Now is the Time: Experts vs. the Uninitiated as Future Nominees to the U.S. Court of Appeals for Veterans Claims

Bradley W. Hennings, David E. Boelzner, Jennifer Rickman White*

Introduction

Two-thirds of judges appointed to the Court of Appeals for Veterans Claims ("CAVC" or "Court") *could* and *should* be drawn from among lawyers experienced in the U.S. Department of Veterans Affairs ("VA") benefits claims adjudication system. It is a specialty court, and like other such courts, its judges would benefit from specialized experience. All stakeholders in the claims system and the Court's work, and most importantly, veterans, would benefit from a Court that has appointees steeped in VA law and adjudication.

I. History and Structure of the CAVC

Congress, as part of the Veterans' Judicial Review Act ("VJRA") of 1988,[1] created the CAVC under Article I of the Constitution, and the court began issuing decisions in January 1990.[2] Prior to the advent of the CAVC, there was no judicial review of decisions promulgated by the Board of Veterans' Appeals (the "Board" or "BVA").[3] The Board is the highest adjudicatory body

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* Bradley W. Hennings is a Veterans Law Judge at the Board of Veterans' Appeals, (BVA) current member of the CAVC's Rules Advisory Committee, former law clerk at the CAVC, a Past-President of the CAVC Bar Association and a founding member of the CAVC Historical Society. David E. Boelzner has represented veteran claimants for more than 12 years, for the last seven years with Goodman Allen Donnelly, PLLC in Richmond, Virginia. Jennifer Rickman White is a Counsel at the Board of Veterans' Appeals. The views and opinions expressed in this article are solely those of the authors and should not be attributed to the BVA, the United States Court of Appeals for Veterans Claims (CAVC), or any other organization or individual.

[1] Veterans' Judicial Review Act of 1988, Pub. L. No. 100-687, § 301, 102 Stat. 4105, 4113 (codified as amended at 38 U.S.C. §§ 7251–7299 (2014)).

[2] 38 U.S.C. § 7251 (2012); *see In re* Quigley, 1 Vet. App. 1 (1990).

[3] *History*, U.S. Court of Appeals for Veterans Claims, https://www.uscourts.cavc.gov/history.php (last visited Feb. 7, 2016).

within VA, staffed by Veterans Law Judges ("VLJ") and attorneys.[4] The CAVC was created with exclusive jurisdiction over Board decisions;[5] further review is available in the U.S. Court of Appeals for the Federal Circuit ("CAFC")[6] and, by petition, the Supreme Court.[7] Instead of choosing a court system already in place, lawmakers chose to create an entirely new federal court. The creation of the CAVC as an Article I court was an acknowledgement that veterans require a specialized court to handle appeals from VA.

By statute the CAVC comprises at least three and as many as seven judges, one of whom serves as Chief Judge at any given time, and all serving terms of fifteen years.[8] Currently, Congress has allowed a temporary expansion, adding two more judges.[9] Additionally there are Senior Judges, i.e. former judges of the court, eligible for recall.[10] Their selection process is similar to that for Article III judges: nomination by the president with confirmation by the Senate.[11] However, in the case of the CAVC, there has been, to date, little emphasis placed on the experience of nominees in veterans benefits law.[12] In fact, historically, being a veteran seems to have been a more important requirement than having any sort of specific knowledge of the highly complicated veterans benefits structure.[13]

A survey of the experience of the seventeen judges to have worked since the creation of the CAVC is instructive. Thirteen of the seventeen have been

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[4] *See* 38 U.S.C. §§ 7101, 7103; *Board of Veterans Appeals*, U.S. Dep't of Veterans Affairs, http://www.bva.va.gov (last visited Feb. 7, 2016).

[5] 38 U.S.C. § 7252.

[6] *Id.* § 7292.

[7] *Id.*; *see also* 28 U.S.C. § 1254 (2012).

[8] 38 U.S.C. § 7253.

[9] Press Release, Nat'l Veterans Legal Servs. Program, Court Reviewing Veteran Appeals Gets More Help, Thanks to New Judges, Says NVLSP (July 12, 2012), http://www.nvlsp.org/news-room/press-releases/court-reviewing-veteran-appeals-gets-more-help-thanks-to-new-judges-says-nv.

[10] *About the Court*, U.S. Court of Appeals for Veterans Claims, https://www.uscourts.cavc.gov/about.php (last visited Feb. 13, 2016).

[11] 38 U.S.C. § 7253(b).

[12] 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, 271 (2010) ("[N]one of the original members of the CAVC, an Article I court, had any direct experience with adjudicating individual claims.").

[13] *See id.* at 274 ("The original judges of the court had no direct experience with the adjudication of individual claims, they reviewed decisions by BVA members accustomed to announcing conclusions with little explanation, and they handled appeals that were overwhelmingly pro se.").

veterans,[14] including six of the eight judges currently serving;[15] the two non-veteran judges have some experience with veterans' issues, one with the Senate Committee on Veterans Affairs and the other having held various positions within the National Veterans Legal Services Program ("NVLSP").[16] Two of the current judges have experience working with Veterans Service Organizations ("VSO").[17] One of the previous CAVC judges also had experience on the Senate Committee on Veterans' Affairs[18] and two others worked at high-level positions in VA,[19] one as General Counsel and one in a policy position.[20] Thus far, there have been no private attorneys from the veterans benefits arena appointed, and no one with actual adjudicatory experience at the agency level appointed.

At least one commenter has noted that the lack of specific veterans law knowledge has led to a less deferential review of claims—particularly after the CAVC was first created—which "is neither completely positive nor negative, but it does increase the likelihood that such review will alter the status quo and lead to changes in the system, which ultimately leads to less predictability and a longer process for claimants."[21]

While government attorneys have long been involved in veterans benefits, there was little opportunity for private attorneys to make a living practicing veterans benefits law prior to the passage of the VJRA and the creation of the CAVC in 1988. The permissible attorney fee for representing a veteran

[14] *See Judges*, U.S. Court of Appeals for Veterans Claims, https://www.uscourts.cavc.gov/judges.php (last visited Feb. 13, 2016) (all except Judges Bartley, Nebeker, Schoelen, and Steinberg).

[15] *Id.* (all except Judges Shoelen and Bartley).

[16] *Id.* It's arguable whether legislative experience with veterans' issues has applicability to the adjudication of veterans' benefits, because agency implementation of a policy necessitates a different skillset and knowledge base than the creation of policy.

[17] *Id.* Chief Judge Hagel worked for many years for Paralyzed Veterans of America and Judge Lance served as National Commander of The American Legion during 1999–2000. *Chief Judge Lawrence B. Hagel*, U.S. Court of Appeals for Veterans Claims, https://www.uscourts.cavc.gov/hagel.php (last visited Feb. 21, 2016); *Judge Alan G. Lance, Sr.*, U.S. Court of Appeals for Veterans Claims, https://www.uscourts.cavc.gov/lance.php (last visited Feb. 21, 2016).

[18] *Judge Jonathan R. Steinberg*, U.S. Court of Appeals for Veterans Claims, https://www.uscourts.cavc.gov/lance.php (last visited Feb. 21, 2016).

[19] *Judge William A. Moorman*, U.S. Court of Appeals for Veterans Claims, https://www.uscourts.cavc.gov/moorman.php (last visited Feb. 21, 2016); *Judge Donald L. Ivers*, U.S. Court of Appeals for Veterans Claims, https://www.uscourts.cavc.gov/ivers.php (last visited Feb. 21, 2016).

[20] *See* sources cited *supra* note 19.

[21] Ridgway, *supra* note 12, at 271.

in connection with benefits was limited to $10, an amount determined in 1864.[22] After creation of the CAVC, private attorneys were allowed to represent veterans through the three levels of appellate review, resulting in either contingency fees from a retroactive award or reasonable Equal Access to Justice Act ("EAJA") fees if the CAVC remanded for additional development.[23] In 2007, opportunities for private attorneys to earn additional fees were expanded, as representation was allowed after the initial adjudication by the BVA.[24] This newfound ability of attorneys to actually make a living practicing veterans benefits law has led to a vast expansion in the number of practitioners.

II. Development of a Specialized Veterans Benefits Law Bar

As of 2016, a highly-developed specialized veterans benefits bar exists, which provides an ample supply for potential new appointments to the CAVC. The court itself is over twenty-five years old, with a multitude of experienced practitioners appearing before it.[25] In addition, there are now organizations maintained to support specialization in veterans benefits law.[26] Forums for knowledge exchange have multiplied, to include conferences,[27] law journals,[28] websites and blogs,[29] and the CAVC Historical Society.[30] Finally, there is now significant cross-pollination of knowledge and more experienced practitioners. In addition to the aforementioned forums for knowledge exchange, increasing

[22] 38 U.S.C. § 3404(c)(2) (1982).

[23] Veterans' Judicial Review Act of 1988, Pub. L. No. 100-687, § 104, 102 Stat. 4105, 4108 (1988) (codified as amended at 38 U.S.C. §§ 7251–7299 (2014)).

[24] Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, 120 Stat. 3404, 3407 (2006) (codified at 38 U.S.C. §§ 5722 *et seq.*).

[25] *About the Court*, U.S. Court of Appeals for Veterans Claims, https://www.uscourts.cavc.gov/about.php (last visited Feb. 21, 2016).

[26] *About Us*, CAVC Bar Ass'n, http://www.cavcbar.net/html/about_us.html (last visited Feb. 21, 2016); authors' personal knowledge.

[27] *See, e.g.*, *U.S. Court of Appeals for Veterans Claims Thirteenth Judicial Conference*, U.S. Court of Appeals for Veterans Claims, https://www.uscourts.cavc.gov/conference/judicial_conference.php (last visited Feb. 14, 2016).

[28] *See, e.g.*, *CAVC Bar Association Veterans Law Journal*, CAVC Bar Ass'n, http://www.cavcbar.net/html/journals.html (last visited Feb. 14, 2016).

[29] *See, e.g.*, Seth Director, *CAVC Issues Decision in* Kuppamala v. McDonald, Fink Rosner Ershow-Levenberg, LLC Blog (Jan. 14, 2016), http://blog.finkrosnerershow-levenberg.com/va-benefits-news/cavc-issues-decision-in-kuppamala-v-mcdonald/.

[30] *See, e.g.*, *Save the Date: Upcoming Events*, CAVC Bar Ass'n, http://www.cavcbar.net (last visited Feb. 14, 2016).

numbers of practitioners have experience at different layers of the veterans benefits claims process, often having worked for several stakeholders.[31]

The growth of the veterans benefits bar paralleled that of the CAVC. As noted above, the CAVC began issuing decisions in January 1990.[32] There are now twenty-six volumes of West's Veterans Appeals Reporter, representing twenty-six years of decisions by the CAVC.[33] During this time, the number of attorney and non-attorney practitioners admitted to the Court has grown to nearly 5,000,[34] including private appellant-side attorneys, VA Office of General Counsel ("OGC") attorneys that litigate before the Court, VSO attorneys, non-attorney CAVC practitioners and other attorneys who have been admitted to practice before the Court, but do not do so, i.e. Board Veterans Law Judges and attorneys, CAVC law clerks, and other VA OGC attorneys. In addition, there are an increasing number of law professors and clinical practitioners that practice before the court. Of course, these numbers do not include the many attorneys and agents who are accredited to practice before VA. At last count, over 16,000 individuals are accredited.[35]

Concomitant with the growth of practitioners, organizations of practitioners have matured. The National Organization of Veterans' Advocates ("NOVA") was founded in 1993 and is nearly 25 years old. As stated on its website, "NOVA was created by its founders—Kenneth Carpenter, Keith Snyder, and Hugh Cox—to provide support and organization for the private bar representing veterans in their disability claims against VA."[36] Since its inception, NOVA has held training workshops for new practitioners, provided a forum for networking, presented expert testimony before Congress, and authored

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[31] *See, e.g.*, *Attorney for VA Benefits Cases*, Sean Kendall: Attorney at Law, http://www.seankendalllaw.net (last visited Feb. 14, 2016).

[32] *See In re* Quigley, 1 Vet. App. 1 (1990).

[33] *West's Veterans Appeals Reporter (National Reporter System)*, Thomson Reuters, http://legalsolutions.thomsonreuters.com/law-products/Reporters/Westsreg-Veterans-Appeals-Reporter-National-Reporter-System/p/100022637 (last visited Feb. 14, 2016).

[34] *Public List of Practitioners*, U.S. Court of Appeals for Veterans Claims, www.uscourts.cavc.gov/public_list.php (last visited Feb. 13, 2016).

[35] *See Accreditation Search*, U.S. Dep't of Veterans Affairs, http://www.va.gov/ogc/apps/accreditation/index.asp (last visited Feb. 13, 2016).

[36] *Mission Statement*, Nat'l Org. of Veterans' Advocates, Inc., https://vetadvocates.org/about-nova/mission-statement/ (last visited Feb. 13, 2016). The website further states:

Their vision for NOVA was set forth in its early bylaws:

- To develop through research, discussion, and the exchange of information a better understanding of federal veterans benefits law and procedure;
- To develop and encourage high standards of service and representation for all persons seeking benefits through the federal veterans benefits system and in particular those seeking judicial review of denials of veterans benefits;

amicus briefs to the CAVC, the CAFC, and the U.S. Supreme Court.[37] In addition, it has worked with VA, CAVC, and Senate and House members on various legislative issues, including reform of attorneys' fees for veterans' representation.[38] Today, the organization continues the above-mentioned activities, as well as a Pro Bono Advocates Program, an Advocate Referral Service, semi-annual Continuing Legal Education ("CLE") seminars, and a new website for members and veterans.[39] It interacts with VA, CAVC, legislatures, service organizations, and bar associations.[40]

The CAVC Bar Association was founded in 2001 "to improve and facilitate the administration of justice in the United States Court of Appeals for Veterans Claims."[41] Furthering that goal, the Bar Association provides a wide variety of educational and networking opportunities, including traditional Continuing Legal Education in veterans benefits law, live video streaming of CAVC Bar Association events, the quarterly Veterans Law Journal, and Bench/Bar conferences, as well as social hours and other materials useful to practitioners.[42] Its current makeup reflects the historical goal of the association to represent all stakeholders in the work of the CAVC, a broader group

- To conduct and cooperate in the conduct of courses of study for the benefit of its members and others desiring to represent persons seeking benefits through the federal veterans benefits system;
- To provide opportunity for the exchange of experience and opinions through discussion, study, and publications; and
- To do all and everything related to the above and in general to have all the powers conferred upon a corporation by the District of Columbia.

Id.

[37] *NOVA History*, Nat'l Org. of Veterans' Advocates, Inc., https://vetadvocates.org/about-nova/nova-history/ (last visited Feb. 21, 2016).

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *About Us*, CAVC Bar Ass'n, http://www.cavcbar.net/html/about_us.html (last visited Feb. 21, 2016); National Organization of Veterans' Advocates, *A History of NOVA: Celebrating 20 Years of Advocacy for Those Who Proudly Served 1993 – 2013*, Veterans' Advocate Insider, Apr. 20, 2013, at 26.

[42] *About Us*, CAVC Bar Ass'n, http://www.cavcbar.net/html/about_us.html (last visited Feb. 21, 2016).

than just veterans advocates.[43] In fact, NOVA was initially contacted in 1999 about becoming the CAVC's Bar Association, but ultimately demurred.[44]

The Veterans Consortium Pro Bono Program ("Pro Bono Program") was created in 1992 by four national veterans service organizations—The American Legion, the Disabled American Veterans, and the Paralyzed Veterans of America, along with the National Veterans Legal Services Program.[45] It has a "dual mission: to provide assistance to unrepresented veterans or their family members who have filed appeals at the U.S. Court of Appeals for Veterans Claims (Court); and to recruit and train attorneys in the then fledgling field of veterans' law."[46] Once the CAVC was created, it "quickly realized that 80% of its appellants were proceeding without legal representation."[47] However, "[w]ith the approval of Congress, the Court provided a portion of its annual appropriation to the Legal Services Corporation, which sought proposals to create a program to provide pro bono representation to appellants at the Court."[48] The organizations mentioned above formed The Veterans Consortium Pro Bono Program and submitted the winning proposal.[49] As a result, "[t]he

[43] *Id.* The current CAVC Bar Association Board of Governors consists of three private practitioners, three VA OGC litigators, multiple VSO attorneys, Board of Veterans' Appeals attorneys and CAVC law clerk attorneys. *Id.*

[44] *A History of NOVA*, *supra* note 41.

> In the fall of 1999, NOVA was contacted about becoming the CAVC's Bar Association. The Board concluded that NOVA's mission could be accomplished most effectively by remaining an organization for veterans' advocates and declined to pursue expanding NOVA's status. Robert Chisholm was invited to a meeting with the Chief Judge and Court officials to discuss annual fees, continuing legal education, a Court Bar Association, and intervention options with attorneys experiencing problems in handling their case loads. Chief Judge Kramer requested that NOVA prepare a paper on these issues. NOVA advocated for a $30 admission fee to the Court's bar and proficiency standards, and agreed to support a Court Bar Association." NOVA members have been heavily involved in the CAVC Bar Association. "NOVA members Robert Chisholm, Glenda Herl, Dave Myers, Brian Robertson, Carol Wild Scott, and Bart Stichman, participated as founding members of the Court's Bar Association. Chisholm served as the 2nd President, Stichman served as the 3rd President, and Herl served as the 5th President.

Id. Zachary Stolz of NOVA is the current CAVC Bar Association President. *About Us*, CAVC Bar Ass'n, http://www.cavcbar.net/html/about_us.html (last visited Feb. 21, 2016).

[45] *About Us*, The Veterans Consortium Pro Bono Program, http://www.vetsprobono.org/about-us/ (last visited Feb. 21, 2016).

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

Pro Bono Program has trained attorneys and provided pro bono representation to veterans since the fall of 1992."[50]

The CAVC Historical Society was formed in early 2016.[51] Its mission is designed to be similar to that of similar societies of the U.S. Supreme Court and the U.S. Court of Appeals for the Federal Circuit: to collect and preserve the history of the CAVC.[52] To that end, the CAVC historical society "may support, sponsor and conduct educational programs for practitioners, the general public, scholars, and historians."[53] It may "support research, publish books, journals, electronic materials, and preserve artifacts, all geared to increase public awareness of the history of the CAVC and its unique contributions to resolving issues regarding our nations veterans."[54] One of its first projects "will include participation with the Court in the creation of a scholarly book on the history of the creation of the Court and the first 25 years of judicial review. Other projects undertaken may include oral histories of the USCAVC and curating historical items associated with the Court's early years."[55]

Conferences and programs in the veterans law area include CAVC Judicial Conferences; CAFC Judicial Conferences; CAVC Bar Association CLEs, Programs and Bench/Bar Conferences; NOVA conferences and webinars; Law Clinic Conferences, VA Conferences; and State Bar Conferences.[56] The CAVC Judicial Conferences and Federal Circuit Judicial Conferences are typically bi-annual, with the CAVC Bar Association often putting on a conference in the off-year of the CAVC Judicial Conference cycle.[57] NOVA presents a new

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[50] *Id.* The website explains:

> The Pro Bono Program is governed by an Executive Board of up to seven members. Four of the members represent the Consortium partners, The American Legion, the Disabled American Veterans, the National Veterans Legal Services Program and the Paralyzed Veterans of America, and the remaining members are drawn from the private bar. The Pro Bono Program is made up of two components—the Outreach and Education Component, which works with training and mentoring volunteer attorneys, and the Case Evaluation and Placement Component, which evaluates the cases of veterans seeking services and matches the veteran's case with the volunteer attorneys. All Program operations are overseen by an Executive Director.

Id.

[51] *Welcome*, CAVC Bar Ass'n, http://www.cavcbar.net/ (last visited Feb. 21, 2016).

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *See e.g.*, *infra* notes 57–63 and accompanying text.

[57] *See e.g.*, *U.S. Court of Appeals for Veterans Claims Thirteenth Judicial Conference*, U.S. Court of Appeals for Veterans Claims, https://www.uscourts.cavc.gov/conference/judicial_conference.php (last visited Feb. 7, 2016).

practitioners day and conference semi-annually.[58] Recently, the second Annual National Conference on Law Clinics Serving Veterans was held.[59] VA has also held intermittent conferences, with the State Bar Associations addressing veterans benefits law in a more sporadic and ad-hoc manner.[60]

The number of law review articles, although rather small in the early years of the CAVC, has grown substantially since 2008. Based upon a review of one of the definitive catalogues of the area, more than 120 of the 156 articles regarding veterans benefits law have been published since 2008.[61] 2009 brought the advent of the Veterans Law Review, a scholarly law journal exclusively devoted to veterans benefits law.[62] The CAVC Bar Association's Veterans Law Journal has been regularly published for over ten years.[63] Also, 2013 brought the publication of a Veterans Appeals Guidebook: Representing Veterans in the U.S. Court of Appeals for Veterans Claims.[64] Finally, there is the yearly update of the venerable Veterans Benefits Manual. First published in 1999, it is considered perhaps the most comprehensive and authoritative practitioner treatise on veterans benefits law.[65]

There has also been growth in the academic study of veterans benefits law. A quick review of programs indicates that there are at least thirty law

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[58] *New Practitioner Training*, Nat'l Org. of Veterans' Advocates, https://vetadvocates.org/events-and-training/new-practitioner-dvd/ (last visited Feb. 7, 2016).

[59] *Second Annual National Conference on Law Clinics Serving Veterans*, William & Mary Law School (Oct. 31, 2015), https://law.wm.edu/news/stories/2015/second-annual-national-conference-on-law-clinics-serving-veterans-to-be-held-in-washington,-d.c.-.php.

[60] *See, e.g.*, Patrick Tandy, *Veterans' Legal Needs Focus of 7th Annual Conference*, Md. State Bar Ass'n (July 15, 2015), http://www.msba.org/Bar_Bulletin/2015/07_-_July/Veterans__Legal_Needs_Focus_of_7th_Annual_Conference.aspx.

[61] *Law Review Article Index*, Veterans Law Library, http://www.veteranslawlibrary.com/Article_Index.htm (last visited Feb. 21, 2016).

[62] *See* 1 Veterans L. Rev. iii, v (2009) ("Founded by James P. Terry [and p]ublished by the Board of Veterans' Appeals, the VETERANS LAW REVIEW encourages frank discussion of relevant legislative, administrative, and judicial developments in veterans benefits law.").

[63] *CAVC Bar Association Veterans Law Journal*, CAVC Bar Ass'n, http://cavcbar.net/html/journals.html (last visited Feb. 21, 2016). The Journal is the "Quarterly Publication of the Court of Appeals for Veterans Claims Bar Association." Veterans Law Journal, Winter 2012–2013, at 1.

[64] Veterans Appeals Guidebook: Representing Veterans in the U.S. Court of Appeals for Veterans Claims (Ronald L. Smith, ed. 2014) [hereinafter Veterans Appeals Guidebook].

[65] Paul R. Gugliuzza, *Rethinking Federal Circuit Jurisdiction*, 100 Geo. L.J. 1437, 1479 n.228 (2012) ("To gain a sense of the complexity of the veterans-benefits system and the types of disputes that might arise between a veteran and the VA, simply peruse the leading practitioner treatise, Veterans Benefits Manual (Barton F. Stichman & Ronald B. Abrams eds., 2010), which spans over two-thousand pages.").

school clinics that are currently operating to help veterans with obtaining their benefits.[66] Moreover, there are numerous practitioners teaching veterans law at law schools across the country.[67] The annual National Veterans Law Moot Court Competition recently marked its seventh year in existence with a record number of participating teams.[68] Additionally, the field has seen the recent publication of the first casebook since the creation of the Court of Appeals for Veterans Claims, that fully supports a doctrinal course on veterans benefits law.[69]

Another area of knowledge exchange that has developed since the advent of the CAVC is found in the proliferating number of veterans law websites and blogs. Although they are diverse in terms of their content and reliability, they serve various niche areas of veterans benefits law. Veteranslawlibrary.com is likely the most comprehensive compilation of resources related to veterans benefits law.[70] The NOVA forums are a "go-to" resource for legal advocates.[71] Of course, VA's website itself contains a wealth of information regarding the

[66] Brock Vergakis, *Law School Clinics Help Veterans Escape Benefits Backlog*, Associated Press (May 27, 2013, 7:27 PM), http://www.huffingtonpost.com/2013/05/27/law-school-clinics-veterans-backlog_n_3343559.html.

[67] *See, e.g.*, *James D. Ridgway*, The George Washington Univ. Law Sch., http://www.law.gwu.edu/james-d-ridgway (last visited Feb. 21, 2016); *David E. Boelzner*, Univ. of Richmond Sch. of Law, http://law.richmond.edu/faculty/adjunct-faculty.html (last visited Feb. 21, 2016); *Drew N. Early*, Emory Univ. Sch. of Law, http://law.emory.edu/faculty-and-scholarship/adjunct-faculty-profiles/early-profile.html (last visited Feb. 21, 2016).

[68] *History and Sponsors*, Nat'l Veterans Law Moot Court Competition, http://www.nvlmcc.org/about.html (last visited Feb. 21, 2016). The website states:

> The NVLMCC was first organized in 2009 as the Veterans Law Appellate Advocacy Competition and is the nation's premier moot court competition focusing on veterans law. Hosted every fall in Washington, D.C., the competition brings together teams of students from around the country to argue cutting edge veterans law issues before panels of distinguished practitioners and judges.

Id.

[69] James D. Ridgway, Veterans Law: Cases and Theory (Christina A. Collins ed., 2015).

[70] *Mission Statement*, Veterans Law Library, http://www.veteranslawlibrary.com/about_us.htm (last visited Feb. 21, 2016) ("*Veterans Law Library* seeks to provide a comprehensive guide to materials that may be useful in understanding veterans law. [It] seeks to provide a full spectrum of source material available to all interested parties, and does not take a position on any issue relating to veterans law.").

[71] *See NOVA Forums*, Nat'l Org. of Veterans' Advocates, https://vetadvocates.org/forums/ (last visited Feb. 21, 2016).

veterans benefits system.[72] And other websites cover the spectrum of veterans benefits law interests.[73]

Many practitioners now have experience at different layers of the veterans benefits claims process, often having worked for diverse stakeholders. CAVC law clerks, those who learned at the feet of the first and current CAVC judges, have spread far and wide into the veterans benefits system. These former clerks occupy positions throughout the breadth of the Court's constituencies, from VSO positions to Board of Veterans' Appeals attorneys, from private practitioners to VA OGC attorneys, from Congressional staff positions to clerking at the current CAVC for other judges. Moreover, a number of former VA attorneys have created practices, taking their knowledge of the agency with them as they represent veteran clients.[74] In addition, people move within VA, shifting between areas of the agency like BVA and OGC, and people move among the VSOs.[75] Finally, attorneys throughout the veterans benefits system volunteer their time and talents to the numerous organizations mentioned previously, such as the CAVC Bar Association, NOVA, and the Pro Bono Consortium program.[76] In addition, attorneys have served on the CAVC's

[72] *See generally*, U.S. Dep't of Veterans Affairs, http://www.va.gov (last visited Feb. 21, 2016).

[73] *See, e.g.*, VA Watchdog, http://www.VAWatchdog.org (last visited Feb. 21, 2016) (aggregating content from other sources across the Internet, but also containing "how-to" guides, and commentary and insight from attorneys and non-attorneys); Disabledveterans.org, http://www.disabledveterans.org (last visited Feb. 21, 2016) (covering various improprieties in the VA system, as well initiating its own investigations); Asknod, http://asknod.org (last visited Feb. 21, 2016) (providing legal and non-legal commentary, often done in a humorous and satirical style); Veteran's Law Blog, http://www.veteranslawblog.org (last visited Feb. 21, 2016) (containing practical and helpful information about the claims and appeals process); Hadit.com, http://www.hadit.com (last visited Feb. 21, 2016) (providing a popular message board for veterans to exchange information); Brokenva.com, http://www.brokenva.com/ (last visited Feb. 21, 2016) (providing information on issues with the veterans benefits appeals process); Stateside Legal, http://statesidelegal.org (last visited Feb. 21, 2016) (providing legal help for military members, veterans and their families).

[74] *See, e.g.*, *Meet the Partners*, Bergmann & Moore, LLC, www.vetlawyers.com/veterans-benefits-attorneys/bergmann-moore/ (last visited Feb. 21, 2016); *Daniel G. Krasnegor*, Goodman Allen Donnelly, veteransbenefitgroup.com/meet-our-teamteam/daniel-g-krasnegor (last visited Feb. 21, 2016); *About Amy*, Fochler Veterans Law, http://fochlerveteranslaw.com/about-amy-fochler/ (last visited Feb. 21, 2016); *Katie K. Molter*, Veterans Legal Advocacy Group, http://vetlag.org/wp/attorneys/katie-k-molter/ (last visited Feb. 21, 2016).

[75] *See* Daniel T. Shedd, Cong. Research Serv., R42609, Overview of the Appeal Process for Veterans' Claims 3 (2013).

[76] *E.g.*, Sonya Armfield, *Volunteering with the Veterans Consortium Pro Bono Program*, ABA, http://www.americanbar.org/publications/gpsolo_ereport/2014/february_2014/volunteering_with_the_veterans_consortium_pro_bono_program.html (last visited Feb. 14, 2016).

Rules Advisory Committee, Committee on Admissions and Practice, and the Standing Panel on Admission and Discipline.[77]

In sum, the veterans benefits bar has expanded and advanced substantially since the early 1990s. It has matured in such a way that there are numerous practitioners involved in this area of law who are indeed specialist experts in the law of veterans benefits. Accordingly, the CAVC *could* now be made up of experts from its specialty bar.

III. *Should* the Court's Judges be Drawn from the Veterans Benefits Bar?

A. Is the CAVC a Tribunal That Requires Special Expertise or That Would Do its Job Optimally with Such Expertise?

If the court is not specialized, there is no need for a specialized judiciary. In one respect, the question posed in Section III of this Article seems to call for an obvious affirmative answer: the court was created by Congress under Article I of the Constitution for a specific purpose of serving a particular constituency, to adjudicate appeals of decisions on claims by veterans.[78] Even if the Article I classification and the circumscribed mission of the court did not suggest that it is specialized; the discussions during the legislative deliberations indicate that Congress believed it was creating a tribunal with limited jurisdiction to review specialized decisions.[79]

Congress placed strict constraints on the degree to which the CAVC, and the court to which cases are appealed from it, the Federal Circuit, could intervene in the decision-making of the VA.[80] The courts review issues of law *de novo*, ruling on the meaning of statutes and interpreting regulations.[81] But

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[77] *See* Ct. Vet. App. R. 40(b).

[78] Veterans' Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4105 (1988).

[79] *See, e.g.*, *S. 11, The Proposed Veterans' Administration Adjudication Procedure and Judicial Review Act and S. 2292, Veterans Judicial Review Act: Hearing Before the Comm. on Veterans' Affairs*, 100th Cong. 335 (1988) (statement of Hon. Morris S. Arnold and Hon. Stephen G. Breyer on behalf of the Judicial Conference of the United States) ("The courts are not well equipped to determine such factual issues as whether or not an injury is service-connected or to determine other medical or technical questions, which are of a type the Veterans Administration confronts all of the time *uniformly*.").

[80] *See* 38 U.S.C. § 7261(a)(1) (2012). Parenthetically, none of the judges of the Federal Circuit came from a legal position where veterans benefits law was their primary, or even secondary, focus. Ridgway, *supra* note 12, at 271 ("Consistent with this trend, none of the judges appointed to the Federal Circuit since Congress passed the VJRA have had any veterans law experience."); *see also Judges*, U.S. Court of Appeals for the Fed. Circuit, http://www.cafc.uscourts.gov/judges (last visited Feb. 21, 2016).

[81] 38 U.S.C. § 7261(a)(1).

the CAVC may not reverse nor set aside a material finding of fact made by the agency through its Board of Veterans' Appeals unless the finding is clearly erroneous;[82] that is, in order to overturn the factual finding, on the entire evidence the appellate court must be "left with the definite and firm conviction that a mistake has been committed."[83] More colorfully, this fact-review standard has been characterized (in another context) as requiring that the determination be wrong "with the force of a five-week-old, unrefrigerated dead fish."[84] The Federal Circuit, when reviewing cases appealed from the CAVC, cannot review findings of fact at all, nor issues requiring application of law to fact, unless they raise a constitutional issue.[85] When Congress passed the Veterans Benefits Act of 2002, legislative statements affirmed the view that Board fact-finding should be reviewed with "substantial deference."[86]

The limits imposed on judicial power and the deference toward agency fact-finding derive from Congress's view that factual determinations made by agencies are of such a specialized nature that judges schooled in the general law, even if highly competent, are ill-equipped to second-guess such determinations.[87] Then Judge (now Mr. Justice) Breyer supported this view in testimony before Congress when the legislation establishing the court was pending, declaring that "reviewing Agency fact-finding is something I don't do very well."[88]

There is no question that the law concerning veterans benefits is specific to the benefits claims process and complex. It comprises statutes, many regulations and sub-regulatory authority, and now twenty-six years of case decisions of the CAVC and other courts.[89] But are the *factual* findings made by the agency highly specialized? Is the VA like, for example, the Environmental Protection

[82] *Id.* § 7261(a)(4).

[83] Gilbert v. Derwinski, 1 Vet. App. 49, 52 (1990).

[84] Parts and Elec. Motors, Inc. v. Sterling Elec., Inc., 866 F.2d 228, 233 (7th Cir. 1988).

[85] 38 U.S.C. § 7292(d)(2).

[86] 148 Cong. Rec. S11334 (daily ed. Nov. 18, 2002) (statement of Sen. Rockefeller).

[87] *See, e.g.*, *S. 11, The Proposed Veterans Administration Adjudication Procedure and Judicial Review Act, and S. 2292, Veterans Judicial Review Act: Hearing Before the Senate Comm. on Veterans' Affairs*, 100th Cong. 335 (1988) (statement of Hon. Morris S. Arnold, Judge, U.S. Dist. Ct. W.D. Ark.) ("The courts are not well equipped to determine such factual issues as whether or not an injury is service-connected or to determine other medical or technical questions, which are of a type the Veterans Administration confronts all of the time *uniformly*.").

[88] *Id.* at 361 (statement of Hon. Stephen G. Breyer, Judge, U.S. Court of Appeals for the First Circuit).

[89] *See, e.g.*, Michael P. Allen, *Veterans' Benefits Law 2010-2013: Summary, Synthesis, and Suggestions*, 6 Veterans L. Rev. 1, 1–3 (2014).

Agency or the Food and Drug Administration, dealing with scientific arcana as the raw material of its decision-making?[90]

VA, unlike agencies such as the EPA that consider complex scientific phenomena, does not make specialized fact determinations that require extraordinary expertise.[91] The Board decides, on a largely paper evidentiary record, factual matters such as whether witnesses are credible and whether expert medical evidence from doctors is probative and convincing.[92] These are questions routinely entrusted in other adjudicatory systems to assessment by non-specialized groups of individuals, i.e. juries.[93] An appellate judge trained in ordinary civil litigation would be entirely capable of making these sorts of findings, as is done in bench trials.

What *is* specialized about VA decision-making, however, is the process itself.[94] The VA claims process is both complex[95] *and* distinctive. Indeed, it has unique characteristics that raise particular issues and challenges. First, like other administrative adjudicatory systems, it is non-adversarial, in that the potential payor of the benefits sought by a claimant does not (or is not

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[90] *See* Elizabeth Fisher, Pasky Pascual & Wendy Wagner, *Rethinking Judicial Review of Expert Agencies*, 93 Texas L. Rev. 1681, 1690 (2015) ("The EPA has significant scientific and administrative capabilities, and yet the task [of judicial review] is a difficult one because the scientific–administrative and legal aspects of decision making do not easily relate to each other."); *see also* Jason J. Czarnezki, *An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation, and the Chevron Doctrine in Environmental Law*, 79 U. Colo. L. Rev. 767, 817–19 (2008) (highlighting the tendency of courts to defer to agencies when complicated science is involved).

[91] *See* 121 Am. Jur. Trials 357 *Litigation Before Department of Veterans Affairs* § 6 (2011) [hereinafter *Litigation Before VA*].

[92] *See Wading Through Warehouses of Paper: The Challenges of Transitioning Veterans Records to Paperless Technology: Hearing Before the Subcomm. on Disability Assistance and Memorial Affairs*, 112 Cong. 1–2, 5 (2012) (statements of Rep. Runyan, Chairman, H. Subcomm. on Disability Assistance and Memorial Affairs, and Richard Dumancas, Deputy Dir. for Claims, Am. Legion); *see also Litigation Before VA*, *supra* note 91.

[93] *See* Aetna Ins. Co. v. English, 204 S.W.2d 850, 855 (Tex. Civ. App. 1947) ("It is axiomatic that in all cases tried to a jury, the jury has the responsibility of passing upon the credibility of the witnesses and the weight to be given their respective testimony."); Hays v. United States, 231 F. 106, 108 (8th Cir. 1916) ("Whether the evidence is of sufficient probative force to convince the mind beyond a reasonable doubt is addressed solely to the judgment of the jury.").

[94] *See, e.g.*, Veterans Appeals Guidebook, *supra* note 64, at ch. 12, fig. 12-A (outlining the claims adjudication process and noting aspects that differ from other federal agencies).

[95] *See* U.S. Dep't of Veterans' Affairs, Veteran Appeals Experience: Listening to the Voices of Veterans and their Journey in the Appeals System 6 (2016) [hereinafter Veteran Appeals Experience].

supposed to) work against the establishment of the claim of entitlement.[96] The agency decision-makers are supposed to neutrally consider the evidence submitted and assess whether entitlement has been established.[97] Furthermore, in the VA system, not only does the government not work against the claim, it must actually assist the claimant in several ways: explaining what sort of evidence is required, obtaining relevant documentary records, and, in some cases seeking a medical opinion on some aspect of the veteran's condition or its relation to events in military service.[98]

Unlike another similar non-adversarial claims system, Social Security's, the VA system actually precludes lawyers from charging a fee when representing claimants at the initial stage, until the Regional Office has made a decision on the claim.[99] While many Social Security claimants are not represented by lawyers at the initial decision stage, attorneys can charge a fee for such representation, and so it is more common.[100] Very few veteran claimants have counsel initially, and many do not have lawyers until later in the appeal process, if ever.[101] This fact imposes considerable burden on the agency to try to make its procedural and substantive requirements comprehensible by lay claimants. A fair amount of litigation has derived from this challenge,[102] and a recent internal VA study has indicated that the challenge is not being met.[103]

A second aspect of the VA claim system that poses challenges is the fact that the evidence upon which the VA bases its adjudicatory decisions in most cases

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[96] *See* Nohr v. McDonald, 27 Vet. App. 124, 131 (2014); Austin v. Brown, 6 Vet. App. 547, 553 (1994) (stating that VA must procure evidence in an impartial, unbiased, and neutral manner); Forshey v. Principi, 284 F.3d 1335, 1360 (Fed. Cir. 2002) (Mayer, C.J., dissenting). In *Forshey*, the Chief Justice argued:

> [T]he veterans' system is constructed as the antithesis of an adversarial, formalistic dispute resolving apparatus. It is entirely inquisitorial in the [ROs] and at the Board . . . where facts are developed and reviewed. The purpose is to ensure that the veteran receives whatever benefits he is entitled to, not to litigate as though it were a tort case.

Forshey, 284 F.3d at 1360.

[97] *Id.*

[98] 38 U.S.C. §§ 5103, 5103A (2012); 38 C.F.R. § 3.159 (2015).

[99] 38 U.S.C. § 5904(a)(5); 38 C.F.R. § 14.636(c).

[100] *See* U.S. Court of Appeals for Veterans Claims, Annual Report (Fiscal Year 2014), http://www.uscourts.cavc.gov/documents/FY2014AnnualReport06MAR15FINAL.pdf [hereinafter Annual Report].

[101] *Id.* In 2014, approximately a third of the more than 4,000 appeals and petitions were pro se at the time of filing. *Id.*

[102] *See, e.g.*, Shinseki v. Sanders, 556 U.S. 396 (2009) (resolving defective notice issue in Mayfield v. Nicholson, 19 Vet. App. 103, 121 (2005)).

[103] *See* Veteran Appeals Experience, *supra* note 95, at 23–24 (noting that veterans cannot understand the process).

is almost entirely written, and persuasiveness on the witness stand is not typically a factor as it is in civil and criminal trials.[104] Although the Board affords claimants the opportunity for one hearing before the VLJ, either in person or through electronic means,[105] a hearing is not mandatory and some claimants do not avail themselves of the opportunity.[106] Even where they do, the hearing does not develop the record in the same way a jury or bench trial does in civil litigation.[107] There is no cross examination; VLJs are instructed not to cross examine claimants or lay witnesses, and there are usually no other witnesses present.[108] So the sort of probing interrogation that is a hallmark of adversary litigation does not occur.[109] Cross examination—by which inconsistencies in testimony are exposed, vague recollection is discredited, and half-formed or ill-considered opinion is dissected and its weaknesses revealed—does not occur in veterans cases.[110]

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[104] *See* U.S. Gov't Accountability Office, GAO-05-655T, VA Disability Benefits: Board of Veterans' Appeals Has Made Improvements in Quality Assurance, but Challenges Remain for VA in Assuring Consistency 3 (2005).

[105] 38 U.S.C. §§ 7107(b), (e)(1) (2012); 38 C.F.R. § 20.700 (2015).

[106] 38 C.F.R. §§ 3.103(c)(2); 38 C.F.R. § 20.700. The co-author, who represents veteran claimants, rarely advises his clients to participate in a Board hearing. *All* evidence and argument *may be* submitted in writing, so the hearing is not necessary for submission of either. The author is unaware of any Board decision which has turned on the claimant's or another witness's demeanor in the hearing, so the advantage of impressing a VLJ with the client's *bona fides* is minimal. But in the spontaneous colloquy of a less-than-formal hearing, a claimant may say something he does not mean, or say something in a confused or misleading way, and that "sound bite" then becomes a deadly weapon in the hands of the Board. Board judges are not supposed to cross-examine claimants, 38 C.F.R. §§ 3.103(c)(2), 20.700, but they occasionally ask challenging questions that flummox claimants. And the hearing does not afford the advocate an opportunity to cross-examine, for example, the authors of adverse VA medical reports or opinions. On the other hand, in cases where there is no hearing, the first evaluation of a case will likely be by a staff attorney for the Board, not the VLJ, so if a case would benefit from getting the Board member's attention particularly, this may militate for a hearing. All in all, however, the author generally assesses the chance of a hearing imperiling rather than helping a claim as too great. This is not a universal view among advocates, indeed may be a minority view, but it accounts for why some claimants elect to forgo a Board hearing.

[107] 38 C.F.R § 20.702(c).

[108] *Id.*

[109] Wigmore described cross examination as the "greatest legal engine ever invented for the discovery of truth." 3 John Henry Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law 27, § 1367 (2d. ed. 1923).

[110] *See* David E. Boelzner, *In Sight, It Must Be Right: Judicial Review of VA Decisions for Reasons and Bases vs. Clear Error*, 17 Rich. J. L. & Pub. Int. 681, 691 (2014).

The prohibition of lawyer involvement in the veterans claims system for a hundred and fifty years[111] is undoubtedly responsible, at least in part, for the establishment of a non-adversarial system intended to be navigable by unrepresented claimants. But an unintended consequence of the prohibition is the lack of rigorous evidentiary development that results from opposing advocates advancing their best evidence and challenging the evidence against them.[112]

B. Do Similar Courts Draw From a Specialized Bar?

There are three courts similar in creation and function to the CAVC: the Tax Court, the Federal Court of Claims and the U.S. Court of Appeals for the Armed Forces.[113] These courts were created as specialty courts with jurisdiction over specific types of cases and were established under Article I of the U.S. Constitution.[114] In acknowledgement of the necessity of specialized knowledge, appointees to these courts have had significant experience with the legal subject matter of the types of cases adjudicated by these courts.[115]

1. Tax Court

The U.S. Tax Court, as it now exists, was created in 1969.[116] After the Internal Revenue Service ("IRS") determines that a taxpayer owes the federal government, the taxpayer may dispute the deficiency. Taxpayers have a choice of forum, but 95% of disputes with the IRS are brought before the U.S. Tax Court, as other forums are only available *after* the payment of the disputed amount.[117] The U.S. Tax Court also has jurisdiction over other procedural and

[111] The prohibition on lawyers being paid to represent veterans in pursuing claims for benefits from the government was imposed by Congress because of abuses during the U.S. Civil War. *See* Ridgway, *supra* note 69, at 13.

[112] An example drawn from an actual case: a VA medical opinion cited two studies in the medical literature as support for a conclusion that there was no nexus with service. The unrepresented veteran did not obtain the cited studies, and the Board took the VA examiner's opinion at face value, including that the medical literature supported the opinion. On appeal to the court, counsel was engaged and did obtain the studies, neither of which supported the opinion as the examiner had asserted.

[113] Lawrence Baum, *Judicial Specialization and the Adjudication of Immigration Cases*, 59 Duke L.J. 1501, 1532–33 (2010).

[114] *Id.* at 1532–35.

[115] *See infra*, Part III.B.i–iii.

[116] *See* Harold Dubroff & Brant J. Hellwig, The United States Tax Court: An Historical Analysis 179 (2d. ed. 2014) (citing Tax Reform Act of 1969, Pub. L. No. 91-172, § 951, 83 Stat. 730 (1969)).

[117] David Laro, *The Evolution of the Tax Court as an Independent Tribunal*, 1995 U. Ill. L. Rev. 17, 18 (1995).

administrative matters related to the collection of taxes.[118] The Tax Court is composed of a maximum of nineteen presidentially-appointed members.[119] The website for the Tax Court stresses that all of the judges have expertise in tax law and apply that expertise in order to ensure that taxpayers are assessed only what they owe, and no more.[120] A review of biographies of the seventeen current judges on the Tax Court indicates that they each have tax law experience, and each has prior service as a federal government employee in the area of tax.[121] Their employment includes experience at the Treasury Department; the Department of Justice, Tax Division; and as Tax Counsel to various Congressional Committees and Senators.[122]

2. United States Court of Federal Claims

Congress created the U.S. Court of Claims, now the Court of Federal Claims, in 1855 to hear cases against the federal government.[123] In 1887, the court's jurisdiction extended nationwide to all claims against the government except tort, equitable, and admiralty claims.[124] This jurisdiction includes claims for just compensation after the federal government has taken property, claims for refunds of federal taxes, claims for payment to government personnel, breach of contract claims where the government is a party, disputes concerning Native American lands, and claims against the federal government for patent and copyright infringement.[125] In 1987, jurisdiction was expanded to cover vaccine injury cases; however, these cases are specifically heard by the court's Office of Special Masters.[126] As of 1982, the Court of Federal Claims had sixteen judges, appointed by the president and confirmed by the Senate,

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[118] *See, e.g.*, King v. Comm'r, T.C. Memo 2015-36, 2015 Tax Ct. Memo LEXIS 42, at *14–17 (T.C.M. Mar. 9, 2015).

[119] *About the Court*, U.S. Tax Court, https://www.ustaxcourt.gov/about.htm (last visited Feb. 13, 2016).

[120] *Id.*

[121] *See Judges*, U.S. Tax Court, https://www.ustaxcourt.gov/judges.htm (last visited Feb. 13, 2016).

[122] *See id.*

[123] *History of the Federal Judiciary*, Fed. Judicial Ctr., http://www.fjc.gov/history/home.nsf/page/courts_special_coc.html (last visited Feb. 13, 2016).

[124] *Id.*

[125] *Id.*; *see also* 28 U.S.C. § 1491 (2012).

[126] National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755 (1986) (codified as amended at 42 U.S.C. §§ 300aa-1 to -34); *see also Vaccine Claims/Office of Special Masters*, U.S. Court of Federal Claims, http://www.uscfc.uscourts.gov/vaccine-programoffice-special-masters (last visited Feb. 21, 2016).

serving terms of fifteen years.[127] Currently, there are ten sitting judges and six Senior Judges active.[128] These judges have diverse backgrounds; however, twelve of the sixteen have been federal government employees, with experience at the Department of Justice; the Department of the Interior; various Senate Judiciary Committees; the US Merit Systems Protection Board; the Office of Personnel Management; the Council on Environment Policy, Office of the President; and the Environmental Protection Agency.[129] The four remaining judges, who have had only private experience, practiced in subjects directly relating to the jurisdiction of the Court of Federal Claims, including patent infringement, environmental regulatory law, intellectual property and government contracting.[130]

3. United States Court of Appeals for the Armed Forces

Legislation creating the Court of Military Appeals, later designated the U.S. Court of Appeals for the Armed Forces, became effective in May 1951.[131] The jurisdiction of this court covers cases arising from the military justice system, appealable directly to the Supreme Court as of 1983.[132] Currently, there are five judges who serve on the court at any one time.[133] In order to serve, they must have left military service at least seven years prior to their appointment by the president.[134] There are currently four judges of the Court of Appeals for the Armed Forces, with one slot vacant. All of them served as officers of the Judge Advocate General ("JAG") Corps in various branches of service.[135] Discussing a future nominee to the Court, at least one commentator has noted that "[g]iven the court's specialized nature and the politics of confirmation hearings by the Senate Armed Services Committee, a non-veteran would likely be a 'hard sell.'"[136]

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[127] Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 27 (codified at 28 U.S.C. §§ 171-172 (2012)).

[128] *Judicial Officers*, U.S. Court of Federal Claims, http://www.uscfc.uscourts.gov/judicial-officers (last visited Feb. 13, 2016).

[129] *Id.*

[130] *Id.*

[131] Uniform Code of Military Justice, Pub. L. No. 81-506, 64 Stat. 109 (1950) (codified at 10 U.S.C. §§ 801–946); *see also About the Court*, U.S. Court of Appeals for the Armed Forces, http://www.armfor.uscourts.gov/newcaaf/about.htm (last visited Feb. 21, 2016).

[132] *About the Court*, *supra* note 131.

[133] *Judges*, U.S. Court of Appeals for the Armed Forces, http://www.armfor.uscourts.gov/newcaaf/judges.htm (last visited Feb. 21, 2016).

[134] *Id.*

[135] U.S. Court of Appeals for the Armed Forces, About the Court Brochure 9–14 (August 2015), www.armfor.uscourts.gov/newcaaf/library/brochure.pdf.

[136] Eugene R. Fidell, *The Next Judge*, 5 J. Nat'l Security L. & Pol'y 303, 310–11 (2011).

C. What are the Advantages and Disadvantages in Having a Specialized Judiciary?

As should be evident from the preceding discussion, the VA claims process is not only *sui generis* but also complex.[137] It aims to do many things at once: to remain informal and accessible to and navigable by lay claimants, yet give effect to many intricacies of procedure and substantive law; to provide thorough due process in claims adjudication, but handle over 1.3 million claims a year—potentially worth billions of dollars—expeditiously; and to employ modern technology while laboring under an enormous load of paper. These sorts of competing aims create tensions and challenges, and as Congress, VA, and the federal courts strive to confront those challenges, the quantity and complexity of law—statutory, regulatory, and decisional—expands inexorably.[138] Although the VA claims process is designed to be accessible to lay claimants without legal assistance, it is actually quite complex:

> From the inception of the claims process until today, hundreds of cases and laws and tens of thousands of rules, well-intended in isolation, have piled on top of, underneath, and in between each other creating a staggering level of complexity. With permutations numbering in the millions, the process is barely comprehensible to experts and completely opaque to the Veterans who depend on its outcomes.[139]

Further evidence of this complexity is the most comprehensive overview of VA benefits issues and practices, the Veterans Benefits Manual promulgated by NVLSP which currently runs to over 1700 pages of relatively small-print font, excluding the indices;[140] a companion volume containing the relevant statutes and regulations is over 2100 pages long.[141] This belies the notion that this area of law is easily navigable by non-experts.

While the sheer volume of the tasks before it is a major concern of the VA claims system, challenges are also posed by changing circumstances. As generals are often said to be fighting the last war, so VA is addressing mod-

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[137] Ridgway, *supra* note 12, at 252 ("By incorporating both paternalism and entitlement, the VA system suffers from internal conflict: it seeks to comprehensively cover all deserving claimants through substantively and procedurally complex rules intended to address all possible fact patterns.").

[138] *See Examining the U.S. Department of Veterans Affairs' Claims Processing System: Hearing Before the H. Comm. on Veterans' Affairs*, 110th Cong. 3 (2008) (statement of Gerald Manar, Deputy Dir., National Veterans Service, Veterans of Foreign Wars of the United States) ("[I]ncreased complexity extends the time it takes to resolve claims and increases the opportunity for error").

[139] Veteran Appeals Experience, *supra* note 95, at 1.

[140] Veterans Benefits Manual (Barton F. Stichman et al. eds., 2015).

[141] Federal Veterans Laws, Rules and Regulations (2015).

ern claims with an apparatus devised prior to World War II.[142] For example, one commentator has pointed out that the scheme for rating disabilities was formulated during a time when most ordinary people earned their living by manual labor, whether in farming or in industry.[143] Many of the regulations pertaining to the VA system were devised before lawyers were much involved in the system. For a great many years, the so-called period of "splendid isolation" of the VA claims system,[144] agency decision-makers were not accountable outside the agency.[145] Having got their noses under the tent via judicial review, lawyers are now involved in claims beginning after the initial decision by the regional office.[146] Whether lawyers' increased presence is cause or effect, there can be little doubt that the attitude toward decision-making has changed, with a higher expectation of procedural propriety and avoidance of caprice, and with less trust placed in the good offices and discretion of VA officials. Yet there remain vestiges of the former trust, such as the presumption of regularity (reliability) of VA mailing practices,[147] the presumption of competency and lack of bias of VA Compensation & Pension examiners,[148] the presumption that evidence or arguments that are unmentioned by the decision-maker were nevertheless considered.[149] Again, the system reflects in its complexity tensions between what was and what now is, even between what is supposed to occur in theory and what actually occurs in practice.

A confusing eddy of law, history, duty, aspiration, reason, and fact immediately confronts a newly appointed CAVC judge. The court's caseload,[150] which is one of the heaviest in the United States,[151] demands that a new judge

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[142] James D. Ridgway, *A Benefits System for the Information Age*, *in* Glimpses of the New Veteran 135–36 (Alice A. Booher, ed., 2015).

[143] *Id.*

[144] The phrase appears in H.R. Rep. No. 100-963, at 10 (1988), quoting Robert L. Rabin, *Preclusion of Judicial Review in the Processing of Claims for Veterans Benefits: A Preliminary Analysis*, 27 Stanford L. Rev. 905, 905 (1975).

[145] *See* Robert L. Rabin, *Preclusion of Judicial Review in the Processing of Claims for Veterans Benefits: A Preliminary Analysis*, 27 Stanford L. Rev. 905, 905 (1975).

[146] Daniel T. Shedd, Cong. Research Serv., R42609, Overview of the Appeal Process for Veterans' Claims 31 (2013).

[147] Sthele v. Principi, 19 Vet. App. 11, 16–17 (2004).

[148] Wise v. Shinseki, 26 Vet. App. 517, 525 (2014).

[149] Bernklau v. Principi, 291 F.3d 795, 801 (Fed. Cir. 2002).

[150] *See* Annual Report, *supra* note 100, at 1. 3,745 appeals were filed at the court in 2014, along with almost 2500 EAJA fee applications. Despite over 6500 dispositions, there remained over 3500 matters pending at the end of the year. The average number of merits dispositions per judge was 175. *Id.* at 1, 4–5.

[151] *See* Virginia A. Girard-Brady, *Vacancies on the CAVC Attract National Attention . . . and Some Nominees*, Veterans L. J. 1, 15 (Summer 2011).

be productive immediately, with no time to discern, much less absorb, the complexity of the system and how it came to be so complex.[152] Yet it is perhaps essential for a judge to render decisions in light of an appreciation of this complexity and history. Even where the field of law originates from and is governed by statute, case decisions fill in the details of the law in the manner of the common law, and awareness of context is crucial. The great majority of decisions by the Court are single-judge, non-precedential decisions;[153] so the deleterious effect of an out-of-sync decision might arguably be minimized because it only affects one claimant, but that may not be the case. In fact, out-of-sync decisions may matter even more in this system where single-judge decisions predominate, because in such a system the outcome of an appeal may depend upon the judge to whom it is assigned. A recent empirical study indicates that there is considerable outcome variance in single-judge decisions of the CAVC, which is troubling, given that it is an appellate tribunal.[154] Greater familiarity with the evolution and complexity of the system out of which appeals grow could reduce the undesirable result of claimants with substantially similar claims receiving different results from the Court.

Appointment of judges from the ranks of experienced veterans law practitioners would alleviate or mitigate many of the challenges faced by newly appointed CAVC judges. Lawyers who have worked for VA or on behalf of veterans in the claims system would have an awareness of the complexity of the process, and of the myriad issues that arise, which an outsider to the system will lack. The outsider will have a much longer learning curve, likely inducing greater reliance on law clerks—themselves often just out of law school[155]—to help fill in gaps in understanding, clerks who themselves often have no experience in the veterans claims system. Thus, where the hope would be for maximum expertise in the handling of thousands of appeals, in decisions affecting millions of veterans and billions of dollars of benefits, instead there are judges and their clerks scrambling to get up to speed. The relatively slower pace of mastery of the Court's complexity is problematic, because there are many more appeals than can be handled optimally: the study of single-judge

[152] This phenomenon is not unique to the CAVC. When one of the authors was a junior associate in a business litigation firm, his supervising attorney was appointed to the federal bench, and the associate then had the adventure of helping with a court-appointed criminal representation, so the incipient judge would not go on the bench with absolutely no previous exposure to criminal law.

[153] *See* Annual Report, *supra* note 100, at 1.

[154] 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*, 26 Stan. L. & Pol'y Rev. (forthcoming 2015) (on file with authors).

[155] One of the authors clerked at the CAVC and can attest to the prevalence of new law school graduates in chambers of the Court.

decision-making mentioned earlier strongly recommends discontinuation of the practice due to the variation in outcome; the chief impediment to rendering all decision via panels is the caseload of the court and the greater time required for panel decisions to be made.[156]

Beyond the general disadvantage of judges and their clerks not being expert in the subject matters and procedures with which the court deals, this fact has a practical impact on the manner of practice before the court. While it is wise for an advocate who files a brief with the court to craft explanations that will be intelligible to the clerks—because it cannot be known how much dependence a particular chambers will place on the clerks—where the judge is new to the entire veterans field this technique becomes even more important.[157] Were the Court's judges reliably familiar with the field, there could be more confidence that any lacuna in the clerks' knowledge would be filled in, and briefing could be more efficient.

It must be acknowledged that there could also be disadvantages in drawing judges from the veterans' benefits bar. There is a tendency for specialists to become insular, such that the thinking of generalists no longer contributes to development of law in the specialized field, eliminating valuable cross-pollination.[158] Repetitive focus on the same issues and specialized processes can narrow the scope of thinking into familiar channels, to the exclusion of ideas "outside the box."[159] It is also possible for "capture" to occur; i.e., where the judiciary is well-known to repeat practitioners, those practitioners gain

[156] Ridgway et al., *supra* note 154 (manuscript at 42–44, 59).

[157] Few advocates who have practiced before the Court have not had at least one case where there was a strong suspicion that the Court missed the point of the arguments; certainly this can be the fault of inept briefing, but it can also result from reliance on clerks who do not thoroughly understand the law.

[158] Rochelle Cooper Dreyfuss, *Specialized Adjudication*, 1990 BYU L. Rev. 377, 379 n.4 (1990) (noting, e.g., the influence of economic analysis on antitrust law, as exemplified by the work of Judge Richard Posner).

[159] Judge William Greenberg, one of the newer judges on the CAVC and a lawyer with no substantial previous experience in the veteran field, likes to cite *Hayburn's Case*. *See, e.g.*, Jones v. McDonald, No. 14-0523, 2015 U.S. App. Vet. Claims Lexis 1761, at *2 (Dec. 30, 2015) (citing Hayburn's Case, 2 U.S. (2 Dall.) 408 (1792)) (injecting fundamental constitutional principles into the court's jurisprudence). There is surely value in having this sort of infusion of thinking from outside the specialized field, if only to challenge accepted notions. Given the frequent importance of evidentiary issues in the veteran claims system, i.e. how a tribunal lacking adversarial evidentiary development properly goes about analyzing and assessing evidence, the perspective from practitioners in adversarial systems could contribute much valuable insight into whether satisfactory adjudication is occurring and, if not, what mechanisms might be borrowed from the adversarial model to improve the system.

an advantage over one-time litigants, as they are more likely to know the eccentricities of the court's rules and specialized law.[160]

The most obvious tactic to avoid these disadvantages would be to avoid drawing *all* candidates for the CAVC judiciary from the specialized bar but still call primarily upon experienced specialists. Unlike the U.S. Supreme Court, for example, where policy orientation can have an enormous impact on the court's decisions and consequently on major issues for the nation, the CAVC is centered around a single overriding policy: to resolve individual appeals fairly and efficiently. There are no major political forces swirling around the court's work such that having a judge with a particular outlook is crucial to any constituency. Rather, the issue for the CAVC is perspective, having a way to freshen that perspective to avoid channeled thinking, and an occasional maverick can serve this role. The benefits of selecting most judges from those experienced in veterans' benefits law outweigh the possible disadvantages, particularly if those disadvantages are minimized by not confining the selection of judges entirely to the experienced veterans bar.

IV. Judges of the CAVC Should Be Selected Primarily from the Specialized Veterans Benefits Bar

The Court of Appeals for Veterans Claims ("CAVC") *should* draw a majority of its future judges from among lawyers experienced in the VA benefits system: *at least* two-thirds of all future nominations to the court should go to veterans benefits attorneys. Now is the time, given the maturation of the veterans benefits bar. All stakeholders, and most importantly, veterans, would benefit from a Court that has appointees steeped in VA law and adjudication.

As established above, the CAVC is a specialty court that deals with an unusually complex claims process and, like other such Article I courts that are similar in creation and with limited jurisdiction, its judges should have specialized experience.[161] It would be unthinkable to have judges on the Tax Court with no experience in tax law; judges on the Court of Appeals for the Armed Forces without military experience; and judges on the Court of Federal Claims with no administrative law experience. Given the complexity of the law and the maturity of the bar, there is no reason that the nomination process for the CAVC should be any different from other Article I courts'

[160] Dreyfuss, *supra* note 158, at 380.

[161] A leading academic commenter on veterans benefits law has noted, "*some aspects of this area of the law may in fact be too complex for the uninitiated lawyer*." Michael P. Allen, *Veterans' Benefits Law 2010 – 2013: Summary, Synthesis and Suggestions*, 6 Veterans L. Rev. 1, 7 n.33 (2014) (emphasis added). He has also noted: "This Stuff is Hard." Michael P. Allen, *The Law of Veterans' Benefits 2008–2010: Significant Developments, Trends, and A Glimpse Into the Future*, 3 Veterans L. Rev. 1, 60 (2011).

nomination processes. That where specialized experience in the relevant area of law is, in effect, a prerequisite for consideration.

An ideal mix of that experience would be that for every three slots filled, there would be one nominee from the appellants' bar, one nominee from VA and an outside nominee. Moreover, nominees from that first category should have immersed themselves in the system over the course of their careers, beyond merely practicing in the area. Such "big picture" nominees would both reflect the best of their various constituencies, ultimately providing increased quality, efficiency, and ultimate outcomes for veterans and the veterans benefits system as a whole. These options include appointment of BVA VLJs, appellant-side attorneys (private bar and VSOs), VA-side appellate attorneys, and outside candidates. These various options are discussed below.

The Board of Veterans' Appeals renders the final administrative benefits decision on behalf of the Secretary of Veterans Affairs.[162] Though a part of VA, it is akin to a trial court in that it is the final trier of fact at the administrative level.[163] VLJs or Board Members are the decision-makers at the Board. They are appointed by the Secretary of Veterans Affairs, with the approval of the President of the United States.[164] It is their decisions that are appealed to and reviewed by the CAVC.[165]

In view of the specialized knowledge that VLJs presumably possess regarding veterans benefits law, as well as the fact that their appointment must be approved by the president, it is curious that no VLJ has been appointed to the Court.[166] Although they are not technically Administrative Law Judges ("ALJs"), the requirements to be appointed are similar.[167] That is, they are required to have at least seven years legal experience as a "licensed attorney

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[162] *See* 38 U.S.C. § 7104(a) (2012). The statute states:

> All questions in a matter which under section 511(a) of this title is subject to decision by the Secretary shall be subject to one review on appeal to the Secretary. Final decisions on such appeals shall be made by the Board. Decisions of the Board shall be based on the entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law and regulation.

Id.; *see also* 38 U.S.C. § 511; 38 C.F.R. § 20.101(a) (2011).

[163] *See* McBurney v. Shinseki, 23 Vet. App. 136, 139 (2009) ("[T]he Board, as the final trier of fact, is not constrained by . . . determinations below."); Gilbert v. Derwinski, 1 Vet. App. 49, 52 (1990) (noting that the BVA "functions as a factfinder in a manner similar to that of a trial court.").

[164] 38 U.S.C. § 7101A(a)(1).

[165] *Id.* § 7252(a).

[166] *See* Ridgway, *supra* note 12, at 271 ("Article III appellate judges are frequently drawn from the ranks of the trial judges who, in turn, are often former trial attorneys.").

[167] *See* Appeals Regulations: Title for Members of the Board of Veterans' Appeals, 68 Fed. Reg. 6,621, 6,622–23 (Feb. 10, 2003) (to be codified at 38 C.F.R. pt. 19).

preparing for, participating in, and/or reviewing formal hearings or trials involving litigation and/or administrative law at the Federal, State or local level."[168] The specialized experience required is defined as "experience dealing with laws and regulations pertaining to veterans' benefits, as set forth primarily in Title 38 of the United States Code and the Code of Federal Regulations, and areas of medicine and/or laws as related to the Board's [of Veterans' Appeals] jurisdiction."[169] VLJs typically have an average of nine years of specialized experience, when they are selected.[170]

It is quite possible that the lack of VLJs appointed to the Court reflects some historical negative perceptions of the VLJ corps.[171] However, the Board has significantly changed in the last fifteen years.[172] Moreover, the profile of VLJs has also recently changed. In addition to the usual attorneys who have come from among counsel to the Board, the Secretary has begun selecting VLJs who have experience outside the Board or VA, most recently selecting VLJs who have served as attorney law clerks at the CAVC.[173]

Another source for possible appointments is the attorneys of the Veterans Court Appellate Litigation Group ("ALG"), formerly known as VA Professional Staff Group VII. The ALG represents the Secretary of Veterans Affairs in all matters before the CAVC.[174] In addition:

> Although most cases involve appeals to the CAVC from final decisions of the Board of Veterans' Appeals regarding many of the veterans benefit programs administered by the Secretary, [the ALG] also handles cases involving petitions for extraordinary

[168] *See e.g.*, *Veteran Law Judge Job Posting*, USAJobs, https://www.usajobs.gov/GetJob/PrintPreview/385277900 (last visited Feb. 21, 2016).

[169] *Id.*

[170] *See* Corey L. Bosely & Bradley W. Hennings, *A Proposed Approach to the BVA's Clarified Hearing Duties to Explain and Suggest Pursuant to* Bryant v. Shinseki, 5 Veterans L. Rev. 164, 181 (2013) (noting that a "[VLJ] may have many . . . hearings in the same day, possibly with cases involving similarly complex issues or voluminous evidence."); *see also Five Attorneys Named to Board of Veterans' Appeal*, PRNewswire (Apr. 19, 2004), http://www.prnewswire.com/news-releases/five-attorneys-named-to-board-of-veterans-appeals-72540917.html.

[171] A recent reprint of a 2002 article catalogues some VLJ criticisms. *See generally* Robin J. Artz, *What Veterans Would Gain from Administrative Procedure Act Adjudications*, 62 Fed. Law. 14 (2015).

[172] Many of Judge Artz's concerns were addressed in a Final Rule in 2003. *See* Appeals Regulations: Title for Members of the Board of Veterans' Appeals, 68 Fed. Reg. 6,621 (Feb. 10, 2003) (to be codified at 38 C.F.R. pt. 19).

[173] One of the authors is well aware of the individuals being chosen as VLJs, as he is one of them.

[174] Anita U. Ajenifuja, *A Peek Inside . . . The Department of Veterans Affairs Office of General Counsel Professional Staff Group VII*, Veterans L. J. 1, 13–14 (Winter 2012–2013).

> writs brought under the All Writs Act and applications for fees and expenses brought under the . . . (EAJA).[175]

"[W]hen fully staffed, [the ALG] is composed of over 100 employees, including approximately 70 attorneys, making it the largest staff group in the [VA] OGC."[176]

These attorneys are somewhat akin to Assistant U.S. Attorneys. While veterans law is not criminal law and the VA appellate attorneys are not prosecutors, litigation before the CAVC is an adversarial process, unlike at the administrative level, and they represent the U.S. government.[177] There is a long tradition of appointing former prosecutors to the federal bench.[178] In fact, some consider this type of experience to be critical to serving on a federal district or appeals court.[179]

The appellant's side of the veterans benefits bar has been represented on the CAVC bench, although none have come from veterans benefits law private practice; instead they have been drawn from government, academia and general private practice. Rather, there have been only been two judges selected who practiced before the CAVC as attorneys, both on behalf of Veterans Service Organizations: Chief Judge Hagel, who worked for years at Paralyzed Veterans of America,[180] and Judge Bartley, who worked at the National Veterans Legal Services Program.[181] The traditional large VSOs (American Legion, Disabled American Veterans, Veterans of Foreign Wars, AMVETS, Vietnam Veterans of America, etc.) have not typically employed great numbers of attorneys in their organizations, and do not have attorneys practicing before VA or the

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[175] *Id.* at 13. The author further states:

> From an attorney's perspective, the work in [the ALG] is professionally challenging and rewarding. There is opportunity for collaborative work as well as independence in managing one's own cases. In addition, PSG VII attorneys must meet the challenge of responding to a large variety of work product submitted by pro se appellants, single practitioners, veterans service organizations, as well as small, mid-sized, and major law firms.

Id. at 14.

[176] *Id.* at 13.

[177] *Id.*

[178] *See* Bob Egelko, *Obama Nominations Heavy on Ex-Prosecutors*, San Francisco Chronicle (Feb. 3, 2013, 11:30 AM), http://www.sfgate.com/nation/article/Obama-nominations-heavy-on-ex-prosecutors-4248122.php.

[179] *See generally* Sheldon Goldman, Picking Federal Judges: Lower Court Selection from Roosevelt Through Reagan (1997).

[180] *Chief Judge Lawrence B. Hagel*, U.S. Court of Appeals for Veterans Claims, www.uscourts.cavc.gov/hagel.php (last visited Feb. 21, 2016).

[181] *Judge Margaret Bartley*, U.S. Court of Appeals for Veterans Claims, https://www.uscourts.cavc.gov/bartley.php (last visited Feb. 21, 2016).

CAVC.[182] Therefore, it is not surprising that their staff attorneys have not been elevated to the court. But it is interesting that there have, as yet, been no private practitioners elevated either.

Perhaps the lack of private practitioners appointed to the CAVC reflects some residual ambivalence in the veterans benefits law community regarding the involvement of attorneys, particularly those who charge veterans fees for representation. As noted above, for over 100 years there was a significant fee limitation, which effectively precluded representation by lawyers on veterans' claims.[183] But regardless, NOVA is now over twenty years old with some of its members engaged in this area of law even prior to the creation of the CAVC.[184] Moreover, since the 2007 legislation that allows attorneys to represent clients during the administrative appeals process for a contingent fee,[185] there have been thousands of additional attorneys who are now practicing regularly before the VA, as well as the CAVC.[186] Many of these practitioners have experience at multiple levels of the appeals process, and have worked for various organizations, including VA, the CAVC, and VSOs, etc.[187] Whatever the state of the private bar in the Court's early years, there are without question now a number of extremely competent and experienced private practitioners with a diverse set of capabilities.

When the CAVC was created, its judges could not have been chosen from lawyers experienced in the field, because there were relatively few of them. Moreover, there was little or no case law in the area of veterans benefits, given the historical prohibition of judicial review of the veterans benefits system. Therefore, the initially appointed judges had little experience with the benefits system they were adjudicating. The closest the CAVC got to direct claims experience was Judge Donald Ivers, the former General Counsel of VA and Judge Jonathan Steinberg, a staffer from the Senate Veterans Affairs

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[182] Disabled American Veterans did have an appellate litigation group that practiced before the Court, but this was disbanded in 2008. *See, e.g.*, *Our Legal Team*, Crisholm, Chrisholm & Kilpatrick, LLC, https://cck-law.com/about-cck/our-legal-team/landon-e.-overby (last visited Feb. 21, 2016). One of the authors is familiar with the fact that the large VSOs have relationships with law firms, whereby they have those firms offer to help their members appeal BVA decisions to the CAVC on a pro bono basis; however, they are eligible for EAJA fees.

[183] *See supra* note 22 and accompanying text.

[184] *See NOVA History*, Nat'l Org. of Veterans' Advocates, https://vetadvocates.org/about-nova/nova-history/ (last visited Feb. 21, 2016).

[185] *Id.*; *see* Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, 120 Stat. 3404, 3407 (2006) (codified at 38 U.S.C. §§ 5722 *et seq.*).

[186] *See Public List of Practitioners*, U.S. Court of Appeals for Veterans Claims, www.uscourts.cavc.gov/public_list.php (last visited Feb. 13, 2016).

[187] *E.g.*, *Judge Donald L. Ivers*, U.S. Court of Appeals for Veterans Claims, https://www.uscourts.cavc.gov/ivers.php (last visited Feb. 21, 2016).

Committee.[188] Although both clearly had experience with veterans benefits, there is little evidence that either had familiarity with the essentials of claims presentation or adjudication. In addition, while the other appointed judges were veterans, they had no particular specialized experience in this administrative area.[189] Rather, many of them, although distinguished attorneys, were simply political appointments.[190]

As acknowledged above, there is value in outside perspectives. Judges without much exposure to the veterans claims process are likely to bring a fresh set of eyes to problems inherent in the adjudication system. In addition, they are potentially less likely to be susceptible to capture or unconscious bias to one side or the other. Most importantly, they can often more easily draw parallels to other areas of law. Although veterans' benefits law is indeed a unique and specialized area of practice, like all areas of law, it can benefit from lessons learned and applied in other contexts. To hermetically seal veterans benefits law off from the rest of the legal community would be shortsighted at best. Therefore, recognizing this, it is proposed that one-third of all slots on the Court should be filled by someone with predominantly "outside" experience.

Finally, in view of the information and discussion set out above, every administration going forward should consult the CAVC Bar Association and NOVA, in addition to VSOs and VA, prior to putting forth any nomination. The American Bar Association, as well as many local bar associations, has been providing evaluations of candidates' suitability for Article III judgeships for decades.[191] There is little reason to think that the organizations familiar with the specialized veterans bar would not be able to provide a similar kind of evaluation. In fact, it would arguably provide additional legitimacy to anyone appointed, if the major players in the veterans system all agreed that the individual was suitably qualified.

Conclusion

Veterans are an important constituency. The premise of the veterans benefits system, surely a view shared by most, is that this constituency deserves

[188] *Id.*; *Judge Jonathan R. Steinberg*, U.S. Court of Appeals for Veterans Claims, https://www.uscourts.cavc.gov/lance.php (last visited Feb. 21, 2016).

[189] *See Judges*, U.S. Court of Appeals for Veterans Claims, https://www.uscourts.cavc.gov/judges.php (last visited Feb. 13, 2016).

[190] *See id.*

[191] Denis Steven Rutkus, Cong. Research Serv., R43762, The Appointment Process for U.S. Circuit and District Court Nominations: An Overview 8 (2014); Sheldon Goldman, Picking Federal Judges: Lower Court Selection from Roosevelt Through Reagan 118 (1997).

particular respect and gratitude from the nation.[192] A measure of that respect and gratitude is the caliber of decision-making applied to veterans' claims. It seems unusual that more experience is required of Veterans Law Judges who adjudicate claims at the agency than of judges of the CAVC, which reviews those adjudications.[193]

Given the specialized Article I nature of the CAVC, the President should appoint nominees with VA claims experience to at least two-thirds of future CAVC openings. There was little choice but to appoint inexperienced judges when the court was founded twenty-five years ago. However, given the huge appeals backlog and maturation of the veterans benefits bar, to continue to follow the previous appointment pattern is not in the best interests of the Court's constituencies or of the Court itself. This is not the time to appoint judges who require on-the-job training. Rather, a majority of the CAVC should consist of experts with a sophisticated understanding, at the time of appointment, of the veterans' claims system, and its component parts. All stakeholders, and most importantly veterans, would benefit from a Court that has appointees steeped in VA law and adjudication. Our nation's veterans deserve no less.

[192] *See, e.g.*, James D. Ridgway, *Why So Many Remands?: A Comparative Analysis of Appellate Review by the United States Court of Appeals for Veterans Claims*, 1 Veterans L. Rev. 113, 166 n.290 (2009) ("As a nation, we owe it to those men and women who have served our country to raise the level of discussion about how best 'to care for him who shall have borne the battle and for his widow, and his orphan.'" (quoting Abraham Lincoln, President, Second Inaugural Address (Mar. 4, 1865))).

[193] *See* Appeals Regulations: Title for Members of the Board of Veterans' Appeals, 68 Fed. Reg. 6,621, 6,622–23 (Feb. 10, 2003) (to be codified at 38 C.F.R. pt. 19).