Standards of the Standards of Review

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INTRODUCTION

An effective standard of review is the hallmark of a healthy and properly functioning judicial system. The benchmark by which a judge or jury analyzes, and ultimately determines an outcome, is crucial to the proper administration of justice. A standard of review must be clearly defined to be effective, but as several commentators have noted, even the primary law dictionaries avoid defining "standard of review."[2] What a particular standard of review signifies, when it should be applied, and how it should be applied are questions that lawyers, lawmakers, and even judges struggle with.[3] It is disheartening to think that something so critical and fundamental to the rule of law is so easily confused or worse, completely unknown.

This glaring problem is an issue that has plagued the United States Court of Appeals for Veterans Claims ("Veterans Court") since its inception. As Judge Steinberg described, "the standard of judicial review for various [Board of Veterans' Appeals ("Board")] determinations" is "an exceedingly murky area of our jurisprudence."[4] The United States Supreme Court

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[2] *See* Ursula Bentele & Eve Cary, Appellate Advocacy Principles and Practice 119 (4th ed. 2004); Charles A. Borek, *Social Science Explanations for Disparate Outcomes in Tax Court Abuse of Discretion Cases: A Tax Justice Perspective*, 33 Cap. U. L. Rev. 623, 634 n.46 (2005); Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 Seattle U. L. Rev. 11, 12 (1994).

[3] Amanda Peters, *The Meaning, Measure, and Misuse of Standards of Review*, 13 Lewis & Clark L. Rev. 233, 234-35 (2009).

[4] Butts v. Brown, 5 Vet. App. 532, 542 (1993) (Steinberg, J., concurring).

(Supreme Court) has stated that the question of standard of review is generally answered by "explicit statutory command" or "a long history of appellate practice."[5] The question of standard of review for the Veterans Court is, therefore, moderately clear when it falls under the statutory authority outlined in this article. However, being the nation's youngest court and in a truly unique area of the law, it is difficult for practitioners to firmly grasp the concept of standard of review and its application in the Veterans Court.

I. BACKGROUND

The scope of a court's review establishes the full range of legal issues and factual circumstances over which a court may exercise jurisdiction. Although standard of review and scope of review are related and are both necessary to determine a court's jurisdiction to review matters, they are separate concepts. The standard of review determines the degree of deference given to a lower court, or, in the case of the Veterans Court, to the Board. The scope of review is the range of law and facts over which a court has jurisdiction to review. The statute outlining the Veterans Court's scope of review is 38 U.S.C. § 7261. This statute, titled "Scope of review" states:

> (a) In any action brought under this chapter [38 U.S.C. §§ 7251 et seq.], the Court of Appeals for Veterans Claims, to the extent necessary to its decision and when presented, shall–
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> > (1) decide all relevant questions of law, interpret constitutional, statutory, and regulatory provisions, and determine the meaning or applicability of the terms of an action of the Secretary;
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> > (2) compel action of the Secretary unlawfully withheld or unreasonably delayed;

[5] Pierce v. Underwood, 487 U.S. 552, 558 (1988).

> (3) hold unlawful and set aside decision, findings (other than those described in clause (4) of this subsection), conclusions, rules, and regulations issued or adopted by the Secretary, the Board of Veterans' Appeals, or the Chairman of the Board found to be–
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> > (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
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> > (B) contrary to constitutional right, power, privilege, or immunity;
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> > (C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or
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> > (D) without observance of procedure required by law; and
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> (4) in the case of a finding of material fact adverse to the claimant made in reaching a decision in a case before the Department [of Veterans Affairs] with respect to benefits under laws administered by the Secretary, hold unlawful and set aside or reverse such finding if the finding is clearly erroneous.[6]

The statute delineates the scope of review that the Veterans Court has jurisdiction over.[7] On one end of the scope of review

[6] 38 U.S.C. § 7261(a) (2006).

[7] It is important to note that the Veterans Court's scope of review is narrowed by 38 U.S.C. §§ 7252 and 7266, which the Veterans Court has interpreted to mean that scope of review is limited to final Board decisions. However, this limitation does not necessarily extend to arguments raised in the first instance to the Veterans Court. *See* Maggitt v. West, 202 F.3d 1370, 1377-78 (Fed. Cir. 2000) (holding that the Veterans Court has scope of review to address

range are questions of pure law, including interpretation of the meaning of the law. Pure questions of law are reviewed under a de novo standard of review.[8] The term "law" includes reviewing the applicability and substantive terms of the U.S. Constitution, statutes, the Department of Veterans Affairs (VA) regulations, and previous precedential court opinions.[9]

On the opposite end of the scope of review range are questions of pure fact, which are analyzed under a clearly erroneous standard of review.[10] The pure law and pure fact questions provide the bookends for the range of the Veterans Court's scope of review. At one end of the scope are the easily defined questions of pure law and at the opposite end are questions based on pure fact.

Difficulty arises when determining the applicable standard of review when an issue falls between these two bookends on the scope of review range. These issues of mixed law and fact, often referred to as application of law to facts, are not only more difficult to define but more difficult to place on the scope of review range and the standard of review deference spectrum.

The governing statute provides a brief and somewhat opaque outline of the Veterans Court's standards of review. The Veterans Court has generalized the standards of review into three categories: "de novo," "clearly erroneous," and "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[11] The inclusion of "abuse of discretion" with the Veterans Court's "arbitrary and capricious" standard of review is understandable considering 38 U.S.C. § 7261(a) lists them under the same subheading and many courts determining them to be

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arguments first raised at the court, so long as it otherwise has jurisdiction over the claim).

[8] 38 U.S.C. § 7261(a)(1); *see* Smith v. Gober, 14 Vet. App. 227, 230 (2000) ("This Court reviews questions of law de novo without any deference to the Board's conclusion of law.").

[9] 38 U.S.C. § 7261(a)(1).

[10] *Id*. § 7261(a)(4).

[11] McLendon v. Nicholson, 20 Vet. App. 79, 83 (2006).

the same. However, because it is not universally accepted that the terms are one and the same, this note will address each separately.[12] Further, because "otherwise not in accordance with law" is used rarely, if at all, as an independent standard of review, it will be considered solely as a part of the "arbitrary and capricious" standard of review.

Accordingly, the beginning of the standard of review deference spectrum is de novo, which is least deferential to the Board's conclusions and findings. At the end of the deference spectrum is either abuse of discretion or arbitrary and capricious, depending on whether they are considered the same standard or not. This end of the deference spectrum, whether abuse of discretion or arbitrary and capricious, is most deferential to the Board's conclusions and findings. The scope of review range and standard of review deference spectrum are illustrated in Figure 1. The solid black line designates an interpretation of "abuse of discretion" as a more deferential standard of review than "arbitrary and capricious."[13] The gray dashed line designates "abuse of discretion" and "arbitrary and capricious" as synonymous.[14] It would seem more logical that if pure fact gives the least deference to questions of law

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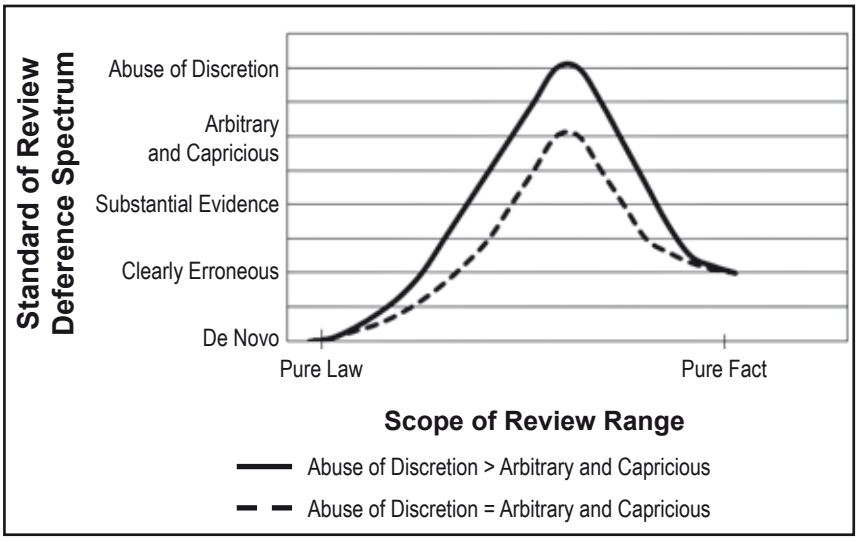
[12] Morton v. Smith, 91 F.3d 867, 870 (7th Cir. 1996) (differentiating between abuse of discretion and arbitrary and capricious standards of review); *see also* Pierre v. Conn. Gen. Life Ins. Co., 932 F.2d 1552, 1562 (5th Cir. 1991); *but see* Meditrust Fin. Serv. Corp. v. Sterling Chems., Inc., 168 F.3d 211, 214 (5th Cir. 1999); Vizcaino v. Microsoft Corp., 120 F.3d 1006, 1009 (9th Cir. 1997) (holding that an action would be reviewed "under the arbitrary or capricious standard, or for abuse of discretion, which comes to the same thing") (internal quotation marks omitted); Sheppard & Enoch Pratt Hosp., Inc. v. Travelers Ins. Co., 32 F.3d 120, 125 n.4 (4th Cir. 1994) (using an "arbitrary and capricious" or "abuse of discretion" standard of review); Abnathya v. Hoffmann-La Roche, Inc., 2 F.3d 40, 45 n.4 (3d Cir. 1993) (holding that an arbitrary and capricious standard of review is the same as an abuse of discretion standard of review).

[13] Richard H. W. Maloy, *"Standards of Review" - Just a Tip of the Icicle*, 77 U. Det. Mercy L. Rev. 603, 629 (2000) ("The amount of deference varies with the courts and also with the issues, but certainly more deference is given to the trial court's rulings under [the abuse of discretion] standard than under others.") (footnotes omitted).

[14] Brian C. Whipps, *Substantial Evidence Supporting the Clearly Erroneous Standard of Review: The PTO Faces Off Against the Federal Circuit*, 24 Wm. Mitchell L. Rev. 1127, 1130 (1998) ("The spectrum . . . from most deferential to the fact finder's determinations to least deferential to fact finder's determinations, is (1) arbitrary, capricious, (2) substantial evidence, (3) clearly erroneous, (4) de novo review.").

then questions of fact should give the most deference and all points in the middle should be placed on a straight line between the two. However, as can be clearly seen in the graph, some questions of mixed law and fact are afforded a greater deference than questions of pure law or pure fact.

Figure 1:



II. STANDARDS OF REVIEW

A. De Novo

The Supreme Court has explained that the definition of "de novo" is when "a reviewing court makes an original appraisal of all evidence to decide whether or not it believes that judgment should be entered for plaintiff."[15] De novo review is a blank slate in which the Veterans Court reviews an appeal without regard to the Board's decision. This is the most lenient and least deferential standard of review. Consequently, this is the easiest to overcome

[15] Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 514 n.31 (1984); *see* 6 Jacob A. Stein, Glenn A. Mitchell & Basil J. Mezines, Administrative Law § 51.01[2], at 51-101 (2009) (de novo review is the broadest scope of review); Kunsch, *supra* note 2, at 14.

because, essentially, a claimant receives a new chance to convince an adjudicating body that his or her argument is the correct one.

The term "de novo" can be slightly confusing in its usage because, at times, it denotes only how a court will review something, not the standard by which it is reviewed.[16] Although the Veterans Court does not have statutory authority to conduct a "trial de novo," it is important to note that while the terms are similar, they are in fact wholly separate concepts. A "trial de novo" consists of an appellate proceeding "in which both issues of law and issues of fact are reconsidered as if the original trial had never taken place."[17]

Further, the Veterans Court may review a matter "de novo" but analyze it based on a particular statute, regulation, or prior precedential opinion. For example, the Veterans Court reviews whether a document constitutes a Notice of Disagreement under a "de novo" standard of review.[18] However, whether that document is a Notice of Disagreement is analyzed based on 38 U.S.C. § 7105 and prior precedential opinions.

Further complicating use of the "de novo" standard of review, courts will, at times, review a lower adjudicating body's decision anew (de novo) but apply the standard of review the lower

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[16] The United States Court of Appeals for the Federal Circuit (Federal Circuit) highlighted some of the difficulties in the term "de novo" review in Hensley v. West, 212 F.3d 1255 (Fed. Cir. 2000). The Federal Circuit stated:

> The phrase "*de novo* review," although occasionally used by both this court and the [Veterans Court], may in certain contexts be misunderstood. Appellate courts can "review" only that which has happened in the past, while the term "*de novo*" may be understood to mean anew, without reference to what has gone before. To the extent that "*de novo*" connotes judicial review anew and without reference to what has gone before, the term fails to accurately describe the appellate process, and particularly is this so when it is applied to review of issues upon which any measure of deference is accorded to the decision under review.

Id. at 1263.

[17] Barron's Law Dictionary 524 (4th ed. 1996).

[18] Young v. Shinseki, 22 Vet. App. 461, 466 (2009); Palmer v. Nicholson, 21 Vet. App. 434, 436 (2007); Archbold v. Brown, 9 Vet. App. 124, 131 (1996).

adjudicating body did or should have used. Consequently, a court may state it is reviewing a decision "de novo" but nonetheless apply a "clearly erroneous" standard of review.[19] In terms of veterans' law, the Veterans Court has stated that "conclusions of law may be reviewed de novo, and set aside when such conclusions of law are 'arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law.'"[20]

B. Clearly Erroneous

The Supreme Court has explained that the definition of clearly erroneous is "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."[21] In *Gilbert v. Derwinski*, the Veterans Court determined that the

[19] As a highlight to this seeming paradox, the United States Court of Appeals for the Fifth Circuit somewhat cryptically stated that "'a district court's determination of whether a plan administrator abused its discretion–a mixed question of law and fact–*de novo*,' we review the Plan's decision from the same perspective as did the district court, and we directly review the Plan's decision for an abuse of discretion." Meditrust Fin. Serv. Corp. v. Sterling Chems., Inc., 168 F.3d 211, 214 (5th Cir. 1999) (citations omitted). The Federal Circuit also added confusion by stating that "as we have previously held, the 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' standard of review employed by the Veterans' Court contemplates *de novo* review of questions of law." Kent v. Principi, 389 F.3d 1380, 1384 (Fed. Cir. 2004).

[20] Young v. Brown, 4 Vet. App. 106, 108 (1993), *abrogated by* Butts v. Brown, 5 Vet. App. 106 (1993); *see* McGrath v. Brown, 5 Vet. App. 57, 59 (1993); *but see* Butts v. Brown, 5 Vet. App. 532, 539-40 (1993) (finding selection of diagnostic code (DC) is a mixed question of law and fact, overruling *McGrath* holding the selection of DC is a question of law).

[21] Anderson v. Bessemer City, 470 U.S. 564, 573 (1985) (citing United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948)); Merchants Nat'l Bank of Mobile v. United States, 7 Cl. Ct. 1, 7 (1984) (noting that the Supreme Court's definition of clearly erroneous "has received general acceptance"); *see* Easley v. Cromartie, 532 U.S. 234, 242 (2001) ("In applying [the clearly erroneous] standard, we, like any reviewing court, will not reverse a lower court's finding of fact simply because we 'would have decided the case differently.' Rather, a reviewing court must ask whether, 'on the entire evidence,' it is 'left with the definite and firm conviction that a mistake has been committed.'") (citations omitted); *accord* Andino v. Nicholson, 498 F.3d 1370, 1373 n.1 (Fed. Cir. 2007) ("It is not enough that the VA conclude that it would have decided the issue differently had it been analyzing all the evidence to determine whether to grant service connection in the first instance. To be 'clearly erroneous' there must be a definite and firm conviction that a mistake has occurred.") (citations omitted); Woehlaert v. Nicholson, 21 Vet. App. 456, 461-62 (2007); *see also* Gilbert v. Derwinski, 1 Vet. App. 49, 52 (1990).

Supreme Court's definition of clearly erroneous applies to veterans' law.[22] The "clearly erroneous" standard of review is not the most nor the least deferential standard, it falls somewhere in between.[23] Exactly how much deference is given to a Board's decision under the "clearly erroneous" standard of review has only been modestly addressed by the Veterans Court.

The Veterans Court has attempted to alleviate the amorphous deferential standard of "clearly erroneous" by stating that it "may not substitute its judgment for the factual determinations of the Board on issues of material fact merely because the Court would have decided those issues differently in the first instance."[24] Accordingly, the "clearly erroneous" standard of review determines whether an error, on the whole of the record, has been made; it does not grant the Veterans Court the authority to make factual determinations. The Veterans Court has also, in a handful of cases, stated that it "may only overturn a finding of the Board if there does not exist a 'plausible basis' in the record that supports the factual determination at issue."[25] However, this does

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22 *Gilbert*, 1 Vet. App. at 52.

23 *See* Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 623 (1993) (stating that "review under the 'clearly erroneous' standard is significantly deferential, requiring a 'definite and firm conviction that a mistake has been committed'"); *see also* Whipps, *supra* note 14, at 1130.

24 Washington v. Nicholson, 19 Vet. App. 362, 366 (2005); *see also* United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948) (noting that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed"). Interestingly, the Supreme Court has used very similar language when describing the "arbitrary and capricious" standard of review. The "scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); *see* Marsh v. Or. Natural Res. Council, 490 U.S. 360, 378 (1989) (stating that an agency has "discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive").

25 Mauerhan v. Principi, 16 Vet. App. 436, 440 (2002) (stating that under the "clearly erroneous" standard of review the Veterans Court "may only overturn a finding of the Board if there does not exist a 'plausible basis' in the record that supports the factual determination at issue"); *accord* Powell v. West, 13 Vet. App. 31, 33 (1999); Beaty v. Brown, 6 Vet. App. 532, 536 (1994); *Gilbert*, 1 Vet. App. at 53.

not provide much further information because the term "plausible" is not defined by the Veterans Court. Additionally, the term itself is only rarely utilized but important to highlight because of the confusion that can be caused by its usage.

Other courts reviewing agency decisions under the Administrative Procedure Act (APA)[26] utilize a "substantial evidence" standard of review. That standard of review is not utilized in veterans' law because the Veterans' Judicial Review Act (VJRA)[27] specifically substituted a "clearly erroneous" standard of review for the "substantial evidence" standard of review.[28] Congress seemed intent to provide the Veterans Court with a standard of review that would be less deferential than the "substantial evidence" standard under the APA. Although congressional intent appears clear, the practical application of a less deferential standard has proven difficult. This is in part because the location of "clearly erroneous" on the standard of review deference spectrum is only modestly addressed by the courts, including the Veterans Court.

The Supreme Court has stated that the difference between the "clearly erroneous" and "substantial evidence" standards of review "is a subtle one - so fine that (apart from the present case) we have failed to uncover a single instance in which a reviewing court conceded that use of one standard rather than the other would in fact have produced a different outcome."[29] The Supreme Court's inability to uncover more cases determining that there would be a different outcome, depending on the use of "clearly erroneous" as a standard of review instead of "substantial

[26] Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706 (2006).
[27] Veterans' Judicial Review Act (VJRA), Pub. L. No. 100-687, § 301, 102 Stat. 4105 (1988).
[28] Roberson v. Principi, 17 Vet. App. 135, 146-47 (2003) (comparing and contrasting APA and VJRA).
[29] Dickinson v. Zurko, 527 U.S. 150, 162-63 (1999); *see Roberson*, 17 Vet. App. at 146-47; *see also* Amy R. Rigdon, *Dangerous Data: How Disputed Research Legalized Public Single-Sex Education*, 37 Stetson L. Rev. 527, 562 n.213 (2008) (explaining that the "substantial evidence" standard of review is more deferential than the "clearly erroneous" standard of review).

evidence", is understandable and easily explained.[30] First, the two standards fall close to each other on the deference spectrum. Secondly, courts, including the Veterans Court, are generally not in the practice of outlining different outcomes depending on which standard of review is utilized.[31] Generally, *if* a court determines and states its standard of review, the court will apply it without further enunciation. Accordingly, although difficult to establish in practice, for the purposes of more clearly defining where on the deference spectrum "clearly erroneous" is located, it requires more deference than "de novo" but less deference than "substantial evidence." This is important to note, even if only a technicality, because when the Veterans Court addresses a novel issue that another court has addressed under the APA, the Veterans Court should, in theory, give slightly less deference to the Board's determination than the other court gave to that agency's determination. Further, the deference that Congress placed in the VJRA concerning this standard of review is important because it shines a light on the other standards of review, which Congress left the same as those under the APA, such as "de novo" and "arbitrary and capricious."

C. Arbitrary and Capricious

The Supreme Court established the definition of the "arbitrary and capricious"[32] standard of review in *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*[33] the

[30] There is difficulty in finding and reconciling the Supreme Court cases alone. *See generally* Maureen Armour, *Rethinking Judicial Discretion: Sanctions and the Conundrum of the Close Case*, 50 SMU L. Rev. 493 (1997); Whipps, *supra* note 14; Nicholas S. Zeppos, *Deference to Political Decisionmakers and the Preferred Scope of Judicial Review*, 88 Nw. U.L. Rev. 296 (1993).

[31] As explained further below, the vast majority of cases from the Veterans Court do not state what standard of review is being used, let alone explain how the appeal might be decided under a different standard of review.

[32] Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). As explained above, this note discusses "abuse of discretion" and "arbitrary and capricious" separately. Also of note, is that the Supreme Court seems to fall into the same trap of treating the two as the same. *Compare Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 *with* Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 172 (1988); *and* Gulf Oil Co. v. Bernard, 452 U.S. 89, 103 (1981).

[33] *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. The Supreme Court stated the following:

Supreme Court explained that an agency's action or judgment is arbitrary and capricious if it:

> [R]elied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[34]

The Veterans Court more succinctly stated in *Young v. Brown*, that under "the 'arbitrary and capricious' standard of review as prescribed by 38 U.S.C. § 7261(a)(3)(A)" a Board decision will be affirmed if it is "'premised upon a rational basis and supported by appropriate and relevant factors which [are] properly articulated.'"[35] It is important to differentiate between "plausible basis" and "rational basis." The term "rational basis" applies under the "arbitrary and capricious" standard, while "plausible basis" applies, albeit sporadically, to the "clearly

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> The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.

Id. (citing Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)); *see also* Natural Res. Def. Council, Inc. v. U.S. EPA, 966 F.2d 1292, 1297 (9th Cir. 1992); Keith G. Bauerle, *The Ninth Circuit's "Clarifications" in Lands Council v. McNair*: *Much Ado About Nothing?*, 2 Golden Gate U. Envtl. L.J. 203, 206 (2009).

34 *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43; *see also* Mississippi Valley Barge Line Co. v. United States, 292 U.S. 282, 286-87 (1934) ("The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.").

35 Young v. Brown, 9 Vet. App. 141, 143 (1996), *aff'd sub nom.* Young v. Gober, 121 F.3d 662 (Fed. Cir. 1997) (quoting Gilbert v. Derwinski, 1 Vet. App. 49, 58 (1990)). Also of note, the Federal Circuit's review of the "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" standard of review under the APA was that the agency is entitled to a "presumption of regularity," and "the agency's action must be upheld as long as a rational basis is articulated and relevant factors are considered." Emery Worldwide Airlines, Inc. v. United States, 264 F.3d 1071, 1085 (Fed. Cir. 2001) (citations omitted); *see* Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 285 (1974); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971).

erroneous" standard of review.[36] Although it is clear that the "arbitrary and capricious" standard of review gives substantial deference to the Board's decision, whether there is a "rational basis" for the Board's decision is difficult to determine because the term has been used in wildly varying contexts.

The Veterans Court has utilized a "rational basis test" in certain cases.[37] The Veterans Court has stated that the proper standard of review under the "rational basis test" is that a "statute withstands constitutional scrutiny on equal protection grounds unless the statute is 'patently arbitrary and irrational' and not reasonably related to any proper congressional purpose."[38] However, the Veterans Court has only utilized this "rational basis test" when reviewing issues concerning equal protection. Further, the primary law dictionaries only define "rational basis" in terms of the Equal Protection Clause. Accordingly, the "rational basis test" is essentially a separate standard of review the Veterans Court uses solely for equal protection cases and is therefore, of little value in determining the proper definition of "rational basis" under the "arbitrary and capricious" standard of review.

Most beneficial in determining the proper definition and application of "rational basis" concerning the "arbitrary and capricious" standard of review is an inspection of how other courts have treated the standard under the APA. Every federal court of appeals, adjudicating under the APA, has defined the "arbitrary and capricious" standard of review similar to the Veterans Court's definition from *Young v. Brown*, namely, that as long as the decision is based on a rational basis and supported by appropriate

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36 Mauerhan v. Principi, 16 Vet. App. 436, 440 (2002) (stating that under the "clearly erroneous" standard of review the Court "may only overturn a finding of the Board if there does not exist a 'plausible basis' in the record that supports the factual determination at issue"); *accord* Powell v. West, 13 Vet. App. 31, 33 (1999); Beaty v. Brown, 6 Vet. App. 532, 536 (1994); *Gilbert*, 1 Vet. App. at 52-53.

37 Lariosa v. Principi, 16 Vet. App. 323, 329 (2002).

38 *Id.* (quoting U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 177 (1980)).

and relevant factors, it will be upheld.[39] Several courts have stated that under the "arbitrary and capricious" standard of review, a court should "presume the agency's action to be valid."[40] Another court of appeals has stated that "[r]ational basis review protects the political choices of our government's elected branches."[41]

Further, although every federal court of appeals has stated that the "arbitrary and capricious" standard of review is determined based on whether there is a "rational basis," each court fails to fully explain what exactly is considered "rational." Although Judge Learned Hand stated that "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary,"[42] in this case the lack of defining language for what

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[39] River St. Donuts, LLC v. Napolitano, 558 F.3d 111, 114 (1st Cir. 2009) ("Review under the arbitrary and capricious standard is narrow and . . . , is highly deferential, and the agency's actions are presumed to be valid. Under this standard, we are required to determine whether the agency's decision is supported by a rational basis, and if so, we must affirm.") (citations omitted); *accord* United Keetoowah Band of Cherokee Indians of Okla. v. United States, 567 F.3d 1235, 1251-52 (10th Cir. 2009) ("Under the arbitrary and capricious standard of review, 'review is narrow and deferential; we must uphold the agency's action if it has articulated a rational basis for the decision and has considered relevant factors.'") (quoting Nutraceutical Corp. v. Von Eschenbach, 459 F.3d 1033, 1038 (10th Cir. 2006)); Blaustein & Reich, Inc. v. Buckles, 365 F.3d 281, 291 (4th Cir. 2004); Fluor Daniel, Inc. v. NLRB, 332 F.3d 961, 967 (6th Cir. 2003); *Emery Worldwide Airlines*, Inc., 264 F.3d at 108; Bagdonas v. Dep't of Treasury, 93 F.3d 422, 425-26 (7th Cir. 1996); Latecoere Int'l, Inc. v. U.S. Dep't of the Navy, 19 F.3d 1342, 1356 (11th Cir. 1994); Sentara-Hampton Gen. Hosp. v. Sullivan, 980 F.2d 749, 755 (D.C. Cir. 1992); Educ. Assistance Corp. v. Cavazos, 902 F.2d 617, 622 (8th Cir. 1990); Friends of Earth v. Hintz, 800 F.2d 822, 831 (9th Cir. 1986); Chemung County v. Dole, 781 F.2d 963, 971 (2d Cir. 1986); Am. Fed'n of Gov't Employees v. Fed. Labor Relations Auth., 715 F.2d 224, 227-28 (5th Cir. 1983); Lukens Steel Co. v. Klutznick, 629 F.2d 881, 885-86 (3d Cir. 1980).

[40] *River St. Donuts, LLC*, 558 F.3d at 114 ("under the arbitrary and capricious standard . . . the agency's actions are presumed to be valid") (citations omitted); *accord* Envtl. Def. Fund, Inc. v. Costle, 657 F.2d 275, 282-83 (D.C. Cir. 1981).

[41] Evans v. Eaton Corp. Long Term Disability Plan, 514 F.3d 315, 321 (4th Cir. 2008).

[42] Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945); *see* McDowell v. Shinseki, 23 Vet. App. 207, 218 (2009) (Hagel, J., concurring in result, dissenting in part) (citing *Cabell*); *see also* Jordan v. De George, 341 U.S. 223, 234 (1951) (Jackson, J., dissenting) (describing dictionaries as "the last resort of the baffled judge"); Hynes v. Grimes Packing Co., 337 U.S. 86, 115-16 (1949) ("[O]ne may not fully comprehend the statute's scope by extracting from it a single phrase . . . and getting the phrase's meaning from the dictionary or even from dissimilar statutes.").

entails "rational basis" a review of lay dictionaries may provide additional enlightenment. Lay dictionaries define "rational" as "based on, or derived from reasoning."[43] Accordingly, based on the above discussion, it seems that for the Board to have a rational basis, it only requires some establishment based on "relevant factors" with substantial deference to the Board decision.

D. Abuse of Discretion

A standard of review based on only "abuse of discretion," without the inclusion of "arbitrary and capricious," has only been used by the Veterans Court a few times. The Veterans Court, as with most courts, lumps "abuse of discretion" within the "arbitrary and capricious" standard of review.[44] However, not all courts view the two standards as being synonymous,[45] and the few instances that the Veterans Court has addressed an "abuse of discretion" standard of review, it has distinguished it significantly from its definition of the "arbitrary and capricious" standard of review.[46] The Veterans Court has stated that the "abuse of discretion" standard is not only highly deferential but can only be overcome by a showing of bad faith or willful abuse of the judicial process.[47] Further, the Veterans Court has restricted its use of the "abuse

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[43] Webster's New World Dictionary 1115 (3d ed. 1991).

[44] Vizcaino v. Microsoft Corp., 120 F.3d 1006, 1009 (9th Cir. 1997) (holding that an action would be reviewed "under the arbitrary or capricious standard, or for abuse of discretion, which comes to the same thing") (internal quotation marks omitted); Sheppard & Enoch Pratt Hosp., Inc. v. Travelers Ins. Co., 32 F.3d 120, 125 n.4 (4th Cir. 1994) (using an "arbitrary and capricious or abuse of discretion" standard of review); Abnathya v. Hoffmann-La Roche, Inc., 2 F.3d 40, 45 n.4 (3d Cir. 1993) (holding that an arbitrary and capricious standard of review is the same as an abuse of discretion standard of review).

[45] Morton v. Smith, 91 F.3d 867, 870 (7th Cir. 1996) (differentiating between abuse of discretion and arbitrary and capricious standards of review); Pierre v. Conn. Gen. Life Ins. Co., 932 F.2d 1552, 1562 (5th Cir. 1991) (same).

[46] In *Morgan v. Principi*, the Veterans Court compared the "abuse of discretion" standard of review to a "'good cause' determination," by stating that both standards were highly deferential. Morgan v. Principi, 16 Vet. App. 20, 27-28 (2002); *see* Brown v. West, 13 Vet. App. 88, 89 (1999).

[47] Perry v. West, 11 Vet. App. 319, 332 (1998); Ebert v. Brown, 4 Vet. App. 434, 437 (1993); Jones v. Derwinski, 1 Vet. App. 596, 607 (1991); *accord* Reyes v. Nicholson, 21 Vet. App. 370, 377 (2007); *but see* Herzog v. Derwinski, 2 Vet. App. 502, 503 (1992).

of discretion" standard of review by stating, "[I]f no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for 'abuse of discretion.'"[48] Consequently, if it is a separate standard of review, "abuse of discretion" is the most deferential to the Board decision.

III. APPLICATION AND USAGE ISSUES

As stated at the beginning of this note, an effective standard of review is the hallmark of a healthy and properly functioning judicial system. Standards of review should be utilized to focus an appellate court on its proper authority and provide a barometer for what review will entail.[49] Standards of review also help the litigating parties assess the weight of their case and tailor their arguments to the appellate court accordingly. Further, standards of review safeguard against an appellate body acting outside its given area of authority.[50]

Currently, there are several issues plaguing the Veterans Court and its application of standards of review.[51] These issues, addressed below, include unclear definitions, complete lack of standard of review in the opinion, misapplication, and conflicting usage. Also included in each section is a proposed solution.

The conflicting application and usage of standards of review in single-judge opinions is beyond the scope of this article. Further, the issue of where a particular claim falls on the standard of review range (from pure law to pure fact) and therefore on the standard of review deference spectrum (from "de novo" to "abuse of discretion") is not specifically addressed. This determination

[48] Darrow v. Derwinski, 2 Vet. App. 303, 306 (1992) (quoting Heckler v. Chaney, 470 U.S. 821, 830 (1985)).
[49] Evans v. Eaton Corp. Long Term Disability Plan, 514 F.3d 315, 320-21 (4th Cir. 2008).
[50] *Id.*
[51] Butts v. Brown, 5 Vet. App. 532, 541-42 (1993) (Steinberg, J., concurring).

is one that will always be at a court's discretion.[52] However, by clearly defining, consistently using, and uniformly applying standards of review, the Veterans Court will help alleviate these issues. As the Veterans Court fills in the scatter points along the scope of review range and the standard of review deference spectrum, it will be easier for litigating parties to deduce and for judges, whether single, panel, or en banc, to determine the proper standard of review.

A. Ambiguous Definitions

As the previous section highlighted, the Veterans Court's standard of review definitions are not clearly defined. The definitions for the "de novo" and "clearly erroneous" standards of review are the most adequately defined. This is understandable considering these standards are utilized for the bookends of the scope of review range, with "de novo" applying to questions of law and "clearly erroneous" applying to questions of fact.

The primary issue concerning definitions arise from the unclear language of 38 U.S.C. § 7261(a)(3)(A), which states only "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The question of whether "abuse of discretion" is a separate standard of review or simply a part of the "arbitrary and capricious" standard of review is immediately apparent. What confuses this issue beyond comprehension is that the Veterans Court has used "abuse of discretion" both as a part of the "arbitrary and capricious" standard of review[53] and as a separate standard of its own.[54] If the "abuse of discretion" standard

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[52] Stein, Mitchell & Mezines, *supra* note 15, at § 51.01[1], at 51-2-51-7 ("The final word on interpretation of law and its *applicability*, whether constitutional or statutory, *resides in the courts*, which may substitute their judgment on questions of law for that of the agency on a virtually carte blanche basis.") (emphasis added).

[53] *See generally* Roberts v. Shinseki, 23 Vet. App. 416 (2010) (en banc); Bouton v. Peake, 23 Vet. App. 70, 71 (2008); Allen v. Nicholson, 21 Vet. App. 54 (2007); Russell v. Principi, 3 Vet. App. 310 (1992).

[54] *See* Perry v. West, 11 Vet. App. 319, 332 (1998); Ebert v. Brown, 4 Vet. App. 434, 437 (1993); Darrow v. Derwinski, 2 Vet. App. 303, 306 (1992); Jones v. Derwinski, 1 Vet. App. 596, 607 (1991).

of review is determined based on whether there is bad faith or willful abuse of the judicial process by VA, then it is a separate standard of review. It would seem that this contrast in definitions stems from one of two possibilities: (1) the standards are the same and the outliers using a separate "abuse of discretion" standard of review were incorrect; or (2) the standards are not the same and because of simple oversight and the terms proximity in 38 U.S.C. § 7261(a)(3)(A) they have simply been incorrectly used analogously.

The solution to this problem is simple: The Veterans Court need only issue an en banc decision clarifying which decisions were incorrect, those using separate standards or those using the same. Then the en banc Veterans Court must define and clearly state where and how "abuse of discretion" will be applied. Whether the Veterans Court chooses to view the standards as the same or separate is irrelevant; there is ample authority supporting both propositions. What is important is that the Veterans Court clarify this glaring ambiguity and proceed forward in a consistent manner.

B. Lack of Standard of Review in the Opinion

As stated above, standards of review should be utilized to focus an appellate court on their proper authority and provide a type of review barometer. Accordingly, it is disheartening when the Veterans Court seems to totally disregard standards of review by failing to even state what standard is being utilized for the decision. Out of 2,903[55] precedential opinions by the

[55] In order to establish the number of precedential opinions, a LEXIS search was conducted of all opinions from March 1, 1994, to March 1, 2010. The search utilized the following "Terms & Connectors" language: "veteran and not precedent and not electronic." The terms "not precedent" and "not electronic" were utilized to negate the opinions that may not be cited as precedent under Rule 30(a). *See* U.S. VET. APP. R. 30(a); *see*, *e.g.*, Nelson v. Mansfield, No. 05-2260, 2007 WL 3083537 (Vet. App. Oct. 2, 2007). (LEXIS search results on file with author).

Veterans Court, 1,734[56] failed to state a standard of review. Stated differently, 60% of precedential opinions from the Veterans Court failed to state a standard of review. This is shown graphically in Figure 2 with the solid black section representing no standard of review was utilized. Further, the bar graph of Figure 2 is a cross section of how the Veterans Court used the "arbitrary and capricious" and "abuse of discretion" standards of review.

The failure to address what standard of review is being utilized leads to inconsistency and a perception that the Veterans Court disregards the standards that outline the level of deference that should be afforded Board decisions. Further, precedential opinions by the Veterans Court are supposed to determine an issue and outline how similar cases in the future should be dealt with through single-judge opinions.[57] If the precedential opinion is not clear on the standard of review it is impossible for a single judge to then interpret and apply that holding to a new set of circumstances in a different appeal.

The solution to this problem is, again, simple: The Veterans Court needs to begin specifically identifying the standard of review utilized in *every* opinion, especially precedential opinions. If the Veterans Court clearly states the standard of review, instead of deciding a case without indicating any, the court can avoid the bewilderment and frustration of the litigating parties and the Board. Further, this will clarify the standard of review that should be utilized in a particular single judge disposition.

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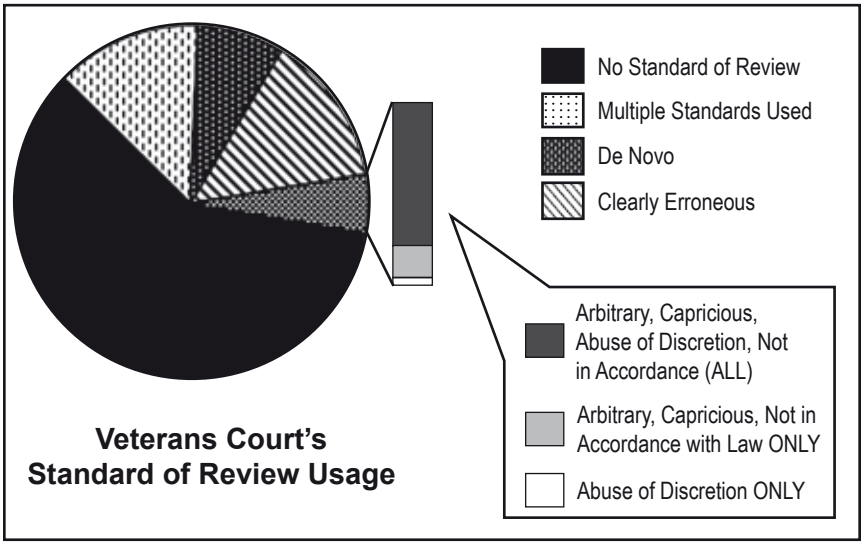
[56] In order to establish the number of precedential opinions that failed to state a standard of review, a LEXIS search was conducted of all opinions from March 1, 1994 to March 1, 2010. The search utilized the following "Terms & Connectors" language: "(abuse /s discretion) or arbitrary or capricious or (substantial /s evidence) or 'clearly erroneous' or 'de novo' or standard or review and not precedent and not electronic." These results were then subtracted from the number of results for total precedential opinions. (LEXIS search results on file with author).

[57] *See* Frankel v. Derwinski, 1 Vet. App. 23, 25-26 (1990).

Figure 2:



C. Conflicting Usage

The Veterans Court's usage of "de novo" and "de novo review" concerning questions of law has led to conflicting applications of standards of review. In a number of cases, the Veterans Court has stated that "de novo review" of questions of law is analyzed under an "arbitrary and capricious" standard of review.[58] Consequently, these cases, if using any kind of uniform canon for the "arbitrary and capricious" standard of review, must give significant deference to the Board's decision. However, in other cases, the Veterans Court has utilized a "de novo" standard of review to analyze a question of law completely anew, without deference to the Board's decision.[59] This conflicting usage has led to confusion concerning the standard of review spectrum and scope

[58] McGrath v. Brown, 5 Vet. App. 57, 59 (1993), *abrogated by* Butts v. Brown, 5 Vet. App. 532, 540 (1995).

[59] Lennox v. Principi, 353 F.3d 941, 945 (Fed. Cir. 2003); Grottveit v. Brown, 5 Vet. App. 91, 92 (1993); Bagby v. Derwinski, 1 Vet. App. 225, 227 (1991); Colvin v. Derwinski, 1 Vet. App. 171, 174 (1991).

of review range. In theory, questions of pure law, a bookend for the scope of review range, are analyzed under a "de novo" standard of review on the deference spectrum, and, therefore, little to no deference to the Board's decision need be given. If the standard of review for the most simple pure questions of law cannot be concisely and uniformly stated then there is little hope for judges or practitioners to capably determine the more difficult questions of mixed law and fact.

The Veterans Court's usage of the terms "plausible basis," "rational basis," and "rational basis test" has also led to confusion. The terms seem very similar but have been used in very different circumstances. The confusion between the terms is frustrated even more because the Veterans Court has failed to adequately define each or uniformly apply them.

The solution to these problems is for the Veterans Court to adequately outline when exactly each of these standards of review are used and what exactly they mean. Through clarification of the standards, the conflicts between usage should be alleviated.

CONCLUSION

The Veterans Court has an open opportunity to address the issues plaguing its definitions, application, and usage of standards of review. As the nation's youngest court, it has far fewer cases to reconcile concerning standards of review. Further, as a court in a truly unique area of law, the Veterans Court has near carte blanche to address these issues. Other courts of appeals must rectify their issues concerning standards of review with an eye to uniformity between them. If the Veterans Court simply defines the standards of review clearly, consistently uses and uniformly applies each, then it will be easier for litigating parties to deduce and for the court to determine the proper standard of review.