

No. 19-1094

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT**

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CONLEY MONK, JR, JAMES BRIGGS, TOM COYNE, WILLIAM DOLPHIN,  
JIMMIE HUDSON, LYLE OBIE, STANLEY STOKES, and WILLIAM JEROME WOOD, II,  
*Claimants-Appellants,*

v.

ROBERT L. WILKIE,  
Secretary of Veterans Affairs  
*Respondent-Appellee,*

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On Appeal from the United States Court of Appeals for Veterans Claims,  
No. 15-1280, Chief Judge Robert N. Davis, Judge Amanda L. Meredith,  
Judge Coral Wong Pietsch, Judge Joseph L. Toth, Judge Margaret C. Bartley,  
Judge Mary J. Schoelen, Judge Michael P. Allen, and Judge William S. Greenberg.

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**BRIEF OF AMICUS CURIAE NATIONAL LAW SCHOOL VETERANS  
CLINIC CONSORTIUM IN SUPPORT OF APPELLANTS CONLEY  
MONK, Jr, JAMES BRIGGS, TOM COYNE, WILLIAM DOLPHIN,  
JIMMIE HUDSON, LYLE OBIE, STANLEY STOKES,  
and WILLIAM JEROME WOOD, II, SUPPORTING REVERSAL**

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**UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT****CERTIFICATE OF INTEREST****Case Number** 19-1094**Short Case Caption** Monk v. Wilkie**Filing Party/Entity** National Law School Veterans Clinic Consortium (NLSVCC)

**Instructions:** Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box.** Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 07/06/2020Signature: /s/ Angela K. DrakeName: Angela K. Drake

<p><b>1. Represented Entities.</b> Fed. Cir. R. 47.4(a)(1).</p>	<p><b>2. Real Party in Interest.</b> Fed. Cir. R. 47.4(a)(2).</p>	<p><b>3. Parent Corporations and Stockholders.</b> Fed. Cir. R. 47.4(a)(3).</p>
<p>Provide the full names of all entities represented by undersigned counsel in this case.</p>	<p>Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.</p>	<p>Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.</p>
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	<p>James Briggs</p>	
	<p>Tom Coyne</p>	
	<p>William Dolphin</p>	
	<p>Jimmie Hudson</p>	
	<p>Lyle Obie</p>	
	<p>Stanley Stokes</p>	
	<p>William Jerome Wood, II</p>	

Additional pages attached

**4. Legal Representatives.** List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

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Monk v. Wilkie, No. 20-1305, U.S. Court of Appeals for the Federal Circuit		

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## **IDENTITY OF AMICUS CURIAE, ITS INTEREST IN THE CASE, AND SOURCE OF AUTHORITY TO FILE**

The National Law School Veterans Clinic Consortium (“NLSVCC”) submits this brief in support of the position of the Appellants, Conley Monk, Jr., James Briggs, Tom Coyne, William Dolphin, Jimmie Hudson, Lyle Obie, Stanley Stokes, and William Jerome Wood, II. The filing of this brief was authorized by the Board of the NLSVCC, a 501(c)(3) organization.

The NLSVCC is a collaborative effort of the nation’s law school legal clinics dedicated to addressing the unique legal needs of U.S. military veterans on a pro bono basis. The Consortium’s mission is, working with like-minded stakeholders, to gain support and advance common interests with the VA, U.S. Congress, state and local veterans service organizations, court systems, educators, and all other entities for the benefit of veterans throughout the country.

The NLSVCC exists to promote the fair treatment of veterans. Members of the NLSVCC work on a daily basis with veterans, advocating their claims in the backlogged VA disability system. Clients in the member clinics have died while waiting for a VA decision. Therefore, the NLSVCC is highly interested in seeing systemic change occur so that benefits are more quickly paid.

**STATEMENTS PURSUANT TO FEDERAL RULE OF APPELLATE  
PROCEDURE 29(a)(4)(E)**

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E) and the Federal Circuit Rule 29(a), the NLSVCC states:

- a) No party's counsel has authored this brief in whole or part;
- b) No party or party's counsel has contributed money intended to fund the preparation or submission of this brief;
- c) No other person has contributed money intended to fund the preparation or submission of this brief.

## SUMMARY OF ARGUMENT

The U.S. Department of Veterans Affairs (VA) now administers two different systems of appeal of VA disability compensation claims: (1) the “legacy” system, and (2) the new system implemented by the Veterans Appeals Improvement and Modernization Act of 2017 (the AMA). *See generally* AMA, Pub. L. No. 115-55, 131 Stat. 1105; VA Claims and Appeals Modernization, 84 Fed. Reg. 138 (Jan. 18, 2019) (final rule). Veterans with legacy appeals suffer from unreasonable delay in the resolution of their claims. While the AMA was implemented with the goal of addressing the problem of delay in VA’s processing of appeals, those appeals in the legacy system continue to exist alongside appeals subject to the AMA, and they are still subject to the unreasonable delays that the AMA was intended to address. *See* VA Claims and Appeals Modernization, 84 Fed. Reg. 138 (Jan. 18, 2019) (final rule).

Moreover, even for claims subject to the new AMA system—which are distinct from legacy claims—it is too early to tell if the AMA provides veterans with accurate and timely decisions. Government reports suggest VA is not equipped to address whether the AMA actually improves the process.

Nevertheless, the present appeal concerns veterans with appeals in the legacy system, which is a separate and distinct system from those appeals subject to the AMA.

This brief demonstrates that veterans with legacy appeals are still subject to unreasonable delay despite the implementation of a new, separate appeals process under the AMA. It also demonstrates that, even for veterans with claims subject to the new appeals process, the AMA is not a panacea to the delay in processing that is endemic to VA’s disability adjudication system.

## ARGUMENT

### **I. Veterans with legacy appeals, which now exist alongside AMA appeals, will continue to experience delay despite the new legislation.**

In the Annual Report from the Board of Veterans’ Appeals for Fiscal Year 2019, VA reported that the *average* length of time between the filing of an appeal at the Regional Office and the Board’s disposition of the appeal was more than three years—1,273 days—for legacy claims. *Annual Report Fiscal Year (FY) 2019*, DEPARTMENT OF VETERANS AFFAIRS BOARD OF VETERANS APPEALS 25, *available at* [https://www.bva.va.gov/docs/Chairmans\\_Annual\\_Rpts/BVA2019AR.pdf](https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2019AR.pdf). Despite the implementation of the AMA, VA projects that the Board of Veterans’ Appeals could receive as many as 100,000 legacy appeals in Fiscal Year 2020. *Id.* at 29. VA states that the Board of Veterans’ Appeals “plans to resolve its inventory of legacy appeals by the end of Calendar Year 2022;” however, this does not include returned remands in the legacy system. *Id.*

In August 2018, VA predicted that the legacy inventory at the Board of Veterans' Appeals will persist until at least 2024. *Comprehensive Plan for Processing Legacy Appeals and Implementing a Modernized System*, U.S. DEPARTMENT OF VETERANS AFFAIRS 24 (August 2018), available at <https://benefits.va.gov/benefits/docs/appeals-report-201808.pdf>. VA reported that, due to “the complex, non-linear legacy process, it is difficult for VA to project when all legacy appeals will be resolved, or provide timeliness goals for legacy appeals.” *Id.* at 7. VA also predicted that the Board’s overall inventory will double between 2018 and 2024 due to the influx of appeals under the AMA in addition to legacy appeals. *Id.* at 24.; David Ames et al., *Due Process and Mass Adjudication: Crisis and Reform*, 72 STAN. L. REV. 1, 17 (2020).

A November 2017 report from the U.S. Digital Service at VA stated that, without programs to remove veterans from the legacy system, “it would take seven years to resolve all legacy hearing requests after the applicability date of the [Veterans Appeals Improvement and Modernization] Act.” This takes these appeals to February 2026. Chris Given, *Data Brief: Board Hearings Pose Substantial Risk to Appeals Modernization Act Implementation*, DIGITAL SERVICE AT VA 1, 5 (Nov. 21, 2017) (addendum). The report noted that the Rapid Appeals Modernization Program, one of VA’s programs to remove veterans from the legacy system, “will not mitigate the backlog.” *Id.* at 1, 5-6. The report concluded

that “[t]he growing hearings backlog is a major risk to the Board [of Veterans’ Appeals], even without the impending disruption of the Appeals Modernization Act.” *Id.* at 8.

From January 2016 through November 2017, prior to implementation of the AMA, VA’s Office of Inspector General (VA’s OIG) conducted a review to determine whether Veterans Benefits Administration (VBA) staff could improve the timeliness of appeals processing for legacy claims. VA’s OIG, 16-01750-79, VETERANS BENEFITS ADMINISTRATION, REVIEW OF TIMELINESS OF THE APPEALS PROCESS i-ii (March 18, 2018), *available at* <https://www.va.gov/oig/pubs/VAOIG-16-01750-79.pdf>. VA’s OIG found that it took VBA “an average of 111 to 755 days to complete the various phases” of the appeals with “significant periods of inactivity throughout all phases.” *Id.* at ii.

These systemic problems exist with legacy appeals and the AMA does not address systemic issues that are part and parcel of, or unique to, legacy appeals. VA’s OIG identified a number of systemic issues throughout VA’s appeals process that contribute to delay for legacy claims. For example, VA’s OIG found that 17 percent of appeals were closed prematurely *without* providing notice to the appellants even though they required additional action. *Id.* at 9. The appeals were closed prematurely because “VBA staff did not timely and accurately update” one of VA’s internal databases for tracking appeals, and VA uses an automated

function in the database “that relies on the updates to close appeal records.” *Id.* at 9, 37. Additionally, VA’s OIG found that an estimated 13 percent of legacy appeals being recertified to the Board of Veterans’ Appeals “were not processed according to the Board’s remand instructions.” *Id.* at 9. VBA management and staff reported that these errors were “due to rushing and not paying attention in order to meet individual production standards.” *Id.* at 10. The AMA does not purport to cure these systemic issues contributing to delay in legacy appeals processing; it simply creates new forms and administrative paths which will likely have its own universe of systemic processing problems given the issues and recommendations described in section II below.

In short, legacy appeals exist alongside appeals subject to the AMA in VA’s adjudication system. Government reports demonstrate that the delays associated with legacy appeals will persist for years despite the implementation of the AMA; therefore, the present appeal remains highly relevant.

## **II. Recent government reports identify flaws in implementation of the AMA that present risk of error and delay.**

Legacy claims are subject to unreasonable delay, and according to recent government reports, claims subject to the AMA may also be subject to unreasonable delay. Recent government reports have identified flaws in VA’s implementation of AMA, which include VA’s lack of plans for comparing timeliness and accuracy of claims under the AMA with those under the legacy

appeals process, as well as the absence of a plan to address the risk of delay when veterans select more “resource-intensive” options under the AMA.

**a. VA has not implemented plans for comparing the timeliness and accuracy of claims processing under the AMA with that of the processing of legacy claims.**

Even if veterans with claims subject to the AMA received accurate and timely disability decisions, veterans with legacy claims would still suffer from unreasonable delay since the AMA implements a separate appeals process. It will be difficult, however, to compare the timeliness of decisions under the two appellate systems because, while the new legislation does require VA to report certain performance metrics, it does not require VA to compare performance of the new AMA process to the legacy appeals process. *See* AMA, Pub. L. No. 115-55, § 5, 131 Stat. 1105 (Aug. 23, 2017); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-19-272T, VA DISABILITY BENEFITS: PLANNING GAPS COULD IMPEDE READINESS FOR SUCCESSFUL APPEALS IMPLEMENTATION 9-10 (December 12, 2018), <https://www.gao.gov/assets/700/695946.pdf> (“Developing such a plan would better position the agency to fully understand whether the new process is an improvement.”)

Prior to implementation of the AMA, a report from the Government Accountability Office (GAO) recommended that VA articulate how it will monitor and assess the appeals process under the AMA compared to the legacy process,



including specifying timeliness goals, as well as measures of accuracy. GAO, GAO-19-272T, VA DISABILITY BENEFITS: PLANNING GAPS COULD IMPEDE READINESS FOR SUCCESSFUL APPEALS IMPLEMENTATION 7 (December 12, 2018), *available at* <https://www.gao.gov/assets/700/695946.pdf>. After the implementation of the AMA, a GAO report found that VA “has not fully articulated detailed steps and time frames for assessing the relative performance of the new and legacy appeals processes.” GAO, GAO-19-571T, VETERANS AFFAIRS: SUSTAINED LEADERSHIP NEEDED TO ADDRESS HIGH-RISK ISSUES 28 (May 22, 2019), *available at* <https://www.gao.gov/assets/700/699254.pdf>. Without these metrics, the report states, “VA cannot determine the extent to which the new process will achieve final resolution of veterans’ appeals sooner than the legacy process.” *Id.*

Further, as recently as April 2020, the GAO gave two priority recommendations to VA regarding its disability benefits appeals process, one of which was to “clearly articulate in its appeals plan how it will monitor and assess the new appeals process compared to the legacy process . . .”. GAO, GAO-20-537PR, PRIORITY OPEN RECOMMENDATIONS: DEPARTMENT OF VETERANS AFFAIRS 4-5, 17 (Apr. 20, 2020), *available at* <https://www.gao.gov/assets/710/706403.pdf>. Without this clear articulation and associated findings, it is too early to know whether the timeliness of claims processing under the AMA solves the delay problems that continue to exist in legacy claims processing. Nevertheless, the

present appeal concerns veterans with legacy claims; therefore, the timeliness of claims subject to the AMA has no bearing on the timeliness of legacy claims.

**b. VA has not developed plans to fully address the risk of veterans choosing more “resource-intensive” options under the AMA.**

Under the AMA, Veterans must choose the path to appeal a VA decision with which they disagree from a set of different options. Some of these options involve the submission of additional evidence, or a request for an administrative hearing or both, and these options exist at both the Regional Office and the Board of Veterans’ Appeals levels. *See generally* 38 C.F.R. § 3.2501 (2020) (explaining that VA will readjudicate the claim if new and relevant evidence is submitted with the supplemental claim); 38 C.F.R. § 3.103(d) (2020) (stating that veterans have the right to a hearing upon request prior to the issuance of a decision on the supplemental claim); 38 U.S.C. § 7113(b) (2020) (stating that veterans may request a hearing at the Board of Veterans’ Appeals and may submit additional evidence at the Board hearing and for 90 days thereafter). The GAO has described the paths of appeal involving the submission of new evidence or a hearing as “resource-intensive options” that “potentially subject veterans to longer wait times.” GAO, GAO-20-537PR, PRIORITY OPEN RECOMMENDATIONS: DEPARTMENT OF VETERANS AFFAIRS 17 (Apr. 20, 2020), *available at* <https://www.gao.gov/assets/710/706403.pdf>.

After the implementation of the AMA, the GAO reported that VA had not developed plans to fully address the risk of Veterans choosing more “resource-intensive” options at higher rates than expected. GAO, GAO-19-571T, VETERANS AFFAIRS: SUSTAINED LEADERSHIP NEEDED TO ADDRESS HIGH-RISK ISSUES 27 (May 22, 2019), *available at* <https://www.gao.gov/assets/700/699254.pdf>. Less than one year later, in April 2020, the GAO again reported that VA “needs to develop and document risk mitigation strategies that address veterans . . . choosing the more resource-intensive options involving new evidence or hearings . . . .” GAO, GAO-19-571T, PRIORITY OPEN RECOMMENDATIONS: DEPARTMENT OF VETERANS AFFAIRS 17 (Apr. 20, 2020), *available at* <https://www.gao.gov/assets/710/706403.pdf>.

Indeed, VA’s webpage about appeals to the Board of Veterans’ Appeals under the AMA states that the evidence submission option and the hearing request option each take “more than one year for the Board to complete.” *What are my Board Appeal options?*, BOARD APPEALS, <https://www.va.gov/decision-reviews/board-appeal/> (last visited June 28, 2020). Further, data that VA is required to publish under the AMA demonstrates that in the first year of the AMA implementation, delay increased for veterans choosing the resource-intensive options on appeal to the Board of Veterans’ Appeals, such as the evidence submission option and the hearing option. *See May 2020 Monthly Report, Appeals*

*Modernization Act Reporting*, VETERANS BENEFITS ADMINISTRATION REPORTS, <https://www.benefits.va.gov/REPORTS/ama/> (select “May 2020” hyperlink; open the Excel document; select the “Part 1 – AMA (W-Y)” tab) (showing that, for Fiscal Year 2019, 85 percent of cases on the AMA hearing docket at the Board of Veterans’ Appeals were decided within one year, while for Fiscal Year 2020, 69.4 percent of cases on the AMA hearing docket at the Board of Veterans’ Appeals were decided within one year).

**III. Veterans’ actual experiences with the AMA show that claims subject to the AMA are also subject to error and delay.**

NLSVCC members are law school clinics who are helping their clients on a daily basis in navigating the legacy system and the new AMA appeals system. We describe below one account from a member clinic, illustrating difficulties in the new system, as representative of problems that exist. As time goes on, and given the warnings identified by the GAO, and internal VA reports, the list of problems with the new system will likely increase, making the need for judicial intervention even more important.

Frank Green, a client of the Veterans Legal Clinic at the University of Illinois Chicago John Marshall Law School (the UIC John Marshall Clinic), served in the U.S. Army from August 1964 until January 1967. Mr. Green is a 71-year-old Vietnam veteran who has been receiving VA disability compensation for almost 20 years due to service-connected post-traumatic stress disorder, diabetes,

chronic renal failure, and peripheral neuropathy of both the upper and lower extremities. Mr. Green's VA disability rating is 100 percent. His disabilities have affected his abilities to perform the activities of daily living. He exhibits an inability to feed himself and keep himself clean, an inability to attend to the wants of nature, and the loss of coordination of the upper and lower extremities. He requires care and assistance on a regular basis by another person.

Prior to the implementation of the AMA, Mr. Green filed a claim with VA for special monthly compensation due to his need for regular aid and attendance from another person. Veterans who are permanently bedridden or with such significant service-connected disabilities as to be in need of regular aid and attendance may apply for this benefit. *See* 38 U.S.C. § 1114(1) (2020). During the pendency of Mr. Green's claim, he "opted in" to the AMA through the Rapid Appeals Modernization Program (RAMP), a precursor to the launch of the actual AMA. On January 22, 2019, he received a VA supplemental claim decision denying his claim for special monthly compensation.

On October 23, 2019, the UIC John Marshall Clinic filed a Higher-Level Review appeal form on Mr. Green's behalf, as well as a brief in support of Mr. Green's claim. On October 23, 2019, VA responded with correspondence in which it confirmed receipt of the appeal but stated that since the decision on appeal was made prior to February 19, 2019, it could not accept the request.

On November 6, 2019, the UIC John Marshall Clinic sent a letter to VA explaining that VA erred in finding the appeal could not be accepted because Mr. Green already opted-in to the AMA through RAMP; therefore, his claim was subject to the AMA. The UIC John Marshall Clinic called VA to discuss the issue on January 6, 2020. The representative told the UIC John Marshall Clinic that the appeal was filed on the incorrect form, and that the appeal should be on the VA Form 21-4138, Statement in Support of Claim.

The UIC John Marshall Clinic sent an email to the Nashville Regional Office on the same day, January 6, 2020, regarding Mr. Green's claim. The email explained that the appeal was filed on the correct form since Mr. Green had opted into the AMA through RAMP. The Clinic asked that the appeal be established or, in the alternative, to be supplied with the correct form; however, the Clinic did not receive a response to the email.

On January 7, 2020, the UIC John Marshall Clinic submitted the VA Form 21-4138 to VA, which is the form mentioned by the VA representative over the phone. On May 6, 2020, the UIC John Marshall Clinic spoke to a VA representative about Mr. Green's claim. The representative told the Clinic that the VA Form 21-4138 was the incorrect form and would not be processed. The representative told the Clinic that the email sent on January 6, 2020 prompted an inquiry, but the inquiry was closed without action or explanation. The

representative explained that he would reopen the inquiry and have a supervisor call the Clinic within 24-48 hours. The Clinic asked the representative to request that the VA supervisor call the Clinic attorney's cell phone since she was working remotely due to the COVID-19 pandemic.

On May 7, 2020, the VA supervisor called the UIC John Marshall Clinic's office phone number and left a voicemail stating that Mr. Green's claim for special monthly compensation would be established.

On May 20, 2020, the UIC John Marshall Clinic again contacted VA to confirm that the appeal was established. The VA representative advised the Clinic that the appeal had not been established because the forms submitted were incorrect.

This account is similar to the accounts shared by NLSVCC members who face obstacles in navigating their clients' claims through the new system. It illustrates how the AMA will not cure the delays that veterans' disability compensation claims are subject to in VA's adjudication system, while simultaneously harming those veterans who are depending on VA for help, many of whom are elderly and in declining health.

## **CONCLUSION**

For the reasons stated above, the appeal continues to be relevant despite the statutory changes relating to the Appeals Modernization Act, and for the reasons

stated in its Feb. 4, 2019 brief, ECF No. 38, NLSVCC respectfully requests that the Court certify the class of claimants as requested by Appellants.

/s/ Angela K. Drake  
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## Data Brief

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# Board Hearings Pose Substantial Risk to Appeals Modernization Act Implementation

CHRIS GIVEN | DIGITAL SERVICE at VA  
NOVEMBER 21, 2017

## Abstract

The backlog of Board hearings has more than doubled in size over the last decade, and new requests continue to outpace resolutions. Although the effects of this backlog have been obscured by the stagnation of progress on the Board's docket, this backlog takes on new urgency with the enactment of the Veterans Appeals Improvement and Modernization Act of 2017. Absent programs to remove Veterans from the legacy appeals process, it would take seven years to resolve all legacy hearing requests after the applicability date of the Act. Despite some delaying effects, the Rapid Appeals Modernization Program will not mitigate the backlog. And following the applicability date, the Act enables Veterans to appeal directly to the Board and is projected to require increased hearings capacity of at least 20% and as much as 136%. The lower end of this range assumes hearing request rates will shift downward given knowledge of longer wait times on the hearings docket, but Veteran decision-making around hearings shows limited elasticity with regard to timeliness, and hearings offer significant, quantifiable benefits to Veterans.

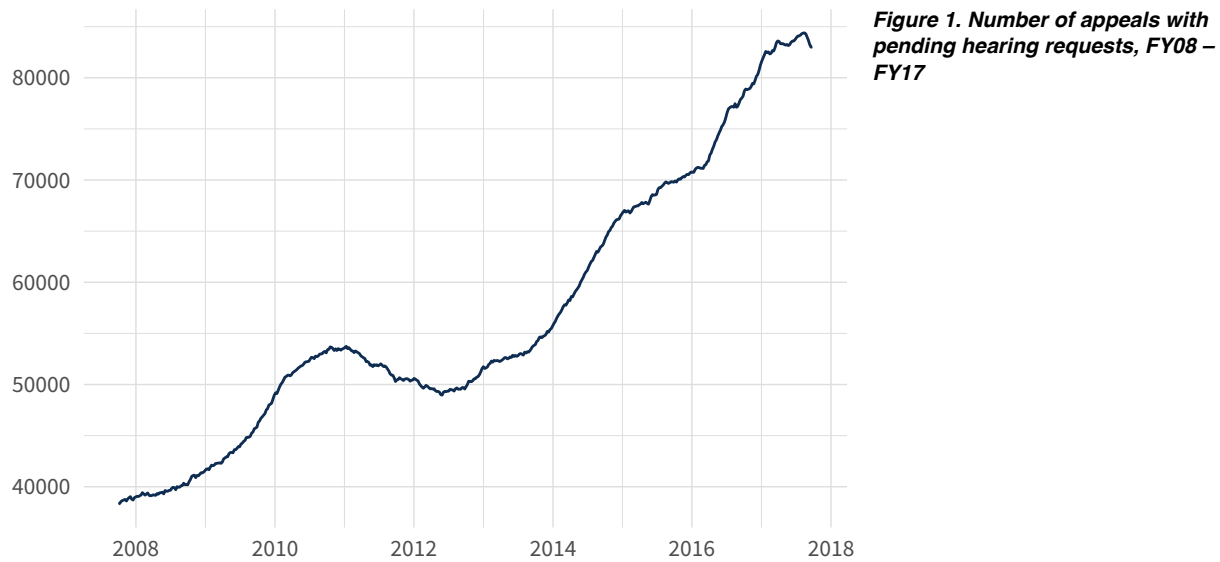
## Key Points

**The backlog of Board hearings has more than doubled over the last decade, and hearing requests continue to outpace resolutions.**

Between FY2008 and FY2017, a ten-year period, the number of pending hearing requests grew from less than 40,000 to more than 80,000 (see figure 1). Veterans have the option to request a hearing with a Veterans Law Judge (VLJ) when they complete a VA Form 9, continuing their appeal to the Board of Veterans' Appeals (the Board). 54% of Veterans who completed a Form 9 between FY2015 and FY2017 opted to request a Board hearing.

## Addendum 2

The Board has fallen further behind on resolving hearing requests every year since FY2013. In FY2017, the Board increased the number of scheduled hearing resolutions (held, canceled, and



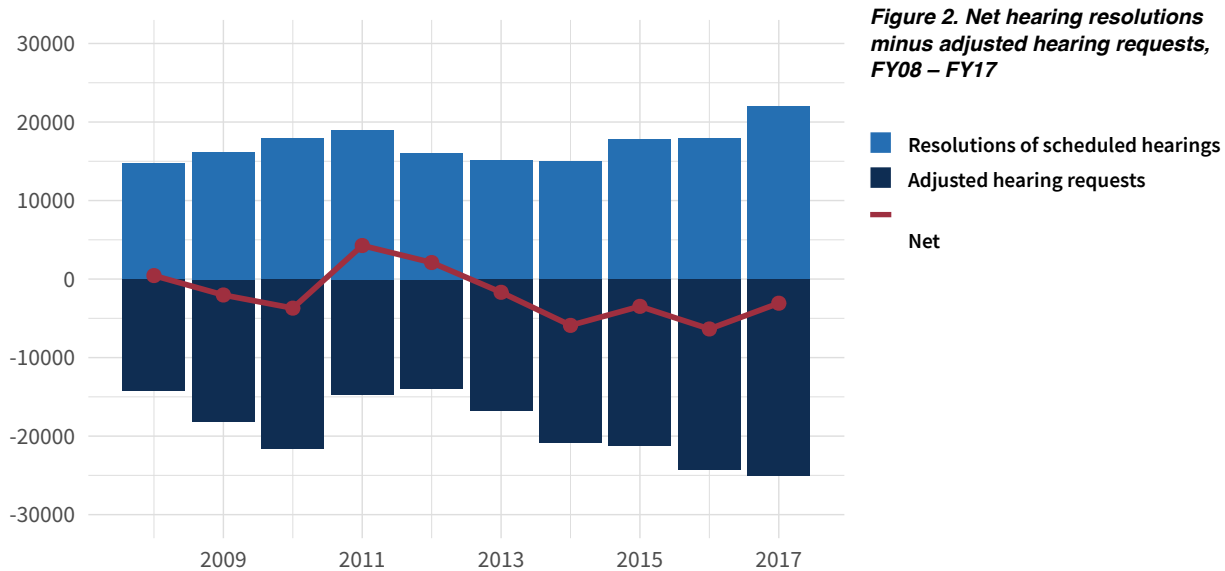
no-show hearings) to a record 21,975 (of which 16,628 or 76% were held hearings), but received 32,603 new hearing requests, a difference of more than 10,000 requests.

Not all of these hearing requests will be resolved by means of a scheduled hearing. If the Veteran submits additional evidence prior to certification of their appeal, a full field grant may close the appeal. The Veteran may choose to withdraw their hearing request or their appeal, or they may die prior to their hearing. It is possible to adjust the number of new hearing requests to account for these other potential outcomes.

Figure 2 shows, by fiscal year, the net balance of hearing requests resolved by means of a scheduled hearing minus the adjusted number of hearing requests, that is the number of requests that are expected to be scheduled. This adjusted number deducts those requests where prior to the scheduling of a hearing, a full field grant will be issued, the request will be withdrawn, the appeal will be withdrawn, or the Veteran will die.

Although these adjusted hearing request figures show a net negative balance of only ~4,000 requests per year for the last five years (FY2013 through FY2017), it is important to note how these cumulative imbalances self-correct to the detriment of the Veteran in the appeals process. As wait times for hearings increase, so too do the rates of withdrawal and death while waiting for a hearing to be scheduled. Indeed, of the 32,603 hearing requests received in FY2017, the model predicts that prior to scheduling of the hearing, ~3,900 requests (12%) will

## Addendum 3



be withdrawn, ~1,300 appeals (4%) will be withdrawn, and ~1,000 Veterans (3%) will die (an additional ~1,300 appeals or 4% will be closed by a full field grant).<sup>1</sup>

**Although the effects of the hearings backlog have been obscured by the stagnation of progress on the Board's docket, this trend reversed in 2017.**

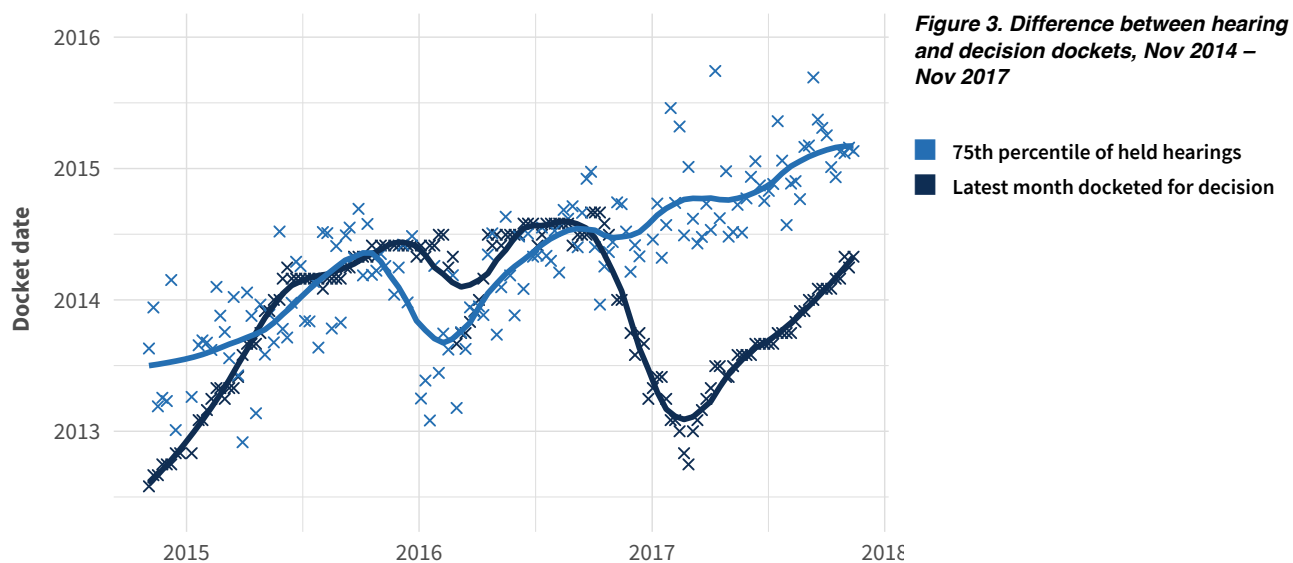
At time of writing, the Board is hearing appeals with docket dates up to May 2015, while it is deciding cases with docket dates only up to May 2014. This gap is counter to conventional wisdom that requesting a hearing will increase the wait for a Board decision, although this may remain true for some cases including travel board hearings at smaller, rural regional offices and appeals that are certified after they reach the front of the Board's docket.

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<sup>1</sup> Survival analysis is used to model hearing request outcomes as a set of competing risks. Data is left-truncated and right-censored to confine analysis to a single fiscal year. Kaplan-Meier curves are calculated for the following competing risks: scheduled hearing, activation without a scheduled hearing (presumed to be due to withdrawal of hearing request), field grant, withdrawal, and death. The adjusted hearing request number is the product of new hearing requests and the final hazard rate of scheduled hearings for that fiscal year. There are some known issues with this methodology: 1) Survival analysis produces a lagging snapshot, i.e. it overstates a given hazard rate when that rate is falling; 2) Although the VACOLS field that tracks hearing requests is expected to match the Veteran preference identified on the Form 9, this field is regularly overwritten and may undercount withdrawn hearing requests; 3) Some regional offices may cancel scheduled hearings by deleting the record in VACOLS as opposed to marking it withdrawn, a practice which would understate the rate of scheduled hearings.

## Addendum 4

The existence of this gap is attributable not to significant progress on the hearings docket, which has fallen further behind, only progressing about one and a half years over the last three years, but rather to stagnation of the decision docket, which began to move backward in October 2016 (see figure 3). This stagnation has multiple potential explanations, including 1) increased Veterans Benefits Administration (VBA) remand production, 2) decreased Board decision production, and 3) an influx of appeals that had been held up by Veteran Service Organization (VSO) backlogs. With an increase in (2) as new attorneys began to produce decisions, and the depletion of VSO backlogs (3), this trend reversed in March 2017.



At its peak, the gap between the decision docket and the docket dates of appeals being heard (as measured by the 75th percentile of held hearing docket dates) exceeded 20 months. It is now less than 10 months and continues to narrow. If the Board produces decisions at a rate of 80,000 per year, the docket is predicted to reach May 2015, the latest docket date currently being scheduled for hearings, in September 2018. If the Board produces decisions at a rate of 90,000 per year, the docket is predicted to reach May 2015 two months earlier in July 2018.<sup>2</sup>

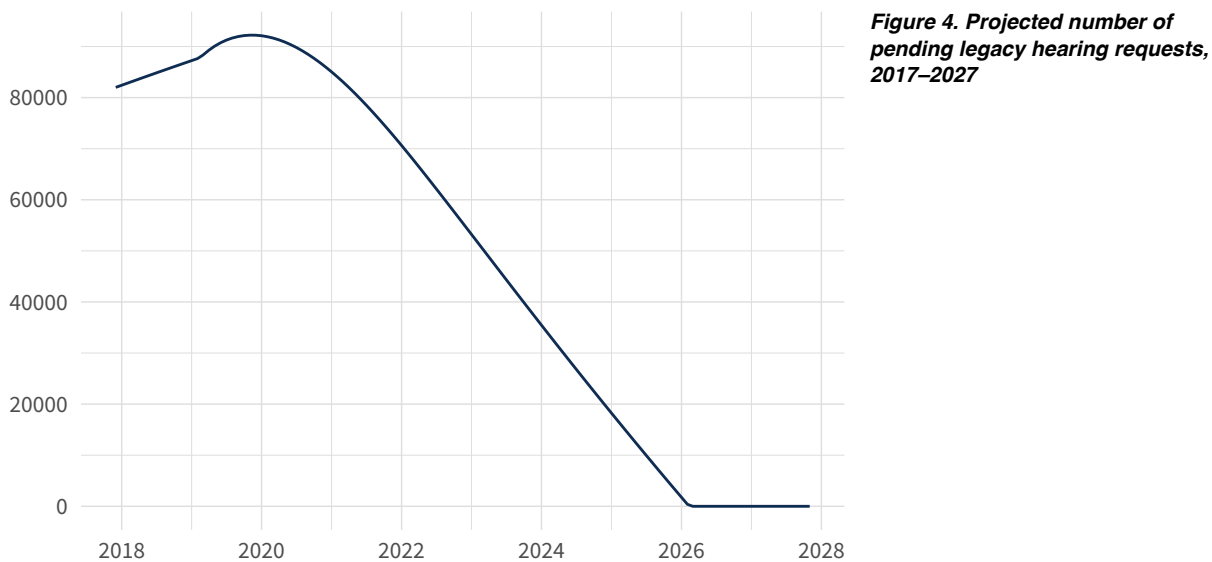
<sup>2</sup> The Board's docket is modeled as a queue. Only final (non-remanded) Board decisions and post-remand field grants and withdrawals are considered exits from the queue. The number of pre-activation/ahead-of-docket appeals and ahead-of-docket appeals pending administrative or VSO action are held constant. The number of pending remands is interpolated linearly by the mean duration of a remand between the current state and a steady state calculated as the product of the Board's remand rate and the mean duration of a remand. CAVC remands are modeled as a constant rate. These numbers are summed to calculate a docket margin  $n$ , and the docket month of the  $n$ th oldest appeal determines the Board's predicted docket month.

## Addendum 5

### **Absent programs to remove Veterans from the legacy appeals process, it would take seven years to resolve all legacy hearing requests after the applicability date of the Appeals Modernization Act.**

The Board has indicated it currently plans to allocate two-thirds of its hearing capacity to legacy hearings following the applicability date of the Appeals Modernization Act (AMA), February 14, 2019. A simplified model is created using the following assumptions: 1) total capacity of 24,000 scheduled hearings annually, a third of which are removed following the applicability date; 2) an annual withdrawal rate of 4.5%, accrued monthly; 3) a constant rate of new requests consistent with the 32,600 received in FY2017, attenuated following the applicability date (the total number of post-applicability date requests received is ~44,000, consistent with ~205,000 appeals pending in the NOD stage on February 14, 2019).

Under this scenario, legacy hearing requests would not be resolved until February 2026.



### **The Rapid Appeals Modernization Program will not mitigate the backlog.**

The Rapid Appeals Modernization Program (RAMP) provides Veterans with the option of withdrawing their compensation appeal and having their claims reevaluated by VBA using the Higher-Level Review (HLR) or Supplemental Claim (SC) lanes created by AMA prior to the applicability date of the Act (the option to file a Notice of Disagreement (NOD) is excluded from the program). VBA has targeted 75% participation of eligible Veterans in the program. If 75% of Veterans with pending hearing requests were to participate in RAMP that would dramatically reduce the legacy hearings backlog.

## Addendum 6

However, RAMP appeals are unlikely to exit the appeals process in large numbers. For any appeal that has reached the Form 9 stage and has a pending hearing, HLR or SC review is duplicative of review already completed. If Supplemental Statement of Case (SSOC) outcomes are used as an analog for this process, grant rates of between 3% and 13% could be expected.<sup>3</sup> If their claim is again denied by VBA, Veterans will have the option of appealing again, with all three AMA lanes now available to them. The remaining 87–97% of appeals, for which Veterans had previously opted to complete a Form 9 and request a Board hearing, would likely see a high rate of return to the Board and to the hearings backlog.

The Board would be precluded from holding these hearings until the applicability date, February 14, 2019. Assuming VBA achieves its goal of 75% participation, a grant rate of 13%, and a withdrawal rate of 19%,<sup>4</sup> the Board would begin AMA with a hearings backlog of at least 45,000 requests, only inclusive of RAMP participants who withdrew their appeals during the Form 9 or Certification stage (excluding RAMP participants who withdrew their appeals during other stages but opt to file an NOD and request a hearing). Depending on how Board resources are balanced between dockets, this eventuality would likely result in an AMA hearings backlog in excess of three years prior to a single new AMA appeal being filed.

### **The rate of hearing requests is projected to increase due to the Appeals Modernization Act enabling Veterans to appeal directly to the Board.**

In the legacy appeals process, 40% of appeals reach the Form 9 stage, of which 54% request a Board hearing. The product of these two rates, 21.6%, represents the expected rate at which Veterans who disagree with a claim decision will request a hearing.

The inventory model produced by the Board and VBA during a Government Accountability Office (GAO) inquiry into readiness for Appeals Modernization Act implementation made the following assumptions: 1) 50% of Veterans will opt to appeal directly to the Board; 2) 50% of all AMA decisions will be appealed a second time through another lane, of which 50% will opt to appeal to the Board; 3) 30% of Board appeals will request a hearing. Under these assumptions, the expected rate at which Veterans who disagree with a claim decision will request a hearing is 22.5%. This marginal 0.9 point change in the hearing request rate from the status quo

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<sup>3</sup> When a Veteran submits additional evidence after receiving a statement of the case SOC, the rate at which a full field grant is issued is 13%. With a denominator of all appeals, regardless of whether new evidence was submitted, the rate of post-SOC field grants is 3%.

<sup>4</sup> 19% is the status quo rate at which Veterans withdraw their appeals, withdraw their hearing requests, or die prior to resolution of their request.

## Addendum 7

nevertheless would increase the expected number of new requests in FY2019 to ~35,600, up from 32,603 in FY2017. Adjusted using a 19% withdrawal rate, the scheduled hearing capacity that would be required to keep pace is ~26,400, a 20% increase from FY2017 actuals.

However, this assumes a significant reduction in hearing request rates from the status quo, where 54% of Veterans request a hearing. Were Veterans to request hearings at status quo rates, ~64,100 new requests would be submitted annually, requiring scheduled hearing capacity of ~51,900 to keep pace, a 136% increase from FY2017.

### **Veteran decision-making around hearings shows limited elasticity with regard to timeliness.**

A central premise of the GAO inventory model is that hearing request rates will shift downward given knowledge of longer wait times on the hearings docket. Counter to this premise, there is reason to doubt the elasticity of Veteran hearing preferences with regard to timeliness.

Many Veterans, representatives, and VA employees already operate under the (presently incorrect) assumption that requesting a hearing will increase wait times for a Board decision. Expectations for the resultant delay vary, from the representative who advises, "It'll sit there for another year or more," to the Veteran who ascribed a five or six year delay to his hearing.

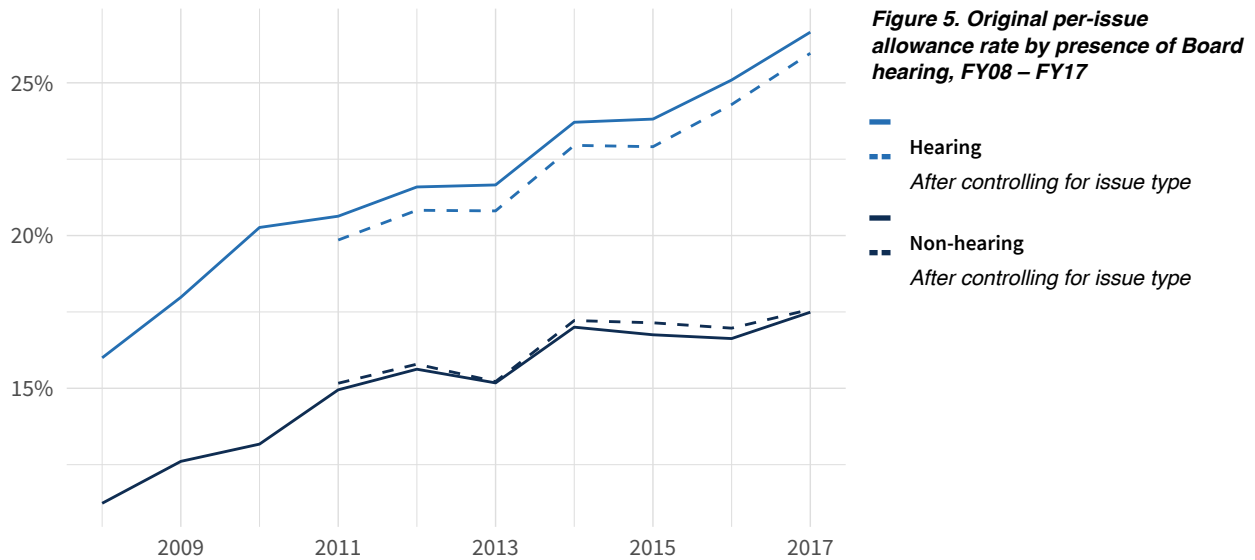
The reasons Veterans choose to have hearings are deeply personal. During interviews with Veterans conducted after hearings, one described his reasons for requesting a hearing, "I wanted to show [the judge] all the scars from all the surgeries, the five or six surgeries I've had." Another said, "I wanted them to see me. I wanted to see them. I wanted to look at them the way they're looking at me."

### **Hearings offer significant, quantifiable benefits to Veterans.**

Selecting a hearing even in the face of additional wait time is a rational decision, according to data on appeal outcomes. In FY2017, the presence of a Board hearing resulted in a 8.4 point increase to the original per-issue allowance rate, from 17.6% to 26%, after controlling for the type of issue (see figure 5). Hearings may increase the likelihood of a favorable outcome by 1) creating the opportunity for the VLJ to advise the Veteran and representative on the appeals process and identify additional evidence that may be valuable, 2) establishing appellant credibility on issues where they can provide competent testimony, and/or 3) introducing other

## Addendum 8

bias. It is also possible that a latent variable may affect both outcomes and Veteran preference for a hearing.



For more detail on the effect of Board hearings on appeal outcomes, see the Appendix.

## Conclusion

The growing hearings backlog is a major risk to the Board, even without the impending disruption of the Appeals Modernization Act. Although there is significant uncertainty as to the choices Veterans will make under the new system, the risk posed by hearings is substantial, and the Board's own projections, as provided to the GAO, would require a 20% increase in capacity. The downside risk of demand exceeding capacity by 136%, even if unlikely, cannot be ruled out absent data on Veteran preferences.





### **Appendix: Effect of Board Hearings on Appeal Outcomes**

We hypothesize that hearings may increase the likelihood of a favorable outcome by 1) creating the opportunity for the VLJ to advise the Veteran and representative on the appeals process and identify additional evidence that may be valuable, 2) establishing appellant credibility on issues where they can provide competent testimony, and/or 3) introducing other bias. We acknowledge the possibility that a latent variable may affect both outcomes and preference for a hearing.

An appeal will contain a combination of issues, between two and three in a typical case, although the maximum can be much higher. When studying the impact of exogenous factors such as the presence of a hearing on appeal outcomes, it is useful to treat each issue as an independent observation, rather than attempt to understand the complex interplay of issues within the appeal as a whole. Issues are categorized into unique types that number in the thousands, most of which occur only infrequently. Although this classification is imperfect and sometimes combines functionally different contentions, observation suggests that issues of a given type behave similarly, an assumption that will be validated by calculation of an intraclass correlation coefficient below.

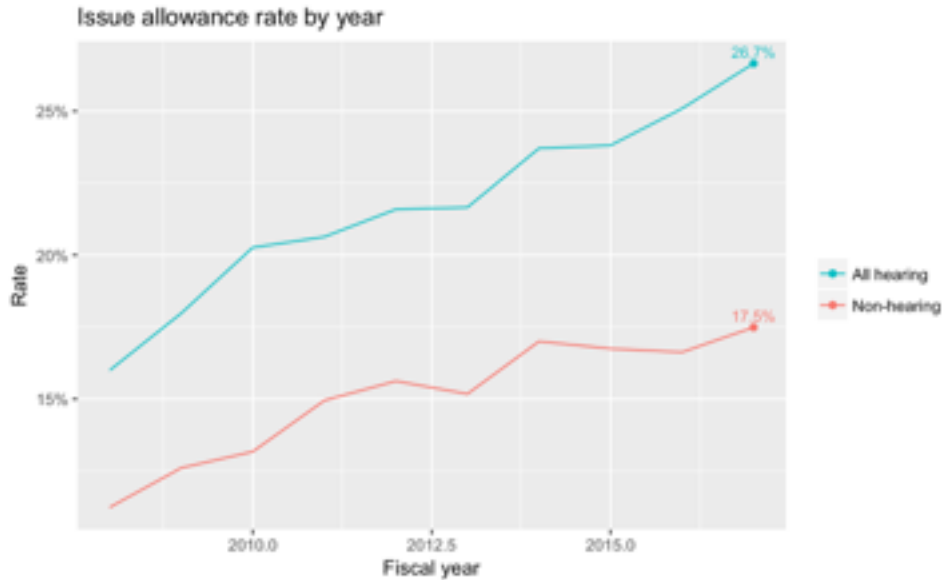
In addition to being allowed or denied by a decision of the Board, an issue can be remanded to the Agency of Original Jurisdiction (AOJ) in order to remedy procedural error. Assuming the AOJ does not, in the process of correcting the error, identify a reason to grant the issue, the issue will return to the Board for another decision, which could trigger further remand. Issues that the Board has decided can also be further appealed to the Court of Appeals for Veterans Claims, which can remand them to the Board. The data does not permit an issue to be linked between each of these remands, and issues can be repeatedly remanded over the course of multiple years. For these reasons, post-remand issues are discarded from this analysis, leaving only original issues receiving their first decisions. Although it is possible that there are follow-on effects of hearings that appear in subsequent decisions, such effects are beyond the scope of this analysis.

The presence of a hearing is determined by a travel board, videoconference, or central office hearing that was held prior the date of the decision. Canceled hearings, and hearings at which the Veteran did not appear, are not included for the purposes of this analysis. The presence of a hearing is encoded as a binary variable, under the assumption that additional hearings beyond the first do not provide additional marginal benefit.

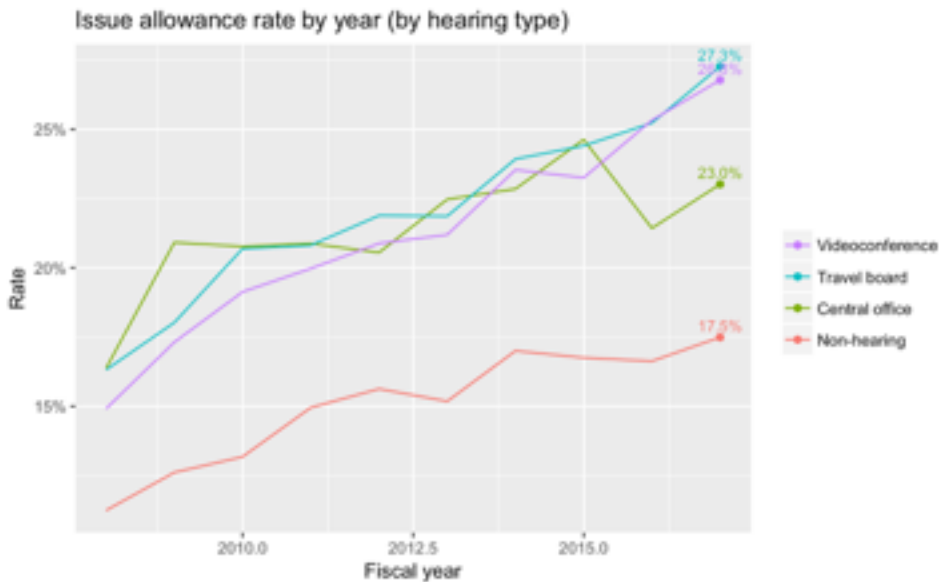
Finally, this analysis is limited to study of compensation issues, which constitute the vast majority of the Board's caseload.

## Addendum 10

We retrieve all compensation issues on original decisions made between FY2008 and FY2017. Without making any adjustment for issue type, we arrive at the following observed per-issue allowance rates by year. We see steadily rising allowance rates across both groups, with a persistent difference between them.

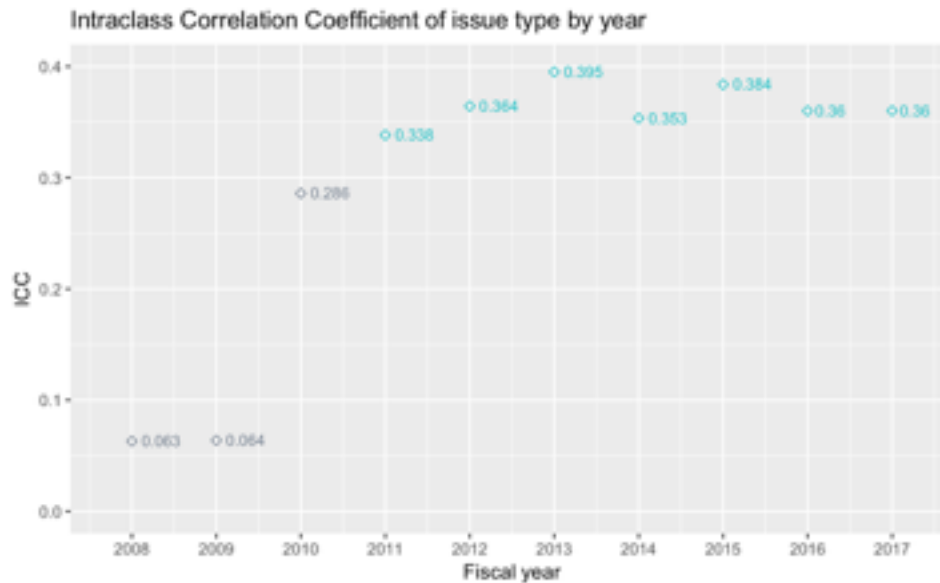


We can break out the hearing issues by whether they received a travel board, videoconference, or central office hearing.



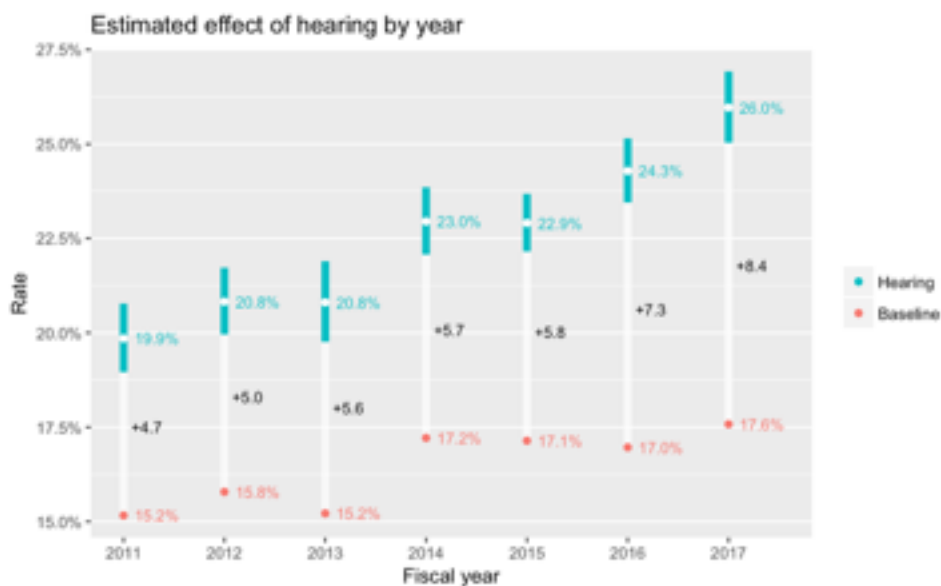
## Addendum 11

In order to understand whether modeling issue type as a random effect in a mixed effects model is useful, we calculate the intraclass correlation coefficient of issue type as it affects the independent variable: whether the issue was allowed. We can see a transition that occurred in FY2010 between an older issue taxonomy and the current one. The older exhibits little cohesion, indicating that it would provide little explanatory power when incorporated into a mixed effects model. However, under the current system, issues of the same type behave similarly, and this fact will enable us to account for differences in the hearing and non-hearing populations. We will use only FY2011 and later, shown in blue.

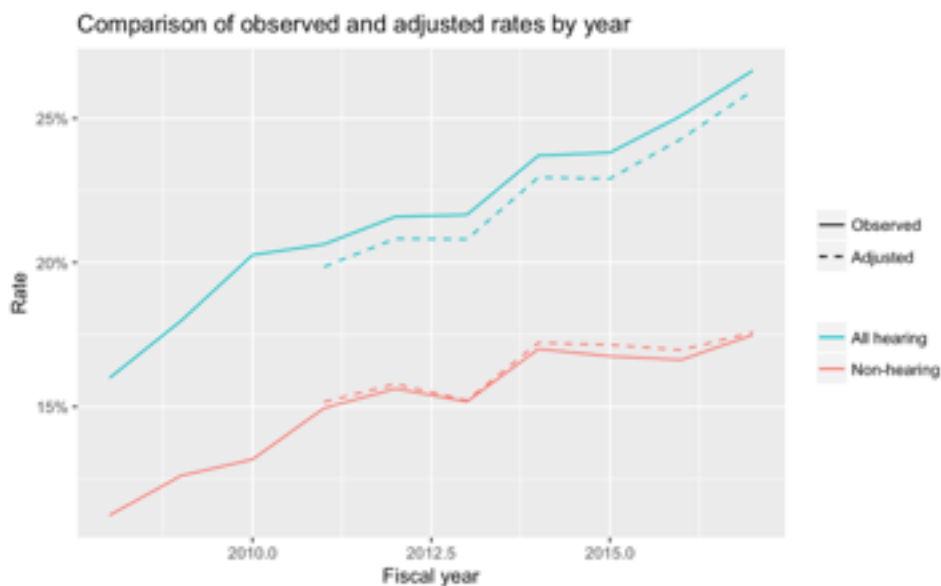


We input each sufficiently cohesive year into a binomial mixed effects model. Attempts to create multi-year models consistently fail to converge, so we are limited to looking at individual years. The hearing indicator variable is used as the fixed effect, with the issue type as the random effect, modeled as having an uncorrelated random intercept and slope. The entire population of issues, both hearing and non-hearing, are then predicted with the hearing indicator held constant in order to estimate a comparable allowance rate for the full population's mix of issue types. 95% confidence intervals for the hearing effect are approximated using the Wald method and applied to the predicted allowance rates; confidence intervals for the intercept are not incorporated.

## Addendum 12



We can compare these adjusted rates to the observed rates. The differences between these rates are largely consistent between years, with the adjustment consistently contracting the observed hearing effect, indicating that the mix of issues for appeals that receive hearings may have slightly higher allowance rates on average.



We can compare the Wald method of approximating confidence intervals with a parametric bootstrap method for FY2017, and find that the faster Wald method provides a reasonable estimate of the confidence interval (note that these are binomial coefficients).

## Addendum 13

	<b>Wald</b>	<b>Bootstrap</b>
2.5%	0.5223515	0.5179618
97.5%	0.6406015	0.6351344

We arrive at the net percentage point difference in the allowance rate between hearing and non-hearing issues for FY2017.

<b>2.5%</b>	<b>50%</b>	<b>97.5%</b>
+7.45	+8.39	+9.34

### The summary of the model:

```

Generalized linear mixed model fit by maximum likelihood (Laplace Approximation) ['glmerMod']
Family: binomial ( logit )
Formula: allowed ~ as.integer(hearing) + (as.integer(hearing) || issue_type)
Data: issues.2017
Control: glmerControl(optimizer = "bobyqa")

      AIC      BIC   logLik deviance df.resid
48758.1 48793.7 -24375.1  48750.1    54441

Scaled residuals:
   Min       1Q   Median       3Q      Max
-2.8513 -0.4773 -0.3587 -0.2208  8.1039

Random effects:
 Groups      Name                Variance Std.Dev.
issue_type  (Intercept)            1.86238  1.3647
issue_type.1 as.integer(hearing) 0.03913  0.1978
Number of obs: 54445, groups: issue_type, 2006

Fixed effects:
              Estimate Std. Error z value Pr(>|z|)
(Intercept)   -1.75254    0.04684  -37.41  <2e-16 ***
as.integer(hearing) 0.58148    0.03017   19.28  <2e-16 ***
---
Signif. codes:  0 '***' 0.001 '**' 0.01 '*' 0.05 '.' 0.1 ' ' 1

Correlation of Fixed Effects:
      (Intr)
as.ntgr(hr) -0.275

```

In order to examine whether conducting hearings over videoconference has an effect on outcomes, we can compare travel board and videoconference hearings. These have the advantage of being functionally similar, as both are scheduled and conducted at regional offices. The model is able to converge when run using all years from FY2011 to FY2017, and over this time period, we do not see a statistically significant difference between travel board

## Addendum 14

and videoconference hearings. It is possible to achieve a significant effect for FY2015 at the <0.05 level (binomial coefficient of -0.083, standard error of 0.032); however, no other year, taken individually, shows a significant effect.

```
Generalized linear mixed model fit by maximum likelihood (Laplace Approximation) ['glmerMod']
Family: binomial ( logit )
Formula: allowed ~ as.integer(video_hearing) + (as.integer(video_hearing) || issue_type)
Data: issues.ro_hearings
Control: glmerControl(optimizer = "bobyqa")
```

```
      AIC      BIC    logLik deviance df.resid
170475.2 170515.8 -85233.6 170467.2   187140
```

Scaled residuals:

```
      Min      1Q  Median      3Q      Max
-3.1360 -0.4844 -0.3907 -0.1796  6.9148
```

Random effects:

```
Groups      Name                Variance Std.Dev.
issue_type  (Intercept)                2.115860 1.4546
issue_type.1 as.integer(video_hearing) 0.003588 0.0599
Number of obs: 187144, groups: issue_type, 2962
```

Fixed effects:

```
              Estimate Std. Error z value Pr(>|z|)
(Intercept)    -1.327598   0.036641  -36.23  <2e-16 ***
as.integer(video_hearing)  0.007517   0.014046   0.54   0.593
---
```

Signif. codes: 0 '\*\*\*' 0.001 '\*\*' 0.01 '\*' 0.05 '.' 0.1 ' ' 1

Correlation of Fixed Effects:

```
(Intr)
as.ntgr(v_) -0.188
```

**UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT**

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS**

**Case Number:** 19-1094

**Short Case Caption:** Monk v. Wilkie

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Date: 07/06/2020

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Name: Angela K. Drake