



## CRS Report for Congress

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

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### Summary

Congress, through the Department of Veterans Affairs (VA), extends various benefits to veterans and certain of their family members. Sometimes veterans may not agree with the VA's initial decisions concerning the award and/or the amount of these benefits. Within the VA, there is an extensive appeal/review process that concludes with the decision of the Board of Veterans' Appeals (BVA). Final decisions of the BVA may be appealed to the U.S. Court of Appeals for Veterans Claims (CAVC), which is an independent federal court, entirely separate from the VA. This report examines the historical and legislative background of the CAVC and its current operation.

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

The VA provides a broad range of congressionally mandated benefits and services to United States veterans and certain members of their families.<sup>2</sup> There are various eligibility criteria for such benefits and discrete processes for determining benefit claims.<sup>3</sup>

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

<sup>2</sup> See CRS Report RL33993, *Veterans' Health Care Issues*, by Sidath Viranga Panangala; CRS Report RL34063, *Veterans' Medical Care: FY2008 Appropriations*, by Sidath Viranga Panangala; CRS Report RL33985, *Veterans' Benefits Issues in the 110<sup>th</sup> Congress*, by Carol D. Davis, Shannon S. Loane, Meredith Peterson, Christine Scott, Charmaine Mercer, Libby Perl, and Douglas Reid Weimer.

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

Thereafter, a veteran may appeal a determination within the VA. The final appeal body within the VA is the BVA.<sup>4</sup>

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

The CAVC's website indicates that most cases before the CAVC deal with the "entitlement to disability or survivor benefits, or the amount of those benefits, but a few deal with education benefits, life insurance, home loan foreclosure, or waiver of indebtedness."<sup>12</sup> The CAVC's website provides detailed statistical information regarding the number of cases filed and the ultimate disposition of those cases.<sup>13</sup>

## Jurisdiction

The VJRA gave the CAVC the "exclusive jurisdiction to review decisions of the Board of Veterans Appeals."<sup>14</sup> The BVA is required to notify veteran claimants of their appeal rights to the CAVC.<sup>15</sup> Only a person who is "adversely affected" by a BVA

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<sup>4</sup> See CRS Report RL33323.

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

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

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

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

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

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

<sup>11</sup> 38 U.S.C. § 7292.

<sup>12</sup> See [<http://www.vetapp.uscourts.gov/about>]. Then go to "History."

<sup>13</sup> *Id.* Then go to "Annual Report."

<sup>14</sup> 38 U.S.C. § 7252(a).

<sup>15</sup> *Id.* § 5104(a).

decision may appeal to the CAVC.<sup>16</sup> However, neither the Secretary of Veterans Affairs nor any other VA official may appeal a BVA decision to the CAVC.<sup>17</sup>

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

## Organization and Operation of the CAVC

The CAVC consists of at least three, but not more than seven, judges.<sup>21</sup> The judges are appointed by the President with the advice and consent of the Senate.<sup>22</sup> The judges serve for a term of fifteen years.<sup>23</sup> The President may remove a judge from office prior to the expiration of his/her term for various reasons that would prevent the proper execution of the judge's duties.<sup>24</sup> Under certain circumstances, retired CAVC judges may be recalled for further service on the CAVC.<sup>25</sup> At the present time there are seven judges.<sup>26</sup>

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<sup>16</sup> *Id.* § 7266(a).

<sup>17</sup> *Id.* § 5107(a).

<sup>18</sup> *Id.* § 7266(a).

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

<sup>20</sup> 38 U.S.C. § 7266(a).

<sup>21</sup> *Id.* § 7253(a). 38 U.S.C. § 7253(b) provides that "not more than the number equal to the next whole number greater than one-half of the number of judges of the Court may be members of the same political party." 38 U.S.C. § 7253(h) provides for the temporary expansion of the court from January 1, 2002 through August 15, 2005. The authorized number of judges provided for by 38 U.S.C. § 7253(a) was increased by two; one nominated and appointed in 2002 and one in 2003. If the appointment(s) was/were not made in 2002 or 2003, the appointment(s) could be made before October 1, 2004.

<sup>22</sup> *Id.* § 7252(b).

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

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

<sup>25</sup> *Id.* § 7257.

<sup>26</sup> See [<http://www.vetapp.uscourts.gov/about/>]. Then go to "Judges."

The court does not hold trials, hear witness testimony, or receive new evidence.<sup>27</sup> In deciding a case, the CAVC considers the BVA decision, the briefs submitted by the parties, and the record that was considered by the VA and was available to the BVA. Under some circumstances, if the issues warrant, the CAVC holds oral argument.<sup>28</sup> Only about 1% of the decided cases involve oral argument.<sup>29</sup> The CAVC holds most arguments in its Washington, DC courtroom, but may occasionally conduct an argument by telephone conference call.<sup>30</sup>

The court's official opinions are published in West's Veterans Appeals Reporter.<sup>31</sup> They are available online in Westlaw, Lexis, and without digest on the CAVC's website (under Court Decisions & Opinions). They are also sent to the Government Printing Office for microfilm distribution to its nationwide depository library system.

Congress delegated broad power to the CAVC to prescribe its own rules of court.<sup>32</sup> The CAVC's rules were modeled after the Federal Rules of Appellate Procedure and have been amended various times.<sup>33</sup> The rules are available on the CAVC's website.<sup>34</sup>

The CAVC has a comprehensive case management system. After the record on appeal and the briefs for both sides are filed with the Clerk of the Court, they are sent to the Central Legal Staff ("staff") within the Office of the Clerk. The staff creates an initial evaluation of the case and a memo recommending a disposition of the case. The staff recommends whether the case should be handled by one judge, a panel without argument, or a panel with argument.<sup>35</sup>

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

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<sup>27</sup> 38 U.S.C. § 7261.

<sup>28</sup> See [[http://www.vetapp.uscourts.gov/oral\\_arguments](http://www.vetapp.uscourts.gov/oral_arguments)].

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> This is established by practice of the Court rather than by federal statute or regulation.

<sup>32</sup> 38 U.S.C. § 7264.

<sup>33</sup> See [[http://www.vetapp.uscourts.gov/court\\_procedures/RulesPracticeProcedure.cfm](http://www.vetapp.uscourts.gov/court_procedures/RulesPracticeProcedure.cfm)].

<sup>34</sup> *Id.*

<sup>35</sup> See [[http://www.vetapp.uscourts.gov/court\\_procedures](http://www.vetapp.uscourts.gov/court_procedures)]. Then go to "Internal Operating Procedures."

<sup>36</sup> *Id.*

is then returned to the Clerk and the case will, in most cases, eventually be assigned to a panel of three judges, who will ultimately decide the case.<sup>37</sup>

The appellant may represent him/herself or may be represented by an attorney or authorized representative.<sup>38</sup> The VA's Office of the General Counsel represents the Secretary of Veterans Affairs (and the VA) before the CAVC.<sup>39</sup>

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

### Legislation in the 110<sup>th</sup> Congress<sup>43</sup>

Current legislative issues concern the backlog of cases at the CAVC and the overall length of time needed to process an appeal through the VA and then through the CAVC. An additional related concern is the hardship of those veterans who are not receiving any benefits while their appeals are pending.

On May 3, 2007, **S. 1289** was introduced by Senator Larry Craig. If enacted, the legislation would amend Title 38 of the U.S. Code to modify the salary and the terms of the judges of the CAVC. The bill would also modify the recall provisions for retired CAVC judges and other matters relating to the CAVC. Title V of **S. 1315**, introduced by Senator Daniel Akaka on May 7, 2007, is substantially derived from S. 1289, and deals with the recall of judges, pay structure, registration fees, and other issues. On November 6, 2007, **H.R. 4084** was introduced by Representative John Hall. The bill derives some of its provisions from S. 1289 and S. 1315. H.R. 4084 would require the CAVC to submit an annual report summarizing its workload to the Senate and House Committees on Veterans' Affairs, and would require the General Services Administration to provide Congress with a report on the expansion of the CAVC's office space.

On September 25, 2007, **S. 2091** was introduced by Senator Daniel Akaka. If enacted, the bill would amend Title 38 of the U.S. Code to increase the number of the CAVC's active judges from seven to nine.

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<sup>37</sup> There is no jury involved in this judicial procedure.

<sup>38</sup> Representation before the court is governed by U.S. Vet. App. R. 46.

<sup>39</sup> 38 U.S.C. § 7263(a).

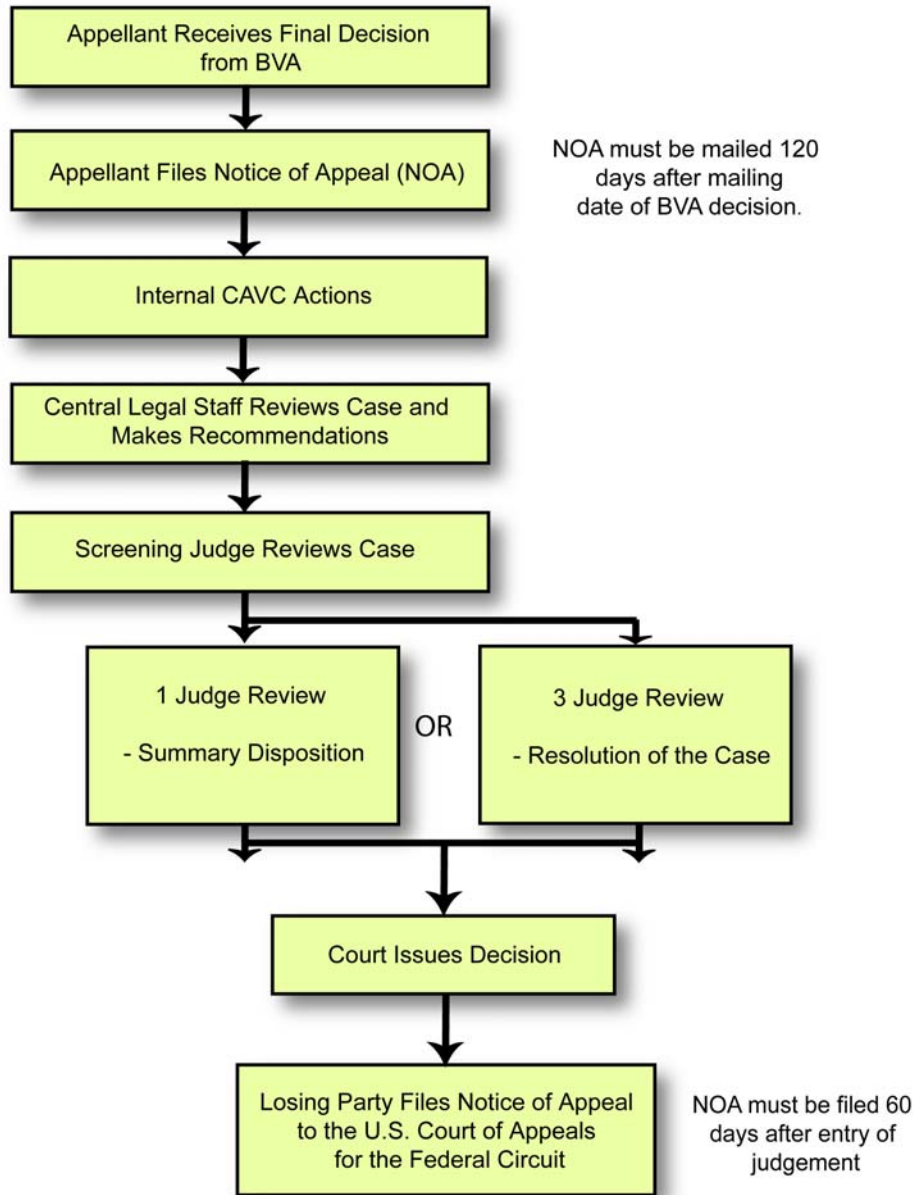
<sup>40</sup> *Id.* § 7292.

<sup>41</sup> 28 U.S.C. § 2107.

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

<sup>43</sup> See CRS Report RL33985 at 14-15 (PDF version) for a more detailed discussion of legislative issues and the pending legislation.

**Figure 1. Simplified CAVC Case Review**



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