



# Veterans Affairs: The U.S. Court of Appeals for Veterans Claims—Judicial Review of VA Decision Making

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## Summary

Congress, through the Department of Veterans Affairs (VA), extends various benefits to veterans and certain of their family members. Sometimes veterans may not agree with the VA's initial decisions concerning the award and/or the amount of these benefits. Within the VA, there is an extensive appeal/review process that concludes with the decision of the Board of Veterans' Appeals (BVA). Final decisions of the BVA may be appealed to the U.S. Court of Appeals for Veterans Claims (CAVC), which is an independent federal court, entirely separate from the VA. With organizational and operational issues having been addressed by prior Congresses, the 111<sup>th</sup> Congress is considering legislation to deal with funding for the CAVC—H.R. 3082, H.Amdt. 315 to H.R. 3082, and S. 1407. A brief overview of the CAVC's historical and legislative background may help to give context to its current operation.

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## Legislative and Historical Background<sup>1</sup>

The VA provides a broad range of congressionally mandated benefits and services to United States veterans and certain members of their families.<sup>2</sup> There are various eligibility criteria for such benefits and discrete processes for determining benefit claims.<sup>3</sup> Thereafter, a veteran may appeal a determination within the VA. The final appeal body within the VA is the BVA.<sup>4</sup>

For many years, judicial review of VA decisions or orders was statutorily prohibited. The first such legislation was the World War Veterans' Act of 1924.<sup>5</sup> The 1930 legislation that established the VA (formerly the Veterans Administration)<sup>6</sup> continued this exclusion. Section 5 of the Economy Act of 1933 provided that decisions by the VA were final and not subject to review in federal court.<sup>7</sup> These prohibitions were eliminated by the Veterans' Judicial Review Act of 1988 (VJRA),<sup>8</sup> which authorized the judicial review of BVA denials of individual veterans' claims for benefits in a new Article I court.<sup>9</sup> This court was originally named the U.S. Court of Veterans Appeals and was subsequently renamed the U.S. Court of Appeals for Veterans Claims (CAVC).<sup>10</sup> The legislation also provided for review of CAVC decisions in the U.S. Court of Appeals for the Federal Circuit.<sup>11</sup>

The CAVC's website indicates that the CAVC provides a review of decisions by the BVA that are adverse to the veteran's claim of "entitlement to benefits for service connected-disabilities, survivor benefits and other benefits such as education payments and waiver of indebtedness."<sup>12</sup> The CAVC's website provides detailed statistical information regarding the number of cases filed and the ultimate disposition of those cases.<sup>13</sup>

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<sup>1</sup> See the CAVC's "History" at <http://www.uscourts.cavc.gov/about/History.cfm>.

<sup>2</sup> See CRS Report R40737, *Veterans Medical Care: FY2010 Appropriations*, by Sidath Viranga Panangala; CRS Report RL34626, *Veterans' Benefits: Benefits Available for Disabled Veterans*, by Christine Scott and Carol D. Davis; CRS Report RL34370, *Veterans Affairs: Health Care and Benefits for Veterans Exposed to Agent Orange*, by Sidath Viranga Panangala and Douglas Reid Weimer.

<sup>3</sup> See CRS Report RL33113, *Veterans Affairs: Basic Eligibility for Disability Benefit Programs*, by Douglas Reid Weimer. Compensation for service-connected disabilities is one of the major programs that the VA administers. See CRS Report RL33323, *Veterans Affairs: Benefits for Service-Connected Disabilities*, by Douglas Reid Weimer.

<sup>4</sup> See CRS Report RL33323, *Veterans Affairs: Benefits for Service-Connected Disabilities*, by Douglas Reid Weimer, at 8.

<sup>5</sup> P.L. 68-242, § 5, 43 Stat. 607 (1924).

<sup>6</sup> P.L. 71-536, § 2, 46 Stat. 1016 (1930).

<sup>7</sup> P.L. 72-212, §§ 401-408, 47 Stat. 382 (1932).

<sup>8</sup> P.L. 100-687, § 301, 102 Stat. 4105 (1988).

<sup>9</sup> See 38 U.S.C. §§ 7251-7299. Article I courts are courts of limited jurisdiction created by Congress in the exercise of its legislative powers. In establishing an Article I court, Congress draws on authority distinct from that used to establish federal courts of general jurisdiction under Article III of the Constitution.

<sup>10</sup> Veterans Programs Enhancement Act of 1998, P.L. 105-368, § 511, 112 Stat. 3341. See 38 U.S.C. § 7251.

<sup>11</sup> 38 U.S.C. § 7292.

<sup>12</sup> See <http://www.uscourts.cavc.gov/>.

<sup>13</sup> See [http://www.uscourts.cavc.gov/annual\\_report/](http://www.uscourts.cavc.gov/annual_report/).

## Jurisdiction

The VJRA gave the CAVC the “exclusive jurisdiction to review decisions of the Board of Veterans Appeals.”<sup>14</sup> The BVA is required to notify veteran claimants of their appeal rights to the CAVC.<sup>15</sup> Only a person who is “adversely affected” by a BVA decision may appeal to the CAVC.<sup>16</sup> However, neither the Secretary of Veterans Affairs nor any other VA official may appeal a BVA decision to the CAVC.<sup>17</sup>

There are two basic jurisdictional requirements in appealing a BVA decision to the CAVC. First, an appellant may appeal only a final BVA decision on a claim for benefits to the CAVC.<sup>18</sup> Second, the appellant’s Notice of Appeal (NOA)<sup>19</sup> must be received or postmarked using the U.S. Postal Service within 120 days from the mailing of the BVA decision.<sup>20</sup>

## Organization and Operation of the CAVC

The CAVC consists of at least three, but not more than seven, judges.<sup>21</sup> The judges are appointed by the President with the advice and consent of the Senate.<sup>22</sup> The judges serve for a term of 15 years.<sup>23</sup> The President may remove a judge from office prior to the expiration of his/her term for various reasons that would prevent the proper execution of the judge’s duties.<sup>24</sup> Under certain circumstances, retired CAVC judges may be recalled for further service on the CAVC.<sup>25</sup> At the

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<sup>14</sup> 38 U.S.C. § 7252(a).

<sup>15</sup> *Id.* § 5104(a).

<sup>16</sup> *Id.* § 7266(a).

<sup>17</sup> *Id.* § 5107(a).

<sup>18</sup> *Id.* § 7266(a).

<sup>19</sup> The NOA is a notice sent by the appellant or his/her counsel seeking CAVC review of the BVA’s final decision. To be considered a NOA, the document must follow the requirements of Rule 3(c) of the CAVC’s Rules of Practice and Procedure. The NOA must provide the name, address, and phone number of appellant(s); identify the BVA decision being appealed; and provide appropriate information if being filed by the veteran’s representative.

<sup>20</sup> 38 U.S.C. § 7266(a).

<sup>21</sup> *Id.* § 7253(a). 38 U.S.C. § 7253(b) provides that “not more than the number equal to the next whole number greater than one-half of the number of judges of the Court may be members of the same political party.” 38 U.S.C. § 7253(h) provides for the temporary expansion of the court from January 1, 2002, through August 15, 2005. The authorized number of judges provided for by 38 U.S.C. § 7253(a) was increased by two; one nominated and appointed in 2002 and one in 2003. If the appointment(s) was/were not made in 2002 or 2003, the appointment(s) could be made before October 1, 2004. Title IV, Sec. 601 of the Veterans’ Benefits Improvement Act of 2008 (P.L. 110-389) increases, as of December 31, 2009, from seven to nine the maximum numbers of judges on the CAVC. As of January 1, 2013, no appointment may be made to the CAVC that would result in there being more than nine judges.

<sup>22</sup> *Id.* § 7252(b).

<sup>23</sup> 38 U.S.C. § 7253(c) provides that when a judge who is nominated by the President for appointment to an additional term on the Court without a break in service, and whose term of office expires while that nomination is pending before the Senate, may continue in office for up to one year while that nomination is pending.

<sup>24</sup> *Id.* § 7253(b), (f). 38 U.S.C. § 7253(f) provides that a judge of the Court may be removed from office by the President on “grounds of misconduct, neglect of duty, or engaging in the practice of law.” The President may not remove a judge of the Court from office on any other ground.

<sup>25</sup> *Id.* § 7257. Title VI, Sec. 603 of the Veterans’ Benefits Improvement Act of 2008 (“Act”) (P.L. 110-389) repeals the 180-day limit on the number of days per year a recall-eligible retired CAVC judge may voluntarily serve on the CAVC in recall status. It establishes a three-tiered retirement pay structure with respect to judges appointed on or after the date (continued...)

present time there are seven judges serving in “active status.” In addition, five retired judges are currently in “recall status.”<sup>26</sup>

The court does not hold trials, hear witness testimony, or receive new evidence.<sup>27</sup> In deciding a case, the CAVC considers the BVA decision, the briefs submitted by the parties, and the record that was considered by the VA and was available to the BVA. Under some circumstances, if the issues warrant, the CAVC holds oral argument. Less than 1% of the decided cases involve oral argument.<sup>28</sup> The CAVC holds most arguments in its Washington, DC, courtroom but may occasionally conduct an argument by telephone conference call.

The court’s official opinions are published in West’s Veterans Appeals Reporter.<sup>29</sup> They are available online in Westlaw, Lexis, and without digest on the CAVC’s website.<sup>30</sup> They are also sent to the Government Printing Office (GPO) for microfilm distribution to its nationwide depository library system.

Congress delegated broad power to the CAVC to prescribe its own rules of court.<sup>31</sup> The CAVC’s rules were modeled after the Federal Rules of Appellate Procedure, and have been amended various times.<sup>32</sup> The rules are available on the CAVC’s website.<sup>33</sup>

The CAVC has a comprehensive case management system. After the record on appeal and the briefs for both sides are filed with the Clerk of the Court, they are sent to the Central Legal Staff (“staff”) within the Office of the Clerk. The staff creates an initial evaluation of the case and a memo recommending a disposition of the case. The staff recommends whether the case should be handled by one judge, a panel without argument, or a panel with argument.<sup>34</sup>

Following the staff’s review of the case file, it is forwarded to a “screening judge” who reviews the case and the staff’s evaluation and recommendation. The screening judge, a position that rotates among all CAVC judges, determines how the case will be set for the calendar. Also, until a case has been assigned, the screening judge reviews incoming motions and rules on them. The screening judge may set the case for a summary disposition by one judge or by disposition of a panel of three judges.<sup>35</sup> The file is then returned to the Clerk, and the case will, in most cases, eventually be assigned to a panel of three judges who will ultimately decide the case.<sup>36</sup>

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(...continued)

of enactment of the act. Tier one represents retired judges recalled to active service, tier two represents recall-eligible judges, and tier three represents non-recall-eligible retired judges. The act also exempts current and future recall-eligible retired judges from involuntary recall once they have served an aggregate of five years of recall service.

<sup>26</sup> See <http://www.uscourts.cavc.gov/about/judges/>.

<sup>27</sup> 38 U.S.C. § 7261.

<sup>28</sup> See [http://www.uscourts.cavc.gov/annual\\_report/](http://www.uscourts.cavc.gov/annual_report/). See annual reports for 2000-2009.

<sup>29</sup> This is established by practice of the Court rather than by federal statute or regulation.

<sup>30</sup> See [http://www.uscourts.cavc.gov/research\\_court\\_cases/DecisionsOpinions.cfm](http://www.uscourts.cavc.gov/research_court_cases/DecisionsOpinions.cfm).

<sup>31</sup> 38 U.S.C. § 7264.

<sup>32</sup> See [http://www.uscourts.cavc.gov/court\\_procedures/RulesPracticeProcedure.cfm](http://www.uscourts.cavc.gov/court_procedures/RulesPracticeProcedure.cfm).

<sup>33</sup> *Id.*

<sup>34</sup> See [http://www.uscourts.cavc.gov/court\\_procedures/InternalOperatingProcedures.cfm](http://www.uscourts.cavc.gov/court_procedures/InternalOperatingProcedures.cfm).

<sup>35</sup> *Id.*

<sup>36</sup> There is no jury involved in this judicial procedure.

The appellant may represent him/herself or may be represented by an attorney or authorized representative.<sup>37</sup> The VA's Office of the General Counsel represents the Secretary of Veterans Affairs (and the VA) before the CAVC.<sup>38</sup>

Following a final decision of the CAVC, the decision may be appealed to the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit").<sup>39</sup> An appeal can be filed by either the veteran or the VA.<sup>40</sup> Appeals to the Federal Circuit are required to be filed within 60 days of the final CAVC decision.<sup>41</sup> Following a final decision by the Federal Circuit, either the veteran or the VA may petition the U.S. Supreme Court for certiorari within 90 days of the Federal Circuit's final action.<sup>42</sup>

## Legislative Interest

Legislation was passed in the 110<sup>th</sup> Congress to alleviate the backlog of cases at the CAVC and reduce the overall length of time needed to process an appeal through the VA and then through the CAVC. A related concern of Congress was the hardship of those veterans who did not receive any benefits while their appeals were pending.

S. 3023 (introduced by Senator Daniel Akaka) was signed into law on October 10, 2008 (P.L. 110-389), Title VI, the Veterans' Benefits Improvement Act of 2008 ("Act") which made several changes which impact the operation of the CAVC. The law temporarily increases the number of active judges on the CAVC by two.<sup>43</sup> The act directs the CAVC to prescribe rules to protect privacy and security concerns related to filing of documents and the public availability of documents retained by, or filed electronically with, the CAVC. The act repealed the 180-day limit on the number of days per year that a recall-eligible judge may voluntarily serve in recall status. Salary structure was also amended.<sup>44</sup> The chief judge of the CAVC is required to report annually on the court's work load to the House and Senate Committees on Veterans' Affairs. The act removed the \$30 annual limit on practice and registration fees for those admitted to practice before the CAVC.

Legislation introduced in the 111<sup>th</sup> Congress has dealt only with funding for the CAVC and not with organizational or operational issues.<sup>45</sup> To date, none of the bills has been enacted.

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<sup>37</sup> Representation before the court is governed by U.S. Vet. App. R. 46. See [http://www.uscourts.cavc.gov/about/how\\_to\\_appeal/](http://www.uscourts.cavc.gov/about/how_to_appeal/). See CRS Report RL33704, *Veterans Affairs: The Appeal Process for Veterans' Claims*, by Douglas Reid Weimer.

<sup>38</sup> 38 U.S.C. § 7263(a).

<sup>39</sup> *Id.* § 7292.

<sup>40</sup> This contrasts with the appeals to the CAVC. Only the veteran may appeal an adverse decision of the BVA to the CAVC; the VA may not appeal a BVA decision favorable to the veteran to the CAVC.

<sup>41</sup> 28 U.S.C. § 2107.

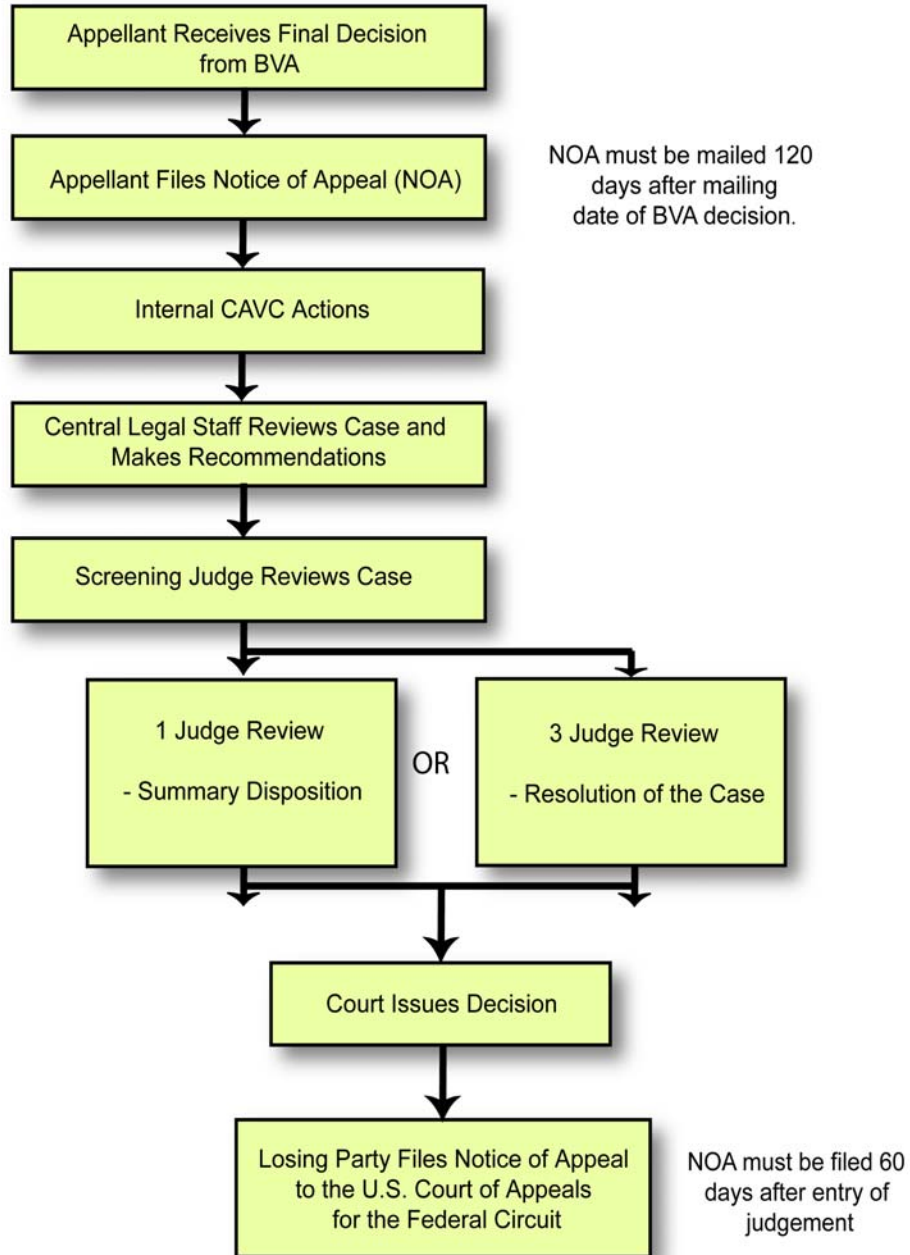
<sup>42</sup> 38 U.S.C. § 7292(c). A petition for certiorari is a request for the Supreme Court to review the decision of the lower court. If the petition is granted, the Supreme Court will review the case.

<sup>43</sup> See footnote 21.

<sup>44</sup> See footnote 25.

<sup>45</sup> H.R. 3082, 111<sup>th</sup> Cong., 1<sup>st</sup> Sess. (2009); H.Amdt. 315 to H.R. 3082, 111<sup>th</sup> Cong., 1<sup>st</sup> Sess. (2009); S. 1407, 111<sup>th</sup> Cong., 1<sup>st</sup> Sess. (2009).

Figure I. Simplified CAVC Case Review



Source: Adapted by CRS from information on the CAVC website. See <http://www.vetapp.uscourts.gov/>.



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