A FLAWED ASSUMPTION: WHY THE U.S. COURT OF APPEALS FOR VETERANS CLAIMS SHOULD ABANDON ITS PRESUMPTION AGAINST THE CERTIFICATION OF CLASS ACTIONS

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I. INTRODUCTION

After twenty years, the United States' longest-running military conflict has finally drawn to a close with the withdrawal of U.S. troops from Afghanistan.[1] The veterans who first deployed in support of combat operations in Afghanistan had to—literally in some cases—hand the fighting off to their children.[2] Those veterans now look to the country that sent them into combat to provide them with care and compensation for the wounds they incurred. Two hundred thousand veterans of the post-9/11 era are now leaving the military each year[3] and many of them will seek to access the host of veterans[4] benefits offered by various state and federal agencies—most notably those offered by the U.S. Department of Veterans Affairs (VA). Some of those veterans will find little difficulty obtaining health care, housing, disability compensation, educational assistance, and a wide range of other benefits offered to them by the VA in thanks for their service.

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[1] Adam Nossiter and Eric Schmitt, *U.S. War in Afghanistan Ends as Final Evacuation Flights Depart*, N.Y. TIMES (Aug. 30, 2021), https://www.nytimes.com/2021/08/30/world/asia/afghanistan-us-occupation-ends.html.

[2] J.P. Lawrence & Philip W. Wellman, *Years After They Fought in Afghanistan, US Troops Watch as Their Children Deploy to Same War*, STARS & STRIPES (Oct. 7, 2020), https://www.stripes.com/news/years-after-they-fought-in-afghanistan-us-troops-watch-as-their-children-deploy-to-the-same-war-1.647659#.

[3] U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-438R, TRANSITIONING SERVICEMEMBERS: INFORMATION ON MILITARY EMPLOYMENT ASSISTANCE CENTERS 1 (2019), https://www.gao.gov/assets/gao-19-438r.pdf.

[4] The use of the word "veterans" as an attributive noun—written without the apostrophe that would typically indicate a plural possessive noun—is a term of art in the field of veterans benefits which this Comment will employ where appropriate. *See, e.g.*, *Which Is Correct: Veterans Day or Veteran's Day?*, THESAURUS.COM, https://www.thesaurus.com/e/grammar/veterans-day-grammar/ (last visited Oct. 1, 2021).

Some, however, will receive denial letters rejecting their claims for benefits and be forced to wade through an administrative and judicial appeals process complicated by inexorably long processing times,[5] repeated remands,[6] and the litigation of complex issues of law and fact often without the assistance of counsel.[7]

Countless veterans face these substantial burdens in litigating their claims for benefits through the administrative and judicial system. The VA estimates that there are now 20.3 million living veterans in the United States.[8] The largest, by far, of the many VA-administered benefits programs available to those veterans is service-connected disability compensation.[9] Under this program, veterans are entitled to receive a monthly compensation check and free or low-cost medical treatment for any injury or disease incurred as a result of their military service.[10] Only about 4.9 million veterans currently receive this service-connected

[5] *See* Hugh B. McClean, *Delay, Deny, Wait Till They Die: Balancing Veterans' Rights and Non-Adversarial Procedures in the VA Disability Benefits System*, 72 SMU L. REV. 277, 284 (2019) (showing that it can take up to nine years from the time of initial filing to fully litigate a claim through the administrative and judicial appellate process); *see also* Monk v. Wilkie, 30 Vet. App. 167, 185 (2018) (Allen, J., concurring in part) (comparing the delays faced by veterans seeking VA benefits to the plight of the litigants in Charles Dickens' fictional case Jarndyce v. Jarndyce, which had been "pending for so long that '[i]nnumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it . . . [and] a long procession of Chancellors has come in and gone out'"), *aff'd*, 978 F.3d 1273 (Fed. Cir. 2020).

[6] *See* U.S. DEP'T OF VETERANS AFFS. BD. OF VETERANS' APPEALS, ANNUAL REPORT: FISCAL YEAR 2020, at 37 (2020), https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2020AR.pdf [hereinafter BVA 2020 REPORT] (showing that in fiscal year 2020, the Board of Veterans Appeals granted 33.8% of legacy appeals and remanded 40.6%, and granted 37.0% of modernized appeals and remanded 28.2%); *see also* U.S. CT. OF APPEALS FOR VETERANS CLAIMS, FISCAL YEAR 2020 ANNUAL REPORT 3 (2020), http://www.uscourts.cavc.gov/documents/FY2020AnnualReport.pdf [hereinafter CAVC 2020 REPORT] (showing that 80.7% of appeals were remanded either in whole or in part).

[7] *See* BVA 2020 REPORT, *supra* note 6, at 36 (showing that 39.4% of veterans whose legacy appeals were remanded and 29.2% of those whose legacy appeals were denied at the Board were unrepresented); *see also* CAVC 2020 REPORT, *supra* note 6, at 1 (showing that twenty-three percent of veterans were pro se at the time of filing appeals and twelve percent remained pro se by the time of disposition).

[8] NAT'L CTR. FOR VETERANS ANALYSIS & STATS., U.S. DEP'T OF VETERANS AFFS., VETERAN POPULATION PROJECTION MODEL 2018: A BRIEF DESCRIPTION 4 (2018), https://www.va.gov/vetdata/docs/Demographics/New_Vetpop_Model/VP_18_A_Brief_Description.pdf (last updated Aug. 5, 2020).

[9] Disability compensation represents over $95 billion of the agency's approximately $114 billion in annual benefits outlays. *See* VETERANS BENEFITS ADMIN., U.S. DEP'T OF VETERANS AFFS., ANNUAL BENEFITS REPORT: FISCAL YEAR 2019, at 7 (2019), https://www.benefits.va.gov/REPORTS/abr/docs/2019-abr-v2.pdf# [hereinafter 2019 BENEFITS REPORT].

[10] 38 U.S.C. § 1110; *see also* 38 C.F.R. § 17.36(b) (2019).

disability compensation.[11] Each year the VA processes over a million new claims by veterans seeking new or increased disability compensation benefits,[12] but only grants those benefits to a small percentage of claimants.[13] When the VA denies a veteran's claim, that veteran must wade into the morass of the VA's administrative appeals process, and often ends up waiting years to gain access to much-needed health care and disability benefits while their claims move through the system.[14]

Long wait times, claims backlogs, and disparate outcomes are not problems unique to the VA. Many of the administrative agencies that are responsible for adjudicatory functions suffer from similar challenges.[15] A handful of agencies have experimented with mechanisms that could speed up claim processing and improve the quality and consistency of adjudication by aggregating similar claims.[16] But the veterans claims adjudication system, like most of the administrative state, has historically resisted the implementation of "tools used by courts to efficiently resolve large groups of claims, like class actions and other complex litigation procedures."[17]

For some veterans seeking administrative and judicial review when their claims are denied, the issues they must litigate are unique to the factual circumstances of their service and medical history and would not be appropriate for aggregate resolution.[18] For others, however, the

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[11] 2019 BENEFITS REPORT, *supra* note 9, at 8.

[12] *See* News Release, *VA Continues Record Setting Claims Processing Pace for 2019*, DEP'T OF VETERANS AFFS. OFF. OF PUB. AND INTERGOVERNMENTAL AFFS., (Dec. 9, 2019), https://www.va.gov/opa/pressrel/pressrelease.cfm?id=5371 (showing that the VA processed 1.44 million new claims in 2019).

[13] 2019 BENEFITS REPORT, *supra* note 9, at 8 (showing that the VA granted 309,091 new claims in 2019).

[14] *See* McClean, *supra* note 5 at 283–84; *see also* Veterans for Common Sense v. Shinseki, 644 F.3d 845, 878
(9th Cir. 2011) (characterizing these adjudicatory delays as a deprivation of health care that constitutes a due process violation); Neil Eisner, 2003 A.B.A. SEC. ADMIN. L. & REGUL. PRAC. REP. 3 (2003) [hereinafter ABA REPORT], https://www.americanbar.org/content/dam/aba/directories/policy/2003_my_102.authcheckdam.pdf ("[I]t is not uncommon for a veteran seeking disability compensation for an illness to die before that person's claim can be resolved.").

[15] Michael Sant'Ambrogio & Adam S. Zimmerman, *Inside the Agency Class Action*, 126 YALE L.J. 1634, 1637 (2017) (noting similar issues "[a]cross the administrative state").

[16] *See, e.g.*, *id*. at 1641–42 (describing aggregate resolution procedures employed by the Equal Employment Opportunity Commission, the National Vaccine Injury Compensation Program, and the Office for Medicare Hearings and Appeals).

[17] *See id*. at 1640, 1654.

[18] *See* 38 C.F.R. § 3.303 (2019) ("Service connection connotes many factors . . . . Each disabling condition . . . must be considered on the basis of the places, types and circumstances of his service as shown by service records, the official history of each

VA may have denied their claims based on regulations or adjudication procedures that apply to entire categories of similarly situated veterans and bar them from benefits. For example, veterans returning from Iraq and Afghanistan discovered that—despite being exposed to "burn pits" and breathing in the fumes given off by burning batteries, paint, solvents, coolants, electronics, and a host of other toxic materials—the VA did not presume they had a toxic exposure.[19] Instead, the VA placed the burden on the veteran to produce scientific evidence of the toxicity of those burn pits and medical evidence linking the exposure to their conditions.[20] Vietnam veterans spent years fighting the VA's unfair regulatory presumption that *every veteran* who physically set foot on the soil or inland waters of Vietnam was exposed to Agent Orange, whereas veterans exposed on the ships and planes that actually carried it had to provide proof of that exposure.[21]

Prior to the enactment of the Veterans Judicial Review Act (VJRA) in 1989, veterans were able to bring class-action lawsuits in federal district courts to challenge regulations or adjudicative policies that precluded entire classes of veterans from obtaining benefits.[22] Following the passage of the VJRA, the U.S. Court of Appeals for Veterans Claims (CAVC) became the exclusive avenue for judicial review of all VA

organization in which he served, his medical records and all pertinent medical and lay evidence.").

[19] *See* Alex Horton, *Jon Stewart Urges Health-Care Law for Veterans Exposed to Toxic Burn Pits*, WASH. POST (Sept. 15, 2020), https://www.washingtonpost.com/national-security/2020/09/15/jon-stewart-burn-pits-veterans/; *see also* Steve Beynon, *VA Has Denied About 78% of Disability Claims from Burn Pits*, STARS & STRIPES (Sept. 23, 2020), https://www.stripes.com/news/veterans/va-has-denied-about-78-of-disability-claims-from-burn-pits-1.646181.

[20] *See* Alex Horton, *Jon Stewart Urges Health-Care Law for Veterans Exposed to Toxic Burn Pits*, WASH. POST (Sept. 15, 2020), https://www.washingtonpost.com/national-security/2020/09/15/jon-stewart-burn-pits-veterans/.

[21] *See* INSTITUTE OF MEDICINE OF THE NATIONAL ACADEMIES, BLUE WATER NAVY VIETNAM VETERANS AND AGENT ORANGE EXPOSURE 1–2, Nat'l Acad. Press 2011, https://www.ncbi.nlm.nih.gov/books/NBK209599/pdf/Bookshelf_NBK209599.pdf. See Section III.A, *infra*, of this Comment for further discussion of *Haas v. Nicholson*, 20 Vet. App. 257, 259 (2006), *rev'd and remanded sub nom.* Haas v. Peake, 525 F.3d 1168 (Fed. Cir. 2008).

[22] *See*, *e.g.*, Robison v. Johnson, 352 F. Supp. 848, 851 (D. Mass. 1973) (certifying a class of selective service registrants who had satisfactorily completed alternative civilian service and were denied veterans educational benefits), *rev'd*, 415 U.S. 361 (1974); Wayne State Univ. v. Cleland, 440 F. Supp. 811, 814 (E.D. Mich. 1977) (certifying a class of veterans enrolled in a weekend college program who had been denied full-time educational benefits), *aff'd in part, rev'd in part*, 590 F.2d 627 (6th Cir. 1978); Giusti-Bravo v. U.S. Veterans Admin., 853 F. Supp. 34, 35, 42 (D.P.R. 1993) (approving a stipulated class settlement pursuant to FED. R. CIV. P. 23(e) by a class of veterans from Puerto Rico and the Virgin Islands).

benefits-related claims.[23] The CAVC almost immediately began rejecting petitions to certify class actions because it believed that its ability as an appellate court to render a binding, precedential decision to a single litigant made class actions unnecessary.[24]

This Comment will examine the CAVC's long-held view of itself primarily as an appellate court akin to the federal circuit courts of appeal that issue precedential decisions. It will then show how that view has led to the development and codification of a rebuttable presumption against certifying class actions based on the flawed assumption that the court's ability to issue a precedential decision makes class actions unnecessary. Finally, this Comment will argue that the presumption against the certification of class actions should be abandoned. Part II will explain how veterans benefits claims are litigated through the administrative agency process and explore the factors that led to the creation of the CAVC as a level of judicial review over veterans' claims. Part III will trace the CAVC's repeated rejections of requests for class action certification from the time the court was created by the VJRA in 1989 through the decision by the Federal Circuit in 2017 which held that the CAVC must entertain requests to certify class actions. It will also examine how the CAVC reacted to the Federal Circuit's decision by adopting the rebuttable presumption against class action certification. Part V will show that the CAVC's ability to issue precedential decisions is nominal at best and complicated by numerous practical limitations. It will argue that the rebuttable presumption against the certification of class actions is based on a flawed premise and should be abandoned by the CAVC.

[23] Michael P. Allen, *The Youngest Federal Court: The United States Court of Appeals for Veterans Claims*, ADMIN. & REG. L. NEWS 4 ("The court has exclusive jurisdiction to review decisions of the Board of Veterans' Appeals.").

[24] *See, e.g.*, Harrison v. Derwinski, 1 Vet. App. 438, 438 (1991); Lefkowitz v. Derwinski, 1 Vet. App. 439, 440 (1991).

II. BACKGROUND OF VETERANS CLAIMS AND THE CREATION OF THE CAVC

In order to seek disability compensation benefits, a veteran must file a claim with the VA online, by mail, or in-person.[25] The veteran then receives an initial administrative decision from one of the VA's fifty-six regional offices.[26] If the veteran disagrees with the decision, they may request a higher-level review by a senior adjudicator or appeal to the agency's internal Board of Veterans Appeals (BVA).[27] A veteran who appeals their initial decision under the BVA's traditional "legacy" appeal system waits an average of 1,583 days for a decision on that appeal.[28] That wait time includes an estimated average of 523 days waiting on internal agency remands.[29] Prior to 1989, once the BVA (or the internal review mechanisms of the VA's predecessor agencies)[30] rendered a final decision on an individual claim, a veteran had no recourse beyond the agency.[31] In 1989, succumbing to pressure from numerous veterans groups, Congress passed the Veterans Judicial Review Act, which created the U.S. Court of Appeals for Veterans Claims (CAVC).[32] The CAVC is an Article I court[33] with the jurisdiction to review final decisions

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[25] *See How to File a VA Disability Claim*, U.S. DEP'T OF VETERANS AFFS., https://www.va.gov/disability/how-to-file-claim/ (last visited Oct. 8, 2021). Veterans can also seek the assistance of an accredited service organization for assistance with filing their claim. *Get Help Filing Your Claim or Appeal*, U.S. DEP'T OF VETERANS AFFS., https://www.va.gov/disability/get-help-filing-claim/ (last visited Oct. 8, 2021).

[26] *See About VBA*, U.S. DEP'T OF VETERANS AFFS., https://www.benefits.va.gov/BENEFITS/about.asp (last visited Oct. 8, 2021).

[27] 38 C.F.R. § 3.2500 (2019).

[28] *See* BVA 2020 REPORT, *supra* note 6, at 30. The BVA is gradually transitioning from their legacy appeals system to a "modernized" appeals system. But as of the most recent published data, most appeals are still being processed under the legacy system, and it remains to be seen whether wait times in the modernized system will be substantially different. *Id*. at 32.

[29] *Id.* at 30.

[30] Before the VA was created in 1921, veterans benefits were administered, at different points, by the Department of War, the Department of the Interior, and the Treasury. DEP'T OF VETERANS AFFS., VA HISTORY IN BRIEF 3–8, https://www.va.gov/opa/publications/archives/docs/history_in_brief.pdf (last visited Oct. 8, 2021).

[31] Prior to the passage of the VJRA, it was the view of Congress that there should be no judicial review of individual veterans benefits decisions. *See* H.R. REP. NO. 100-963, at 9 (1988), *as reprinted in* 1998 U.S.C.C.A.N. 5782, 5790 ("[O]ver the years, the Congress has declared its views that there should be no judicial remedy with respect to claims for veterans benefits, and this policy was honored for nearly 170 years.").

[32] *See* Veterans' Judicial Review Act of 1988, Pub. L. No. 100-687, § 301(a), 102 Stat. 4105, 4113 (1988). Congress initially named the court the United States Court of Veterans Appeals until they renamed it in the Veterans Programs Enhancement Act of 1998, Pub. L. No. 105-368, § 511(b), 112 Stat. 3315, 3341 (1998).

[33] An "Article I court" is a specialized subject-matter tribunal created by Congress to administer and adjudicate specific federal benefits and programs. Article I courts are considered "non-judicial" because they are not part of the judicial branch created by

of the BVA.[34] Now a veteran who disagrees with a BVA decision can petition the CAVC for judicial review of that decision.[35] The decisions of the CAVC on questions of law are appealable to the U.S. Court of Appeals for the Federal Circuit.[36]

The CAVC generally renders a decision on a veteran's case in one of two ways. The court can elect to have the case heard by a single judge, who then issues an unpublished, non-precedential decision.[37] Alternatively, the court can hear the case before a panel of no less than three judges, which issues a published, precedential decision.[38] A single-judge decision resolves the case for the individual claimant, sometimes affirming, denying, or modifying the agency's decision, or remanding back to the agency.[39] The court views these single-judge, non-precedential decisions as a time-saving tool, appropriate for cases "of relative simplicity" which—in the court's view—do not present novel or important questions of law.[40]

Because the CAVC is one of the busiest federal appellate courts,[41] it relies on its ability to issue these unpublished, single-judge opinions to manage its overwhelming caseload.[42] The court uses an initial screening process to identify cases that a single-judge can quickly dispose of

Article III of the U.S. Constitution. As is true with the CAVC, the decisions of many Article I courts are appealable to Article III courts. *See Understanding the Federal Courts*, ADMIN. OFF. OF THE U.S. CTS. 3, https://www.uscourts.gov/sites/default/files/understanding-federal-courts.pdf (last visited Oct. 8, 2021).

34 38 U.S.C. §§ 7251–52.

35 *See* 38 U.S.C. § 7252(a).

36 *Id.* § 7292(a), (c).

37 *Id.* § 7254(b); *see also* Allen, *supra*, note 23, at 5 ("The great majority of the court's work is done through
these single judge memoranda decisions, which are non-precedential.").

38 38 U.S.C. §7254(b); *see also* Allen, *supra* note 23, at 5 (noting that "[o]n rare occasions" the entire CAVC will sit and render a decision "as an *en banc* court," but panels generally consist of three judges).

39 *See* 38 U.S.C. § 7252(a).

40 *See* Frankel v. Derwinski, 1 Vet. App. 23, 25–26 (1990) (adopting a six-factor test to screen for cases appropriate for panel disposition); *see also Internal Operating Procedures*, U.S. CT. OF APPEALS FOR VETERANS CLAIMS 1–2 [hereinafter *CAVC Internal Operating Procedures*], https://www.uscourts.cavc.gov/documents/IOPJuly19_2019.pdf (last visited Oct. 8, 2021).

41 Allen, *supra* note 23, at 5 ("The court is a busy place. It consistently ranks in the top two or three federal appellate courts in terms of cases per judge . . . . And I should add that our caseload is rising."); s*ee also* CAVC 2020 REPORT, *supra* note 6, at 8 ("The Court received 1,322 filings per active judge . . . in FY 2020. The number of filings per active judge for the Circuit Courts of appeals ranged from 81 to 443.").

42 Victoria Hadfield Moshiashwili, *Ending the Second "Splendid Isolation"? Veterans Law at the Federal Circuit in 2013*, 63 AM. U. L. REV. 1437, 1467 (2014) ("[I]t is only by using its statutory ability to issue such non-precedential decisions that the court is able to manage such an overwhelming workload."); *see also Frankel*, 1 Vet. App. at 26.

without the extensive briefing and oral argument typically required by a panel decision.[43] Notably, the determination of whether a panel will decide a case can involve "a personal or telephone conference between a [CAVC] staff attorney and the parties,"[44] potentially giving represented parties an advantage over pro se veterans in strategizing and seeking precedential review where it may be desirable. Ultimately, approximately ninety-nine percent of cases at the CAVC that reach a final disposition by either a judge or a panel are decided by a single judge.[45] Of the 8,954 appeals that were initially filed with the CAVC in FY 2020, only 0.5% reached a final disposition by a panel, the rest being resolved either by a single judge or otherwise dismissed or withdrawn, often by agreement of the parties.[46]

Because of the need to manage their caseload, and because these single-judge decisions only affect the veteran before the court, the judges who issue them often do not go to great lengths to explain the law being applied.[47] The same "screening judge" who determines that the case does not warrant panel consideration writes the decision,[48] often without any oral argument or even full briefing.[49]

Additionally, anywhere from one-third to half of all CAVC decisions involve remanding the case back to the VA.[50] This process of repeated remands, both at the agency level and at the CAVC, along with short, thinly-reasoned opinions that do not bind the VA in any other cases, places veterans as a community in a "hamster wheel" of adjudications.[51]

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[43] *Frankel*, 1 Vet. App. at 26 ("In anticipation of a heavy case load the Court has implemented a case management system with a central legal staff assigned to evaluate the cases as soon as issues are identified and relative simplicity or complexity can be determined.").

[44] *Id.*; *see also CAVC Internal Operating Procedures*, *supra* note 40, at 1.

[45] *See* CAVC 2020 REPORT, *supra* note 6, at 2 (showing that of 2,581 cases that proceeded to a decision by the court, 2,433 were decided by a single judge).

[46] *Id.* at 1–2.

[47] Moshiashwili, *supra* note 42, at 1467.

[48] *CAVC Internal Operating Procedures*, *supra* note 40, at 2.

[49] *See* Frankel v. Derwinski, 1 Vet. App. 23, 26 (1990) (noting that one of the advantages of the screening process is that it "make[s] it possible to treat a considerable number of cases without full briefing and oral argument"); *see also CAVC Internal Operating Procedures*, *supra* note 40, at 2 ("A request for oral argument generally is not granted for cases deemed appropriate for single-judge disposition.").

[50] *See* 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, 153 (2009); *see also* CAVC 2020 REPORT, *supra* note 6, at 3 (showing that, out of 8,430 appeals, 2,259 were wholly remanded and 4,552 were remanded either in whole or in part in addition to other relief).

[51] *See* Coburn v. Nicholson, 19 Vet. App. 427, 434 (2006) (Lance, J., dissenting) (describing the habit of repeated remands for further development as "perpetuat[ing] the hamster-wheel reputation of veterans law"); *see also* McClean, *supra* note 5, at 283

Commentators have traditionally applied the "hamster wheel" analogy to describe the plight of individual veterans who get stuck litigating their claims through the system.[52] But when entire groups of similarly situated veterans must repeatedly litigate the same issues and often receive no more than a non-binding, non-precedential decision, entire classes of veterans remain stuck in the hamster wheel repeatedly and unnecessarily litigating the same issues.

A panel's precedential decision does, in theory, bind the VA, potentially in a manner that would be favorable to other similarly situated claimants. But precedential decisions are exceedingly rare, and the CAVC issues some to veterans who are unrepresented by counsel.[53] Attorneys represent the VA in every case, but pro se veterans may not be capable of fully briefing their positions or otherwise advocating for their best interests without counsel.[54] Represented veterans with meritorious legal positions, which may have led to a precedential decision, may instead resolve their dispute with the VA at the pre-disposition conference, whereas a pro se veteran generally does not have the opportunity to do so.[55] The VA also frequently endeavors to settle or otherwise moot cases that are scheduled for precedential review.[56] Additionally, once a precedential decision is issued, there is no requirement that the VA notify similarly situated veterans a decision that may be beneficial to them.[57]

("The procedure for claiming and appealing benefits has been likened to a hamster wheel because veterans' claims are developed, denied, appealed, and remanded *ad infinitum*.").

[52] *See id.*

[53] *See* CAVC 2020 REPORT, *supra* note 6, at 1 (showing that twenty-three percent of veterans were pro se at the time of filing appeals and twelve percent of appeals remained pro se by the time of disposition); *see also* Lawrence B. Hagel & Michael P. Horan, *Five Years Under the Veterans' Judicial Review Act: The VA Is Brought Kicking and Screaming into the World of Meaningful Due Process*, 46 ME. L. REV. 43, 64 (1994) ("[T]here is a need for more trained advocates, knowledgeable in the law of veterans' benefits. Many of the court's precedential opinions have been issued with the veteran appearing pro se.").

[54] *See* Hagel & Horan, *supra* note 53, at 64 ("The adversary model of dispute resolution depends for success on two relatively equally matched parties arguing their points with full force. The VA is fully represented in every case.").

[55] *See CAVC Internal Operating Procedures*, *supra* note 40, at 1 (noting that court staff will generally hold a conference with represented parties to "discuss the issues and encourage joint resolution of the appeal" whereas pre-disposition conferences with pro se veterans are generally confined to "matters other than the merits of the appeal").

[56] *See* Monk v. Shulkin, 855 F.3d 1312, 1320–21 (Fed. Cir. 2017).

[57] Hagel & Horan, *supra* note 53, at 65 ("[T]he VA is under no duty to identify those veterans and make them whole. It is, rather, up to the individual veteran to discover the court's precedent and ask for a readjudication of his or her case based upon that decision and a claim of clear and unmistakable error.").

Given these concerns, after the passage of the VJRA, legal scholars began to propose that the CAVC adopt a mechanism that is expressly designed to benefit large groups of claimants who are similarly situated and may face difficulty litigating their claim individually—the class action.[58] The class action mechanism has several key features which make it an attractive option for adjudicating large volumes of claims.[59] First, it can improve the likelihood that claimants are able to be represented by competent counsel because a large class action may attract attorneys willing to represent the class where a lone claimant could not afford to retain counsel.[60] Second, class actions encourage more efficient adjudication of claims, particularly when those claims are factually and legally similar.[61] Finally, class action adjudication encourages the "uniform application of law" by treating similarly situated claimants in a consistent manner.[62]

Despite these potential benefits, the CAVC repeatedly rejected the creation of a class action mechanism for the first twenty-eight years of its existence, reasoning that entertaining class actions would be a violation of the court's jurisdictional statutes,[63] as well as inappropriate and unnecessary for an appellate court that was capable of issuing precedential decisions.[64] As of 2017, the CAVC stood alone as the only

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[58] *Id.* ("Another question that may receive consideration in the future is whether the court should hear class action suits as a possible mechanism to compel correction of a systemic error."); *see also* ABA REPORT, *supra* note 14, at 7 (recommending that Congress "authorize the CAVC to certify class actions" because "the lack of this procedure is unfair to many veterans").

[59] *See* Sant'Ambrogio & Zimmerman, *supra* note 15, at 1649–50.

[60] *Id.* at 1649 (citing Adam S. Zimmerman, *Funding Irrationality*, 59 DUKE L.J. 1105, 1115 (2010) ("Class certification is thought to enable litigation when damages are too small for individuals to justify the high costs of retaining counsel.")).

[61] *Id.* at 1650 (citing 1 WILLIAM B. RUBENSTEIN ET AL., NEWBERG ON CLASS ACTIONS § 1.9 (5th ed. 2015) ("Class actions are particularly efficient when . . . the courts are flooded with repetitive claims involving common issues.")).

[62] *Id.*; *see also* Ebanks v. Shulkin, 877 F.3d 1037, 1040 (Fed. Cir. 2017) (reasoning that systemic issues that affect large groups of veterans are "best addressed in the class-action context, where the court could consider class-wide relief").

[63] *See* Am. Legion v. Nicholson, 21 Vet. App. 1, 8 (2007) ("Congress has expressly limited our jurisdiction to addressing only appeals and petitions brought by individual claimants."); *see also* Monk v. McDonald, No. 15-1280, 2015 WL 3407451, at *3 (Vet. App. May 27, 2015) ("[The appellant] fails to appreciate the Court's long-standing declaration that it does not have the authority to entertain class actions."), *rev'd and remanded sub nom.* Monk v. Shulkin, 855 F.3d 1312 (Fed. Cir. 2017).

[64] *See* Lefkowitz v. Derwinski, 1 Vet. App. 439, 440 (1991) (holding that "such a procedure is unnecessary in light of the binding effect of this Court's published opinions as precedent in pending and future cases"); *see also* Harrison v. Derwinski, 1 Vet. App. 438, 438 (1991) (holding the same); *Monk*, 2015 WL 3407451, at *3 ("[T]o do so would be both unwise and unnecessary.") (citation omitted).

non-Article III court to conclude that it lacked the authority to entertain class actions.[65]

Then, in a 2017 case which became known as "*Monk II*," the Federal Circuit overturned nearly three decades of CAVC precedent and held that the CAVC *did* have the authority to entertain class actions in the context of petitions for writs of mandamus under the All Writs Act (AWA).[66] Two years later, in *Skaar v. Wilkie*, the CAVC itself held that it had even broader authority to entertain class actions which aggregated individual appeals of BVA decisions, even where some members of the class did not have final decisions.[67] Allowing class actions at the CAVC represented a monumental shift and opened new avenues of litigation for veterans and advocates.[68]

The CAVC, however, has always viewed its ability as an appellate court to issue precedential decisions as inherently superior to the class action vehicle.[69] In that vein, in *Skaar v. Wilkie*—one of the first major cases where a claimant requested class certification arising from the appeal of an individual benefits decision following *Monk II*—the CAVC went beyond the traditional requirements of Rule 23 of the Federal Rules of Civil Procedure ("Rule 23").[70] The court held that all litigants must also overcome a rebuttable presumption that a precedential decision on the individual case of the proposed class representative would be superior to the certification of a class action.[71] On November 10, 2020, the court officially codified this presumption as part of a set of newly published revisions to their Rules of Practice and Procedure.[72]

The CAVC based its decision to add a rebuttable presumption against the certification of class actions on the arguably questionable premise that their "ability to render binding precedential decisions will ordinarily be adequate."[73] As this Comment will demonstrate below, not only are precedential decisions vanishingly rare, but they suffer from limitations such as lack of notice, inadequate representation of veterans throughout the entire claims adjudication process, and failures on the

65 Sant' Ambrogio & Zimmerman, *supra* note 15, at 1654.

66 Monk v. Shulkin, 855 F.3d 1312, 1318 (Fed. Cir. 2017); *see also* 28 U.S.C. § 1651(a).

67 Skaar v. Wilkie, 32 Vet. App. 156, 184–85 (2019).

68 *See* Monk v. Wilkie, 30 Vet. App. 167, 184 (2018) (Davis, J., concurring) ("This holding is a seismic shift in our precedent, departing from nearly 30 years of this Court's case law."), *aff'd*, Monk v. Wilkie, 978 F.3d 1273 (Fed. Cir. 2020).

69 *See Skaar*, 32 Vet. App. at 196.

70 *Id*.

71 *Id.* (citation omitted).

72 Order, *In Re*: Rules of Practice and Procedure, Misc. No. 12-20 (Vet. App. Nov. 10, 2020), https://www.uscourts.cavc.gov/documents/MiscOrder12-20.pdf.

73 *Skaar*, 32 Vet. App. at 196.

part of the VA to adhere to the court's decisions. The presumption against the certification of class actions also puts the CAVC out of step with the rest of the federal court system and places an unnecessary hurdle in the path of veterans.

III. TRACING THE DEVELOPMENT OF THE CAVC'S REJECTION OF CLASS ACTIONS

Prior to the passage of the VJRA, veterans had been able to pursue class actions in federal district courts against the VA for the denial of benefits. Courts evaluated certification of those classes by the well-known standards of Rule 23 and treated them much like any other class action.[74] In *Nehmer v. U.S. Veterans' Administration*, a pre-VJRA case, a class of veterans who had been exposed to the herbicide dioxin during their military service challenged a VA regulation that recognized only a single dioxin-related skin condition—chloracne—as compensable.[75] The district court recognized that the only relevant considerations in determining whether to certify a class were the requirements of Rule 23.[76] The court found that the requirements were met and certified the class.[77] Considering cross-motions for summary judgment, the court ultimately invalidated the regulation and placed a moratorium on further denials.[78] The parties reached a stipulated settlement as a result of the litigation that was eventually codified in VA regulations and remains a part of VA claims adjudication guidance to this day.[79]

Once Congress enacted the VJRA in 1989, the CAVC became the exclusive forum for judicial review of VA benefits claims and veterans lost the ability to bring similar class actions before the CAVC.[80] Until the

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[74] *See*, *e.g.*, Robison v. Johnson, 352 F. Supp. 848, 851 (D. Mass. 1973) (certifying a class of selective service registrants who had satisfactorily completed alternative civilian service and were denied veterans educational benefits), *rev'd*, 415 U.S. 361 (1974); Wayne State Univ. v. Cleland, 440 F. Supp. 811, 814 (E.D. Mich. 1977) (certifying a class of veterans enrolled in a weekend college program who had been denied full-time educational benefits), *aff'd in part, rev'd in part*, 590 F.2d 627 (6th Cir. 1978); Giusti-Bravo v. U.S. Veterans Admin., 853 F. Supp. 34, 42 (D.P.R. 1993) (approving a stipulated class settlement pursuant to Fed. R. Civ. P. 23(e) by a class of veterans from Puerto Rico and the Virgin Islands).

[75] Nehmer v. U.S. Veterans' Admin., 118 F.R.D. 113, 115–16 (N.D. Cal. 1987).

[76] *Id*. at 116 (citing Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178 (1974)).

[77] *Id*. at 125.

[78] Nehmer v. U.S. Veterans' Admin., 712 F. Supp. 1404, 1423 (N.D. Cal. 1989).

[79] *See* 38 C.F.R. § 3.816(a) (2019).

[80] *See Legislative Hearing on H.R. 761, H.R. 2243, H.R. 3485, H.R. 3544, and Draft Legislation Before the H. Subcomm. on Disability Assistance and Mem'l Affs. of the Comm. on Veterans' Affs.*, 111th Cong. 47 (2009) (statement of Barton F. Stichman, Joint Executive Director, National Veterans Legal Services Program) ("[T]he ability of a veteran or veterans organization to file a class action ended with the VJRA.") (citing Lefkowitz v. Derwinski, 1 Vet. App. 439 (1991)).

Federal Circuit's landmark decision in *Monk II* in 2017, the CAVC held firm to the idea that it was categorically prohibited from entertaining class actions by its jurisdictional statute. The court also repeatedly expressed the view that class actions would be unnecessary due to its ability to issue binding precedential decisions. After *Monk II*, the CAVC had to grapple with how it would handle the certification of class actions and how its pre-*Monk II* jurisprudence would be impacted by the Federal Circuit's decision. Section A below will explore the development of the CAVC's stance towards class actions in the Pre-*Monk II* era. Section B will explore the landmark *Monk II* decision, and how the Federal Circuit's reasoning began to reshape the class action landscape at the CAVC. Section C will examine the CAVC's decision in *Skaar v. Wilkie* and the codification of the rebuttable presumption against the certification of class actions.

A. *The CAVC in the Pre-*Monk II *Era*

After the VJRA established the CAVC, the court first considered its authority to establish a class action procedure in two cases decided on the same day: *Harrison v. Derwinski*, and *Lefkowitz v. Derwinski*. At the time, it was not clear whether Congress—in conferring exclusive jurisdiction over veterans claims on the CAVC—intended for veterans to be able to continue to bring class actions before the CAVC as they had previously in federal district courts.[81] The CAVC had to determine whether Congress intended to grant it such authority; in two short, virtually identical, per curiam opinions, the court held that it did not have such authority and denied both appellants' petitions to establish a class action procedure.[82]

The court's opinions in both cases were grounded primarily in a three-part plain-text interpretation of its jurisdictional statutes.[83] First, the court looked to 38 U.S.C. § 7252, which expressly limits the jurisdiction of the CAVC to reviewing decisions of the BVA.[84] Next, the court pointed out that 38 U.S.C. § 7261(c) prohibits it from holding trials de novo.[85] Finally, the court noted that 38 U.S.C. § 7266 requires that each individual aggrieved by a BVA decision file an individual notice of

[81] *Id.* ("When Congress enacted the [VJRA] in 1988, it inadvertently erected a significant roadblock to justice. . . . Congress failed to address clearly the authority of the CAVC and the Federal Circuit to certify a case as a class action.").

[82] Lefkowitz v. Derwinski, 1 Vet. App. 439, 440 (1991); Harrison v. Derwinski, 1 Vet. App. 438, 438–39 (1991).

[83] *See Harrison*, 1 Vet. App. at 438–39; *Lefkowitz*, 1 Vet. App. at 440.

[84] *Id.*

[85] *Id.*

appeal.[86] With these three statutes read together, the court believed it "lack[ed] the power to adopt a rule" for class actions because it was limited to hearing only appeals from individual veterans who had received a final BVA decision and filed a notice of appeal where the court could rule on the closed administrative record.[87]

The opinions also stated, without any elaboration, that a class action procedure "in this appellate court would be highly unmanageable," without addressing the fact that there was no longer a non-appellate forum where veterans would be able to bring class action claims.[88] Finally, the court stated that class actions were "unnecessary in light of" the CAVC's ability to issue binding, precedential opinions.[89]

In a concurrence in *Harrison*, Judge Kramer posited that the court might have the power to aggregate claims if every claimant met the jurisdictional requirements.[90] Hence, under this proposed approach, a class could be formed by a group of veterans who had all fully litigated their appeals up through the BVA and received a final decision. Judge Kramer also gave the first indication of a willingness to consider class actions under the All Writs Act.[91] Judge Kramer stated that "the Court may have the power to entertain class actions" under the AWA "in appropriate situations," but did not indicate what those situations might be.[92]

The CAVC next addressed the scope of its jurisdictional statutes and whether there were any avenues for claim aggregation in *American Legion v. Nicholson*.[93] Although the plaintiff was not explicitly attempting to certify a class action, the court took the opportunity to more fully explain the view that its jurisdictional statutes strictly confined it to hearing only individual appeals.[94] Judge Hagel would eventually cite *American Legion*, alongside *Harrison* and *Lefkowitz*, in

86 *Id.*

87 *See id.*

88 *Id*.

89 *Harrison*, 1 Vet. App. at 438–39; *Lefkowitz*, 1 Vet. App. at 440.

90 *Harrison*, 1 Vet. App. at 439 (Kramer, J., concurring).

91 The All Writs Act allows "all courts established by Act of Congress" to "issue all writs necessary or appropriate in aid of their respective jurisdictions." 28 U.S.C. § 1651(a). The AWA was intended to give Article I courts flexible powers to create procedural tools to aid them in the performance of their duties. *See* Price v. Johnston, 334 U.S. 266, 282 (1948) (referring to the AWA as "a legislatively approved source of procedural instruments designed to achieve 'the rational ends of law'").

92 *Harrison*, 1 Vet. App. at 439 (Kramer, J., concurring).

93 *See* American Legion v. Nicholson, 21 Vet. App. 1 (2007).

94 *See* Am. Legion v. Nicholson, 21 Vet. App. 1, 4 (2007).

the denial of class certification that led to *Monk II*.[95] Here, the American Legion did not attempt to certify a class action but rather sought a writ of mandamus directing the VA to stay adjudication on a class of claims brought by "blue water" Vietnam veterans[96] seeking compensation for diseases related to their exposure to defoliating herbicides.[97] Perhaps dissuaded by the existing precedent on class actions, the American Legion instead argued that it had associational standing on behalf of all the blue water Vietnam veterans and asked the CAVC for a writ of mandamus to resume VA processing of blue water herbicide claims pending the resolution of the appeal of *Haas v. Nicholson*.[98]

In *Haas*, an individual Vietnam veteran had appealed a decision by the BVA denying him service-connected disability benefits for conditions that he alleged were caused by his exposure to Agent Orange while aboard naval ships in the offshore waters around Vietnam.[99] The VA denied Mr. Haas's claim because he did not "set foot on land in the Republic of Vietnam" and the VA could not, therefore, presume that he had actually been exposed to Agent Orange.[100] A three-judge panel heard *Haas* and concluded that the VA's interpretation of the regulation was unlawful and that veterans who had served in the waters near Vietnam were entitled to a presumption of exposure.[101]

The decision in *Haas* was, on its face, a monumental win for blue water Vietnam veterans who had fought for decades to obtain disability benefits for the injuries they suffered as a result of being exposed to Agent Orange and other defoliating herbicides.[102] As a precedential

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[95] *See* Monk v. McDonald, No. 15-1280, 2015 WL 3407451, at *3 (Vet. App. May 27, 2015), *rev'd and remanded sub nom.* Monk v. Shulkin, 855 F.3d 1312 (Fed. Cir. 2017).

[96] A "blue water" veteran is a servicemember who served on a ship in the open waters surrounding Vietnam but did not set foot on shore. *See Blue Water Navy Veterans and Agent Orange Exposure*, U.S. DEP'T OF VETERANS AFFS., https://www.publichealth.va.gov/exposures/agentorange/locations/blue-water-veterans.asp (last visited Oct. 8, 2021).

[97] *Am. Legion*, 21 Vet. App. at 2.

[98] *Id*. at 2–3; *see also* Haas v. Nicholson, 20 Vet. App. 257 (2006). An association may have standing to bring a suit on behalf of its members, even where there is no injury to the association itself, "when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Hunt v. Washington State Apple Advert. Comm'n, 432 U.S. 333, 343 (1977).

[99] Haas v. Nicholson, 20 Vet. App. 257, 258–59 (2006), *rev'd and remanded sub nom.* Haas v. Peake, 525 F.3d 1168 (Fed. Cir. 2008).

[100] *Id*. at 259.

[101] *Id*. at 273.

[102] *See* Rory E. Riley-Topping, *Presumptive Benefits to Blue Water Navy Veterans are a Major Win*, THE HILL (Jan. 30, 2019), https://thehill.com/opinion/national-security/427600-presumptive-benefits-to-blue-water-navy-veterans-are-a-major-win.

decision, *Haas* should have, by law, bound the VA to presume exposure for all of the other thousands of blue water veterans.[103]

Rather than implement this new precedent, the Chairman of the BVA issued a memorandum, at the direction of the Secretary of Veterans Affairs, halting the adjudication of all claims for disability compensation based on offshore herbicide exposure.[104] Instead of allowing the many blue water veterans with pending claims and appeals to benefit from the CAVC's precedential decision, the VA simply stopped processing their claims while it appealed the *Haas* decision to the Federal Circuit.[105]

To allow these veterans to benefit from Mr. Haas's win and the precedential decision issued by the CAVC, the American Legion sought a writ of mandamus directing the VA to resume processing claims in accordance with the *Haas* decision.[106] Perhaps seeing an alternative avenue in Judge Kramer's dissents in *Harrison* and *Lefkowitz*, the American Legion also argued that the CAVC had jurisdiction to hear its associational claim on behalf of its members, pursuant to the AWA.[107]

Judge Greene wrote the majority opinion, joined by Judges Moorman, Lance, and Davis.[108] The court concluded that 38 U.S.C. §§ 7252(a) and 7266(a) limited its jurisdiction to decisions of the BVA brought by "a person adversely affected" and indicated that the plain meaning of the statutes leans towards the interpretation that a "person" is an individual.[109]

The majority also discussed the legislative history of the VJRA. It concluded that Congress did not intend the CAVC to go beyond hearing individual claims by veterans who had received final decisions from the VA.[110] In the majority's view, the proper role of Veterans Service Organizations like the American Legion should be representing and assisting individual claimants in bringing their appeals rather than bringing aggregated claims on behalf of their members as a whole.[111]

The majority also addressed the idea of jurisdiction for aggregated claims under the AWA.[112] The court concluded that the AWA is limited to writs "in aid of" the CAVC's jurisdiction, and since its jurisdiction is

103 *See* 38 U.S.C. § 7261(a)(1)-(2).
104 Am. Legion v. Nicholson, 21 Vet. App. 1, 2 (2007).
105 *Id*.
106 *Id*.
107 *Id.* at 3, 7.
108 *Id.* at 2, 9, 11–12.
109 *Id.* at 4.
110 *Am. Legion*, 21 Vet. App. at 4–5.
111 *Id.* at 6–7.
112 *Id.* at 7–8; *see also* 28 U.S.C. § 1651(a).

limited to individual claims, so too are writs *in aid of* such jurisdiction.[113] In the majority's view, Congress had "impose[d] a prudential limitation" upon the court's exercise of jurisdiction over claims made only by individuals.[114]

In a dissent, Judge Kasold argued that while the CAVC's *appellate* jurisdiction is limited to reviewing individual board decisions, the court possesses independent authority under the AWA to grant "extraordinary relief" *in aid of* that jurisdiction.[115] Judge Kasold also took the position that the legislative history cited by the majority was inapplicable to the situation at hand because none of it directly addressed the question of associational standing in the context of the AWA.[116]

In a separate dissent, Judge Hagel argued that a writ of mandamus under the AWA is appropriate because it is not dependent on the individual circumstances of the American Legion's members and would apply uniformly to all members.[117] Judge Hagel "strongly agree[d]" that the focus of the court should be on individual claims and emphasized that "very limited circumstances . . . would support" associational standing.[118]

During the same period that the court was rendering these decisions—holding that its authorizing statute prevented it from entertaining class actions and associational standing claims—the court was also actively resisting legislative reforms that would have amended the VJRA to grant it such authority. The Veterans Appellate Review Modernization Act was draft legislation proposed in 2009 that would have, among other things, explicitly granted the CAVC the jurisdiction to entertain class actions and adopted Rule 23 as the framework for certification.[119] Judge Kasold appeared at committee hearings on the bill and opposed those provisions on behalf of the court, saying that "we don't see the need for such explicit authority" and stating—somewhat at odds with the court's published decisions on the matter—that "it is

113 *Am. Legion*, 21 Vet. App. at 7–8.

114 *Id.* at 8.

115 *Id*. at 9 (Kasold, J., dissenting).

116 *Id*. at 10–11.

117 *Id*. at 11 (Hagel, J., dissenting).

118 *Am. Legion*, 21 Vet. App. at 11–12.

119 *Legislative Hearing on H.R. 761, H.R. 2243, H.R. 3485, H.R. 3544, and Draft Legislation Before the H. Subcomm. on Disability Assistance and Mem'l Affairs of the Comm. on Veterans' Affairs*, 111th Cong. 2, 43 (2009). Portions of this draft legislation were ultimately introduced as the Veterans Appeals Improvement and Modernization Act of 2009, H.R. 4121, 111th Cong. (2009).

not clear that we don't already have the authority."[120] Judge Kasold seemed to hold open the possibility that the court did, in fact, have the authority to certify class actions and took the position that the holding in *Lefkowitz* was that class actions were simply unnecessary—not that they were, as a rule, beyond the court's authority.[121] Ultimately the grant of class action authority was dropped from the final version of the legislation.[122]

In 2011, the now-Chief Judge Kasold appeared before the committee again and opposed certain provisions of H.R. 1484, the Veterans Appeals Improvement Act of 2011, arguing that class actions were not needed due to the court's ability to issue precedential decisions.[123] The initial draft of the bill included the creation of a commission to study whether the CAVC "should have the authority to hear class action or associational standing cases."[124] Chief Judge Kasold argued to the committee that class actions were unnecessary because the court's published cases were "totally binding on the [VA]," and that if an individual veteran secured a win on a particular issue, the VA "would then take action" on all other veterans' claims in accordance with that decision.[125] After Judge Kasold's testimony, Congress dropped the creation of the commission from the bill.[126]

The first step on the road towards the court's eventual acceptance of class actions came in 2015 when the CAVC first heard the case of Vietnam veteran Conley Monk and rendered a decision that came to be known as "*Monk I*."[127] In 2015, Mr. Monk brought a petition for a writ of

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120 *Id*. at 9. Judge Kasold appeared on behalf of then-Chief Judge William P. Green, who was "unable to attend." *Id*. at 42.

121 *Id.* at 43.

122 *Compare Legislative Hearing on H.R. 761, H.R. 2243, H.R. 3485, H.R. 3544, and Draft Legislation Before the H. Subcomm. on Disability Assistance and Mem'l Affairs of the Comm. on Veterans' Affairs*, 111th Cong. 9 (2009) (describing the sections of the draft legislation as including the creation of a commission, a grant of class action authority, and provisions on the assignments of error), *with* Veterans Appeals Improvement and Modernization Act of 2009, H.R. 4121, 111th Cong. §§ 3, 4 (2009) (incorporating the provisions on assignment of error and the creation of a commission).

123 *Legislative Hearing on H.R. 811, H.R. 1407, H.R. 1441, H.R. 1484, H.R. 1627, H.R. 1647, and H. Con. Res. 12 Before the H. Subcomm. on Disability Assistance and Mem'l Affairs of the Comm. on Veterans' Affairs*, 112th Cong. 19–21 (2011).

124 Veterans Appeals Improvement Act of 2011, H.R. 1484, 112th Cong. §3 (as introduced in the House, Apr. 12, 2011).

125 *Legislative Hearing on H.R. 811, H.R. 1407, H.R. 1441, H.R. 1484, H.R. 1627, H.R. 1647, and H. Con. Res. 12 Before the H. Subcomm. on Disability Assistance and Mem'l Affairs of the Comm. on Veterans' Affairs*, 112th Cong. 21 (2011).

126 *See* Veterans Appeals Improvement Act of 2011, H.R. 1484, 112th Cong. (as referred to Senate committee, June 6, 2011).

127 *See* Monk v. Tran, No. 2020-1305, 2021 WL 244309, at *1 (Fed. Cir. Jan. 26, 2021) (referring to the decision as "*Monk I*").

mandamus before the CAVC challenging the VA's "pervasive and unlawful delay[s] in adjudicating" the appeals of disability benefits claims.[128] Mr. Monk had filed a claim for benefits that was denied, and he appealed the denial of that claim to the BVA in July of 2013.[129] At the time of his petition to the CAVC in May of 2015, his appeal had been pending before the BVA for 20 months, and nearly three years had elapsed since the filing of the initial claim.[130] Mr. Monk asked that the CAVC issue a writ of mandamus and "compel the Secretary promptly to decide his claim and that of thousands of similarly situated veterans."[131] Mr. Monk alleged that the VA's failure to respond to his appeal for over 20 months "amounted a constructive denial of benefits."[132]

Mr. Monk's petition recognized that the CAVC had previously declined to adopt class action or aggregate procedures.[133] He took the position that the court possessed the authority under the AWA to establish a class action procedure.[134] Mr. Monk argued that, "[f]or practical and policy reasons," the court should use its inherent rulemaking authority to create a class action mechanism.[135] He cited a law review article written by Judge Hagel before joining the court, in which Hagel acknowledged that class actions may be a necessary tool at the CAVC to "compel correction" of the types of "systemic error[s]" by the VA that would be untenable for individual veterans to litigate one-by-one.[136]

Judge Hagel decided *Monk I* in a non-precedential opinion.[137] Judge Hagel summarily rejected the possibility of a class action based on the binding precedent established by the en banc court in *Lefkowitz*, *Harrison*, and *American Legion*.[138] In the face of that binding precedent, Judge Hagel concluded that the CAVC lacked the authority to certify a class action and that "[in] the absence of such authority, no other arguments matter."[139]

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128 Monk v. McDonald, No. 15-1280, 2015 WL 3407451, at *1 (Vet. App. May 27, 2015), *rev'd and remanded sub nom.* Monk v. Shulkin, 855 F.3d 1312 (Fed. Cir. 2017).

129 *Monk*, 2015 WL 3407451, at *1.

130 *Id.*

131 *Id.* at *2.

132 *Id.* at *1.

133 *Id.* at *2.

134 *Monk*, 2015 WL 3407451, at *1–2.

135 *Id.* at *2.

136 *Id.*; *see also* Hagel & Horan, *supra* note 53, at 65.

137 *Monk*, 2015 WL 3407451, at *1.

138 *Id.* at *3.

139 *Id.*

B. Monk II*: The Federal Circuit Upends Three Decades of CAVC Precedent*

Conley Monk appealed the CAVC's denial of his petition for class certification to the U.S. Court of Appeals for the Federal Circuit, and their groundbreaking decision came to be known as "*Monk II*."[140] The Federal Circuit had previously seemed to agree—or at least declined to disagree—with the CAVC in two non-precedential decisions holding that the CAVC lacked the authority to certify class actions but had never squarely ruled on the issue in a precedential decision.[141] But in a sudden reversal of nearly thirty years of CAVC precedent in *Monk II*, the Federal Circuit overruled the CAVC's *Monk I* decision and held that the CAVC did, in fact, have the authority to certify class actions and develop procedures for the aggregation of claims.[142]

Circuit Judge Reyna, writing for the unanimous three-judge panel, rebutted each of the lines of reasoning previously used by the CAVC to reject class actions. Judge Reyna pointed out that veterans were able to bring class actions prior to the VJRA and noted that—although the legislative history indicated an intent for the CAVC to *focus* on individual claims—there was nothing in the legislative history showing that Congress intended to explicitly remove or preclude veterans' ability to bring class actions at the CAVC when they had previously been able to bring them in federal district courts.[143]

Judge Reyna then examined the CAVC's narrow reading of its jurisdictional statutes, which it first applied in *Lefkowitz* and *Harrison*, and concluded that such a strict interpretation of the statutes was misguided.[144] The Federal Circuit reminded the CAVC that its overarching statutory mandate codified in the VJRA was to "compel action of the Secretary unlawfully withheld or unreasonably delayed."[145] It reasoned that this explicit grant of authority to compel such action, and the attendant authority to "prescribe rules of practice and procedure" also explicitly granted by Congress to achieve that end, overrode the CAVC's narrow view of its own jurisdiction based on their overly technical combination of § 7252, § 7261(c), and § 7266.[146]

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140 Monk v. Shulkin, 855 F.3d 1312, 1315 (Fed. Cir. 2017); *see also* Monk v. Tran, No. 2020-1305, 2021 WL 244309, at *1 (Fed. Cir. Jan. 26, 2021) (referring to the decision as "*Monk II*").

141 *See Monk*, 855 F.3d at 1321 n.7 (citing Spain v. Principi, 18 Fed. App'x. 784, 786 (Fed. Cir. 2001); Adeyi v. McDonald, 606 F. App'x 1002, 1004 (Fed. Cir. 2015)).

142 *Monk*, 855 F.3d at 1318, 1321.

143 *Id.* at 1319.

144 *Id.* at 1320.

145 *Id.* (quoting 38 U.S.C. § 7261(a)(2)).

146 *Id.*

The Federal Circuit also validated Judge Kassold's dissent in *American Legion* by clarifying that the CAVC's authority under the AWA is not limited to the strict jurisdictional boundaries that apply to individual appeals but is a "legislatively approved . . . instrument[]" that broadly empowers the CAVC to achieve equity and "fill gaps in their judicial power."[147]

Judge Reyna also highlighted a number of compelling policy rationales for the adoption of a class action mechanism at the CAVC and why such a procedure would "promot[e] efficiency, consistency, and fairness, and improv[e] access to legal and expert assistance by parties with limited resources."[148] First, Judge Reyna noted that "case law is replete" with examples of the VA dodging the effect of judicial review by acting swiftly to moot individual mandamus petitions just before the CAVC could rule on them and reasoned that a class action mechanism would help put an end to this practice.[149] Judge Reyna also pointed out that the VA uses similar tactics—mooting individual cases that are scheduled for precedential review—to evade unfavorable precedential decisions.[150]

The Federal Circuit also called out the CAVC on its extremely low number of precedential decisions each year and opined that perhaps class actions would enable the CAVC to "consistently adjudicate cases by increasing its prospects" of issuing binding opinions.[151] Amicus curiae briefs highlighted the inconsistency of CAVC adjudications as a major factor for consideration. In one brief cited in Judge Reyna's opinion, a group of former General Counsels for the VA argued that "the CAVC's practice of disposing of cases on a piecemeal basis undermines the precedential value of its decisions."[152] These amici pointed out that the CAVC utilizes the "narrowest possible grounds policy" to dispose of a case by remanding it back to the BVA as soon as a single error—legal or factual—is identified.[153] As a result of this policy, the CAVC's decisions

147 *Id.* at 1318; *see also* Am. Legion v. Nicholson, 21 Vet. App. 1, 9 (2007) (Kasold, J., dissenting).

148 *Monk*, 855 F.3d at 1320.

149 *Id.* at 1320–21 (citing Young v. Shinseki, 25 Vet. App. 201, 215 (2012); Seller v. McDonald, No. 16-2768, 2016 WL 5828055, at *2 (Vet. App. Sept. 30, 2016); Dotson v. McDonald, No. 16-2813, 2016 WL 5335437, at *1 (Vet. App. Sept. 23, 2016); Dalpiaz v. McDonald, No. 16-2602, 2016 WL 4702423, at *1 (Vet. App. Sept. 8, 2016)).

150 *Monk*, 855 F.3d at 1321 (citing Brief for Am. Legion et al. as Amici Curiae Supporting Appellant at 18–25).

151 *Id.*

152 Brief for Former Gen. Couns. of the Dep't of Veterans Affairs as Amicus Curiae at 17, Monk v. Shulkin, 855 F.3d 1312 (Fed. Cir. 2017) (No. 15-7092), 2015 WL 9311513.

153 *Id.* at 17–18 (citing Best v. Principi, 15 Vet. App. 18, 19-20 (2001); Mahl v. Principi, 15 Vet. App. 37, 38 (2001)).

routinely "dispose of cases raising the same legal issue on entirely different grounds, never reaching the common question of law."[154]

The Federal Circuit concluded that there is "no reason" the CAVC cannot adjudicate class actions because the CAVC is "no different in this respect from, for example, the EEOC or bankruptcy courts."[155] This comparison of the CAVC to the EEOC and bankruptcy courts severely undercuts the CAVC's long-held view of itself primarily as an appellate court issuing precedential decisions.[156] It seemed to belie a sense on the Federal Circuit that the CAVC is more properly viewed as a part of the Article I administrative adjudication system than it is an appellate court akin to the Federal Circuit itself and the other Article III circuit courts of appeal.[157]

Following the Federal Circuit's decision, Mr. Monk returned to the CAVC, and it formally recognized its authority to certify a class action in the mandamus context but ultimately decided not to certify Mr. Monk's proposed class.[158] Recognizing that it would likely adopt formal rules to govern class action certification at some point in the future, the court decided that it would use Rule 23 as a guide in the interim.[159] The court applied the well-known factors of Rule 23(a)—numerosity, commonality, typicality, and adequacy—and the requirement that a class action fall within one of the subcategories of Rule 23(b).[160]

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154 *Id.* at 18.

155 *Monk*, 855 F.3d at 1321.

156 U.S. bankruptcy courts are subsidiary to the federal district courts and exercise jurisdiction over bankruptcy matters only by referral from the district court, which can be withdrawn at any time. 28 U.S.C. § 1334(a); 28 U.S.C. § 157(a), (d). Class actions at the EEOC are conducted through an internal agency process and adjudicated by administrative judges. 29 C.F.R. § 1614.204 (2020). An amicus brief filed by fifteen law professors pointed out to the Federal Circuit that many other Article I "administrative courts of appeal" use methods of case aggregation to consolidate cases, such as the "Civilian Board of Contract Appeals, the HHS Departmental Appeals Board, the Department of Agriculture, OMHA, and the Environmental Appeals Board." Corrected Amicus Brief and Appendix of 15 Administrative Law, Civil Procedure, and Federal Courts Professors in Support of Appellant and Reversal at 15, Monk v. McDonald, No. 15-1280, 2015 WL 3407451 (Vet. App. May 27, 2015), *rev'd and remanded sub nom.* Monk v. Shulkin, 855 F.3d 1312 (Fed. Cir. 2017) (No. 15-7092), 2015 WL 8485190.

157 *See Veterans' Disability Compensation: Forging a Path Forward: Hearing Before the S. Comm. on Veterans' Affairs,* 111th Cong. 36 (2009) (Statement of Prof. Michael P. Allen) ("[T]here is at times an unusual tension between the Veterans Court and the Federal Circuit . . . [O]ne cannot read the opinions of these bodies without being left with the firm conviction that there are occasions on which each court displays a certain lack of respect for the other . . . [T]his tension is a product of the current structure of judicial review.").

158 Monk v. Wilkie, 30 Vet. App. 167, 181 (2018), *aff'd*, No. 2019-1094, 2020 WL 6141013 (Fed. Cir. Oct. 20, 2020).

159 *Id.* at 170.

160 *Id.* at 174; *see also* FED. R. CIV. P. 23.

Ultimately, the court held that Mr. Monk's proposed class did not satisfy the requirement of commonality.[161] Notably, however, the court did not add an additional presumption against class actions, and Judge Allen even took time in a concurrence to commend the plurality's adoption of the Rule 23 framework as "wise[]" given its "long history in the Federal courts."[162] Judge Allen also made a point to remind the court that although individual precedential decisions bind the VA, they are small in number and difficult for individual claimants to enforce.[163]

After *Monk II*, the notion that precedential decisions make certification of class actions unnecessary began to resurface in the CAVC's response to two motions for class certification decided in 2019: *Godsey v. Wilkie* and *Wolfe v. Wilkie*.[164] In both cases, after evaluating the proposed classes under the standard Rule 23(a) factors, the court elected to evaluate the "superiority" of a class action in a manner analogous to a 23(b)(3) claim, despite acknowledging that the parties were seeking the certification of what would normally be a 23(b)(2) class.[165] Both decisions acknowledged the burden of obtaining and enforcing individual precedential decisions.[166] But by electing to go through the analysis of superiority where Rule 23 would not ordinarily require it, the court began to resurrect the fundamental assumption from *Harrison* and *Lefkowitz* that the question of class certification must begin with the assumption that a precedential panel decision is generally preferable.[167] This assumption also contained within it a deeper, unstated, and flawed premise—discussed more fully below—that enforceable precedential decisions are an option that is realistically available to most individual veterans.

161 *Monk*, 30 Vet. App. at 181.

162 *Id.* at 188 (Allen, J., concurring in part).

163 *Id.* at 200.

164 *See* Godsey v. Wilkie, 31 Vet. App. 207 (2019); Wolfe v. Wilkie, 32 Vet. App. 1 (2019).

165 Godsey v. Wilkie, 31 Vet. App. 207, 224 (2019); Wolfe v. Wilkie, 32 Vet. App. 1, 32–33 (2019).

166 *See Godsey*, 31 Vet. App. at 224 ("[D]eciding this petition as a class empowers the Court to monitor and enforce its order more easily and efficiently than would be possible through the filing of individual petitions seeking compliance in each claimant's case."); *see also Wolfe*, 32 Vet. App. at 33 ("To force class members to proceed through the normal appellate process individually would amount to a monumental waste of agency and judicial resources in a system already rife with delay.").

167 *See* discussion *supra* Section III.A.

C. *The CAVC Gives and Takes Away:* Skaar v. Wilkie

In 1966, a U.S. Air Force bomber carrying four nuclear warheads collided with a refueling tanker in the airspace over Palomares, Spain.[168] Emergency parachutes on two of the warheads failed to deploy and they impacted the ground at high speed, causing them to explode in sub-nuclear detonations that scattered radioactive plutonium across the Spanish countryside.[169] Approximately 1,600 U.S. servicemembers—most low-ranking Air Force personnel with no specialized training in radioactive cleanup—were sent to clean up the debris with little to no protective gear, each spending anywhere from several weeks to several months exposed to the plutonium.[170] Many of these servicemembers developed cancers, blood disorders, cardiovascular conditions, and other diseases, but the VA denied their applications for disability compensation.[171] The Air Force had collected data on the plutonium levels at the cleanup site, but the VA decided to discard that data because it showed levels of exposure that the VA assumed were inaccurate because they were so high.[172] Then, after having discarded the data showing levels of exposure that would have substantiated the Palomares veterans' claims, the VA denied them disability benefits.[173]

One of the Air Force veterans who spent years litigating his claim for benefits through the VA brought a petition to the CAVC for class certification on behalf of the Palomares veterans.[174] Although the CAVC had recently granted class action certifications in the context of petitions for a writ of mandamus in *Wolfe* and *Godsey*, this was the first time the CAVC considered whether to grant class certification in the context of aggregating the appeals of the merits of multiple individual BVA decisions.[175] In a move described as "herald[ing] the beginning of an era," the court held that it would entertain class actions outside of the

168 Skaar v. Wilkie, 32 Vet. App. 156, 167 (2019).

169 *Id.* at 168.

170 Dave Phillips, *Legal Win is Too Late for Many Who Got Cancer After Nuclear Clean-Up*, N.Y. TIMES (Feb. 11, 2020), https://www.nytimes.com/2020/02/11/us/palomares-air-force-nuclear.html; Dave Collins, *Case Over 1966 US Bomb Accident in Spain Goes Before Court*, WASH. POST (Sept. 2, 2020), https://www.washingtonpost.com/health/case-over-1966-us-bomb-accident-in-spain-goes-before-court/2020/09/02/b8b62f60-ed4f-11ea-bd08-1b10132b458f_story.html.

171 Collins, *supra* note 170.

172 *Id.*; *see also Skaar*, 32 Vet. App. at 169 ("[R]ecorded urine dose intakes for Palomares veterans 'seemed unreasonably high' compared to 'environmental measurements' derived from air sampling some 15 years after the cleanup . . . .").

173 Collins, *supra* note 170.

174 *Skaar*, 32 Vet. App. at 170.

175 *Id.* at 166 ("The issue we confront here—class certification in the context of an appeal of an individual Board decision—is one of first impression.").

context of petitions for a writ of mandamus and allow the aggregation of individual benefits appeals.[176]

The court proceeded to evaluate the merits of Mr. Skaar's petition for class certification and concluded that the petition satisfied all the requirements of Rule 23(a) and 23(b)(2).[177] It then went on to add a rebuttable presumption against certifying class actions.[178] Writing for the majority, Judge Allen relied on the long-standing notion that the court's ability to issue precedential decisions was inherently superior to certification of a class action.[179] The court held that, in addition to all the usual Rule 23 requirements, the court will "presume class actions should not be certified" unless a claimant can demonstrate that a class action is "superior to other available methods for fairly and efficiently adjudicating the controversy."[180] In justifying the presumption, Judge Allen drew upon the superiority language from Rule 23(b)(3) but did not use the actual 23(b)(3) factors and applied the presumption against certification to all types of class actions.[181]

Judge Allen also made a point to strike back at the Federal Circuit's comparison of the CAVC to the EEOC and bankruptcy courts and the arguments by amici in *Monk II* comparing the court to administrative agency appeals boards, writing that "to our knowledge, we are the only appellate body in the Nation with the authority to aggregate actions in the first instance."[182] It is clear from this language that the CAVC does not see itself as akin to an administrative agency appeals board or a bankruptcy court—as it is well-established that those bodies do have the ability to aggregate[183]—but as an appellate court akin to the federal circuit courts of appeal.

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176 *Id.* at 200–01. Notably, the VA has appealed the class certification decisions in both *Skaar* and *Wolfe* to the Federal Circuit on jurisdictional grounds, seeking to substantially limit the CAVC's authority to certify classes arising from both writs and appeals. *See* Brief of Respondent-Appellant at 21, Skaar v. McDonough, Nos. 2021-1757 and 2021-1812 (Fed. Cir. Jul. 16, 2020); Brief for Respondent-Appellant at 26, Wolfe v. Wilkie, No. 2020-1958 (Fed. Cir. Jan. 19, 2020).

177 *Skaar*, 32 Vet. App. at 194.

178 *Id.* at 196 ("[W]e will presume classes should not be certified because our ability to render binding precedential decisions ordinarily will be adequate. Claimants seeking class certification can rebut this presumption . . . .").

179 *Id.*

180 *Id.* at 172.

181 *Id.* at 196–97.

182 *Id.* at 195.

183 *See* Corrected Amicus Brief and Appendix of 15 Administrative Law, Civil Procedure, and Federal Courts Professors in Support of Appellant and Reversal at 15, Monk v. Shulkin, 855 F.3d 1312 (Fed. Cir. 2017) (No. 15-7092), 2015 WL 8485190 at *15.

The *Skaar* decision established four factors that claimants can demonstrate to rebut the presumption against certifying class actions.[184] The presumption can be overcome by showing that (1) the claims are directed at the policy itself; (2) litigation of the challenge involves compiling a complex factual record; (3) the record is sufficiently complete for adjudication; and (4) there is a need for remedial, class-wide enforcement.[185] A full discussion of the merits of each of these factors would exceed the scope of this Comment and would go beyond the basic and fundamental flaw that underlies the presumption against the certification of class actions—the court's long-standing commitment to viewing itself primarily as an appellate court routinely issuing precedential panel decisions that make class actions unnecessary. In reality, the vast majority of the court's work consists of single judges disposing of the claims of individual litigants as quickly and efficiently as possible.

In crafting these factors, the court did identify some practical limitations that can make class actions difficult to manage and that, in certain cases, "render the class action format inappropriate for a particular suit."[186] Judge Allen pointed to decisions where class actions were held to be unmanageable because (1) individual class members' claims were governed by disparate sets of state laws, (2) communicating with a large class and providing the required notice and opt-out rights was too difficult, and (3) the claims of the class members "required too many individualized determinations."[187] These manageability concerns present in other federal courts are largely inapplicable at the CAVC, particularly once the requirements of Rule 23 have been met. Federal statutes and regulations govern all claims brought before the CAVC, and the commonality and typicality requirements of Rule 23 already ensure that classes are only certified where they present a common question of law and when resolution of the class claims can be accomplished by the adjudication of the claims of the class representative.[188] The VA is also uniquely positioned to provide effective notice to veterans, as they maintain access to vast databases of veteran contact information.[189]

184 *Skaar*, 32 Vet. App. at 197–98.

185 *Id.*

186 *See Skaar*, 32 Vet. App. at 196 (quoting Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 164 (1974)).

187 *Id.* at 196–97 (internal citations omitted).

188 *Id.* at 192.

189 Maria Souden, Acting Dir., VA Info. Res. Ctr., Overview of VA Data, Information Systems, National Databases and Research Uses (Oct. 7, 2019), https://www.hsrd.research.va.gov/for_researchers/cyber_seminars/archives/3694-notes.pdf (noting

The CAVC has rendered relatively few decisions on class certification since it formally implemented the rebuttable presumption in *Skaar*,[190] so it remains to be seen how difficult it will be for claimants to use the four factors to rebut the presumption against certification. Some of the decisions that have been rendered, however, are already demonstrating the court's propensity to summarily reject class certification based on their long-standing assumption that their precedential decisions are an available and enforceable remedy for most veterans.[191] In a recent decision on two consolidated cases, the court rejected both veterans' claims on the merits but also elected, in the alternative, to deny their motions for class certification.[192] Writing for the panel, Chief Judge Bartley stated that the claimants had not demonstrated that there was "a need for remedial enforcement . . . because a binding precedential decision would be adequate to provide relief to any valid prospective class members."[193] The court presumed that if the claimants were successful in challenging the validity of the regulation at issue, the VA would "immediately implement [that] precedential decision," and Judge Bartley dismissed any possibility of VA non-compliance as "hypothetical" and "unlikely."[194]

The CAVC recently granted class certification for only the fourth time in its history[195] in *Beaudette v. McDonough*.[196] The petitioners in *Beaudette* challenged the VA's interpretation of 38 U.S.C. § 1720G as

that the VA maintains the "largest integrated healthcare system" database in the country, with 20 years of data on 9 million veterans). Federal records custodians also maintain the last known home address of every single veteran upon separation from the military. *DD Form 214, Discharge Papers and Separation Documents*, NAT'L ARCHIVES, https://www.archives.gov/personnel-records-center/dd-214.

190 *See* CAVC 2020 REPORT, *supra* note 6, at 7 ("Over the course of FY 2020 . . . the Court received four requests for class certification and class action, and certified two classes.").

191 *See* Bowling v. McDonough, No. 18-5263, 2021 U.S. App. Vet. Claims. LEXIS 513, at *3 (Mar. 29, 2021) ("[I]f we were to decide the class action motion, we would deny it because appellants have not rebutted the presumption that a precedential decision would be adequate."). The court consolidated *Appling v. McDonough*, No. 19-0602, with *Bowling* and rendered a decision on class certification in both cases in the same decision. *Id*. at *2.

192 *Id.* at *10.

193 *Id*. at *12 (quoting Skaar v. Wilkie, 32 Vet. App. 156, 197 (2019)).

194 *Id*. at *16 (first quoting *Skaar*, 32 Vet. App. at 198; then quoting Ward v. Wilkie, 31 Vet. App. 233, 242 (2019)).

195 The CAVC has previously certified classes in *Godsey v. Wilkie*, 31 Vet. App. 207 (2019), *Wolfe v. Wilkie*, 32 Vet. App. 1 (2019), and *Skaar v. Wilkie*, 32 Vet. App. 156 (2019).

196 Beaudette v. McDonough, No. 20-4961, 2021 U.S. App. Vet. Claims LEXIS 671 (Apr. 19, 2021).

insulating its determinations under the Caregivers Program[197] from any form of appellate review by either the BVA or the judiciary.[198] The court held that the "unique circumstances [of the] case warrant[ed] class-wide relief."[199] Because the VA had denied claimants any form of meaningful appellate review for so long, the CAVC reasoned that the "centralized relief" afforded by a class action was necessary to remedy the issue.[200] The CAVC briefly analyzed each of the first three *Skaar* factors, noting that none are "more or less important than the others."[201] Then, the court spent the bulk of its *Skaar* analysis on the final factor stating that "*[m]ost importantly* . . . a precedential decision would not effectively inform past program claimants of their appellate rights or ensure that VA honored them."[202]

In the future, the CAVC may apply one of the first three *Skaar* factors to reject class actions due to more practical concerns such as complexity or the lack of a well-developed record.[203] But the court's class action jurisprudence up to this point, and its early decisions applying the rebuttable presumption against certification, indicate that its primary focus remains centered on using the fourth factor—the enforcement factor—to determine whether its nominal ability to render a precedential decision renders the certification of a class action unnecessary.

IV. THE REBUTTABLE PRESUMPTION AGAINST THE CERTIFICATION OF CLASS ACTIONS SHOULD BE ABANDONED BY THE CAVC

The problem with the CAVC's presumption against the certification of class actions is that it is fundamentally rooted in a flawed premise—that the alternative to certification of a class action is a precedential decision. Practically, the odds are quite low that any given veteran will be able to obtain a precedential decision where their legal position was thoroughly briefed, argued by competent counsel, and notice of that decision was then disseminated to all affected veterans and scrupulously adhered to by the VA. Logically, it does not make sense to presume that courts should deny the certification of class actions where

197 Congress established the Program of Comprehensive Assistance for Family Caregivers (Caregiver Program) to provide certain VA benefits to family members who deliver in-home personal care services to seriously disabled veterans. *See* Beaudette v. McDonough, No. 20-4961, 2021 U.S. App. Vet. Claims LEXIS 671, at *1–2 (Apr. 19, 2021).

198 *Id.* at *1.

199 *Id.* at *22.

200 *Id.* at *23.

201 *Id.* at *21.

202 *Id.* at *23 (emphasis added).

203 *See* Skaar v. Wilkie, 32 Vet. App. 156, 197–98 (2019).

only a mere possibility exists that a putative class claimant may one day obtain a published, precedential decision in an appellate court. Section A below will discuss the three major areas where practical limitations undermine the CAVC's reliance on precedential decisions to justify the rebuttable presumption: availability, enforceability, and notice. Section B will challenge the logic of denying class certification to a litigant based on the theoretical possibility that they could obtain a precedential appellate decision. The CAVC's resistance to the class action device on such grounds is simply incongruent with how other federal courts treat putative class representatives.

A. *Practical Challenges: Availability, Enforceability, and Notice*

The rebuttable presumption begins with a flawed implicit premise—that the alternative to receiving class certification is receiving a precedential decision. Virtually all veterans who bring cases before the CAVC receive unpublished decisions. The CAVC issues vanishingly few precedential decisions—fewer than any other federal appellate court.[204] Panels only issue published, precedential decisions in six percent of cases that proceed to a decision by the court.[205] Single judges decide the other ninety-four percent of cases and issue unpublished, non-precedential decision.[206] The CAVC is constrained in its ability to hear cases before a panel and write published decisions because its caseload is overwhelmingly high.[207] In FY 2020, the CAVC averaged over 700 appeals filed per month—a caseload of over 1,300 filings per active judge compared with an average of anywhere from 81 to 443 filings per active judge in the federal circuit courts of appeal.[208]

Despite the issuance of the *Monk II* ruling issued in 2017, the CAVC has still received relatively few requests for class certification.[209] Due to an increase in the number of final decisions adjudicated by the BVA each

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[204] Approximately eighty-seven percent of decisions in the federal circuit courts of appeal are unpublished. *Table B-12—U.S. Courts of Appeals Judicial Business*, U.S. CTS. (Sept. 30, 2019), https://www.uscourts.gov/statistics/table/b-12/judicial-business/2019/09/30. The CAVC exceeds even the most unpublished circuit, the 11th Circuit, in which 93.5% of decisions are unpublished. *Id.*

[205] *See* CAVC 2020 REPORT, *supra* note 6, at 2 (showing that of 2,581 cases that proceeded to a decision by the court, 2,433 were decided by a single judge).

[206] *Id*.

[207] *Id.* at 7–8 ("[E]ach active judge on the Court carries a substantial workload . . . . Congress recently renewed the Court's temporary authority for nine active judges. The Court's current workload justifies making the temporary expansion to nine judges permanent.").

[208] *Id.*

[209] *See id*. at 7 (noting that, in FY 2020, "the Court received four requests for class certification and class action, and certified two classes").

year, the court's caseload has risen dramatically.[210] Given the current caseload trends, it seems the odds are low for more individual veterans to obtain precedential decisions without some sort of drastic increase in the number of active judges on the court.[211] Increased use of the class action still stands as one of the best avenues for the CAVC to "increase[e] its prospects for precedential opinions."[212]

The VA also frequently dodges the effects of precedential decisions that could be issued. When veterans' cases are scheduled for a panel review, the VA often avoids a binding precedential decision by mooting the individual case.[213] This tactic becomes unavailable to the VA in class actions because mooting the individual claim of the class representative does not moot the class claims.[214] After Conley Monk appealed his case to the Federal Circuit in *Monk II*, but before a decision had been reached, the VA granted him a 100% disability rating and then argued to the Federal Circuit that the appeal of class certification was moot.[215] The Federal Circuit summarily rejected that argument and explicitly held that a class action claim does not become moot even if the VA resolves the class representative's claim, so long as "'other persons similarly situated will continue to be subject to the challenged conduct.'"[216]

Even when a binding precedential decision is issued to an individual veteran, it is by no means guaranteed that the VA will adhere to the decision and grant all other veterans the benefits of a favorable decision, thereby saving them the burden of litigating the issue themselves. In *Staab v. McDonald*, the CAVC held that the VA had been wrongly interpreting and applying 38 U.S.C. § 1725 by denying claims for the reimbursement of non-VA emergency medical costs where the veteran had *any* form of outside health insurance that might potentially cover those costs.[217] The court "definitively and unambiguously" struck

210 *Id*.

211 *See* CAVC 2020 REPORT, *supra* note 6, at 7 ("These numbers are the highest in the 30-year history of the Court.").

212 Monk v. Shulkin, 855 F.3d 1312, 1321 (Fed. Cir. 2017).

213 Young v. Shinseki, 25 Vet. App. 201, 215 (2012) (en banc) (Lance, J., dissenting) ("[The CAVC] regularly orders the Secretary to respond to a [mandamus petition] . . . . When the Court issues such an order, the great majority of the time the Secretary responds by correcting the problem within the short time allotted for a response, and the petition is dismissed as moot."); *see also Monk*, 855 F.3d at 1321 (recognizing that the VA intentionally moots petitions for writs of mandamus before the CAVC can review them).

214 U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 404 (1980).

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

216 *Id*. at 1317 (quoting Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 76 (2013)).

217 Wolfe v. Wilkie, 32 Vet. App. 1, 11 (2019); Staab v. McDonald, 28 Vet. App. 50, 55 (2016).

down the VA's interpretation of the statute and instructed the VA not to exclude veterans with private medical insurance from potential reimbursement.[218] The VA responded by crafting a new regulation that excluded "nearly every type of expense a veteran could have incurred" and created a scheme that was "indistinguishable from the world Staab *authoritatively held impermissible under the statute*."[219] When a putative class representative brought another challenge to the VA's actions in *Wolfe v. Wilkie*, the court recognized that—despite having the benefit of a precedential decision that indisputably held the VA's actions to be unlawful—the only recourse individual claimants had in the face of such intransigence on the part of the VA was "[f]ull exhaustion of the agency review process, followed by an appeal to [the CAVC]."[220] Individual litigants do not have any way of enforcing the VA's violation of a precedential decision issued to another veteran other than spending years litigating the issue up to the CAVC themselves, whereas a member of a class who is successfully awarded relief and "suffers VA's noncompliance" can enforce the class judgment with the VA being subject to contempt for non-compliance.[221]

Veterans need the enforcement mechanisms that accompany class judgments because the VA has repeatedly shown itself to be far more intransigent than the CAVC would like to believe.[222] The VA simply defied the holding of the precedential decision issued to a single litigant in *Staab* until the enforcement mechanisms of a class action were brought to bear in *Wolfe*.[223] The *Nehmer* class, who entered into a consent decree with the VA pursuant to a pre-VJRA class action, has had to bring four separate enforcement motions in district court over the last twenty-nine years to enforce the VA's adherence to the

218 *Wolfe*, 32 Vet. App. at 11.

219 *Id*.

220 *Id*. at 33.

221 *Id*.; *see also* Skaar v. Wilkie, 32 Vet. App. 156, 198 (2019) ("[C]laimants not party to [a precedential decision] who may be subject to errors affecting their rights, whether due to VA's non-compliance with our decision at a later date or otherwise, do not have any right to prompt remedial enforcement."); Monk v. Wilkie, 30 Vet. App. 167, 200 (2018) (Allen, J., concurring in part) ("[A] precedential decision does not give a person who is not a party to that case a right to enforce a decision without instituting a separate action. If that person were a certified class member, however, he or she would have an enforceable right subject to contempt."), *aff'd*, No. 2019-1094, 2020 WL 6141013 (Fed. Cir. Oct. 20, 2020).

222 *See* Bowling v. McDonough, No. 18-5263, 2021 U.S. App. Vet. Claims. LEXIS 513, at *16 (Mar. 29, 2021) (characterizing VA non-compliance as "hypothetical" and "unlikely").

223 *See* Wolfe v. Wilkie, 32 Vet. App. 11 (2019) (recognizing that the VA responded to *Staab* by creating a regulation which the CAVC had already "authoritatively held impermissible").

settlement.[224] The Ninth Circuit, in ruling on an appeal taken from the district court's decision on one of those motions, remarked that "[w]hat is difficult for us to comprehend is why the Department of Veteran Affairs, having entered into a settlement agreement and agreed to a consent order . . . continues to resist its implementation so vigorously."[225] Veterans need the robust enforcement mechanisms that accompany a class action to overcome this type of "obstructionist bureaucratic opposition" by the VA.[226]

Additionally, when a precedential decision is issued in an individual case, there is no obligation on the part of the VA to notify other veterans who might benefit from that decision.[227] The VA's actions—like those at issue in *Wolfe*—further complicate notice of precedential decisions. There, not only did the VA explicitly adopt a regulation that was directly contrary to the binding precedent of the CAVC, but it also began "affirmatively informing veterans" that they were *not* eligible for the medical coverage that the court had decided they were eligible for—"[i]n other words, the Agency was telling veterans that the law was exactly opposite to what a Federal court had held the law to be."[228] The court recognized that many veterans might have elected not even to pursue appeals of adverse decisions on the issue based on the VA's misrepresentations of the precedential decision in *Staab*.[229]

Clearly, a precedential decision issued to a single veteran does little to benefit similarly situated veterans if the VA refuses to abide by it and misinforms veterans regarding the effect of that decision. Further, many of the unrepresented veterans who litigate claims through the system lack the time, resources, research skills, or legal knowledge to locate or even understand the significance of precedential decisions that are beneficial to them.[230] One of the factors that motivated the court to

224 *See* Nehmer v. U.S. Dep't of Veterans Affairs, No. C 86-06160 WHA, 2020 U.S. Dist. LEXIS 207458, at *6 (N.D. Cal. Nov. 5, 2020) ("On three separate occasions (four including this motion), they have had to seek enforcement of the consent decree on a class-wide basis. Each time, Judge Henderson interpreted the consent decree in plaintiffs' favor and granted the requested relief.").

225 Nehmer v. U.S. Dep't of Veterans Affairs, 494 F.3d 846, 864 (9th Cir. 2007).

226 *See id.* at 865.

227 *See* Hagel & Horan, *supra* note 53, at 65 ("[T]he VA is under no duty to identify those veterans and make them whole. It is, rather, up to the individual veteran to discover the court's precedent and ask for a readjudication of his or her case based upon that decision and a claim of clear and unmistakable error.").

228 *Wolfe*, 32 Vet. App. at 12.

229 *Id*.

230 *See* Brief for Am. Legion et al. as Amici Curiae Supporting Appellant at 16, Monk v. Shulkin, 855 F.3d 1312 (Fed. Cir. 2017) (No. 15-7092), 2015 WL 8485189); *see also*

grant class certification in *Beaudette* was the belief that, because of the highly unique circumstances of the case, affected claimants "would be left to discover [a precedential] opinion through extraordinary diligence or by chance."[231] That is the situation that faces countless veterans due to the systemic lack of representation and inadequate notice of the effect of precedential decisions. The CAVC's presumption against the certification of class actions is simply not supported by the reality of the practical challenges facing veteran litigants in obtaining and enforcing precedential decisions.

B. *The Logical Inconsistency of the Presumption Against Class Actions*

Requiring litigants to overcome a presumption *against* certifying class actions based on the mere possibility that they could individually obtain a precedential decision is not consistent with how other federal courts view class actions.[232] Theoretically, any putative class representative could instead litigate their individual claims in the trial court. If they were to win, their case would be, at minimum, persuasive precedent for other similarly situated plaintiffs. And if they were to lose, they could appeal their claim to an appellate court and could potentially obtain a binding, precedential decision that would benefit other plaintiffs within that appellate court's jurisdiction.

But the class action device serves a vital role in our legal system beyond simply functioning as a slightly more efficient route for multiple litigants to obtain decisions that they could just as easily seek individually. The fact that the class representative obtains a judgment for themselves is more properly viewed as merely a "byproduct[] of the class-action device."[233] The class representative has a "right" to step up and serve as a "private attorney general" to protect the rights of absent

Veterans' Disability Compensation: Forging a Path Forward: Hearing Before the S. Comm. on Veterans' Affairs, 111th Cong. 35–36 (2009) (statement of Prof. Michael P. Allen) ("[T]he current system of judicial review has built into it a serious risk of prejudice to veterans . . . . [leaving] particularly those unrepresented at the filing of a judicial appeal, at risk of running afoul of rules designed to implement an adversarial system.").

231 Beaudette v. McDonough, No. 20-4961, 2021 U.S. App. Vet. Claims LEXIS 671, at *23 (Apr. 19, 2021).

232 *See* U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 403 (1980) ("[T]he Federal Rules of Civil Procedure give the proposed class representative the right to have a class certified if the requirements of the Rules are met."); *see also* Esplin v. Hirschi, 402 F.2d 94, 99 (10th Cir. 1968) ("[I]f there is to be an error made, let it be in favor and not against the maintenance of the class action . . . .").

233 *See Geraghty*, 445 U.S. at 403 ("Although the named representative receives certain benefits from the class nature of the action, some of which are regarded as desirable and others as less so, these benefits generally are byproducts of the class-action device.").

and unrepresented parties and prevent them from having to come before the court themselves to enforce already-issued precedential judgments.[234]

The class action exists to correct the type of problem that plagues veterans benefits adjudication—a "large number of actions," each of which has "common question[s]" that are disputed over and over again through a "process of a practical smothering of repeated suits" which "take some time and [do] not always operate fairly."[235] Class actions promote access to justice by allowing for the collective resolution of claims where veterans cannot effectively bring claims and enforce judgments as individuals.[236] The development of CAVC class action jurisprudence from *Harrison* and *Lefkowitz* through *Monk II* and *Skaar* has been the slow recognition that class actions *are*, in many ways, "superior to other available methods for fairly and efficiently adjudicating the controversy" when compared to the challenges that face veterans in taking advantage of the vanishingly small number of precedential decisions to come out of the CAVC.[237] Veterans should not have to repeatedly make this case on their own by overcoming the rebuttable presumption in every potential class action. And the CAVC should not continue to assume that their precedential decisions are being scrupulously adhered to by the VA and taken advantage of by all similarly situated veterans. Rather, the CAVC should align itself with the rest of the federal judiciary and recognize that a potential class claimant has "the *right* to have a class certified" if they meet the requirements of Rule 23.[238]

V. CONCLUSION

The CAVC should eliminate the presumption against the certification of class actions that is now codified in U.S. Vet. App. Rule 22(a)(3). The court's newly adopted U.S. Vet. App. Rule 23 already captures the long-standing prerequisites of numerosity, commonality, typicality, adequacy of class representatives and counsel, and availability of appropriate relief drawn from Rule 23, whose adoption by the court Judge Allen rightly commended as wise.[239] The

234 *Id*. at 402–03.

235 *See* ZECHARIAH CHAFEE, SOME PROBLEMS OF EQUITY, *in* THE THOMAS M. COOLEY LECTURES, SECOND SERIES 152–53 (1949).

236 *See* Sant'Ambrogio & Zimmerman, *supra* note 15, at 1649.

237 *See* Skaar v. Wilkie, 32 Vet. App. 156, 172 (2019).

238 *See* U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 403 (1980).

239 Monk v. Wilkie, 30 Vet. App. 167, 188 (2018), *aff'd*, No. 2019-1094, 2020 WL 6141013 (Fed. Cir. Oct. 20, 2020) (Allen, J., concurring in part and dissenting in part).

presumption against class action certification is based on the faulty assumption that veterans can come to the CAVC and obtain binding, enforceable precedential decisions that spur the VA to correct its errors and fulfill its mission to "care for [those] who shall have borne the battle."[240] Sadly, that is simply not the reality for the vast majority of veterans. Rather than place another hurdle in veterans' path to obtaining benefits, the CAVC should abandon the presumption against the certification of class actions.

[240] *Mission, Vision, Core Values & Goals*, U.S. DEP'T OF VETERANS AFFS., https://www.va.gov/about_va/mission.asp (last visited Oct. 8, 2021).