Settling *Skaar*: The End of Class Actions and the Need for New Mass Adjudication of Veteran Claims for Disability Compensation

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ABSTRACT: Aggregation of claims is an invaluable tool for administrative agencies that receive hundreds of thousands of claims each year. These agencies use a variety of tools, but one agency that does not aggregate claims is the Department of Veterans Affairs' Board of Veterans' Appeals. The Board of Veterans' Appeals adjudicates each claim individually, which has become a problem considering the recent spike in claims filed with VA and appeals filed before the Board. As time has gone on, the number of claims has significantly increased, and mass adjudication is needed to alleviate some of that burden. Despite its value, aggregation is not available to veterans until they appeal to the Court of Appeals for Veterans Claims, a process that could take years. This situation is further complicated by the Federal Circuit's 2022 decision in Skaar v. McDonough. *In* Skaar*, the Federal Circuit's new jurisdictional requirements for class members functionally eliminate class actions in an appellate posture. This Note argues that, as a result, veterans need a new method of mass adjudication. This Note proposes that the Board of Veterans' Appeals should create its own procedure of agency adjudication, and the Court of Appeals for Veterans Claims should implement its own rules of joinder and consolidation.*

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INTRODUCTION

In June of 2023, the U.S. Supreme Court denied, without comment, the petition for a writ of certiorari in *Skaar v. McDonough*,[1] a Court of Veterans Appeals-certified class action challenging the Air Force's use of radiation dose estimates and the denial of benefits for a group of veterans.[2] The events of *Skaar* began back in 1966 when a mid-air refueling went wrong, causing a U.S. B-52 bomber to crash-land in Palomares, Spain.[3] Fortunately, none of the bomber's four hydrogen bombs detonated, but two were dislodged, spreading

1. Skaar is pronounced "score," not "scar." The underlying *Skaar* case has stretched across the tenure of numerous VA Secretaries and has been renamed numerous times from *Skaar v. O'Rourke* to *Skaar v. Wilkie* and finally *Skaar v. McDonough*. Throughout this Note, I avoid case name short cites—except where an *id.* short cite is appropriate and unambiguous—in order to promote clarity and avoid confusing cases. In textual references to the cases, I use the name *Skaar* unless I specifically mean to refer to a specific case within the series as opposed to the series of litigation as a whole.

2. Skaar v. McDonough, 48 F.4th 1323, 1325 (Fed. Cir. 2022).

3. Dave Philipps, *Legal Win Is Too Late for Many Who Got Cancer After Nuclear Clean-Up*, N.Y. TIMES (Feb. 11, 2020), https://www.nytimes.com/2020/02/11/us/palomares-air-force-nuclear.html (on file with the *Iowa Law Review*).

radioactive dust and covering the area surrounding Palomares.[4] The U.S. military sent 1,388 military personnel[5]—mostly low-ranking cooks, grocery clerks, and even band members—to clean up the plutonium dust, exposing them to radiation in the process.[6]

As the years passed, a growing number of those servicemen, later known as Palomares veterans, became sick with various types of cancer and other illnesses; however, the Department of Veterans Affairs ("VA") consistently denied their requests for disability compensation.[7] Eventually, Mr. Skaar, a Palomares veteran whose own benefits request VA denied, appealed VA's decision and made it to the U.S. Court of Appeals for Veterans Claims ("CAVC" or "Veterans Court"), where the court certified a class of Palomares veterans.[8] VA appealed the decision to the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit"), challenging the certified class.[9] The Federal Circuit vacated the class certification due to jurisdictional issues with members of the class, leading to Mr. Skaar's appeal to the U.S. Supreme Court.[10] The Federal Circuit's decision "effectively eliminate[d] class actions in the veterans' context."[11]

This Note argues that the Federal Circuit's decision in *Skaar v. McDonough* functionally eliminates the Veterans Court's ability to certify and hear class actions arising from appeals, and it remains uncertain how the new jurisdictional requirements will impact the court's decision to certify an appeals class in the future. Thus, a new system of resolving veterans' claims en masse is necessary. In Part I, this Note provides necessary background, including the history of VA; the development of the Veterans Court and judicial review for veterans; and the case of *Skaar v. McDonough*. Part II explores the difficulties facing veterans throughout the benefits process and the impact of *Skaar* on future class actions arising from appeals decisions. Part III proposes two different solutions that VA and the Veterans Court should implement to improve the effective resolution of claims and mitigate the negative impacts of *Skaar* on future claimants. This Note concludes by explaining how the proposed solutions

4. *Id.* The two bombs that went off "contained more than [three] billion micrograms," and just a single microgram is considered harmful. *Id.* The detonation contaminated 490 acres with radioactive plutonium. Brief of Appellee Sec'y of Veterans Affs. at 1–2, Skaar v. Wilkie, 32 Vet. App. 156 (2019) (No. 17-2574), *vacated and remanded sub nom.* Skaar v. McDonough, 48 F.4th 1323 (Fed. Cir. 2022).

5. Appellee's Response to the Ct.'s Nov. 13, 2018, Order at 2, Skaar v. Wilkie, 32 Vet. App. 156 (No. 17-2574). Many sources estimate anywhere between 1,300 and 1,600, but the Department of Defense provided VA with more accurate numbers during *Skaar*'s litigation. *Id.* According to the Department of Defense, Palomares personnel included: "1,253 active duty Air Force personnel, 108 Army personnel, 27 Navy personnel, 32 U.S. civilians, and 36 Spanish Nationals." *Id.*

6. Jan Beyea & Frank N. von Hippel, *History of Dose, Risk, and Compensation Assessments for US Veterans of the 1966 Plutonium Cleanup in Palomares, Spain*, 117 HEALTH PHYSICS 625, 625 (2019).

7. Philipps, *supra* note 3.

8. Skaar v. Wilkie, 33 Vet. App. 127, 149–50 (2020) (en banc), *vacated in part sub nom.* Skaar v. McDonough, 48 F.4th at 1323.

9. *See* Skaar v. McDonough, 48 F.4th at 1329.

10. *Id.* at 1335.

11. Skaar v. McDonough, 57 F.4th 1015, 1016 (Fed. Cir. 2023) (Dyk, J., dissenting).

would alleviate the current burdens facing the Agency and allow timely and efficient resolution of claims.

I. THE VETERANS BENEFITS PROCESS

To fully comprehend the Federal Circuit's decision in *Skaar* and its impact on judicial review in the Veterans Court, this Part examines the history and background of the veterans benefits process and the Veterans Court, including *Skaar*. First, this Part discusses the history of VA. Next, this Part examines the role of judicial review in the veterans benefits process. Third, this Part outlines how a claim is filed and progresses. Lastly, this Part discusses the claims of various Palomares veterans, including Mr. Skaar, and their journey to the Veterans Court.

A. JUDICIAL REVIEW AND VETERANS BENEFITS

President Hoover created the Veterans Administration (now the Department of Veterans Affairs) on July 21, 1930, when he signed Executive Order 5398 and made the Veterans Bureau a federal administration.[12] A few years later, Congress consolidated all veterans' services in a single federal agency: the Veterans Administration. After World War II, the veteran population dramatically increased, as did the number of new benefits.[13] Due to the influx of veterans and benefits claims, VA internally reorganized in 1953 and established the Department of Veterans Benefits, the predecessor of the modern Veterans Benefits Administration ("VBA"). In 1989, VA replaced the Veterans Administration when President Reagan made VA a cabinet position.[14]

There exists a consensus "that access to court ought to be guaranteed to those complaining of arbitrary treatment by administrative officials."[15] Yet, until 1988, this access was functionally unavailable for veterans contesting their benefits decisions.[16]

1. "Splendid Isolation": VA's Development Without Judicial Review

Between the late 1700s and the formal creation of VA, various government entities including "the Departments of War, the Interior, and the Treasury made decisions on veterans benefits."[17] These benefits ranged from pension

12. *VA History Summary*, U.S. DEP'T VETERANS AFFS. (Aug. 6, 2024), https://department.va.gov/history/history-overview [https://perma.cc/BRA3-K5XQ].

13. *Id.*

14. *Id.*

15. Robert L. Rabin, *Preclusion of Judicial Review in the Processing of Claims for Veterans' Benefits: A Preliminary Analysis*, 27 STAN. L. REV. 905, 905 (1975); *see also* Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946).

16. Prior to 1988, veterans filed suits in federal district courts around the country. *See generally* Johnson v. Robison, 415 U.S. 361 (1974) (discussing whether a conscientious objector qualified for educational benefits and whether his claim arose under the Constitution or VA statute). These suits typically dealt with issues separate from disability compensation and often immediately faced motions to dismiss due to VA's assertion that the Agency operated independently from judicial review.

17. James D. Ridgway, *The Veterans' Judicial Review Act Twenty Years Later: Confronting the New Complexities of the Veterans Benefits System*, 66 N.Y.U. ANN. SURV. AM. L. 251, 253 (2010).

payments for disabled Revolutionary War soldiers to the establishment of a domiciliary for sailors in the early nineteenth century.[18] None of these decisions were subject to any sort of judicial review.[19] When the government founded VA,[20] it did so without extending judicial review to benefits decisions.[21] At the time, "VA stood 'in "splendid isolation as the single federal administrative agency whose major functions [we]re explicitly insulated from judicial review."'"[22]

The absence of judicial review continued until World War II, when President Roosevelt signed Executive Order 6230, establishing the Board of Veterans' Appeals ("BVA" or "Board").[23] The BVA, a non-adversarial body, has the authority to provide final decisions on the VA Secretary's ("Secretary") determinations.[24] For decades, the BVA served as VA's main mechanism of review and was the only adjudicative body within the veterans benefits system.[25] While the BVA had—and still has—a duty to assist veterans, its decisions were excluded from judicial review.[26] This meant that if a veteran received an unfavorable decision from the Board, the decision was final. Veterans had no option to appeal outside of the Agency.

2. The Passage and Effects of the Veterans' Judicial Review Act

In 1988, this longstanding prohibition on judicial review changed when Congress passed the Veterans' Judicial Review Act ("VJRA").[27] Although Congress intended it to be "a fine-tuning process with particular emphasis placed on the format for judicial review," the VJRA had a much broader

18. Victoria L. Collier & Drew Early, *Cracks in the Armor: Due Process, Attorney's Fees, and the Department of Veterans Affairs*, 18 ELDER L.J. 1, 4 (2010).

19. Ridgway, *supra* note 17, at 253.

20. At this point in history, VA was not known as the Department of Veterans Affairs, but this Note will still refer to it as VA to avoid confusion.

21. Rabin, *supra* note 15, at 905.

22. Gardner v. Brown, 5 F.3d 1456, 1463 (Fed. Cir. 1993) (quoting H.R. REP. NO. 100-963, at 10 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 5782, 5791).

23. *Board of Veterans' Appeals*, U.S. DEP'T VETERANS AFFS. (May 17, 2024), https://www.bva.va.gov/index.asp [https://perma.cc/N2TH-ZKJU].

24. 38 U.S.C. § 7104(a) (2018).

25. The Board is the highest level of review still within the Agency. This means that it operates within governing statutes, specifically those dealing with the Secretary's discretion. *See* 38 C.F.R. § 20.104(a) (2024) ("All questions of law and fact necessary to a decision by the Secretary . . . under a law that affects the provision of benefits by the Secretary to veterans . . . are subject to review on appeal to the Secretary.").

26. Barton F. Stichman, *The Impact of the Veterans' Judicial Review Act on the Federal Circuit*, 41 AM. U. L. REV. 855, 858–59 (1992). Three years after VA was created, Congress added provisions that prohibited court review of VA's individual benefits decisions. *Id.*; *see also* Ridgway, *supra* note 17, at 254 ("Rather than accept decisions of the federal courts as binding, Congress replaced the invalid statute with a scheme that excluded judicial review altogether.").

27. Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988). Even though disability compensation decisions were exempt from judicial review before the VJRA, veterans groups pressured for procedural reforms that made the system more claimant-friendly and increased VA's burden. Ridgway, *supra* note 17, at 254–55.

impact.[28] The VJRA significantly expanded the scope of 38 U.S.C. § 511(a),[29] prohibiting any court from reviewing a VA decision on "all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans."[30] It also codified the Secretary's duty to assist claimants,[31] subjected VA's rulemaking to notice and comment procedures[32] under the Administrative Procedure Act,[33] and mandated the BVA Chairman report to Congress each year.[34] The VJRA's biggest impact was the creation of the Court of Appeals for Veterans Claims, whose decisions could be appealed to the Federal Circuit and the Supreme Court.

The CAVC[35] is an appellate court with exclusive jurisdiction over BVA decisions.[36] Typically, the CAVC reviews the Board's decision based on the veterans' service records, medical records, and other documents making up the record before the Agency, written briefs from the parties, and occasionally oral arguments.[37] The Veterans Court occasionally reviews Board decisions through oral arguments but only when the case presents new legal issues.[38] Like other appellate courts, the CAVC's scope of review is limited to questions

28. WILLIAM F. FOX, THE LAW OF VETERANS BENEFITS: JUDICIAL INTERPRETATION 16 (3d ed. 2002).

29. Veterans' Judicial Review Act § 101, 101 Stat. at 4105–06. For clarity's sake, note that § 511(a) was previously § 211(a) until it was recodified in 1991.

30. 38 U.S.C. § 511(a). District courts have theoretically retained jurisdiction to adjudicate lawsuits that challenge VA actions separate from direct benefits decisions from the Secretary. Jacob B. Natwick, Note, *Unreasonable Delay at the VA: Why Federal District Courts Should Intervene and Remedy Five-Year Delays in Veterans' Mental-Health Benefits Appeals*, 95 IOWA L. REV. 723, 730 (2010). This distinction exists, but generally "[f]ederal district courts are excluded from veterans' benefits adjudications." Monk v. United States, No. 22-cv-1503, 2024 WL 1344712, at *4 (D. Conn. Mar. 29, 2024). 38 U.S.C. § 511(a) means lawsuits with elements that could ultimately impact veterans benefits may not be challenged in federal court under § 511(a). *But see id.* at *1 (denying the government's motion to dismiss in a case involving claims "that the VA rejects Black veterans' benefits applications at a higher rate because of their race").

31. Veterans' Judicial Review Act § 103, 101 Stat. at 4106. Previously, this duty to assist only extended to providing applications to claimants and informing them when the application was complete. After the VJRA, that duty expanded, and the Agency now "shall assist such a claimant in developing the facts pertinent to the claim." *Id.*

32. The Administrative Procedure Act requires agencies to publish their proposed rulemaking, allowing the public an opportunity to comment on the proposed rule before adoption. Arnold Rochvarg, *Adequacy of Notice of Rulemaking Under the Federal Administrative Procedure Act—When Should a Second Round of Notice and Comment Be Provided?*, 31 AM. U. L. REV. 1, 2 (1981). The idea behind the notice and comment period is to allow the public to "educate the agency" and provide additional consideration. *Id.* at 2–3.

33. Veterans' Judicial Review Act § 102, 101 Stat. at 4106.

34. *Id.* § 208, 101 Stat. at 4112.

35. When first created, the CAVC was known as the Court of Veterans Appeals ("CVA" or "COVA"). *See id.* § 301, 102 Stat. at 4113. For this Note, it will be referred to as its modern name, the Court of Appeals for Veterans Claims.

36. *About the Court*, U.S. CT. APPEALS FOR VETERANS CLAIMS, https://www.uscourts.cavc.gov/about.php [https://perma.cc/BU7S-9J32].

37. *Id.*

38. *Id.*

of law, and the court cannot conduct its own fact-finding.[39] As an Article I court, CAVC judges are appointed for fifteen-year terms.[40] It uses three methods to issue opinions: nonprecedential single-judge decisions, precedential three-judge panels, and precedential en banc decisions.[41] According to the CAVC's 2023 Annual Report, of the 7,839 appeals and petitions that reached the court, forty were heard by a three-judge panel, and none were heard en banc.[42] This means that less than one percent of decisions from the CAVC were precedential in fiscal year 2023.[43] Even though the CAVC's decision is likely nonprecedential, the appeals process does not stop there.

If a veteran or VA would like to appeal a decision from the CAVC, the appeal is sent to the Federal Circuit. The VJRA did not create the Federal Circuit, but it did grant exclusive jurisdiction over CAVC decisions to the Federal Circuit.[44] However, the Federal Circuit's jurisdiction over CAVC decisions does not extend to "a challenge to a factual determination" or "a challenge to a law or regulation as applied to the facts of a particular case."[45] The only time the Federal Circuit can examine the facts is when there is a constitutional issue.[46] When examining the CAVC's determination, the Federal Circuit can overturn the determination if it "is arbitrary, capricious, an abuse of discretion, unconstitutional, contrary to a statute, in excess of statutory authority, without observance of procedure required by law, or otherwise not in accordance with law."[47] For example, in *Skaar*, the Federal Circuit overruled the CAVC's class certification because it determined that the CAVC "exceeded its jurisdiction" by including veterans who had yet to file a claim and veterans who had not received a final agency decision.[48]

3. Class Actions

This Section explains the impact of *Monk v. Shulkin* on the CAVC's rules of practice and procedure, as well as the procedure of the CAVC used to create new rules. Class actions are procedural tools that allow mass resolution of

39. 38 U.S.C. § 7261.

40. *Id.* § 7253.

41. *Id.*

42. U.S. CT. OF APPEALS FOR VETERANS CLAIMS, FISCAL YEAR 2023 ANNUAL REPORT 1–3 (2023), https://www.uscourts.cavc.gov/documents/FY2023AnnualReport.pdf [https://perma.cc/9Q4V-6JP4].

43. Historically, this has been the trend for precedential decisions in the CAVC. *See* JONATHAN M. GAFFNEY, CONG. RSCH. SERV., IF11365, U.S. COURT OF APPEALS FOR VETERANS CLAIMS: A BRIEF INTRODUCTION 2 (2019); James D. Ridgway, Barton F. Stichman & Rory E. Riley, *"Not Reasonably Debatable": The Problems with Single-Judge Decisions by the Court of Appeals for Veterans Claims*, 27 STAN. L. & POL'Y REV. 1, 11, 38 (2016).

44. Stichman, *supra* note 26, at 865.

45. 38 U.S.C. § 7292(d)(2).

46. *Id.*

47. Stichman, *supra* note 26, at 864; 38 U.S.C. § 7292(d)(1).

48. Skaar v. McDonough, 48 F.4th 1323, 1331–32 (Fed. Cir. 2022); *see infra* Section I.C.

claims.[49] Class actions are an appropriate measure when "[t]he issues involved are common to the class as a whole," and "[t]hey turn on questions of law applicable in the same manner to each member of the class."[50] While the VJRA ensured VA was subject to judicial review, it did not bring class actions to veterans, despite high-profile veteran class actions in the district courts.[51]

As an administrative court established under Article I,[52] the CAVC has statutory authority to prescribe its own rules of practice and procedure.[53] In Article III courts, Rule 23 of the Federal Rules of Civil Procedure ("FRCP") authorizes and governs class actions, and that rule had been used to hear class actions related to veterans benefits but not cases regarding the final decision for disability compensation.[54]

i. Monk v. Shulkin

Prior to 2017, class actions did not occur in the CAVC.[55] In fact, the CAVC explicitly denied it had the authority to certify and hear class actions because "(1) it lack[ed] the power to adopt a rule of the kind proposed for class actions . . . (2) such a procedure . . . would be 'highly unmanageable' . . . [and] (3) such a procedure is unnecessary in light of the binding effect of this [c]ourt's published opinions as precedent in pending and future cases."[56]

The CAVC's refusal to certify class actions changed when the Federal Circuit issued its opinion in *Monk v. Shulkin*. Mr. Conley F. Monk, Jr., a Vietnam veteran, petitioned the CAVC "to certify a class action and to otherwise aggregate for adjudication the claims of thousands of veterans whose claims were similarly situated to his own."[57] In *Monk*, the veterans were seeking a declaration from the CAVC ordering the Secretary to promptly issue a decision on their claims for disability compensation that had been pending for years.[58] The Federal Circuit eventually certified Mr. Monk's class for three reasons: First, the Federal Circuit held that "the All Writs Act unquestionably applies in the Veterans Court"

49. JONATHAN M. GAFFNEY, CONG. RSCH. SERV., LSB10376, AN ARMY OF MANY: VETERANS' BENEFITS CLASS ACTIONS IN THE U.S. COURT OF APPEALS FOR VETERANS CLAIMS 2 (2019).

50. Califano v. Yamasaki, 442 U.S. 682, 701 (1979).

51. *See, e.g.*, Nehmer v. U.S. Veterans' Admin., 712 F. Supp. 1404, 1407–08 (N.D. Cal. 1989) (challenging VA's implementation of a statute that authorized VA to award benefits for certain disabilities caused by Agent Orange exposure and doing so through a class suit); *In re* Agent Orange Prod. Liab. Litig. MDL No. 381, 818 F.2d 145, 149–50 (2d Cir. 1987) (filing a products liability class action against the Agent Orange manufacturers).

52. Stichman, *supra* note 26, at 855 n.3.

53. GAFFNEY, *supra* note 43, at 1.

54. *See Nehmer*, 712 F. Supp. at 1408–09; Nat'l Ass'n of Radiation Survivors v. Derwinski, 994 F.2d 583, 585 (9th Cir. 1992) (challenging, through a class action, VA's ten dollar statutory cap on attorney fees for representing a veteran before VA).

55. Harrison v. Derwinski, 1 Vet. App. 438, 438 (1991); Lefkowitz v. Derwinski, 1 Vet. App. 439, 440 (1991).

56. *Harrison*, 1 Vet. App. at 438 (citations omitted).

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

58. Adam S. Zimmerman, *The Veterans Class Action*, ADMIN. & REGUL. L. NEWS, Spring 2018, at 10, 10.

and had already "provided authority to aggregate cases in various contexts"; second, the CAVC's statutory authority to prescribe its rules of practice and procedure meant the CAVC could create its own class action procedures; and third, there was "no persuasive indication that Congress intended to *remove* class action protection for veterans when it enacted the VJRA."[59]

The All Writs Act ("AWA") provides that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions,"[60] and this applies to the CAVC as well. Article III courts and the CAVC have used the AWA to include jurisdiction "where an appeal is not then pending but may be later perfected."[61] This means that courts have extended their appellate jurisdiction to include cases that are within their jurisdiction due to writs *and* cases or appeals that have not yet been filed but would be within the jurisdiction if they were filed.[62] The CAVC has jurisdiction over final Board decisions, so claimants can file petitions for a writ of mandamus under the AWA to petition for a class when VA is doing something that is preventing the CAVC from having jurisdiction. For example, in *Beaudette v. McDonough*, VA had a rule that prevented claimants from appealing adverse decisions regarding the Caregivers Program[63] to the Board.[64] The Beaudettes filed a petition for a writ of mandamus to allow appeals to the Board.[65] Because the Beaudettes would have fallen under the CAVC's jurisdiction (i.e., received a Board decision) but for VA's rule preventing appeal, a writ of mandamus was appropriate. The AWA's role in *Skaar* will be discussed further in Section I.C.

After the Federal Circuit's decision in *Monk*, the case returned to the CAVC. The CAVC then implemented a class action procedure modeled on Rule 23 of the FRCP and made class actions available to veterans appealing their benefits decision at the Veterans Court.[66]

ii. CAVC's Development of Class Action Procedure

After the CAVC's decision in *Monk*, the CAVC's Rules Advisory Committee ("RAC") offered the Veterans Court assistance in drafting its own class action

59. *Monk*, 855 F.3d at 1318–20.

60. 28 U.S.C. § 1651(a).

61. Fed. Trade Comm'n v. Dean Foods Co., 384 U.S. 597, 603 (1966); Wolfe v. Wilkie, 32 Vet. App. 1, 23 (2019), *rev'd sub nom.* Wolfe v. McDonough, 28 F.4th 1348 (Fed. Cir. 2022).

62. *Dean Foods Co.*, 384 U.S. at 603–04 (describing case law where writs have been issued and the jurisdiction has been extended to include appeals not yet perfected).

63. The VA Family Caregiver Assistance Program allows a family member caring for the veteran to receive a monthly stipend, healthcare, education and training, mental health counseling, financial assistance to travel with the veteran to receive care, and other benefits. *The Program of Comprehensive Assistance for Family Caregivers*, U.S. DEP'T VETERANS AFFS. (Aug. 19, 2024), https://www.va.gov/family-and-caregiver-benefits/health-and-disability/comprehensive-assistance-for-family-caregivers [https://perma.cc/HP9B-4HGW].

64. Beaudette v. McDonough, 93 F.4th 1361, 1364 (Fed. Cir. 2024).

65. *Id.* at 1365.

66. Initially after the decision in *Monk*, the CAVC used Rule 23 of the Federal Rules of Civil Procedure as a guide when it established its new class action procedure. Max W. Yarus, *The Uncharted Waters of Veterans Class Actions*, 9 STETSON J. ADVOC. & L. 115, 117–18 (2022); GAFFNEY, *supra* note 43, at 4.

rule. Shortly thereafter, the CAVC assembled a Judicial Advisory Committee ("JAC").[67] Working in tandem, the RAC and JAC spoke with class action experts about class action procedures in other courts.[68] The committees' work culminated in Rules 22 and 23 of the CAVC's Rules of Practice and Procedure.[69] Rule 22 governs how to file a Request for Class Certification and Class Action ("RCA"), while Rule 23 governs the action on an RCA.[70]

The rules governing class actions at the CAVC are similar to Rule 23 of the FRCP, but the Veterans Court has some key distinctions. The first distinction is in Rule 23(a) of the CAVC's Rules of Practice and Procedure, which states the prerequisites for an RCA. The prerequisites of Rule 23 of the FRCP require that:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.[71]

To file an RCA in the CAVC, veterans must meet similar prerequisites to those required by the FRCP, but they face an even bigger challenge. If a veteran wants to file for an RCA, they must demonstrate that a class "would serve the interests of justice to a greater degree than would a precedential decision granting relief on a non-class action basis."[72] The idea that a class needs to be "superior" to other forms of adjudication comes from FRCP 23(b)(3),[73] otherwise known as the superiority requirement. The CAVC has joined some Article III courts in their interpretation of FRCP 23(b)(3)[74] and imposed a superiority requirement, making class certification even more difficult for claimants.

The CAVC's Rule 23 also differs procedurally from Rule 23 of the FRCP. For example, before any claim reaches the court—class action or non-class action—the CAVC has Rule 33 staff conferences that allow parties to discuss the appeal and potentially simplify or resolve the issue before it reaches the

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67. Order Assembling a Jud. Advisory Comm. at 1, *In re*: Jud. Advisory Comm., Misc. No. 04-17 (Vet. App. May 19, 2017).

68. Zimmerman, *supra* note 58, at 10.

69. *See* Order Assembling a Jud. Advisory Comm., *supra* note 67, at 1; Order at 1, *In re*: Rules of Prac. & Proc., Misc. No. 12-20 (Vet. App. Nov. 10, 2020).

70. VET. APP. R. 23. This discussion focuses mainly on Rule 23 of both the CAVC's Rules of Practice and Procedure and Rule 23 of the FRCP .

71. FED. R. CIV. P. 23(a).

72. VET. APP. R. 22(a)(3).

73. FED. R. CIV. P. 23(b) ("An action may be maintained as a class action if . . . the court finds that . . . a class action is superior to other available methods for the fair and efficient adjudication of the controversy.").

74. *See, e.g.*, Mullins v. Direct Digital, LLC, 795 F.3d 654, 663 (7th Cir. 2015) (discussing how various circuits have applied the superiority requirement differently).

court.[75] Rule 33 conferences are not included in class action procedure under Rule 23 of the FRCP.[76] Another difference in CAVC's class action procedure is its creation of Rule 22, which describes the requirements for filing an RCA.[77]

By creating its own rules governing class actions, the CAVC implemented its rulemaking authority and ensured class actions were an option for future veterans appealing a VA decision. While it brought more options to veterans, this new opportunity brought new complications to an already convoluted procedural system.

B. FILING A CLAIM FOR VETERANS BENEFITS

When a former service member has an injury, illness, or condition due to military service, they can file a VA claim for disability compensation. First, the veteran must determine if they qualify for benefits because service alone is not sufficient to establish a right to benefits. 38 U.S.C. § 101 defines a veteran as "a person who served in the active military, naval, air, or space service, and who was discharged or released therefrom under conditions other than dishonorable."[78] If the veteran meets the statutory definition of a veteran, they can file a claim.[79] This is typically the equivalent of a pro se filing.[80] Once the

75. VET. APP. R. 33.

76. The closest the FRCP gets to Rule 33 conferences in Article III courts is likely FRCP 16(a)(5). Rule 16 governs pretrial conferences and allows courts to order pretrial conferences for "facilitating settlement." FED. R. CIV. P. 16(a)(5).

77. VET. APP. R. 22. An RCA must: define the class and explain why a class action would be appropriate and why a class would better "serve the interests of justice" than a precedential decision; discuss counsel's role and experience with class actions; state the relief sought and why it should be granted; explain the relevant facts; and include an appendix of documents supporting the RCA. *Id.*

78. 38 U.S.C. § 101(2). Veteran status is exclusionary by its literal definition considering it only applies to service members separated under conditions other than dishonorable. For those who have dishonorable discharges, the process typically begins with attempts to upgrade their discharge status. *See How to Apply for a Discharge Upgrade*, U.S. DEP'T VETERANS AFFS., https://www.va.gov/discharge-upgrade-instructions [https://perma.cc/F94T-CP6S]. Veteran status also only applies to the active components of the military branches. National Guardsmen and reservists are typically only eligible for VA benefits if they were deployed, activated for a federal mission, or served full-time (Active Guard Reserve). They may also be eligible if they served a full twenty years. *See* Jon Soucy, *Guard and Reserve Members Receive 'Veteran' Status*, NAT'L GUARD (Dec. 28, 2016), https://www.nationalguard.mil/News/Article/1038989/guard-and-reserve-members-receive-veteran-status [https://perma.cc/2XNN-4DZJ] (explaining how, prior to a 2016 bill, Guard members could only obtain veteran status if they served 180 days or more in a federal status, not including training).

79. *Eligibility for VA Disability Benefits*, U.S. DEP'T VETERANS AFFS. (Aug. 15, 2023), https://www.va.gov/disability/eligibility [https://perma.cc/UE9W-F9CR].

80. At this stage in the process, veteran service organizations ("VSOs") such as the American Legion or Veterans of Foreign Wars can aid the veteran throughout the filing process, but they are generally considered pro se representation and are not legally trained. *See* Acciola v. Peake, 22 Vet. App. 320, 326 n.1 (2008) ("[T]he Court need not decide today whether the appellant, represented by a veteran's service organization, is pro se for purposes of sympathetic readings, because VA conceded that it reads all filings sympathetically, regardless of the nature of representation . . . ."); Craig Kabatchnick, *After the Battles: The Veterans' Battle with the VA*, 35 HUM. RTS. 13, 16 (2008). Lawyers only get paid once there's a rating decision, so it is unlikely that they will formally represent during the initial filing. *See* 38 C.F.R. § 14.636(c)(1)(i) (2024) ("[A]ttorneys may charge claimants . . . for representation provided after an agency of original jurisdiction has issued notice of an initial decision on the claim . . . .").

veteran has submitted their claim to the Regional Office ("RO"), along with any relevant medical records, lay statements, or other evidence, VA reviews the claim.[81] The veteran must meet certain criteria for VA to grant their claim.[82] As of March 2024, it takes VA an average of 158.4 days to initially grant or deny the veteran's request for disability compensation.[83] It would be an extreme anomaly if a veteran were to appeal their decision and resolve their claim within a year.[84]

To qualify for VA disability compensation, the claimant must "have a current illness or injury . . . that affects [the] mind or body" and must have "served on active duty, active for training, or inactive duty training."[85] One of the most important criteria to meet is to establish the claim as service-connected.[86] Service connection has three requirements; the claimed condition must be: (1) a current disability that (2) occurred in service, and (3) there must be nexus between the disability and the veteran's service.[87] A condition qualifies as current if it manifested at any time during the pendency of the claim, but not if it was resolved prior to the claim's submission.[88] To meet the in-service requirement, the facts must demonstrate "that a particular injury or disease resulting in disability was incurred coincident with service in the Armed forces, or if preexisting such service, was aggravated therein."[89] Nexus is often the most difficult requirement to demonstrate because it involves connecting the current disability with the in-service event. In some situations, a veteran's condition may be considered presumptively service-connected due to when and where they served and the condition they reported.[90]

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81. *Fully Developed Claims Program*, U.S. DEP'T VETERANS AFFS. (May 15, 2024), https://www.va.gov/disability/how-to-file-claim/evidence-needed/fully-developed-claims [https://perma.cc/6PKE-BMXK].

82. *How to File a VA Disability Claim*, U.S. DEP'T VETERANS AFFS. (Oct. 8, 2024), https://www.va.gov/disability/how-to-file-claim [https://perma.cc/83Z9-E4RZ].

83. *The VA Claim Process After You File Your Claim*, U.S. DEP'T VETERANS AFFS. (Mar. 7, 2024), https://www.va.gov/disability/after-you-file-claim [https://perma.cc/ZSU4-8GDH].

84. *Decision Wait Times*, BD. OF VETERANS' APPEALS, U.S. DEP'T VETERANS AFFS. (Nov. 29, 2023), https://www.bva.va.gov/decision-wait-times.asp [https://perma.cc/F2F2-5QEY].

85. *Eligibility for VA Disability Benefits*, *supra* note 79.

86. 38 C.F.R. § 3.1(k) (2024).

87. *See* M21-1 ADJUDICATION PROCEDURE MANUAL, PART V, CH. 2 (2024) (outlining the different criteria for assessing whether or not a condition is service-connected); *see also* 38 C.F.R. § 3.1(k) ("*Service-connected* means, with respect to disability or death, that such disability was incurred or aggravated, or that the death resulted from a disability incurred or aggravated, in line of duty in the active military, naval, air, or space service.").

88. McClain v. Nicholson, 21 Vet. App. 319, 321 (2007).

89. 38 C.F.R. § 3.303(a).

90. For example, Vietnam veterans who were in Vietnam between January 9, 1962, and May 7, 1975, have a presumption of exposure to Agent Orange. *Agent Orange Exposure and Disability Compensation*, U.S. DEP'T VETERANS AFFS. (Sept. 20, 2024), https://www.va.gov/disability/eligibility/hazardous-materials-exposure/agent-orange [https://perma.cc/YZY8-6S75]. When a veteran files a claim for certain conditions such as bladder cancer due to exposure to Agent Orange, they are considered to have a presumptive condition. *Id.* Thus, when a veteran files a claim for bladder cancer due to Agent Orange exposure when they were in Vietnam on February 12, 1963, their burden

An example of a request for disability compensation might be a veteran suffering from a right knee disability. The veteran would need to demonstrate the existence of a current condition that had not been resolved before filing the claim. Next, the veteran would need to provide some evidence that the disability was incurred or aggravated by military service, which could be accomplished by producing service records or lay testimony demonstrating the veteran injured their knee on an Airborne mission, parachuting out of a plane. Finally, the veteran could satisfy the nexus requirement by presenting evidence that the current knee disability is related to the in-service injury. This generally, but not always, requires a "nexus" opinion from a medical professional.[91]

After the RO has evaluated all the evidence, it will issue a rating decision explaining VA's determination.[92] If the claim has been granted, the veteran can begin receiving compensation starting from the date VA received the claim—the veteran's effective date.[93] If the claim has been denied, the veteran has only one year to appeal that decision.[94] The veteran has three appeal options: higher-level review, a supplemental claim, and an appeal to the BVA. Higher-level review is a de novo review of the claimant's case by a higher-level reviewer to determine whether an error or a difference of opinion would change the decision.[95] Higher-level review does not allow for the submission of new evidence, but it has the additional option of an informal conference for the veteran's representative.[96] No new evidence is allowed with this appeal option.[97]

A supplemental claim can be confusing to claimants because it has two different meanings depending on when it is filed. A supplemental claim filed within a year of a VA decision is an appeal of that decision, whereas a supplemental claim filed more than a year after the decision has become final is, essentially, a request to reopen the previously denied claim with "new and

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to demonstrate service connection is essentially eliminated so long as they have documentation supporting their claim. *See id.* (explaining disability compensation information specifically for veterans exposed to Agent Orange); *see also* Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxics Act of 2022, Pub. L. No. 117-168, 136 Stat. 1759 (describing how veterans exposed to burn pits and other toxic situations while in service are presumptively service connected for a variety of conditions).

91. *What Is a Nexus Letter?*, VETERANS GUIDE (July 19, 2024), https://veteransguide.org/va-disability/nexus-letter [https://perma.cc/4FWP-HWD6].

92. *Understanding the Initial Regional Office Decision*, GANG & ASSOCS., VETERANS DISABILITY INFO, https://www.veteransdisabilityinfo.com/resources/understanding-initial-regional-office-decision [https://perma.cc/JF4F-8PYJ].

93. *Disability Compensation Effective Dates*, U.S. DEP'T VETERANS AFFS. (May 15, 2024), https://www.va.gov/disability/effective-date [https://perma.cc/634L-SQG5].

94. This Note uses the system under the Appeals Modernization Act of 2017. Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115-55, 131 Stat. 1105. Claims under the Adjudication Process (filed before February 19, 2019) are still pending as legacy claims. *Id.* If the veteran chooses to appeal to the CAVC, they only have 120 days to make that decision. *How to Appeal a Board of Veterans' Appeals Decision*, U.S. CT. APPEALS FOR VETERANS CLAIMS, https://www.uscourts.cavc.gov/appeal.php [https://perma.cc/2WDD-PWPP].

95. *Higher-Level Reviews*, U.S. DEP'T VETERANS AFFS. (May 15, 2024), https://www.va.gov/decision-reviews/higher-level-review [https://perma.cc/2RNS-7RF2].

96. *Id.*

97. *Id.*

relevant evidence."[98] Both types of supplemental claims require new and relevant evidence[99]—the only difference to the claimant is the effective date of the award of benefits.[100] If the claimant files a supplemental claim within a year, they keep their original effective date. If the claimant does not file within a year, they will lose that effective date. Supplemental claims are valid options for veterans still obtaining more evidence, whether it be lay or medical.[101] Some veterans may file multiple supplemental claims before ultimately appealing to the Board if the supplemental claim does not lead to a favorable decision.

The highest level of appellate review within the Agency is an appeal to the BVA.[102] The BVA has three avenues of review: direct review, evidence submission, or hearing.[103] Board decisions are not precedential and only binding on the veteran whose appeal the BVA is reviewing.[104] A supplemental claim, a request for higher-level review, and an appeal to the BVA can all occur at various stages of a single claim.[105] The difficulty is keeping the claim alive through these appeals processes, and each appeal option has strategic implications.

If the veteran appeals to the Board and gets an adverse decision, they can appeal to the CAVC's "exclusive jurisdiction" over Board decisions.[106] Cases reach the CAVC's docket through appeals from the BVA or petitions for extraordinary relief in a writ of mandamus.[107] Only a claimant "'adversely affected' by a BVA decision" can appeal to the CAVC; VA, on the other hand, cannot appeal.[108] If either party is dissatisfied with the CAVC's decision, they can appeal to the Federal Circuit and, eventually, the Supreme Court.[109]

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98. Stacey-Rae Simcox, *Thirty Years of Veterans Law: Welcome to the Wild West*, 67 U. KAN. L. REV. 513, 567 (2019) (quoting 38 U.S.C. § 5108(a)); 38 C.F.R. § 3.2501 (2024).

99. 38 C.F.R. § 3.2501.

100. Simcox, *supra* note 98, at 552–53. A claimant who appeals a decision by filing a supplemental claim with new and relevant evidence within a year of that decision is entitled to the effective date of the claim that resulted in the appealed decision. *Id.*

101. *See Supplemental Claims*, U.S. DEP'T VETERANS AFFS. (Oct. 8, 2024), https://www.va.gov/decision-reviews/supplemental-claim [https://perma.cc/ZNQ7-YP2A].

102. The RO also has some capacity to hear appeals, which has become more common as BVA has become inundated with appeals and created a significant backlog. *See Claims Backlog*, U.S. DEP'T VETERANS AFFS. (Oct. 7, 2024), https://www.benefits.va.gov/reports/mmwr_va_claims_backlog.asp [https://perma.cc/SQ9N-NB74].

103. *Board Appeals*, U.S. DEP'T VETERANS AFFS. (July 23, 2024), https://www.va.gov/decision-reviews/board-appeal [https://perma.cc/G4VR-5LUL].

104. 38 C.F.R. § 20.1303; *see also* 38 U.S.C. § 7104(a) (detailing the statutory authority granting and establishing the jurisdiction of the board).

105. 38 U.S.C. § 7105. At various stages, a veteran could appeal using higher-level review, a supplemental claim, and Board review.

106. 38 U.S.C. § 7252(a).

107. GAFFNEY, *supra* note 43, at 1. Petitions for extraordinary writs are filed when an individual has a pending claim before VA that has been either unreasonably delayed or unlawfully withheld. *Id.* The CAVC has the power to issue an extraordinary writ compelling VA to act on the petition. *Id.* Once assigned to a judge, a petition for extraordinary writ looks like an appeal and goes through the same process. *Id.* at 2.

108. *Id.* at 1 (quoting 38 U.S.C. § 7266(a)).

109. *Court Process*, U.S. CT. APPEALS FOR VETERANS CLAIMS, http://www.uscourts.cavc.gov/court_process.php [https://perma.cc/79F9-UJ9R].

C. SKAAR V. MCDONOUGH & CHANGING CLASS ACTIONS

On January 17, 1966, a U.S. B-52 bomber crashed into a refueling plane, and all four of the hydrogen bombs it was carrying fell in Palomares, Spain.[110] The bombs did not explode, but two detonators went off.[111] When the detonators went off, seven pounds of highly radioactive plutonium dust covered the Spanish countryside.[112] The United States sent 1,388 service members to clean up the plutonium,[113] which filled 5,400 barrels over the sixty-two-day mission.[114] For those sixty-two days, these servicemen inhaled airborne plutonium without protection[115] and many spent years suffering from a variety of health conditions due to their exposure.

One of the veterans who suffered from health conditions due to exposure at Palomares is retired Air Force Chief Master Sergeant Victor Skaar. Mr. Skaar was a 29-year-old Airman and one of the first to arrive on-site at Palomares.[116] Years later, in 1982, Mr. Skaar underwent his Air Force exit physical and discovered that his white blood cell count was abnormal.[117] In 1998, Mr. Skaar

110. Philipps, *supra* note 3.

111. *Id.*

112. Dave Collins, *Veterans Seek Class Action Lawsuit over 1966 H-Bombs Accident*, MIL. TIMES (Dec. 11, 2017), https://www.militarytimes.com/veterans/2017/12/11/class-action-lawsuit-sought-over-1966-spain-h-bombs-accident [https://perma.cc/BQ2L-F5UP].

113. Appellee's Response to the Ct.'s Nov. 13, 2018, Order, *supra* note 5, at 2. The Palomares cleanup is one shocking event after another. For example, when establishing the protection procedures, an expert from the Los Alamos National Laboratory told others involved in the operation that "[t]he manual says you will dress up in coveralls, booties, cover your hair, wear a respirator, wear gloves." WRIGHT H. LANGHAM, DEP'T OF ENERGY SECRET BRIEFING 296 (1967), https://s3.documentcloud.org/documents/2797062/xxplutonium-1967-DOE-secret-briefing.pdf [https://perma.cc/B73Q-LL58]. Since this "caused consternation" in Palomares, the military did not follow the manual for fear of alarming the local population. *Id.* There were also reports of the Air Force purchasing contaminated tomatoes that the service members ate "[t]o assure the public there was no danger." Dave Philipps, *Decades Later, Sickness Among Airmen After a Hydrogen Bomb Accident*, N.Y. TIMES (June 19, 2016), https://www.nytimes.com/2016/06/20/us/decades-later-sickness-among-airmen-after-a-hydrogen-bomb-accident.html (on file with the *Iowa Law Review*). As an additional safety measure, some airmen were sent to Spanish homes with radiation detectors, but the airmen who were sent were not trained on the equipment and were told to keep the detectors turned off. *Id.* One Airman sent to Palomares sums up the events of the cleanup: "They told us it was safe, and we were dumb enough, I guess, to believe them." *Id.*

114. Chloe Shantz-Hilkes & John McGill, *U.S. Veteran Sues Military Half-Century After Classified Cold War Disaster*, CBC RADIO (Feb. 17, 2020), https://www.cbc.ca/radio/asithappens/as-it-happens-friday-edition-1.5464054/u-s-veteran-sues-military-half-century-after-classified-cold-war-disaster-1.5464387 [https://perma.cc/ABK8-3322].

115. Beyea & von Hippel, *supra* note 6, at 626. Drs. Beyea and von Hippel worked on an appeal with Palomares veterans, including testifying before the BVA on behalf of one of the Palomares veterans, Mr. Feeley, whose case this Note discusses in Part III.

116. Richard Currey, *The Palomares Nuclear Disaster and a Class-Action Victory*, VVA VETERAN ONLINE (Mar./Apr. 2020), https://vvaveteran.org/40-2/40-2_palomares.html [https://perma.cc/5EQW-X4PG].

117. Philipps, *supra* note 3.

was diagnosed with leukopenia, and he filed a claim for leukopenia a few years later.[118]

The journey of *Skaar* is a long and complex one. VA denied Mr. Skaar's original claim in 2000.[119] In 2001, a consulting firm evaluated the methodology the Air Force was using to establish dose estimates.[120] They found evidence that the dose estimates excluded data from the samples taken at Palomares and focused on high samples from later in time rather than the first high samples taken.[121] Mr. Skaar used the report from the consulting firm to allege that the "dose estimates [did] not constitute 'sound scientific evidence' as required by law" and, as a result, reopened his claim in 2011.[122] The reopened claim was denied in 2012 when the Air Force used its dose methodology to conclude that Mr. Skaar's radiation exposure at Palomares was an unlikely cause of his leukopenia.[123] Mr. Skaar appealed to the Board in 2013, and the Air Force provided a revised dose estimate as part of those proceedings, which constituted "new and material evidence" sufficient to reopen his claim.[124] The Board remanded back to the RO, which still found that the radiation was not a likely cause of Mr. Skaar's leukopenia.[125] Mr. Skaar appealed the RO's decision to the Board, which denied his claim in 2017.[126] Mr. Skaar then appealed the denial to the CAVC.[127]

VA denied Mr. Skaar's claim using a formula designed to estimate the radiation exposure to veterans in an organ affected by a current disability.[128] When filing for class certification, Mr. Skaar alleged that the Palomares dose estimate methodology was not based on "sound scientific evidence," as required by regulation, and sought relief on behalf of all Palomares veterans accordingly.[129]

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118. Skaar v. Wilkie, 32 Vet. App. 156, 168 (2019), *vacated and remanded sub nom.* Skaar v. McDonough, 48 F.4th 1323 (Fed. Cir. 2022).

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 169. If a claimant can demonstrate "new and material evidence," they can reopen their closed claim. *See, e.g.*, *id.* at 170.

123. *Id.* at 169.

124. *Id.* at 170.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 169–70.

129. *Id.* at 169, 171. The claim that the dose estimate methodology did not constitute "sound scientific evidence" arose from how the Air Force used the samples taken from Palomares veterans. Mr. Skaar was a part of "the High 26," a group of service members who were the most exposed at Palomares. *Id.* at 168. When it came time for the consulting firm to assess the readings from the Palomares veterans, including the High 26, the firm thought the on-site samples were "unreasonably high" compared to "environmental measurements" made up of air samples from fifteen years after the incident and estimates from other exposure cases. *Id.* at 169. The firm compared its estimates to the actual dose intakes and decided to "exclude[] data from the on-site samples and attribute[] more significance to samples collected at later dates for the High 26 Group." *Id.* The Air Force adopted the consulting firm's dose estimate methodology even though it excluded those samples

In a rare full-court decision, the CAVC heard Mr. Skaar's case.[130] The CAVC noted that:

> [T]he proposed class contains five subgroups. They are the following:
>
> - Past Claimants: those Palomares veterans whose claims based on ionizing radiation exposure were denied before reaching the Board but who did not perfect an appeal of that denial;
> - Expired Claimants: those Palomares veterans whose claims based on ionizing radiation exposure the Board has denied but whose appeal windows to this Court have expired without the filing of a Notice of Appeal;
> - Present Claimants: those Palomares veterans whose claims based on ionizing radiation exposure the Board has denied and whose appeal windows to this Court have not yet expired or who have already appealed an adverse decision to this Court;
> - Present-Future Claimants: those Palomares veterans who have filed claims based on ionizing radiation exposure that remain pending before VA at any level and that VA will deny; and
> - Future-Future Claimants: those Palomares veterans who have developed a radiogenic condition but have not yet filed claims based on ionizing radiation exposure.[131]

The class the CAVC certified in 2019 included present claimants, present-future, and future-future claimants.[132] Even though the present-future and future-future claimants had not received a final decision from the BVA, the CAVC concluded Mr. Skaar's status as class-representative meant that his satisfaction of jurisdictional requirements under 38 U.S.C. § 7252 (obtaining

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and recommended further study, noting that its findings were "preliminary estimates that cannot be considered as definitive." *Id.*

130. Skaar v. McDonough, 48 F.4th 1323, 1331 n.2 (Fed. Cir. 2022).

131. Skaar v. Wilkie, 32 Vet. App. 156, 179–80 (2019) (footnote omitted), *vacated and remanded sub nom.* Skaar v. McDonough, 48 F.4th 1323 (Fed. Cir. 2022). The proposed class raised two claims: a claim under 38 C.F.R. § 3.309(d)(3)(ii) and 38 C.F.R. § 3.311(c). *Id.* at 171. The section 3.309 claim "challenge[d] VA's omission of the Palomares cleanup from the list of radiation-risk activities." *Id.* The section 3.311 claim challenged "VA's compliance with § 3.311(c)'s command that when adjudicating Palomares veterans' claims VA rely on dose estimates based on 'sound scientific and medical evidence.'" *Id.* The proposed class wanted Palomares recognized as a "radiation-risk activity," dose estimates that were supported by "sound scientific and medical evidence," and the re-adjudication of benefits for class members who had already been denied. *Id.*

132. *Id.* at 201.

a final Board decision) extended to the rest of the class.[133] This marked CAVC's first-ever class from a direct appeal from the VA benefits system.[134]

After the CAVC certified the *Skaar* class,[135] VA appealed to the Federal Circuit, solely focused on the class certification.[136] The Federal Circuit vacated the class certification because it believed the CAVC exceeded its jurisdiction.[137] According to the Federal Circuit, the CAVC should not have included "veterans who had not received a Board decision and veterans who had not yet filed a claim."[138] The Federal Circuit found that the CAVC could not include unnamed claimants based "on its jurisdiction over Mr. Skaar's claim or its power to aggregate claims and certify class actions."[139] Since the future-future claimants had not filed a claim and had not received a final decision from the BVA, the CAVC lacked jurisdiction over those class members. Similarly, the lack of a final decision for present-future claimants meant they did not fall within the CAVC's jurisdiction either. Like the CAVC, the Federal Circuit refused to include past and expired claimants.[140]

Mr. Skaar filed a petition for rehearing en banc after the Federal Circuit vacated the class certification. In 2023, the Federal Circuit refused to rehear the case in a seven to five decision.[141] The dissenting judges, in an opinion authored by Judge Dyk, found that the panel's analysis was flawed and that its

133. "Rather, we hold that because Mr. Skaar, as class representative, has obtained a final Board decision pursuant to section 7252, the jurisdictional door has been opened, and we may use our other authorities . . . to aggregate Mr. Skaar's claims with those of the remaining class members." *Id.* at 181. The CAVC also found that the class certification was supported by *Bowen v. City of New York*. *Id.* at 183–85 (citing Bowen v. City of New York, 476 U.S. 467, 484, 486 (1986)) (discussing the circumstances that allowed members of a class to move forward with a suit even though not all members of the class had administratively exhausted their options by receiving a final decision). Using *Bowen*, the CAVC held that it had the jurisdiction to certify a class including members who did not have a final BVA decision and, thus, had not administratively exhausted their options. *Id.* at 184–85. The lack of administrative exhaustion was acceptable so long as "(i) the challenged conduct is collateral to the class representative's administratively exhausted claim for benefits . . . ; (ii) enforcing the exhaustion requirement would irreparably harm the class; and (iii) the purposes of exhaustion would not be served by its enforcement." *Id.* at 185.

134. *See Court Certifies Class of Veterans Exposed to Radiation*, YALE L. SCH. (Dec. 9, 2019), https://law.yale.edu/yls-today/news/court-certifies-class-veterans-exposed-radiation [https://perma.cc/HC7H-599J].

135. The CAVC remanded the dose estimate methodology issue back to the BVA. Skaar v. McDonough, 48 F.4th at 1329.

136. *Id.* at 1325.

137. *Id.* at 1331–33.

138. *Id.* at 1331–32.

139. *Id.* at 1332.

140. *Id.* at 1335. Mr. Skaar had filed a cross-appeal claiming that the CAVC improperly declined to equitably toll the statutory appeal period for those claimants because the extraordinary circumstances required for equitable tolling are "a case-by-case analysis and not a categorical determination." *Id.* at 1335 (quoting Skaar v. Wilkie, 32 Vet. App. 156, 187 (2019), *vacated and remanded sub nom.* Skaar v. McDonough, 48 F.4th at 1323). The Federal Circuit disagreed with this argument and found no evidence of "any legal error or misinterpretation." *Id.*

141. Skaar v. McDonough, 57 F.4th 1015, 1016 (Fed. Cir. 2023).

jurisdictional limitations dramatically restricted veterans' abilities to adjudicate their claims en masse.[142]

Judge Dyk also noted that the majority failed to consider the AWA's authority over a class action mechanism and mistakenly interpreted Supreme Court precedent "barring class actions where all class members have not yet satisfied the requirements of § 7252."[143] In *Monk v. Shulkin*, the Federal Circuit found that "[t]he All Writs Act unquestionably applie[d]" to the CAVC[144] and has been used as the basis for aggregation in other courts.[145] In *Skaar*, the Federal Circuit did not discuss the power of the AWA and, according to the dissent, instead chose to improperly focus on the jurisdictional issue under Section 7252(a).[146] The AWA would have superseded any jurisdictional requirements that did exist, but Mr. Skaar's status as the class representative satisfied such requirements.[147]

After the Federal Circuit denied Mr. Skaar's request for rehearing, he filed a petition for a writ of certiorari with the Supreme Court.[148] On June 20, 2023, the Supreme Court denied certiorari without comment.[149] When the Federal Circuit vacated the class certification, the case returned to the CAVC where Mr. Skaar requested that the CAVC "issue mandate to return his individual claim to the Board."[150] In November 2023, Mr. Skaar's case returned to the BVA.[151]

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142. *Id.* at 1016–17 (Dyk, J., dissenting).

143. *Id.* at 1018. Section 7252(a) establishes the CAVC's jurisdiction and exclusive jurisdiction over BVA decisions. 38 U.S.C. § 7252(a).

144. Monk v. Shulkin, 855 F.3d 1312, 1318 (Fed. Cir. 2017).

145. *Id.* at 1318–19 (describing how the AWA has been used to aggregate cases in various contexts); *see also* Adam S. Zimmerman, *The Class Appeal*, 89 U. CHI. L. REV. 1419, 1451–65 (2022) (describing the role of the AWA in various appellate bodies).

146. *See* Skaar v. McDonough, 57 F.4th at 1018 (Dyk, J., dissenting) ("[T]he class action mechanism is not created by § 7252(a), nor is it cabined to only those who presently satisfy the jurisdictional requirements of that section. Rather, the class action mechanism is created by the All Writs Act . . . as our decision in *Monk* concluded . . . .").

147. Fed. Trade Comm'n v. Dean Foods Co., 384 U.S. 597, 603 (1966); Skaar v. Wilkie, 32 Vet. App. 156, 182 (2019), *vacated and remanded sub nom.* Skaar v. McDonough, 48 F.4th 1323 (Fed. Cir. 2022).

148. *See* Petition for a Writ of Certiorari at 2–4, Skaar v. McDonough, 143 S. Ct. 2637 (2023) (No. 22-815). In this petition, Mr. Skaar's argument mirrored that of Judge Dyk and the other dissenting judges, stating that the Federal Circuit majority "misinterpreted the jurisdictional provision of the Veterans Judicial Review Act . . . imposing a cramped construction of the judicial power conferred on the Veterans Court by Congress." *Id.* at 3.

149. *See generally* Skaar v. McDonough, 143 S. Ct. 2637 (2023).

150. Appellant's Corrected Response to Ct.'s July 25, 2023 Order at 1, Skaar v. McDonough, No. 17-2574 (Vet. App. Aug. 10, 2023).

151. *See* Order at 1, Skaar v. McDonough, No. 17-2574 (Vet. App. Oct. 13, 2023). Mr. Skaar's case was refiled twice at the CAVC in April of 2024; one case pursued a petition for a writ of mandamus to compel the Board "to act on his motion for aggregation, or in the alternative, to remedy the Board's unreasonable delay." Petitioner's Reply Brief in Support of Petition for Extraordinary Relief at 1, Skaar v. McDonough, No. 24-2457 (Vet. App. July 15, 2024). That petition was denied as moot after the Board denied the motion to aggregate. Order at 3, Skaar v. McDonough, No. 24-2457 (Vet. App. Aug. 13, 2024). The other was filed as a benefits appeal, but the case was dismissed. Order at 1, Skaar v. McDonough, No. 24-2455 (Vet. App. Aug. 29, 2024). A third case

The history of VA, the VJRA's effects on the veterans benefits process, and *Skaar*'s background demonstrate the decades it has taken to develop the current process of adjudicating a claim for disability compensation. When the system's slow methods of change combine with the complexities of actually filing a claim, problems arise for claimants.

II. CLASS ACTIONS POST-*SKAAR*

The Supreme Court's denial of Mr. Skaar's petition for a writ of certiorari ensured that the Federal Circuit's decision would remain the law. By denying Mr. Skaar's petition without comment, the Supreme Court did not clarify the impact of the *Skaar* decision on the CAVC's class action authority. Based on the lack of clarification from the Supreme Court and the minimal case law involving class actions of veterans benefits claims,[152] the true impact of *Skaar* is still unknown. Many legal scholars and veterans advocates believe that *Skaar* "effectively eliminates such class actions for veterans."[153] This Note agrees with their assessments based on the difficulties of establishing a class, the lack of enforcement mechanisms, and the complexity of filing a claim and appealing an adverse decision.

It is important to clarify that both *Skaar* and this Note focus on class actions appealing Board decisions. Claimants can pursue a separate type of class action through a writ of mandamus, which was discussed earlier in Section I.B. However, it is unlikely that the Federal Circuit's decision in *Skaar* will impact writ class actions.

This Part discusses barriers stemming from the benefits process, including the significant backlog currently facing veterans benefits claims and appeals, VA's increasing workload due to the mass exodus of claims processors, and complications with representation. Next, this Part examines the lack of enforcement mechanisms available for veterans within the veterans benefits system and how the lack of class actions only adds another barrier to enforcement.

A. BARRIERS FROM THE BENEFITS PROCESS

VA often touts its system as claimant-friendly, allowing each veteran's claim to be adjudicated based on their individual facts and circumstances. In this "non-adversarial" system, a VA claims processor assesses each claim, and if that rater gives the claimant an unfavorable decision, the veteran can appeal to the

was filed in August of 2024 and currently faces a motion to dismiss. Appellee's Motion to Dismiss at 1, Skaar v. McDonough, No. 24-5887 (Vet. App. Oct. 15, 2024).

152. *Monk v. Shulkin* was only decided in 2017, and *Skaar* was the first class action arising out of a benefits appeal. *Skaar v. McDonough*, YALE L. SCH., https://law.yale.edu/studying-law-yale/clinical-and-experiential-learning/our-clinics/veterans-legal-services-clinic/skaar-v-mcdonough [https://perma.cc/54RP-KNEE]. The other class actions the CAVC certified before *Skaar* were petitions for extraordinary relief. *See generally* Godsey v. Wilkie, 31 Vet. App. 207 (2019) (illustrating the CAVC's first certified class action and first class action arising out of a petition).

153. Skaar v. McDonough, 57 F.4th 1015, 1016 (Fed. Cir. 2023) (Dyk, J., dissenting); *see also* Adam S. Zimmerman, *Exhausting Government Class Actions*, U. CHI. L. REV. ONLINE, Oct. 20, 2022, at 1, 4 ("[T]his cramped view of the class action will mean that many veterans will not be able to mount class actions at all . . . .").

Board. While this is viewed as a benefit by the Agency, it has some significant drawbacks: the timeliness of a claim, VA and the BVA's present and ever-growing backlog of claims and appeals, and the inherent complexity of the VA benefits system, particularly when that system is now straddling two distinct (and distinctly complex) appeals frameworks, as will be discussed in Section II.A.1 below. If the Federal Circuit limits class actions to claimants with final decisions from the Board that are still "alive" at the time of class certification,[154] the ability of multiple veterans (and their survivors) to obtain relief is essentially gone.

This Section explores the barriers within the disability compensation process. First, and the most significant problem facing veterans, is VA's and the BVA's backlogs and delays due to those backlogs. Next, this Section highlights the growing workload within VA due to a mass exodus of claims processors and the Agency's own bureaucracy. Finally, this Section discusses the inherent complexities of the "non-adversarial" system and problems with representation within the disability compensation process.

1. Backlogs and Delays

The biggest issue facing claimants for decades has been the length of time VA takes to adjudicate claims for benefits.[155] As of July 2024, VA has about 250,000 backlogged claims and almost one million pending claims.[156] The difference between backlogged and pending claims is the amount of time it

154. To make things even more difficult, veterans only have 120 days to decide to file a Notice of Appeal, the first step of an appeal, to the CAVC. *How to Appeal a Board of Veterans' Appeals Decision*, *supra* note 94.

155. It is difficult to know the true extent of the backlog because VA has a history of moving data around, removing the claims from VAs trackers as soon as it is appealed, keeping separate trackers for claims in backlog and pending claims, etc. *See, e.g.*, Pete Hegseth, *The VA Scandal: Two Years On*, NAT'L REV. (Apr. 7, 2016, 8:00 AM), https://www.nationalreview.com/2016/04/va-still-unreformed [https://perma.cc/R43M-4WLH] (describing VA scandals between 2014 and 2016, including VA's manipulation of healthcare wait times). Even with the data available, it does not look good. Generally, practitioners of veterans law and Congress agree that VA has been facing a significant backlog for decades and is an overburdened system. *See* Melissa Chan, *Thousands of Workers Leave the VA Amid a Flood of New Cases and Quota Demands*, NBC NEWS (Sept. 30, 2023, 6:00 AM), https://www.nbcnews.com/news/us-news/thousands-workers-leave-va-flood-new-cases-quota-demands-rcna103013 [https://perma.cc/N3VF-6K5C]; Leo Shane III, *Total of Overdue VA Disability Claims Balloons to Almost 300,000*, MIL. TIMES (Sept. 21, 2023), https://www.militarytimes.com/veterans/2023/09/21/total-of-overdue-va-disability-claims-balloons-to-almost-300000 [https://perma.cc/G92Z-3EUN]; Linda F. Hersey, *Lawmakers Urge VA to Reduce Backlog, Wait Times on Veterans' Claims for Benefits*, STARS & STRIPES (June 27, 2024), https://www.stripes.com/veterans/2024-06-27/veterans-benefits-claims-backlog-pact-act-14315042.html [https://perma.cc/6J2R-AKUH].

156. *Claims Backlog*, *supra* note 102; *Claims Inventory*, U.S. DEP'T VETERANS AFFS., https://www.benefits.va.gov/reports/mmwr_va_claims_inventory.asp [https://perma.cc/WF9Q-NL77]. To most people, pending and backlogged claims would be the same thing, but VA distinguishes the two pools. *See Claims Backlog*, *supra* note 102 ("Once VA decides a claim, it's no longer in the claims inventory. If a [v]eteran appeals a benefits decision, the appealed claim is tracked separately."). The main difference is that backlogged claims are pending claims that have been pending for over 125 days. *Understanding VA's Current Claims Backlog Environment, Future Growth*, U.S. DEP'T OF VETERANS AFFS., VA NEWS (Aug. 27, 2021), https://news.va.gov/93906/understanding-vas-current-claims-backlog-environment-future-growth [https://perma.cc/5VEY-ZXYU]. This distinction provides no other benefit other than allowing VA to play with data.

takes to obtain a decision from VA; backlogged claims have been waiting for over 125 days.[157] The Board has over two hundred thousand pending appeals and, on average, resolves about one hundred thousand appeals a year.[158] At its peak in March of 2013, VA had 611,703 claims in its backlog.[159] Once again, those claims were separate from claims pending a decision, which, at the time of VA's backlog peak, was only 883,930.[160] In 2023, VA's pending claims inventory reached a new peak of around 1.1 million pending claims.[161] In 2023, the claims backlog began with around 150,000 backlogged claims and ended the year with over 400,000.[162]

This has been an ongoing problem, and it is one of the reasons Congress passed the Veterans Appeals Improvement and Modernization Act of 2017 ("AMA").[163] The AMA was intended "to expedite VA's appeals process while protecting veterans' due process rights."[164] The AMA was designed to streamline the process by allowing VA to "take such actions as may be necessary to provide for the expeditious treatment by the Veterans Benefits Administration of any claim that is returned by a higher-level adjudicator . . . or remanded by the Board of Veterans' Appeals."[165] If they do not request some form of appeal, the claim is essentially dead.[166] Claims that were decided before February 19, 2019, are a part of the legacy system.[167] With the passage of the AMA, claimants whose cases began before February 19, 2019, have two options for the system to resolve their claim.

Rather than expediting and simplifying the process, the AMA instead added to the confusion. The AMA was intended to give veterans greater choice and more control over how their appeals were adjudicated.[168] In reality, this "choice" and "control" has confused lay veterans and their representatives and frustrated claimants who were promised faster decisions but have been waiting just as many—and in many cases, more—years as in the legacy system for the

157. *Claims Backlog*, *supra* note 102.

158. *Decision Wait Times*, *supra* note 84. VA claims the significant increase in claims is due to the passage of the PACT Act, but the numbers were already on the rise prior to the PACT Act's passage. *See Claims Backlog*, *supra* note 102.

159. *See Claims Backlog*, *supra* note 102.

160. *Claims Inventory*, *supra* note 156.

161. *Id.*

162. *Claims Backlog*, *supra* note 102.

163. H.R. REP. NO. 115-135, at 5 (2017) ("Unfortunately, VA's current appeals process is broken.").

164. *Id.* at 2.

165. Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. 115-55, 131 Stat. 1109.

166. *Board Appeals*, *supra* note 103.

167. 38 C.F.R. § 19.26 (2024). Claimants can opt out of the legacy system and into the AMA. *Id.*

168. *Four Important Things to Know About Appeals Modernization*, U.S. DEP'T VETERANS AFFS.: VA NEWS (July 15, 2019), https://news.va.gov/62997/four-important-things-know-appeals-modernization [https://perma.cc/69RH-WGTS].

Board to issue a decision.[169] This has been, and continues to be, the subject of congressional hearings, where fingers are pointed, but no one takes responsibility or offers a viable solution.[170]

Despite congressional efforts to modernize and expedite the process, claimants still face significant delays from the moment of filing. As the backlog grows, additional delays are guaranteed for future claimants. It takes an average of almost 150 days just to get an initial decision from VA.[171] If the claimant receives an adverse determination, that wait time only increases as they go through the appeals process.

The time it takes to get a decision from the Board is more difficult to determine. The BVA is legally required to decide appeals in the order they are docketed,[172] on what is described as a "first-come, first-served basis."[173] That assessment is not entirely accurate, considering that some cases are expedited for various reasons. For example, veterans' advocates can ask the Board to expedite appeals by filing a motion for advancement on the Board's docket. These motions are appropriate when the claimant is terminally ill, facing significant financial hardship, is over age seventy-five, or shows other sufficient cause.[174] Similarly, CAVC remands and returns remands from the Agency of Original Jurisdiction ("AOJ")[175]—the VBA or Veterans Health Administration—and those remands also move ahead of non-expedited appeals.[176] As more and more remands return from the AOJ and CAVC, and veterans and their advocates file more motions for advancement on the docket, BVA's requirement to hear cases in docket order is being far overshadowed by these expedited appeals.[177] Non-expedited appeals are continuously pushed to the back of the docket, which means that the fastest way—sometimes the only way—to get an appeal to the Board in a timely manner is to file a motion to advance on the docket.

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169. *See* Simcox, *supra* note 98, at 560–61; *see also* Chris Attig, *VA Appeals Modernization Act – The Pros and Cons of Choice*, VETERANS L. BLOG, https://www.veteranslawblog.org/va-appeals-modernization [https://perma.cc/GX87-X3F8].

170. VA has blamed everything from the legacy appeals system to the PACT Act for its backlog. *See Examining the VA Appeals Process: Ensuring High Quality Decision-Making for Veterans' Claims on Appeal: Hearing Before the H. Comm. on Veterans' Affs.*, 118th Cong. 2 (2023) (statement of Kenneth A. Arnold, Vice Chairman, Bd. of Veterans' Appeals) ("Honestly, the older [l]egacy system of appeals has been holding us back from achieving even greater success under AMA."); *see also Reviewing VA's Implementation of the PACT Act: Hearing Before the H. Comm. on Veterans' Affs.*, 118th Cong. 5–6 (2023) (statement of Joshua D. Jacobs, Under Sec'y for Benefits, Dep't of Veterans Affs.) (describing how the PACT Act would increase VA's backlog).

171. *The VA Claim Process After You File Your Claim*, *supra* note 83. Since claims enter the backlog after 125 days, new claims are almost guaranteed to end up in the backlog.

172. 38 U.S.C. 7107.

173. *Decision Wait Times*, *supra* note 84.

174. 38 C.F.R. § 20.902(c)(1) (2024).

175. The AOJ is where the original determination came from. *See* 38 C.F.R. § 19.26. For example, if VHA denies healthcare benefits, VHA is the AOJ in that claim.

176. *Decision Wait Times*, *supra* note 84.

177. *Id.* In fiscal year 2018, 45,068 of the 85,288 (53%) appeals were expedited appeals (remands and advances on the docket). *Id.* In fiscal year 2023, 68,327 of the 103,245 appeals (66%) adjudicated were expedited. *Id.*

Due to the Board's advancement of expedited cases, it is not officially known how long an appeal typically waits before the BVA. In fiscal year 2023, it took an average of 1.8 years to completely resolve an appeal with no remands before the BVA.[178] Between the three appeal options, appeals took between 314 and 927 days to complete.[179] This length of time has been steadily increasing since Congress created the AMA in 2019, and considering VA's current backlog, the length of time required to resolve an appeal before the Board is also likely to increase.

While veterans and other claimants face many deadlines, VA does not. Once a veteran submits a claim, it turns into a waiting game. Claimants face significant delays before they even reach the CAVC, which is currently the first (and only) level of the process where mass relief is available, either via a precedential opinion or class action. VA's backlog and the significant wait times facing claimants are unlikely to change as long as VA and the BVA continue to issue decisions in this individual manner rather than offering mass relief.

2. Growing Workload Within VA

Another barrier facing claimants navigating the benefits process is the growing workload of VA employees and the mass exodus of VA employees in response to this increased workload. For decades, VA claims processors have been overburdened,[180] and the Agency saw record-high turnover during the COVID-19 pandemic.[181]

While the passage of the Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxics ("PACT") Act of 2022 greatly

178. *Id.* Once again, this data is misleading. The BVA's "Legacy and AMA Timeliness Comparison" data excludes decisions with remanded issues, which can add a significant amount of waiting time to the claimant's appeal. For example, in *Skaar*, the claim returned to the BVA twice on remand, and to satisfy the conditions imposed in each remand, the opinion took an extra four years to reach the CAVC. Skaar v. McDonough, 48 F.4th 1323, 1327–29 (Fed. Cir. 2022). To put that in perspective, Mr. Skaar filed his initial claim less than a year after I was born, and it reached the CAVC the year I graduated from high school. It is also important to note that the fight for Palomares veterans has been going on for almost fifty years. *See* Stephen Losey, *Court Rules Vets Exposed to Radiation from 1966 Nuke Disaster Can Sue for Benefits*, AIR FORCE TIMES (Dec. 9, 2019), https://www.airforcetimes.com/news/your-air-force/2019/12/09/court-rules-vets-exposed-to-radiation-from-1966-nuke-disaster-can-sue-for-benefits [https://perma.cc/JV5K-P6R8] ("I am happy that the [CAVC's] opinion means I can continue to fight for recognition alongside my fellow Palomares veterans, many of whom are too ill to fight on their own, and their widows. I have been fighting this battle since I was [forty-five] years old and am hopeful that the [CAVC's] decision will finally allow me, at the age of [eighty-three], to receive benefits for my numerous radiation-related illnesses, including cancer.").

179. *Decision Wait Times*, *supra* note 84.

180. The burden facing VA employees is well-documented, and VA employee burnout has been the subject of multiple academic studies. *See* Tamara M. Schult, David C. Mohr & Katherine Osatuke, *Examining Burnout Profiles in Relation to Health and Well-Being in the Veterans Health Administration Employee Population*, 34 STRESS & HEALTH 490, 493 (2018).

181. *See* Eric Katz, *As Turnover Soars, Most VA Employees Say They Were Not Emotionally Supported During the Pandemic*, GOV'T EXEC. (May 10, 2022), https://www.govexec.com/workforce/2022/05/turnover-va-employees-not-emotionally-supported-pandemic/366761 [https://perma.cc/PH6G-L4QB] ("VA is currently experiencing its worst turnover rate in [fifteen] years . . . .").

expanded benefits for claimants alleging toxic substance exposure, that increased access has also increased the burden on VA employees with inadequate training, mandatory overtime, and increased quotas.[182]

In 2022, over 600 claims processors retired or resigned, and by October of 2023, approximately 500 more left the Agency—a number that only increases each year.[183] To counteract the large number of departures, VA has been aggressively hiring processors with almost 5,000 joining the Agency in 2022 and over 6,500 in 2023, nearly doubling the number of claims processors.[184] Although this aggressive hiring spree has allowed VA to complete nearly two million claims, the backlog increased to over 400,000, the highest it has been since 2013.[185]

Many claims processors struggle with VA's quota system, which it has used since 2017. The quota system measures performance; claims processors must meet standards within the system by completing specific tasks worth a certain number of points each pay period.[186] Some of these tasks involve verifying information from the veteran's file or reviewing documents the veteran submitted. It can take a significant amount of time to properly review a veteran's file, which has become increasingly difficult to accomplish under VA's quota requirements. According to one processor, "it was easier and quicker to look for the first thing that would discredit a claim and close it out, rather than find ways to approve it."[187]

3. Complexity and Lack of Representation

For decades, the CAVC, the Federal Circuit, and the Supreme Court "have long recognized that the character of the veterans' benefits statutes is strongly

182. Chan, *supra* note 155. It is not entirely clear why the PACT Act would result in an increased backlog—since the purpose of this statute was to make it easier for veterans to obtain benefits—but VA has regularly blamed the PACT Act for the growing backlog. Leo Shane III, *Vets Can Apply for All PACT Act Benefits Now After VA Speeds Up Law*, MIL. TIMES (Sept. 1, 2022), https://www.militarytimes.com/news/burn-pits/2022/09/01/vets-can-apply-for-all-pact-act-benefits-now-after-va-speeds-up-law [https://perma.cc/6YJ7-WK42]; *see* Nicholas Slayton, *VA Claims Processors Overwhelmed, Quitting from High Case Load*, TASK & PURPOSE (Oct. 1, 2023, 4:23 PM), https://taskandpurpose.com/military-life/va-claims-processors-overwhelmed-quotas-veterans [https://perma.cc/9CLJ-RMK3]; Patricia Kime, *VA Claims Backlog Expected to Grow to 400K, Largely Due to the PACT Act*, MILITARY.COM (May 22, 2023), https://www.military.com/daily-news/2023/05/22/va-claims-backlog-expected-grow-400k-largely-due-pact-act.html [https://perma.cc/NB3M-ZVMR].

183. Slayton, *supra* note 182. Over two thousand claims processors have left since 2020. Chan, *supra* note 155.

184. Chan, *supra* note 155. After VA hired the claims processors in 2023, VA has approximately 12,900 on its staff. *Id.*

185. Leo Shane III, *VA Staff Are Completing More Claims Than Ever but Still Falling Behind*, MIL. TIMES (Jan. 17, 2024), https://www.militarytimes.com/veterans/2024/01/17/va-staff-are-completing-more-claims-than-ever-but-still-falling-behind [https://perma.cc/U8PC-ZBK6].

186. Chan, *supra* note 155.

187. *Id.* ("[VA's quota system] stresses our own internal ethics . . . . It's an untenable request to make on anybody.").

and uniquely pro-claimant."[188] This interpretation means that the veterans benefits process is considered "'non-adversarial,' 'paternalistic,' or 'veteran-friendly'" because the Agency is supposed to work with rather than against the veteran.[189] These intentions to create a non-adversarial, claimant-friendly system serve as good guidance for the system as a whole and appear to make things easier for claimants,[190] but the system does not always seem to act in a non-adversarial, claimant-friendly way.

The non-adversarial process begins when a veteran files a claim because VA has a duty to "make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim for a benefit."[191] This is known as the duty to assist, and it can be a very helpful tool to veterans. But it can also be harmful. Under this duty, veterans rely on VA to obtain documents rather than using traditional and more adversarial tools like discovery or depositions.[192] By framing issues as a failure to assist, the CAVC and the Federal Circuit have been able to avoid constitutional challenges.[193] Even though it is a claimant-friendly system, many of the provisions designed to help veterans throughout their claims can also be used against them—particularly when veterans do not want or need VA's "assistance."

As the veteran's claim progresses through the system, the process only gets more complex.[194] The VJRA created the CAVC and gave it exclusive

188. Hodge v. West, 155 F.3d 1356, 1362 (Fed. Cir. 1998); *see, e.g.*, Coffy v. Republic Steel Corp., 447 U.S. 191, 196 (1980) ("The statute is to be liberally construed for the benefit of the returning veteran."); McKnight v. Gober, 131 F.3d 1483, 1485 (Fed. Cir. 1997) ("Certainly, if there is ambiguity in the statute, 'interpretive doubt is to be resolved in the veteran's favor.'" (quoting Brown v. Gardner, 513 U.S. 115, 118 (1994))); Trilles v. West, 13 Vet. App. 314, 326 (2000) (en banc) (describing "the VA nonadversarial [claims adjudication] process").

189. Nino C. Monea, *Just How Paternalistic Is the VA? An Examination of the "Non-Adversarial" Veterans' Benefits System*, 126 W. VA. L. REV. 77, 79 (2023) (quoting Butler v. Principi, 244 F.3d 1337, 1340 (Fed. Cir. 2001)); *see also* Michael P. Allen, *Due Process and the American Veteran: What the Constitution Can Tell Us About the Veterans' Benefits System*, 80 U. CIN. L. REV. 501, 507–09 (2012) (discussing the administrative and judicial aspects of the veterans benefits process).

190. *See* Hugh B. McClean, *Delay, Deny, Wait Till They Die: Balancing Veterans' Rights and Non-Adversarial Procedures in the VA Disability Benefits System*, 72 SMU L. REV. 277, 280 (2019) ("The rules of evidence for VA hearings are relaxed, there is no statute of limitations on filing claims, and veterans can endlessly appeal denied claims upon a showing of new and relevant evidence.").

191. 38 U.S.C. § 5103A(a)(1).

192. McClean, *supra* note 190, at 304.

193. *See, e.g.*, Nohr v. McDonald, 27 Vet. App. 124, 134 (2014) (explaining how the CAVC did not address whether the Board's failure to allow the veteran to question the VA medical examiner violated the veteran's Fifth Amendment rights, instead framing it as a duty to assist error); *see also* McClean, *supra* note 190, at 289–306 ("Appellate courts have avoided constitutional questions . . . by instead reviewing whether the VA failed to assist veterans in the development of their claims in individual cases.").

194. In a 2016 press release, VA stated that "[t]he current appeals process is complicated and ineffective, and [v]eterans on average are waiting about [five] years for a final decision on an appeal that reaches the Board of Veterans' Appeals, with thousands waiting much longer." Press Release, U.S. Dep't of Veterans Affs., Care and Benefits for Veterans Strengthened by $182 Billion VA Budget, (Feb. 9, 2016), https://news.va.gov/press-room/care-and-benefits-for-veterans-strengthened-by-182-billion-va-budget [https://perma.cc/8U8R-KDZ4]. This was prior to the passage of the AMA, so this assessment only applied to what is now the legacy system.

jurisdiction over final decisions of the BVA, but the CAVC has no fact-finding authority and reviews the BVA's factual determinations under the clearly erroneous standard.[195] The Federal Circuit's jurisdiction is even more limited as it can only review questions of law and cannot review challenges to factual determinations or as applied to the facts of a particular case.[196] These limitations mean that as veterans appeal, only certain arguments can be raised. Facts—key to most claims—are only in question at certain levels.

Along with certain arguments, certain appeals have different benefits. The AMA created supplemental claims and higher-level review.[197] A supplemental claim is appropriate when the veteran has "new and relevant evidence" or the review is based on a change in law.[198] Higher-level review is appropriate when the veteran disagrees with the decision or thinks there was an error in the decision.[199] Regardless of which avenue a veteran chooses to appeal an adverse decision, a common barrier to many appeals are remands. Both the Board and the CAVC order a staggering number of remands each year, which can lead to disjointed interactions between the two bodies. These disjointed interactions are beyond the normal failure to apply precedent and other favorable standards for veterans.

These strategic decisions can be complex even for legal professionals, but VA disability benefits claims are often initially filed by the veteran or a VSO.[200] In fact, the veterans benefits process has a long and difficult history with attorneys.[201] Originally avoided due to fears of making the non-adversarial system adversarial, effective legal representation only became available to veterans at the agency level after the VJRA.[202] Despite this change, the long battle with attorneys' fees[203] and VA's historically negative views of veterans benefits lawyers[204] have led to a system precariously balancing its intention for pro se filings with attorney representation.

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195. McClean, *supra* note 190, at 295–96.

196. 38 U.S.C. § 7292(d)(1). The clearly erroneous standard is a standard of review that falls in the middle between the most and least deferential standard. Lee Will Berry IV, Note, *Standards of the Standards of Review*, 3 VETERANS L. REV. 263, 271 (2011). Under the clearly erroneous standard, the CAVC determines whether, after reviewing the record, an error has been made. *Id.*

197. Claimants could still appeal to the Board, but they had these additional options to accomplish the AMA's goals of efficiency and expediency.

198. *Supplemental Claims*, *supra* note 101.

199. *Higher-Level Reviews*, *supra* note 95.

200. VSOs are trained to help veterans with claims, but they are not legal professionals. 38 C.F.R. § 14.629 (2024). Like many aspects of service, it is often luck of the draw because some VSOs are better than others. *See* William J. Maddix, Comment, *Statutory Restrictions on Complex Claimants' Right to Retain Counsel in VA Proceedings:* Walters v. National Association of Radiation Survivors, 71 IOWA L. REV. 1231, 1235–36 (1986) (discussing how VSO representatives can face a variety of challenges that eventually impact their clients).

201. *See* Collier & Early, *supra* note 18, at 6–9.

202. *Id.* at 12.

203. *Id.* at 6–11.

204. *Id.* at 8 ("[P]ublic sentiment established the legacy of governmental distrust of attorneys in veterans' claims and fueled a tradition of little (or no) enthusiasm for increasing any statutory cap on attorney fees.").

The veterans benefits process is considered non-adversarial, but it actually provides fewer procedural rights to claimants than other similar systems.[205] These different procedures to keep the system non-adversarial also explain the long history of avoiding attorney representation for veterans seeking disability compensation. Regardless, the benefits system is full of complexities for any person, especially for lay veterans who are often battling a disability while attempting to obtain the benefits they have rightfully earned through their service.

B. LACK OF ENFORCEMENT MECHANISMS

When a court issues its decision in a class-action suit, it offers the parties an enforceable decision.[206] If the losing party refuses to abide by the court's conditions, the prevailing party can return to the court for enforcement.[207] This required enforcement would help appellants because it could avoid the constant remands that arise when a party claims that a legal standard should apply to them. With a class order, VA cannot distinguish one case from the other. Without a binding class decision, VA can distinguish one case from another and avoid applying precedent. If veterans appealing Board decisions are functionally unable to obtain class action relief due to the Federal Circuit's opinion, then this method of enforcement is no longer an option as well.

When the CAVC created its own class action procedure, it implemented the superiority requirement, which differentiated its rule from the FRCP and required the claimant requesting class certification to explain why the class—and not a rare precedential decision—would best serve the interest of justice or equity.[208] This condition requires more initial work from the claimant, but it would benefit veterans in the future because it would give them an enforcement mechanism that cannot be obtained with a precedential decision.

Court-ordered enforcement is not the only enforcement mechanism option for claimants, but it is likely the most effective. As previously stated, the vast majority of decisions in the veterans benefits scheme are not precedential. Whether they come from the Board, VA, or the CAVC, nearly all the decisions claimants receive only apply to that individual claimant, even if countless other claimants allege similar injuries from the same incident.

One such example of VA's commitment to individual decisions is the case of *Feeley v. McDonough*.[209] Mr. Edward Feeley was another Air Force veteran

205. *See* McClean, *supra* note 190, at 303 ("[V]eterans have a right to the fair adjudication of their claims under the Fifth Amendment of the Due Process Clause, [but] courts have been reluctant to interfere with Congress's statutory scheme.").

206. *See* FED. R. CIV. P. 23(c)(3).

207. *Id.*

208. VET. APP. R. 22(a)(3) (requiring the person requesting class relief to "explain the reasons why a decision granting relief on a class action basis would serve the interests of justice to a greater degree than would a precedential decision granting relief on a non-class action basis").

209. Mr. Feeley's case information comes from public records, either the CAVC's electronic docket or the Veterans Legal Services Clinic's website.

who was sent to Palomares and was a part of the same cleanup as Mr. Skaar.[210] Mr. Feeley was diagnosed with B-cell non-Hodgkin's lymphoma, which he asserted was caused by his role at the Palomares cleanup.[211] *Feeley* demonstrates the issue with the lack of precedent that permeates the veterans benefits process. Mr. Feeley also attempted to certify a class before the Board, which will be discussed in Section III.A.

When Mr. Feeley's case was pending before the Board, two nuclear physicists, Dr. Frank von Hippel and Dr. Jan Beyea, testified on his behalf about the Air Force's incorrect dose estimate methodology.[212] After their testimony, the Board found that the evidence was "sufficient to place the relevant evidence, at a minimum, in a state of equipoise as to whether the Veteran's B-cell non-Hodgkin lymphoma was related to his active military service."[213] The Board granted service connection for Mr. Feeley's lymphoma under VA's benefit-of-the-doubt rule where the veteran prevails if the positive and negative evidence is in "approximate balance."[214]

As discussed in Part I, BVA decisions are never precedential,[215] and CAVC decisions are precedential less than one percent of the time.[216] Ironically, if a veteran were seeking a precedential decision, it would be better for veterans if a claimant were to lose before the Board so they can appeal to the CAVC in hopes of obtaining a favorable precedential decision. Even if another veteran suffered from B-cell non-Hodgkin's lymphoma due to radiation at Palomares, the Board's decision in *Feeley* would not apply. The best strategy for that veteran would be to contact Dr. von Hippel and Dr. Beyea and ask them to testify. The problem with that strategy is not every veteran has the resources to contact nuclear physicists, and those physicists do not have unlimited amounts of time.[217] The lack of precedential decisions can lead to absurd results and strategies to obtain a favorable result.

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210. *New Federal Suit Filed Against VA on Behalf of Veterans Exposed to Radiation at Palomares Nuclear Cleanup*, YALE L. SCH. (Nov. 1, 2021), https://law.yale.edu/yls-today/news/new-federal-suit-filed-against-va-behalf-veterans-exposed-radiation-palomares-nuclear-cleanup [https://perma.cc/HGQ4-MF7W].

211. Title Redacted by Agency, Bd. Vet. App. A22019407, No. 210104-130980, 2022 WL 16573133, at *1 (Sept. 21, 2022).

212. *Id.* at *3. Dr. von Hippel testified that he found different dose estimations than the Air Force, and there was a "likelihood of connection between radiogenic cancers and his dose estimates for the [v]eteran." *Id.* Dr. Beyea concluded that, according to his estimates, "it was as likely as not that the [v]eteran's lymphoma was caused by his exposure to radiation in Palomares." *Id.*

213. *Id.*

214. 38 U.S.C. § 5107(b).

215. 38 C.F.R. § 20.1303 (2024) ("Although the Board strives for consistency in issuing its decisions, previously issued Board decisions will be considered binding only with regard to the specific case decided. . . . [E]ach case presented to the Board will be decided on the basis of the individual facts of the case . . . .").

216. U.S. CT. OF APPEALS FOR VETERANS CLAIMS, *supra* 42, at 3.

217. Even if veterans can find nuclear physicists to testify on their behalf, VA has issues assessing scientific evidence. *See generally* Meghan E. Brooks, *Presuming Enough? Keeping the PACT Act's Promise*, 110 IOWA L. REV. 571 (2025) (discussing the BVA's refusal to assess the scientific evidence challenging the Air Force's dose estimate methodology).

Even in situations that are ripe for a precedential decision, it is still possible that the case will not reach the CAVC because VA tends to moot cases to avoid litigation and avoid implementing change.[218] For example, in *Monk*, the Secretary argued that Mr. Monk's appeal was moot because "VA awarded Mr. Monk a one hundred percent (100%) disability rating."[219] When Mr. Monk appealed to the CAVC, VA awarded him a disability benefits award in an attempt to ensure there was no justiciable dispute.[220] The CAVC "agree[d] that Mr. Monk's appeal concerning his individual disability claim [was] rendered moot," but his class certification appeal was not.[221] In Mr. Feeley's case, the Board granted his claim, mooting his appeal at the CAVC, and the PACT Act mooted enough of the rest of the proposed class's claims to stop the suit.[222]

Based on the current issues, including backlogs, wait times, and the inherent complexity of the benefits process,[223] it is extremely difficult for claimants to satisfy the Federal Circuit's jurisdictional requirements in *Skaar* while abiding by the CAVC's rules governing class actions. To properly establish a class under the Federal Circuit's guidance in *Skaar*, the class must contain members who are not one of the over one million claims pending before VA.[224] If they did receive a decision and appealed within the year required, they cannot be one of the countless decisions languishing before the Board. Thus, the likelihood that a class of forty or more veterans with common questions of law or fact[225] can meet the Federal Circuit's requirements is slim.

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218. *See, e.g.*, Monk v. Shulkin, 855 F.3d 1312, 1316 (Fed. Cir. 2017) (describing how VA granted Mr. Monk's claim for full disability benefits after he appealed to the CAVC); Young v. Shinseki, 25 Vet. App. 201, 214–15 (2012) (Lance, J., dissenting) (explaining how significant delays meant lack of legal review, and when the CAVC ordered VA to respond to those improper delays, VA granted benefits and dismissed the case as moot).

219. *Monk*, 855 F.3d at 1316.

220. *Id.*

221. *Id.*

222. Appellant's Unopposed Motion to Dismiss Appeal at 1–2, Feeley v. McDonough, No. 21-7045 (Vet. App. Oct. 11, 2022).

223. As part of the *Skaar* proceedings, the CAVC ordered VA to report specific information about Palomares veterans. Appellee's Response to the Ct.'s Nov. 13, 2018, Order, *supra* note 5, at 1. VA attorneys contacted the VBA and the Board to figure out how many Palomares veterans, since 2001, had received an adverse decision and how many had appeals pending before the Board. *Id.* at 3. The system the VBA uses cannot search for specific events, nor was it "designed to search across all records for text found within individual documents." *Id.* Instead, they conducted a search for the word "Palomares" appearing in titles and subjects of documents. *Id.* They found forty-four veterans, twenty-two of whom had the last name "Palomares," and the rest could not be identified as Palomares veterans because the data did not contain claim information *Id.* at 4. The Board was similarly unhelpful because their system also did not track cases based on events and only tracked radiation exposure cases as "bomb" or "non-bomb" related. *Id.* Since the VBA and the Board did not contain the records responsive to the CAVC's order, VA turned to commercial legal databases and conducted various word searches. *Id.* at 5. The attorneys found six cases, two of which were irrelevant to *Skaar*'s claims and an additional two that pertained to Palomares but did not fall within the scope of the order. *Id.* at 5–6. These events demonstrate how hard it is for VA, the agency dealing with veterans' claims, to find veterans who may be part of a class. It will be even more difficult for veterans.

224. *Claims Backlog*, *supra* note 102; *Claims Inventory*, *supra* note 156.

225. VET. APP. R. 23.

III. EN MASSE RESOLUTION: AGGREGATION AND NEW RULES

As Circuit Judge Dyk put it in the dissenting opinion denying an en banc rehearing of *Skaar*, "aggregate treatment of claims at the Veterans Court could 'promot[e] efficiency, consistency, and fairness, and improv[e] access to legal and expert assistance by parties with limited resources.'"[226] The same motivations that pushed the Federal Circuit to acknowledge the CAVC's class action authority still exist today. The only thing that has changed is the Federal Circuit's effective elimination of class actions in an appellate posture. Since class actions are no longer a viable option for most veterans appealing a denial of benefits, and the problems requiring aggregate resolution of claims still exist, new solutions are needed. This Part proposes two potential solutions: (1) aggregation at the Board and (2) formal rules of joinder and consolidation at the CAVC. Both options would lead to judicial efficiency and conservation of the CAVC and BVA's limited resources, so both would be viable solutions to solve many of the problems discussed above in Part II.

A. AGGREGATION AT THE BVA

Federal agencies adjudicate thousands upon thousands of cases each year, and many of them use some form of aggregation to manage their caseloads.[227] These agencies typically have broad discretion under their enabling acts to create their own procedures,[228] and VA is one of those agencies. VA is subject to congressional action, but it has its own rulemaking authority under 38 U.S.C. § 501(a).[229] Using its authority, VA has promulgated various regulations governing the BVA.[230] Nothing in VA's rules or regulations prevents aggregation at the Board, and its priorities of timely adjudication[231] and efficient use of resources[232] indicate that the Board should implement aggregation. This Section examines the Equal Employment Opportunity Commission's ("EEOC") use

226. Skaar v. McDonough, 57 F.4th 1015, 1017 (Fed. Cir. 2023) (Dyk, J., dissenting) (alterations in original) (quoting *Monk*, 855 F.3d at 1320).

227. ADMIN. CONF. OF THE U.S., ADMINISTRATIVE CONFERENCE RECOMMENDATION 2016-2: AGGREGATION OF SIMILAR CLAIMS IN AGENCY ADJUDICATION 1 (2016), https://www.acus.gov/sites/default/files/documents/aggregate-agency-adjudication-final-recommendation_1.pdf [https://perma.cc/9UBP-UYML].

228. *See, e.g.*, Michael Sant'Ambrogio & Adam S. Zimmerman, *Inside the Agency Class Action*, 126 YALE L.J. 1634, 1706–28 (2017) (compiling non-Article III tribunals' various aggregation rules).

229. 38 U.S.C. § 501(a) ("The Secretary has authority to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department and are consistent with those laws, including . . . the manner and form of adjudications and awards.").

230. *See, e.g.*, 38 C.F.R. § 14.636 (2024) (discussing payment of fees for representation at the Board); 38 C.F.R. § 3.103 (explaining VA's duty to assist claimants and to maintain their procedural due process rights).

231. Timely adjudication is emphasized throughout the Board's governing statutes, as well as in the VJRA. *See, e.g.*, 38 U.S.C. § 7101(a) (describing how the Board shall consist of sufficient members "to conduct hearings and dispose of appeals properly before the Board in a timely manner").

232. *See* Ramsey v. Nicholson, 20 Vet. App. 16, 28 (2006) ("[A]gencies have discretion to develop case management techniques that make best use of their limited resources.").

of agency aggregation as an example of one of the many ways agencies aggregate, including Mr. Feeley's attempt to aggregate at the agency level.

1. Equal Employment Opportunity Commission

Government agencies utilize agency aggregation in various ways. Over seventy-one agencies use some form of aggregation, including class actions, joinder, consolidation, statistical sampling, and other methods.[233] This Note will specifically focus on the EEOC.

The EEOC is a government agency that enforces employment anti-discrimination laws, and one of its duties is to investigate discrimination claims against employers.[234] The EEOC employs Administrative Law Judges ("ALJs") to adjudicate claims in administrative proceedings,[235] similar to the BVA's Veterans Law Judges ("VLJs"). Like VA, the EEOC created its class complaint procedures modeled after Rule 23 of the FRCP.[236] However, instead of relying on explicit direction from Congress, the EEOC relies on Title VII's authority "to enforce the provisions [prohibiting employment discrimination] through appropriate remedies . . . and shall issue such rules . . . as it deems necessary and appropriate to carry out its responsibilities."[237] Despite lacking explicit authority to do so, the EEOC has been adjudicating claims en masse through class complaints for decades.[238]

Aggregation at the Board would not be much different from the CAVC's and the EEOC's development of its own aggregation procedures. It is important to note the CAVC and BVA are two distinct organizations, but their relationship would help the Board develop mass aggregation procedures. For example, the CAVC's experience with rule development is significant, and even though it operates separately from the BVA, many of the people involved with promulgating Rule 22 of the CAVC were VLJs or other practitioners before the BVA.[239]

The Board has the knowledge, and it can easily use the framework established by the EEOC. When the EEOC established its class complaints procedure, it did so within the Agency. Like the EEOC, the Board should establish its own aggregation procedure.

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233. Sant'Ambrogio & Zimmerman, *supra* note 228, at 1657.

234. MICHAEL SANT'AMBROGIO & ADAM ZIMMERMAN, ADMIN. CONF. OF THE U.S., AGGREGATE AGENCY ADJUDICATION 29 (2016).

235. *Id.* at 31.

236. *Id.*

237. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241; *see also* SANT'AMBROGIO & ZIMMERMAN, *supra* note 234, at 31.

238. SANT'AMBROGIO & ZIMMERMAN, *supra* note 234, at 33.

239. *See* Order Assembling a Jud. Advisory Comm., *supra* note 67, at 2–3.

2. *Feeley*: A Motion to Aggregate Before the Board

Mr. Feeley's case is not just an example of the Board's inability to resolve similar claims[240]—*Feeley* likely serves as the first attempt at aggregation before the Board.[241] In 2021, Mr. Feeley's case sat before the Board like many other Palomares veterans, when he filed a motion for aggregation.[242] In this motion, Mr. Feeley requested the BVA "certify a class of Palomares veterans with radiogenic conditions whose applications for benefits the VA has denied or will deny."[243]

According to Mr. Feeley, aggregation at the Board would benefit both claimants and the CAVC.[244] As discussed in Part I, the CAVC can only review questions of law, so it is limited in its decision-making.[245] The Board exists within VA, so it does not face the same limitations as a traditional appellate court. Instead, aggregation at the Board "would allow the BVA to address class-wide questions of fact in the first instance."[246] The Board and the CAVC are

240. *See* Skaar v. Wilkie, 33 Vet. App. 127, 140 (2020) (en banc), *vacated in part sub nom.* Skaar v. McDonough, 48 F.4th 1323 (Fed. Cir. 2022) ("No matter how deferential our standard of review may be, when the Board does not explain its reasons for reaching a factual finding, the [c]ourt's ability to review anything is frustrated.").

241. In 2024, once Mr. Skaar's case returned to the Board, he filed a renewed motion to aggregate; however, the Board failed to rule on the motion. Petitioner's Reply Brief in Support of Petition for Extraordinary Relief, *supra* note 151, at 2. The Board eventually denied this motion to aggregation, which Mr. Skaar is currently appealing at the CAVC. Appellee's Motion to Dismiss, *supra* note 151, at 1.

242. VETERANS LEGAL SERVS. CLINIC, YALE L. SCH., MOTION FOR AGGREGATION 19 (2021) [hereinafter MOTION FOR AGGREGATION], https://law.yale.edu/sites/default/files/area/clinic/document/2021.06.29_feeley_bva_motion_to_aggregate.pdf [https://perma.cc/H3TE-T2XN].

243. *Id.* at 15. This class was essentially the *Skaar* class with some minor procedural differences. Mr. Feeley's proposed class was:

> [A]ll U.S. veterans who were present at the 1966 cleanup of plutonium dust at Palomares, Spain, who have filed applications for service-connected disability compensation based on exposure to ionizing radiation at Palomares, whose applications the VA has denied or will deny, and who have a disease specific to radiation-exposed veterans as defined in 38 C.F.R. § 3.309(d)(2). This definition includes claims pending or decided at the Regional Office, . . . appeals pending at the Board, and appeals in which the BVA has rendered a final decision.

Id. at 2 (citation omitted). The class certified in *Skaar* was:

> All U.S. veterans who were present at the 1966 cleanup of plutonium dust at Palomares, Spain, and whose application for service-connected disability compensation based on exposure to ionizing radiation VA has denied or will deny by relying, at least in part, on the findings of dose estimates requested under 38 C.F.R. § 3.311, except those whose claims have been denied and relevant appeal windows of those denials have expired, or those whose claims have been denied solely based on dose estimates obtained before 2001.

Skaar v. Wilkie, 32 Vet. App. 156, 201 (2019) (emphasis omitted), *vacated and remanded sub nom.* Skaar v. McDonough, 48 F.4th 1323 (Fed. Cir. 2022). *Skaar*'s class included 38 C.F.R. § 3.311, while *Feeley* uses 38 C.F.R. § 3.309(d)(2) because Skaar was unable to bring his claim under 3.309(d)(2). *Id.* at 169.

244. MOTION FOR AGGREGATION, *supra* note 242, at 11.

245. *See supra* Section I.A.

246. MOTION FOR AGGREGATION, *supra* note 242, at 9.

independent bodies, but their work is intertwined because the CAVC is unable to issue a decision if the Board does not do its job correctly.

Aggregating claims at the BVA would alleviate some of the Board's workload and make it easier for the CAVC to review Board decisions. Right now, the Board faces a significant and uncertain burden with the number of claims it has pending. By allowing aggregation at the agency level, the Board would be able to resolve multiple claims in one decision. This may go against the Board's practice of evaluating each veteran's individual claim based on their record and facts, but modifying the class certification procedure for the Board would still allow that. Class certification requires that there be questions of law or fact common to the class. Without commonality, the class cannot exist. It would not be the entirely individualized approach the BVA currently employs. However, examining common questions of law and fact would lead to an increase in efficiency, and the preservation of resources would be more beneficial. Most importantly, it would save time for veterans who may not be able to afford the Board's current wait times.

The Board denied Mr. Feeley's motion to aggregate, which Mr. Feeley appealed to the CAVC.[247] VA granted Mr. Feeley's benefits before the CAVC could rule on the question of whether or not the Board could aggregate, which rendered his claim moot.[248] While mooting Mr. Feeley's claim did not moot the rest of the proposed class's claims, the passage of the PACT Act did.[249] It is currently unknown how the CAVC would rule on a motion to aggregate before the Board, but it is known that VA would strongly oppose it. In *Feeley*, VA filed three motions in response to the motion to aggregate: a motion to dismiss for lack of subject matter jurisdiction,[250] a motion to stay proceedings,[251] and a motion to strike.[252] Regardless, at the time of this Note, the CAVC has not ruled on a motion for aggregation.[253]

B. JOINDER AND CONSOLIDATION AT THE CAVC

Although aggregation at the Board would help resolve claims before they were appealed to the CAVC, another possible solution would be for the CAVC to create rules of joinder and consolidation.[254] As discussed in Part I, the CAVC

247. Response in Opposition to Appellee's Motion to Dismiss at 1, Feeley v. McDonough, No. 21-7045 (Vet. App. Dec. 15, 2021).

248. *Id.* at 1–2.

249. *Id.*

250. *See generally* Response in Opposition to Appellee's Motion to Dismiss, *supra* note 247.

251. *See generally* Appellee's Opposed Motion for Stay of Proc. Pending Adjudication of the Sec'y's Motion to Dismiss, Feeley v. McDonough, No. 21-7045 (Vet. App. Dec. 1, 2021).

252. *See generally* Appellee's Motion to Strike Appellant's Notice of Related Case, Feeley v. McDonough, No. 21-7045 (Vet. App. Dec. 15, 2021).

253. As of July 2024, Mr. Skaar has petitioned the CAVC for a writ of mandamus to compel the BVA to rule on his motion to aggregate before the Board. Notice of Related Case at 2, Skaar v. McDonough, No. 24-2455 (Vet. App. Apr. 15, 2024).

254. *See* Sant'Ambrogio & Zimmerman, *supra* note 228, at 1659 ("[The study] found far more rules permitting consolidation of cases or claims in non-Article III tribunals. Sixty-nine agencies and Article I courts have a rule permitting consolidation or joinder.").

has statutory authority to prescribe its own rules of practice and procedure.[255] The CAVC twice used that authority to explicitly deny that it had class action authority,[256] but it was forced to reverse its decisions and implement class action procedure after the Federal Circuit's ruling in *Monk*.[257] Since the CAVC has previously created its own rules and can act wholly independent of VA's authority,[258] the CAVC should propose and enact its own rules of joinder and consolidation.[259] This Section first explores the concept of joinder and what it would look like for the Veterans Court. Then, this Section discusses consolidation and how its opportunity for mass resolution of claims would benefit veterans.

1. Joinder

Rules 18, 19, and 20 of the FRCP govern joinder of parties.[260] Rule 18 establishes the joinder of claims,[261] Rule 19 discusses when parties are required to be joined, and Rule 20 discusses permissive joinder, when parties may be joined, but it is not required.[262]

The CAVC already has a rule that allows joinder in specific situations. Rule 3(d), Joint Appeals, of the CAVC's rules allows joinder in situations where "more than one person is entitled to appeal from a decision of the Board and their interests make joinder practicable."[263] Other than Rule 3(d), the CAVC does not have a formal rule of joinder, but it does give judges discretion.[264] The main problem is how the judges use—or do not use—that discretion. Even when judges do decide to join appeals, it is often on an

255. 38 U.S.C. § 7264 ("The proceedings of the [CAVC] shall be conducted in accordance with such rules of practice and procedure as the Court prescribes.").

256. Harrison v. Derwinski, 1 Vet. App. 438, 438 (1991); Lefkowitz v. Derwinski, 1 Vet. App. 439, 440 (1991).

257. After *Monk*, the CAVC indicated that it would adopt its own rule but would operate under Rule 23 of the FRCP until its own rule could be established. *See* Monk v. Wilkie, 30 Vet. App. 167, 170 (2018) ("The Court anticipates that . . . it will adopt a rule on aggregate procedures that is appropriate for this Court. However, until that time, the Court will use Rule 23 of the Federal Rules of Civil Procedure as a guide."). When the CAVC implemented its own class action rules, they were similar to Rule 23 but with additional VA-specific language. *See, e.g.*, VET. APP. R. 23.

258. 38 U.S.C. § 7252.

259. Joinder and consolidation are different legal concepts; however, for this Note, joinder and consolidation are functioning as related solutions that are ultimately independent of one another.

260. Rule 21 discusses the misjoinder and nonjoinder of parties. Since this Note proposes the CAVC create its own rules of joinder, this rule may be relevant, but the CAVC already rules on joint motions in very specific circumstances, which means the court also can add or drop parties. *See* VET. APP. R. 3.

261. FED. R. CIV. P. 18.

262. FED. R. CIV. P. 19; FED. R. CIV. P. 20.

263. VET. APP. R. 3(d).

264. To have a joint appeal, the moving parties must move to join their appeals, and a judge needs to grant that motion in order for the case to proceed. VET. APP. R. 3. Rule 3(d) does not lay out any guidelines for when a judge is or is not required to grant the motion, so it seems to be at the judge's discretion.

inconsistent basis.[265] There needs to be more formal guidance in an official rule allowing joinder because judges would still have the final decision in deciding whether the rule applied, ultimately preserving their discretion.

When *Monk v. Shulkin* returned to the CAVC to implement the Federal Circuit's guidance on class actions, it also discussed Rule 20 of the FRCP and joinder.[266] The CAVC found that the petitioners' claims arose out of the same transaction and were trained on a common question, so the CAVC "deem[ed] the joinder of additional petitioners appropriate."[267] In *Monk*, that same transaction was "a delay in adjudication of their appeals after submission of a[] [Notice of Disagreement]."[268] If the class in *Monk* arose out of the same transaction sufficient for Rule 20 to apply, then it is likely that many future classes of veterans would also apply, even if they served at different times with different claims. In most courts, this language from the CAVC would create a precedential decision on which future appellants could rely, but this was not a precedential decision pursuant to CAVC Rule 30(a).[269] The CAVC's language may be cited, but it is no more binding than a Fifth Circuit opinion in the Eighth Circuit.

While not binding, the CAVC's language gives insight into how an appellant may bring a request for joinder of claims and the necessary framework for such a claim. Like its development of class action procedures, the CAVC's discussion relies heavily on Rule 20 of the FRCP and the framework it establishes. Rule 20 requires appellants to "assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and . . . any question of law or fact common to all plaintiffs will arise in the action."[270] The CAVC found joinder appropriate because of the portions of Rule 20 arising from the same transaction and involving common questions of law. It would not be a stretch for the Veterans Court to implement this reasoning from *Monk* into its procedure in a similar manner to how it implemented class action procedure.

Additionally, since joinder operates separately from class actions, veterans would not face the same procedural restrictions. For example, while numerosity is not a component of joinder, it is a significant barrier after the Federal Circuit's decision in *Skaar*. The likelihood of finding a class of forty-plus veterans whose claims arose from a similar transaction is quite slim, considering the significant

265. *See, e.g.*, Sapp v. Wilkie, 32 Vet. App. 125, 132–35 (2019) (discussing the procedural posture of the denials and subsequent appeals).

266. *See* Monk v. Shulkin, No. 15-1280, 2018 WL 507445, at *6–7 (Vet. App. Jan. 23, 2018); *see also id.* at *5 ("The Court concludes that, for purposes of this case, Rule 20 provides a useful standard by which to assess the request to amend here with respect to the joinder of additional petitioners.").

267. *Id.* at *6–7.

268. *Id.* at *6. A Notice of Disagreement is a tool used under the legacy system to express discontent with the decision and ask for appellate review. *Manage a Legacy VA Appeal*, U.S. DEP'T VETERANS AFFS. (Dec. 11, 2023), https://www.va.gov/decision-reviews/legacy-appeals [https://perma.cc/N2QG-A2LW].

269. VET. APP. R. 30.

270. FED. R. CIV. P. 20.

backlogs within VA and the BVA. By using joinder, veterans would still be able to benefit from the mass resolution of claims in a similar manner to class actions without having to jump through all the procedural hoops. Rather than adjudicating each appeal individually with nonprecedential decisions, claims could be resolved together.

2. Consolidation

According to 4 C.F.R. § 28.29 (a)(1), "[c]onsolidation may occur where two or more parties have cases which should be united because they contain identical or similar issues."[271] Currently, the CAVC does not have a formal rule for consolidation, but it is mentioned in many of its rules.[272] Additionally, section IX(b) of the CAVC's Internal Operating Procedures ("IOP") allows consolidation "in the interest of judicial economy."[273] Based on that internal procedure, consolidation *appears* to be an option at the CAVC, but the IOP's language limits consolidation to two specific situations. Consolidation is only appropriate at the CAVC when "cases involve[e] the same appellant, or cases where different appellants are contesting the same decision of the Board."[274] This means that consolidation is only appropriate if a veteran has multiple appeals pending at the CAVC[275] or two claimants are appealing the same Board decision.[276]

The decision to grant a motion to consolidate is at the judge's discretion,[277] but it is typically only granted according to the guidance of the CAVC's IOP.[278]

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271. 4 C.F.R. § 28.29 (a)(1) (2024).

272. *See, e.g.*, VET. APP. R. 3(e) ("Appeals may be consolidated by order of the Court on its own initiative or on a party's motion."); VET. APP. R. 21(c) ("Petitions may be consolidated by order of the Court on its own initiative or on a party's motion."); VET. APP. R. 23 ("One or more members of a class may submit an RCA as representative parties on behalf of all members only if . . . the class is so numerous that consolidating individual actions in the court is impracticable . . . ."); VET. APP. R. 28 ("[i]n cases involving more than one appellant, including consolidated cases"); VET. APP. R. 45 ("Unless a case has been assigned to a Judge . . . the Clerk may act on motions and applications . . . that seek to . . . consolidate appeals.").

273. U.S. CT. OF APPEALS FOR VETERANS CLAIMS, INTERNAL OPERATING PROCEDURES (IOPS) 13 (2023), http://www.uscourts.cavc.gov/documents/IOP02OCT2023.pdf [https://perma.cc/XVF9-GY8F]. Judicial economy in the CAVC involves the preservation of the court's resources by being as efficient as possible. *See id.*

274. *Id.*

275. *See, e.g.*, Young v. Shinseki, 22 Vet. App. 461, 463–64 (2009) ("[T]he appellant has two appeals pending before the Court stemming from two different Board decisions on the same claim for disability benefits . . . . [T]he Court ordered the consolidation of these appeals . . . .").

276. An example of two appeals of the same Board decision would be if two spouses were claiming survivor benefits as a deceased veteran's surviving spouse. *See, e.g.*, Sapp v. Wilkie, 32 Vet. App. 125, 133 (2019) (describing how two women applied for survivor benefits after a veteran died and were issued separate decisions under the same case number). It seems odd that this is a mechanism the CAVC accounts for, but consolidation of claims outside of class actions is not typically considered.

277. *See* VET. APP. R. 3(e) ("Appeals may be consolidated by order of the Court on its own initiative or on a party's motion."); VET. APP. R. 21(c) ("Petitions may be consolidated by order of the Court on its own initiative or on a party's motion.").

278. U.S. CT. OF APPEALS FOR VETERANS CLAIMS, *supra* note 273, at 13.

But the CAVC has consolidated appeals outside of that guidance before. In *Dingess v. Nicholson*, two veterans, Mr. Dingess and Mr. Hartman, separately appealed the BVA's decisions in their respective cases.[279] Mr. Dingess appealed the Board's denial of a higher disability rating and additional disability benefits related to employment, while Mr. Hartman appealed an earlier effective date for his claim.[280] The issues in both appeals fell within 38 U.S.C. § 5103(a).[281] Rather than relating directly to the denial of benefits, the Federal Circuit remanded and consolidated the appeals to determine whether 38 U.S.C. § 5103(a) "appl[ies] to the assignment of an initial disability rating . . . and effective date . . . associated with an award of VA service-connection disability compensation."[282] Mr. Dingess and Mr. Hartman did not have appeals arising from the same decision of the Board, nor did their cases involve the same appellant, but the Federal Circuit felt it appropriate to consolidate their cases, and the CAVC issued a single decision.

Consolidating appeals would create more judicial efficiency and potentially ensure that veterans receive a decision from the judge or panel of judges best positioned to hear their case. In *Feeley*, Mr. Feeley filed a Notice of Related Case while *Skaar* was at the CAVC and "request[ed] that his appeal be deemed related to *Skaar*."[283] The idea was that the judges hearing *Skaar* would be best positioned to hear *Feeley* because they were the judges with the most knowledge about Palomares and procedural issues in the cases. The focus on prior knowledge is also present within the IOP's section on subsequent appeals.[284]

The CAVC never ruled on Mr. Feeley's notice, so its strength as a legal strategy is unknown. What is known is many functions of consolidation already occur at the CAVC, and the court's guiding principles—conserving judicial resources, judicial efficiency, and timely decisions—align well with consolidation. The CAVC should implement the rulemaking process it used to create class action procedures and create a rule governing the consolidation of claims.

C. BENEFITS OF MASS ADJUDICATION

Each of these solutions, whether it be aggregation at the Board or joinder and consolidation at the CAVC, would benefit future veterans appealing adverse decisions. Aggregate procedures "provide more access, efficiency, and consistency than individualized litigation,"[285] and these are the very reasons

279. Dingess v. Nicholson, 19 Vet. App. 473, 477–78 (2006).

280. *Id.* at 481.

281. *Id.* at 482.

282. *Id.* at 477, 481.

283. Appellee's Motion to Strike Appellant's Notice of Related Case, *supra* note 252, at 1.

284. *See* U.S. CT. OF APPEALS FOR VETERANS CLAIMS, *supra* note 273, at 5 ("If the author [j]udge determines that the new appeal involves substantially the same issue(s) raised in the prior appeal, the [j]udge retains the case for appropriate disposition and directs [Central Legal Staff] to have the case assigned to that [j]udge."). It should be noted that this procedure applies to subsequent appeals arising from the same case, not necessarily another veteran's appeal.

285. Sant'Ambrogio & Zimmerman, *supra* note 228, at 1649.

the Federal Circuit granted class action authority to the CAVC.[286] This Section starts by discussing how mass resolution would promote judicial economy and consistency for claimants, which are some of its biggest critiques. Then, this Section explores how creating devices allowing mass resolution would be in line with Supreme Court precedent. It is this alignment with Supreme Court precedent that the dissent in *Skaar* said the majority's decision lacked.

1. Judicial Economy and Consistency

When multiple claims arise from a similar context, the claims will likely result in the same or comparable decisions. For example, if one radiation-exposed veteran is denied benefits for their cancer because the radiation was not significant enough, it is unlikely that another service member who suffered health concerns due to the same incident would have their claim granted. Rather than waiting on remands or almost-guaranteed denials, their claims should be adjudicated together.[287] Doing so would promote judicial efficiency by reducing the significant backlog and number of pending claims before VA. Rather than veterans waiting years for a BVA decision just to be remanded when that claim was granted for another veteran, those cases could be heard together to save time and resources for both the parties and the court itself.

Mass adjudication would not only allow greater judicial economy, but it would also allow for more consistency. One of the biggest critiques of the system is that the few precedential decisions available to veterans and their advocates are often applied inconsistently.[288] Allowing for mass resolution of claims either before the Board or through joinder and consolidation at the CAVC would help this problem. By focusing on a collective decision rather than an individual, the ruling would apply to the entire group of claims. This would prevent potentially absurd situations like in Mr. Feeley's case. Due to the success of using the testimony of nuclear physicists, other Palomares veterans may try to do the same in hopes of achieving a consistent decision. Essentially, if it worked for one veteran, it hopefully works for another.

2. Supreme Court Precedent

Historically, the Supreme Court has given agencies significant levels of flexibility to determine the most effective procedural form when the decisions

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286. *See* Skaar v. McDonough, 57 F.4th 1015, 1017 (Fed. Cir. 2023) (Dyk, J., dissenting) ("[The] aggregate treatment of claims at the Veterans Court could 'promot[e] efficiency, consistency, and fairness, and improv[e] access to legal and expert assistance by parties with limited resources.'" (alterations in original) (quoting Monk v. Shulkin, 855 F.3d 1312, 1320 (Fed. Cir. 2017))).

287. *Contra* Ridgway et al., *supra* note 43, at 40 (discussing how the CAVC has refused to use summary orders in order to ensure "every veteran [receives] at least some explanation from the court").

288. *See* Ronald L. Smith, *The Administration of Single Judge Decisional Authority by the United States Court of Appeals for Veterans Claims*, 13 KAN. J.L. & PUB. POL'Y 279, 283 (2003) ("[Single-judge decisions] may result in a lack of uniformity among decisions in similar cases, thereby undermining stare decisis."); *see also* Natsumi Antweiler, Note, *Creating an Unprecedented Number of Precedents at the U.S. Court of Appeals for Veterans Claims*, 60 WM. & MARY L. REV. 2311, 2325–27 (2019) ("With little precedent, rules are applied inconsistently by those who implement them at the [A]gency, thus creating large variance in outcomes.").

will impact a significant number of people.[289] In fact, when other appellate courts faced jurisdictional questions involving future claimants, the Supreme Court upheld the idea of class-wide relief.[290] In one case involving a proposed class within Social Security benefits, the Supreme Court "specifically approved classes including both individuals who had filed claims but who had not yet secured a decision from the Secretary and those who had not yet even filed claims but would do so in the future."[291]

The Federal Circuit's decision failed to take into account Supreme Court precedent and misattributed jurisdictional requirements regarding future claimants. The Supreme Court has consistently found that jurisdiction over claims is not as limited as the Federal Circuit's decision made it seem. The AWA at least partially created the CAVC's class action authority, and numerous appellate bodies have extended the AWA's authority to claimants who have yet to file.[292] Rather than taking the expansive view adopted by the Supreme Court and other courts, the Federal Circuit focused on a very narrow interpretation of the CAVC's jurisdiction, and it did so in direct contradiction to Supreme Court precedent. Allowing veterans to aggregate claims at the BVA or join and consolidate claims at the CAVC would be a more accurate interpretation of Supreme Court precedent than *Skaar*.

CONCLUSION

After the Federal Circuit's decision in *Skaar*, the existence of appellate class actions is murky at best and functionally dead at worst. As Circuit Judge Dyk wrote in his dissent, "[t]his case [was] a particularly appropriate vehicle for class action treatment."[293] The Palomares veterans in *Skaar* were automatically capped at a class of 1,388 members; they sought specific relief by requesting the Air Force reexamine and improve its dose estimate methodology; the potential class members were all but guaranteed a denial under the current procedure; and the claims all stemmed from the same occurrence (their exposure at Palomares).[294] Despite having what is probably the closest the system will get to a perfect class, the Federal Circuit vacated the *Skaar* class.[295] While class

289. Sant'Ambrogio & Zimmerman, *supra* note 228, at 1639–41.

290. *See* Skaar v. McDonough, 57 F.4th 1015, 1019 (Fed. Cir. 2023) (Dyk, J., dissenting) ("[E]xhaustion of administrative remedies . . . is not a jurisdictional requirement under [Supreme Court precedent] . . . even for named plaintiffs. The Supreme Court . . . stated that the only '"jurisdictional" requirement [is] that claims be presented to the [A]gency.'" (third alteration in original) (quoting Smith v. Berryhill, 587 U.S. 471, 478 (2019))).

291. *Id.* (citing Califano v. Yamasaki, 442 U.S. 682, 698–703 (1979)).

292. *See id.* ("[A circuit court's] authority is not confined [under the All Writs Act] to the issuance of writs in aid of a jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected." (alterations in original) (quoting Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 25 (1943))); *see also* Klay v. United Healthgroup, Inc., 376 F.3d 1092, 1099 (11th Cir. 2004) ("[T]he [All Writs] Act allows [courts] to safeguard not only ongoing proceedings, but potential future proceedings . . . ." (footnotes omitted)).

293. Skaar v. McDonough, 57 F.4th at 1021 (Dyk, J., dissenting).

294. Skaar v. McDonough, 48 F.4th 1323, 1325–26 (Fed. Cir. 2022).

295. *See id.* at 1335.

actions may be unavailable, the ability to adjudicate claims en masse is still sorely needed.

VA and the wider veterans benefits system is greatly overburdened and confusing for the very demographic it was created to serve. The number of pending claims before VA climbs by the thousands each month, adding to the already immense backlog. The average time to appeal a decision at the Board is a minimum of 314 days.[296] Veterans are facing significant wait times within VA and at the Board. These wait times only increase with the mass exodus of claims processors and poor training and quotas that encourage claims processors to deny rather than investigate claims. Veterans may not even satisfy the procedural requirements to join a class (obtaining a Board decision) because the complexity of the benefits systems is difficult for even seasoned legal advocates to navigate. In a system that is designed to be non-adversarial, veterans often end up confused and, as a result, claims expire.

This system needs another solution to alleviate its burden, but that would require new rules. Currently, the BVA is committed to providing each appellant with their own individual decision, even if another veteran has the exact same injury from the exact same circumstances. Similarly, the CAVC rarely provides any precedential decisions. This lack of precedent only increases the wait times veterans face while trying to get their claims adjudicated. VA, the BVA, and the CAVC would benefit from aggregation at the Board and joinder and consolidation at the CAVC. These procedures preserve judicial economy, apply the law consistently, and follow Supreme Court precedent—things the Federal Circuit's decision in *Skarr* does not do.

In March of 2023, VA Secretary Denis McDonough stated, "I'm here to fight like hell for all vets, ... [s]o we are going to use all the tools that we have to ensure that every single veteran . . . gets the kind of benefits that they have earned and so richly deserve."[297] Secretary McDonough made his statement one week after Mr. Skaar filed a petition for a writ of certiorari at the Supreme Court.[298]

Secretary McDonough made a commitment to fight for veterans, and his words are seemingly backed up by VA's claimant-friendly system. In reality, VA is not fighting *for* veterans but is instead often fighting *against* them. Veterans are facing long wait times at almost every step of the process, inconsistent applications of precedent, and a complex system to obtain their benefits. One of the strongest tools to help alleviate some of these difficulties—class actions—is functionally dead for veterans appealing benefits decisions. In order to continue resolving claims in an efficient and timely manner, the veterans benefits system should look into other methods of aggregation. Aggregation at the Board and rules of joinder and consolidation at the CAVC would help fill the gap left by class actions post-*Skaar*.

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296. *Decision Wait Times*, *supra* note 84.

297. Bigad Shaban, *VA Secretary Vows to 'Fight Like Hell' for Veterans Amid Racial Disparities Within Benefits Program*, NBC BAY AREA (Mar. 3, 2023, 12:11 PM), https://www.nbcbayarea.com/news/local/va-secretary-benefits-program-discrimination-racial-disparities-bigad-shaban/3171012 [https://perma.cc/R9Y8-GESA].

298. *See generally* Petition for a Writ of Certiorari, *supra* note 148.