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## Review of Recent Veterans Law Decisions of the Federal Circuit

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## Review of Recent Veterans Law Decisions of the Federal Circuit

### Abstract

The last in-depth review of veterans law cases decided by the Federal Circuit was published by the *American University Law Review* in 2015. Since that time, the Federal Circuit has substantially changed procedural rules applicable to veterans cases, including authorizing the use of the class action device and clarifying the correct standard to use when challenging agency delay and inaction. In an important case with wide application to administrative law generally, the Federal Circuit addressed the issue of proper deference for agency regulations and policies. The Supreme Court granted certiorari in *Kisor v. Wilkie* and reaffirmed principles articulated in *Auer v. Robbins* and *Bowles v. Seminole Rock & Sand Co.*, articulating a new three-step analysis. With regard to substantive developments in the area of veterans law, the Federal Circuit reversed a prior 2008 decision and provided final and effective relief for “Blue Water” Navy Veterans who have long fought for Agent Orange-related benefits. It is a remarkable time to be a veterans advocate, and we are pleased to provide this update.

## REVIEW OF RECENT VETERANS LAW DECISIONS OF THE FEDERAL CIRCUIT

ANGELA DRAKE,\* YELENA DUTERTE\*\* & STACEY RAE SIMCOX\*\*\*

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## INTRODUCTION

In order to appreciate the significance of the cases discussed below, a brief overview of federal veterans benefits law is beneficial. There are three key features of this unique area of law to understand.

First, veterans benefits law is the creature of a robust federal statutory and regulatory scheme. It is unlike any other adjudicatory system. Indeed, “the contrast between ordinary civil litigation . . . and the system that Congress created for the adjudication of veterans benefits claims could hardly be more dramatic.”<sup>1</sup> The system is uniquely pro-claimant.<sup>2</sup> Proceedings before the United States Department of Veterans Affairs (VA) are informal and nonadversarial.<sup>3</sup>

Second, the VA is statutorily obligated to help the veteran by developing evidence to support the claim and by giving the veteran the benefit of the doubt in deciding the claim.<sup>4</sup> The statutory “duty to assist” includes providing a medical examination and/or obtaining a medical opinion whenever such proof is necessary to make a decision on the claim.<sup>5</sup> Most significantly, in evaluating the evidence, the VA must give the veteran the benefit of the doubt.<sup>6</sup> By its very terms, this evidentiary standard is far more lenient than other standards, including “to a reasonable degree of medical certainty,” “beyond a reasonable doubt,” or “by a preponderance of the evidence.”

Third, the VA struggles with high error rates that lead to substantial delays for veterans. Prior to the 2017 Veterans Appeals Improvement and Modernization Act (Appeals Modernization Act),<sup>7</sup> benefits

1. *Henderson v. Shinseki*, 562 U.S. 428, 440 (2011).

2. *See Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998) (finding that the United States Court of Appeals for the Federal Circuit and the United States Supreme Court “both have long recognized that the character of the veterans’ benefits statutes is strongly and uniquely pro-claimant”).

3. *Id.*

4. “The VA is charged with the responsibility of assisting veterans in developing evidence that supports their claims . . .” *Henderson*, 562 U.S. at 440; *see* 38 U.S.C. § 5103A(a) (2012) (“The Secretary shall make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant’s claim for a benefit under a law administered by the Secretary.”).

5. § 5103A(d)(1).

6. “When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant.” § 5107(b); *Henderson*, 562 U.S. at 440.

7. Veteran Appeals Improvement and Modernization Act of 2017, 115 Pub. L. No. 115-55, 131 Stat. 1105 (2017). It is too early to know whether this act has successfully reduced average length of appeal.

appeals took seven years on average, according to the VA's own statistics.<sup>8</sup> One in fourteen veterans died while waiting for the resolution of his or her appeal.<sup>9</sup> Numerous reports by the Office of the Inspector General have documented a myriad of problems in the system, including the use of incompetent medical examiners for claims involving traumatic brain injuries (TBI)—the signature wound of the War on Terror;<sup>10</sup> lost and missing claims documents;<sup>11</sup> and erroneous adjudication of military sexual trauma claims.<sup>12</sup>

#### I. BRIEF BACKGROUND ON THE COURT OF APPEALS FOR VETERANS CLAIMS

Prior to 1988, decision making in the Department of Veterans Affairs was a two-tiered administrative system. Decisions rendered by the VA's Board of Veterans Appeals ("the Board" or "Board") were not subject to judicial review. The Federal Circuit described this era in *Gardner v. Brown*<sup>13</sup> as one of "splendid isolation," where Board decisions were free from judicial scrutiny.<sup>14</sup>

The rationale underlying this freedom from judicial review was based on the premise that the VA claims adjudication process should remain nonadversarial in nature.<sup>15</sup> Congress was concerned that adding judicial review to the VA's decisions (and, by implication, attorneys to press veterans' claims) would add an element of antagonism into the system. This fear loomed large in every discussion Congress had regarding changes in the system.<sup>16</sup> Congressional

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8. Ben Kesling, *Hundreds of Thousands of Veterans' Appeals Dragged out by Huge Backlog*, WALL ST. J. (Aug. 22, 2018, 7:00 AM), <https://www.wsj.com/articles/hundreds-of-thousands-of-veterans-appeals-dragged-out-by-huge-backlog-1534935600> [<https://perma.cc/UZK5-XGCV>].

9. *Id.*

10. DEP'T OF VETERAN AFF.: OFF. OF THE INSPECTOR GEN., REP. NO. 16-04558-249, VA POLICY FOR ADMINISTERING TRAUMATIC BRAIN INJURY EXAMINATIONS i–ii (2018).

11. DEP'T OF VETERAN AFF.: OFF. OF THE INSPECTOR GEN., REPORT NO. 18-01214-157, HEALTH INFORMATION MANAGEMENT MEDICAL DOCUMENTATION BACKLOG i–ii (2019).

12. DEP'T OF VETERAN AFF.: OFF. OF THE INSPECTOR GEN., REPORT NO. 17-05248-241, DENIED POSTTRAUMATIC STRESS DISORDER CLAIMS RELATED TO MILITARY SEXUAL TRAUMA i–ii (2018).

13. 5 F.3d 1456 (Fed. Cir. 1993), *aff'd*, 513 U.S. 115 (1994).

14. *Id.* at 1463 (citing H.R. REP. NO. 100-963, pt. 1, at 10 (1988)); *see also* *Brown v. Gardner*, 513 U.S. 115, 122 (1994).

15. Stacey-Rae Simcox, *Thirty Years of Veterans Law: Welcome to the Wild West*, 67 U. KAN. L. REV. 513, 517 (2019).

16. *Id.* at 518.

conversation on this subject lasted for over thirty-five years.<sup>17</sup> Finally, the general public's concerns about the VA's failing adjudication system led to a compromise which allowed for the creation of a federal court with the power to review the Board's decisions.<sup>18</sup>

In 1988, President Reagan signed the Veterans' Judicial Review Act<sup>19</sup> into law, creating the United States Court of Appeals for Veterans Claims (CAVC) as an Article I court.<sup>20</sup> Currently, the CAVC has a total of nine judges, each of whom serve for a fifteen-year term.<sup>21</sup>

The CAVC has exclusive jurisdiction to review decisions of the Board.<sup>22</sup> Specifically, the court may: (1) decide all relevant questions of law; (2) interpret constitutional, statutory, and regulatory provisions; (3) determine the meaning or applicability of the terms of an action of the Secretary of Veterans Affairs ("the Secretary"); (4) compel action of the Secretary unlawfully withheld or unreasonably delayed; (5) hold unlawful and set aside decisions, findings, conclusions, rules and regulations adopted by the Secretary or the Board that are arbitrary and capricious, an abuse of discretion, contrary to constitutional right, or in excess of statutory authority, among other things; and (6) hold unlawful and set aside or reverse clearly erroneous findings of material fact made by the VA.<sup>23</sup>

Limited appellate jurisdiction over CAVC decisions lies in the Federal Circuit. The Federal Circuit has exclusive jurisdiction to review and decide any challenge to the validity or interpretation of any statute or regulation and to interpret constitutional and statutory provisions related to veterans' claims.<sup>24</sup> The Federal Circuit also has the authority

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17. Lawrence B. Hagel & Michael P. Horan, *Five Years Under the Veterans' Judicial Review Act: The VA Is Brought Kicking and Screaming into the World of Meaningful Due Process*, 46 ME. L. REV. 43, 44 (1994).

18. S. REP. NO. 100-418, at 30-31 (1988) (opening statement of Chairman Alan Cranston, Senate Committee on Veterans' Affairs).

19. Veterans' Judicial Review Act, Pub. L. No. 100-687, § 301, 102 Stat. 4105 (1988).

20. *Id.* The CAVC was previously referred to as the Court of Veterans Appeals. *See generally* Simcox, *supra* note 15, at 513-14.

21. 38 U.S.C. § 7253(a)-(c), (h) (5) (i) (1) (2012).

22. § 7252(a).

23. § 7261(a). The "clearly erroneous" standard differs slightly from the Administrative Procedures Act's "arbitrary and capricious" standard applied to questions of fact. *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989) (referring to 5 U.S.C. § 706 (1988)).

24. 38 U.S.C. § 7261(c).

to set aside regulations and interpretations which are arbitrary, capricious, an abuse of discretion, or otherwise unlawful.<sup>25</sup>

However, the Federal Circuit cannot review challenges to a factual determination or to a law or regulation as applied to the facts of a particular case, unless it presents a constitutional issue.<sup>26</sup> The Federal Circuit does have the authority to affirm, modify, remand, or reverse a decision of the CAVC.<sup>27</sup>

The Federal Circuit does not often make decisions in the area of veterans law. However, when it does, the decision often impacts hundreds of thousands of veterans. The Federal Circuit's decisions can overturn decades of case law in one fell swoop.

## II. AUER DEFERENCE SURVIVES

Since the 2010 term, only one veterans law case, *Kisor v. Wilkie*,<sup>28</sup> has been decided by the Supreme Court of the United States. In *Kisor*, the question presented to the Court was whether it should overrule *Auer v. Robbins*<sup>29</sup> and *Bowles v. Seminole Rock & Sand Co.*<sup>30</sup> The Court did not overrule *Auer* or *Seminole Rock*;<sup>31</sup> instead it developed a more thorough test to help courts review agency interpretation of the agency's own regulations.<sup>32</sup> In her opinion, Justice Kagan acknowledged that, in the past, the Supreme Court sent mixed messages regarding *Auer* deference and clarification and guidance was in order.<sup>33</sup>

Before discussing the details of the *Kisor* opinion, Section II.A of this Article will explain the history of *Auer* and *Seminole Rock* deference. Then, Section II.B will discuss *Kisor*'s framework for future cases involving issues relating to agency regulations.

### A. The History of Auer Deference

*Bowles v. Seminole Rock & Sand Co.* preceded the Supreme Court's decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>34</sup> by approximately four decades but did not offer any specific explanation

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25. *Id.* § 7261(d).

26. *Id.*

27. *Id.* § 7261(b).

28. No. 18-15, slip op. 1, 28–29 (2019).

29. 519 U.S. 452 (1997).

30. 325 U.S. 410 (1945).

31. *Kisor*, slip op. at 29.

32. *Id.*

33. *Id.*

34. 467 U.S. 837, 842–43 (1984).



for the circumstances requiring deference to an agency's interpretation of its own ambiguous regulation.<sup>35</sup> In the most common explanation of the *Seminole Rock* standard, an agency interpretation of its own regulation is controlling unless its reading is plainly erroneous or inconsistent with the regulation.<sup>36</sup>

In 1997, the Supreme Court reaffirmed the Court's view of *Seminole Rock* in *Auer*. In *Auer*, the petitioners were sergeants and lieutenants of the St. Louis police force who were seeking payment for overtime pay under the Federal Labor Standards Act.<sup>37</sup> The St. Louis Board of Police Commissioners argued that the petitioners were not entitled to overtime pay because they fell under the "bona fide executive, administrative, or professional" employee exemption in the federal statute.<sup>38</sup> Under the Department of Labor's regulations, exempt status is also measured by whether the employee is paid on a salary-basis.<sup>39</sup> The officers argued they were not truly salaried employees, because their income could be reduced based on disciplinary infractions.<sup>40</sup>

The Secretary of Labor, in an amicus curiae brief, interpreted the salary-basis test articulated in the regulation to deny exempt status where employees are covered by a policy that permits disciplinary or deductions in pay as a practical matter.<sup>41</sup> The Secretary of Labor explained that if an actual practice or an employment policy created a significant likelihood of a pay cut, the exemption would not apply.<sup>42</sup> The Court, with Justice Scalia writing, found that because this test is a creature of the Secretary of Labor's own regulations, its interpretation is controlling unless plainly erroneous or inconsistent with the regulation.<sup>43</sup>

Since *Auer*, courts have followed Justice Scalia's roadmap with regard to agency interpretation of its own regulations.<sup>44</sup> Specifically, courts will defer to the agency's interpretation of its own ambiguous regulation, unless the interpretation is clearly erroneous.<sup>45</sup> However, since 2011, the Supreme Court has signaled increasing skepticism

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35. *Id.*; see also *Seminole Rock*, 325 U.S. at 414.

36. *Seminole Rock*, 325 U.S. at 414.

37. *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

38. *Id.* at 455 (citing 29 U.S.C. § 213(a)(1) (1994)).

39. *Id.* at 461.

40. *Id.* at 462.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 461.

45. *Id.*

about the future of *Auer*.<sup>46</sup> *Kisor* created the perfect storm for the Court to reconsider the two-decade *Auer* precedent.

### B. *Kisor Fails to Overturn Auer*

The Supreme Court's most recent foray into reexamining *Auer* arose in the context of a veteran's claim for disability compensation. In *Kisor*, the Court was presented with the Secretary of the VA's interpretation of an ambiguous regulation, 38 C.F.R. § 3.156(c)(1), and the meaning of the word "relevant" in the context of the case.<sup>47</sup> The regulation provides, "at any time after VA issues a decision on a claim, if VA receives or associates with the claims file *relevant* official service department records that existed and had not been associated with the claims file when VA first decided the claim, VA will reconsider the claim . . . ."<sup>48</sup> Significantly, the regulation allows for the effective date of the award of the benefits to date back to the submission of the original claim if relevant official service department records are associated with the file.<sup>49</sup>

The claimant, James Kisor, originally filed a claim for benefits in 1982 for post-traumatic stress disorder (PTSD).<sup>50</sup> At that time, the VA denied his claim because he lacked a diagnosis.<sup>51</sup> In 2006, Mr. Kisor reapplied and presented two new service records and a current diagnosis.<sup>52</sup> The VA granted the claim but established the effective date for payment as 2006, not 1982.<sup>53</sup> Mr. Kisor argued that the effective date should be 1982, not 2006, because the records existed and were

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46. See *Decker v. Nw. Env'tl. Def. Ctr.*, 568 U.S. 597, 617 (2013) (Scalia, J., concurring) ("Two terms ago, in my separate concurrence in *Talk America*, I expressed doubts about the validity of [*Auer*]. In that case, however, the agency's interpretation of the rule was also the fairest one, and no party had asked us to reconsider *Auer*. Today, however, the Court's deference to the Agency makes the difference (note the Court's defensive insistence that the Agency's interpretation need not be 'the best one'). And respondent has asked us, if necessary, to 'reconsider *Auer*.' I believe that it is time to do so.") (citation omitted); *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 158–59 (2012); *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 69 (2011) (Scalia, J., concurring).

47. *Kisor v. Wilkie*, No. 18-15, slip op. 1, 2 (2019).

48. 38 C.F.R. § 3.156(c)(1) (2019) (emphasis added).

49. *Id.* § 3.156(c)(3). The effective date of a claim may bear significantly on the value of the claim and result in a substantial discrepancy in benefits awarded upon review.

50. *Kisor*, slip op. at 2.

51. *Id.*

52. *Id.*

53. *Id.*

not associated with his claim file at the VA. Mr. Kisor's reading of the regulation required the earlier effective date. Reviewing his argument, the Board found that the later associated service records were not "relevant" because they did not relate to the reason for the 1982 denial.<sup>54</sup> Here, the agency's interpretation of the regulation came directly from the Board's decision.<sup>55</sup>

At the Federal Circuit, the court determined *Auer* deference applied to the Agency's interpretation.<sup>56</sup> Specifically, the Federal Circuit found that the term "relevant" was ambiguous and determined that the Board's interpretation was not plainly erroneous or inconsistent.<sup>57</sup> Mr. Kisor appealed to the Supreme Court.<sup>58</sup>

At the Supreme Court, Mr. Kisor argued that *Auer* deference is a violation of the separation of powers clause in the U.S. Constitution because the governmental branch that makes the laws should not be the one to also interpret the laws it makes.<sup>59</sup> Mr. Kisor argued that if deference to interpretation should be allowed, it should be based upon a more formal manner of conveying a definition of the terms.<sup>60</sup> According to Mr. Kisor, only those definitions which result from Administrative Procedures Act<sup>61</sup> (APA) notice and comment procedures should be accepted by a court.<sup>62</sup>

The Solicitor General, perhaps sensing that the Court was considering reviewing *Auer*, argued that *Seminole Rock* and *Auer* raise significant concerns under the APA and lack clear historical precedent.<sup>63</sup> The government urged the Court to impose limits on agency deference to force agencies to commit to better rule making, stopping short of requesting the court to overrule *Seminole Rock* and *Auer* completely. Overruling these cases would open the floodgates, as thousands of cases relying on these precedents may have to be litigated again.<sup>64</sup> The government also argued that agency interpretation of its

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54. *Id.*

55. *Id.*

56. *Kisor v. Shulkin*, 869 F.3d 1360, 1367 (Fed. Cir. 2017), *vacated and remanded*, *Kisor* slip op. at 2424.

57. *Id.*

58. *Kisor*, slip op. at 3.

59. *Id.* at 19.

60. *Id.*

61. *Id.* at 22.

62. *Id.*

63. Brief of Respondent at 14, *Kisor v. Wilkie*, No 18-15 (2019).

64. *Id.*

own regulation should only be considered when the interpretation represents the view of the agency as a whole and not the view of a single employee such as the Veterans Law Judge in Mr. Kisor's case.<sup>65</sup>

In *Kisor*, the Supreme Court ultimately decided to uphold *Auer* deference<sup>66</sup> However, *Kisor* provides needed guidance for courts presented with the important issues arising from agency interpretation of its own regulations. Justice Kagan, writing for the Court, outlines a three-step test.<sup>67</sup> First, the court must determine whether there is genuine ambiguity in the regulatory language.<sup>68</sup> Second, if ambiguity exists, the interpretation of the regulation must be a reasonable interpretation.<sup>69</sup> Third, even if the interpretation is reasonable, the court must determine whether that interpretation is entitled to controlling weight.<sup>70</sup>

With regard to the first step, the Supreme Court instructs lower courts to exhaust all traditional rules of construction to determine whether regulatory language is genuinely ambiguous.<sup>71</sup> Although the Court did not exhaustively describe these traditional tools, most courts look to the natural reading or ordinary understanding of the disputed word.<sup>72</sup> Additionally, courts will look to the statutory context in which the term is used and the original intent of the drafter or agency.<sup>73</sup>

If no ambiguity exists, a court should apply the plain meaning of the word or phrase that is in dispute.<sup>74</sup> Thus, courts do not have to give deference to an agency's interpretation of its own regulations if the regulation is unambiguous.<sup>75</sup>

With regard to the second *Kisor* step, if a court finds a genuine ambiguity in the regulatory language, a court must determine whether the agency interpretation is reasonable.<sup>76</sup> This framework is

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65. *Id.* at 12, 27, 46.

66. *Kisor*, slip op. at 29.

67. *Id.* at 13–15.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. See VALERIE BRANNON & JARED COLE, CONG. RESEARCH SERV., R44954, CHEVRON DEFERENCE: A PRIMER 17 (2017) (describing judges' methods of determining the "natural reading" or "ordinary understanding" of the word at issue, including reference to dictionaries).

73. *Id.*

74. *Kisor*, slip op. at 14.

75. *Id.*

76. *Id.*

reminiscent of the *Chevron* analysis.<sup>77</sup> If the interpretation is unreasonable, a court does not need to give deference to the agency's interpretation.<sup>78</sup> However, even if the interpretation is reasonable, a court must still move to step three.<sup>79</sup> This final step is the biggest shift from the traditional *Auer* deference.

The third and final step requires a court to determine whether the agency's interpretation is entitled to controlling weight.<sup>80</sup> There are several factors a court should consider on this point, including whether the interpretation is the agency's official position, implicates the agency's substantive expertise, and shows fair and considered judgment.<sup>81</sup> Unlike *Auer*, *Kisor* allows the court to review the agency's process in creating its guidance and determine whether deference is proper in that context.<sup>82</sup>

In light of the newly articulated test, the Supreme Court remanded *Kisor*. On remand, the Federal Circuit must first determine whether ambiguity actually exists as to the term "relevant."<sup>83</sup> If no ambiguity exists, the analysis stops and the plain meaning would apply.<sup>84</sup> If the term "relevant" is ambiguous, the Federal Circuit must determine whether the VA Secretary's interpretation is reasonable.<sup>85</sup> If unreasonable, the analysis would stop and no deference would be afforded to the VA Secretary.<sup>86</sup> However, if the Federal Circuit finds the interpretation reasonable, it must analyze whether Congress would want the interpretation by the Board of Veterans Appeals to be given deference as the agency's decision on the proper interpretation.<sup>87</sup> In this regard, the Court pointed out that the Board consists of 100 veteran law judges who individually review cases.<sup>88</sup> Further, the Court discussed that Board decisions are of nonprecedential value.<sup>89</sup> Given these facts, the Supreme Court directed the Federal Circuit to determine whether the

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77. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

78. *Kisor*, slip op. at 14.

79. *Id.* at 15.

80. *Id.*

81. *Id.*

82. *Id.* at 15–17.

83. *Id.* at 13.

84. *Id.* at 14.

85. *Id.* at 15.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

interpretation of regulatory language by this level of agency personnel should be accorded deference under the new *Kisor* test.<sup>90</sup>

Looking forward, *Kisor* deference will likely lead to more robust criticism and legal challenges to agencies and their interpretations of their own regulations. *Kisor* will require courts to analyze how the agency reached its interpretation, not simply rely on the agency's interpretation however made.

### III. FEDERAL CIRCUIT'S REVIEW OF VA'S INTERNAL MANUAL, M21-1

In 2016, Disabled American Veterans (DAV) petitioned the Federal Circuit to review a provision of the VA Adjudication Procedures Manual M21-1 ("the M21").<sup>91</sup> As detailed below, the M21 is the VA's internal manual, used by adjudicators and cited by the Board on occasion.

DAV's challenge arose from federal law that provides a presumption for Persian Gulf veterans with a medically unexplained chronic multisymptom illness ("MUCMI").<sup>92</sup> The VA regulations implementing this law define a MUCMI as "a diagnosed illness *without conclusive pathophysiology or etiology*."<sup>93</sup> However, in 2015, the VA changed the M21 to require both an inconclusive pathophysiology *and* an inconclusive etiology to meet the definition of a MUCMI.<sup>94</sup> Further, the amended M21 added an example that provided that sleep apnea could not be a MUCMI.<sup>95</sup> Although many advocates agreed that the M21 misinterpreted the regulation, the Federal Circuit found that it did not have jurisdiction to review the VA's internal manual.<sup>96</sup>

In a separate case, *Gray v. Secretary of Veterans Affairs*,<sup>97</sup> the veteran petitioned the Federal Circuit to review a provision of the M21 related to Agent Orange.<sup>98</sup> Congress enacted statutes providing for presumptive service connection for veterans who served in the Republic of Vietnam during the Vietnam era and suffered from a disease on the list of illnesses determined to be related to Agent

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90. *Id.*

91. *Disabled Am. Veterans v. Sec'y of Veterans Affairs*, 859 F.3d 1072, 1074 (Fed. Cir. 2017).

92. 38 U.S.C. § 1117 (2012).

93. 38 C.F.R. § 3.317(a)(2)(ii) (2017).

94. *Disabled Am. Veterans*, 859 F.3d at 1074.

95. *Id.*

96. *Id.*

97. 875 F.3d 1102, 1104 (Fed. Cir. 2017), *vacated*, 774 F. App'x 678 (2019).

98. *Id.*

Orange exposure.<sup>99</sup> In 2016, the VA updated the M21 to also exclude veterans who served in bays, harbors, and ports of Vietnam.<sup>100</sup> Again, because the new interpretation is located in the VA's internal manual, the M21, the Federal Circuit found that it did not have jurisdiction to review these policies.<sup>101</sup>

Before discussing the Federal Circuit's conclusion that it lacked jurisdiction to review the VA's internal manual, Section III.A. of this Article below will discuss in further detail the M21 and its use in the VA's system. Section III.B. will discuss prior Federal Circuit jurisprudence relating to the judicial review of agency action. Finally, Section III.C. will focus on the Court's finding in *Gray* and its impact on veterans law in the future.

#### A. *The M21-1 Manual*

The VA consolidates and explains its policies and procedures in an internal manual, the M21.<sup>102</sup> The M21 is not published in the Federal Register or the Code of Federal Regulations.<sup>103</sup> The VA explains, the M21 is issued by the Chief Benefits Director and its provisions are intended to provide uniform procedures for adjudication of claims.<sup>104</sup> The M21 specifically provides guidance for Veterans Benefits Administration (VBA) employees, who adjudicate claims and appeals.<sup>105</sup> The VA has explicitly concluded that the M21 does not constitute the instructions of the Secretary, and its provisions are not binding on the Board.<sup>106</sup> Further, the M21 is currently in electronic form and is amended on a regular basis.<sup>107</sup> As of November 20, 2019, the VA changed the M21 365 times in 2019 alone.<sup>108</sup>

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99. 38 U.S.C. § 1116(a) (2012).

100. *Id.*

101. *Gray*, 875 F.3d at 1104.

102. *Disabled Am. Veterans v. Sec'y of Veterans Affairs*, 859 F.3d 1072, 1074 (Fed. Cir. 2017).

103. *Id.*

104. *Vet. Aff. Op. Gen. Couns. Prec. 7-92* (1992) (internal quotations omitted).

105. *Disabled Am. Veterans*, 859 F.3d at 1074.

106. *Id.* at 1077.

107. *M21-1 Changes by Date*, U.S. DEP'T OF VETERANS AFF., [https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va\\_ssnew/help/customer/locale/en-US/portal/55440000001018/content/554400000100821/Changes%20by%20Date](https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/55440000001018/content/554400000100821/Changes%20by%20Date) [https://perma.cc/BZA3-Z8VE].

108. *Id.*

In the M21, the VA outlines the various steps that an adjudicator must take in each case.<sup>109</sup> For example, the M21 reviews how to classify mail and what type of action should be taken when a piece of mail is received, including prioritizing mail from Congress, action mail that requires the VA to respond, and filing mail that does not necessitate a response.<sup>110</sup> However, *Disabled American Veterans* and *Gray* illustrate situations in which the M21 is more than just a procedural manual and negatively impacts a veteran's rights under federal law.

*B. The Federal Circuit's Authority to Review the VA's Actions*

Under the APA, rules promulgated by an agency can be challenged.<sup>111</sup> The APA requires agencies to publish certain rules in advance of their effective date so that stakeholders can provide input on the regulations.<sup>112</sup> However, the APA does not apply to rules of procedure, statements of general policy, and interpretations of general applicability.<sup>113</sup> Specifically, an interpretative rule is exempt from notice and comment rulemaking.<sup>114</sup> An interpretative rule simply indicates an agency's reading of a statute or a rule and does not create new rights or remedies.<sup>115</sup> As a result, the APA notice and comment provisions do not apply if the policy is labeled "interpretive."

Under 38 U.S.C. § 502, an action by the Secretary of the U.S. Department of Veterans Affairs under § 552(a)(1) or § 553 of title 5 is subject to judicial review directly to the Federal Circuit, bypassing the CAVC.<sup>116</sup> Section 552(a)(1) requires that all substantive rules of general applicability and statements of general policy or interpretation of general applicability must be published in the Federal Register.<sup>117</sup>

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109. See generally *M2-1 Adjudication Procedures Manual*, U.S. DEP'T OF VETERANS AFF., [https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va\\_ssnew/help/customer/locale/en-US/portal/55440000001018/content/55440000073398/M21-1,%20Adjudication%20Procedures%20Manual,%20Table%20of%20Content](https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/55440000001018/content/55440000073398/M21-1,%20Adjudication%20Procedures%20Manual,%20Table%20of%20Content) [https://perma.cc/648M-XH6M].

110. *M21-1 III.ii.1.B.2.a*, U.S. DEP'T OF VETERANS AFF., [https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va\\_ssnew/help/customer/locale/en-US/portal/55440000001018/content/55440000014111/M21-1,-Part-III,-Subpart-ii,-Chapter-1,-Section-B-Mail-Management](https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/55440000001018/content/55440000014111/M21-1,-Part-III,-Subpart-ii,-Chapter-1,-Section-B-Mail-Management) [https://perma.cc/5ZA6-2Y54].

111. 5 U.S.C. § 704 (2012).

112. *Paralyzed Veterans of Am. v. West*, 138 F.3d 1434, 1435 (Fed. Cir. 1998).

113. *Id.*

114. *Splane v. West*, 216 F.3d 1058, 1064 (Fed. Cir. 2000).

115. *Id.* at 1063.

116. 38 U.S.C. § 502.

117. 5 U.S.C. § 552(a)(1)(D).



Section 553 refers to agency rulemaking that must comply with notice and comment procedures.<sup>118</sup>

Previously, the Federal Circuit reviewed a challenge to a Veterans Health Administration directive because the directive was not published for notice and comment in the Federal Register before adoption, as required under § 553.<sup>119</sup> Reviewing the directive under § 552(a)(1), the Federal Circuit explained that § 552(a)(1) does not only require publication of substantive rules but also statements of general policy and interpretations of general applicability.<sup>120</sup> However, rules created under § 552(a)(2) are exempt from judicial review under 38 U.S.C. § 502 because they are not published in the Federal Register.<sup>121</sup> Under § 552(a)(2), the statute allows agencies to publish rules available for public inspection in electronic format, including statements of policy and interpretation that have been adopted by the agency but are not published in the Federal Register.<sup>122</sup> Additionally, administrative staff manuals and instructions to staff that affect a member of the public are also not reviewable under § 502.<sup>123</sup>

Due to § 502's limiting jurisdiction, the Federal Circuit can only review those matters that are published in the Federal Register or rules subject to notice and comment under § 553, unless the agency action has the force of law.<sup>124</sup> Several times in the past few years, the Federal Circuit has addressed whether the provisions found in the M21 rise to the level of a rule, reviewable under its jurisdiction.

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118. § 553.

119. *Preminger v. Sec'y of Veterans Aff.*, 632 F.3d 1345, 1347–49 (Fed. Cir. 2011) (per curiam).

120. *Id.* at 1348–49.

121. 38 U.S.C. § 502.

122. 5 U.S.C. § 552(a)(2).

123. 38 U.S.C. § 502.

124. *Disabled Am. Veterans v. Sec'y of Veterans Aff.*, 859 F.3d 1072, 1077–78 (Fed. Cir. 2017).

C. Disabled American Veterans' *Lasting Impact on the Future of Veterans Law*

A million claims for benefits are filed every year with the VA.<sup>125</sup> Of the claims filed, only four to five percent are appealed to the Board.<sup>126</sup> The M21 is essentially binding on at least ninety-five percent of claims filed by veterans, since those veterans do not appeal to the Board.<sup>127</sup> What makes this reality even more concerning is the Regional Office's rate of error.<sup>128</sup> The Board overturns the Regional Office's decision 74.56% of the time, by either granting the claim outright or remanding the case back to the Regional Office, because the Regional Office failed to comply with its duties.<sup>129</sup>

In *Disabled American Veterans* and *Gray*, the Federal Circuit explained that because the M21 provisions are not binding on the Board, the provisions do not have the force of law.<sup>130</sup> The VA does not treat M21 provisions like regulations, and as a result, they are not published for notice and comment. Thus, when the VA determines an interpretation of a regulation, such as what the term "in the Republic of Vietnam" means, and chooses to place that interpretation in the M21, the VA effectively evades judicial review under the holding in *Disabled American Veterans*. While the *Gray* certiorari petition was pending in the Supreme Court, the Federal Circuit decided *Procopio v. Wilkie*,<sup>131</sup> discussed below, mooted *Gray*.<sup>132</sup>

Due to *Disabled American Veterans* and *Gray*'s precedent, there is currently no judicial review available to address incorrect or inadequate guidance in the M21.<sup>133</sup> Therefore, for each claim that is filed with the Regional Office, the adjudicator is required to follow the

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125. Cf. *Veterans Benefits Administration Process One Millionth Claim in FY 2014*, U.S. DEP'T OF VETERANS AFF.: OFF. OF PUB. & INTERGOVERNMENTAL AFF., (July 14, 2014, 8:00 AM), <https://www.va.gov/opa/pressrel/pressrelease.cfm?id=2582> [<https://perma.cc/ZAA9-A663>] (announcing the VA's projected processed claims as totaling 1.3 million for Fiscal Year 2014, an increase of 200,000 over Fiscal Year 2013).

126. DEP'T OF VETERANS AFF., DEPARTMENT OF VETERANS AFFAIRS (VA) STRATEGIC PLAN TO TRANSFORM THE APPEAL PROCESS 11.

127. *Id.*

128. DEP'T OF VETERANS AFF. (VA) BOARD OF VETERANS' APPEALS, ANNUAL REPORT FISCAL YEAR (FY) 2018, at 31–33 (2019).

129. *Id.* at 31.

130. *Disabled Am. Veterans v. Sec'y of Veterans Aff.*, 859 F.3d 1072, 1077 (Fed. Cir. 2017).

131. 913 F.3d 1371 (Fed. Cir. 2019).

132. *Gray v. Wilkie*, 139 S. Ct. 2764, 2764 (2019) (vacating and remanding Federal Circuit Decision as moot).

133. *Disabled Am. Veterans*, 859 F.3d at 1072.

M21, which may be inconsistent with the law.<sup>134</sup> As discussed above, many of these claims are on appeal for five to seven years before reaching the Board which is the first adjudicative level not bound by the M21's guidance. In the future, a significant risk remains that the VA will implement rules in the M21 that are inconsistent with statutes and regulations, just as it did in *Gray*. Until reversed, *Disabled American Veterans* and *Gray* allow the agency to forego drafting regulations and simply add interpretive language into the M21, without the concern of judicial review. This situation is unfortunate, given the special solicitude imbued in federal veterans benefits law.<sup>135</sup>

#### IV. SIGNIFICANT SUBSTANTIVE LAW CHANGES FOR VIETNAM VETERANS

Recently, the Federal Circuit has decided significant cases that have overturned decades of case law, impacting hundreds of thousands of veterans. Two powerful examples of these changes are found in the court's decisions in *Procopio v. Wilkie* and *Saunders v. Wilkie*<sup>136</sup> discussed more fully below.

##### A. *Blue Water Vietnam Veterans*—*Procopio v. Wilkie*

In 1979, several Vietnam veterans and their families joined in a class action suit against the makers of the herbicide referred to as “Agent Orange.”<sup>137</sup> Agent Orange was sprayed during the Vietnam War in Vietnam and in other areas in order to clear the jungle of foliage, improving visibility for American troops fighting the enemy.<sup>138</sup> The veterans involved in the Agent Orange litigation asserted exposure to Agent Orange caused harmful conditions and diseases.<sup>139</sup> In 1984, the veterans and manufacturers settled the claims for \$180 million dollars.<sup>140</sup>

In 1991, partially in response to the plight of Vietnam veterans and partially in response to the possibility of a prolonged conflict in the Middle East, Congress passed a statute that presumed veterans who served “in the Republic of Vietnam” were exposed to Agent Orange.<sup>141</sup>

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134. *Id.* at 1078.

135. *See Henderson v. Shinseki*, 562 U.S. 428, 440 (2011).

136. 886 F.3d 1356 (Fed. Cir. 2018).

137. *In re “Agent Orange” Prod. Liab. Litig.*, 597 F. Supp. 740, 746 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987).

138. *Id.* at 775–76.

139. *Id.* at 764–75.

140. *Id.* at 863.

141. *See* 38 U.S.C. § 1116 (2012); 102 CONG. REC. 2360–61 (1991).

Two years later, the VA finalized regulations to implement the statute. In these regulations, the VA interpreted “in the Republic of Vietnam” to include service “in the waters offshore” of Vietnam and service requiring duty or visitation on land in the Republic of Vietnam.<sup>142</sup> Because the VA later believed that the regulation’s phrase “waters offshore” was ambiguous, a 1997 VA General Counsel opinion interpreted “waters offshore” to include only the inland waterways of Vietnam.<sup>143</sup>

While receiving presumptive exposure to Agent Orange was relatively simple for Vietnam veterans who had stepped foot on the landmass of Vietnam (described as “boots on the ground” by VA advocates) this was not the case for veterans who had served on ships in the territorial waters of Vietnam.<sup>144</sup> These veterans were referred to as “Blue Water” veterans in the open ocean, as opposed to the “Brown Water” veterans who served on the inland waterways of Vietnam in shallower waters.<sup>145</sup>

In 2006, the CAVC issued a decision in the case of a Blue Water Navy veteran, Jonathan Haas. In this case, the CAVC used the two-step test found in the Supreme Court’s decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>146</sup>:

First . . . is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.<sup>147</sup>

Applying *Chevron*, the CAVC considered § 1116 and found the phrase “in the Republic of Vietnam” ambiguous.<sup>148</sup> Because the court

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142. 38 C.F.R. § 3.307(a)(6) (1993).

143. *Procopio v. Wilkie*, 913 F.3d 1371, 1373 (Fed. Cir. 2019) (citing Gen. Counsel Prec. 27-97 (July 23, 1997); 62 Fed. Reg. 63,603, 63,604 (Dec. 1, 1997)).

144. *See, e.g.*, *Gray v. McDonald*, 27 Vet. App. 313, 316–17 (2015).

145. *Id.* at 317.

146. Recall that the *Chevron* analysis was utilized before *Kisor*’s recalibration of *Auer* and *Standing Rock* deference. *See infra* Section I.B.

147. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (internal footnotes omitted).

148. *Haas v. Nicholson*, 20 Vet. App. 257, 269 (2006), *rev’d sub nom*, *Haas v. Peake*, 525 F.3d 1168 (Fed. Cir. 2008).

found the statute ambiguous, it then turned to step two of the *Chevron* test to determine if the VA's interpretation of the phrase was reasonable and entitled to deference.<sup>149</sup> The CAVC found that the regulation "merely has replaced statutory ambiguity with regulatory ambiguity" and reviewed the VA's interpretation of its regulation's meaning through the lens of *Auer* deference.<sup>150</sup> In this review, the CAVC held that the VA's interpretation of the regulatory phrase "waters offshore" was "plainly erroneous" and could be afforded no deference.<sup>151</sup>

In 2008, the Federal Circuit heard the Secretary of Veterans Affairs' appeal of the CAVC's decision and decided *Haas v. Peake*.<sup>152</sup> The panel decision, written by Judge Bryson, also applied the two-step test<sup>153</sup> created by the Supreme Court in *Chevron* to determine whether or not the VA's interpretation was entitled to deference. The Federal Circuit agreed with the CAVC that "[t]here are many ways in which to interpret the boundaries of a sovereign nation such as the former Republic of Vietnam" to include only the landmass, or a nation's "economic zone."<sup>154</sup> While the government supported the position that § 1116 was ambiguous concerning the meaning of "in the Republic of Vietnam," Mr. Haas argued that the phrase "in the Republic of Vietnam" was clearly intended to include the "territorial waters off of the landmass of Vietnam."<sup>155</sup> Mr. Haas pointed to two official references, including the United Nations Convention on the Law of the Sea, which defined "Republic of Vietnam" to include the twelve nautical miles off the shore of Vietnam.<sup>156</sup> The court discussed the fact that there were other definitions of "Republic of Vietnam" that did not include the territorial waters off of the shore and that the legislative history of the statute was unclear concerning the territorial waters.<sup>157</sup> The court noted, "Congress did not indicate that service 'in' the Republic of Vietnam included service on the waters offshore or in any other location nearby."<sup>158</sup>

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149. *Id.* at 269–70.

150. *Id.* at 269–71.

151. *Id.* at 269–70.

152. 525 F.3d 1168 (Fed. Cir. 2008).

153. *Id.* at 1186.

154. *Id.* at 1184 (citing *Haas*, 20 Vet. App. at 263).

155. *Id.*

156. *Id.*

157. *Id.* at 1184–85.

158. *Id.* at 1185.

Mr. Haas also argued the legislative history behind § 1116 indicated Congress's clear intent to include presumptive service connection to veterans who served in the offshore waters. The court disagreed with this analysis of the legislative history.<sup>159</sup> However, in light of the various definitions of "in the Republic of Vietnam" that could be applicable, the Federal Circuit agreed with the CAVC that the phrase "in the Republic of Vietnam" was ambiguous.<sup>160</sup>

Having determined § 1116 was ambiguous, the Federal Circuit turned to step two of the *Chevron* test. The Court analyzed whether the VA's interpretation of "in the Republic of Vietnam" to include only the inland waterways of Vietnam was reasonable.<sup>161</sup> In order to answer this question, the court reviewed the VA's interpretation of its own regulations implementing § 1116. Specifically, the court looked at the 1993 formally adopted VA regulation interpreting "in the Republic of Vietnam" to mean "waters offshore" and the General Counsel's 1997 opinion defining "waters offshore" to include only the "inland waterways of Vietnam."<sup>162</sup> The court began this review with a consideration of *Auer* deference: that "an agency's interpretation of its own regulations is controlling unless plainly erroneous or inconsistent with the regulations being interpreted" and that "substantial deference" must be granted.<sup>163</sup>

The Federal Circuit acknowledged the concerns of the CAVC, which had determined that the VA's interpretation of its regulation was "plainly erroneous,"<sup>164</sup> and found that these concerns were not significant enough to overcome *Auer* deference. Specifically, the CAVC expressed concern that the VA's interpretation and application of the regulation was not consistent.<sup>165</sup> The Federal Circuit agreed but found that occasional inconsistency did not strip the agency of the deference it was due under *Auer*.<sup>166</sup> The CAVC also articulated a concern that the VA's interpretation of its regulation was riddled with flawed reasoning

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159. *Id.*

160. *Id.* at 1186.

161. *Id.* at 1186.

162. *Id.* at 1180–82, 1186.

163. *Id.* at 1186 (citing *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 165 (2007) (internal quotations omitted); *see also Auer v. Robbins*, 519 U.S. 452, 461–63 (1997); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (quoting *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988)).

164. *Haas*, 525 F.3d at 1174.

165. *Id.* at 1187.

166. *Id.*

leading to a “plainly erroneous” conclusion.<sup>167</sup> The Federal Circuit disagreed with this concern as well, stating that the court saw nothing about the General Counsel’s opinion that “renders that interpretation . . . plainly erroneous.”<sup>168</sup> With regard to the CAVC’s concern that the VA’s interpretation of its regulation was not the product of “valid or thorough reasoning,”<sup>169</sup> because of the lack of scientific evidence supporting the “arbitrariness of the line-drawing done by the agency,” the Federal Circuit remained unpersuaded.<sup>170</sup> After a quick overview of only some of the scientific evidence available, the Federal Circuit determined that the CAVC’s focus on the facts of Mr. Haas’ case specifically had no bearing on a reasonable interpretation of the meaning of the regulation as a whole.<sup>171</sup> The Federal Circuit contrasted the CAVC’s reasoning to the VA’s own interpretation which the court considered a “plausible construction of the statutory language . . . it is based on a simple but undisputed fact—that spraying was done on land, not over the water.”<sup>172</sup>

From 2008 to 2019, the *Haas* case prevented Blue Water veterans from benefitting from the Agent Orange presumptions and receiving VA benefits for diseases caused by the herbicide. The landscape for the surviving Blue Water Navy veterans changed dramatically when the Federal Circuit overruled *Haas* in its 2019 en banc decision in *Procopio v. Wilkie*.<sup>173</sup>

Appellant, Alfred Procopio was a Navy veteran who served aboard the U.S.S. Intrepid in the open waters near Vietnam in the 1960s.<sup>174</sup> Mr. Procopio filed a claim with the VA for diabetes and prostate cancer, two conditions on the Agent Orange list.<sup>175</sup> The VA denied his claims in 2009.<sup>176</sup> The CAVC, in a single judge opinion, cited *Haas* and

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167. *Id.* at 1191.

168. *Id.*

169. *Id.*

170. *Id.* at 1193.

171. *Id.* at 1194–95.

172. *Id.* at 1195. *But see id.* at 1197 (Fogel, J., dissenting) (agreeing that the statute itself was ambiguous but finding the VA’s interpretation unreasonable).

173. 913 F.3d 1371, 1380 (Fed. Cir. 2019).

174. *Id.* at 1374.

175. *Id.* at 1371; *see also* U.S. DEP’T OF VETERANS AFFAIRS, DISEASES ASSOCIATED WITH AGENT ORANGE, <https://www.publichealth.va.gov/exposures/publications/agent-orange/agent-orange-summer-2015/agent-orange-presumptives.asp> [https://perma.cc/L25P-T9YE].

176. *Procopio*, 913 F.3d at 1374.

found that a presumptive service-connection for Mr. Procopio was not possible because he served in the territorial waters of Vietnam.<sup>177</sup>

Mr. Procopio appealed the case to the Federal Circuit and after two oral arguments in 2018 before a panel of judges the court ordered an en banc hearing.<sup>178</sup> The court also ordered further briefing and argument to specifically address two questions. First, “[d]oes the phrase ‘served in the Republic of Vietnam’ . . . unambiguously include service in offshore waters . . . ?” Second, “[w]hat role, if any, does the pro-claimant canon play in this analysis?”<sup>179</sup> Mr. Procopio’s supporters filed fourteen amicus briefs to further aid him in his efforts.<sup>180</sup>

In its January 2019 decision, the Federal Circuit, stopping at step-one of the Chevron analysis, found that “the *Haas* court went astray when it found ambiguity in § 1116 based on ‘competing methods of defining the reaches of a sovereign nation.’”<sup>181</sup> In coming to its conclusion, the court conducted an overview of international law, beginning with Article 4 in the 1955 Geneva Convention which extended the military line of demarcation for the Republic of Vietnam into the territorial waters.<sup>182</sup> The court also considered the 1958 United Nations Convention on the Territorial Sea and the Contiguous Zone, which proposed that a country’s sovereignty extends beyond inland waters and into the territorial seas.<sup>183</sup> Additionally, the court cited the 1982 United Nations Convention on the Law of the Sea, a convention considered and dismissed by the *Haas* court,<sup>184</sup> which recognized the territorial waters “having a breadth ‘not exceeding [twelve] nautical miles.’”<sup>185</sup> Because Congress ratified the convention that extended the sovereignty of a nation beyond its landmass and into the waters up to twelve nautical miles from shore, the court found that Congress’s use of the term “in the Republic of Vietnam” was carefully chosen and unambiguous<sup>186</sup>:

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177. *Procopio v. McDonald*, No. 15–4082, 2016 WL 6816244, at \*5 (Vet. App. Nov. 18, 2016), *rev’d and remanded sub nom. Procopio v. Wilkie*, 913 F.3d 1371 (Fed. Cir. 2019).

178. *Procopio*, 913 F.3d at 1374.

179. *Id.*

180. *Id.* at 1372–73.

181. *Id.* at 1380.

182. *Id.* at 1375.

183. *Id.* (citing Convention on the Territorial Sea and the Contiguous Zone, art. 1(1), Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639).

184. *Id.* at 1375–76; *see also Haas v. Peake*, 525 F.3d 1168, 1184 (Fed. Cir. 2008), *overruled by Procopio v. Wilkie*, 913 F.3d 1371 (Fed. Cir. 2019).

185. *Procopio*, 913 F.3d at 1375–76.

186. *Id.* at 1376.



Congress chose to use the formal name of the country and invoke a notion of territorial boundaries by stating that “service *in* the Republic of Vietnam” is included. The intent of Congress is clear from its use of the term “in the Republic of Vietnam,” which all available international law unambiguously confirms includes its territorial sea. Because we must “give effect to the unambiguously expressed intent of Congress,” we do not reach *Chevron* step two.<sup>187</sup>

The Federal Circuit commented that because it had found that congressional statutes were designed with a pro-veteran purpose, the court did not need to reach a decision on whether the pro-veteran canon of statutory interpretation referred to in *Henderson ex rel. Henderson v. Shinseki*<sup>188</sup> and *Brown v. Gardner*<sup>189</sup> should be applied.<sup>190</sup>

Judge Lourie filed a concurrence, agreeing with the result but finding § 1116 was ambiguous, and explaining his view that the regulation interpreting the statute was unreasonable because “waters offshore” meant exactly that.<sup>191</sup> Because Mr. Procopio served in the waters offshore, he was entitled to the presumption of Agent Orange exposure.<sup>192</sup> Judge O’Malley also concurred, writing a robust support of the pro-veteran canon of interpretation and its additional support for the majority’s decision.<sup>193</sup>

Judge Chen, joined by Judge Dyk, dissented. Judge Chen found that the statute was ambiguous and argued that overruling *Haas* undermined stare decisis with no support, such as a change in law.<sup>194</sup> Judge Chen also expressed concern that such a decision was imprudent due to Congress’s contemporaneous consideration of a new statute regarding the issue of veterans who served in the waters offshore of Vietnam.<sup>195</sup> The *Procopio* decision, Judge Chen pointed out, will result in a significant increased budget for the VA that reflects a policy choice better left to Congress.<sup>196</sup> As to the pro-veteran canon, Judge Chen commented that it had never been

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187. *Id.* at 1375.

188. 562 U.S. 428, 441 (2011).

189. 513 U.S. 115, 117–18 (1994).

190. *Procopio*, 913 F.3d at 1380 (citing *Henderson*, 562 U.S. 428 (2011); *Brown*, 513 U.S. 115, 117–18 (1994)).

191. *Id.* at 1381 (Lourie, J., concurring).

192. *Id.*

193. *Id.* at 1382 (O’Malley, J., concurring).

194. *Id.* at 1388–89 (Chen, J., dissenting).

195. *Id.* at 1394–95.

196. *Id.*

applied before to *Chevron* step one analysis and was not sufficient to convert an “ambiguous statute into an unambiguous one.”<sup>197</sup>

In March 2019, VA Secretary Wilkie indicated that the VA would not be seeking review of the *Procopio* decision by the Supreme Court.<sup>198</sup>

### B. Aftermath of Procopio

Spurred to action by the *Procopio* decision, Congress passed the Blue Water Navy Vietnam Veterans Act of 2019<sup>199</sup> (“the Act”) in June of 2019.<sup>200</sup> Congress debated the passage of this bill for years, concerned about the impact of opening the class of Vietnam veterans entitled to a presumptive exposure to Agent Orange to Blue Water Sailors. The budgetary impact was substantial: an estimated \$280 million over the next ten years in disability benefits alone.<sup>201</sup> The VA asserted that up to 560,000 veterans could be eligible for benefits under the new Act, including almost 38,000 Blue Water Vietnam veterans who had previously been denied benefits.<sup>202</sup>

Section 2 of the Act grants presumptive exposure to veterans serving offshore of the coast of Vietnam “not more than [twelve] nautical miles seaward of a line commencing on the southwestern demarcation line of the waters of Vietnam and Cambodia and intersecting” at eleven

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197. *Id.* at 1394 (J. Chen, J., dissenting).

198. Nikki Wentling, *VA Secretary Recommends DOJ Not Challenge Ruling on “Blue Water” Benefits*, STARS & STRIPES (Mar. 26, 2019), <https://www.stripes.com/va-secretary-recommends-doj-not-challenge-ruling-on-blue-water-benefits-1.574387> [<https://perma.cc/GH6S-S55B>].

199. Pub. L. No. 116–23, 133 Stat. 966 (2019).

200. *Id.*; see also Leo Shane III, *‘Blue Water’ Veterans Bill Clears Senate, Heads to White House for Final Signature*, MIL. TIMES (June 12, 2019), <https://www.militarytimes.com/news/pentagon-congress/2019/06/12/blue-water-veterans-bill-clears-senate-heads-to-white-house-for-final-signature> [<https://perma.cc/NLA8-92K6>].

201. See CONG. BUDGET OFFICE, H.R. 299, BLUE WATER NAVY VIETNAM VETERANS ACT OF 2019: AS REPORTED BY THE HOUSE COMMITTEE ON VETERANS’ AFFAIRS ON MAY 10, 2019 6 (2019), <https://www.cbo.gov/system/files/2019-05/hr299.pdf> [<https://perma.cc/AMS9-PXLA>]; Amanda Dolasinski, *Blue Water Navy Bill Stalls in Senate, but Fight Continues*, MIL. OFFICERS ASS’N AM. (Dec. 11, 2018) <https://www.moaa.org/content/publications-and-media/news-articles/2018-news-articles/blue-water-navy-bill-stalls-in-senate,-but-fight-continues> [<https://perma.cc/J8T3-UBX8>].

202. Appendix for Respondent’s Brief at 86, *Procopio v. Sec’y of Veterans Affairs*, 943 F.3d 1376 (Fed. Cir. 2019) (No. 19–2184); *VA Extends Agent Orange Presumption to “Blue Water Navy” Veterans*, U.S. DEP’T VETERANS AFF.: VANTAGE POINT (July 8, 2019), <https://www.blogs.va.gov/VAntage/62832/va-extends-agent-orange-presumption-blue-water-navy-veterans> [<https://perma.cc/YL75-7LPL>].

different longitudinal and latitudinal points.<sup>203</sup> The Act also provides benefits for veterans who served in Korea and the children of American veterans stationed in Thailand who were exposed to Agent Orange during the Vietnam War.<sup>204</sup> Section 3(c)(3) of the Act allowed the Secretary to place a stay on pending claims until the law took full effect on January 1, 2020 or until the Secretary could implement regulations relating to the statute.<sup>205</sup> The VA Secretary implemented a stay on July 1, 2019, citing the authority granted to him under the Act.<sup>206</sup> Two-hundred cases had been decided under *Procopio* between April 1 and June 30 of 2019.<sup>207</sup>

In July 2019, Mr. Procopio filed a petition for review before the Federal Circuit arguing that the Secretary's stay of his case was improper because the Secretary's authority to stay cases would not begin until the law took effect in January 2020.<sup>208</sup> Therefore, Mr. Procopio argued, his case should be decided under 38 U.S.C. § 1116 and the court's decision in *Procopio* immediately—regardless of the stay on claims brought under the new Act.<sup>209</sup> The court determined that the Secretary's stay amounted to an “interpretation of general applicability formulated and adopted by the agency” under 5 U.S.C. § 552(a)(1)(D) and that the Blue Water Act “unambiguously authorizes” him to issue the stay.<sup>210</sup> The court also found that the authority to stay extended to pending claims pursuant to § 1116 and ultimately denied the petition for review.<sup>211</sup>

### C. *Overturing Twenty Years of Case Law: Saunders v. Wilkie*

In 2018, the Federal Circuit made another sweeping decision in *Saunders v. Wilkie*, overturning twenty years of case law at the CAVC. *Saunders* changed the way the VA must define a “disability.”

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203. Blue Water Navy Vietnam Veterans Act of 2019, Pub. L. No. 116–23, § 2(d) (2019) (to be codified in 38 U.S.C. § 1116A(d)).

204. *Id.* §§ 3–4.

205. *Id.* § 3(c)(3)(B).

206. Appendix for Petitioner's Brief at 1, *Procopio v. Sec'y of Veterans Affairs*, No. 19–2184 (Fed. Cir. 2019).

207. *Id.* at 4.

208. Petitioner's Brief at 16, 27, *Procopio v. Sec'y of Veterans Affairs*, 943 F.3d 1376 (Fed. Cir. 2019) (No. 19–2184).

209. *Id.* at 16–18.

210. *Procopio v. Sec'y of Veterans Affairs*, 943 F.3d 1376, 1377, 1380–81 (Fed. Cir. 2019).

211. *Id.* at 1382.

The roots of the *Saunders* decision are found in the 1999 CAVC decision in *Sanchez-Benitez v. West*<sup>212</sup> (“*Sanchez-Benitez I*”) and the subsequent 2001 Federal Circuit decision<sup>213</sup> (“*Sanchez-Benitez II*”).

In *Sanchez-Benitez I*, the CAVC considered the issue of whether pain, without an accompanying diagnosis, met the requirements of a “disability” which can be compensated under federal benefits law. 38 U.S.C. §§ 1110 and 1131 provide for compensation for disabilities incurred during wartime or peacetime where the disability results from personal injury or disease contracted in the line of duty.<sup>214</sup>

The veteran, Jose Sanchez-Benitez, filed a disability claim for chronic neck pain, even though no formal diagnosis existed, and the VA denied his claim.<sup>215</sup> On appeal, the CAVC acknowledged that VA regulations require pain to be considered in the severity of rating a disability but held that “pain alone, without a diagnosed or identifiable underlying malady or condition, does not in and of itself constitute a disability for which service connection may be granted.”<sup>216</sup>

On appeal to the Federal Circuit, Mr. Sanchez-Benitez directly challenged the CAVC’s holding regarding pain.<sup>217</sup> The court discussed Mr. Sanchez-Benitez’ challenge after a summation of the CAVC’s reasoning in denying his claim:

His argument is that under the basic disability statutes, pain alone is a compensable disability, even if the pain cannot be attributed to any current disability. Thus, under Mr. Sanchez-Benitez’s view, a veteran who is currently suffering from pain, but who cannot attribute the pain to any particular disability, is nonetheless compensably disabled. Mr. Sanchez-Benitez presents an interesting, indeed perplexing, question, but not one that we need or can decide in this appeal. Even assuming *arguendo* that free-standing pain wholly unrelated to any current disability is a compensable disability, such pain cannot be compensable in the absence of proof of an in-service disease or injury to which the current pain can be connected by medical evidence. Such a “pain alone” claim must fail when there is no sufficient factual showing that the pain derives from an in-service disease or injury.<sup>218</sup>

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212. *Sanchez-Benitez v. West* (*Sanchez-Benitez I*), 13 Vet. App. 282 (1999).

213. *Sanchez-Benitez v. Principi* (*Sanchez-Benitez II*), 259 F.3d 1356 (Fed. Cir. 2001).

214. 38 U.S.C. §§ 1110, 1131 (2012).

215. *Sanchez-Benitez I*, 13 Vet. App. at 283–84.

216. *Id.* at 285.

217. *Sanchez-Benitez II*, 259 F.3d at 1360.

218. *Id.* at 1361–62.

Rather than issue a holding regarding whether pain alone equates to a “disability,” the Federal Circuit found that there was no medical nexus to support the contention that Mr. Benitez-Sanchez’s pain was due to the trauma he incurred in service, so Mr. Benitez-Sanchez could not state a claim.<sup>219</sup> The court reiterated the judgment of the CAVC in this case “rests on alternative grounds: the failure of proof of medical connection of current pain to the alleged in-service neck trauma incident, and the statement in the [CAVC’s] opinion that ‘pain alone’ is not compensable.”<sup>220</sup>

In the two decades following the litigation of Mr. Sanchez-Benitez’s claims, the CAVC applied the holding that “pain alone” is not a disability from its 1999 *Sanchez-Benitez I* over one-hundred times. These denials included the case, *Saunders v. McDonald*.<sup>221</sup>

In 2008, Melba Saunders filed a claim for chronic knee pain.<sup>222</sup> A VA medical examiner found that there was no pathology to diagnose the source of Ms. Saunders’s knee pain but then gave an opinion that her knee pain was related to her active duty service.<sup>223</sup> The Board of Veterans’ Appeals denied Ms. Saunders’s claim basing its decision on *Sanchez-Benitez I* that pain alone without an underlying condition is not a compensable disability.<sup>224</sup>

Ms. Saunders appealed to the CAVC arguing that the language in *Sanchez-Benitez I* was “dicta.”<sup>225</sup> In its opinion, the CAVC criticized Ms. Saunders’s contention in a lengthy single judge opinion on the issue.<sup>226</sup> The court noted that what Ms. Saunders characterized as dicta was actually prefaced by the word “holds” making it clear the court was establishing precedent.<sup>227</sup> The CAVC then tackled Ms. Saunders’s argument that “it does not matter what the panel thought it was doing or intended to do because the [Federal Circuit] implicitly converted the Court’s precedential statement into dicta.”<sup>228</sup> The CAVC discussed the Federal Circuit’s acknowledgement in *Sanchez-Benitez II* that the

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219. *Sanchez-Benitez II*, 259 F.3d 1356, 1361–62 (Fed. Cir. 2001).

220. *Id.* at 1362.

221. *Saunders v. McDonald*, No. 15-0975, 2016 WL 3002862, at \*1 (Vet. App. May 25, 2016), *rev’d*, 886 F.3d. 1356 (Fed. Cir. 2018).

222. *Id.* at \*1.

223. *Id.*

224. *Id.*

225. *Id.* at \*2.

226. *Id.* at \*3.

227. *Id.* at \*2.

228. *Id.*

CAVC's *Sanchez-Benitez I* decision rested on alternative grounds to include the issue of whether pain alone was a compensable disability.<sup>229</sup> The CAVC determined that the Federal Circuit's "explicit recognition that this Court had decided an important legal issue establishes that the Court's conclusion was, on its face, not dicta."<sup>230</sup> The CAVC goes on to note that there is "no rule stating that if the Federal Circuit affirms this Court under one of two alternative bases the Court gave for its decision, then the other basis for its decision is converted to dicta."<sup>231</sup>

To underscore the importance of its *Sanchez-Benitez I* holding while denying Ms. Saunders's claim for knee pain, the CAVC added:

The portion of *Sanchez-Benitez* that is dispositive in this case is about as settled as caselaw can be. Most importantly, no one, to the Court's knowledge, has ever suggested that the rule applied by the Board here is dicta. Throughout the nearly two decades since the rule stated in *Sanchez-Benitez* was written, the Court has unfailingly deemed it to be good precedential authority . . . It doesn't take much reading between the lines to realize that the appellant wishes to neutralize *Sanchez-Benitez* without going through the arduous steps necessary to convince this Court or the one above to overturn longstanding precedent.<sup>232</sup>

A panel of the CAVC adopted the single-judge opinion issued in *Saunders* after finding no legal error in the reasoning of the judge.<sup>233</sup>

Ms. Saunders appealed the CAVC decision. In 2018, the Federal Circuit issued its decision in *Saunders v. Wilkie*.<sup>234</sup> Judge O'Malley, writing for a three-judge panel which included Judges Newman and Dyk, held that "the [CAVC] erred as a matter of law in finding that Saunders's pain alone, absent a specific diagnosis or otherwise identified disease or injury, cannot constitute a disability under 38 U.S.C. § 1110 (2016)."<sup>235</sup> When discussing the issue of pain alone as a compensable disability, the Federal Circuit began its discussion by noting that Ms. Saunders' case is not impacted by *Sanchez-Benitez II* because the panel that decided that case made no decision on the

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229. *Id.*

230. *Id.* at \*3.

231. *Id.*

232. *Id.* at \*4, 6.

233. *Saunders v. McDonald (Saunders II)*, No. 15-0975, 2016 WL 4258493, at \*1 (Vet. App. Aug. 12, 2016), *rev'd*, 886 F.3d 1356 (Fed. Cir. 2018).

234. 886 F.3d. 1356, 1358 (Fed. Cir. 2018).

235. *Id.*

CAVC's earlier holding regarding pain alone as a disability.<sup>236</sup> The court then explained "we characterized as dicta the very holding in *Sanchez-Benitez I* that is at issue here."<sup>237</sup> Criticizing the holding of *Sanchez-Benitez I*, the Federal Circuit found that the CAVC offered no support for its contention that pain alone cannot qualify as a disability. The Federal Circuit found the CAVC read the provisions of § 1110 out of context with the other statutes regarding functional impairment, thus rendering the CAVC's interpretation of disability "illogical."<sup>238</sup>

After outright dismissing any precedential value arising from *Sanchez-Benitez I* and *Sanchez-Benitez II*, the Federal Circuit then analyzed the meaning of the term "disability" in 38 U.S.C. § 1110 and determined the word means a "functional impairment of earning capacity, not the underlying cause of said disability."<sup>239</sup> The Federal Circuit held that because pain can diminish bodily function, "pain need not be diagnosed as connected to a current underlying condition to function as an impairment."<sup>240</sup> In one sentence referring to the holding of *Sanchez-Benitez I* as dicta, which may not have been entirely clear from the *Sanchez-Benitez II* opinion as evidenced by the CAVC's later reliance on its original holding, the Federal Circuit overturned two decades of case law at the CAVC with the stroke of a pen. The entire impact of *Saunders* will take several years to measure as the VA implements the Federal Circuit's opinion and teaches it to the lowest-level decision makers. However, the wide-sweeping change in the definition of "disability" cannot be overstated.

#### V. ADDRESSING DELAYS IN THE VA SYSTEM

Under the All Writs Act,<sup>241</sup> Article I courts may issue writs necessary or appropriate in aid of their jurisdictions. With respect to mandamus petitions alleging unreasonable delay, "[b]ecause the statutory obligation of a Court of Appeals to review on the merits may be defeated by an agency that fails to resolve disputes, a Circuit Court may resolve claims of unreasonable delay in order to protect its future jurisdiction."<sup>242</sup> With regard to the CAVC specifically, its jurisdictional

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236. *Id.* at 1361–62.

237. *Id.*

238. *Id.* at 1355–56.

239. *Id.* at 1363.

240. *Id.* at 1364.

241. 28 U.S.C. § 1651 (2012).

242. *Telecomms. Research & Action Ctr. v. FCC (TRAC)*, 750 F.2d 70, 76 (D.C. Cir. 1984).

statute, 38 U.S.C. § 7261(a)(2), provides that the CAVC may, “to the extent necessary to its decision . . . compel action of the Secretary unlawfully withheld or unreasonably delayed.”<sup>243</sup>

Like many veterans before them, the nine appellants in the *Martin v. O’Rourke*<sup>244</sup> case petitioned the CAVC to issue writs of mandamus in response to alleged unreasonable delays.<sup>245</sup> The veterans alleged the delays in their cases constituted a violation of their rights under the Due Process Clause.<sup>246</sup> In *Martin*, the Federal Circuit determined the CAVC used the wrong standard to measure unreasonable delay when it used the test first articulated by the CAVC in *Costanza v. West*<sup>247</sup> in 1999.<sup>248</sup>

In *Costanza*, the veteran asserted that the VA’s delay in certifying his appeal to the Board, a ministerial act, took too long when almost one year had transpired from the date he filed his appeal.<sup>249</sup> The CAVC, in *Martin*, denied the writ, stating, that when a petition is based on such a delay, the Court’s precedents support the veteran’s right to such a writ when the veteran demonstrates the alleged delay is tantamount to the Secretary’s arbitrary refusal to act, bearing in mind the demands on the Secretary’s resources.<sup>250</sup>

In rejecting the standard described in *Costanza*, the Federal Circuit found “[t]here is little to be said about this standard’s origin.”<sup>251</sup> Accepting the appellants’ suggestion, the Federal Circuit found the analysis set out in the D.C. Circuit’s 1984 decision in *Telecommunications Research & Action Center v. FCC*<sup>252</sup> (*TRAC*) “provides a more balanced approach because it requires consideration of the veterans’ interests and does not require a showing of intent.”<sup>253</sup> Given the adoption of *TRAC*, the Federal Circuit concluded that if the CAVC finds the delay unreasonable under *TRAC*, it need not conduct a separate due process analysis.<sup>254</sup> The Federal Circuit remanded the claims that were not

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243. 38 U.S.C. § 7261(a)(2).

244. 891 F.3d 1338 (Fed. Cir. 2018).

245. *Id.* at 1340.

246. *Id.* at 1342.

247. 12 Vet. App. 133 (1999).

248. *Martin*, 891 F.3d at 1344.

249. *Costanza*, 12 Vet. App. at 134.

250. *Martin*, 891 F.3d at 1344 (citing *Ribavdo v. Nicholson* 20 Vet. App. 552, 555 (2007)).

251. *Id.*

252. 750 F.2d 70 (D.C. Cir. 1984).

253. *Martin*, 891 F.3d at 1345.

254. *Id.* at 1348–49.



mooted by the VA during the pendency of the appeal to the CAVC for the proper analysis under *TRAC*.<sup>255</sup>

*TRAC* outlines a six-factor test for analyzing a claim of unreasonable delay to determine “whether the agency’s delay is so egregious as to warrant mandamus.”<sup>256</sup> The factors include the following:

1. the time agencies take to make decisions must be governed by a “rule of reason;”
2. where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason;
3. delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake;
4. the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority;
5. the court should also take into account the nature and extent of the interests prejudiced by delay; and
6. the court need not “find any impropriety lurking behind agency lassitude in order to hold that agency action is ‘unreasonably delayed.’”<sup>257</sup>

The CAVC has relied on *Martin* many times in the past year, especially in its single-judge opinions disposing of writs. In the 100 post-*Martin* CAVC cases addressing unreasonable delay (through February 29, 2020) all were denied except one: *Godsey v. Wilkie*.<sup>258</sup> These denials often recite the language in *Martin* that a delay may be the result of the VA following its statutory duty to assist and not a result of agency inaction, without deep analysis.<sup>259</sup>

Only two CAVC precedential panel decisions have addressed *Martin*. *Godsey v. Wilkie*, discussed further below, certified a class where claimants experienced unreasonable delay with regard to certain ministerial acts in the appeals process, ironically almost identical to the challenge in *Costanza*

255. *Id.* at 1349. *See* *Monk v. Shulkin (Monk II)*, 855 F.3d 1312, 1321 (Fed. Cir. 2017) (noting that the VA’s action on certain claims rendered those claims moot).

256. *TRAC*, 750 F.2d at 80.

257. *Id.* (internal citations omitted).

258. 31 Vet. App. 207 (2019) [discussed below in Section VI. D.].

259. *See, e.g.*, *Bowlin v. Wilkie*, No. 19-2576, 2019 WL 3307851, at \*2 (Vet. App. July 24, 2019) (denying veterans claim as moot despite multi-year delay and no *TRAC* analysis); *Cantrell v. Wilkie*, No. 19-1559, 2019 WL 2426166, at \*2–3 n.1 (Vet. App. June 11, 2019) (finding that, despite no *TRAC* analysis, the veteran had not exhausted available remedies and was, therefore, not entitled to writ); *Sorkness v. Wilkie*, No. 18-2611, 2018 WL 4408980, at \*3 (Vet. App. Sept. 17, 2018) (finding no egregious delay).

twenty years earlier.<sup>260</sup> In the other panel decision, *Monk v. Wilkie*,<sup>261</sup> the CAVC denied a petition for extraordinary relief.<sup>262</sup>

In *Monk v. Wilkie (Monk IV)*, the CAVC highlighted the absence of a “hard and fast rule with respect to the point in time at which delay [in the adjudication of VA claims] becomes unreasonable.”<sup>263</sup> It explained that *Martin* states that the “rule of reason” requires a review of “the particular agency action for which unreasonable delay is alleged” and an evaluation of the reasonableness of the delay given the specific factual circumstance before the court.<sup>264</sup> Accordingly, various factors inform the reasonableness inquiry and “more complex and substantive agency actions take longer than purely ministerial ones.”<sup>265</sup>

With regard to the six petitioners in *Monk IV*, the CAVC found that all but one, William Dolphin, had withdrawn their claims or their claims were moot due to VA action.<sup>266</sup> For Mr. Dolphin’s situation in particular, the CAVC attributed the delay in the VA’s adjudication of his claims to the fulfillment of substantive agency actions to comply with statutory duties.<sup>267</sup> The CAVC cited several details in Mr. Dolphin’s claims history, from his sixty-page transcript to the submission of more than 1600 pages of military and medical records to the ten additional medical examinations to evaluate PTSD, TBI, seizures, headaches, peripheral nerves, lower back and shoulder pain, hearing loss, heart disease, and diabetes claims.<sup>268</sup> The CAVC’s decision focused on the VA’s last action in the appeal, not the totality of the time Mr. Dolphin’s

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260. *Id.* at 215.

261. 32 Vet. App. 87 (2019) [currently on appeal as Federal Circuit Case No. 20-1305].

262. *Id.* at \*14. The *Monk* case has led to several reported opinions at the CAVC and Federal Circuit levels. The nomenclature used by the CAVC in its October 2019 order will be used in this Article. *See, e.g.*, *Monk v. McDonald (Monk I)*, No. 15-1280, 2015 WL 3407451 (Vet. App. May 27, 2015) (CAVC’s decision denying class certification); *Monk v. Shulkin (Monk II)*, 855 F.3d 1312 (Fed. Cir. 2017) (authorizing the use of the class action device); *Monk v. Wilkie (Monk III)*, 30 Vet. App. 167 (2018) (CAVC’s decision to deny class certification following remand); *Monk v. Wilkie (Monk IV)*, 32 Vet. App. 87 (2019).

263. *Monk IV*, 32 Vet. App. at 102 (quoting *Martin v. O’Rourke*, 891 F.3d 1338, 1346 (Fed. Cir. 2018)).

264. *Id.* at 111 (Allen, J., concurring in part) (quoting *Martin*, 891 F.3d at 1345).

265. *Martin*, 891 F.3d at 1345–46.

266. *Monk IV*, 32 Vet. App. at 93, 97 (following the remand from the Federal Circuit an amended writ petition was filed naming an additional six class representatives, including Mr. William Dolphin).

267. *Id.* at 103.

268. *Id.*

case was pending, which was over five years. In his dissent, Judge Allen criticized the majority's "slicing and dicing" analysis of Mr. Dolphin's VA "odyssey."<sup>269</sup> He highlighted that under the majority's analysis, and the VA's concession at oral argument, even a delay of 100 years would satisfy *TRAC* factor one.<sup>270</sup> This decision is currently on appeal at the Federal Circuit.<sup>271</sup>

Accordingly, while *Martin* is helpful to the extent that it provides a broader and a more favorable analysis for veterans considering filing a petition requesting a writ of mandamus, the end results appear to be the same as under the *Costanza* test, where writs were not granted.

*Martin* is important not only for the adoption of the *TRAC* analysis, but also because of Judge Moore's powerful concurrence which should be required reading for every American. She notes that the appeals process "takes over *five and a half years* on average from the time a notice of disagreement is filed until the Board issues a decision, which often sets the stage for more proceedings on remand."<sup>272</sup> She reminds us that during this uncertain process, veterans may be lacking daily necessities, including food and shelter.<sup>273</sup> This deprivation occurs when years later these same veterans are found to be entitled to the funds.<sup>274</sup> Noting that three of the veterans in the nine cases before the court in *Martin* died while their appeal was pending, Judge Moore reminds us that it is up to the courts to protect these individuals, concluding with this call to action:

The men and women in these cases protected this country and the freedoms we hold dear; they were disabled in the service of their country; the least we can do is properly resolve their disability claims so that they have the food and shelter necessary for survival. It takes on average six and a half years for a veteran to challenge a VBA determination and get a decision on remand. God help this nation if it took that long for these brave men and women to answer the call to serve and protect. We owe them more.<sup>275</sup>

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269. *Id.* at 108, 112 (Allen, J., dissenting in part).

270. *Id.* at 112.

271. Brief for Petitioner, *Monk v. Wilkie*, No. 20-1305 (Fed. Cir. 2020).

272. *Martin v. O'Rourke*, 891 F.3d 1338, 1350 (Fed. Cir. 2018) (Moore, J., concurring).

273. *Id.*

274. *Id.*

275. *Id.* at 1352.

## VI. CLASS ACTIONS: AGGREGATE PROCEDURE IN VETERANS CASES

A. *Background to the Federal Circuit Appeal*

The Federal Circuit has handed down several instrumental decisions in the area of class action litigation. One such case is the *Monk* line of cases. Conley Monk served in the United States Marine Corps during the Vietnam War.<sup>276</sup> He later suffered from several disabilities that he believed to be related to his military service, including PTSD.<sup>277</sup> He filed a claim with the VA in February of 2012.<sup>278</sup>

In 2013, the VA notified Mr. Monk that it denied his claims because his discharge was “other than honorable.”<sup>279</sup> Mr. Monk timely appealed this decision by filing the proper form, known as a Notice of Disagreement (NOD), within one year of the denial.<sup>280</sup> A hearing took place in February 2014.<sup>281</sup>

More than one year later, in March 2015, Mr. Monk learned from his congresswoman that the VA would not process his appeal until it received records from the Board of Corrections for Naval Records (BCNR) regarding his discharge status.<sup>282</sup>

Mr. Monk then filed a petition for a writ for mandamus at the CAVC, asserting that the delay the VA took in deciding his claim was unreasonable and asking the CAVC to compel action.<sup>283</sup> He sought class certification on behalf of all similarly situated veterans.<sup>284</sup> His proposed class included all veterans 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 as

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

277. *Id.*

278. *Id.*

279. *Id.*; see, e.g., U.S. Dep’t of Defense, MCO 1900.16, Separation and Retirement Manual, ¶ 1003(2)(c) (2015) (An “other than honorable” discharge is the appropriate form of separation when a Marine commits an act or omission that “constitutes a significant departure from the conduct expected from a Marine”).

280. *Monk II*, 855 F.3d at 1314.

281. *Id.* (mentioning that separately Mr. Monk applied to the Board of Correction of Naval Records (BCNR) to upgrade his discharge status).

282. Opening Brief of Claimant-Appellant at 12–13, *Monk v. McDonald (Monk I)*, No. 15-1280, 2015 WL 6388290 (Vet. App. May 27, 2015) (stating the actual dates of the steps in the adjudication of Monk’s claims were found in Appellant’s Brief to the Federal Circuit).

283. *Monk I*, 15-1280, 2015 WL 3407451, at \*2.

284. *Id.*

defined by 38 U.S.C. §§ 7107(a)(2)(B)–(C).<sup>285</sup> Mr. Monk asserted that the All Writs Act provides authority for the CAVC to aggregate cases.<sup>286</sup>

On May 27, 2015, the CAVC refused to grant class certification, finding it lacked authority to certify a class.<sup>287</sup> On July 8, 2015, the CAVC issued an order denying Mr. Monk's individual petition for mandamus relief.<sup>288</sup> It found that the VA's delay in adjudicating Mr. Monk's disability claim resulted, at least in part, from the VA's need for certain BCNR records.<sup>289</sup>

### B. *The Federal Circuit Decision*

The Federal Circuit appeal focused solely on the issue of whether the CAVC had the authority to entertain class actions. During the pendency of the proceedings, the VA had determined that Mr. Monk was entitled to receive VA benefits at the one hundred percent level, rendering the underlying issue of delay moot.<sup>290</sup> Interestingly, the VA Secretary conceded in oral argument that the CAVC in fact had authority to handle class actions but asserted Mr. Monk's claim was moot, and the requested class was not proper for class action treatment.<sup>291</sup>

The Federal Circuit first determined that the VA's grant of benefits during the course of the proceedings did not moot the request for class certification.<sup>292</sup> Relying upon *United States Parole Commission v. Geraghty*<sup>293</sup> and *Genesis HealthCare Corp. v. Symczyk*,<sup>294</sup> both Supreme Court cases addressing mootness in class actions, the Federal Circuit found it significant that Mr. Monk's claim was granted *after* his request for class certification was made and denied.<sup>295</sup> The Federal Circuit also

285. *Id.*

286. *Id.*

287. *Id.* at \*3 (citing prior CAVC decisions where the court found it lacked authority to certify class actions including *Am. Legion v. Nicholson*, 21 Vet. App. 1, 3–4 (2007); *Henderson v. Brown*, 10 Vet. App. 272, 278 (1997) (per curiam); *Harrison v. Derwinski*, 1 Vet. App. 438, 439 (1991) (en banc); *Lefkowitz v. Derwinski*, 1 Vet. App. 439, 440 (1991) (per curiam)).

288. *Monk v. McDonald*, No. 15-1280, 2015 WL 4139012, at \*3 (Vet. App. July 8, 2015), *rev'd and remanded sub nom. Monk v. Shulkin*, 855 F.3d 1312 (Fed. Cir. 2017).

289. *Id.*

290. *Id.* at 1316.

291. Oral Arg. at 14:40–20:19, 22:58–23:07, *Monk II*, 855 F.3d 1312 (2017), <http://oralarguments.cafc.uscourts.gov/default.aspx?fl=2015-7092.mp3>.

292. *Monk II*, 855 F.3d at 1317.

293. 445 U.S. 388 (1980).

294. 569 U.S. 66 (2013).

295. *Monk II*, 855 F.3d at 1317.

noted that another class member, Mr. Van Allen, moved to join Mr. Monk's proposed class (a motion denied by the CAVC), distinguishing the case from *Genesis*, where no other individuals moved to join the class.<sup>296</sup>

Most significantly, the Federal Circuit recognized that sometimes a class action is the only way to get an issue answered.<sup>297</sup> A "class-action claim is not necessarily moot upon the termination of the named plaintiff's claim" in circumstances in which "other persons similarly situated will continue to be subject to the challenged conduct," but "the challenged conduct was effectively unreviewable, because no plaintiff possessed a personal stake in the suit long enough for litigation to run its course."<sup>298</sup> This is an important ruling in light of the fact that veterans' writ petitions, based upon unnecessary delay, often become moot by the VA's response to the writ.<sup>299</sup>

The Federal Circuit found that the authority for the use of the class action device in CAVC proceedings existed in three ways: under the All Writs Act; pursuant to the CAVC's own enabling statutes; and by virtue of the CAVC's inherent powers.<sup>300</sup> Each of these bases is discussed below.

First, concurring with the Second Circuit's decision in *United States ex rel. Sero v. Preiser*,<sup>301</sup> the Federal Circuit reiterated that the All Writs Act permits courts to create "appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage."<sup>302</sup> In this regard, the court explained that it could employ Federal Rule of Civil Procedure 23 analysis to determine whether class certification is appropriate.<sup>303</sup> The relevant factors found in the rule include whether the class is so numerous that joinder of all members is impracticable; whether common questions of law or fact exist; whether the claims of the representative parties are typical for the class; and whether the representative parties will fairly and adequately protect the interest of the class.<sup>304</sup> Recognizing that the CAVC's jurisdiction extends to "compel action of the Secretary unlawfully

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296. *Id.*; See *Symczyk*, 569 U.S. at 70 (highlighting issues of conditional certification).

297. *Monk II*, 855 F.3d at 1320–21.

298. *Symczyk*, 569 U.S. at 75–76 (internal quotations omitted).

299. See *Ebanks v. Shulkin*, 877 F.3d 1037, 1040 (Fed. Cir. 2017) (noting that the Federal Circuit later found class certification as an appropriate procedural device).

300. *Monk II*, 855 F.3d at 1318.

301. 506 F.2d 1115, 1125–26 (2d Cir. 1974).

302. *Monk II*, 855 F.3d at 1318–19.

303. *Id.* at 1319.

304. *Id.* (citing FED. R. CIV. P. 23).

withheld or unreasonably delayed,”<sup>305</sup> the Federal Circuit said it could find “no principled reason why the [CAVC] cannot rely on the All Writs Act to aggregate claims in aid of its jurisdiction.”<sup>306</sup>

Second, with regard to the CAVC’s own statutory authority, the Federal Circuit noted that nothing in the Veterans Judicial Review Act (VJRA) restricts the use of the class action device.<sup>307</sup> Rather, 38 U.S.C. § 7264(a) grants express authority for the CAVC to create its own rules necessary to exercise its jurisdiction.<sup>308</sup> The court explained that, just as the Equal Employment Opportunity Commission (EEOC) and bankruptcy courts have found ways to aggregate claims, the CAVC may do so as well.<sup>309</sup>

Third, with regard to the final underpinning for CAVC authority to entertain class actions, the Federal Circuit explained that the CAVC’s enabling statutes do not, by their terms, preclude the class action device.<sup>310</sup> The CAVC debunked the statutory impediments highlighted in its earlier decisions, including the provisions that the CAVC review individual Board decisions following a notice of appeal, without a *de novo* trial.<sup>311</sup> Upon review of the jurisdictional statutes as a whole, the CAVC found those provisions to be too limited.<sup>312</sup> Again, the court explained that § 7261 broadly grants the CAVC authority to “compel action of the Secretary unlawfully withheld or unreasonably delayed.”<sup>313</sup> Considering the CAVC’s statutory authority to craft its own rules, the Federal Circuit found that the CAVC’s rule disallowing class actions constituted an abuse of discretion.<sup>314</sup> In balancing the CAVC’s reasoning for categorically refusing to certify class actions, the Federal Circuit identified significant potential benefits veterans would gain

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305. 38 U.S.C. § 7261(a) (2012).

306. *Monk II*, 855 F.3d at 1319.

307. *Id.* at 1320

308. *Id.*

309. *Id.* at 1319–21.

310. *Id.* at 1320–22.

311. *Id.* at 1320.

312. *Id.* (commenting that the CAVC had identified three statutory impediments to their authority to hear class actions in *Harrison*: (1) 38 U.S.C. § 7252 “limits the jurisdiction of this Court to the review of [Board] decisions”; (2) 38 U.S.C. § 7261(c) prohibits fact finding, stating “[i]n no event shall findings of fact . . . be subject to trial *de novo* by the Court”; and (3) 38 U.S.C. § 7266 provides that “each person adversely affected by such a [Board] decision must file a notice of appeal”) (alteration in original).

313. *Id.* at 1319.

314. *Id.* at 1318.

through an aggregate claims process: efficiency, consistency, fairness, and improvement of access to legal and expert assistance to those with limited resources.<sup>315</sup>

The Federal Circuit's decision recognizes the reality many veterans face in the arduous VA appeal process. Recall that the VA granted Mr. Monk's disability claims with a one hundred percent rating during his appellate process, arguably mooting his claim.<sup>316</sup> This is not an atypical development. Indeed, in the *Monk II* decision, the Federal Circuit points out that writs challenging the VA's delay in adjudicating appeals often evade judicial review because the VA usually acts promptly to resolve mandamus petitions.<sup>317</sup> Citing CAVC Judges Lance and Hagel, the court said:

[W]hen the [CAVC] orders the VA to respond to a petition "set[ting] forth a well-pleaded complaint that the processing of a claim has been improperly delayed," the "great majority of the time" the VA "responds by correcting the problem within the short time allotted for a response, and the petition is dismissed as moot because the relief sought has been obtained."<sup>318</sup>

Further, the court highlighted instances, raised by amicus curiae, where the VA had granted full benefits to veterans whose claims were scheduled for CAVC precedential review, while denying similarly situated veterans benefits on the same grounds.<sup>319</sup>

### C. Monk III

When the matter was remanded to the CAVC, Mr. Monk filed an Amended Petition for Extraordinary Relief, deleting that portion of the proposed class definition that limited the proposed class to those "veterans facing financial or medical hardship."<sup>320</sup> The Amended Petition added eight additional named representatives.<sup>321</sup> On October 26, 2017, the CAVC issued a per curiam order inviting amici participation and requesting guidance on twelve discrete questions including, inter alia, whether Federal Rule of Civil Procedure 23 should be used as the model rule; how fact finding will be conducted; and whether class relief is superior to a

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315. *Id.* at 1320.

316. *Id.* at 1316.

317. *Id.* at 1320–21 (citing *Young v. Shinseki*, 25 Vet. App. 201, 215 (2012)).

318. *Id.* at 1321.

319. *Id.* (citing Brief for Am. Legion as Amici Curiae at 18–25, *Monk v. Shulkin*, 855 F.3d 1312 (Fed. Cir. 2017) (Nos. 2015-7092; 2015-7106)).

320. *Monk v. Wilkie (Monk III)*, 30 Vet. App. 167, 170 (2018).

321. *Id.*



precedential decision.<sup>322</sup> In response, the court received nine amicus briefs.<sup>323</sup> On August 23, 2018, the court, sitting en banc, ultimately denied the requested class certification, issuing a split decision with four judges supporting the order and four judges dissenting.<sup>324</sup>

The “crux” of the certification decision centered upon the commonality element.<sup>325</sup> Judge Schoelen, writing in favor of denying class certification, noted that petitioners assert the length of time they have waited for resolution of their pending appeals may vary and acknowledged petitioners’ contention that “this variance is unimportant so long as the wait is more than [twelve] months.”<sup>326</sup> The question, as simplified, nonetheless precluded class certification because the petitioners’ legal theories required the court to determine whether the VA’s delay was unreasonable.<sup>327</sup> As to the reasonableness question, Judge Schoelen explained that the court decides whether any delay is unreasonable by examining the substantive claims underlying their petition and the justification the VA offers for the delay.<sup>328</sup> Relying on the recent *Martin* case decided by the Federal Circuit, Judge Schoelen noted that delay might be the result of “complete inaction” by the VA or the VA’s statutory duty to assist a claimant in developing the case.<sup>329</sup> Whether the VA’s delay was reasonable is integral to each of the petitioner’s claims and as a result, no commonality exists.<sup>330</sup>

Judge Davis concurred, stating:

[A] class must have claims that “depend on a common contention” that is “capable of classwide resolution” such that a “determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” Here, there are countless different reasons for processing time for each claim; therefore, one answer will not resolve all claims. Significantly, claims processing time does not necessarily mean, “delay.”<sup>331</sup>

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322. *Monk v. Shulkin*, No. 15-1280, 2017 WL 4864521, at \*1, \*2 (Ct. Vet. App. Oct. 17, 2017) (per curiam).

323. General Docket, *Monk v. Shulkin*, 2017 WL 4864521 (Vet. App. 2017) (No. 15-1280).

324. *Monk III*, 30 Vet. App. at 169, 181, 184, 189. Judges Schoelen, Davis, Pietsch and Meredith wrote that the commonality element ultimately defeated class certification in the *Monk* context, while Judges Allen, Bartley, Toth and Greenberg believed a class should have been certified. *Id.* at 181.

325. *Id.* at 175.

326. *Id.*

327. *Id.* at 176.

328. *Id.*

329. *Id.* at 177.

330. *Id.* at 182 (Davis, J., concurring).

331. *Id.*

Judge Davis was not a VA apologist, stating five to seven years for resolution of an appeal is “unreasonable.”<sup>332</sup> He called for “radical change” to address the 450,000 cases in the VA’s backlog.<sup>333</sup> Radical change includes, in his view, the following elements: “[f]inality, a closed record, aggregate claims resolution, alternative dispute resolution, and claims waivers for immediate cash payments.”<sup>334</sup> Chief Judge of the CAVC at the time of the opinion, he also noted the historic significance of the *Monk III* case in the CAVC jurisprudence, calling it a “seismic shift.”<sup>335</sup>

Judge Allen, writing for three judges who would grant class certification, was undeterred by the individual questions raised by Judge Schoelen, warning that not all merits questions must be resolved in the class certification analysis.<sup>336</sup> Using a boat analogy, he wrote:

Assume that each class member’s claim is a small boat floating on the water in a pool. The commonality inquiry (for this metaphorical pool) is trained on whether there is a single action that will cause the pool to drain or fill such that all the boats will move together. If there is, there is commonality among the boats because there is a single action that affects them all “in one stroke.”<sup>337</sup>

Judge Allen identified the “fundamental problem with the plurality’s reasoning” as the failure to apprehend the theory of the case presented by petitioners: “[t]heir theory is that there is a period of time that is simply too long for a claimant to wait for a decision.”<sup>338</sup>

Judge Greenberg wrote separately stating, “‘courts may not abdicate their role and deny any effective remedy’ to victims of administrative delay simply ‘because the problem is difficult.’”<sup>339</sup> He asserted the CAVC always had jurisdiction to determine class actions, prior to *Monk I*, and any limitations have been self-imposed by the CAVC itself.<sup>340</sup> Citing Justice Ginsburg’s dissent in *Wal-Mart*, Judge Greenberg states the CAVC must act as the “glue” in the fractured VA adjudicatory system.<sup>341</sup>

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332. *Id.* at 181–82.

333. *Id.* at 182.

334. *Id.*

335. *Id.* at 184.

336. *Id.* at 190 (Allen, J., concurring in part).

337. *Id.* at 191.

338. *Id.* at 194.

339. *Id.* at 201 (Greenberg, J., dissenting) (internal citations omitted).

340. *Id.*

341. *Id.* at 202.

Despite the differing (and entertaining) opinions in the remanded *Monk III* case, all judges agreed that Federal Rule of Civil Procedure 23 would be the appropriate model for a class action rule in the CAVC in the future.<sup>342</sup> The case is now on appeal again at the Federal Circuit at the time of this writing, as is the dismissal of the putative class members' individual claims for extraordinary relief.<sup>343</sup>

#### D. Class Actions in the CAVC Following *Monk*

As noted above, the CAVC determined it will use aggregate resolution procedures in appropriate cases initiated by a petition. Notwithstanding the denial of class certification in the *Monk* case, the CAVC has certified three classes at the time of this writing.

The first class action certified by the CAVC was *Godsey v. Wilkie*, in which the issue again was undue delay.<sup>344</sup> In contrast to *Monk*, the court limited the *Godsey* class to a single segment of the appeals process involving a pure ministerial action by the VA—the time it takes the VA to “certify” a case to the Board following receipt of the Form 9.<sup>345</sup> Before February 19, 2019, a claimant dissatisfied with a VA benefits decision could appeal that decision to the Board by filing a NOD and, ultimately, a Substantive Appeal, using a Form 9.<sup>346</sup> Once a claimant files a Form 9, the VA would “certify” the case and transfer the appellate record to the Board with a Form 8.<sup>347</sup>

In 2017, when the *Godsey* petition was filed, it took the VA, on average, 773 days to certify a case to the Board after receiving a Form 9 and an additional 321 days after that to transfer the record to the Board.<sup>348</sup>

The *Godsey* petitioners asserted the three-year timespan was so unreasonable that it amounted to a deprivation, which stripped them

342. The author is on the CAVC's Rules Advisory Committee and the Committee has been charged with creating the Rule to be adopted as part of the Court's Rules of Practice.

343. On October 23, 2019, the CAVC denied the remaining claims in *Monk* finding the individual claims of all named representatives other than Dolphin were withdrawn or moot. *See Monk v. Wilkie (Monk IV)*, 32 Vet. App. 87, 108 (2019). As to Mr. Dolphin, the CAVC (with Judges Allen and Greenberg dissenting) found that under the *TRAC* factors, no unreasonable delay existed. *Id.* Judge Pietsch dissented because of concerns with jurisdiction. *Id.* at 117.

344. *Godsey v. Wilkie*, 31 Vet. App. 207, 215 (2019).

345. *Id.*

346. *Id.* at 213–14 (referencing 38 U.S.C. § 7105(a) (2012)).

347. *See id.* at 216 (explaining the VA's application of the certification process established in 38 C.F.R. § 19.35 (2018)).

348. *Id.*

of their constitutional right to due process.<sup>349</sup> They requested class certification and an order compelling the VA Secretary to expedite the appeals certification and transfer process.<sup>350</sup>

The CAVC agreed, although it modified the proposed class to those veterans waiting more than eighteen months.<sup>351</sup> It also granted the extraordinary relief in the same decision, ordering the Secretary to certify cases within 120 days or take other action to develop the veteran's claim.<sup>352</sup> The CAVC made clear that by adjudicating the merits and the class decision at the same time in *Godsey* was not the adoption of a general policy for deciding such matters concurrently in future cases.<sup>353</sup> However, given the unique circumstances surrounding the *Godsey* case, particularly the nature of the alleged injury and the need for rapid remedial action, the CAVC resolved both matters in a single order.<sup>354</sup>

The second class action certified by the CAVC was *Wolfe v. Wilkie*,<sup>355</sup> in which the CAVC certified a class of veterans asserting entitlement to reimbursement for emergency medical expenses at non-VA facilities.<sup>356</sup> The *Wolfe* case came with a complex procedural background including an earlier CAVC opinion in *Staab v. McDonald*,<sup>357</sup> which found that the Secretary's implementing regulations relating to these reimbursements were contrary to law.<sup>358</sup> The CAVC's frustration was palpable, and the opinion read as a stinging rebuke to the agency. The CAVC admonished the VA for misleading veterans into believing they were not entitled to reimbursements and for implementing regulations directly contrary to the court's ruling.<sup>359</sup>

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349. *Id.* at 214.

350. *Id.*

351. *Id.* at 221–22.

352. *Id.* at 230.

353. *Id.* at 224–25.

354. Judge Pietsch dissented, citing her concerns about the lack of any class action rules in place at the CAVC. *Id.* at 231 (Pietsch, J., dissenting). With regard to the merits, Judge Pietsch determined that VA is well aware of the delays and she would “let the Secretary run his agency.” *Id.* at 233.

355. 32 Vet. App. 1, 11 (2019).

356. *Id.* at 12.

357. 28 Vet. App. 50, 55 (2016) (holding that congressional intent required veterans to be reimbursed for emergency medical costs not covered by third-party insurer).

358. *Wolfe*, 32 Vet. App. at 11–12 (expressing condemnation for the Secretary's post-*Staab* regulations).

359. *Id.*

The CAVC certified the class proposed by petitioner, which included veterans whose claims were or would be denied.<sup>360</sup> It held the regulation found in 38 C.F.R. § 17.1005(a)(5) unlawful, required readjudication of affected claims, and ordered the VA to send corrective letters to veterans.<sup>361</sup>

The third class action certified by the CAVC is *Skaar v. Wilkie*.<sup>362</sup> In this case, the CAVC certified a class of veterans who served in Palomeres, Spain and were exposed to radiation arising from a midair collision in 1966.<sup>363</sup> The merits of the class action involved presumptions relating to radiogenic diseases. With regard to the class certification analysis, the CAVC narrowed the proposed class definition which included an array of veterans whose claims spanned the adjudication process: from those who had never filed a claim to those who never appealed a denial.<sup>364</sup>

After modifying the class definition<sup>365</sup> and limiting the claim to a single regulatory challenge, the CAVC used Federal Rule of Civil Procedure 23 as its model, engaging in the common Rule 23(a) analysis including the requirements of numerosity, commonality, typicality and adequacy.<sup>366</sup> The CAVC found that injunctive relief was proper, and that class action device was the superior method for litigating the claim.<sup>367</sup> Notably, the CAVC created a presumption against class certification because of its ability to render binding precedential decisions.<sup>368</sup>

Presumptions, by definition, can be overcome and the majority in *Skaar* identified several none-exclusive factors that advocates should consider in the request for class certification.<sup>369</sup> The judicially created presumption can be overcome by showing, with a preponderance of the evidence, the following factors which weigh in favor of certification:

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360. *Id.*

361. *Id.* at 40. *But see id.* at 42 (Falvey, J., dissenting) (finding that a writ was unnecessary).

362. 32 Vet. App. 156 (2019).

363. *Id.* at 167.

364. *Id.* at 179–80.

365. The majority in *Skaar* found that *Palomeres* veterans who had not timely appealed decisions were not part of the class, as equitable tolling would not apply. *Id.* at 186–90 (explaining that they could later file supplemental claims if needed). Judge Schoelen, in her concurrence, would have allowed the past and expired subgroups but she would exclude “future” claimants. *Id.* at 203–06 (Schoelen, J., concurring in part).

366. *Id.* at 189–94.

367. *Id.* at 189–95.

368. *Id.* at 196.

369. *Id.* at 197.

1. the challenge is collateral to a claim for benefits (in *Skaar*, this factor was met because the challenge involved VA's adherence to a regulation, not interference with agency process with regard to his particular claim)
2. the litigation of the challenge involves compiling a complex factual record (in *Skaar*, this was technical and scientific information about dosage requirements and processes)
3. the appellate record is sufficiently developed to permit judicial review of the challenged conduct (in *Skaar*, the record was complete because the challenge was to the compliance with the regulation, in contrast to a determination as to the proper dosage methodology which would not be suitable for class certification because of the lack of record); and
4. the putative class has alleged sufficient facts suggesting a need for remedial enforcement (in *Skaar*, the advanced age and radiogenic disease supported this factor).<sup>370</sup>

These factors are weighted equally and on a case-by-case basis.<sup>371</sup>

In her concurrence in part, Judge Schoelen suggested an additional two factors to consider: (1) whether the challenge involves complex technical or scientific matters, and (2) whether the conduct is "systemic," meaning a significant number of claims involve the issue.<sup>372</sup> Judges Falvey, Pietsch, and Meredith dissented, questioning the necessity and efficacy of class certification given the CAVC's authority to issue precedential decisions which bind the VA.<sup>373</sup> The dissent urged that class actions are only appropriate in appeals (as opposed to petitions for a writ) where there is a final Board decision.<sup>374</sup> The dissent also asserted that as an additional jurisdictional matter, the class certification decision must be made only upon the record before the agency and the evidence used by the majority in its analysis was not part of that record.<sup>375</sup> In sum, the dissent criticized the majority's unnecessary "legal innovation" beyond the power granted by Congress, when a precedential decision would have had the same result.<sup>376</sup>

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370. *Id.* at 197–99.

371. *Id.* at 197.

372. *Id.* at 207–08 (Schoelen, J., concurring in part).

373. *Id.* at 208–09 (Falvey, J., dissenting).

374. *Id.* at 209.

375. *Id.* at 216–19.

376. *Id.* at 224–25.

Over the past few years and with the urging and guidance of the Federal Circuit, we have seen the legal landscape for veterans change. Unreasonable delay, the bane of veterans nationwide, can be addressed by writs, which should be analyzed under a revamped standard, as described in *Martin*. Unreasonable delay can also be addressed on a class-wide basis, as established in *Godsey*.

With regard to class actions raising issues other than delay, a path has been revealed in *Skaar*. Although *Skaar* adds an impediment to class certification by virtue of the new presumption against class certification and the additional multifactor analysis, the CAVC's acknowledgement of the importance of the class action device in veterans cases is the "seismic" change first noted by Judge Davis in *Monk III*. In *Skaar*, the CAVC acknowledged that the class action device can address "repetitive wrongdoing," improve access to justice, prevent the VA's mooted of claims scheduled for precedential review and correct systemic errors.<sup>377</sup> This is all good news for veterans advocates who continue to argue for meaningful advances under the law for veterans, on behalf of a grateful nation.<sup>378</sup>

## VII. EQUITABLE REMEDIES

The Federal Circuit has reviewed many cases surrounding equitable remedies in the past decade, since *Henderson v. Shinseki*.<sup>379</sup> In *Henderson*, the Court found the 120-day notice of appeal deadline applicable to cases filed with the CAVC lacked jurisdictional attributes, and, therefore, a failure to meet that deadline did not have the same strict consequences.<sup>380</sup> Specifically, the Supreme Court found that this filing was not jurisdictional, and thus, the CAVC could toll the 120-day statute of limitations when equity demanded.<sup>381</sup> The Court focused heavily on the pro-veteran slant of the federal veterans benefits laws.<sup>382</sup>

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377. *Id.* at 179.

378. Abraham Lincoln famously stated in his second inaugural address that the nation would "care for him who shall have borne the battle, and for his widow, and his orphan." This promise to serve and honor the men and women who are America's veterans has become the mission of the VA. U.S. DEP'T OF VETERANS AFFS., *About VA, Mission, Vision, Core Values & Goals*, [https://www.va.gov/about\\_va/mission.asp](https://www.va.gov/about_va/mission.asp) [https://www.va.gov/about\_va/mission.asp] (last updated Aug. 20, 2015).

379. 562 U.S. 428 (2011).

380. *Id.*

381. *Id.* at 434, 441.

382. *Id.* at 431, 437–38.

Similar to *Henderson*, in *James v. Wilkie*,<sup>383</sup> the Federal Circuit reviewed equitable tolling principles applicable to an untimely notice of appeal.<sup>384</sup> In *Burris v. Wilkie*,<sup>385</sup> the Court considered whether the CAVC may grant equitable relief claims under 38 U.S.C. § 503.<sup>386</sup>

A. *James Requires the CAVC to Provide More Analysis to Untimely Notice of Appeals*

The question presented in *James* was whether the CAVC applied the proper legal standard when reviewing the extraordinary circumstances requirement in equitable tolling cases.<sup>387</sup> Mr. Charles James placed his notice of appeal (NOA) in the mailbox, with the mailbox flag up within the 120-day deadline required by statute to appeal a Board decision to the CAVC.<sup>388</sup> However, for unknown reasons, the NOA did not get picked up by United States Postal Service.<sup>389</sup>

Under *Checo*, in order to benefit from equitable tolling, an appellant must demonstrate extraordinary circumstances, due diligence, and causation.<sup>390</sup> The Supreme Court requires a flexible case-by-case analysis.<sup>391</sup> In *James*, the Federal Circuit determined that the CAVC failed to perform a proper analysis.<sup>392</sup> The Federal Circuit found that the CAVC's categorical conclusion that equitable tolling can never apply to a case involving a fallen mailbox flag is wrong.<sup>393</sup> The Federal Circuit found that the CAVC failed to consider whether the fallen mailbox flag was due to an alleged third-party interference with the federal collection of mail and whether this circumstance could justify equitable tolling.<sup>394</sup> Additionally, the Federal Circuit found that it was irrelevant as to whether Mr. James could have done more to file his

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383. 917 F.3d 1368 (Fed. Cir. 2019).

384. *Id.* at 1370.

385. 888 F.3d 1352 (Fed. Cir. 2018).

386. *Id.* at 1356–58 (rejecting Petitioner's argument that the CAVC itself can grant equitable relief and holding that only the Secretary may do so).

387. *James*, 917 F.3d at 1370 (remanding the case back to the CAVC so the proper legal standard could be applied).

388. *Id.*

389. *Id.*

390. *Id.* at 1372–73 (citing *Checo v. Shinseki*, 748 F.3d 1373, 1378 (Fed. Cir. 2014)).

391. *Id.* at 1373 (pointing out the need for even greater flexibility when adjudicating veterans' claims).

392. *Id.*

393. *Id.*

394. *Id.* at 1374.



NOA, in terms of the extraordinary circumstances element.<sup>395</sup> On remand, the CAVC granted equitable tolling in Mr. James's case.<sup>396</sup>

*B. Federal Circuit Agrees That the CAVC Does Not Have Jurisdiction Under 38 U.S.C. § 503 to Grant Monetary Relief*

The question presented in *Burris* is whether the CAVC, itself, has jurisdiction to grant equitable relief.<sup>397</sup> *Burris* is a consolidated case of Charles Burris and Ben Thompson.<sup>398</sup>

Under 38 U.S.C. § 503, the VA Secretary may pay out benefits if there is administrative error or a finding that a person detrimentally relied upon a determination of the VA, without knowledge that it was erroneously made.<sup>399</sup> In the *Burris* case, the appellant's father was granted permanent and total disability, effective October 1, 2000.<sup>400</sup> This grant of benefits entitled Mr. Burris to Dependents Education Assistance ("DEA") benefits.<sup>401</sup> In 2010, the appellant requested the benefits from 2002 to 2004.<sup>402</sup> However, the VA denied the claim because the costs were over one year old.<sup>403</sup> Under statutes and regulations, this was a proper determination by the VA.<sup>404</sup> The CAVC found that it was without jurisdiction to grant equitable relief.<sup>405</sup>

In Ben Thompson's case, the veteran was entitled to forty-eight months of education.<sup>406</sup> As of May 2011, he had used forty-four months and twenty-two days.<sup>407</sup> In July 2011, Thompson received two notifications from the VA regarding his education eligibility.<sup>408</sup> In the first notice, the VA told him he had three months and eight days left remaining.<sup>409</sup> In the second notice, the VA told him he had thirty-six

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395. *Id.* at 1375.

396. Order Granting Equitable Tolling, *James v. Wilkie*, No. 16-1948 (Vet. App. June 27, 2019).

397. *Burris v. Wilkie*, 888 F.3d 1352, 1357 (Fed. Cir. 2018).

398. *Id.* at 1354.

399. *Id.* at 1358.

400. *Id.* at 1354.

401. *Id.*

402. *Id.*

403. *Id.*

404. *Id.* at 1359–62 (discussing the problems that would arise if the relevant statutes were interpreted differently).

405. *Id.* at 1354.

406. *Id.* at 1355.

407. *Id.*

408. *Id.*

409. *Id.*

months of education remaining.<sup>410</sup> Relying on the second notice, Mr. Thompson transferred the remainder of his eligibility to his son to attend a more expensive school than the two he was considering.<sup>411</sup> The VA refused to provide the thirty-six months of benefits and the Board affirmed.<sup>412</sup> Thompson requested equitable relief from the VA Secretary; however, the Secretary denied the request.<sup>413</sup> He then appealed to the CAVC and the Federal Circuit.<sup>414</sup>

The Federal Circuit determined that the CAVC does not have authority to outright grant monetary relief to veterans.<sup>415</sup> The Federal Circuit found that Congress gave the VA Secretary the exclusive discretionary authority to provide this relief.<sup>416</sup> Sadly for veterans, there is no judicial remedy where the VA Secretary refuses equitable relief.

#### VIII. EQUAL ACCESS TO JUSTICE ACT DECISIONS

28 U.S.C. § 2412(d)(1)(A) awards attorney's fees and expenses to a prevailing party in litigation against the United States where the position of the United States was not substantially justified.<sup>417</sup> This statute is titled the Equal Access to Justice Act<sup>418</sup> (EAJA). Several decades of case law, discussed below, have refined the definition of a "prevailing party" and the circumstances under which EAJA fees may be awarded.

A party does not need to obtain a final judgment in his or her favor in order to be a "prevailing party," according to the Supreme Court's decision in *CRST Van Expedited, Inc. v. E.E.O.C.*<sup>419</sup> (*CRST*), the "touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties."<sup>420</sup> As a further refinement of the "prevailing party" status for EAJA awards, the Federal Circuit found that when a case is remanded back to an agency without a judicial finding of error or an acknowledgment of error by the

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410. *Id.*

411. *Id.*

412. *Id.*

413. *Id.*

414. *Id.*

415. *Id.* at 1360.

416. *Id.*

417. 28 U.S.C. § 2412(d)(1)(A) (2012).

418. *Id.*

419. 136 S. Ct. 1642, 1646 (2016).

420. *Id.* (citing *Tex. State Teachers Ass'n. v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792–93 (1989)).

agency, there is no prevailing party for EAJA purposes.<sup>421</sup> In 2018, the Federal Circuit decided two important cases providing further definition to the term “prevailing party,” *Winters v. Wilkie*<sup>422</sup> and *Robinson v. O’Rourke*.<sup>423</sup>

#### A. *Winters v. Wilkie*

The Appellant, Mrs. Regina Winters, substituted herself into her husband’s claim for disability compensation when he passed away.<sup>424</sup> The Board of Veterans’ Appeals denied her husband’s underlying claims in 2013 and her attorney submitted what may have been considered a motion for revision of the Board decision.<sup>425</sup> The Board did not consider the motion as a request for revision but instead referred the issues to the lower agency regional office for review.<sup>426</sup> In sending the request to the regional office, the Board never informed Mrs. Winters that they did not consider her motion a motion for review.<sup>427</sup> Because the Board failed to provide Mrs. Winters notice of this final decision that her letter did not constitute a motion for reconsideration, her 120-day window to appeal the Board’s decision to the CAVC never began to run.<sup>428</sup>

In 2014, the Board denied other claims in Mrs. Winters’s case and she appealed both the 2013 and 2014 Board decisions to the CAVC.<sup>429</sup> The CAVC dismissed the 2013 appeal because the court found it did not have jurisdiction due to the Board’s failure to issue a final decision regarding those claims.<sup>430</sup> Finding that the 2013 and 2014 issues were inextricably intertwined, the CAVC remanded both sets of claims back to the Board for decision.<sup>431</sup>

Mrs. Winters’s attorney filed a petition with the CAVC for EAJA fees based upon the court’s remand of the issues back to the agency.<sup>432</sup> The CAVC rejected the petition regarding the 2013 claims because the

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421. *Davis v. Nicholson*, 475 F.3d 1360, 1366 (Fed. Cir. 2007).

422. 898 F.3d 1377, 1378 (Fed. Cir. 2018).

423. 891 F.3d 976, 978 (Fed. Cir. 2018).

424. *Winters*, 898 F.3d at 1379.

425. *Id.*

426. *Id.*

427. *Id.*

428. *Id.*

429. *Id.*

430. *Id.*

431. *Id.* at 1380.

432. *Id.*

court did not have jurisdiction over these issues in the first place.<sup>433</sup> The court then dismissed the petition regarding the 2014 claims finding that Mrs. Winters was not a “prevailing party” because the remand of the 2014 claims was not due to administrative error in the 2014 decision.<sup>434</sup>

In her appeal to the Federal Circuit, Mrs. Winters argued that the CAVC remand was partially based on the Board’s premature decision on the 2014 claims which constituted an error.<sup>435</sup> The Federal Circuit held that Mrs. Winters failed to meet the burden of demonstrating that there was error in the 2014 decision noting that “a boxer thrown out of the ring and then allowed back in to continue the fight has not prevailed.”<sup>436</sup> There is no law requiring the Board to decide the issues in any certain order, and Mrs. Winters failed to demonstrate a material alteration in the legal relationship of the parties under *CRST*.<sup>437</sup> The remand was based solely upon judicial economy and no error on the part of the agency was shown.<sup>438</sup>

The decision in *Winters* reinforces the court’s previous decisions that remand alone is not enough to warrant EAJA fees.

#### B. Robinson v. O’Rourke

On appeal to the CAVC, Mr. Bennie Robinson’s counsel, who also represented Mr. Robinson at the agency level, argued an issue for the first time that ended up in a favorable decision for Mr. Robinson.<sup>439</sup> The CAVC did not apply the doctrine of issue exhaustion and did not identify any error on the part of the Board but set aside the Board decision and remanded the case so that the Board could address the new arguments brought up on appeal.<sup>440</sup> Mr. Robinson’s attorney filed a petition for EAJA fees arguing that the remand indicated Mr. Robinson was a “prevailing party.”<sup>441</sup> The CAVC denied the application because the remand was not predicated on Board error but upon the

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433. *Id.*

434. *Id.*

435. *Id.* at 1382.

436. *Id.* at 1384 (citing *Akers v. Nicholson*, 409 F.3d 1356, 1360 (Fed. Cir. 2005)).

437. *Id.*

438. *Id.*

439. *Robinson v. O’Rourke*, 891 F.3d 976, 978 (Fed. Cir. 2018).

440. *Id.*

441. *Id.* at 979.

new arguments of the attorney.<sup>442</sup> The court reiterated that a remand alone does not grant prevailing party status.<sup>443</sup>

The Federal Circuit noted that the Supreme Court's 2016 decision in *CRST* did not concern a remand to an agency but instead dealt with defendants—not plaintiffs—who prevailed.<sup>444</sup> Because of this difference, the court commented that it is unclear if reconsideration or clarification of previous precedent at the Federal Circuit regarding agency remands will be necessary in the future.<sup>445</sup> The court found that no decision regarding *CRST*'s impact was necessary in Mr. Robinson's case because the remand was not predicated on agency error and did not result in a material alteration of the relationship between the parties.<sup>446</sup> The court noted:

Robinson's position in this appeal would reward a claimant for raising an argument for the first time at the [CAVC]. Such a result is illogical and contrary to fundamental principles of orderly procedure and good administration. While "[w]e recognize that EAJA is an important component of the framework within which veterans may seek benefits," . . . we do not interpret the statute in a manner that incentivizes claimants to withhold arguments before the Board, or, alternatively, that requires the Board or [CAVC] to *sua sponte* search for and address issues that may be lurking in the record but that have not been briefed.<sup>447</sup>

In *Robinson*, the Federal Circuit left open the question of whether the precedential holdings regarding remands back to the agency level should be reexamined in light of the Supreme Court's 2016 *CRST* decision. Limiting EAJA fees in decisions remanding cases back to the agency due to administrative error could have catastrophic effects on veterans and their advocates, particularly because remand is the most utilized resolution when the CAVC determines there was agency error.<sup>448</sup> Often, EAJA fees are the only fees attorneys earn in cases representing veterans in an environment where twenty-six percent of veterans who file at

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442. *Id.*

443. *Id.*

444. *Id.* at 982.

445. *Id.*

446. *Id.*

447. *Id.* at 986.

448. Many CAVC cases are remanded based upon a "joint motion to remand" in which the VA Secretary, through counsel, agrees an error was made. *See, e.g.*, CAVC Rule 33. In these cases, there should be no question that an EAJA fee is proper given the concession of an error.

the CAVC are pro se.<sup>449</sup> It will be important to watch the Federal Circuit's consideration and implementation of *CRST* in the coming years.

#### CONCLUSION

Over the past four years, the Federal Circuit has dramatically changed CAVC procedural rules, administrative law principles, and overturned decades of case law. Each of the decisions discussed above will have a substantial impact on the teaching and practice of veterans law, specifically with regard to administrative law principles and procedural possibilities.

Given that the United States is still engaged in its longest war to date, the War on Terror currently being waged in Iraq and Afghanistan, veterans will continue to benefit from the able assistance of counsel. As important, judicial review of VA actions is necessary so that our veterans receive all of their earned benefits. In light of the seismic changes discussed above, affecting hundreds of thousands of veterans, the need for informed and effective counsel to help our nation's veterans seek the disability benefits they have earned is of utmost importance.

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449. U.S. CT. OF APP. FOR VETERANS CLAIMS, ANN. REP. 1 (2018), <http://www.uscourts.cavc.gov/documents/FY2018AnnualReport.pdf> [<https://perma.cc/N9VW-7JQQ>].