by the fact that the Board's interpretation and application of § 3.321(b)(1) were contrary to the plain language of that regulation and without policy support.").
59 668 F.3d 1325 (Fed. Cir. 2011).
60 *Id.* at 1330-31.
61 *See supra* note 38.
62 *Johnson I*, 26 Vet. App. at 243.
63 *See* Cody v. Caterisano, 631 F.3d 136, 142 (4th Cir. 2011) ("As the Government notes, litigating cases of first impression is generally justifiable."); Hill v. Gould, 555 F.3d 1003, 1008 (D.C. Cir. 2009) (holding that, although the Secretary of the Interior misconstrued the statute regarding whether he could permissibly exclude the mute swan from the protection of the Migratory Bird Treaty Act, 16 U.S.C. §§

for the government to be forced to pay attorney's fees, its position must be unreasonable; and in *Johnson* the CAVC had decided – en banc – that the Secretary's arguments were not only reasonable but correct.[64]

Moreover, in rejecting the government's policy arguments, the Federal Circuit neither addressed the government's practical concerns about the functionality of the rating schedule nor explained why it attached so much weight to the regulation's prefatory language, "to accord justice."[65] On the latter point, the Federal Circuit's analysis was apparently that, having chosen to offer compensation even if the veteran did not meet the standards for compensation under the rating schedule, the government really must have meant to offer compensation in *more* such cases.[66] The Secretary offered an olive branch, and the Federal Circuit divined that he must have meant to offer the entire tree.

Finally, as Judge Bartley's dissent in *Johnson III* noted, veterans law EAJA cases did not support the notion that a misstep at the "plain language" portion of statutory interpretation rendered the government's position per se unreasonable.[67] As the dissent noted, the question under EAJA is not at what stage of the analysis the Secretary's arguments lost the day; the question is how reasonable the Secretary's position was, considering the totality of the circumstances.[68]

III. *BUTTS* TAKES *JOHNSON*'S HARSH DECISION ONE STEP FURTHER

If *Johnson III* was a gut punch for VA, the result in *Butts v. McDonald*[69] was a roundhouse kick to the face. *Butts* involved the same regulation, the interpretation of the same language—"disability or disabilities"—and the same result at the Board of Veterans' Appeals. So, VA had all of the same arguments in its favor to avoid paying EAJA fees that VA had in *Johnson*. However, in *Butts*, the Board issued its decision at a time after the CAVC had issued *Johnson I* and before the Federal Circuit had issued *Johnson II*.

To recap: at the time VA denied the benefits in the *Butts* case, the Secretary had just successfully urged the only court in the country whose sole business is interpreting veterans law[70] to go en banc and announce that the Secretary's interpretation of § 3.321(b)(1) was the law of the land. Nevertheless, the CAVC determined that, even considering the legal landscape at the time the *Butts* Board decision issued, the Board's interpretation was still unreasonable.[71]

703-712, "the Secretary took a reasoned position on a novel issue, and the sparse agency record did not 'obviously defy the requirements of the [Administrative Procedure Act]'").

64 *See Johnson I*, 26 Vet. App. at 248.

65 *Johnson II*, 762 F.3d at 1366 (quoting 38 C.F.R. § 3.321(b)(1)).

66 *See id.*

67 *See Johnson III*, 28 Vet. App. at 155 (Bartley, J., dissenting) (citing Bates v. Nicholson, 20 Vet. App. 185, 192 (2006) (noting that although Secretary's interpretation ran contrary to the statute's "plain language" and had "no basis in the statutory language, legislative history, or case authority," the Secretary was substantially justified because the case was a "matter of first impression" and the interpretation "could not have been easily divined from existing caselaw").

68 *See id.* at 153-54 (quoting Patrick v. Shinseki, 668 F.3d 1325, 1332 (Fed. Cir. 2011) (remanding because "although the Veterans Court acknowledged this 'totality of the circumstances' standard, it improperly focused on only one factor"). Ironically, by allowing the "plain language" step of the analysis to overrule the other factors in the analysis, the *Johnson III* court ran afoul of *Patrick*, the most important case citation for the majority in *Johnson III*.

69 *Butts*, 28 Vet. App. at 74.

70 *See supra* note 4; *see also Butts*, 28 Vet. App. at 111 (Moorman, J., dissenting) ("[W]hen *Butts* was decided by the Board, recognizing this Court's status as the single Federal court having jurisdiction to hear appeals from final VA decisions, *Johnson I* was the law of the land.").

71 *Butts*, 28 Vet. App. at 86.

Far from acting unreasonably, the Board of Veterans Appeals had been *bound by* the result in *Johnson I* at the time it denied the benefits.[72] So argued the Secretary, anyway. But the CAVC held that the Secretary could have sought a stay of all Board decisions potentially raising the issue of collective extraschedular consideration, pending the Federal Circuit's review in *Johnson II*.[73] And, because the Secretary's interpretation of § 3.321(b)(1) was contrary to the "plain language" of the regulation, the Secretary had had no reasonable alternative but to ask the CAVC for such a stay.[74]

Of course, the Secretary did not know that the Federal Circuit would overturn the CAVC, much less that the Federal Circuit would fail to consider any of the Secretary's policy justifications. Nevertheless, just like the hapless protagonist at the beginning of this Article, the Secretary was taken to task by the court (the CAVC) for his unreasonable heeding of the authority provided by the state troopers (also the CAVC). Even though the Secretary was bound by their authority, he should have spoken up, told the CAVC that they had likely gotten it wrong in *accepting* his interpretation, and asked for a stay.[75]

In veterans law, the Secretary may not simply choose to stay all cases pending before the Board that may be affected by the outcome of a pending appeal; instead, the Secretary must file a motion with the veterans court for leave to stay all of those cases.[76] This contrasts veterans law with other areas of administrative law, where unilateral agency decisions to stay pending administrative matters are permitted.[77]

The CAVC failed to cite to a single case in which an agency, though pleased with the result of a judicial interpretation of the agency's actions, nonetheless sought to stay all pending matters involving those same type of actions because the agency thought a higher court might strike down the favorable interpretation. The CAVC did not provide any insight into why a reasonable Secretary would choose to seek a stay in such a situation, let alone why no reasonable Secretary *would not* have sought a stay, which, after all, is the operative test.[78] Considering that substantial justification has been described as "whether the agency had a rational ground for thinking it had a rational ground for its action,"[79] *Butts* truly catches the Secretary between the proverbial rock and a hard place.

Butts has since been affirmed, without opinion, by the Federal Circuit.[80] Even if the Federal Circuit had not affirmed *Butts*, three factors nevertheless would support highlighting *Butts* and *Johnson III* in describing EAJA trends at the CAVC. First, the Federal Circuit's review of CAVC substantial justification determinations is extremely limited, if not nonexistent.[81] Second, overturning *Butts* would

---

72 *Id.* at 81.
73 *Id.* at 86.
74 *Id.* at 102-03 (Bartley, J., dissenting) (noting that the majority's holding amounted to a determination that the Secretary's only reasonable response to *Johnson I* was to seek a stay).
75 *See id.* at 110 (Moorman, J., dissenting) ("[B]y the majority's reasoning, a wise Secretary and Board would not have followed our decision [in *Johnson I*] unless or until it was declared correct by the Federal Circuit.").
76 *See* Ribaudo v. Nicholson, 20 Vet. App. 552 (2007) (en banc) ("[T]he law fails to provide the Secretary and Board Chairman with the authority to unilaterally stay cases before the Board as they see fit because of a disagreement with a decision of this Court or pending an appeal to the Federal Circuit.").
77 *See* Ithaca Coll. V. NLRB, 623 F.2d 224 (2d Cir. 1980 (noting that the NLRB "cannot . . . choose to ignore [a court] decision as if it had no force or effect" but "it would be reasonable for the Board to stay its proceedings in another case that arguably falls within the precedent of the first one"); *see also Ribaudo*, 20 Vet. App. at 557 (noting distinctions between veterans law and applications of the National Labor Relations Act that contribute to the differences in approach where stays are concerned).
78 *See Butts,* 28 Vet. App. at 103 (Bartley, J., dissenting).
79 Kolman v. Shalala, 39 F.3d 173, 177 (7th Cir. 1994).
80 Butts v. Wilkie, 721 F. App'x 988 (Fed. Cir. 2018).
81 *See* Bowey v. West, 218 F.3d 1373, 1378 (Fed. Cir. 2000) (noting that the Federal Circuit may not review the CAVC's determination of whether the government was substantially justified).

not have necessarily disturbed *Johnson III*'s essential holding about the talismanic nature of "plain language" in an attorney's fees analysis.[82] Third, in the judicial Rorschach test that is substantial justification, *Butts* and *Johnson III* together help demonstrate the CAVC's current stance on the reasonableness of the government's arguments. Regardless, in the skyline of the CAVC's EAJA jurisprudence, *Butts* is a skyscraper of a decision.

IV. IN CONTRAST TO *JOHNSON* AND *BUTTS*, EARLY VETERANS LAW EAJA CASES ESTABLISH A GOVERNMENT-FRIENDLY STANDARD

Johnson III and *Butts* stand in stark contrast to early CAVC EAJA decisions, which established a liberal interpretation of substantial justification, one that gave the government credit for the particularities, eccentricities, and complexities of veterans law.

1. ***Stillwell*: Good-Faith Arguments and Confusing Tapestries**

One of the earliest CAVC decisions to delve into the substantive provisions of EAJA is *Stillwell v. Brown*.[83] If *Pierce v. Underwood* is the starting point for federal courts' conducting EAJA substantial justification analyses, *Stillwell* is the *Underwood* of veterans law.[84] *Stillwell* provided both a framework and several guiding lights for veterans law practitioners on the issue of substantial justification.[85]

Stillwell held that the CAVC would decide substantial justification by examining the government's position under the "totality of the circumstances."[86] Further, *Stillwell* noted that among the most probative factors in the totality analysis were "merits, conduct, reasons given, and consistency with judicial precedent and VA policy with respect to such position, and action or failure to act, as reflected in the record on appeal and the filings of the parties before the Court."[87]

In addition to these factors, *Stillwell* identified "special circumstances" that apply to substantial justification determinations in the veterans law context:

> Two special circumstances may also have a bearing upon the reasonableness of the litigation position of the VA, and of the action or inaction by the VA at the administrative level. One is the evolution of VA benefits law since the creation of this Court that has often resulted in new, different, or more stringent requirements for adjudication. The second is that some cases before this Court are ones of first impression involving good faith arguments of the government that are eventually rejected by the Court.[88]

---

82 *See Johnson III*, 28 Vet. App. at 143.
83 6 Vet. App. 291 (1994).
84 *See* Pierce v Underwood, 487 U.S. 552 (1988). In *Underwood*, the Supreme Court settled a longstanding debate and clarified that the phrase "substantially justified" does not mean "justified to a high degree" but rather means "'justified in substance or in the main'—that is, justified to a degree that could satisfy a reasonable person." *Id.* at 565.
85 Cases at both the Federal Circuit and the veterans court routinely cite *Stillwell* for its basic substantial justification framework. *See, e.g.*, White v. Nicholson, 412 F.3d 1314, 1317 (Fed. Cir. 2005); Johnson v. Principi, 17 Vet. App. 436, 442 (2004).
86 6 Vet. App. at 302. This position was far from novel; *Stillwell* adopted the standard from a pre-Veterans Judicial Review Act opinion from the Federal Circuit, *Essex Electro Engineers, Inc. v. United States*, 757 F.2d 247, 253 (Fed. Cir. 1985) ("The reasonableness of the government's litigation position is determined by the totality of the circumstances, and we eschew any single-factor approach."). *See Stillwell*, 6 Vet. App. at 302 (citing *Essex*).
87 *Stillwell*, 6 Vet. App. at 302.
88 *Id.* at 303.

Read together, the two special circumstances described in *Stillwell* amount to the CAVC's acknowledgment that judicial review of veterans law regulations and statutes was still very new.[89] VA, the early CAVC recognized, should be given credit for advancing good faith arguments in the face of new and at times more exacting standards imposed by the courts.

Stillwell is also significant because it established "confusing tapestry" as a buzzword for EAJA jurisprudence in veterans law circles. The underlying merits decision in *Stillwell* involved the government's attempt, by enacting 38 C.F.R. § 3.53, to interpret and further define an eligible "surviving spouse" under 38 U.S.C. § 101(3). Section 101(3) provides that a "surviving spouse" for purposes of VA survivor benefits is someone who lived continuously with the veteran from the date of marriage until the date of the veteran's death, unless "there was a separation which was due to the misconduct of, or procured by, the veteran without the fault of the spouse."[90] On its face, the statute deals only with the conduct of the parties to the marriage at the time of separation; it contains no provision denying benefits to a surviving spouse who became separated because of the veteran's misconduct who then elected to remain separated from the veteran for reasons unrelated to the misconduct.[91]

In 38 C.F.R. § 3.53(a), VA tied the surviving spouse's entitlement to benefits to his or her ability to show that "there was no separation due to the fault of the surviving spouse."[92] Additionally, § 3.53(b) stated that the continuing cohabitation requirement would be met if the parties were separated for any reason "which did not show an intent on the part of the surviving spouse to desert the veteran."[93]

The surviving spouse in *Stillwell* established that her initial separation from the Veteran was due to the Veteran's abusive conduct, but there was no evidence that the surviving spouse attempted to again cohabitate with the Veteran after the initial separation.[94] VA determined that the appellant was not a surviving spouse under 38 U.S.C. § 101(3) and 38 C.F.R. § 3.53(a).[95]

While an appeal to the CAVC was pending, the court issued *Gregory v. Brown*,[96] holding that the first sentence of 38 C.F.R. § 3.53(a) violated section 101(3), because the spouse's conduct should be analyzed only to the extent it established fault at the time of separation, not subsequently.[97] After *Gregory* issued, the parties in *Stillwell* recognized that the court's new interpretation of section 101(3) required readjudication by VA, and, like the parties in *Butts*, they agreed to a joint motion for remand.[98]

At the EAJA phase, the CAVC held that the government had misinterpreted the language of the statute.[99] However, the court held that the government had been substantially justified because, while the Board "incorrectly applied the law and erred in so doing, . . . the VA may have reasonably, although incorrectly, inferred from the use of the word 'desert' in § 3.53(b), a need for continuing faultless conduct

---

89 *See* Veterans' Judicial Review Act, Pub. L. No. 100-687 § 402, 102 Stat. 4105 (1988) (establishing judicial review over final VA benefits decisions for the first time).
90 38 U.S.C. § 101(3) (2012).
91 *See id.*
92 38 C.F.R. § 3.53(a) (1993); *see Stillwell*, 6 Vet. App. at 293 (describing the statutory and regulatory standards for surviving spouses at the time of the Board decision in *Stillwell*).
93 38 C.F.R. § 3.53(b).
94 *Stillwell*, 6 Vet. App. at 293.
95 *Id.* (quoting the underlying Board decision, BVA 91-34157, at 3 (Oct. 17, 1991) (noting that, after the initial separation, "there was never any intent on the part of . . . appellant to again cohabit with the veteran").
96 5 Vet. App. 108 (1993).
97 *Id.*
98 6 Vet. App. at 293.
99 *Id.* at 303.

after separation in cases not involving separation by mutual consent."[100] The CAVC also noted that the statutory and regulatory framework presented a "confusing tapestry,"[101] from which "meaning [wa]s not easily discerned."[102] Viewed in this light, the Board's misinterpretation "appear[ed] to be no more than a reasonable mistake."[103] The CAVC would acknowledge the "confusing tapestry" of veterans law for years to come.[104]

Thus, in *Stillwell*, the CAVC found that the agency had misinterpreted—and had enacted a regulation that directly contravened—the language of the statute, the same type of analysis by which the Federal Circuit in *Johnson II* had determined that the government had violated the "plain language" of 38 C.F.R. § 3.321(b)(1).[105] However, in *Stillwell*, unlike in *Johnson III* and *Butts*, the CAVC held that the government's position was substantially justified.

2. ***Felton*: Cases of First Impression Given Leeway, and No "Plain Meaning" Rule**

Another early CAVC case that helped establish the court's expansive definition of substantial justification was *Felton v. Brown*.[106] At the merits stage of *Felton*, the veterans court again invalidated part of a regulation written by the Secretary as contrary to statutory authority.[107] Specifically, the court invalidated 38 C.F.R. § 3.558(c)(2), which dealt with payments to veterans following certain competency determinations, as "in excess of statutory authority" found in 38 U.S.C. § 5503(b)(1), which also involved payments to veterans after certain competency determinations.[108]

Section 5503(b)(1)(A) states that veterans who are determined to be "incompetent," who are receiving certain care or treatment from the government without charge, who have no spouse or child, and whose estates equal or exceed $1,500, cannot receive pension or compensation payments until the estate is reduced to $500.[109] Section 5503(b)(1)(B) states that veterans shall receive a "lump sum" payment of all benefits withheld under subsection (b)(1)(A), but not until the expiration of six months following a finding of competency.[110] Subsection (b)(1)(B) does not explicitly specify whether any of the other enumerated conditions in subsection (b)(1)(A) must expire in order to trigger a lump-sum payment, or whether the six-month competency period alone triggers it.[111]

The invalidated regulatory section, 38 C.F.R. § 3.558(b)(2), prohibited the payment of lump-sum payments to a veteran rated competent for six months and then re-rated incompetent unless "he or she has a proper dependent" who "is a spouse or child."[112] The veteran in *Felton* was rated incompetent for six months and met the other qualifiers in section 5503(b)(1)(A) for a suspension of benefits, and then was rated competent

---

100 *Id.*
101 *Id.* (quoting Hatlestad v. Derwinski, 1 Vet. App. 164, 167 (1991)).
102 *Id.*
103 *Id.*
104 *See, e.g.*, Camphor v. Brown, 8 Vet. App. 272, 275 (1995) (quoting *Stillwell*'s "confusing tapestry" language and holding the government's administrative position was substantially justified for the reasons stated in *Stillwell*); Golliday v. Brown, 7 Vet. App. 249, 255 (1994) (citing *Stillwell* and holding that a statute's complexity and difficulty to interpret weighed in the government's favor in the substantial justification analysis).
105 *See* 762 F.3d at 1365-66.
106 7 Vet. App. 276 (1994).
107 Felton v. Brown, 4 Vet. App. 363, 370-71 (1993).
108 *Id.* at 371.
109 38 U.S.C. § 5503(b)(1)(A) (1988).
110 *Id.* § 5503(b)(1)(B).
111 *Id.*
112 38 C.F.R. § 3.558(c)(2) (1991).

for a period of six months, before being rated incompetent again.[113] He was denied benefits after his six-month competency period only because, under the language of § 3.558(b)(2), he did not have a proper dependent.[114]

At the merits stage, the CAVC held that the language of the statute, together with the statute's context, belied the Secretary's assertion that 38 C.F.R. § 3.558(c)(2) was a permissible exercise of his authority.[115] The court went further, holding that when "'a statute's language is plain, and its meaning clear, no room exists for construction. There is nothing to construe.' The language of the statute, taken in context, mandates payment to the veteran."[116]

At the EAJA stage, however, the CAVC noted that it appeared that the Secretary had been attempting "to interpret a gap in a statute and a VA regulation."[117] The court stated, "[g]iven the statutory silence on the particular matter and the lack of a conflict with adverse precedent, the Secretary's position during this part of the administrative phase, i.e., in promulgating the regulation at issue, was substantially justified."[118] The court also gave weight to the fact that the case was one of first impression.[119]

Judge Steinberg dissented in *Felton*, stating that, in his view:

> [W]hen this Court holds that an agency's interpretation of the law violates the *clear* and *plain* meaning of the statute, the Secretary . . . has a heavy burden to carry to persuade the Court that both his adoption of the regulation and his litigating posture were reasonable as a matter of law.[120]

Importantly, Judge Steinberg's view did not gain a majority of the court.

V. EAJA JURISPRUDENCE IN VETERANS LAW SHIFTS AWAY FROM THE GOVERNMENT'S FAVOR

Given the early veterans law EAJA cases, which emphasize issues such as the novelty of a legal issue, the confusing nature of a statute or regulation, and the complexity of veterans law itself as pertinent considerations counting in the government's favor, and which downplay the impact of a "plain language" misinterpretation of a statute's language, it is tempting to wonder whether *Johnson III* and *Butts* are simply anomalies. But, in actuality, these cases – along with *Patrick v. Shinseki*, where the Federal Circuit's observation about plain language helped lead to the results in *Johnson III* and *Butts*[121] – represent the culmination of a clear trend in EAJA jurisprudence in veterans law toward more EAJA fees and fewer cases where the Secretary was deemed to have acted reasonably.

---

113 *Felton*, 4 Vet. App. at 371.
114 *Id.*
115 *Id.* at 370-71 ("It is clear that it is contrary to the language and purpose of the statute to deny the veteran his lump-sum compensation" and that the "restriction [imposed by the regulation] is clearly in contravention of the statute and . . . is an unauthorized limitation on the scope of 38 U.S.C. § 5503.").
116 *Id.* at 369 (citation omitted).
117 Felton v. Brown, 7 Vet. App. 276, 284 (1994).
118 *Id.*
119 *Id.* at 284-85.
120 *Id.* at 292 (Steinberg, J., dissenting). Judge Steinberg raised several additional objections to the court's analysis, which are also notable for the fact that they did not win the day, including his belief that the court had gone beyond the arguments of the parties to assert additional arguments in defense of the Secretary's position, and his disagreement with the weight the court gave to the fact that the case presented an issue of first impression. *Id.* at 288-89.
121 Patrick v. Shinseki, 668 F.3d 1325, 1330-31 (Fed. Cir. 2011).

1. A Gradual Shift

Cases prior to *Johnson III* and *Butts* show gradual movement to a more exacting standard imposed on VA. In a 2013 case, *Cline v. Shinseki*,[122] the CAVC cited a number of considerations that should have weighed heavily in the government's favor, but nevertheless relied on the strong language in its own merits decision to find the government without substantial justification. At the merits stage, the court held that the government's position, that the addition of subsection (c)(2) to 38 C.F.R. § 3.156 was merely a clarification of existing policy, was based on "no evidence" in the "plain language of the regulation or in the Secretary's comments on the proposed amendments."[123]

At the EAJA stage, the CAVC acknowledged that "the Secretary could not have predicted that the Court would interpret subsection (c)(2) in such a manner."[124] The court also acknowledged that it was dealing with "a case of first impression."[125] Also, in an eerie prelude to *Johnson III* and *Butts*, the court noted that its own prior holdings regarding this particular regulation gave legitimacy to the government's interpretation.[126] The court noted that its merits decision had been a divided one.[127] Finally, the court noted that the Secretary enjoys heightened deference when interpreting his own regulations.[128]

Nevertheless, the CAVC in *Cline* found no substantial justification for the government's position, relying on its own holding at the merits stage that "there was 'no evidence' to support the Secretary's interpretation."[129] The court observed, in fact, that the strong language in its own merits decision essentially required a result against the Secretary.[130] Thus in *Cline*, as in *Johnson III* and *Butts*, despite nominally conducting an analysis of all the factors that counseled in favor of finding the government substantially justified, the court found that the language of its merits decision constrained it to find that the government was not substantially justified.[131]

Even prior to *Cline*, and prior to *Patrick*, the veterans court had begun to treat the government's violation of the "plain meaning" of a statute as talismanic, for EAJA fee purposes. In *Gordon v. Peake*, the government chose to litigate an issue of first impression, namely, whether the Veterans Claims Assistance Act (VCAA) applied to claims for proceeds from National Service Life Insurance (NSLI) policies.[132] The Secretary argued that they were not covered, a position the court found substantially unjustified because it violated the "plain language" of the statute.[133]

---

122 26 Vet. App. 325 (2013).
123 *Id*. at 329.
124 *Id.*
125 *Id.* at 330.
126 *Id.*
127 *Id.*
128 *Id.*
129 *Id.*
130 *Id.* ("Even if the Court were to assume that this was a 'close question,' . . . the Court's findings on the merits make it difficult to conclude that the Secretary's position was reasonable.").
131 *Id.* at 331.
132 22 Vet. App. 265, 268-69 (2008). The Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096, added a number of new requirements for the Secretary in assisting veterans in bringing claims, including, pertinent to *Gordon*, a requirement that upon receipt of a substantially complete application for benefits, the Secretary notify the claimant of any information not previously provided to the Secretary that is necessary to substantiate the claim. 38 U.S.C. § 5103(a) (2012).
133 *Gordon*, 22 Vet. App. at 271 (finding no substantial justification "[g]iven the plain meaning and clarity of the statutory provision in question, as stated by the Court in its underlying merits opinion, and the Court's rejection of the Secretary's argument as contrary to the plain meaning of the applicable statutory provisions").

The CAVC in *Gordon* acknowledged that the case presented an issue of first impression,[134] but the strength of the government's argument regarding substantial justification went further. Although in the merits decision the court had found that the issue was governed by a "plain language" reading of section 5103, in actuality the court based its reasoning on the lack of congressional *exclusion* of NSLI benefits from the provisions of the VCAA.[135] In the same breath in which the court stated that it was relying on "plain language," the court also stated that its holding was based on the fact that "Congress, we believe, would have made its intention clear in the statute" if it had intended the Secretary's reading.[136]

Gordon is a useful illustration of a logical fallacy with the "plain language, therefore plainly wrong" reasoning. Sometimes, as in *Gordon*, a court states that the "plain language" of a statute compels the result when what the court really means is, "We have examined the language of the statute and, on balance, reading A is correct over reading B." Confirmation bias then can lead the same court to become enamored with the perceived strength of its own reasoning.[137] If *our* result was "plain" and "clear," disagreement with that result must be unreasonable.[138] Of course, reasonable minds can differ about the correct interpretation of the unadorned words of a statute just as they can differ about any other matter. Only hindsight judgment permits the inference that plain language errors are inherently plainly wrong.[139]

Even before *Gordon*, the CAVC began to break with the EAJA standards established in *Felton* and *Stillwell*. Cases in the late 1990s and early 2000s began to cite portions of *Felton* and *Stillwell* in an observational fashion, and not in support of the reasonableness of the Secretary's overall position. In *Moore v. Gober*, the court cited *Stillwell*'s "confusing tapestry" standard to note that the regulations at issue, involving total disability ratings based on individual unemployability, were complex, but the court granted EAJA fees because of the agency's failure to obtain records from the veteran's educational and vocational rehabilitation files.[140] In *Swiney v. Gober*, the court cited *Felton* on cases of "first impression," but actually noted language in *Felton* cautioning that cases of "first impression" did not necessarily establish that the government was substantially justified.[141] In awarding fees, the court also cited the court's violation of the "plain language" of the regulation at issue as a factor for why the Secretary was not substantially justified.[142]

2. "No Other Court in the Country Awards EAJA Fees As Liberally As This One"

By as early as 2001, various judges at the veterans court had begun to comment upon the increasingly liberal nature in which the CAVC handed out EAJA fees and the correspondingly narrow

---

134 *Id.* at 268-69.
135 *Id*. at 279-80.
136 *Id.* ("Clearly, if Congress had intended that the Secretary's *section 5103(a)* notice obligations did not apply to NSLI beneficiary claimants, Congress, we believe, would have made its intention clear in the statute and used language to that effect.") (italics in original).
137 Or, as in the case of *Johnson III* and *Butts*, with the force of the Federal Circuit's hyperbolically dismissive language in *Johnson II*.
138 *See* Sisk, *supra* note 19, at 41-42. According to Sisk,

> When any person makes a decision, it is easy to believe that no reasonable person could have reached a contrary determination. Too many district judges may be falling into the temptation of viewing their opinions on the merits as the measure of manifest reasonableness. 'As with any mirror-gazing, there is a risk of being unduly taken with what you see.' (quoting Pub. Citizen Health Research Group v. Young, 909 F.2d 546, 549 (D.C. Cir. (1990)).

139 *See* Taucher v. Brown-Hruska, 396 F.3d 1168, 1173 (D.C. Cir. 2005) (In considering substantial justification under EAJA, "as in other areas[,] courts need to guard against being subtly influenced by the familiar shortcomings of hindsight judgment.").
140 10 Vet. App. 436, 441 (1997).
141 14 Vet. App. 65, 71 (2000).
142 *Id.* at 72.

definition the court was giving to the term "substantial justification." Judge Holdaway, dissenting in Cullens v. Gober, noted that "No other court in the country awards EAJA fees as liberally as this one." He specifically noted that the veterans court was the only court that awarded EAJA fees based on the Secretary's failure to articulate the reasons for his denial of benefits. Judge Holdaway also observed that because the question on the merits in Cullens involved a novel issue that came about because of a change in law, the court's prior jurisprudence should have counseled a denial of EAJA fees.

In *Cullens*, Judge Farley concurred with the result but wrote separately to state that "a course correction is required because the Court has inexplicably and erroneously drifted away from the substantial justification mooring initially set by *Stillwell v. Brown*."[143] Specifically, Judge Farley noted that the court had "drifted away" from *Stillwell*'s emphasis on the "totality of the circumstances" as the appropriate rubric for review.[144]

Year-to-year statistics on EAJA fee awards bear out the judges' concerns. The data show a clear shift in veterans court jurisprudence over the years towards awarding fees in a progressively higher percentage of cases. From fiscal year 1999 to fiscal year 2015, the percentage of EAJA applications denied over EAJA applications filed steadily decreased. In FY 1999, 826 EAJA applications were filed, and the court denied 85 of these, or 10.3 percent.[145] In FY 2001, 801 EAJA applications were filed, and the court denied 19 of these, or 2.4 percent.[146] In FY 2008, 2461 EAJA applications were filed, and the court denied just 16 of these, or 0.65 percent.[147] In fiscal year 2015, the numbers are 2,909 EAJA applications filed and 10 applications denied, for a percentage of only 0.34.[148] In other words, since at least 1999, the veterans court has denied smaller and smaller percentages of all EAJA applications filed.

The result of the above figures is a growing perception that "[i]n litigating with veterans, the government more often than not takes a position that is substantially unjustified."[149]

VI. CONTRASTING EAJA IN VETERANS LAW WITH EAJA IN OTHER CONTEXTS

Examining EAJA decisions in non-veterans law contexts reveals contrasts with veterans law. Other areas of administrative law have the permissive "substantial evidence" standard of review. A reviewing court "must sustain the findings of the ALJ so long as they are supported by substantial evidence."[150] Substantial evidence means "such relevant evidence as a reasonable person might accept as adequate to support a conclusion."[151] No such test exists in veterans law, meaning that even if there is "substantial evidence" in the record to support a Board member's findings, the Board decision may still be remanded where the Board member fails to articulate the precise basis for his or her conclusions.[152]

---

143 *Id.* at 244-45 (Farley, J., concurring).
144 *Id.*
145 CAVC Annual Report FY 1999 to 2008, https://www.uscourts.cavc.gov/documents/Annual_Report_-_20081.pdf. These figures do not take into account dismissals on procedural grounds.
146 *Id.*
147 *Id.*
148 CAVC Annual Report FY 2015, https://www.uscourts.cavc.gov/documents/FY2015AnnualReport.pdf.
149 Transcript of Oral Argument at 52, Astrue v. Ratliff, 560 U.S. 586 (2010).
150 Scott v. Barnhart, 297 F.3d 589, 593 (7th Cir. 2002).
151 Lingenfelter v. Astrue, 504 F.3d 1028, 1035 (9th Cir. 2007).
152 *See* Thompson v. Principi, 16 Vet. App. 467, 470 (2002) (noting that a "reasons-or-bases" error is the equivalent of the Board's decision having had "no reasonable basis in law or fact"); *see infra* Section VII.2.

Even with a more permissive standard on the merits, courts adjudicating non-veterans administrative law cases have stated that, although a "holding that the agency's decision was unsupported by substantial evidence is a strong indication that the 'position of the United States' was not substantially justified,"[153] failing the substantial evidence test indicates, but does not conclusively establish, a lack of substantial justification for EAJA purposes.[154]

Courts in non-veterans law settings are likely, as early CAVC cases were likely, to note the complexity or confusing nature of an area of law as a factor counting in the government's favor.[155] As noted above, courts of general jurisdiction are also more likely than the courts that decide veterans law disputes to give the government credit for litigating a novel issue.[156]

As Judge Bartley noted in dissent in *Johnson III*, courts deciding non-veterans law issues do not award attorney's fees on the basis that the case was decided by the "plain language" canon.[157] In non-veterans law contexts in general, courts appear to be more reluctant to seize upon particular language of the merits decision to label the government's position unreasonable and more open to examining the reason why the government's argument lost, regardless of what language the court used at the merits stage.[158] Some courts have found government positions substantially justified even if the positions were labeled "arbitrary and capricious" at the merits stage,[159] and even if the agency committed a misstatement of fact.[160] In other words, EAJA jurisprudence involving other areas of government recognizes that EAJA is an inquiry designed to be separate from the merits.[161]

---

153 Thangaraja v. Gonzales, 428 F.3d 870, 874 (9th Cir. 2005); ("[I]t will be only a 'decidedly unusual case in which there is substantial justification under the EAJA even though the agency's decision was reversed as lacking in reasonable, substantial and probative evidence in the record.'").

154 Meier v. Colvin, 727 F.3d 867, 872 (9th Cir. 2013).

155 *See* Meinhold v. U.S. Dep't of Defense, 123 F.3d 1275, 1278 (9th Cir. 1997) ("The government may avoid EAJA fees if it can prove that the regulation it violated was ambiguous, complex, or required exceptional analysis."); Pottgieser v. Kizer, 906 F.2d 1319, 1324 (9th Cir. 1990) (holding that the government misread Social Security statute contrary to its plain meaning, but its position was substantially justified because "the Secretary's litigation position had a reasonable basis and the Social Security statutes [are] complex").

156 *See* Cody v. Caterisano, 631 F.3d 136, 142 (4th Cir. 2011); Hill v. Gould, 555 F.3d 1003, 1008 (D.C. Cir. 2009).

157 *See, e.g.*, Saysana v. Gillen, 614 F.3d 1, 6 (1st Cir. 2010) (holding that the government wrongly contended statute was ambiguous; however, government's position was substantially justified because case presented a novel issue on which there was little precedent); *Pottgieser*, 906 F.2d at 1324 (finding that the government misread Social Security statute contrary to its plain meaning, but position was substantially justified where, inter alia, "the Secretary's litigation position had a reasonable basis").

158 *See* Gonzales v. Free Speech Coal., 408 F.3d 613, 620 (9th Cir. 2005) ("To be sure, the Supreme Court soundly rejected the government's arguments. But . . . [b]y putting undue weight on the Supreme Court's holding on the merits, the district court seemed to rely on hindsight, rather than an assessment of the reasonableness of the government's position at the time of the litigation." (emphasis removed)).

159 *See* F.J. Vollmer Co. v. Magaw, 102 F.3d 591, 596 (D.C. Cir. 1996) ("[W]hether agency action invalidated as arbitrary and capricious might nevertheless have been substantially justified depends on what precisely the court meant by 'arbitrary and capricious.'"); FEC v. Rose, 806 F.2d 1081, 1087-89 (D.C. Cir. 1986) (noting that labeling an action "arbitrary and capricious" on the merits is merely "a legal conclusion" that may apply to a wide variety of agency errors, "including sensible but legally flawed actions as well as outrageous ones").

160 *See* Williams v. Astrue, 595 F. Supp. 2d 582, 587 (E.D. Pa. 2009) ("In the instant case, while the Commissioner recognized the ALJ's misstatement of fact, there was other evidence in the record which substantially justified the Commissioner's overall defense of the ALJ's decision.").

161 *See* Cline v. Shinseki, 26 Vet. App. 325, 327 (2013) ("[W]e have cautioned that '[t]he inquiry into the reasonableness of the Government's position . . . may not be collapsed into our antecedent evaluation of the merits, for the EAJA sets forth a distinct legal standard.'" (quoting Halverson v. Slater, 206 F.3d 1205, 1208 (D.C. Cir. 2000) (additional citation omitted))); *see also Rose*, 806 F.2d at 1088 (noting that the "adequacy of an agency's explanation" may be "logically unrelated to whether the underlying agency action is justified under the organic statute").

VII. HOW THE NATURE OF VETERANS LAW HAS CAUSED EAJA JURISPRUDENCE TO SHIFT TO A GOVERNMENT-UNFRIENDLY STANDARD

1. Natural Sunsetting of *Stillwell* and *Felton* Over Time

The shifting of EAJA jurisprudence in veterans benefits cases may be, at least in part, the natural "sunsetting" of *Stillwell* and *Felton* over time.[162] Judicial review of veterans law issues was still very new at the time of *Stillwell* and *Felton*.[163] As time passes, the government will have less and less cause to argue that the sudden onset of judicial review created "new, different, or more stringent requirements for adjudication."[164] It is therefore arguable that some adjustment to the "substantial justification" standard, and therefore to the availability of attorney fees in general, was inevitable.

2. Lack of Substantial Justification for Failure to Articulate "Reasons and Bases"

Ultimately, veterans law EAJA jurisprudence has shifted from being government-friendly to being government-hostile because of the ways in which veterans law itself is distinct. One of these ways is that the CAVC awards EAJA fees for situations that include the failure of the agency to adequately articulate the "reasons or bases" behind its decision to deny benefits, as discussed in *Cullens*.[165] This distinction was discussed at length in two recent *Veterans Law Review* articles, by David E. Boelzner and Hillary Bunker et al.[166]

In one respect, the Boelzner and Bunker articles overstate the importance of the "reasons or bases" effect on EAJA fee numbers. Both of the articles, along with Judge Holdaway's opinion in *Cullens*, proceed from the premise that veterans law is the only area of administrative law where EAJA fees are awarded based on the failure of the agency to adequately articulate its reasoning.[167] This is partly true, but incomplete.

In veterans law, EAJA fees are awarded for so-called "reasons-and-bases" errors on an automatic basis.[168] In other areas of administrative law, a deficiency in articulating the reasons for an administrative decision can provide the basis for a finding of lack of substantial justification, but the rule is not

---

162 *See* Sisk, *supra* note 19, at 136 (noting that EAJA originally was enacted with a "sunset" provision causing the act to expire in 1984, but that EAJA was eventually re-enacted in 1985, with the sunset provision removed) (citing Pub. L. No. 96-481, Title II, § 204(c), 94 Stat. 2325, 2329 (1980)).

163 *See supra* note 88 and accompanying text.

164 Stillwell v. Brown, 6 Vet. App. 291, 303 (1994).

165 *Compare* Elcyzyn v. Brown, 7 Vet. App. 170, 176 (1994) (finding no substantial justification, and awarding EAJA fees, where "the BVA rejected appellant's entitlement to a permanent total evaluation for his service-connected PTSD . . . without providing any independent medical basis for its conclusions and without providing any reasons or bases for rejecting the medical evidence supporting appellant's claim"), *with* Hill v. Gould, 555 F.3d 1003, 1008 (D.C. Cir. 2009) (noting that the Secretary lost because the agency record was "utterly silent on any basis, let alone any reasonable basis, to support exclusion of the mute swan from the *List of Migratory Birds*," but denying fees and noting that "[a]t the fee stage, however, an inadequate agency record is not necessarily fatal").

166 *See* David E. Boelzner, *EAJA Fees for Reasons-and-Bases Remands: The Perspective of a Veterans' Lawyer*, 7 VETERANS L. REV. 1 (1995); Hillary Bunker et al., *Reforming the Equal Access to Justice Act to Maximize Veterans' Receipt of Benefits and Increase Efficiency of the Claims Process*, 4 VETERANS L. REV. 206 (2012).

167 *See, e.g.*, Bunker et al., *supra* note 169, at 207.

168 *See* ZP v. Brown, 8 Vet. App. 303, 304 (1995) (finding the government's administrative position lacking in substantial justification and explaining, "[t]he Secretary acknowledged that the B[oard] did not provide an adequate statement of reasons or bases . . . long after the Court had clearly articulated the parameters of the reasons or bases requirement in *Gilbert v. Derwinski*"); *Elcyzyn*, 7 Vet. App. at 176 (awarding EAJA fees based on failure of Board to give adequate reasons or bases for its decision).

absolute.[169] For EAJA fees to be based on an articulation deficiency in non-veterans-law arenas, the lack of clarity in the agency decision must be particularly acute.[170] While EAJA fees can be granted for conclusory analyses, an Administrative Law Judge's ("ALJ's") analysis can be incomplete and not necessarily merit EAJA fees, provided she offers at least some discussion of the facts.[171] EAJA fees are sometimes granted in other areas of administrative law for a failure to articulate the reasons for a decision, coupled with a more substantive error by the agency.[172]

It also must be understood that the "reasons or bases" obligation is different in the veterans law context than in other administrative law contexts. In veterans law, the agency must provide "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."[173] The CAVC has always strictly construed this requirement, mandating that the Board describe the "precise basis" for the agency action in question.[174]

In other areas of administrative law, the standard for what the agency must articulate is decidedly less rigorous. For example, in Social Security Administration ("SSA") cases, the requirement that the SSA Commissioner articulate the bases for his or her decisions has been described as "far from precise" and "deliberately flexible."[175] In stark contrast with veterans law, "[o]nly a minimal level of articulation by the ALJ as to his assessment of the evidence" is required.[176] However, an SSA ALJ still must build an "accurate and logical bridge from the evidence to [his or her] conclusion so that [a reviewing court] may assess the validity of the agency's ultimate findings and afford a claimant meaningful judicial review."[177]

When more is required to be articulated by the agency in the first place, it stands to reason that courts will scrutinize more closely the agency's articulation of its reasoning for purposes of determining entitlement to EAJA fees.[178] Nevertheless, EAJA fees are easier to obtain in the veterans law context

---

169 Conrad v. Barnhart, 434 F.3d 987, 991 (7th Cir. 2006) (noting that there is "no per se rule" that "precludes attorney's fees whenever the alleged error is the failure to articulate reasons for discounting" key evidence).

170 *See* Hudson v. Sec'y of Health and Human Servs., 839 F.2d 1453, 1458 (11th Cir. 1988) (holding that the government was not substantially justified when the Secretary accepted the "conclusory statements" by the ALJ that he had "carefully considered all the testimony given at the hearing," and moreover that the Secretary's position that "an ALJ recommendation that failed to articulate the reasons for the ALJ's decision with requisite specificity could be accepted" was not substantially justified); *see also* Meier v. Colvin, 727 F.3d 867, 873 (9th Cir. 2013) ("Given the serious flaws in the ALJ's analysis, we are not persuaded that the government reasonably chose to defend the ALJ's decision in this action."); Golembiewski v. Barnhart, 382 F.3d 721, 723 (7th Cir. 2004) (finding the government's administrative position not substantially justified where, inter alia, the ALJ had "improperly discredited Golembiewski's testimony about pain without explaining reasons for rejecting testimony").

171 *See* Grieves v. Astrue, 360 F. App'x 672, 675 (7th Cir. 2010) (denying EAJA fees where "the district court found that the reasons the ALJ discussed for discounting the medical opinion of Grieves's treating physician were flawed and inadequate. But the district court did not conclude that the record lacked substantial evidence," and also noting that "unlike in *Golembiewski*, the ALJ here did not ignore entire lines of evidence or find that there was no evidence in support of Grieves's application").

172 *See* Scott v. Barnhart, 297 F.3d 589, 595 (7th Cir. 2002) (finding no substantial justification where the ALJ "failed to articulate adequately the bases for his conclusions").

173 38 U.S.C. § 7104(d)(1) (2012).

174 Gilbert v. Derwinski, 1 Vet. App. 49, 56-57 (1990).

175 Stein v. Sullivan, 966 F.2d 317, 319-20 (7th Cir. 1992).

176 *See id.* at 320 (citing Stephens v. Heckler, 766 F.2d 284, 287 (7th Cir. 1985)); *see also* Burnett v. Brown, 830 F.2d 731, 735 (7th Cir. 1987) ("[A]n ALJ is not required to evaluate every piece of testimony and submitted evidence; however, he must articulate at some minimum level his analysis of the evidence in cases in which considerable evidence is presented."). In *Stein*, the Seventh Circuit held that even though the adjudicator had failed to meet the minimal articulation requirement for an ALJ, the failure did not render the decision substantially unjustified because "[t]here was evidence to support the Secretary's position. A genuine dispute existed." *Stein*, 966 F.2d at 320.

177 *Scott*, 297 F.3d at 595.

178 *See* Thompson v. Principi, 16 Vet. App. 467, 470 (2002).

because it is easier to become a "prevailing party" in veterans law than in any other area of the law. Recall that a reversal with instructions that benefits be granted is not necessary for "prevailing party" status to attach; rather, a remand for additional agency proceedings consistent with judicial instructions, where the reviewing court does not retain jurisdiction over the case, suffices.[179] In veterans law, the demanding "reasons or bases" standard, along with the lack of a "substantial evidence" standard, causes large numbers of remands for articulation errors that would not be deemed errors in other administrative law contexts.[180]

3. Determination by the Courts That the Purposes of EAJA Mirror the Purposes of Judicial Review of Veterans Benefits Cases

Another way in which EAJA jurisprudence in veterans law differs from EAJA jurisprudence in other areas of government litigation is the determination by the CAVC and the Federal Circuit that the purposes of EAJA dovetail with the benevolent purposes of the creation of judicial review of veterans cases.

The first iteration of EAJA was enacted in 1980,[181] but EAJA jurisprudence has been developing in the context of veterans law only since 1992. The biggest reason for this is that the CAVC, the Nation's youngest federal court, was not established until 1988 and did not begin hearing cases until 1989.[182]

The second biggest reason is that, even after the creation of judicial review of veterans benefits decisions, EAJA was not initially thought to extend to the CAVC. The first EAJA opinion to issue from the CAVC, *Jones v. Derwinski*,[183] authored by Chief Judge Nebeker, said, simply, EAJA fee-seekers need not apply.[184] The court explained that waivers of sovereign immunity must be strictly construed, and the EAJA statute did not explicitly waive sovereign immunity with respect to cases at the CAVC, although it did do so for proceedings before other specialty courts, such as the United States Tax Court and the United States Court of Federal Claims (then called the United States Claims Court).[185]

In response to *Jones*, Congress enacted the Federal Courts Administration Act of 1992 ("FCAA"), which amended EAJA to explicitly name the CAVC (then called the United States Court of Veterans Appeals) as among the courts subject to EAJA.[186] In its report concerning the FCAA, the Senate Judiciary Committee was emphatic about the merits of extending EAJA to veterans benefits claims, pointing out that the "objective of EAJA is to eliminate financial deterrents to individuals

---

179 *See* Former Emp. of Motorola Ceramic Prods. v. United States, 336 F.3d 1360, 1366 (2003).

180 *Compare* Gilbert v. Derwinski, 1 Vet. App. 49, 56-57 (1990) (requiring that Board members articulate the "precise basis" for the denial of VA benefits), *with Stein*, 966 F.2d at 319-20 (noting that the articulation requirement in Social Security cases is "far from precise" and "deliberately flexible"); *see also* 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, 137 (2009) (noting the unusually high rate of remand at the CAVC and noting that the demanding "reasons or bases" standard "contrasts sharply with most other areas of the law, which have a strong presumption of correctness in reviewing the merits of decisions that an affirmance will be granted if there is any view of the evidence that would support the decision below").

181 *See* Pub. L. No. 96-481, 94 Stat. 2325 (1980).

182 *See* Veterans' Judicial Review Act, Pub. L. No. 100-687 § 301, 102 Stat. 4113 (1988) (establishing the exclusive jurisdiction of the then-called "Court of Veterans Appeals" over appeals from decisions of the Board of Veterans' Appeals); *see generally Matter of Quigley*, 1 Vet. App. 1 (1990) (first decision to issue from the CAVC, submitted for decision December 4, 1989, and decision issued January 22, 1990).

183 2 Vet. App. 231 (1992) (en banc).

184 *Id.* at 233.

185 *Id.*; *see* Ardestani v. INS, 502 U.S. 129, 137 (1991) ("The EAJA renders the United States liable for attorney's fees for which it would not otherwise be liable, and thus amounts to a partial waiver of sovereign immunity. Any such waiver must be strictly construed in favor of the United States.").

186 Pub. L. No. 102-572, § 506, 106 Stat. 4506, 4513 (1992); *see* 28 U.S.C. § 2412(d)(2)(F) (2012) (added to state that "court" under the statute includes the Court of Appeals for Veterans Claims).

attempting to defend themselves against unjustified Government action. Veterans are exactly the type of individuals the statute was intended to help."[187]

The creation of EAJA and the creation of the veterans court itself thus share a common purpose: promoting access to judicial review for a population of deserving plaintiffs.[188] Moreover, in recognition of the benevolent purposes the system serves, the VA benefits system is designed to be, at the administrative level, informal and pro-claimant.[189] In increasing fashion, the CAVC and the Federal Circuit have seized on Congress's general observation about the necessity of *extending* EAJA to veterans law cases in making determinations about the necessary *outcome* of EAJA cases in veterans law.

In *Kelly v. Nicholson*, a case determining whether a remand based on the Board's failure to consider all evidence relevant to a claim conferred "prevailing party" status, the Federal Circuit noted:

> Removing [deterrents to judicial review] is imperative in the veterans benefits context, which is intended to be uniquely pro-claimant, and in which veterans generally are not represented by counsel before the [VA regional office] and the [B]oard. EAJA is a vital complement to this system designed to aid veterans, because it helps to ensure that they will seek an appeal when the VA has failed in its duty to aid them or has otherwise erroneously denied them the benefits that they have earned. [190]

In *Wagner v. Shinseki*, the Federal Circuit rejected the Secretary's argument that the court should deny supplemental EAJA fees for veterans' efforts in pressing the EAJA application itself, where the veterans court had substantially reduced the amount of fees based on a holding that "much of the requested fees were unreasonable."[191] The Federal Circuit quoted *Kelly* and noted the beneficent purposes of EAJA as a primary purpose for its holding.[192]

In *Golden v. Gibson*, in adjudicating the close question of whether fees could be obtained for attorney travel time, the CAVC explicitly broke the tie in the veteran's favor by looking to the purposes of EAJA and noting that those purposes coincide with the purposes of judicial review of veterans cases.[193] In *Froio v. McDonald*, the court cited *Kelly*, *Wagner*, *Golden*, and the language from the Senate

---

187 S. Rep. No. 102-342, at 39 (1992); *see also* Jones v. Brown, 41 F.3d 634, 635-37 (Fed. Cir. 1994) (describing the original *Jones* decision and subsequent legislative action).

188 *Compare* James D. Ridgway et al., *"Not Reasonably Debatable": The Problems with Single-Judge Decisions by the Court of Appeals for Veterans Claims*, 27 STAN. L. & POL'Y REV. 1, 2-3 (2016) ("The Court of Appeals for Veterans Claims ("CAVC") was created in 1988 to finally provide veterans a day in court."), *with* Sullivan v. Hudson, 490 U.S. 877, 890 (1989) (holding that EAJA must be "read in light of its purpose to diminish the deterrent effect of seeking review of, or defending against, governmental action").

189 *See* Henderson v. Shinseki, 562 U.S. 428, 431 (2011) ("The VA's adjudicatory 'process is designed to function throughout with a high degree of informality and solicitude for the claimant.'" (quoting Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 311 (1985)).

190 463 F.3d 1349, 1352 (Fed. Cir. 2006) (internal citations omitted).

191 Wagner v. Shinseki, 640 F.3d 1255, 1258 (Fed. Cir. 2011) (citation and internal quotation marks omitted).

192 *See id.* at 1258-59 ("[A]n award of fees incurred in every stage of litigation is consistent with the legislative purpose of the EAJA." (citation and quotation marks omitted)).

193 Golden v. Gibson, 27 Vet. App. 1 (2014). In *Golden*, the court noted:

> One purpose of EAJA is to eliminate financial barriers prohibiting individuals from vindicating their rights against the Government through litigation. EAJA is of added importance in veterans' cases, 'where it "helps to ensure that [veterans] will seek an appeal when the [Department of Veterans Affairs] has failed in its duty to aid them or has otherwise erroneously denied them the benefits that they have earned."' We also note that attorneys who represent veterans and their survivors provide value both to their clients and to the courts before which they practice, and we want to encourage that representation. Based on the importance of EAJA in adjudicating veterans' cases, we determine that attorney travel time is compensable at the full hourly rate, if the fees sought for travel time are reasonable.

Id. at 6 (internal citations omitted).

Judiciary Committee's report about extending EAJA to veterans cases in determining that courts could award EAJA fees for work performed by law students.[194] In *Butts* itself, the CAVC focused on the special significance of EAJA fees in the pro-claimant context of veterans law, noting this principle early in the opinion.[195] Then, in the same opinion, it referenced this principle two more times.[196]

Although the cases are right to note that the extension of EAJA to veterans law cases shares a common purpose with the creation of judicial review of veterans benefits cases, a slippery slope emerges when the court decides whether a particular government argument was reasonable based on the need for judicial review of veterans law cases. Such a philosophy could justify an EAJA award for every veteran who is a prevailing party. After all, ignoring the substantial justification prong completely in veterans law cases would undoubtedly lead to more fees recovered, which would help "eliminate financial barriers prohibiting individuals from vindicating their rights against the Government through litigation."[197]

However, the substantial justification prong was also meant to be an important bulwark against the chilling of government arguments in defense of public money.[198] The government cannot be incentivized to protect the taxpayer at the CAVC in a meaningful way if the substantial justification prong is increasingly reduced to surplusage on the basis that veterans are worthy plaintiffs.

It is also disingenuous to decide cases as though veterans are the only class of worthy litigants in the EAJA context. Social Security disability cases, like veterans law cases, involve largely impecunious plaintiffs for whom providing an additional incentive to pursue a claim against the government is important.[199] As EAJA scholar Lowell Baier points out, "[m]ost Social Security beneficiaries who use EAJA are disabled and seek supplemental security income, which depends on proof of disability and frequently involves litigation."[200] Baier also points to Native Peoples and immigrants in asylum cases as worthy beneficiaries of EAJA.[201] Cases involving the Department of Labor also involve litigants who have been recognized as particularly needy of the protections of EAJA.[202]

---

194 Froio v. McDonald, 27 Vet. App. 352, 355-56 (2015).

195 *See* Butts, 28 Vet. App. at 78 ("EAJA is particularly important in the pro-claimant veterans benefits system, as it aids veterans who choose to appeal VA decisions erroneously denying them benefits they have earned.").

196 *See id.* at 83. Responding to criticism that the Board was following precedent, the CAVC stated:

> The fact that the Secretary may have to pay EAJA fees despite following precedent is necessary to effectuate EAJA's purpose: to eliminate financial barriers for challenging governmental actions. If compliance with precedent was a bar to EAJA, . . . veterans with limited financial means would face even greater difficulty obtaining counsel to bring valid challenges to existing caselaw.

Id. at 83. *See also id.* at 85 (responding to the Secretary's argument about how he had interpreted the regulation in his Adjudication Procedures Manual, the CAVC chastised the Secretary for issuing a guideline that did not explicitly favor the veteran, saying, "[t]he guidelines interpreting . . . the regulation are hardly consistent with the legislative scheme and the veterans benefit arena generally, which is 'intended to be uniquely pro-claimant'").

197 *See Golden*, 27 Vet. App. at 6.

198 *See* Roanoke River Basin Ass'n v. Hudson, 991 F.2d 132, 139 (4th Cir. 1993).

199 *See* Uphill v. Barnhart, 271 F. Supp. 2d 1086, 1092 (E.D. Wis. 2003) ("In social security cases, it is particularly important to encourage counsel to seek a judicial award of benefits if there is a reasonable chance of obtaining it. This is so because social security claimants must commonly wait years before their cases are resolved."); *see also* Astrue v. Ratliff, 560 U.S. 586, 600 (2010) (Sotomayor, J., concurring) (noting that EAJA awards "have proved to be a remarkably efficient way of improving access to the courts for the statute's intended beneficiaries, including thousands of recipients of Social Security and veteran's benefits each year"); Joseph A. Fischetti, Ratliff v. Astrue*: The Collision of the Equal Access to Justice Act and the Debt Collection Improvement Act*, 40 SETON HALL L. REV. 723, 758 (2010) (writing about the importance of EAJA fees in the context of Social Security law and noting that "EAJA fees become disproportionately important in practice areas involving impoverished clients").

200 LOWELL E. BAIER, INSIDE THE EQUAL ACCESS TO JUSTICE ACT: ENVIRONMENTAL LITIGATION AND THE CRIPPLING BATTLE OVER AMERICA'S LANDS, ENDANGERED SPECIES, AND CRITICAL HABITATS 122 (2016).

201 *See id.* at 124.

202 *See* Former Emps. of BMC Software v. United States Sec'y of Labor, 454 F. Supp. 2d 1306, 1355 (2006) ("[M]uch as Congress has

Moreover, citing to the non-adversarial nature of the veterans benefits system in general overstates the government's obligations at the EAJA stage because, once a case reaches the veterans court, the process ceases being non-adversarial.[203]

4. ***Brown v. Gardner*: The Effect of the Veteran's Canon on EAJA**

One factor that sets veterans law apart from other areas of administrative law and that has an effect in EAJA adjudications is the *Gardner* canon, also called the "veteran's canon." The *Gardner* canon, from the Supreme Court case *Brown v. Gardner*,[204] states that, when reading statutes, "interpretive doubt is to be resolved in the veteran's favor."[205] As veterans law scholar Linda Jellum notes, the canon traces its roots back to 1940s case law involving veterans benefits statutes, where the Court stated that such statutes ought to be interpreted "liberally."[206] In *Gardner*, the Court transformed the liberal construction of veterans' benefits statutes into a construction in which close cases are resolved in favor of the individual veteran then before the court. This is true even if such a construction might not benefit veterans generally.[207] While *Gardner* is sometimes cited as secondary support for the court's agreement with otherwise worthy arguments by veterans, in some more recent cases, the CAVC has begun to cite *Gardner* as the CAVC's primary support for a holding.[208]

The *Gardner* canon, as many scholars have noted, has an inherent tension with other interpretive canons, namely *Chevron* and *Auer* deference, which are designed to work in the government's favor in interpreting statutes and regulations.[209] In no other area of administrative law does such a powerful trump card in favor of the private litigant exist.[210] In veterans law, when it comes to the complex dance of regulatory and statutory interpretation, while the veteran may be Fred Astaire, the Secretary is Ginger Rogers, doing the same dance as the veteran, but backwards and in heels.[211]

---

charged the U.S. Department of Veterans Affairs . . . with caring for those who have risked life and limb for our freedom, so too Congress has entrusted to the Labor Department the responsibility for providing training and other re-employment assistance to those who have paid for our place in the global economy with their jobs.").

[203] *Compare* Collaro v. West, 136 F.3d 1304, 1309-10 (Fed. Cir. 1998) (recognizing that the veterans benefits adjudicatory system is "nonadversarial, ex parte, [and] paternalistic"), *with* JONATHAN M. GAFFNEY, CONG. RESEARCH SERV., IF11365, U.S. COURT OF APPEALS FOR VETERANS CLAIMS: A BRIEF INTRODUCTION 1 (2019) (noting that "[p]roceedings before the CAVC are adversarial").

[204] 513 U.S. 115 (1994).

[205] *Id.* at 118.

[206] Linda D. Jellum, *Heads I Win, Tails You Lose: Reconciling* Brown v. Gardner*'s Presumption that Interpretive Doubt Be Resolved in Veterans' Favor with* Chevron, 61 AM. U. L. REV. 59, 65-67 (2011).

[207] *Id.* at 73. *But see Ravin v. Wilkie*, 31 Vet. App. 104, 113 (2019) (en banc) (suggesting, but not holding, that the CAVC should avoid using *Gardner* to decide a case in an individual veteran's favor where that interpretation might work harm to the interests of veterans generally).

[208] *See, e.g.*, Otero-Castro v. Principi, 16 Vet. App. 375, 382 (2002) (rejecting VA's interpretation of the rating schedule in favor of the private litigant because, per *Gardner*, "interpretive doubt is to be resolved in favor of the claimant").

[209] *See* Auer v. Robbins, 519 U.S. 452, 461-63 (1997) (noting that an agency's interpretation of its own regulation is generally accepted unless plainly wrong or inconsistent with the language of the regulation); Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984) (noting that, where a statute is ambiguous, courts must accept an agency's reasonable interpretation of that statute through authorized regulations); *see also* Jellum, *supra* note 209, at 77 nn.139-41 (noting the inherent tension between *Gardner* and traditional standards of agency deference and stating, "[t]raditionally, courts defer almost completely to an agency's interpretation of its own regulation because the agency wrote the regulation"); Victoria Hadfield Moshiashwili, *The Downfall of* Auer *Deference: Veterans Law at the Federal Circuit in 2014*, 64 AM. U. L. REV. 1007, 1081 (2015) ("In the context of the explicitly claimant-friendly veterans benefits system, . . . both *Chevron* deference and *Auer* deference are often at odds with the presumption, established in *Gardner*, that interpretive doubt should be resolved in the veteran's favor.").

[210] *See* Jellum, *supra* note 209, at 121 ("*Gardner*'s Presumption [has] morphed from a simple directive to courts to construe veterans benefits statutes liberally into a veterans' trump card in which . . . VA always loses the interpretive battle.").

[211] *See* Bob Thaves, *Frank and Ernest* (cartoon strip), United Media, 1982.

In at least one EAJA case, *Carpenter v. Principi*, which stood for 18 years before being overturned, the CAVC cited *Gardner* as *the primary reason* for the CAVC's holding that an attorney could not recover both a contingency fee for past-due benefits and an EAJA fee award for work on the same case.[212] The CAVC, without stating that the EAJA statute was ambiguous as to the statute's requirement regarding fee offsets against contingency fee agreements for the "same work" performed, cited *Gardner* in holding, "If there is any room for interpretive doubt as to what constitutes the 'same work' for the purposes of EAJA, such doubt must be resolved in the veterans' favor."[213] The court gave no explanation for applying *Gardner* to EAJA, a statute that is not a veterans benefits statute but a statute of general applicability.[214]

Eighteen years later, in *Ravin v. Wilkie*, the CAVC overturned *Carpenter* and held that attorneys need not refund the veteran for the difference between EAJA fees awarded by the CAVC and contingency fees based on past-due benefits that the attorney had helped the veteran achieve in proceedings at the agency level.[215] Essentially, the CAVC simplified the relationship between veterans and their lawyers representing them before the Board and the CAVC, and – at least in theory – provided more financial incentive for private attorneys to represent veterans throughout the claims process.[216] Among other criticisms lodged at the *Carpenter* analysis, the veterans court in *Ravin* quibbled with *Carpenter*'s use of the veteran's canon to decide an EAJA issue.[217] However, the court in *Ravin* did not fully reject the citation to *Gardner*. Rather, the CAVC simply noted, "It seems an open question whether the pro-veteran *Gardner* canon is properly invoked in the EAJA context."[218] Mostly, *Ravin* took issue with the fact that *Carpenter* had applied *Gardner* to EAJA in a way that benefitted the individual veteran in *Carpenter*, rather than applying *Gardner* to EAJA in a way that benefitted veterans as a whole.[219]

The existence of the veteran's canon is a boon to veterans at the merits stage of litigation: close questions will, on balance, be decided in the individual veteran's favor more often than in other areas of administrative law.[220] And the extra cases that are decided in the veteran's favor are not decided that way because the government makes worse arguments than it makes in Social Security cases, labor law cases, or cases construing environmental regulations. Those extra cases are decided in the veteran's favor because of the veteran's canon.

---

212 Carpenter v. Principi, 15 Vet. App. 64, 76 (2001) (en banc), *overruled by* Ravin v. Wilkie, 31 Vet. App. 104 (2019) (en banc).
213 *Id.*
214 *See* Jellum*, supra* note 209, at 76.
215 31 Vet. App. 104, 106 (2019) (en banc).
216 *Id.* at 115.
217 *Id.* at 112-13.
218 *Id.* at 112.
219 *Id.* at 112-13.
220 *See* Jellum, *supra* note 209, at 121.

5. No Credit Given at EAJA Stage for Merits-Stage Losses Due to the Particularities of Veterans Law

One would expect that the existence of the *Gardner* canon, the standard of veteran-friendliness, the lack of a "substantial evidence" standard, and the exacting reasons-or-bases standard would lead to the granting of *fewer* attorney fee applications in veterans law cases. After all, the government merely has to show that its arguments were "reasonable" to prove substantial justification.[221] Because close questions are always resolved in the veteran's favor at the merits stage, in many cases the government loses not because it acted unreasonably but because the veteran received the benefit of the doubt.[222] One would expect that the CAVC would give the government some credit at the EAJA stage for this fact.

Instead, the government gets no credit at the EAJA stage. In *Lacey v. Wilkie*, the CAVC decided a novel issue of statutory interpretation: whether the short-lived Veterans Retraining Assistance Program (VRAP) applied – i.e., provided a financial benefit – when a veteran took certain courses *offered by* a community college or technical school, or only when a veteran took courses *at* a community college or technical school.[223] The VA Secretary argued that VRAP only applied to courses taken *at* a community college or technical school, and therefore it did not apply to the appellant's courses, which were taken towards a bachelor's degree at a four-year college.[224] After being unable to resolve the question by using the traditional tools of statutory construction, the CAVC resorted to the veteran's canon to resolve the issue in the veteran's favor.[225] The result should surprise no one: the tie went to the veteran, as it should.

At the EAJA fees stage, the CAVC acknowledged that the question the Secretary had tried to answer was novel, acknowledged that the question was "ambiguous in this regard, as it provides no clear answer to whether benefits can be used at four-year colleges," acknowledged that "there was no clear precedent at the time of the Board's decision," and acknowledged that the Board had relied on inferences created by analogous regulations.[226] But, the CAVC awarded attorney fees anyway.[227] In support of its holding that the Secretary's position had not been substantially justified, the CAVC noted that the Secretary could have provided advance guidance about his interpretation of the statute if he had wanted.[228] The CAVC also cited – what else? – *Butts v. McDonald*.[229] The CAVC spent not one word discussing the fact that the veteran's canon had been the lynchpin of the CAVC's holding on the merits.

In fact, no case in the 30-year history of EAJA jurisprudence at the CAVC has identified the merits-stage application of the *Gardner* canon as a reason to deny EAJA fees. Not one case has cited the application of the *Gardner* canon, or judicial veteran-friendliness generally, as a reason to even consider denying EAJA fees.[230] Instead, the opposite has been true: in *Cottle v. Principi*, the CAVC not only

---

221 Pierce v. Underwood, 487 U.S. 552, 565 (1988).
222 *See* Jellum, *supra* note 209, at 121 (reasoning that, for courts considering whether VA properly applied the *Gardner* canon, "it is unclear whether an interpretation that does not favor a particular veteran-litigant would be veteran-friendly enough to be considered reasonable").
223 32 Vet. App. 71 (2019).
224 *Id.* at 75.
225 *Id.* at 80.
226 Lacey v. Wilkie, 32 Vet. App. 387, 389-91 (2020).
227 *Id.* at 391.
228 *Id.*
229 *Id.* ("Indeed, in *Butts*, upon which the Secretary relies as support for finding substantial justification in this case, the Board was following guidance that the Court itself had set out in existing precedent that was overturned subsequent to the Board decision, and even under those circumstances, the Court found that the Board's position was not substantially justified.").
230 *Cf.* Ravin v. Wilkie, 31 Vet. App. 104, 112-13 (2019) (en banc) (discussing the possible application of the *Gardner* canon to the context of resolving a fee dispute between attorney and veteran-client).

disagreed with the Secretary's interpretation of a regulation as proffered in a VA General Counsel precedent opinion, it noted with disapproval that the General Counsel, in formulating her opinion, "fail[ed] to discuss or consider *Gardner* at all."[231] Similarly, in *Butts*, the majority chastised the Secretary for failing to use veteran-friendliness as an affirmative factor in the Secretary's interpretation of 38 C.F.R. § 3.321(b)(1).[232] In both *Johnson III* and *Butts*, the dissenters referenced *Auer* deference and argued that the court should have deferred to the agency's interpretation of its own regulation, but this argument did not carry the day.[233]

Because of the way the veterans court has decided cases both at the merits stage and the attorney-fee stage, the veterans court may be double-billing the government. In close cases, the government pays once for the benefits that the veteran receives because of the pro-claimant nature of the system, and it pays a second time at the EAJA phase because the government failed to account in its arguments for the rule that the veteran should win close cases.[234]

6. Limited Federal Circuit Review

The inertia of a body in motion is only as good as the emptiness of the pathway in front of it.[235] In the veterans law context, because the CAVC's attorney-fee determinations are so relatively insulated from judicial review, the momentum of the CAVC's jurisprudence on the issue of substantial justification has been difficult to stop.

The veterans court, although nominally an appellate body, is analogous to an Article III district court in the scope of its review over a final agency decision.[236] Similar to an Article III district court, the decisions of the veterans court are not appealable directly to the Supreme Court but first are reviewed by the Federal Circuit.[237] In non-veterans-law cases in Article III courts, once the initial court makes a determination as to substantial justification, that determination can be reviewed for abuse of discretion.[238]

Although appellate review of substantial justification is generally deferential to the district court,[239] where the district court's decision involved the application of law to fact, the reviewing court is

---

231 *See* Cottle v. Principi, 14 Vet. App. 329, 336 (2001).
232 *Butts*, 28 Vet. App. at 85.
233 *Johnson III*, 28 Vet. App. at 150 (Bartley, J., dissenting); *Butts*, 28 Vet. App. at 98 (Bartley, J., dissenting).
234 *See Butts*, 28 Vet. App. at 85 (placing burden on VA to provide justification for interpretation of regulation in question); *Cottle*, 14 Vet. App. at 336 (construing regulatory ambiguity in veteran's favor).
235 I. Bernard Cohen, *Preface* to ISAAC NEWTON, THE PRINCIPIA 96-101 (I. .Bernard Cohen & Anne Whitman trans., Univ. of Cal. Press 1st ed. 1999) (1687) (stating that an object in motion stays in motion in the same direction and at the same speed unless an external force is applied to it).
236 *See* Henderson v. Shinseki, 562 U.S. 428, 432 n.2 (2011) (noting that the scope of appeal of the veterans court is "similar to that of an Article III court reviewing agency action under the Administrative Procedure Act, 5 U.S.C. § 706"). Readers who enjoy CAVC trivia will be interested to know—or know already—that one of the CAVC's judges, Judge Greenberg, cites this observation from *Henderson* in every single-judge memorandum decision he writes. *See, e.g.*, Moody v. McDonald, No. 15-1952, 2016 U.S. App. Vet. Claims LEXIS 501, at *2 (BVA Mar. 31, 2016); Ortiz-Alvarado v. McDonald, No. 14-2781, 2015 U.S. App. Vet. Claims LEXIS 1459, at *1-2 (BVA Oct. 29, 2015).
237 *See* 38 U.S.C. § 7292(a) (2012) (establishing the Federal Circuit's jurisdiction to review final decisions of the CAVC).
238 *See* Pierce v. Underwood, 487 U.S. 552, 562 (1988) (establishing that "substantial justification" determinations by district courts are reviewed by appellate courts for "abuse-of-discretion"); Conrad v. Barnhart, 434 F.3d 987, 990 (7th Cir. 2006) (upholding district court's denial of fees under abuse-of-discretion standard); Gutierrez v. Barnhart, 274 F.3d 1255, 1257 (9th Cir. 2001) (reversing and remanding on finding that district court abused its discretion in denying fees where government failed to ensure completion of psychiatric review technique form required by regulation in disability cases).
239 United States v. Metro. Dist. Comm'n, 847 F.2d 12, 14-20 (1st Cir. 1988) (discussing the "broad" discretion given to the District Court under the abuse-of-discretion standard for evaluating substantial justification).

required "to undertake more substantive scrutiny."[240] Critically, abuse-of-discretion review allows for course correction by the appellate court when the district court has been unduly swayed by "hindsight judgment"[241] or undervalues a factor such as the novelty of the legal issue argued at the merits stage, which are both criticisms that could be leveled at *Johnson III* and *Butts*.[242]

However, the Federal Circuit's review of CAVC EAJA decisions is limited to whether the veterans court committed an error of law.[243] Because of this, the veterans court's determinations about what particular sets of facts do and do not establish substantial justification are largely unreviewable.[244] Unless the Federal Circuit can couch its criticism of the veterans court's substantial justification decision as an error of law,[245] the veteran's court's EAJA jurisprudence will (and largely does) continue to develop, unchecked by the Federal Circuit.[246] This perhaps helps explain why the *Butts* dissent characterizes the majority's overreliance on the merits as an error of law rather than as an erroneous application of law to fact. [247]

The consequences of the lack of oversight on the question of substantial justification cannot be overstated. Because substantial justification is already a standard that comes down to a "judgment call," it is hard not to view the substantial justification results in the area of veterans law as largely a reflection of the whims and preferences of the particular CAVC judges deciding the cases. [248] The best prescription for avoiding the tendency to overvalue the merits decision and thus overpenalize the government at the EAJA stage is "due humility among district court judges and vigilant appellate review."[249] In veterans law, such vigilant review is lacking.

VIII. BENEFITS AND DETRIMENTS OF CURRENT CAVC EAJA JURISPRUDENCE, AND PROPOSED FIXES

For all of the above reasons, it has become harder for the government to avoid paying EAJA fees in veterans benefits cases than in any other area of the law. Although commentators should be wary of labeling the direction of jurisprudence in a particular area with such reductive terms as "good" or "bad," "desirable" or "undesirable," there is no denying that VA has an EAJA problem.

---

240 United States v. Taylor, 487 U.S. 326, 337 (1988).
241 *See* Gonzalez v. Free Speech Coal., 408 F.3d 613, 620 (9th Cir. 2005) (reversing based on abuse of discretion where the district court's "relying on the Supreme Court opinion and the 'clarity of the holding' puts too much weight on the government's ultimate loss").
242 *See* Hoang Ha v. Schweiker, 707 F.2d 1104, 1106 (9th Cir. 1983) (reversing based on abuse of discretion where the government advanced "a novel but credible extension or interpretation of the law" (internal citation and quotation marks omitted)).
243 *See* Thompson v. Shinseki, 682 F.3d 1377, 1380 (Fed. Cir. 2012) (noting that "we are precluded from reviewing [the veterans court's] application of EAJA to the facts of a particular case"); Bowey v. West, 218 F.3d 1371, 1378 (Fed. Cir. 2000) ("[D]etermining substantial justification requires the application of law to facts. Since such inquiries are specifically excluded from our jurisdictional grant, *see* 38 U.S.C. § 7292(d)(2), we must remand this case to allow the Court of Appeals for Veterans Claims to decide whether the government's position was, in fact, substantially justified.").
244 *See, e.g., Thompson*, 682 F.3d at 1380.
245 *See, e.g.*, Patrick v. Shinseki, 668 F.3d 1325, 1332 (2011).
246 *See Bowey*, 218 F.3d at 1378.
247 *See Butts*, 28 Vet. App. at 92, 103 (Bartley, J., dissenting) (opining that "[t]he majority's troubling fixation on the merits determination in *Johnson II* . . . represents the application of an erroneous legal test" and finding it "legally untenable" that the Secretary would be forced to seek a stay of favorable CAVC decisions pending Federal Circuit review).
248 *See* Chiu v. United States, 948 F.2d 711, 715 (Fed. Cir. 1991); *see also* Ridgway, *supra* note 41, at 3 (noting how often decisions at the CAVC are made by single judges).
249 *See* Sisk, *supra* note 19, at 42.

Some pros and cons naturally follow. One obvious benefit of the direction EAJA cases have taken in veterans law is that the pro-claimant results reinforce the socially desirable goal that veterans in individual cases be given the benefit of every doubt. Veterans are, after all, some of the most deserving and underserved claimants in administrative law.[250] Arguably it makes sense for the courts to apply a statute of general applicability more robustly to veterans than to other litigants against the government.[251] The effects of the CAVC's and Federal Circuit's EAJA jurisprudence augment the benefits to individual veterans that the *Gardner* canon, veteran-friendliness, and a strictly construed reasons-or-bases standard were designed to provide. More to the point, private attorneys are more likely to take veterans benefits cases if they feel assured that they will receive compensation for a job well done.[252] As the CAVC has held, "[A]ttorneys who represent veterans and their survivors provide value both to their clients and to the courts before which they practice, and we want to encourage that representation."[253]

Drawbacks of the current direction of EAJA jurisprudence include that the government will naturally be dissuaded from making reasonable arguments against paying a claim and in defense of taxpayer dollars, which is never what EAJA intended.[254] Each year, an alarming number of EAJA applications granted by the veterans court involve cases where the Secretary does not even argue that it was substantially justified.[255] Over the years, as it has become increasingly difficult for the government to show substantial justification no matter what arguments the government advanced, this voluntary surrendering of EAJA fees by the Secretary has increased.[256] Put another way: VA, the second-biggest agency in the United States government, has basically stopped even trying to convince the courts that it runs its agency in a reasonable way. Why throw more taxpayer dollars into drafting a brief contesting substantial justification when the CAVC almost never agrees that you were substantially justified?

At the merits stage as well, the Secretary cannot help but be influenced by a desire to avoid paying more fees and thus losing more taxpayer money. If the Secretary believes that pressing a novel argument on a complex issue is worthwhile, but if he loses he will almost certainly end up paying the benefits *and* paying EAJA fees, he may be more likely to agree to a remand rather than raise the novel argument, so as to minimize the potential loss.[257] When the government abandons all novel arguments,

---

[250] As Judge Friendly once noted, preferences in the law in favor of veterans are grounded in a "desire to compensate in some measure for the disruption of a way of life . . . and to express gratitude." Russell v. Hodges, 470 F.2d 212, 218 (2d. Cir. 1972); *see also* Hooper v. Bernalillo Cty. Assessor, 472 U.S. 612, 626 (1985) (Stevens, J., dissenting) ("The justification for providing a special benefit for veterans, as opposed to nonveterans, has been recognized throughout the history of our country. It merits restatement. . . . A policy of providing special benefits for veterans' past contributions has 'always been deemed to be legitimate.'"); Kelly v. Nicholson, 463 F.3d 1349, 1353 (Fed. Cir. 2006) (noting that the veterans benefits system is intended to be pro-claimant and that "veterans generally are not represented by counsel before the [regional office] and the [B]oard").

[251] *See* Fischetti, supra note 202, at 758 ("If the administration of justice regardless of client income is accepted as a societal goal, then it is important to promote every possible incentive for attorneys to enter these fields.").

[252] *Ravin v. Wilkie*, 31 Vet. App. 104, 114-15 (2019) (en banc) (discussing merits of previous EAJA decision in terms of whether it incentivized or disincentivized attorneys to represent veterans).

[253] *Golden v. Gibson*, 27 Vet. App. 1, 6 (2014).

[254] *See* Roanoke River Basin Ass'n v. Hudson, 991 F.2d 132, 139 (4th Cir. 1993); Krent, *supra* note 17, at 507 (recognizing "substantial justification" as an important "safeguard" of taxpayer money).

[255] *See, e.g.*, Froio v. McDonald, 27 Vet. App. 352, 355 (2015) ("The Secretary also does not dispute the appellant's allegation that the position of the Secretary was not substantially justified; accordingly, the Court need not further address this issue."); Cook v. Brown, 6 Vet. App. 226, 237 (1994) (noting that the Court need not address whether the Secretary's position was "substantially justified" when the Secretary expressly concedes the issue), *aff'd*, 68 F.3d 447 (Fed. Cir. 1995).

[256] *See Butts*, 28 Vet. App. at 91 (Lance, J., dissenting) ("I am troubled by the Secretary's failure to argue substantial justification in response to the vast majority of applications for attorney fees and expenses filed pursuant to the EAJA before this Court.").

[257] *See Roanoke River Basin Ass'n*, 991 F.2d at 139. Gregory C. Sisk notes:

> [W]hen the government is already shielded by a protective standard of review on the merits, such as rational basis review of administrative decisions, there is little danger that subsequent imposition of an attorney's fee award based on lack of substantial justification will overdeter agencies from vigorous enforcement of the law. When an official or agency making a

it is the public who loses. Novel arguments may end up being meritorious, saving the public money, and benefitting veterans in the aggregate, even though they are unfavorable to the individual veterans pressing the litigation.[258] In short, as EAJA jurisprudence becomes more hostile to the government, the government is likely to decide to sit more dances out.[259] Veterans law is thus more and more likely to be decided by the demands of individual veteran litigants than by robust and spirited advocacy from both sides.[260]

The current veterans law EAJA jurisprudence also borders on intellectual dishonesty. It is difficult to escape the conclusion that the CAVC has *de facto* overruled *Stillwell* and *Felton* in cases like *Gordon*, *Cline*, *Johnson III*, and *Butts*.[261] However, no holding has acknowledged this fact and alerted members of the veterans bar or VA counsel to it. Litigants and judges thus will continue to cite and rely on *Stillwell* and *Felton*, with their references to touchstones like the "confusing tapestry" of veterans law,[262] cases of "first impression,"[263] and evolving standards where good faith arguments are advanced,[264] when in reality these touchstones no longer exist in any practical way.

Remedial action is available to both the CAVC and the Federal Circuit. First, both courts could begin to cite *Gardner* and veteran-friendliness at the EAJA-fee stage as reasons to hold that the government advanced reasonable arguments at the merits stage. These particularities of veterans law, which encourage veterans to vindicate all possible rights to benefits, are necessary and desirable from a public policy perspective. But pretending that the government is *always* unreasonable when it loses a case before the CAVC does harm to the efficient operation of the veterans benefits system.

Second, the Courts, and in particular the Federal Circuit, could shift the burden on the question of substantial justification from the Secretary to the veteran's attorney. Current case law holds that the government bears the burden of showing that its position was substantially justified.[265] To trigger this burden, the private litigant and his attorney need only "allege" that the government was not substantially justified. But the private attorney is the party seeking a benefit. EAJA, as explained above, is supposed to provide an exception to the common law rule that a party bear his own legal fees,[266] not swallow the rule entirely. Instead of requiring the Secretary to prove VA's actions that led to attorney intervention were reasonable, the courts could require that the veteran (who in EAJA cases is always represented by counsel) prove that VA's actions that led to attorney intervention were unreasonable.

> decision is aware that the decision will not be set aside on the merits unless it is unreasonable, the additional possibility of an EAJA fee award if the decision is found unreasonable is unlikely to weigh heavily or at all upon the decisionmaker in choosing a course.

Sisk, *supra* note 19, at 27 n.156.

258 *See* Hodge v. West, 155 F.3d 1356, 1361 n.1 (Fed. Cir. 1998) (noting that "the Secretary's construction is also the construction most favorable to the veteran"); Ravin v. Wilkie, 31 Vet. App. 104, 114-15 (2019) (en banc) (questioning the CAVC's longstanding practice of applying the *Gardner* canon in a way that benefits the individual veteran-claimant, rather than in a way that benefits the veterans benefits system as a whole); *see also* James D. Ridgway, *Toward a Less Adversarial Relationship Between* Chevron *and* Gardner, 9 U. MASS. L. REV. 388, 416 (2014) ("In many cases, however, the agency's objection to a claimant's proposed 'veteran-friendly' interpretation is that the agency has a different view of which interpretation would lead to the most veteran-friendly outcome across the entire system.").

259 *See* Sisk, *supra* note 19, at 202 (noting that the evisceration of the substantial justification provison in EAJA "might well encourage administrators to forgo vigorous enforcement of the law and eschew controversy to avoid being hauled into court").

260 *See* Rivers v. Roadway Exp., Inc., 511 U.S. 298, 312 (1994) (noting that "it is often difficult to predict the precise application of a general rule until it has been distilled in the crucible of litigation").

261 *See supra* Section V.

262 Stillwell v. Brown, 6 Vet. App. 291, 303 (1994).

263 Felton v. Brown, 7 Vet. App. 276, 281 (1993).

264 *See id.* at 292 (Steinberg, J., concurring in part and dissenting in part).

265 Patrick v. Shinseki, 668 F.3d 1325, 1330 (Fed. Cir. 2011); Ravin v. Wilkie, 31 Vet. App. 104, 113 (2019) (en banc).

266 Pierce v. Underwood, 487 U.S. 552, 575 (1988) (Brennan, J., concurring).

To be clear, the government bears the burden of showing it acted reasonably in both veterans cases and non-veterans cases.[267] But this rule is a judge-made rule, not a Congressionally mandated one: nowhere in the EAJA statute did Congress establish a burden.[268] What's more, assuming that the government's position was unreasonable unless the government proves otherwise seems at odds with the presumption of regularity that normally attends government actions.[269] In the context of veterans cases, flipping the burden at the EAJA stage, at least on the issue of substantial justification, might counteract *some* of the underlying assumptions that permeate *Butts v. McDonald* and cases like it. Most EAJA decisions will likely have the same result regardless of which party bears the burden.[270] But shifting the burden could make the difference in excruciatingly close cases, like *Butts*, or in cases where the veteran prevailed on the merits specifically because of the veteran's canon, like *Ravin*.

Congress also has options to alleviate VA's EAJA problem. Because the limits of the Federal Circuit's review of the CAVC's decisions are statutorily mandated,[271] Congress could expand the Federal Circuit's ability to review substantial justification issues, such that the CAVC's determination of whether the position of the government was or was not substantially justified can be reviewed for abuse of discretion. This would put the substantial justification determinations of the CAVC on the same footing as the substantial justification determinations of Article III district courts reviewing administrative actions. It bears emphasizing that after the Secretary's earth-shaking loss in *Butts*, after numerous rounds of substantive arguments before the CAVC and the Federal Circuit on a difficult issue of regulatory interpretation, the Secretary appealed the CAVC's EAJA decision to the Federal Circuit, and the Federal Circuit's decision on appeal stated simply: "AFFIRMED."[272]

Congress could also alter the substantial justification determination standard as it relates to veterans law specifically. One way it could do this would be to eliminate the substantial justification requirement entirely in veterans cases.[273] The veterans court and the Federal Circuit would still have the ability to reject EAJA applications that are not timely filed, that are not brought by a true "prevailing party," or where "special circumstances" would make an award unjust, and to modify fee applications where the amount of fees sought is unreasonable.[274] The elimination of "substantial justification" as a

---

267 *Compare Patrick*, 668 F.3d at 1330, *with* Tripoli Rocketry Ass'n, Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 698 F. Supp. 2d 168, 172 (D.D.C. 2010) (once plaintiffs, members of a rocketry enthusiast club, alleged that ATF's categorization of common hobby rocket motor chemical compound as an "explosive" was not substantially justified, burden shifted to government to show its classification of the chemical compound was substantially justified).

268 28 U.S.C. § 2412(d)(1)(B) (stating simply that "[a] party seeking an award of fees . . . shall also allege that the position of the United States was not substantially justified").

269 *See, e.g.*, Miley v. Principi, 366 F.3d 1343, 1346-47 (Fed. Cir. 2004) (applying presumption of regularity to presume that VA officials acted consistently with their legal duty under 38 U.S.C. § 7105(b)(1) to mail veteran notification of rating decision); Butler v. Principi, 244 F.3d 1337, 1340-41 (Fed. Cir. 2001) (presuming VA officials acted consistently with legal duty under 38 U.S.C. § 5104(a) to mail veteran notice of appeal rights).

270 *See* Essex Electro Eng'rs, Inc, 757 F.2d at 253 (noting that, ultimately, the reasonableness of the government's merits position will be decided by analyzing "the totality of the circumstances").

271 *See* 38 U.S.C. § 7292 (2012).

272 Butts v. Wilkie, 721 F. App'x 988 (Fed. Cir. May 7, 2018) (unpublished).

273 *See* Joanna R. Lampe, *Attorney's Fees and the Equal Access to Justice Act: Legal Framework*, Congressional Research Service, June 10, 2019 (discussing proposal to eliminate substantial justification requirement from EAJA in "Equal Access to Justice Reform Act" of 2003).

274 *See* 28 U.S.C. §§ 2412(d)(1)(A) (2012) (noting that a fee will not be awarded where "special circumstances make an award unjust") and (d)(1)(B) (noting that any application for fees and other expenses under EAJA shall be filed "within thirty days of final judgment in the action" and that the party shall "show[] that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement . . . and the rate at which fees and other expenses were computed").

factor would encourage representation in veterans benefits cases even more than the current system, and it would reduce perverse incentives for the Secretary to avoid raising novel arguments.[275] The Secretary would also not have to consider spending taxpayer dollars on briefs opposing EAJA awards on substantial justification grounds.

The second way Congress could alleviate VA's EAJA-fee problem would be to strengthen the substantial justification requirement in the veterans law context, by enacting a veteran-specific amendment to EAJA. Such amendment could take the form of a proviso that no fees will be granted in cases where the CAVC's merits decision was based all or substantially on legal standards designed to be artificially beneficial to veterans at the merits stage, such as the *Gardner* canon or veteran-friendliness. To alleviate concern by veterans and their attorneys that such a provision would do harm to the proliferation of veteran representation, Congress could increase fee caps in veterans cases where the Secretary's positions are found to lack substantial justification.[276] Congress has already amended the EAJA statute once in recognition of the unique nature of judicial review of veterans benefits cases.[277] The unique nature of EAJA jurisprudence in veterans law, as illustrated by cases like *Butts*, could justify another amendment.

If no corrective actions are taken, the current trajectory of EAJA jurisprudence in veterans law will continue.[278] *Johnson III* and *Butts* will continue to represent the CAVC's and the Federal Circuit's truly unique application of a statute of general applicability.[279] And the government will continue to pay out attorney fees in almost every case VA loses on the merits where the veteran had a lawyer. At very least, courts and litigants must be aware of this singularity, and veterans law commentators must hold the courts accountable for how EAJA jurisprudence progresses in the future.[280]

---

275 *See* Sisk, *supra* note 19, at 197-202 (discussing a Senate proposal to eliminate the substantial justification requirement as part of a proposed overhaul of EAJA and noting that "[g]overnment officials might not be chilled from taking initiative by the prospect of a mandatory fee award").

276 *See* 28 U.S.C. § 2412(d)(2)(A) (providing that attorney fees are capped at $125 per hour, with adjustments allowed for cost of living and other special-factor adjustments).

277 Veterans Claims Assistance Act, Pub. L. No. 102-572, § 506, 106 Stat. 4506, 4513 (1992) (amending 28 U.S.C. § 2412 to recognize the government's waiver of sovereign immunity as to cases before the CAVC).

278 *See* Bowey v. West, 218 F.3d 1371, 1378 (Fed. Cir. 2000).

279 *See* Jellum, *supra* note 209, at 76.

280 *See* LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY—AND HOW THE BANKERS USE IT 92 (Frederick A. Stokes Co. 1914) ("Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.").