

5-15-2019

## Creating an Unprecedented Number of Precedents at the U.S. Court of Appeals for Veterans Claims

Natsumi Antweiler

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Civil Procedure Commons](#), and the [Military, War, and Peace Commons](#)

---

### Repository Citation

Natsumi Antweiler, *Creating an Unprecedented Number of Precedents at the U.S. Court of Appeals for Veterans Claims*, 60 Wm. & Mary L. Rev. 2311 (2019), <https://scholarship.law.wm.edu/wmlr/vol60/iss6/6>

Copyright c 2019 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmlr>

# NOTES

## CREATING AN UNPRECEDENTED NUMBER OF PRECEDENTS AT THE U.S. COURT OF APPEALS FOR VETERANS CLAIMS

### TABLE OF CONTENTS

INTRODUCTION .....	2313
I. BACKGROUND .....	2315
A. <i>How the VA Adjudicates Claims for Benefits</i> .....	2316
B. <i>Why the Backlog Exists</i> .....	2318
C. <i>Why Class Actions Are Insufficient to Remedy the         Situation</i> .....	2321
II. THE BENEFITS OF PRECEDENTIAL OPINIONS .....	2322
A. <i>Nature of the CAVC</i> .....	2323
B. <i>Merits of Nonbinding Decisions</i> .....	2324
C. <i>The Downside of Having Limited Precedential         Opinions</i> .....	2325
III. SOLUTIONS FOR CREATING MORE PRECEDENTIAL OPINIONS .....	2327
A. <i>Increasing Judges at the Court of Appeals for Veterans         Claims Without a Ceiling</i> .....	2327
1. <i>Current Statutory Provisions Regarding Active and             Retired Judges</i> .....	2327
2. <i>Proposing a Statutory Amendment</i> .....	2328
3. <i>Counterarguments and Justifications</i> .....	2329
4. <i>Alternative Proposal: Expanding the Role of Retired             Judges</i> .....	2330
B. <i>Mechanism to Convert Nonprecedential Opinions to         Precedential Opinions: Formation of a Special Reviewing         Process</i> .....	2331

1. <i>Justification for Creating a Special Reviewing Process</i> .....	2332
2. <i>How the Special Reviewing Process Works</i> .....	2333
CONCLUSION.....	2334

## INTRODUCTION

In February 2012, Mr. Conley F. Monk, Jr., a Marine Corps veteran who served during the Vietnam War, filed a claim with the U.S. Department of Veterans Affairs (VA) for disability benefits regarding his post-traumatic stress disorder and other disabilities.<sup>1</sup> Initially, he was denied benefits because he had been discharged under “other than honorable” circumstances.<sup>2</sup> He later challenged the VA’s decision and requested a hearing.<sup>3</sup> Even three years after his filing, the VA had not rendered a decision.<sup>4</sup> Thus, Mr. Monk filed a petition for a writ of mandamus with the United States Court of Appeals for Veterans Claims (CAVC) and requested that the court “order the Secretary of Veterans Affairs ... to promptly adjudicate” his claim.<sup>5</sup> Not only did he ask for *his* claim to be decided, but he also requested that the CAVC certify a class “under a class action or similar aggregate resolution procedure” so that other similarly-situated veterans could also benefit from the decision.<sup>6</sup> The CAVC denied Mr. Monk’s claim, citing the Court’s long-standing declaration that it did not have jurisdiction to hear class actions and that it was “not permitted to go beyond the jurisdictional statute set forth by Congress.”<sup>7</sup> In April 2017, the United States Court of Appeals for the Federal Circuit held to the contrary.<sup>8</sup> The Federal Circuit concluded that the CAVC had abused its discretion by deciding that it lacked authority to certify and adjudicate class action cases.<sup>9</sup> The Federal Circuit stated that the CAVC had authority to entertain class action lawsuits “under the All Writs Act, other statutory authority, and the [CAVC’s] inherent powers.”<sup>10</sup>

---

1. Monk v. Shulkin, 855 F.3d 1312, 1314 (Fed. Cir. 2017).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *See id.*

7. Monk v. McDonald, No. 15-1280, 2015 U.S. Vet. App. LEXIS 684, at \*6 n.1 (May 27, 2015).

8. *Monk*, 855 F.3d at 1318.

9. *Id.*

10. *Id.*

Although class action lawsuits may help the CAVC decide aggregated cases, the prospect raises new and complicated issues. First, there is the question of what rules should be adopted to certify a class.<sup>11</sup> Even if the CAVC were to adopt a Rule 23-type rule that permits class action lawsuits,<sup>12</sup> the court may be required to interpret threshold class action requirements such as numerosity, commonality, typicality, and adequacy of the certified class.<sup>13</sup> Because disability and benefits issues are unique to each individual, it is highly unlikely that a class can be certified.<sup>14</sup> Although the CAVC may theoretically hear class actions, it will not likely resolve any substantive issues that the veterans seek to have addressed.<sup>15</sup> For example, the main issue that Mr. Monk sought the CAVC to address was why the VA was taking so long to decide his case.<sup>16</sup>

Mr. Monk's story—a poor, disabled veteran who put his life at risk overseas and returned only to find himself “at another war” on his own home turf against a system that was supposed to provide him medical and financial assistance<sup>17</sup>—is not unique. In fact, his case is just the tip of the iceberg: there are close to one million claims pending at the VA.<sup>18</sup> Although there is an immense backlog which slows down the whole system, another issue is that only 1.8 percent of CAVC decisions are binding precedential decisions.<sup>19</sup> If the CAVC increased the rate of written, precedential opinions, then

---

11. *Monk v. Shulkin*, No. 15-1280, 2017 U.S. Vet. App. LEXIS 1543, at \*2 (Oct. 26, 2017).

12. Rule 23 of the Federal Rules of Civil Procedure permits class action lawsuits. FED. R. CIV. P. 23(a). Individual parties or entities can be grouped together to create a class if the affected persons are so numerous that joinder is impracticable, there is commonality and typicality amongst the members, and if the representative parties will fairly and adequately protect the class's interest. *Id.* Because the CAVC is an Article I court, and not an Article III court, the federal rules do not apply to it. Thus, Rule 23 is not binding on the CAVC.

13. *See id.*

14. *See, e.g., Compensation: Types of Claims*, U.S. DEP'T VETERANS AFF., <https://www.benefits.va.gov/compensation/types-claims.asp> [<https://perma.cc/DYC7-39NM>].

15. *See Monk*, 855 F.3d at 1314-15 (proposing that a class be composed of those “who had applied for VA benefits, had timely filed an NOD, had not received a decision within twelve months, and had demonstrated medical or financial hardship”).

16. *See id.* at 1314.

17. *See, e.g., Alan Zarembo, VA Is Buried in a Backlog of Never-Ending Veterans Disability Appeals*, L.A. TIMES (Nov. 23, 2015, 4:00 AM), <http://www.latimes.com/nation/la-na-veterans-appeals-backlog-20151123-story.html> [<https://perma.cc/SN7C-QJTX>].

18. Michael Serota & Michelle Singer, *Veterans' Benefits and Due Process*, 90 NEB. L. REV. 388, 390 (2011).

19. *See infra* Part II.A.

it would increase the CAVC's efficiency because it would create clear rules, deter claimants from bringing forward unmeritorious claims, and reduce the number of appeals.<sup>20</sup> This Note proposes two mechanisms to create more precedential opinions at the CAVC: increasing the number of judges,<sup>21</sup> and establishing a new mechanism to convert nonprecedential opinions into precedential opinions.<sup>22</sup>

Part I explains how the VA's adjudicatory system functions—particularly, it shows how this unique system also exacerbates the backlog problem and how class actions will not suffice to remedy the situation. Part II balances the advantages and disadvantages of having more precedential opinions. Finally, Part III introduces two proposals to create more precedents. First, it discusses the benefits of increasing the number of judges and expanding the authority of retired judges. Second, it considers a new mechanism for converting nonbinding opinions to binding opinions.

## I. BACKGROUND

Currently, there are over twenty million veterans who have served the United States.<sup>23</sup> Many veterans have paid the ultimate sacrifice, but many more veterans have been left with mental and physical scars.<sup>24</sup> In return for the veterans' selfless service, Congress established the VA to provide veterans and their families important resources,<sup>25</sup> such as health care, a benefits program to compensate injured veterans, and access to national cemeteries.<sup>26</sup> This Note's main focus is to examine the veterans' benefits system within the Veterans Benefits Administration—a VA administrative body that

---

20. *See infra* Part II.

21. *See infra* Part III.A.

22. *See infra* Part III.B.

23. *Veteran Population Projections 2017-2037*, U.S. DEP'T VETERANS AFF., [https://www.va.gov/vetdata/docs/Demographics/New\\_Vetpop\\_Model/Vetpop\\_Infographic\\_Final31.pdf](https://www.va.gov/vetdata/docs/Demographics/New_Vetpop_Model/Vetpop_Infographic_Final31.pdf) [<https://perma.cc/KBG3-YVUS>].

24. *See* U.S. DEP'T OF VETERANS AFFAIRS, AMERICA'S WARS FACT SHEET (2017), [https://www.va.gov/opa/publications/factsheets/fs\\_americas\\_wars.pdf](https://www.va.gov/opa/publications/factsheets/fs_americas_wars.pdf) [<https://perma.cc/A9HZ-JMGP>] (noting that, since the Revolutionary War, there have been approximately 700,000 in-service deaths and 1.5 million nonmortal woundings).

25. *See* Serota & Singer, *supra* note 18, at 389.

26. *See About VA*, U.S. DEP'T VETERANS AFF., [https://www.va.gov/about\\_va/vahistory.asp](https://www.va.gov/about_va/vahistory.asp) [<https://perma.cc/J5KT-4SPY>].

distributes injury compensation benefits and services to veterans and their families<sup>27</sup>—and to argue that the current system can be improved to provide claimants a faster and more efficient decision-making process. Although nearly 3.3 million veterans and family members are currently receiving VA benefits, close to one million claims are still waiting to be decided.<sup>28</sup>

### A. *How the VA Adjudicates Claims for Benefits*

The VA claims adjudication process is like no other system in the United States. Based on the precept that the claims system should be favorable to military veterans,<sup>29</sup> the VA includes flexibility in the system which is intended to help veterans. For example, to preserve the effective date of a claim, a veteran can just send an “intent to file” claim which does not require any substantive claims.<sup>30</sup> Furthermore, claimants are permitted to continuously submit information before the VA makes a decision on the claim.<sup>31</sup> Other flexibilities require the VA to assist the veteran complete the claim application (at no cost),<sup>32</sup> and to give the claim a sympathetic reading.<sup>33</sup> The VA system does away with statutes of limitation<sup>34</sup> and *res judicata*.<sup>35</sup>

---

27. *Veterans Benefits Administration, About VBA*, U.S. DEP'T VETERANS AFF., <https://benefits.va.gov/BENEFITS/about.asp> [<https://perma.cc/GWD2-EKSN>].

28. See Serota & Singer, *supra* note 18, at 389-90.

29. The system was “originally established as a way for a grateful nation to ensure that those who had served in the military would be well-cared for if they were injured.” Victoria Hadfield Moshiaswili, *Ending the Second “Splendid Isolation”?: Veterans Law at the Federal Circuit in 2013*, 63 AM. U. L. REV. 1437, 1442 (2014). Hence, the government did not want to create an adversarial system; rather, it was in the government’s interest that it did not necessarily “win” the claims brought by the veterans, but that “justice [was] done” and that “all veterans so entitled receive[d] the benefits due to them.” *Id.*

30. The VA allows veterans to submit “intent to file” claims, which only require the veterans to give notice that they plan to file a claim. VETERANS BENEFITS MANUAL § 12.4.2.2 (Barton F. Stichman et al. eds., 2017). The veteran does not have to go into the substance of the claim in this “intent to file”; furthermore, the veteran is not required to file an actual claim later on, if he chooses not to pursue the claim. See *id.* The intent to file is mainly used to preserve the effective date of his claim. *Id.*

31. See Moshiaswili, *supra* note 29, at 1444.

32. See *id.* at 1442-43.

33. See *id.*

34. For example, even after exhausting each level of review, a veteran can provide new and material evidence to restart the process on the same claim. See Serota & Singer, *supra* note 18, at 399-401. The veteran can also challenge disability compensation benefits decisions based on ratings of severity of the disability by claiming that a higher rating should be

The VA also has a low standard of proof and provides the veteran “the benefit of the doubt.”<sup>36</sup>

In addition to these flexibilities, the VA system provides five different levels of review.<sup>37</sup> A veteran (or a surviving spouse or relative) commences a claim at the VA when the veteran files a claim at a VA regional office (RO).<sup>38</sup> The RO “processe[s], develop[s], and adjudicate[s]” the claim.<sup>39</sup> Because the VA system is nonadversarial,<sup>40</sup> the VA is required to assist the veteran in gathering evidence (for example, medical records and service records).<sup>41</sup> The RO adjudicates the claim and decides whether to grant the benefits to the veteran.<sup>42</sup> If the RO denies the claim, then it provides the veteran a Rating Decision to explain the decision.<sup>43</sup> After the RO files the Rating Decision, the veteran has the right to submit a Notice of Disagreement within one year.<sup>44</sup> The VA must then respond with a Statement of the Case which explains the Rating Decision in further detail.<sup>45</sup> At this point, the veteran can take several routes to appeal the decision: the veteran can request that the RO conduct a de novo review or file an appeal with the Board of Veterans’ Appeals

---

granted due to increased disability. VETERANS BENEFITS MANUAL, *supra* note 30, § 5.1.1.1. Otherwise, a veteran can also argue that the Board made a “clear and unmistakable error.” See Moshiaswili, *supra* note 29, at 1444; see also VETERANS BENEFITS MANUAL, *supra* note 30, at § 14.4 (“A unique aspect of the veterans’ benefits system is that once a claim has been finally denied, a veteran can at any time attack the validity of that final decision and potentially reverse VA’s determination.”).

35. Michael J. Wishnie, “A Boy Gets into Trouble”: *Service Members, Civil Rights, and Veterans’ Law Exceptionalism*, 97 B.U. L. REV. 1709, 1720-21 (2017).

36. See Moshiaswili, *supra* note 29, at 1443 n.40.

37. DANIEL T. SHEDD, CONG. RESEARCH SERV., R42609, OVERVIEW OF THE APPEAL PROCESS FOR VETERANS’ CLAIMS 2-3 (2013).

38. See Moshiaswili, *supra* note 29, at 1439. Veterans can bring forward benefit claims for health care, disability compensation, pension, education, and others. Wishnie, *supra* note 35, at 1719. At the time of writing, there were fifty-six regional offices in the United States, Puerto Rico, and the Philippines. *About VBA*, *supra* note 27.

39. Moshiaswili, *supra* note 29, at 1439.

40. See Serota & Singer, *supra* note 18, at 398.

41. See Moshiaswili, *supra* note 29, at 1443.

42. VETERANS BENEFITS MANUAL, *supra* note 30, § 12.6.3.3-4.

43. See Moshiaswili, *supra* note 29, at 1439.

44. VETERANS BENEFITS MANUAL, *supra* note 30, § 12.7.1-2.

45. See *id.* § 12.10.1.



(Board).<sup>46</sup> Although the Board is an appellate body, it “has the power to develop evidence and to find facts de novo.”<sup>47</sup>

If the veteran is still not satisfied with the Board’s decision, the veteran can appeal to the CAVC.<sup>48</sup> The CAVC is only able to make legal determinations and to “affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate.”<sup>49</sup> Unlike the RO or the Board, the CAVC is an adversarial body.<sup>50</sup> Even so, the VA system reserves the veteran’s right to appeal, and thus the system is set up to put the veteran in a more advantageous position.<sup>51</sup> In essence, a veteran has “nothing to lose by appealing” to the CAVC.<sup>52</sup> At this stage, if either party is upset with the CAVC’s decision, then they both have the right to appeal to the Federal Circuit, and then to the Supreme Court.<sup>53</sup>

### *B. Why the Backlog Exists*

This system’s “most significant shortcoming” is the delay incurred at each step of the review process.<sup>54</sup> The VA claims processing system’s backlog totals 900,000 claims across the United States, and continues to grow.<sup>55</sup> At the RO stage, the average process time is

---

46. See Moshiashwili, *supra* note 29, at 1439.

47. *Id.* at 1440.

48. Wishnie, *supra* note 35, at 1722-23.

49. *Id.* at 1723 (quoting 38 U.S.C. § 7252(a) (2012)).

50. Victoria Hadfield Moshiashwili & Aaron Hadfield Moshiashwili, Rearranging Deck Chairs on the Titanic: Lessons from the History of VA’s Growing Disability Claims Backlog 12 (Oct. 31, 2011) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1952070](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1952070) [<https://perma.cc/ZA7S-JJCG>].

51. See Moshiashwili, *supra* note 29, at 1441. Furthermore, a claimant’s Board decision cannot be “worsened” by the CAVC. Benjamin Pomerance, *Fighting on Too Many Fronts: Concerns Facing Elderly Veterans in Navigating the United States Department of Veterans Affairs Benefits System*, 37 *HAMLIN L. REV.* 19, 42 (2014). In other words, if the veteran received a disability rating of 50 percent, the CAVC cannot rate it at anything lower than 50 percent on appeal. See *id.*

52. Pomerance, *supra* note 51, at 42.

53. See SHEDD, *supra* note 37, at 4; Moshiashwili, *supra* note 29, at 1442. “[T]he Federal Circuit can only review questions of law, including constitutional challenges and, less frequently, challenges to VA rulemaking under the [Administrative Procedure Act].” *Id.* at 1442.

54. Michael P. Allen, *The United States Court of Appeals for Veterans Claims at Twenty: A Proposal for a Legislative Commission to Consider Its Future*, 58 *CATH. U. L. REV.* 361, 377 (2009).

55. Pomerance, *supra* note 51, at 49.

183 days; 136 days for the Board; and 416 days for the CAVC.<sup>56</sup> In total, the average time between the claim's initial filing to the ultimate disposition can take between five to seven years.<sup>57</sup>

There are several reasons why the backlog in the VA system has ballooned over the past decade. In some sense, the delay is "inherent in the VA system."<sup>58</sup> The VA system's pro-claimant setup, and the favorable attitude towards the veteran's claim, naturally slows down the process. For example, the VA must provide the veteran with one full year to submit more evidence and information following to substantiate a claim.<sup>59</sup> Furthermore, the VA's role is not just adjudicatory. The VA's process may need to slow down so that it can help the veteran obtain relevant records from the federal government, or even provide the veteran a medical examination.<sup>60</sup> Most judges send claims back to the RO for more thorough review, which puts the claims on a "hamster wheel"<sup>61</sup> just going around and around from one agency to another.<sup>62</sup>

The veterans themselves also delay the process. Because there is no concept of "res judicata,"<sup>63</sup> veterans can keep appealing or re-starting their claims until they get a favorable decision.<sup>64</sup> Even though close to three-quarters of the veterans who have appealed the VA's decisions are already receiving disability compensation,

---

56. Allen, *supra* note 54, at 377.

57. *Id.*

58. See, e.g., *How Can We Force VA to Act on My Claim?*, VETERANS BENEFIT GROUP: GOODMAN ALLEN DONNELLY, <http://veteransbenefitgroup.com/how-can-we-force-va-to-act-on-my-claim-it-is-taking-forever-to-make-a-decision/> [<https://perma.cc/P434-297P>].

59. *Id.*

60. *Id.*

61. See Serota & Singer, *supra* note 18, at 391.

62. See Zarembo, *supra* note 17. In 2007, the Board remanded 36 percent of all cases that it had received to another VA body (which then "adds more than a year to the appellate process"). Allen, *supra* note 54, at 378 (quoting BD. OF VETERANS' APPEALS, DEPT OF VETERANS AFFAIRS, REPORT OF THE CHAIRMAN: FISCAL YEAR 2007, at 3 (2007), <http://www.va.gov/vetapp/chairRpt/BVA2007AR.pdf>). Once the case is reviewed, 75 percent of the cases return to the Board for more proceedings. *Id.*

63. Res judicata, or claim preclusion, "is the principle that a cause of action may not be relitigated once it has been judged on the merits." *Res judicata*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/res\\_judicata](https://www.law.cornell.edu/wex/res_judicata) [<https://perma.cc/4D5N-KXEY>].

64. See Zarembo, *supra* note 17 ("[Veterans] have everything to gain and little to lose by continuing to fight.").

they may continue appealing in hopes of receiving higher disability compensation.<sup>65</sup>

There are also external factors that affect the VA's adjudication process speed. There has been a steep increase in Iraq and Afghanistan war veterans' claims. Since 2001, in just one decade, the number of claims filed doubled from half a million claims to approximately 1.3 million claims.<sup>66</sup> Every claim includes paperwork, and at times a claim file could have more than a thousand pages.<sup>67</sup> Furthermore, the VA is understaffed.<sup>68</sup> For example, only sixty-five board judges ruled on 55,713 cases in fiscal year 2014.<sup>69</sup> Because the system is "non-adversarial" and "claimant-friendly," if a veteran makes an error in the application process, then the VA must perform additional administrative work which creates additional work for an already understaffed system.<sup>70</sup>

In all, it seems that these backlog issues stem from the fact that cases are treated on a case-by-case basis with no hard, defined rules. The fact that backlog issues are individualized further supports the contention that class actions would not be able to address this problem.<sup>71</sup> Instead, these backlog issues show that expanding precedential opinions are the way forward. Particularly, precedential opinions will help draw clearer lines distinguishing between situations that merit and do not merit a grant of benefits.<sup>72</sup> Because unclear rules exacerbate the backlog problem, Congress and the CAVC should consider several solutions to resolve this issue.<sup>73</sup>

---

65. *See id.*

66. Pomerance, *supra* note 51, at 51.

67. *Id.*; *see also* JOHN S. KIERNAN & MICHAEL P. RICHTER, ASS'N B. CITY N.Y., RECOMMENDATIONS RESPECTFULLY SUBMITTED TO THE TRUMP ADMINISTRATION REGARDING WAYS TO IMPROVE THE DEPARTMENT OF VETERANS AFFAIRS CLAIMS AND ADJUDICATION PROCESS 2 (2017), [http://s3.amazonaws.com/documents.nycbar.org/files/20073221-VATrumpTransition\\_COMAJ\\_FINAL\\_1.25.17.pdf](http://s3.amazonaws.com/documents.nycbar.org/files/20073221-VATrumpTransition_COMAJ_FINAL_1.25.17.pdf) [<https://perma.cc/KX6B-YP9E>] ("The paperwork contained within the file that a claim adjudicator must review before issuing a decision on a claim can consist of hundreds and, sometimes, thousands of pages of medical and personnel records.").

68. *Federal Hiring Freeze Poses Problems for Understaffed VA Despite Exemptions*, LAW FIRM NEWSWIRE (Mar. 21, 2017), <https://www.lawfirmnewswire.com/2017/03/federal-hiring-freeze-poses-problems-for-understaffed-va-despite-exemptions/> [<https://perma.cc/E8H4-LQGH>].

69. *See Zarembo, supra* note 17.

70. Pomerance, *supra* note 51, at 51-53.

71. *See infra* Part I.C.

72. *See infra* Part II.

73. *See infra* Part III.

*C. Why Class Actions Are Insufficient to Remedy the Situation*

At first glance, a class action lawsuit may seem to be the ideal solution to resolve the backlog problem in the Veterans Benefits Administration.<sup>74</sup> In Article III courts, a potential “class” must satisfy Rule 23 of the Federal Rules of Civil Procedure to be certified: (a) numerosity, (b) commonality, (c) typicality, and (d) adequacy.<sup>75</sup> But, even to get to the point of certifying a class—let alone obtaining a favorable result—veteran claimants would need to overcome multiple challenges.

Assuming that the CAVC were to adopt a class action rule similar to Rule 23, the “commonality” prong would be difficult to satisfy. Commonality requires that the issue stem from the same source.<sup>76</sup> Veterans who want to form a class action suit regarding backlogs do not share the same “common” incident: two veterans could have been denied the opportunity to receive benefits for more than five years, but one veteran could have filed an original claim based on an Iraq War knee injury, while another veteran could have filed an underlying claim based on PTSD from the Vietnam War. Although both veterans may have been denied benefits for more than five years, it would be difficult to group them into one category.<sup>77</sup> Furthermore, if the length of time claimants were denied benefits differed, it would be questionable whether a veteran with a ten-month delay could be categorized with another veteran who had been waiting for a VA decision for thirty-six months. Hence, the commonality requirement would be too broad and too narrow at the same time to provide a solution to the backlog problem.

Even if a class were certified, it would not guarantee that class actions would be pursued at the CAVC. For example, a 2017 *Yale Law Journal* article identified only two Article I courts and seven

---

74. Some advantages include: “[m]ore powerful litigation posture” for plaintiffs, increased opportunities for settlements, and “[a]voidance of inconsistent results.” See Kenneth S. Canfield, *Advantages and Disadvantages of Class Actions from a Plaintiff’s Lawyer’s Perspective*, BRIEF, Summer 1999, at 58, 61.

75. See FED. R. CIV. P. 23(a).

76. See, e.g., *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 475-79 (2008) (class action lawsuit filed for economic injury due to an oil spill).

77. See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349-50 (2011) (“Commonality requires the plaintiff to demonstrate that the class members ‘have suffered the same injury.’”).

agencies that “permit class actions,” five of which “did not have *any* reported decisions involving [Rule 23]’s use.”<sup>78</sup> Considering the difficulties in satisfying the threshold questions and the possible hesitancy to invoke the class action procedures, class action lawsuits are not sufficient to resolve the backlog issue at the CAVC.

## II. THE BENEFITS OF PRECEDENTIAL OPINIONS

Broadly speaking, class action lawsuits and expanding precedent essentially serve the same purpose—they each give relief to a wide group of people in an efficient and economic manner.<sup>79</sup> Although claimants file lawsuits to obtain a remedy,<sup>80</sup> precedential opinions assist claimants because they eliminate obstacles that prevent a timely remedy.<sup>81</sup> Precedential opinions clarify the rules, and thus would allow veterans to bring their claims under a better-defined system of law<sup>82</sup> and cut back on the time spent on litigation.<sup>83</sup> Binding opinions would create more efficiency and consistency throughout the adjudicatory system and reduce the overall number of appeals.<sup>84</sup> Precedential opinions would also discourage claimants from bringing forward or appealing unmeritorious claims.<sup>85</sup> With fewer appeals, the claims that merit a decision would move through the dockets faster, and thus, veterans would be provided with faster relief.<sup>86</sup> Hence, binding precedent would help reduce the backlog in the VA adjudicatory system.

---

78. See Michael Sant’Ambrogio & Adam S. Zimmerman, *Inside the Agency Class Action*, 126 YALE L.J. 1634, 1659 (2017).

79. See, e.g., *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 155 (1982); Nuno Garoupa & Andrew P. Morriss, *The Fable of the Codes: The Efficiency of the Common Law, Legal Origins, and Codification Movements*, 2012 U. ILL. L. REV. 1443, 1459, 1466 (critiquing various theories concerning the “efficiency of the common law”).

80. See Stephen Meili, *Collective Justice or Personal Gain? An Empirical Analysis of Consumer Class Action Lawyers and Named Plaintiffs*, 44 AKRON L. REV. 67, 72 (2011).

81. See, e.g., Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NW. U. L. REV. 1551, 1580 (2003).

82. See *id.*

83. See *id.* at 1580-81.

84. See *id.*

85. See James D. Ridgway et al., “Not Reasonably Debatable”: *The Problems with Single-Judge Decisions by the Court of Appeals for Veterans Claims*, 27 STAN. L. & POL’Y REV. 1, 10-11 (2016) (describing that single-judge dispositions, which the CAVC employs, are associated with filing unmeritorious claims and appeals).

86. See Zywicki, *supra* note 81, at 1580-81.

### A. Nature of the CAVC

Although other federal appellate courts decide appeals through three-judge panels,<sup>87</sup> the CAVC was established with a unique practice: the court is able to “hear cases by judges sitting alone or in panels, as determined pursuant to procedures established by the Court.”<sup>88</sup> Most CAVC cases are decided by a single judge.<sup>89</sup> Initially, Congress believed that having single-judge rulings was necessary for fear that appeals would overwhelm the court.<sup>90</sup> Not only were single-judge decisions perceived as a way to prevent further backlogs in the VA system,<sup>91</sup> it was also viewed as a quick way to respond to pro se litigants’ many unmeritorious claims.<sup>92</sup> The court held in *Frankel v. Derwinski* that, if “the case on appeal is of relative simplicity,”<sup>93</sup> the CAVC may decide that a single-judge decision is warranted when the case:

1. does not establish a new rule of law;
2. does not alter, modify, criticize, or clarify an existing rule of law;
3. does not apply an established rule of law to a novel fact situation;
4. does not constitute the only recent, binding precedent on a particular point of law within the power of the Court to decide;
5. does not involve a legal issue of continuing public interest; and

---

87. VETERANS BENEFITS MANUAL, *supra* note 30, § 15.6.1.

88. 38 U.S.C. § 7254(b) (2012). This method of adjudication was likely modeled after the U.S. Tax Court—where the court allowed single judges to hear cases—because “many matters had little value as precedent.” Ridgway et al., *supra* note 85, at 6, 12.

89. Between October 1, 2013, and September 30, 2014, 6439 cases were decided by a single judge or by the clerk of a court, and only 108 cases were decided by a panel or en banc. See U.S. COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORT: UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS OCTOBER 1, 2013 TO SEPTEMBER 30, 2014 ¶ 4 (2014) [hereinafter ANNUAL REPORT], <https://www.uscourts.cavc.gov/documents/FY2014AnnualReport06MAR15FINAL.pdf> [<https://perma.cc/A84Y-83UU>].

90. See Ronald L. Smith, *The Administration of Single-Judge Decisional Authority by the United States Court of Appeals for Veterans Claims*, 13 KAN. J.L. & PUB. POL’Y 279, 279 (2004).

91. Between October 1, 2013, and September 30, 2014, the median time from filing an appeal to disposition by a single judge was 14.1 months, whereas it took 23.5 months for multiple-judge decisions. See ANNUAL REPORT, *supra* note 89, ¶ 6(C)-(D).

92. See Ridgway et al., *supra* note 85, at 10.

93. *Frankel v. Derwinski*, 1 Vet. App. 23, 25 (1990).

6. the outcome is not reasonably debatable.<sup>94</sup>

To apply this rule, the CAVC employs a screening judge to access the *Frankel* criteria and determine whether a single judge can review the claims.<sup>95</sup> Once the *Frankel* criteria are satisfied, the screening judge affirms, reverses, or remands the Board's decision.<sup>96</sup> When the single judge circulates the proposed decisions, other judges then have five days to submit their input, including a request for panel consideration; if at least two judges request a panel review, then the court creates a panel to review the case.<sup>97</sup> Unless judges request a panel review, the screening judge's decision then becomes binding on only the parties to the case.<sup>98</sup>

Because of the simple decision-making process, single-judge decisions have no precedential weight.<sup>99</sup> Binding opinions only resolved 1.8 percent of the cases brought before the CAVC in fiscal years 2013 and 2014.<sup>100</sup> Other federal appellate courts issue on average 12 percent of their decisions as binding opinions.<sup>101</sup>

### *B. Merits of Nonbinding Decisions*

Not having binding precedent has certain merits. Single-judge decision proponents contend that nonbinding decisions address resource concerns and increase judges' efficiency in the decision-making process.<sup>102</sup> With the growing number of claims that are brought to court, there is an increasing demand for publication, shelf space, time, and decisionmakers; by opting not to create binding decisions, these concerns are abated.<sup>103</sup>

---

94. *Id.* at 25-26.

95. *See* Smith, *supra* note 90, at 280.

96. *Id.*

97. *Id.*

98. UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS INTERNAL OPERATING PROCEDURES ¶¶ II(b)(4), III(a)(4) [hereinafter IOPS], [https://www.uscourts.cavc.gov/documents/IOPSep21\\_2016.pdf](https://www.uscourts.cavc.gov/documents/IOPSep21_2016.pdf) [<https://perma.cc/NX2J-VHD6>].

99. *Bethea v. Derwinski*, 2 Vet. App. 252, 254 (1992).

100. *See* Ridgway et al., *supra* note 85, at 11.

101. *Id.*

102. *See id.* at 13 (quoting Stephen L. Wasby, *Unpublished Decisions in the Federal Courts of Appeals: Making the Decision to Publish*, 3 J. APP. PRAC. & PROCESS 325, 333-34 (2001)).

103. *See id.* at 12-13.

One of the main concerns with binding decisions is the increased burden on judges. Nationally, the number of judges has not increased, but the number of cases brought to federal courts of appeals has ballooned from roughly 11,000 cases in 1970 to approximately 60,000 in 2002.<sup>104</sup> Proponents argue that nonbinding decisions take the pressure off of producing elaborate and detailed decisions.<sup>105</sup> Furthermore, a telephone conference between a staff attorney and the parties allow decisions to be made “on truncated memoranda or motions for summary disposition and responses in lieu of briefs.”<sup>106</sup> Nonbinding decisions can help judges delegate most of the preparation of those less-influential opinions to clerks and staff, and thus redirect their energy to opinions that require more attention.<sup>107</sup>

### C. *The Downside of Having Limited Precedential Opinions*

Single-judge decisions have some acknowledged drawbacks. They “creat[e] an ‘iceberg jurisprudence’ ... with ... much of its law ‘below the surface.’”<sup>108</sup> With little precedent, rules are applied inconsistently by those who implement them at the agency, thus creating large variance in outcomes.<sup>109</sup> Some veterans may appeal cases just because they believe that a different judge would render a different decision.<sup>110</sup> There is also inconsistent application of the *Frankel*

---

104. See *id.* at 13 (quoting David C. Vladecka & Mitu Gulati, *Judicial Triage: Reflections on the Debate over Unpublished Opinions*, 62 WASH. & LEE L. REV. 1667, 1668 n.2 (2005)).

105. Preparing opinions through a panel hearing requires more time for drafting, editing, and polishing. See Lauren S. Wood, Comment, *Out of Cite, Out of Mind: Navigating the Labyrinth that Is State Appellate Courts’ Unpublished Opinion Practices*, 45 U. BALT. L. REV. 561, 573-74 (2016).

106. *Frankel v. Derwinski*, 1 Vet. App. 23, 26 (1990); see *Ridgway et al.*, *supra* note 85, at 12-13.

107. *But cf.* *Ridgway et al.*, *supra* note 85, at 14-16 (including the practice of judges delegating more work to clerks in a discussion of criticisms of unpublished opinions made by academics and judges).

108. *Id.* at 18 (quoting Michael P. Allen, *Significant Developments in Veterans Law (2004-2006) and What They Reveal About the U.S. Court of Appeals for Veterans Claims and the U.S. Court of Appeals for the Federal Circuit*, 40 U. MICH. J.L. REFORM 483, 515 (2007)).

109. See *id.* at 14, 25.

110. One study reviewed the affirmance rate of BVA cases brought to the CAVC between 2013 and 2014. See *Ridgway et al.*, *supra* note 85, at 3-4, 18, 20-22. The study found that there was a large variance of affirmance rates: one judge affirmed BVA cases at a rate of 26 percent, while another affirmed at a rate of 65 percent, which suggest that such discrepancy is not merely by chance. See *id.* at 25-26. *But see id.* at 19-20 (“[T]here is little reason to believe that veterans are able to effectively monitor the courts and call attention to any deficiencies in its



criteria.<sup>111</sup> For example, the “reasonably debatable” criterion is inconsistently satisfied—a study showed that a case’s outcome differed depending on which judge was assigned the case.<sup>112</sup> The likelihood of a case having two different outcomes suggests that the case concerned a “reasonably debatable” issue and thus a panel should have decided the matter rather than a single judge.<sup>113</sup> In bypassing the opportunities to define a rule by rendering binding precedents, judges are forced to address and interpret rules for similar issues over and over again.<sup>114</sup> Until recently, nonprecedential cases could not even be cited for their persuasive value.<sup>115</sup>

Even if precedential opinions created more rules or increased nuance in the rules, it is better to have a body of law that has more precedents than too few.<sup>116</sup> The increased nuance from precedential opinions counters the argument that some judicial opinions simply repeat past holdings without adding or changing the law. In fact, nuance validates each rule’s strength because it clarifies the strength and limits of a rule by “add[ing] ... slight expansion of the rule to a certain set of facts” or by “limit[ing] ... the law to a certain set of facts.”<sup>117</sup> In other words, those laws that slightly tweak or present law as time goes on justifies the law’s existence. “[T]he doctrine of precedent is like a pointillist painting with judicial opinions as the carefully placed points providing depth,’ and ... when some of the points are removed, the overall picture is made less distinct, its contours less clear.”<sup>118</sup> Hence, increasing the amount of published, binding opinions would greatly benefit the VA. The challenges that

---

work.”).

111. See VETERANS BENEFITS MANUAL, *supra* note 30, § 15.6.1.

112. See *id.*

113. See Ridgway et al., *supra* note 85, at 20-26; see also *Frankel v. Derwinski*, 1 Vet. App. 23, 25-26 (1990).

114. See Zywicki, *supra* note 81, at 1580.

115. U.S. VET. APP. R. 30(a) (2018) (“A party ... may not cite as precedent any action designated as nonprecedential by the Court or any other court.”). Now, nonprecedential cases “may be cited only for the persuasive value of their logic and reasoning, provided that the party states that no clear precedent exists.” *Id.*

116. See, e.g., Elizabeth Y. McCuskey, *Submerged Precedent*, 16 NEV. L.J. 515, 574 (2016).

117. David R. Cleveland, *Overturning the Last Stone: The Final Step in Returning Precedential Status to All Opinions*, 10 J. APP. PRAC. & PROCESS 61, 163 (2009).

118. See *id.* at 164 (quoting Jon A. Strongman, Comment, *Unpublished Opinions, Precedent, and the Fifth Amendment: Why Denying Unpublished Opinions Precedential Value is Unconstitutional*, 50 U. KAN. L. REV. 195, 195 (2001)).

stem from having limited precedential opinions outweighs non-binding precedent's merits.

### III. SOLUTIONS FOR CREATING MORE PRECEDENTIAL OPINIONS

In order to enable more precedential decisions, the VA should consider two options: (1) increasing the number of judges, without placing a maximum limit, through congressional action; and (2) creating a new mechanism to turn nonbinding opinions into binding opinions.

#### *A. Increasing Judges at the Court of Appeals for Veterans Claims Without a Ceiling*

Congress could reevaluate the role of active and retired judges to enable more precedential opinions. To enable the CAVC to render precedential opinions, the court would need to form panels to make these decisions.<sup>119</sup> Hence, an environment conducive to forming panels is necessary.

##### *1. Current Statutory Provisions Regarding Active and Retired Judges*

A federal statute states that the CAVC is composed of “at least three and not more than seven judges.”<sup>120</sup> Unlike Article III judges, CAVC judges operate on fifteen-year fixed terms.<sup>121</sup> The statute has twice permitted temporary expansions to increase the CAVC to nine judges in 2005.<sup>122</sup> However, these were just temporary measures and the effects of this statute are slowly fading out.<sup>123</sup> The current statute provides that new appointments cannot be made if it would result in there being more than seven CAVC judges.<sup>124</sup>

---

119. See Smith, *supra* note 90, at 279-81.

120. 38 U.S.C. § 7253(a) (2012).

121. *Id.* § 7253(c).

122. *Id.* § 7253(h)(1), (i)(1); *Four New Judges Join the CAVC*, VETERANS L.J., Winter 2005, at 1, 2, [http://www.cavcbar.net/Winter\\_2005.pdf](http://www.cavcbar.net/Winter_2005.pdf) [<https://perma.cc/E9WS-MK7H>].

123. See ANNUAL REPORT, *supra* note 89, ¶ 15. There are currently nine active judges on the court. *Judges*, U.S. COURT APPEALS VETERANS' CLAIMS, <https://www.uscourts.cavc.gov/judges.php> [<https://perma.cc/7G4Z-ZSFW>].

124. 38 U.S.C. § 7253(a), (i)(2) (2012).

In addition to temporarily increasing the number of active judges, the Chief Judge has the authority to recall retired judges to serve on the court, and this authority has been exercised previously.<sup>125</sup> Although recalling retired judges is “helpful” and enables the court to “build on the [judges’] gained experiences,”<sup>126</sup> recalled judges cannot exercise the same authority as active judges.<sup>127</sup> Retired judges who have been recalled can only serve for a maximum of ninety days<sup>128</sup> and are not allowed to vote on en banc review.<sup>129</sup> Furthermore, recalling retired judges poses logistical problems—there is not enough space or financing at the court to set up chambers with staff to support these recalled judges.<sup>130</sup>

## 2. Proposing a Statutory Amendment

Congressional action is necessary to give judges more opportunities to create more precedential opinions. Congress should consider adopting a revised statute that would permanently increase the number of judges,<sup>131</sup> without putting a ceiling on the number of judges, even though it would inevitably require a budget increase.<sup>132</sup> A ceiling serves no purpose—not even the U.S. Constitution puts a limit on the number of federal judges.<sup>133</sup> Although the Supreme

---

125. *Id.* § 7257(b)(1); see *The Challenges Facing the U.S. Court of Appeals for Veterans Claims: Hearing Before the Subcomm. on Disability Assistance & Mem’l Affairs of the Comm. on Veterans’ Affairs H.R.*, 110th Cong. (2007) (statement of John J. Hall, Chairman, subcommittee on Disability Assistance and Memorial Affairs) (referring to the recall of five retired judges).

126. *The Challenges Facing the U.S. Court of Appeals for Veterans Claims*, *supra* note 125 (statement of Hon. William P. Greene, Jr., Chief Judge, U.S. Court of Appeals for Veterans Claims).

127. 38 U.S.C. § 7257(b)(1)-(2) (2012); IOPS, *supra* note 98, ¶ VII(b)(1)(A).

128. § 7257(b)(1).

129. IOPS, *supra* note 98, ¶ VII(b)(1)(A).

130. See *The Challenges Facing the U.S. Court of Appeals for Veterans Claims*, *supra* note 125 (statement of Hon. William P. Greene, Jr., Chief Judge, U.S. Court of Appeals for Veterans Claims).

131. There is a Senate bill that proposes to permanently increase the number of judges to nine. See Veterans Court of Appeals Support Act of 2015, S. 1754, 114th Cong. § 2(a) (2015). One article proposes an increase to thirteen judges. See Ridgway et al., *supra* note 85, at 43.

132. See, e.g., CONG. BUDGET OFFICE, S. 1014 EMERGENCY JUDICIAL RELIEF ACT OF 2011, at 2-3 (2011), <https://www.cbo.gov/sites/default/files/112th-congress-2011-2012/costestimate/s10140.pdf> [<https://perma.cc/MR56-DBQL>]. But see George Everly, III & Michael L. Shenkman, *District Judges as Investments*, 53 HARV. J. ON LEGIS. 59, 61 (2016).

133. See U.S. CONST. art. III, § 1.

Court and the highest court in most states typically hear cases en banc,<sup>134</sup> most appellate courts (including the CAVC) hear cases in panels or as single judges.<sup>135</sup> When cases are heard in panels, it does not matter whether a court has nine judges or fifteen judges because the panel composition is predetermined.<sup>136</sup> There is no fear that a decision's outcome would result in a "court packing" scheme.<sup>137</sup> Aside from situations where an en banc review is required,<sup>138</sup> the number of judges in the CAVC has no negative impact on the court's decision-making power; hence, an arbitrary restriction within the statute is unnecessary.<sup>139</sup>

### 3. *Counterarguments and Justifications*

Practical limits would prevent any sudden, exponential increase in the number of judges. First, financial, logistical, and resource constraints would prevent the court from suddenly increasing judges to an unreasonable degree.<sup>140</sup> Budgets and limits on physical space would help maintain judges at a reasonable number.<sup>141</sup> Second, even if claims were to decrease over the years, and opponents thought there were too many active judges, the fifteen-year service limit would enable the court to gradually decrease the number of judges on the bench.<sup>142</sup>

---

134. Yosh Halberstam, *Trial and Error: Decision Reversal and Panel Size in State Courts*, 32 J.L. ECON. & ORG. 94, 94-95 (2016).

135. See Ridgway et al., *supra* note 85, at 10-11, 11 n.49.

136. IOPS, *supra* note 98, ¶ V(b)(1).

137. LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA 451-52 (6th ed. 2007).

138. Out of 3686 cases that were appealed to the CAVC in 2014, only one case was decided en banc, so gathering all of the CAVC judges would be a very rare occurrence. See ANNUAL REPORT, *supra* note 89, ¶ 5.

139. See, e.g., ALICIA BANNON, BRENNAN CTR. FOR JUSTICE, TESTIMONY OF ALICIA BANNON ON S. 1385, FEDERAL JUDGESHIP ACT OF 2013, at 2 (2013), <https://www.brennancenter.org/sites/default/files/analysis/Federal%20Judgeship%20Act%20Testimony.pdf> [<https://perma.cc/9YWZ-U7ND>] (demonstrating how the number of district judges must continually increase as caseloads rise).

140. See, e.g., CONG. BUDGET OFFICE, *supra* note 132, at 2-3.

141. See Rory E. Riley, *Preservation, Modification, or Transformation? The Current State of the Department of Veterans Affairs Disability Benefits Adjudication Process and Why Congress Should Modify, Rather than Maintain or Completely Redesign, the Current System*, 18 FED. CIR. B.J. 1, 20 (2008).

142. See 38 U.S.C. § 7253(c) (2012).

Another reason to increase the number of judges on the CAVC is that it is a specialized, Article I court,<sup>143</sup> so it cannot invite other federal court judges to sit by designation.<sup>144</sup> Thus, the CAVC cannot reach out to other courts' judges to sit on panels; the court is restricted to the current active judges and the recall-eligible retired judges.<sup>145</sup> At this moment, there are only nine active judges.<sup>146</sup> Even if the CAVC were able to invite other federal judges by designation, the rules and substance of the claims brought to the CAVC are specific to veterans' issues and veterans law so guest judges might not have enough knowledge to adjudicate these claims.<sup>147</sup>

#### *4. Alternative Proposal: Expanding the Role of Retired Judges*

If Congress is hesitant to suddenly increase the number of active judges, it should at least consider expanding retired judges' authority.<sup>148</sup> Although the current rules enable the CAVC to recall retired judges, their service is limited.<sup>149</sup> The limits on recalled retired judges pertaining to the time period they can serve or the scope of their authority should be removed. But if Congress were to limit retired recalled judges, it should consider tasking these judges with specific assignments, such as only sitting in on panel decisions.<sup>150</sup>

The CAVC needs to have a larger pool of active judges available so that more panels can be created. Panels would enable the court to render more precedential opinions.<sup>151</sup> With the current situation, in which there are only nine active judges and over 4000 new claims

---

143. See *Welcome*, U.S. COURT APPEALS VETERANS CLAIMS, <http://www.uscourts.cavc.gov/index.php> [<https://perma.cc/G9XW-STZM>].

144. See 28 U.S.C. § 292(a) (2012); Ridgway et al., *supra* note 85, at 44.

145. See Ridgway et al., *supra* note 85, at 44-45 ("In 2014, senior and visiting judges provided almost a quarter of the judge labor in the federal appellate courts of general jurisdiction. This amounts to fifty-one extra judges beyond the authorized strength of those courts.").

146. See *Judges*, *supra* note 123 (noting that, currently, there are nine active judges, eight senior judges, and two retired judges).

147. See Ridgway et al., *supra* note 85, at 45.

148. See 28 U.S.C. § 294(a)-(b) (2012) ("Any judge ... who has retired ... may continue to perform such judicial duties as he is willing and able to undertake.").

149. See 38 U.S.C. § 7257(b)(1).

150. See *infra* Part III.B.

151. See Smith, *supra* note 90, at 280-81.

to address each year,<sup>152</sup> it is understandable that the court would be reluctant to create panels.<sup>153</sup> Thus, Congress should consider expanding retired recalled judges' scope and authority.<sup>154</sup>

*B. Mechanism to Convert Nonprecedential Opinions to Precedential Opinions: Formation of a Special Reviewing Process*

The court could also create a mechanism through which non-precedential opinions could be converted into precedential opinions to establish more precedent. For example, a Federal Circuit Rule provides that “[w]ithin [sixty] days after any nonprecedential opinion or order is issued, any person may request, with accompanying reasons, that the opinion or order be reissued as precedential.”<sup>155</sup> The CAVC should consider adopting a similar rule. This rule allows “any person” to bring forward a request.<sup>156</sup> When applied in this context, the rule would allow a third party<sup>157</sup> who thinks that an opinion or order would work in her favor to bring forward a request so long as it is within sixty days.<sup>158</sup>

Furthermore, the Federal Circuit Rules make precedential dispositions the default, unless the panel specifically states that the disposition is not to be cited as precedent.<sup>159</sup> A rule that creates automatic precedents would not be ideal in the CAVC because too

---

152. See ANNUAL REPORT, *supra* note 89, ¶ 15; *Judges*, *supra* note 123.

153. See *supra* note 89 and accompanying text. In 2014, the median time for disposition by a single-judge was 14.1 months, whereas it took 23.5 months for multiple-judge decisions. See ANNUAL REPORT, *supra* note 89, at ¶ 6(C)-(D).

154. The budget for the CAVC will also need to be increased in order to provide more staff support to the new judges, to pay for salary and pensions, and to expand the physical space and create new chambers. See *supra* note 132 and accompanying text.

155. FED. CIR. R. 32.1(e); see also Elizabeth M. Horton, Comment, *Selective Publication and the Authority of Precedent in the United States Courts of Appeals*, 42 UCLA L. REV. 1691, 1697 & nn.23-28 (1995) (“Eight circuits allow parties or interested persons to move, for good cause, for publication of an opinion previously determined to be unpublished.”).

156. FED. CIR. R. 32.1(e).

157. In fact, the Federal Circuit Rule does consider the request's effect on third parties. See *id.* It requires the requestor to “notify the court and the *parties of any case* that person knows to be pending that would be determined or affected by reissuance as precedential. *Parties to pending cases* who have a stake in the outcome of a decision to make precedential must be given an opportunity to respond.” *Id.* (emphases added).

158. See *id.*

159. See FED CIR. R. 32.1(a)-(b).

many precedential opinions may end up producing inflexible rules.<sup>160</sup> But a mechanism that allows nonprecedential opinions to be converted into precedential opinions, after a period of deliberation, would be helpful.<sup>161</sup> Although some scholars are skeptical about a process to convert nonprecedential CAVC opinions to precedent because “judges ... alone cannot create new precedents.... [and] [i]n order to make a CAVC single-judge disposition precedential, the matter would need to be referred to a panel of the Court for further proceedings,”<sup>162</sup> current and retired judges can create a special reviewing panel to overcome this concern.

### *1. Justification for Creating a Special Reviewing Process*

In many instances, it may be difficult for parties or judges to decide at first blush whether a decision should be precedential.<sup>163</sup> Rather than forcing a single screening judge to make the determination at the front end of the process, the opinion’s weight should be reconsidered once a decision is rendered.<sup>164</sup> Because there are only nine active judges on the court,<sup>165</sup> who together decided 6547 cases in fiscal year 2014,<sup>166</sup> resources are scarce. So, this new mechanism

---

160. The CAVC should not automatically consider all dispositions as precedents by default because of the very different case volumes at the Federal Circuit and the CAVC. For example, the Federal Circuit terminated 1678 cases between October 2015 and September 2016, whereas the CAVC disposed of 6547 cases in fiscal year 2014. Compare U.S. COURT APPEALS FOR THE FEDERAL CIRCUIT, YEAR-TO-DATE ACTIVITY AS OF SEPTEMBER 30, 2016, [http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/revYTD\\_Activity\\_9.30.16.pdf](http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/revYTD_Activity_9.30.16.pdf) [<https://perma.cc/AZQ2-4Z6R>], with ANNUAL REPORT, *supra* note 89, ¶ 4.

Furthermore, the majority of cases terminated by the Federal Circuit were from Article I courts (established through the U.S. Constitution); whereas cases appealed to the CAVC were from an administrative tribunal, which is set up less formally. See U.S. COURT OF APPEALS FOR VETERANS CLAIMS, COURT PROCESS, <https://www.uscourts.cavc.gov/documents/CourtProcessFull.pdf> [<https://perma.cc/27U6-TFRX>]; YEAR-TO-DATE ACTIVITY AS OF SEPTEMBER 30, 2016, *supra*.

161. See, e.g., Thomas Froats, *Unrepresentative Randomization: An Empirical Study of Judging Panels of USPTO Appeals to the CAFC*, 19 TEX. INTELL. PROP. L.J. 79, 91-92 (2010) (“[I]t may be difficult or even impossible to determine prior to the assignment of judging panels if a case will become precedential or not.”).

162. See Smith, *supra* note 90, at 281.

163. See, e.g., Froats, *supra* note 161, at 91-92.

164. See *id.*

165. See *Judges*, *supra* note 123.

166. See ANNUAL REPORT, *supra* note 89, ¶ 4.

considers the type of cases brought to review, the formation of the reviewing panel, and the timing of the reviewing process.

## *2. How the Special Reviewing Process Works*

The new reviewing process for converting nonprecedential opinions to precedential opinions would work in the following way. First, the CAVC would adopt a new rule akin to Federal Circuit Rule 32.1(e).<sup>167</sup> The rule would allow any person—the parties, the government, third parties, or even other judges—to file a request that a nonprecedential opinion be converted into a precedential opinion.<sup>168</sup> The reviewing panel would then review the recommended case and assess its likely effect. The panel would then clarify the legal issues and ultimately decide on a new binding, legal standard.

Two recall-eligible retired judges and one active judge should sit on the reviewing panel. Because the retired judges would have had fifteen years on the court,<sup>169</sup> they would be the most experienced in identifying the legal issues that need clarification. Including an active judge (ideally one who had dealt with the issue that was raised to the panel review) would create continuity. Moreover, the panels can be composed based on the topic that the panels will discuss to create more efficiency and expertise. Perhaps some judges are more used to handling issues regarding post-traumatic stress disorder claims, whereas others have rendered more opinions on total disability ratings based on individual unemployability. Hence, mixing judges with different backgrounds and years of experience would create a robust and thorough reviewing system that would help pave the way to establishing precedential opinions.

The reviewing process could happen either as frequently as once every quarter, or as little as once a year.<sup>170</sup> Furthermore, the judges

---

167. See FED. CIR. R. 32.1(e).

168. For nonparties who file a request, this may seem to pose a “case” or “controversy” issue because it is similar to asking the judges to issue an advisory opinion, but by creating a rule similar to Federal Circuit Rule 32.1, this reviewing process can be viewed as an *extension* of the appeals process and so it would not be treated as a new and separate claim. See U.S. CONST. art. III, § 2, cl. 1.

169. See 38 U.S.C. § 7253(c) (2012).

170. Because the reviewing process would aggregate the same issues from different cases, the rule should provide an “appealing” period of at least 365 days, rather than the 60 days provided by the Federal Circuit Rule. See FED. CIR. R. 32.1(e).



could decide whether there should be multiple reviewing processes that go on simultaneously, or if there should only be one active panel review at a time.

Because there are currently eight recall-eligible retired judges<sup>171</sup> and nine active judges,<sup>172</sup> if one active judge and two retired judges were to compose a panel, then the court would immediately have four panels. Five active judges would have no panel duty. If only one panel were to meet once a year—discussing only one issue—then it could create a minimum of one precedential opinion. An active judge would only have to serve once every eight years in this scenario, and a retired judge would only have to serve once every two years. If all four panels were to meet once every quarter—addressing only one issue per meeting—the court would have sixteen precedential opinions. This would require an active judge to sit on a panel twice a year, and a retired judge would have to sit in every review process. Depending on the reviewing process's frequency, the new mechanism would allow the court to render up to sixteen binding opinions which would be a 25 percent increase in the number of precedential opinions at the CAVC.<sup>173</sup>

### CONCLUSION

Veterans face delays at every step of the process. They need a solution to the backlog problem that has prevented thousands of them from obtaining quick and efficient justice. The CAVC would have to expend lots of time and resources if it were to create new rules for class action lawsuits and certifying classes. Instead, the CAVC should use its limited resources to improve the current situation.

Thus, the VA should consider increasing the number of precedential opinions because this would create a more streamlined process for cases on appeal. Having a clearer set of legal rules would help the court make quicker decisions, and it would also discourage claimants from bringing forward unmeritorious claims. Although

---

171. *See Judges, supra* note 123.

172. *See id.*

173. Between fiscal years 2013-2014, the CAVC issued 75 published opinions, so 16 new precedential opinions would be a 25 percent increase. *See Ridgway et al., supra* note 85, at 11.

the proposed plans would require an increased budget, they would allow for a realistic approach to decrease the backlog.<sup>174</sup>

To expand the number of precedents, one proposal is to encourage congressional action that revises the statute governing the number of judges. Generally, an increase in the number of judges will help the court decide more cases.<sup>175</sup> Even if the court were to maintain the current number of judges, Congress could consider increasing and expanding recall-eligible judges' authority.<sup>176</sup> If these judges can help form panels, then, naturally, the court would be able to increase the number of precedential opinions.<sup>177</sup> Furthermore, setting up a new mechanism that allows the court to convert certain "nonbinding" opinions to "binding" opinions would also increase precedential opinions.<sup>178</sup> Rather than focusing energy on class action lawsuits at the CAVC, the VA should issue more binding, precedential opinions to tackle the backlog problem.

*Natsumi Antweiler\**

---

174. *See supra* notes 130, 140-41 and accompanying text.

175. *See supra* Part III.A.

176. *See supra* Part III.A.4.

177. *See supra* Part III.B.

178. *See supra* Part III.B.

\* I would like to thank the editors and staff of the *William & Mary Law Review* for their tremendous help in editing this Note for publication. I would also like to thank Professor David E. Boelzner for inspiring me to write about this topic—my experience at the Lewis B. Puller, Jr. Veterans Benefits Clinic has been one of the greatest highlights of law school. Finally, thank you to my husband and family for their unwavering love and support.