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## Significant Developments in Veterans Law (2004-2006) and What They Reveal About the U.S. Court of Appeals for Veterans Claims and the U.S. Court of Appeals for the Federal Circuit

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# SIGNIFICANT DEVELOPMENTS IN VETERANS LAW (2004–2006) AND WHAT THEY REVEAL ABOUT THE U.S. COURT OF APPEALS FOR VETERANS CLAIMS AND THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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Michael P. Allen\*

*Nearly twenty years ago, Congress for the first time created a system for judicial review of decisions denying veterans benefits. Specifically, Congress created an Article I Court: the United States Court of Appeals for Veterans Claims. Veterans dissatisfied with actions of the Department of Veterans Affairs regarding benefits could appeal to the Veterans Court. The United States Court of Appeals for the Federal Circuit provided appellate oversight of the Veterans Court. There simply is nothing like the Veterans Court elsewhere in American law. Yet, despite its uniqueness, there has been little scholarly attention to this institution.*

*This Article begins to fill the gap in the literature through a focused consideration of the decisions of the Veterans Court and the Federal Circuit from 2004 to 2006. It has three principal parts. First, it describes the current structure of judicial review in the area and provides a statistical analysis of its operation during the relevant period. Second, the Article explores the substantive development of veterans law from January 2004 through March 2006. Finally, based on that substantive law, the Article draws conclusions about the operations of both the Veterans Court and the Federal Circuit.*

## INTRODUCTION

Nearly one out of every four people in the United States is eligible to receive some type of benefit administered by the United States Department of Veterans Affairs (the VA).<sup>1</sup> The benefits are wide-ranging, including disability compensation, pensions, life insurance, medical care, and educational assistance.<sup>2</sup> The scope of

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1. See Department of Veterans Affairs, Fact Sheet: Facts About the Department of Veterans Affairs (May 2006) at 1, [www.va.gov/opa/fact/docs/vafacts.pdf](http://www.va.gov/opa/fact/docs/vafacts.pdf). Individuals potentially eligible for benefits include veterans as well as some family members and survivors. *Id.* For ease of reference in this Article, I refer to “veterans benefits” even though some of the benefits at issue are more accurately described as benefits to dependents or survivors of veterans.

2. *Id.* at 1–3 (providing an overview of benefit programs the VA administers).

these programs is staggering. For example, in fiscal year 2005, the VA “provided \$30.8 billion in disability compensation, death compensation and pension to 3.5 million people.”<sup>3</sup> The importance of these benefits will only increase in the future as veterans return home from the ongoing conflicts in Iraq, Afghanistan, and other theaters in the “Global War on Terror.”<sup>4</sup>

For much of our Nation’s history, the United States has been strongly committed to providing veterans with benefits for their service. Exemplifying this commitment, President Abraham Lincoln specifically included a call to support veterans and their families in the famous conclusion to his second inaugural address near the end of the Civil War:

With malice toward none, with charity for all, with firmness in the right as God gives us to see the right, let us strive on to finish the work we are in, to bind up the nation’s wounds, to care for him who shall have borne the battle and for his widow and his orphan, to do all which may achieve and cherish a just and lasting peace among ourselves and with all nations.<sup>5</sup>

Perhaps paradoxically, given the political and societal importance of these benefit programs, veterans were essentially unable to obtain any judicial review of decisions denying them benefits for much of American history.<sup>6</sup> That changed in 1988 when Congress provided for such review, creating a system that is unique in American law.<sup>7</sup> But despite the continued importance of veterans benefits programs and the innovative structure of judicial review associated with them, few scholars have focused on this area of the law.<sup>8</sup> This Article begins to fill the gap.

This Article grew out of an invitation to speak at the Ninth Judicial Conference of the United States Court of Appeals for Veterans

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3. *Id.* at 1.

4. The VA now lists the “War on Terrorism (2001 – Present)” as one of “America’s Wars” for record-keeping purposes. *See* Department of Veterans Affairs, Fact Sheet: America’s Wars (November 2005) at 1, [www.va.gov/opa/fact/docs/amwars.pdf](http://www.va.gov/opa/fact/docs/amwars.pdf).

5. President Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), in *ABRAHAM LINCOLN: SELECTED SPEECHES AND WRITINGS* 449 (Library of America ed., 1st Vintage Books 1992), (on file with the University of Michigan Journal of Law Reform), *available at* [www.bartleby.com/124/pres32html](http://www.bartleby.com/124/pres32html) (emphasis added).

6. The history of judicial review of veterans benefits decisions is discussed in detail below. *See infra* Part I.A.

7. *See* Veterans’ Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4105 (codified as amended in scattered sections of 38 U.S.C. (1988)); *see also infra* Part I.A (discussing the establishment of judicial review in this area).

8. I discuss the limited academic commentary that does exist throughout this Article.

Claims (the Veterans Court), the entity Congress created in 1988 as the principal venue for judicial review in the area of veterans benefits.<sup>9</sup> To prepare for that event, I reviewed every precedential opinion concerning veterans law issued from January 2004 through March 2006 by the three federal courts that have jurisdiction in the area: the Supreme Court of the United States, the United States Court of Appeals for the Federal Circuit (the Federal Circuit), and the Veterans Court. That review revealed two overarching issues that form the essential structure for this Article.

First, there was rich growth in the substantive law governing veterans benefits during the period of my review. In addition to specific “stand-alone” decisions that were unquestionably important, distinct patterns also emerged in the development of veterans law. This Article explores those patterns. They show not only where veterans law has been but also, perhaps more importantly, where it may be going.

Second, my review of the precedential decisions identified broader themes concerning the structure of judicial review in the area. These themes allow us to ask, and even tentatively answer, some intelligent questions about the workings of the Veterans Court after nearly two decades in existence, as well as the relationship between the Federal Circuit and the Veterans Court.

The Article proceeds as follows. First, I summarize the structure and history of judicial review of veterans benefits, describe the Veterans Court and its method of operation, and provide an overview of judicial review during the two-year period at issue.<sup>10</sup> Next, I discuss the significant patterns within the various decisions over the past two years as a matter of substantive law.<sup>11</sup> Thereafter, I draw from the decisions of both the Federal Circuit and the Veterans Court some broader themes about those entities, their relationship to one another, and their role in the judicial review of veterans benefits decisions.<sup>12</sup> Finally, I conclude by suggesting that the experience of the Veterans Court is important for a wide range of issues and that scholars should focus on this entity as it nears its twentieth anniversary. I begin the process by suggesting a modest research agenda.

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9. See Veterans' Judicial Review Act § 301, 102 Stat. at 4113–21; see also *infra* Part I.A for a detailed description of the Veterans Court and its place in the structure of judicial review of veterans benefits claims.

10. See *infra* Part I.

11. See *infra* Part II.

12. See *infra* Part III.

## I. JUDICIAL REVIEW OF VETERANS BENEFITS DECISIONS

The judicial review of administrative veterans benefits decisions is unique in American law. A basic understanding of this issue is crucial to appreciate the majority of this Article. This Part first describes the current structure of such judicial review and the history behind that structure.<sup>13</sup> Thereafter, it considers how that review operated statistically in the period from January 2004 through March 2006.<sup>14</sup>

### A. *The History and Structure of Judicial Review of Veterans Benefits Decisions*

“Warriors have been rewarded for their service—or their widows and children have been provided support—since the beginnings of organized society.”<sup>15</sup> This commitment to veterans and their families was also a part of the early American experience<sup>16</sup> and has remained a part of our country’s culture.<sup>17</sup> However, the commitment to providing veterans with benefits in exchange for their service to the Nation has not included a commitment to providing an independent review of decisions concerning those benefits. Instead, for much of our Nation’s history, Congress expressly precluded almost all judicial review in the area.<sup>18</sup>

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13. See *infra* Part I.A.

14. See *infra* Part I.B.

15. IHOR GAWDIK, ET AL., FED. RESEARCH DIV., LIBRARY OF CONG., VETERANS BENEFITS AND JUDICIAL REVIEW: HISTORICAL ANTECEDENTS AND THE DEVELOPMENT OF THE AMERICAN SYSTEM vii (Mar. 1992) (on file with the University of Michigan Journal of Law Reform) [hereinafter VETERANS BENEFITS AND JUDICIAL REVIEW] (study prepared by the Federal Research Division of the Library of Congress under an interagency agreement with the Veterans Court).

16. See *id.* at 21–32 (discussing the provision of benefits to war veterans in Colonial America).

17. See *id.* at 35–70 (discussing development of veterans benefits law from the Revolutionary War through the late 1980s).

18. See *Brown v. Gardner*, 513 U.S. 115, 122 (1994) (noting that “Congress established no judicial review for VA decisions until 1988, only then removing the VA from what one congressional report spoke of as the agency’s ‘splendid isolation’” (citation omitted)). For detailed commentary about the history and operation of the preclusion of judicial review in this area, see WILLIAM F. FOX, JR., THE LAW OF VETERANS BENEFITS: JUDICIAL INTERPRETATION 3–11 (2002); VETERANS BENEFITS AND JUDICIAL REVIEW, *supra* note 15, at 40–70; Frederick Davis, *Veterans’ Benefits, Judicial Review and the Constitutional Problems of “Positive” Government*, 39 IND. L.J. 183, 185–90 (1964); Kenneth B. Kramer, *Judicial Review of the Theoretically Non-Reviewable: An Overview of Pre-COVA Court Action on Claims for Veteran Benefits*, 17 OHIO N.U. L. REV. 99, 99–102 (1990); Richard E. Levy, *Of Two Minds: Charitable and Social Insurance Models in the Veterans Benefits System*, 13 KAN. J.L. & PUB. POL’Y 303, 307–15 (2004);

Decisions granting or denying veterans benefits are initially made and reviewed on appeal within the executive agency charged with responsibility in this area, the VA.<sup>19</sup> In brief, eligible persons apply for veterans benefits at one of the VA's various Regional Offices (RO) or other local offices located across the country.<sup>20</sup> If a claimant is dissatisfied with the decision of the RO, that person must submit a Notice of Disagreement (NOD).<sup>21</sup> After receiving an NOD, the RO is required to prepare a Statement of the Case (SOC) summarizing the bases for its decision.<sup>22</sup>

After receiving the SOC, the claimant must perfect an appeal of the decision by filing certain forms with the Board of Veterans' Appeal (the Board or BVA).<sup>23</sup> The Board is the entity within the VA that decides appeals on the majority of benefits matters.<sup>24</sup> Before Congress established judicial review in 1988, the Board's decisions were final for all intents and purposes.<sup>25</sup>

The story of how this preclusion of judicial review survived for so long is complex. In the beginning, the absence of review was tied to the development of the relationship between the federal courts and the "political" branches of government.<sup>26</sup> Thereafter, a number of rationales supported preclusion, including the legal doctrine that government benefits were mere gratuities to which no person had a right, coupled with the fear that opening the courts for

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Charles G. Mills, *Is the Veterans' Benefits Jurisprudence of the U.S. Court of Appeals for the Federal Circuit Faithful to the Mandate of Congress?*, 17 *TOURO L. REV.* 695, 695-98 (2001); Robert L. Rabin, *Preclusion of Judicial Review in the Processing of Claims of Veterans' Benefits: A Preliminary Analysis*, 27 *STAN. L. REV.* 905, 906-07 (1975); Jonathan Goldstein, Note, *New Veterans Legislation Opens the Door to Judicial Review . . . Slowly!*, 67 *WASH. U.L.Q.* 889, 890-98 (1989).

19. The VA was created in 1930. *VETERANS BENEFITS AND JUDICIAL REVIEW*, *supra* note 15, at 65. Congress elevated the VA to cabinet-level status in 1988. *See* Department of Veterans Affairs Act of 1988, Pub. L. No. 100-527, 102 Stat. 2635 (1988) (codified as amended in scattered sections of 38 U.S.C.).

20. *BOARD OF VETERANS' APPEALS, DEPARTMENT OF VETERANS' AFFAIRS, UNDERSTANDING THE APPEAL PROCESS* 7-8 (Jan. 2000) [hereinafter *UNDERSTANDING THE APPEAL PROCESS*].

21. *See* 38 U.S.C. § 7105(a)-(b) (2000) (setting forth the requirement to submit an NOD and describing its contents).

22. *See* 38 U.S.C. § 7105(d).

23. *See* 38 U.S.C. § 7105(d)(3).

24. *See* 38 U.S.C. §§ 7101-7104 (describing the composition and jurisdiction of the Board); *see also* *UNDERSTANDING THE APPEAL PROCESS*, *supra* note 20, at 6-10 (setting forth the basic contours of the appeal process).

25. *See, e.g.*, Fox *supra* note 18, at 5-17.

26. *See, e.g.*, Hayburn's Case, 2 U.S. (2 Dallas) 409, 413 (1793) (holding that the federal courts could not participate as "commissions" in awarding veterans benefits because their decisions would be subject to revision by executive branch officials); *see also* *VETERANS BENEFITS AND JUDICIAL REVIEW*, *supra* note 15, at 40-45 (discussing early unsuccessful Congressional attempts to enlist the federal courts in review of veterans benefits decisions).

review would inundate the legal system.<sup>27</sup> But for much of the second part of the twentieth century, it appears that the principal obstacle to establishing judicial review was disagreement among groups representing veterans.<sup>28</sup> The reasons for this disagreement were multifaceted, but for our purposes, the turning point occurred in the late 1980s when the views of all the veterans organizations converged on the desirability of some type of judicial review.<sup>29</sup>

After much debate over the form that judicial review would take,<sup>30</sup> Congress passed, and President Ronald Reagan signed into law, the Veterans' Judicial Review Act.<sup>31</sup> The Act effected several significant changes in the law of veterans benefits.<sup>32</sup> For present purposes, the centerpiece of the Act was its creation of the Veterans Court<sup>33</sup> pursuant to Congress's power under Article I of the Constitution to "constitute tribunals inferior to the Supreme Court."<sup>34</sup> Under the Act, the Court is independent of the VA and composed of seven judges, who are appointed by the President and confirmed by the Senate to fifteen-year terms.<sup>35</sup> The Veterans Court's jurisdiction is tied to that of the BVA, which continues its appellate role within the VA.<sup>36</sup> Thus, for the first time, the Act provided for a meaningful and predictably available independent review of VA benefits decisions.

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27. See, e.g., Fox, *supra* note 18, at 5.

28. See, e.g., 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, 44-45 (1994) (describing disagreement about judicial review).

29. Fox, *supra* note 18, at 15; see also *id.* at 45-46.

30. See *id.* at 13-16 (describing legislative compromises leading to the current system); Goldstein, *supra* note 18, at 897-904 (same).

31. Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988) (codified as amended in scattered sections of 38 U.S.C.).

32. For general commentary on the 1988 Act, see Fox, *supra* note 18, at 17-27; Goldstein, *supra* note 18, at 890-98.

33. See 38 U.S.C. § 7252 (2000). Originally, the Veterans Court was known as the United States Court of Veterans Appeals. See Veterans' Judicial Review Act of 1988, 102 Stat. at 4105. It was renamed the United States Court of Appeals for Veterans Claims in 1998. See Veterans Programs Enhancement Act of 1998, Pub. L. No. 105-368, § 511, 112 Stat. 3315, 3341 (1998) (codified at 38 U.S.C. § 7251).

34. U.S. CONST. art. I, § 8, cl. 9.

35. See 38 U.S.C. § 7253 (2000); see also Fox, *supra* note 18, at 18-19 (discussing the composition and structure of the Veterans Court).

36. See 38 U.S.C. § 7252 (2000). This section also explicitly precludes the Veterans Court from reviewing "the schedule of ratings for disabilities . . . or any action of the Secretary in adopting or revising that schedule." *Id.* § 7252(b). The import of this jurisdictional restriction was a significant issue during the period I studied. See *infra* Part II.A.

The scope of the Veterans Court's review has several important features for the purposes of this Article.<sup>37</sup> First, only dissatisfied claimants may appeal a BVA decision to the Veterans Court;<sup>38</sup> for the government, the BVA is the final decision maker. Second, Congress clearly intended the Veterans Court to be an *appellate* tribunal and specifically prohibited it from making initial factual determinations.<sup>39</sup> Third, the Veterans Court has great latitude in determining the composition of the Court that hears appeals. In particular, Congress provided: "[t]he Court may hear cases by judges sitting alone or in panels, as determined pursuant to procedures established by the Court."<sup>40</sup>

As the first Chief Judge of the Veterans Court described it, he was the head of "a brand-new court, and one without any antecedent . . ."<sup>41</sup> Ideally, as the Court approaches its twentieth anniversary, many venues will exist to discuss and debate its successes as well as areas for improvement. This Article does not propose to conduct such a full historical review of the Court and its operations.<sup>42</sup> It is, however, a beginning of such an endeavor because it considers the Court's operation during a period of significant change. Six of the Court's seven members took the bench between December 2003 and December 2004.<sup>43</sup> Indeed, only Chief Judge Greene has served on the Court for more than two-and-a-half years as of this writing.<sup>44</sup> Thus, while this Article does

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37. The following discussion is a high-level overview of the structure of judicial review of veterans benefits decisions. I have by no means attempted to provide a comprehensive treatment of this complex area. Instead, my goal is to present a foundation for understanding the rest of the Article.

38. See 38 U.S.C. § 7252(a) ("The Secretary may not seek review of any such decision [of the Board].").

39. 38 U.S.C. § 7261(c) (2000).

40. 38 U.S.C. § 7254(b). I discuss this authority to use single-judge adjudication at several points below. See *infra* Part I.B. (discussing statistics about the procedure) and Part III.A.1 (discussing potential defects of the procedure).

41. Frank Q. Nebeker, *Jurisdiction of the United States Court of Veterans Appeals: Searching Out the Limits*, 46 ME. L. REV. 5, 5 (1994).

42. For an early assessment of the Veterans Court, see *Veterans Law Symposium*, 46 ME. L. REV. 1, 66 (1994); see also Fox, *supra* note 18, at 27-28 (discussing the "early days" of the Veterans Court).

43. The website of the Veterans Court provides biographies of the judges of the Court. See U.S. Court of Appeals for Veterans Claims Web Page, <http://www.vetapp.uscourts.gov> (last visited Jan. 18, 2007) (on file with the University of Michigan Journal of Law Reform). Judges Bruce Kasold and Lawrence Hagel took the bench in December 2003. Judge William Moorman took office in November 2004. Finally, Judges Alan Lance, Robert Davis, and Mary Schoelen all joined the Court in December 2004. *Id.*

44. Chief Judge William P. Greene, Jr. became a member of the Court in November 1997. See *id.*



not provide a history of the Court, the period under study is highly reflective of a new era of this judicial experiment.<sup>45</sup>

The Veterans Court, however, is only the first venue of judicial review in the area of veterans benefits. Any party aggrieved by a final decision of the Veterans Court, including the VA Secretary, may appeal to the Federal Circuit and, from a decision of that court, to the Supreme Court of the United States.<sup>46</sup> However, the appellate relationship between the Veterans Court and the Federal Circuit that Congress established does not mirror the usual relationship between an “inferior” tribunal and a “superior” court. This special relationship is most evident in the restrictions imposed on the jurisdiction of the Federal Circuit when it reviews decisions of the Veterans Court. As the Federal Circuit recently summarized:

This Court [the Federal Circuit] reviews decisions of the Veterans Court deferentially. Under 38 U.S.C. § 7292(d)(1), we must affirm a Veterans Court decision unless it is “(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or (D) without observance of procedure required by law.” 38 U.S.C. § 7292(d)(1) (2000). Except for constitutional issues, we may not review any “challenge to a factual determination” or any “challenge to a law or regulation as applied to the facts of a particular case.” 38 U.S.C. § 7292(d)(2) (2000).<sup>47</sup>

In sum, the Federal Circuit has the power to review decisions of the Veterans Court with respect to matters of law, but very little else. This restriction on jurisdiction explains the significant number of Federal Circuit decisions that dismiss appeals on jurisdictional grounds.<sup>48</sup> In addition, the jurisdictional restriction likely contributes to the tensions between the Federal Circuit and the Veterans Court that are evident from the decisions over the past two years.<sup>49</sup>

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45. The Court itself appears to recognize the transition. The theme of the Ninth Annual Judicial Conference for the Court held in April 2006 was “New Beginnings.” *See* Ninth Annual Judicial Conference Materials (2006) (on file with the University of Michigan Journal of Law Reform).

46. *See* 38 U.S.C. § 7292 (2000).

47. *Kalin v. Nicholson*, 172 F. App’x 1000, 1002 (Fed. Cir. 2006).

48. *See infra* Appendix B at 1–3 (setting forth jurisdictional dismissals at the Federal Circuit in the period under review and describing the bases for the purported lack of jurisdiction).

49. *See infra* Part III.B for a detailed discussion of the relationship between these courts.

Of course, I do not mean to diminish the important role that the Federal Circuit plays in shaping veterans benefits law. It oversees the legal judgments of the Veterans Court and, as such, performs a critical function in developing the ground rules that govern VA action.<sup>50</sup> In addition, the Federal Circuit has exclusive jurisdiction “to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof . . . .”<sup>51</sup> Such direct regulatory challenges are important in developing the law for a number of reasons, not the least of which is that they allow resolution of pure questions of law before regulations become effective. In other words, there is no need to wait for an issue to arise in a given appeal as would be necessary if regulatory challenges required the case-by-case adjudication that is the hallmark of Veterans Court action.<sup>52</sup> Thus, the Federal Circuit has an important but limited role in the judicial review of veterans benefits decisions.<sup>53</sup>

This subpart has explained the basic structure of judicial review concerning veterans benefits. The next subpart examines statistically how that review operated from 2004 to 2006. Thereafter, Part II analyzes the substantive decisions rendered during the period under review.

### *B. The Statistical Operation of Judicial Review of Veterans Benefits Decisions: 2004–2006*

With apologies to the Clerks of Court for the Veterans Court and the Federal Circuit, I have compiled my own statistics covering the work of both courts from January 2004 through March 2006.<sup>54</sup> I begin with a consideration of the Federal Circuit in the area of veterans law and then turn to the Veterans Court.<sup>55</sup>

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50. See 38 U.S.C. § 7292(d) (2000).

51. 38 U.S.C. § 7292(c).

52. The Federal Circuit decided one such direct regulatory challenge during the period addressed in this Article. See *Disabled Am. Veterans v. Sec’y of Veterans Affairs*, 419 F.3d 1317 (Fed. Cir. 2005) (upholding VA regulations allowing the Board of Veterans Appeals to obtain and consider internal VA medical opinions in the context of an appeal). I discuss this substantive issue in more detail below. See *infra* Part II.D.1.

53. For further discussion of the role of the Federal Circuit in this area, see Fox, *supra* note 18, at 26–27; see also *infra* Part III.B (discussing the role of the Federal Circuit in the provision of veterans benefits).

54. At points in this study I refer to matters after March 2006. For example, if there was further action involving a particular decision, such as an affirmance or reversal, I note it. I did not, however, include such matters in the statistical information I discuss in this subpart of the Article, which is restricted to the twenty-seven month period beginning January 1, 2004 and continuing through March 31, 2006.

55. I have no doubt that the experts in the respective clerks’ offices at the Veterans Court and the Federal Circuit might disagree with some of the categorization decisions I

## 1. The Federal Circuit

During the time covered by this Article, the Federal Circuit issued written opinions on non-jurisdictional matters in sixty-three cases on appeal from the Veterans Court.<sup>56</sup> In addition, the Federal Circuit summarily affirmed nine Veterans Court judgments without issuing opinions.<sup>57</sup> I refer to these combined seventy-two cases as “merits decisions.” The Federal Circuit also issued opinions in thirty-three cases during this period in which the issue was jurisdictional.<sup>58</sup>

Table 1 below summarizes how the Veterans Court fared in the Federal Circuit’s merits decisions, whether by summary affirmance or through a full opinion.

TABLE 1  
FEDERAL CIRCUIT MERITS DECISIONS DISPOSITION—OVERALL

Type of Disposition	Percentage of Cases
Affirmed	73.6%
Reversed	25.0% <sup>59</sup>
Other	1.4% <sup>60</sup>

The Federal Circuit affirmed the Veterans Court’s judgments in nearly three out of every four cases in which the Circuit Court

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made. I present these figures for the purpose of drawing some general conclusions about the landscape that existed in this area during the period of my study. For this purpose, I believe my statistics are adequate.

56. Appendix A to this Article sets out a list of the decisions I placed in this category. The table of decisions summarizes the issue(s) in each case, the decision of the Veterans Court, and the holding of the Federal Circuit. I have not included in this count the decision of the Federal Circuit in *In re Van Allen*, 125 F. App’x 299 (Fed. Cir. 2005), which considered whether the Federal Circuit should issue a writ of mandamus to the Veterans Court. This decision is listed as part of Appendix B.

57. These cases are listed in Appendix B to this Article.

58. These decisions are listed in Appendix B to this Article. The jurisdictional issues essentially broke down into two categories: (1) cases in which the issue involved a factual dispute or the application of law to facts; or (2) appeals from nonfinal Veterans Court orders, such as remands to the BVA. I have not classified as “jurisdictional” cases in which the Federal Circuit discussed the jurisdiction of the Veterans Court or the BVA. Rather, I include such matters as merits decisions.

59. I have included in the reversal category one case in which the Federal Circuit technically vacated the Veterans Court decision and remanded for further proceedings. See *Johnson v. Nicholson*, 127 F. App’x 475 (Fed. Cir. 2005). I included the case in that category because the Federal Circuit determined that the Veterans Court had made a legal error in remanding a case to the BVA for compliance with the duties to notify and assist when the veteran had waived a right to remand on this basis. *Id.* at 477.

60. In one case the Federal Circuit affirmed in part and vacated in part. See *Sharp v. Nicholson*, 403 F.3d 1324 (Fed. Cir. 2005).

reached the merits.<sup>61</sup> However, these statistics tend to mask a serious issue that lies below the surface of the opinions. Tension often exists between the two courts over fundamental matters. That tension has the potential to adversely impact the development of veterans benefits law.<sup>62</sup>

The type of adjudication at the Veterans Court (single judge or panel)<sup>63</sup> did not appear to make a significant difference in reversal rates. Overall, single Veterans Court judges rendered fifty-seven of the seventy-two merits decisions. In other words, 79.1% of the Federal Circuit merits decisions dealt with single-judge opinions and 20.9% dealt with panel opinions. Table 2 summarizes how single-judge and panel judgments of the Veterans Court fared at the Federal Circuit during the past two years. The statistics in Tables 1 and 2 show very little variance in reversal/affirmance rates among all merits decisions and either single-judge or panel opinions.

TABLE 2  
FEDERAL CIRCUIT MERITS DECISIONS DISPOSITION—  
VETERANS COURT SINGLE-JUDGE VS. PANEL DECISIONS

Judgment Type	Affirmance	Reversal	Other
Single Judge	75.4%	24.6%	0%
Panel	66.7%	26.6%	6.7%

As most practitioners before the Veterans Court know, the Court's use of single-judge dispositions is a matter of much

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61. I should note that the official statistics provided by the Federal Circuit reflect an even lower reversal rate during the relevant period. According to information available on the Federal Circuit website for 2004, the reversal rate for cases appealed from the Veterans Court was eleven percent. For 2005, the reversal rate was seven percent. *See* U.S. Court of Appeals for the Federal Circuit Web Page, <http://www.fedcir.gov> (follow "Information and Statistics" hyperlink; then click on the desired year beside the "Statistics" heading) (last visited Jan. 18, 2007) (on file with the University of Michigan Journal of Law Reform) [hereinafter Federal Circuit Web Page]. Direct comparisons between my statistics and those of the Circuit Court are difficult for two main reasons. First, the Federal Circuit operates on a fiscal year system in which a "year" runs from October 1 through September 30. The work I have done is based on a calendar year. Second, and more importantly, the Federal Circuit and I are quite likely counting different things in our calculation of reversal rates. I do not know the full extent of the Federal Circuit's approach so I cannot fully assess the differences in our approaches. Nevertheless, as the text makes clear, differences in reversal rate are not important for present purposes. The key issue is the overall comparison of reversal versus affirmance, which is consistent between the statistics presented here and those contained in the Federal Circuit's reports.

62. *See infra* Part III.B for a discussion of this unique and sometimes stormy relationship.

63. There were no en banc matters considered in Federal Circuit opinions during the relevant time.

interest—some would say much dispute. I also believe that there are significant concerns with such dispositions, though I recognize that the reality of the Court's caseload makes them essential to its operations. I return to a discussion of this issue below.<sup>64</sup> For now, I simply note that single-judge opinions are not significantly more likely to be reversed on appeal at the Federal Circuit, at least not in the past two years.<sup>65</sup> Therefore, this does not appear to be a persuasive objection to single-judge dispositions at the Veterans Court.

## 2. The Veterans Court

While the Federal Circuit has decided relatively few cases, matters are quite different at the Veterans Court.<sup>66</sup> The Clerk of the Veterans Court has published a summary of the Court's "Annual Reports" from 1996 to 2005. From reviewing just one year's Annual Report, it is quite apparent that the Veterans Court has a far more significant role in developing veterans law than the Federal Circuit could ever achieve.

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64. See *infra* Part III.A.

65. Given the importance of single-judge decisions to the working of the Veterans Court, it is surprisingly difficult to obtain solid statistics on the matter. For example, although the Clerk of the Veterans Court makes available Annual Reports addressing a number of issues about the Court's functioning, the type of case disposition is not among the matters reported. See UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORTS (1997–2006) (on file with the University of Michigan Journal of Law Reform) [hereinafter VETERANS COURT ANNUAL REPORT (Year)], available at [http://www.vetapp.uscourts.gov/annual\\_report/](http://www.vetapp.uscourts.gov/annual_report/). Nonetheless, it is clear that a great majority of the Court's cases are decided by single judges. One commentator has recently asserted that for the years 1999, 2000, and 2002, 92.9% of the Veterans Court's "opinions and orders" were decided by single judges. See Sarah M. Haley, Note, *Single-Judge Adjudication in the Court of Appeals for Veterans Claims and the Devaluation of Stare Decisis*, 56 ADMIN. L. REV. 535, 548 (2004); see also FOX, *supra* note 18, at 242 (asserting that approximately eighty percent of the case dispositions in the Veterans Court are by single-judge memoranda); Ronald L. Smith, *The Administration of Single Judge Decisional Authority by the United States Court of Appeals for Veterans Claims*, 13 KAN. J.L. & PUB. POL'Y 279, 282 (2004) (reporting that in Volume 16 of the VETERANS APPEALS REPORTER there were only 86 published decisions compared with 1073 "memorandum decisions"). Mr. Smith's conclusions concerning the relatively small number of panel and en banc decisions (i.e., those that are published) largely match mine. Compare VETERANS COURT ANNUAL REPORTS (2004) & (2005), *supra* (setting forth Court's statistics on total number of decisions), with Appendix C (summarizing all panel and en banc decisions in the twenty-seven month period under consideration in this study).

66. Appendix C to this Article sets forth a summary of all precedential decisions of the Veterans Court in the period from January 1, 2004 through March 31, 2006. The table provides the basic facts of each case, the holdings of the Veterans Court, and other relevant information such as the current status of any appeals.

In 2005, 3466 new cases were filed at the Veterans Court.<sup>67</sup> During that year, the Court issued 1281 “merits” decisions and 624 “procedural” decisions.<sup>68</sup> Finally, the Court considered 877 applications for attorneys’ fees under the Equal Access to Justice Act (EAJA).<sup>69</sup> In total, then, the Veterans Court decided a staggering 2782 cases in 2005, categorized as follows: merits decisions (46%), procedural decisions (22.4%), and EAJA matters (31.5%).

Much can be gleaned from the statistics on Veterans Court decisions. For example, if one removes matters concerning requests for extraordinary writs,<sup>70</sup> there were 1209 non-writ merits decisions in 2005. Table 3 sets forth the disposition of these cases.<sup>71</sup>

TABLE 3  
VETERANS COURT NON-WRIT MERITS DECISIONS  
DISPOSITION IN 2005

Type of Disposition	Percentage of Cases
Affirmed BVA Decision	22.4%
Reversed BVA Decision	21.3%
Mixed Outcomes (i.e., affirmed in part, reversed in part, vacated in part)	3.3%
Remanded to BVA	53.0%

Thus, when the Veterans Court actually decides a question on appeal, it is equally likely to reverse the BVA (21.3%) as to affirm a decision (22.4%). Review of affirmance versus reversal rates, therefore, suggests that the Veterans Court is not constitutionally unfriendly to veterans, at least this was the case in 2005.<sup>72</sup> From the

67. See Veterans Court Annual Report (2005), *supra* note 65. The information the Clerk of Court provides is based on the Court’s fiscal year, which ends September 30. Thus, the information for “2005” is for October 1, 2004 through September 30, 2005. As with the Federal Circuit, a direct comparison of the information I developed and that presented by the Court will not be possible.

68. *Id.*

69. *Id.* The EAJA provides a mechanism by which prevailing parties in certain types of litigation may recover their attorneys’ fees. See 28 U.S.C. § 2412 (2000). In 1992, Congress authorized the Veterans Court to award fees under the EAJA. See Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506, 4513 (1992) (codified at 28 U.S.C. § 2412(d)(2)(F)).

70. The Veterans Court has the authority under the All Writs Act (as do other federal courts) to “issue all writs necessary or appropriate in aid of [its jurisdiction] and agreeable to the usages and principles of law.” 28 U.S.C. § 1651 (2000).

71. All information used to prepare Table 3 appears in the Veterans Court Annual Report (2005), *supra* note 65.

72. It appears that matters were even better from veterans’ perspectives in 2004. According to the Clerk’s statistics, of the non-writ merits decisions (that were not remanded) rendered by the Veterans Court from October 1, 2003 through September 30, 2004, 12.1%

perspective of veterans, the true difficulty is that over half of the merits decisions in 2005 were remanded to the BVA for some type of further proceeding.<sup>73</sup> This reality has potentially serious consequences, to which I return below.<sup>74</sup>

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This Part has described the structure of judicial review of veterans benefits decisions and the landscape of such review over the past two years. The next Part analyzes the substantive decisions of the Federal Circuit and the Veterans Court during the relevant period.

## II. SIGNIFICANT THEMES IN VETERANS LAW: 2004–2006

A review of all the Federal Circuit and Veterans Court opinions in the period covered by this study reveals a number of significant decisions. This Part of the Article, however, does not rehearse all of those developments.<sup>75</sup> Rather, it will highlight the four principal themes in veterans benefits law from January 2004 through March 2006. Those themes tell much about where veterans law has been and also about where it is likely going. This Part considers each of these four themes in turn: (1) the Veterans Court's jurisdiction; (2) the mandate to "take due account of the rule of prejudicial error"; (3) the requirement to read certain pleadings sympathetically and its connection to the question of unadjudicated claims; and (4) certain issues concerning medical examinations. At the conclusion of this Part, I break my self-imposed rule and address one decision that has particular significance. That discussion also serves as a transition to Part III.<sup>76</sup>

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were affirmed, 24.5% were reversed, and 2.7% were a mixed disposition. See Veterans Court Annual Report (2004), *supra* note 65.

73. Remand statistics were better for veterans in 2005 than in 2004. In 2004, 60.6% of the non-writ merits decisions were remanded. See *id.*

74. See *infra* Part II.C.2.

75. I have included a summary of the significant "stand-alone" decisions in veterans benefits law as Appendix D to this Article.

76. I have provided basic information throughout this Article concerning the substantive content of veterans benefits law. At times, I have even provided substantial detail about a given issue. However, I have assumed in this portion of the Article that readers have some understanding of this area of the law.

*A. Jurisdiction, Jurisdiction, Jurisdiction*

One of the most significant themes in the decisions over the past two years concerns the jurisdiction of the Veterans Court. Both the Federal Circuit and the Veterans Court itself have been extremely active in resolving jurisdictional questions. These various decisions set the stage for further development in the years to come and also reflect the tensions that exist between the two courts. Roughly speaking, these decisions fall into two jurisdictional categories: (1) equitable tolling, which extends a claimant's time to file a Notice of Appeal (NOA) at the Veterans Court; and (2) what I refer to as esoteric expansions of Veterans Court jurisdiction. I discuss each area below.

### 1. Equitable Tolling<sup>77</sup>

It is fair to say that the Veterans Court and the Federal Circuit have quite different assessments of the timeliness standard to which claimants should be held when filing an appeal with the Veterans Court. These differences reveal much about the relationship between these courts as well as the transition that claimants face from the "non-adversarial" VA proceedings to the adversarial appellate process. I return to these broader issues in Part III. For now, this subpart focuses on the jurisdictional doctrine itself.

A claimant who is dissatisfied with a BVA decision may seek review in the Veterans Court by filing an NOA with the Veterans Court within 120 days after the BVA mails its notice of decision to the claimant.<sup>78</sup> A recurring issue faced by both the Federal Circuit and the Veterans Court is whether they will consider a claimant's reasons for late filing of the NOA. During the past two years, the Federal Circuit has made clear that the Veterans Court should take a less restrictive view of the circumstances under which the 120-day period can be "equitably tolled."<sup>79</sup>

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77. The equitable tolling developments of the past two years continue the work started by the Federal Circuit in 2002 and 2003. *See, e.g.,* *Bailey v. Principi*, 351 F.3d 1381 (Fed. Cir. 2003); *Santana-Venegas v. Principi*, 314 F.3d 1293 (Fed. Cir. 2002); *Jaquay v. Principi*, 304 F.3d 1276 (Fed. Cir. 2002) (en banc).

78. *See* 38 U.S.C. § 7266(a) (2001) (providing in relevant part that "a person adversely affected by [a BVA] decision shall file a notice of appeal with the Court within 120 days after the date on which notice of the decision is mailed . . .").

79. Of course, the Federal Circuit itself limited the application of equitable tolling in *AF v. Nicholson*, 168 F. App'x 407 (Fed. Cir. 2006). In *AF*, the Federal Circuit affirmed a Veterans Court judgment that equitable tolling principles do *not* apply to the time



Early in the period covered by this Article, the Federal Circuit set the tone for many of its subsequent decisions, at least jurisdictionally. The Federal Circuit reversed the Veterans Court's dismissal of an appeal as untimely when the veteran had misfiled his NOA with the BVA instead of the Court within the 120-day period.<sup>80</sup> The Circuit Court held that such a misfiling, within the appeal period, showed the requisite "due diligence" and thus qualified for equitable tolling.<sup>81</sup>

The Circuit Court addressed a different, and probably more significant, aspect of equitable tolling in *Barrett v. Nicholson*.<sup>82</sup> In that case, the Federal Circuit reversed the Veterans Court's judgment and held that a mental illness may justify equitable tolling of the appellate filing period.<sup>83</sup> Specifically, the Federal Circuit articulated the following test:

[T]o obtain the benefit of equitable tolling, a veteran must show that the failure to file was the direct result of a mental illness that rendered him incapable of rational thought or deliberative decision making or incapable of handling his own affairs or unable to function in society.<sup>84</sup>

The next year in *Arbas v. Nicholson*,<sup>85</sup> the Federal Circuit again reversed the Veterans Court on the issue of equitable tolling. This time, the Circuit Court held that a physical impairment could

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requirements in 38 U.S.C. § 5110(a) (providing the effective dates of benefits) because those rules are not statutes of limitations. *Id.*

80. *Brandenberg v. Principi*, 371 F.3d 1362, 1363 (Fed. Cir. 2004). The Veterans Court had grudgingly reached a similar conclusion in an earlier case. *See Bobbitt v. Principi*, 17 Vet. App. 547, 551 (2004) (critically discussing the Federal Circuit's general reasoning about equitable tolling, but stating that the Veterans Court was bound to follow the decisions).

81. *Brandenberg*, 371 F.3d at 1363–64.

82. *Barrett v. Nicholson*, 363 F.3d 1316 (Fed. Cir. 2004).

83. *Id.* at 1317. *Barrett* also calls into question a Veterans Court decision issued one month before in which the Veterans Court rejected equitable tolling in a Post-Traumatic Stress Disorder (PTSD) case. *See Thornhill v. Principi*, 17 Vet. App. 480, 483–86 (2004).

84. *Barrett*, 363 F.3d at 1321 (internal quotation marks, citations, and brackets omitted). The Circuit Court also noted that parties who were represented during the period of incapacity would face a higher burden and that, for all veterans, more would be required than simply a medical diagnosis alone "or vague assertions of mental problems." *Id.* The Federal Circuit later gave more guidance on the tolling standard it laid out in *Barrett*. In *Van Allen* the court affirmed the Veterans Court holding that evidence of a mental impairment fifteen years before the purported tolling period was not sufficient to satisfy the standard. *Van Allen v. Nicholson*, 129 F. App'x 611, 612–13 (Fed. Cir. 2005).

85. *Arbas v. Nicholson*, 403 F.3d 1379 (Fed. Cir. 2005).

also justify equitable tolling if a veteran could otherwise satisfy the *Barrett* standard.<sup>86</sup>

The disagreements in this general area are not limited to equitable tolling. The Federal Circuit has also taken a different approach than the Veterans Court toward the form of NOAs under the Rules of the Court of Appeals for Veterans Claims.<sup>87</sup> In *Durr v. Nicholson*,<sup>88</sup> the Federal Circuit considered the Veterans Court's dismissal of an appeal as untimely under Rule 3.<sup>89</sup> The Veterans Court had ruled that an appeal was untimely because the claimant's NOA did not specifically identify the BVA decision he was appealing, and it did not include his telephone number, his VA claims file number, or his address.<sup>90</sup> The Circuit Court rejected each of these rationales for dismissing the appeal and, along the way, criticized the Veterans Court for taking too broad a view of the jurisdictional impact of its own rules of procedure.<sup>91</sup>

The Federal Circuit may have formulated the law of equitable tolling and the timeliness of appeals, but it is the Veterans Court that must implement the law in the great majority of cases. While the Veterans Court is complying with the *Brandenberg/Barrett/Arbas* principles, it has not embraced the spirit of those decisions.

*Claiborne v. Nicholson* provides a good example of the Veterans Court's attitude.<sup>92</sup> In that case, an elderly, unrepresented veteran filed an NOA approximately 30 days after the 120-day appeal period had expired.<sup>93</sup> The veteran sought the protections of equitable tolling by asserting that his age and a mental illness (dementia) caused him to file the NOA late.<sup>94</sup> The veteran submitted three brief statements from doctors as well as medical literature

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86. *Id.* at 1381.

87. VET. APP. R. PRACTICE & P. [effective Sept. 13, 2004] (on file with the University of Michigan Journal of Law Reform), available at [http://www.vetapp.gov/documents/Rules\\_of\\_Practice\\_and\\_Procedure.pdf](http://www.vetapp.gov/documents/Rules_of_Practice_and_Procedure.pdf).

88. *Durr v. Nicholson*, 400 F.3d 1375 (Fed. Cir. 2005).

89. *Id.* at 1375–76. Rule 3 is entitled “How to Appeal.” It provides information about matters such as where to file the NOA, how to serve it, the content of the document, and the payment of filing fees.

90. *Durr*, 400 F.3d at 1380–81.

91. *Id.* at 1380–83.

92. *Claiborne v. Nicholson*, 19 Vet. App. 181 (2004), *aff'd*, 173 F. App'x 826 (Fed. Cir. 2006).

93. *See id.* at 182 (noting that the relevant BVA decision was mailed on July 24, 2002 and that the veteran's NOA was deemed filed as of December 28, 2002).

94. *Id.* The veteran also claimed that stress caused by the illnesses of his wife and daughters contributed to his mental confusion. *Id.*

discussing dementia.<sup>95</sup> The Veterans Court rejected equitable tolling and dismissed the appeal as untimely filed.<sup>96</sup>

The Federal Circuit affirmed without opinion the Veterans Court's decision in *Claiborne*.<sup>97</sup> Yet, despite this agreement as to the result, it is difficult to reconcile the Veterans Court's attitude in the opinion with the very concept of equitable tolling. When one reads the Veterans Court opinion, it is striking not so much because of its result—it is possible, as the Federal Circuit apparently concluded, to reach the conclusion the Veterans Court did—but rather by the overly-restrictive attitude the Veterans Court displayed about equitable tolling more generally. For example, the Veterans Court supported its decision in part by noting that the veteran's medical evidence stated only that he was "severely impaired" in his mental processes and by comparing this terminology to the Federal Circuit's requirement that a claimant be "incapable."<sup>98</sup> The Court was, of course, correct in its quotation of both sources, but its approach to equitable tolling does not place much weight on the notions of fairness that formed the foundation of the Federal Circuit's decisions.<sup>99</sup> In other words, even though both the Federal Circuit and the Veterans Court reached the same conclusion in *Claiborne*, that convergence may mask an important foundational difference between the courts over the extent that equitable tolling should be allowed.

I do not mean to suggest that the Veterans Court has abdicated its responsibility to follow the law set by the Federal Circuit. De-

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95. *Id.* at 183–84. On two of the reports, the doctors merely checked boxes indicating that the veteran was "severely impaired" as a result of dementia and that this dementia had a negative impact on his decision-making during the relevant period. *Id.* at 183. The other medical opinion was a more traditional one, which ultimately concluded that the veteran had "symptoms . . . compatible with an early dementia, probably degenerative type" during the relevant period. *Id.* at 184.

96. *Id.* at 188. This was actually the second time that the Veterans Court reached this conclusion. In a single-judge order the Veterans Court dismissed the appeal in 2003. *See Claiborne v. Principi*, 18 Vet. App. 321 (2003). The Federal Circuit vacated that decision and remanded the case for further consideration in light of *Barrett*. *Claiborne v. Principi*, 103 F. App'x 387, 388 (Fed. Cir. 2004).

97. *See Claiborne v. Nicholson*, 173 F. App'x 826 (Fed. Cir. 2006).

98. *Claiborne v. Nicholson*, 19 Vet. App. 181, 187 (2005).

99. *See, e.g., Brandenburg v. Principi*, 371 F.3d 1362, 1363–64 (Fed. Cir. 2004); *Barrett v. Principi*, 363 F.3d 1316, 1318–21 (Fed. Cir. 2004). In another case, the Veterans Court declined to decide whether the *Barrett* principles applied to the late filing of an NOD, the document necessary to start the appellate process *within* the VA. *See McPhail v. Nicholson*, 19 Vet. App. 30, 33–34 (2005). The Veterans Court held that the appellant had abandoned all claims of error on appeal. *Id.* at 33. The Federal Circuit affirmed the Veterans Court decision, holding that the veteran had not alleged below that he had actually filed an NOD at any time. *McPhail v. Nicholson*, 168 F. App'x 952, 952–53 (2006). The Circuit Court declined to reach the issue of whether the *Barrett* principles applied in that situation. *Id.*

spite the obvious disagreement between the two courts on this issue, the Veterans Court has rendered two decisions that are particularly significant in the development of equitable tolling doctrine. First, in *Jones v. Principi*,<sup>100</sup> the Veterans Court held that the statutory “duty to assist”<sup>101</sup> does not apply to an appellant’s assertion that he or she is entitled to equitable tolling at the Veterans Court.<sup>102</sup> The Veterans Court reasoned that the statutory duty to assist was limited to the provision of VA benefits and not to the preservation of procedural rights such as establishing the timeliness of an appeal.<sup>103</sup>

Second, the Veterans Court recently announced a three-part test to assess the appropriateness of equitable tolling under “extraordinary circumstances.”<sup>104</sup> Specifically, the Veterans Court held that equitable tolling would be appropriate when the following conditions were satisfied:

- (1) “the extraordinary circumstance must be beyond the appellant’s control”;<sup>105</sup>
- (2) “the appellant must demonstrate that the untimely filing was a direct result of the extraordinary circumstances”;<sup>106</sup> and
- (3) “the appellant must exercise ‘due diligence’ in preserving his appellate rights, meaning that a reasonably diligent appellant, under the same circumstances, would not have filed his appeal within the 120-day judicial-appeal period.”<sup>107</sup>

Thus, the Veterans Court has established a test that, on its face, appears to implement the Federal Circuit’s instructions that filing deadlines are important but not inflexible. Of course, only time will tell whether the Veterans Court will implement the spirit of the Circuit Court’s rules when applying the test. It does seem certain

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100. *Jones v. Principi*, 18 Vet. App. 500 (2004), *appeal dismissed sub nom.* *Jones v. Nicholson*, 431 F.3d 1353 (Fed. Cir. 2005).

101. Congress has specified that the “Secretary shall make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant’s claim for a benefit under a law administered by the Secretary.” 38 U.S.C. § 5103A(a)(1) (2000). This statutory duty is referred to as the “duty to assist.”

102. *Jones*, 18 Vet. App. At 501–03.

103. *Id.* at 502.

104. *McCreary v. Nicholson*, 19 Vet. App. 324, 332 (2005).

105. *Id.*

106. *Id.*

107. *Id.*

that there will be further development in the law of equitable tolling in the years to come.

## 2. Esoteric Expansion of Veterans Court Jurisdiction

The other strand of decisions in this area concerns the Federal Circuit's relatively liberal view of the scope of Veterans Court jurisdiction, which is governed by 38 U.S.C. §§ 7252.<sup>108</sup> The full import of these decisions is not yet clear. There may not be any further developments along the lines discussed below. On the other hand, the decisions over the past two years might be only the beginning of exploring § 7252's meaning.

The first esoteric expansion of jurisdiction enables judicial review of VA decisions that accredit attorneys and others to represent claimants before the VA.<sup>109</sup> In *Bates v. Nicholson*, an attorney whose accreditation had been revoked petitioned for a writ of mandamus in the Veterans Court and requested the Court to direct the Secretary to issue a Statement of the Case (SOC).<sup>110</sup> The Secretary had refused to issue a SOC on the ground that the BVA did not have jurisdiction over a dispute about accreditation.<sup>111</sup> The Veterans Court denied the writ on the ground that the BVA would not have jurisdiction over the matter and, therefore, the Veterans Court lacked the authority under the All Writs Act to intervene.<sup>112</sup> The Federal Circuit reversed the Veterans Court's judgment and directed the Court to issue the requested writ.<sup>113</sup> The Federal Circuit's decision signals that both the BVA and the Veterans Court should have a hand in representation issues.

Although the Federal Circuit's decision in *Bates* is important for the narrow purpose of representation before the VA, the reasoning in the case has potentially more significant consequences. The Circuit Court effectively held that 38 U.S.C. § 511(a)'s reference to "a law that affects the provision of benefits by the Secretary"<sup>114</sup> should

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108. 38 U.S.C. §§ 7252, 7261 (2000).

109. See 38 U.S.C. §§ 5901, 5904(a) (2000).

110. *Bates v. Nicholson*, 17 Vet. App. 443, 443–44 (2004), *rev'd*, 398 F.3d 1355 (Fed. Cir. 2005).

111. See *id.* at 443–44.

112. See *id.* at 444–46.

113. *Bates*, 398 F.3d at 1366. Thereafter, the Veterans Court issued the writ in compliance with the Federal Circuit's mandate. See *Bates v. Nicholson*, 19 Vet. App. 197, 198 (2005).

114. 38 U.S.C. § 511(a) (2000) concerns the finality of the Secretary's benefit decisions. It insulates those decisions made pursuant to "a law that affects the provision of benefits" from judicial review except in limited circumstances, one of which is review by the Veterans

be read broadly. Specifically, the Circuit Court determined that the phrase refers to any “single statutory enactment that bears a Public Law number in the Statutes at Large.”<sup>115</sup> The application of that rule in *Bates* led to a finding of jurisdiction because the statutory accreditation provision was held to be part of a single statute dealing with veterans benefits. How that rule will apply in other situations remains to be seen, but it certainly has the potential to expand the Veterans Court’s jurisdiction in unforeseen ways.

The second esoteric expansion of jurisdiction concerns § 7252’s restriction on the Veterans Court’s jurisdiction. That section provides:

The Court may not review the schedule of ratings for disabilities adopted under section 1155 of this title or any action of the Secretary in adopting or revising that schedule.<sup>116</sup>

During the past two years the Federal Circuit issued two decisions in connection with this issue. The first decision is unremarkable given the statutory language. Specifically, in *Wanner v. Principi*,<sup>117</sup> the Veterans Court determined that it had jurisdiction to consider whether a particular diagnostic code was consistent with the underlying statute.<sup>118</sup> The Federal Circuit reversed and held that § 7252(b) should be read broadly: “The statutory scheme . . . consistently excludes from judicial review all content of the ratings schedule as well as the Secretary’s actions in adopting or revising that content.”<sup>119</sup> Thus, it seemed that the Federal Circuit had formulated a bright-line rule to keep the Veterans Court from hearing ratings schedule matters.

The potential expansion of jurisdiction—and a fair amount of confusion—came from the Federal Circuit only three weeks after

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Court. See 38 U.S.C. § 511(b)(4) (2000). Thus, by reading § 511(a) broadly, the Federal Circuit effectively read the Veterans Court’s jurisdiction broadly as well.

115. *Bates*, 398 F.3d at 1361.

116. 38 U.S.C. § 7252(b) (2000). Congress has directed that the Secretary “adopt and apply a schedule of ratings of reductions in earning capacity from specific injuries or combination of injuries.” 38 U.S.C. § 1155 (2000). In essence, this ratings schedule operates once a veteran has established that he or she has a service-connected disability. At that point, the ratings schedule specifies how much the veteran’s earning capacity is reduced. The higher the rating, the more the veteran will receive from the VA each month. For a general discussion of the ratings schedule, see VETERANS BENEFITS MANUAL § 3.1.3, at 57 (Barton F. Stichman & Ronald B. Abrams eds., LexisNexis 2006).

117. *Wanner v. Principi*, 17 Vet. App. 4 (2003).

118. *Id.* at 13–15.

119. *Wanner v. Principi*, 370 F.3d 1124, 1129 (Fed. Cir. 2004).

*Wanner* when the Circuit Court decided *Sellers v. Principi*.<sup>120</sup> At issue in *Sellers* was whether 38 C.F.R. § 4.130<sup>121</sup> expressly adopted the DSM-IV's definition of Post-Traumatic Stress Disorder<sup>122</sup> and, therefore, whether the VA erred by not considering those symptoms in the case at hand.<sup>123</sup> The VA argued on appeal to the Federal Circuit that the Veterans Court had violated the jurisdictional restriction in § 7252(b) by reviewing a ratings schedule.<sup>124</sup> The Circuit Court rejected this argument, holding that the veteran's "argument goes not to the content of the ratings criteria, but rather to the correct interpretation of section 4.130, specifically the relationship between the DSM-IV and the general rating formula."<sup>125</sup> At no point in *Sellers* did the Federal Circuit cite its decision in *Wanner*.

It is unclear how *Wanner* and *Sellers* can be reconciled. Indeed, I am tempted to paraphrase the Supreme Court's comments about obscenity here, namely that the Federal Circuit knows what violates § 7252(b) when it sees it, but it cannot define it.<sup>126</sup> The Veterans Court has also struggled with these potentially inconsistent decisions.<sup>127</sup> This area should be monitored in the coming years to see how the apparent inconsistency between *Wanner* and *Sellers* is resolved. The resolution could have a significant impact on the scope of the Veterans Court's jurisdiction.<sup>128</sup>

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120. *Sellers v. Principi*, 372 F.3d 1318 (Fed. Cir. 2004).

121. 38 C.F.R. § 4.130 (1996) sets forth the schedule of ratings for mental disorders.

122. "DSM-IV" refers to the *Diagnostic and Statistical Manual of Mental Disorders*, published by the American Psychiatric Association. DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS FOURTH EDITION (DSM-IV) (Am. Psychiatric Ass'n 1994). The DSM-IV is highly influential in mental health circles. As one popular internet site put it: "The book is typically considered the 'bible' for any professional who makes psychiatric diagnoses in the United States and many other countries." AllPsych Online, *Psychiatric Disorders*, <http://allpsych.com/disorders/dsm.html> (last visited January 30, 2007) (on file with the University of Michigan Journal of Law Reform).

123. *Sellers*, 372 F.3d at 1323–24.

124. *Id.*

125. *Id.* at 1324.

126. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (noting that, while he could not define obscenity, "I know it when I see it").

127. See, e.g., *Byrd v. Nicholson*, 19 Vet. App. 388 (2005); *Smith (Ellis) v. Nicholson*, 19 Vet. App. 63 (2005).

128. Another potential esoteric expansion of jurisdiction also looms on the horizon. In *King v. Nicholson*, a veteran appealed the BVA's decision that it lacked jurisdiction to review a VA medical center determination that a particular outpatient therapy "was not an appropriate course of treatment." *King v. Nicholson*, 19 Vet. App. 406, 407 (2006). The BVA seemed to have a solid ground for its decision given the wording of 38 C.F.R. § 20.101(b): "Medical determinations, such as determinations of the need for and appropriateness of specific types of medical care and treatment for an individual, are not adjudicative matters and are beyond the Board's jurisdiction." 38 C.F.R. § 20.101(b). The Veterans Court surprisingly vacated the BVA's judgment and remanded the case. *King*, 19 Vet. App. at 411. The Veterans Court held, in part, that the Board had failed to consider whether the prohibition in 38

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Finally, there is one other jurisdictional case that does not fit into either of the earlier categories but is nonetheless significant. In *Kirkpatrick v. Nicholson*,<sup>129</sup> the Federal Circuit ruled that BVA decisions remanding matters to a VA Regional Office are not “decisions” and, therefore, cannot be appealed to the Veterans Court.<sup>130</sup> In addition, the Circuit Court held that this rule of “non-finality” allows no exceptions, as there are in limited circumstances when the Veterans Court remands matters to the BVA.<sup>131</sup> While this principle is not surprising, it is doctrinally important because it delays judicial consideration of a veteran’s claim. In any event, the decisions I have discussed in this subpart underscore the importance of jurisdiction to the functioning of the Veterans Court.

*B. The Obligation to “Take Due Account of the Rule of Prejudicial Error”*

Another important theme that emerged during the past two years involves the requirement that, in reviewing BVA decisions, the Veterans Court “shall . . . take due account of the rule of prejudicial error.”<sup>132</sup> In *Conway v. Principi*,<sup>133</sup> the Federal Circuit held that duty-to-notify claims are not excepted from this statutory command.<sup>134</sup> The Circuit Court stated that the requirement “applies to all Veteran’s Court proceedings”<sup>135</sup> and remanded the matter to the Veterans Court to apply the rule of prejudicial error.<sup>136</sup>

The Veterans Court dutifully followed the Federal Circuit’s direction and issued a significant opinion interpreting § 7261(b)(2) and defining the procedures that should be used to “take due

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C.F.R. § 20.101(b) applied to a categorical refusal by the VA to use a given medical procedure or only to an individualized denial of treatment. *Id.* The impression given (although not stated as a holding) was that the regulation might not be as broad as it appears. Nothing may ultimately come of this issue, but it provides another example of a potential area for unique jurisdictional growth.

129. *Kirkpatrick v. Nicholson*, 417 F.3d 1361 (Fed. Cir. 2005).

130. *Id.* at 1365–66.

131. *Id.*

132. 38 U.S.C. § 7261(b)(2) (Supp. III 2003).

133. *Conway v. Principi*, 353 F.3d 1369 (Fed. Cir. 2004).

134. *Id.* at 1374. Like the duty to assist, the “duty to notify” is largely a creature of statute. *See* 38 U.S.C. § 5103(a) (2000). Under this statutory provision, the Secretary must notify a claimant of certain information, including, most importantly, “any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim.” *Id.*

135. *Conway*, 353 F.3d at 1374.

136. *Id.* at 1375.



account” of prejudicial error.<sup>137</sup> In *Mayfield v. Nicholson*,<sup>138</sup> the Veterans Court adopted the following general principles to guide its application of the “rule of prejudicial error.”<sup>139</sup> First, the Veterans Court provided several formulations for defining “prejudicial error.” The central theme was that prejudicial error implicates the “essential fairness of the [adjudication].”<sup>140</sup> In this regard, the Court made clear that a showing of prejudice does not require a conclusion that the outcome would necessarily have been different without the error.<sup>141</sup> The Veterans Court next addressed which party would carry the burden of proving that an alleged error was prejudicial.<sup>142</sup> The Court assigned the burden to the claimant and further indicated that the burden was a heightened one.<sup>143</sup> If a claimant satisfied this burden, then the Secretary would shoulder the burden (again a heightened one) to show that the error was not prejudicial.<sup>144</sup> Finally, the Veterans Court provided guidance for applying the rule of prejudicial error specifically in the context of a claim concerning a breach of the duty to notify.<sup>145</sup>

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137. See *Mayfield v. Nicholson*, 19 Vet. App. 103 (2005), *rev'd*, 444 F.3d 1328 (Fed. Cir. 2006).

138. *Id.*

139. An interesting feature of *Mayfield* is that much of the opinion is dicta. Writing for the panel, Judge Steinberg held that the notice provided by the Secretary was sufficient under the statute. *Id.* at 123–29. Thus, the Veterans Court’s extensive discussion about the meaning of prejudicial error seems unnecessary. See *id.* at 111–23. In any event, whether dicta or not, the Veterans Court has applied the *Mayfield* analysis in later cases in which errors were found. See, e.g., *Kent v. Nicholson*, 20 Vet. App. 1, 8–16 (2006); *Dingess v. Nicholson*, 19 Vet. App. 473, 492–501 (2006); *Pelea v. Nicholson*, 19 Vet. App. 296, 307–09 (2005), *appeal dismissed*, 159 F. App’x 1003 (Fed. Cir. 2005); *Rodriguez v. Nicholson*, 19 Vet. App. 275, 291–95 (2005), *appeal pending*, No. 06-7023 (Fed. Cir.).

140. *Mayfield*, 19 Vet. App. at 116 (quoting *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553–54 (1984)).

141. *See id.*

142. *Id.* at 116–20.

143. *Id.* at 119–20 (requiring that the appellant “[assert] with specificity how an error was prejudicial.”).

144. *Id.* at 120 (stating that, after claimant satisfies his or her burden, “it becomes the Secretary’s burden to demonstrate that the error was clearly nonprejudicial to the appellant—that is, that the error is not one that affected the essential fairness of the adjudication.” (internal quotation marks and brackets omitted)).

145. *Id.* at 120–21. The Court in *Mayfield* and later decisions made clear that a failure of the “first” notice requirement—the requirement for the VA to advise the claimant of the evidence that would be necessary to sustain the claim—was, by definition, an error implicating the fairness of the adjudication. See, e.g., *Pelea*, 19 Vet. App. at 307; *Mayfield*, 19 Vet. App. at 122. The Veterans Court also specifically addressed the rule of prejudicial error in connection with a duty-to-notify claim in *Dingess v. Nicholson*, 19 Vet. App. 473 (2006). In that case, the Court focused on how the duty to notify operated when the initial disability rating and the effective date of benefits were at issue. See *id.* at 484–86. For a good summary of *Mayfield* and the rule of prejudicial error in the context of the duty to notify generally, see VETERANS BENEFITS MANUAL, *supra* note 116, at §§ 15.3.3.5 to 15.3.3.5.1.

Practitioners eagerly awaited the Federal Circuit's assessment of the Veterans Court's guiding rules in *Mayfield*. But those interested in this issue will have to wait longer. On April 5, 2006, the Federal Circuit reversed the Veterans Court's judgment in *Mayfield*.<sup>146</sup> However, the Circuit Court declined to address the Veterans Court's holdings concerning the application of the rule of prejudicial error.<sup>147</sup> Instead, the Federal Circuit held that the Veterans Court had erred by relying on evidence that the BVA had not relied on when it considered the issue.<sup>148</sup> The Circuit Court remanded the matter to the Veterans Court, leaving for another day a decision about the *Mayfield* procedure.<sup>149</sup> This issue will assuredly be a major one in the immediate future.

### *C. Of Sympathetic Readings and Unadjudicated Claims*

The third major theme in veterans law over the past two years concerns two distinct topics: the requirement to read pro se pleadings sympathetically and the question of when claims remain unadjudicated (and therefore pending at the VA) as a matter of law. While distinct, these topics share common ground, which likely explains why both the Federal Circuit and the Veterans Court have tied the issues together. I have attempted to separate them to the extent possible given their treatment in the cases. This subpart begins with a discussion of the sympathetic reading requirement and then turns to the question of unadjudicated claims.

#### 1. Sympathetic Reading of Pro Se Pleadings

A significant development in the past two years was the Federal Circuit's reiteration—and perhaps strengthening—of the duty to “sympathetically read” submissions by pro se claimants. That duty is not new, having been articulated in 2001 in *Roberson v. Principi*.<sup>150</sup> But the Veterans Court apparently did not apply the *Roberson* rule as aggressively as the Federal Circuit had envisioned. For example, the Veterans Court took the position that the *Roberson* duty did not

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146. *Mayfield v. Nicholson*, 444 F.3d 1328 (2006).

147. *Id.* at 1336–37.

148. *Id.* at 1333–36.

149. *Id.* at 1337.

150. *Roberson v. Principi*, 251 F.3d 1378 (Fed. Cir. 2001).

apply to claims of clear and unmistakable error (CUE)<sup>151</sup> in earlier decisions.<sup>152</sup> However, the Federal Circuit reversed the Veterans Court in *Andrews v. Principi*, leaving no doubt that “*Roberson* requires the RO and the Board to sympathetically read all pleadings filed pro se, including CUE motions.”<sup>153</sup> At the same time, the Circuit Court made subsidiary holdings about the duty to read pleadings sympathetically that better delineated the boundaries of the doctrine. Specifically, the Federal Circuit held: “*Roberson* does not require sympathetic reading of pleadings filed by counsel”;<sup>154</sup> and “failure to raise an issue in a CUE motion filed by counsel before the VA is fatal to subsequently raising the issue before the Veteran’s Court.”<sup>155</sup> The full impact of *Andrews* remains to be seen, but it could be significant given the prevalence of CUE claims and pro se litigants in the benefits system.

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151. CUE is an issue that the Veterans Court and Federal Circuit encounter frequently. When a claimant alleges that an earlier decision denying benefits at the administrative level was the product of CUE, he or she is attempting to alter a final adjudication. Accordingly, not just any error is sufficient to establish CUE in an earlier decision because such a finding could undermine a final judgment. As defined in the Code of Federal Regulations:

Clear and unmistakable error is a very specific and rare kind of error. It is the kind of error, of fact or law, that when called to the attention of later reviewers compels the conclusion, to which reasonable minds could not differ, that the result would have been manifestly different but for the error. Generally, either the correct facts, as they were known at the time, were not before the Board, or the statutory and regulatory provisions extant at the time were incorrectly applied.

38 C.F.R. § 20.1403(a) (2006). As a prominent text in veterans law has recognized, “a CUE motion is a difficult one to win.” VETERANS BENEFITS MANUAL, *supra* note 116, § 14.4, at 1056. For a general discussion of the concept, see Fox, *supra* note 18, at 163–73.

I note that the shorthand phrase “CUE claim” is technically inaccurate. The correct description is that an allegation of CUE is a mechanism through which to revise a prior, final decision. See, e.g., 38 U.S.C. § 5109A(d) (2000). I will often use the shorthand phrase “CUE claim” as the Veterans Court and Federal Circuit often do.

152. See *Andrews v. Principi*, 18 Vet. App. 177, 184–87 (2004), *aff’d on other grounds*, 421 F.3d 1278 (Fed. Cir. 2005).

153. *Andrews v. Principi*, 421 F.3d 1278, 1284 (Fed. Cir. 2005); see also *Moody v. Principi*, 360 F.3d 1306, 1310 (Fed. Cir. 2004) (reiterating that *Roberson* requires a sympathetic reading of all pro se pleadings submitted to the VA); *Szemraj v. Principi*, 357 F.3d 1370, 1372–73 (Fed. Cir. 2004) (same). The Veterans Court appears to be taking the Federal Circuit’s commitment to sympathetic reading quite seriously. See, e.g., *Beverly v. Nicholson*, 19 Vet. App. 394, 404–06 (2005) (remanding case to BVA to determine whether appellant’s pro se submissions to the BVA reasonably raised an informal claim to reopen an earlier decision).

154. *Andrews*, 421 F.3d at 1284.

155. *Id.* at 1284–85.

## 2. The Unadjudicated Claim

The second issue in this strand of case law defines when a claim may be considered “unadjudicated” and, therefore, pending at the VA. This question is particularly important because of the Federal Circuit’s strong commitment to finality once a claimant has exhausted all avenues for direct appeal. If a claim is unadjudicated, on the other hand, the finality concerns are not implicated. As made clear yet again during the past two years, there are only two exceptions to this rule of finality: (1) submitting new and material evidence to reopen the finally adjudicated claim; and (2) alleging CUE in the earlier decision.<sup>156</sup> This issue relates to the duty to sympathetically read pro se pleadings because the Federal Circuit has ruled that the VA’s violation of its *Roberson* duty does not render a claim unadjudicated. As the Circuit Court stated in *Andrews*, “when the VA violates *Roberson* by failing to construe the veteran’s pleadings to raise a claim, such claim is not considered unadjudicated but the error is instead properly corrected through a CUE motion.”<sup>157</sup>

In addition to the sympathetic reading connection, the Federal Circuit has specified that the breach of a VA *procedural* duty in an earlier decision does not render a matter unadjudicated.<sup>158</sup> Similarly, in *Bingham v. Nicholson*, the Circuit Court affirmed the Veterans Court’s holding that the VA’s failure to consider one *theory* of recovery does not render a denied claim unadjudicated.<sup>159</sup> Thus, neither a procedural defect nor an inattention to alternative theories will suffice to keep a claim pending at the VA. In sum, the clarification of the law in this area is a significant theme worthy of mention in the period under study.

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156. *Norton v. Principi*, 376 F.3d 1336, 1338 (Fed. Cir. 2004) (citing *Cook v. Principi*, 318 F.3d 1334, 1336 (Fed. Cir. 2002)). See *supra* note 151 for a discussion of CUE. “New and material evidence” is also a term of art. Essentially, the concept is based on a need to preserve finality, and it dictates that an earlier decision will not be revisited unless the factual basis of the decision has changed. See 38 U.S.C. § 7104(b) (2000) (specifying that a claim previously denied by the BVA “may not thereafter be reopened and allowed and a claim based on the same factual basis may not be considered”). For a general discussion of the concept, see Fox, *supra* note 18, at 153–62.

157. *Andrews*, 421 F.3d at 1284.

158. *Norton*, 376 F.3d at 1338–39.

159. See *Bingham v. Nicholson*, 421 F.3d 1346, 1349 (Fed. Cir. 2005).

*D. The Doctor Will See You Now: Medical Matters*

As one might expect given the nature of many veterans benefits, medical matters played an important role in this area of the law over the past two years. The principal decisions essentially fall into two categories: (1) those addressing when the BVA itself may seek expert medical opinions from within the VA; and (2) those providing guidance about medical examinations generally and the role of doctors during such exams particularly. The latter point also encompasses what the BVA may and may not do when considering doctors' reports. This subpart discusses each of these issues in turn.

### 1. The BVA and Obtaining Expert Medical Opinions

Both the Federal Circuit and the Veterans Court addressed the BVA's authority to obtain and consider medical opinions from *within* the VA.<sup>160</sup> A rule promulgated in 2001 and formally adopted in 2004 allowed the BVA to obtain an expert medical opinion from within the VA "when, in its judgment, such medical expertise is needed for equitable disposition of an appeal."<sup>161</sup> The Veterans Court initially considered whether this regulation was valid, eventually holding en banc that it was in *Padgett v. Nicholson*.<sup>162</sup> However, the mandate and opinion in *Padgett* were later withdrawn when the veteran died.<sup>163</sup>

The *Padgett* saga could have caused much uncertainty about the BVA's authority to obtain and consider expert medical opinions from within the VA. However, the Federal Circuit avoided the confusion by resolving a direct challenge to the regulation and allowing the BVA to obtain and consider such information. In *Disabled American Veterans v. Secretary*,<sup>164</sup> the Circuit Court upheld the regulation as consistent with the relevant statutory language.<sup>165</sup>

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160. It is clear that the BVA can obtain expert medical opinions from non-VA doctors. See 38 U.S.C. § 7109 (2000); see also 38 C.F.R. § 20.901(d) (2006) (implementing terms of § 7109).

161. 38 C.F.R. § 20.901(a).

162. *Padgett v. Nicholson*, 19 Vet. App. 133, 138–45 (2005) (en banc), *withdrawn*, *Padgett v. Nicholson*, 19 Vet. App. 334 (2005) (en banc).

163. *Padgett v. Nicholson*, 19 Vet. App. at 336. An appeal of the Court's decision to dismiss the case due to the veteran's death is currently pending before the Federal Circuit. See *Padgett v. Nicholson*, 20 Vet. App. 236 (2005).

164. *Disabled American Veterans v. Secretary*, 419 F.3d 1317 (Fed. Cir. 2005).

165. *Id.* at 1319–23.

Thus, it appears settled that the BVA may obtain expert medical opinions both from within and outside of the VA system.

## 2. Medical Examinations

The Veterans Court issued a number of precedential decisions during the past two years concerning the role of medical examinations in the benefits process. I begin with an interesting decision in which the “duty to assist” took on a dimension that arguably harmed the veteran. In *Kowalski v. Nicholson*,<sup>166</sup> the Veterans Court considered a claim for service connection with respect to hearing loss.<sup>167</sup> The veteran had submitted a letter from his audiologist that he argued provided support for his claim.<sup>168</sup> The VA Regional Office concluded that it needed additional medical evidence and scheduled the veteran for a medical exam.<sup>169</sup> The veteran declined to report for the exam, claiming that the evidence he had submitted was sufficient for the RO to make a decision.<sup>170</sup> One of the issues on appeal was whether the VA could order a claimant to submit to a medical examination under those conditions.

The Veterans Court held that the VA had the regulatory authority to schedule the veteran for an additional hearing examination unless such an order was arbitrary and capricious, which was not the case in *Kowalski*.<sup>171</sup> Moreover, the Court noted that “under these circumstances, any failure by VA to schedule for him an examination before rejecting his claim could have violated VA’s duty to assist him.”<sup>172</sup> Thus, *Kowalski* is important both for its narrow medical examination holding and for its suggestion that the duty to assist may require the VA to act over the veteran’s objections in certain circumstances.

In a series of opinions, the Veterans Court also addressed the role of doctors in the medical examination and the BVA’s use of the information provided by doctors based on such examinations. The key holdings in this area, both new and reiterations, are summarized here. First, the BVA may not disregard a conclusion reached by a doctor after examining the veteran solely because the

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166. *Kowalski v. Nicholson*, 19 Vet. App. 171 (2005).

167. *Id.* at 173.

168. *Id.* at 173–74.

169. *Id.*

170. *Id.*

171. *Id.* at 177–78.

172. *Id.* at 178.

doctor relied on information provided by the veteran, *unless* the BVA finds that the information is unreliable<sup>173</sup> or there are contradictory facts in the record.<sup>174</sup> In addition, the BVA may not substitute its own “medical judgments” for those of doctors who have examined the claimant *even if* the BVA has properly rejected a given medical opinion.<sup>175</sup> Finally, the Veterans Court cautioned doctors that they should not go beyond their medical role in preparing their opinions.<sup>176</sup> This reiteration of previous holdings may prove particularly important in the context of VA doctor examinations. Thus, in its 2004–2006 decisions, the Veterans Court provided important guidance to the VA about medical examinations, which are often so crucial to a veteran’s claims.

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This Part has described the four most significant themes in veterans benefits decisions over the past two years. The next Part analyzes broader issues concerning the structure of the Veterans Court and its relationship with veterans and the Federal Circuit. Before doing so, however, I would be remiss not to mention what may very well be the most significant decision of the Veterans Court during the period I studied: *Ramsey v. Nicholson*.<sup>177</sup>

In *Ramsey*, two petitioners sought writs of mandamus directing the Secretary to rescind certain directives he had issued in response to an earlier Veterans Court decision. In that earlier decision, *Smith (Ellis) v. Nicholson*,<sup>178</sup> the Veterans Court held that, for a veteran with bilateral tinnitus (ringing in both ears), the relevant statutes required the VA to assign separate disability ratings for *each* ear instead of a single rating for both ears together.<sup>179</sup>

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173. *Coburn v. Nicholson*, 19 Vet. App. 427, 432–33 (2006); *Kowalski*, 19 Vet. App. at 179–80. Interestingly, the Veterans Court also held that while a veteran and his or her spouse may “opine as to their needs as they are related to [the veteran’s disability], they are not qualified to provide the medical nexus between their disabilities and the perceived [aid and assistance] needs [of the veteran].” *Howell v. Nicholson*, 19 Vet. App. 535, 539 (2006). As such, medical opinions relying solely on such statements are inadequate. *Id.*

174. *Kowalski*, 19 Vet. App. at 179–80.

175. *Coburn*, 19 Vet. App. at 433 (“[W]e caution the Board that, although it may reject medical opinions, it may not then substitute its own medical judgment for those rejected.”).

176. *See Sizemore v. Principi*, 18 Vet. App. 264, 275 (2004) (reprimanding a VA psychiatrist who had inappropriately addressed in his report whether the claimed in-service stressors for PTSD had been substantiated).

177. *Ramsey v. Nicholson*, 20 Vet. App. 16 (2006).

178. *Smith (Ellis) v. Nicholson*, 19 Vet. App. 63, 78 (2005).

179. *See id.* The Federal Circuit eventually reversed the Veterans Court’s opinion in *Smith v. Nicholson*, 451 F.3d 1344 (Fed. Cir. 2006).

Needless to say, the VA was not pleased with the Veterans Court decision concerning tinnitus. Accordingly, it appealed the *Smith* decision to the Federal Circuit.<sup>180</sup> But the VA also took more aggressive steps to address *Smith*. In particular, the VA Secretary directed the Chairman of the BVA to stay the adjudication of “tinnitus rating cases affected by [*Smith*].”<sup>181</sup> The Secretary took this action without seeking authority from any court.<sup>182</sup> In effect, the Secretary’s order rendered the Veterans Court decision a mere nullity while the matter was on appeal to the Federal Circuit.

The Veterans Court agreed that the Secretary (as well as the Board Chairman) has the inherent authority to issue stays.<sup>183</sup> The Court held, however, that this authority was limited when a Veterans Court decision was already in place. In the words of the Veterans Court:

We hold now that the Secretary’s authority to stay cases at the Board does not include the unilateral authority to stay cases at the Board (or RO) pending an appeal to the Federal Circuit of a decision of this Court. To allow such a stay would permit a unilateral action by the Secretary to stay the effect of one of this Court’s decisions pending the Secretary’s appeal to the Federal Circuit. . . . Such unilateral action by the Secretary is contrary to the concept of judicial review . . . .<sup>184</sup>

The proper procedure was for the Secretary to seek a stay of decision from the appellate court that had jurisdiction over the case when the stay was requested.<sup>185</sup> As a result, the Veterans Court did not grant the writ, instead giving the Secretary thirty days to seek a stay from the Federal Circuit.<sup>186</sup>

To understand the significance of *Ramsey*, one must remember that the Veterans Court is still very much in its infancy. The Court will not turn twenty until 2008.<sup>187</sup> A key ingredient in the Court’s success will be that it is—and is perceived to be—an *independent*

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180. See *Ramsey*, 20 Vet. App. at 18–19 (noting that the VA’s appeal in *Smith* was docketed as No. 05-7168 on July 11, 2005).

181. *Id.*

182. *Id.* at 20.

183. *Id.* at 26–37. Judge Schoelen dissented on this point. See *id.* at 40–43 (Schoelen, J., dissenting).

184. *Id.* at 37–38.

185. *Id.* at 38–39. In this instance, the Federal Circuit had jurisdiction over the appeal. *Id.* at 39.

186. *Id.* at 39.

187. See *supra* Part I.A (discussing creation of the Veterans Court).



*judicial* check on the VA. If the Secretary of Veterans Affairs could choose to comply with some decisions and not others, the Court would become merely a shadow of what it was intended to be. *Ramsey*, then, was a defining moment in cementing the authority of the Veterans Court as just that: *a court*. Yet, other dangers remain for the Court and its mission. I turn to those matters in Part III.

### III. A BROADER PERSPECTIVE ON THE VETERANS COURT AND THE FEDERAL CIRCUIT

In addition to setting the boundaries and frontiers of veterans benefits law, the developments from 2004 to 2006 are also instructive about the nature of judicial review in this area and its two principal institutions. The decisions communicate much about the functioning of the Veterans Court as it nears its twentieth anniversary, the relationship between the Veterans Court and the Federal Circuit, and, finally, the relationship between veterans and the Veterans Court. In each of these areas, the decisions in the past two years reveal certain tensions that could make Congress's bold experiment less successful than it otherwise might be. In this Part, I discuss separately each of the issues highlighted above.

#### *A. The Veterans Court: The Internal Tension Between Its Roles as Error Corrector and Lawgiver*

The Veterans Court has two essential roles that, somewhat paradoxically, cannot be performed well simultaneously.<sup>188</sup> On the one hand, Congress created the Court to bring uniformity, transparency, and cohesion to veterans law through judicial review of executive action.<sup>189</sup> It was intended to be a "lawgiver" in an area that had, historically, been immune from such common lawmaking.<sup>190</sup> At the same time, the Court is clearly meant to correct errors

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188. Other commentators have recognized a general tension in all appellate courts between their error correction and law development roles. See, e.g., Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices on the Federal Courts of Appeals*, 66 BROOK. L. REV. 685, 712–15 (2000); David P. Leonard, *The Correctness Function of Appellate Decision-Making: Judicial Obligation in an Era of Fragmentation*, 17 LOY. L.A. L. REV. 299, 301–08 (1984).

189. For a good discussion of Congress's motivations in creating the Veterans Court and imposing judicial review on veterans benefits issues, see Fox, *supra* note 18, at 13–23; Goldstein, *supra* note 18, at 894–912; see also *supra* Part I.A (discussing the creation and early work of the Veterans Court).

190. See Fox, *supra* note 18, at 18–19 (discussing the Veterans Court's role in creating case law in an area where none had existed before); Nebeker, *supra* note 41, at 5 (describing

made in individual cases within the VA's administrative adjudication system.<sup>191</sup> These activities are not mutually exclusive and could complement each other without much difficulty, except for the crushing caseload at the Court.<sup>192</sup> The Veterans Court's need to resolve a large number of cases has caused it to neglect its lawgiving role in many respects.<sup>193</sup> I discuss this issue below principally in the context of single-judge adjudication, though I also comment on the use of full court panels (i.e., en banc consideration).

### 1. Single-Judge Adjudication

The Veterans Court uses single-judge opinions to resolve the great majority of its cases.<sup>194</sup> This device has created an "iceberg jurisprudence." Like an iceberg with much of its structure under water, the Veterans Court makes much of its law "below the surface" using single-judge opinions. These single-judge decisions are perfectly suited to correcting errors in individual cases.<sup>195</sup> They are

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the Veterans Court as being "without antecedent" in referring to its mission to engage in judicial review where none had existed earlier).

191. See, e.g., 38 U.S.C. § 7261 (2000) (setting forth standard of review with indisputable reference to decisions of the Board in particular cases).

192. See VETERANS COURT ANNUAL REPORTS (1996)–(2005), *supra* note 65 (noting that "new cases filed" at the Veterans Court from 1996 through 2005 ranged from a low of 1620 in 1996 to a high of 3466 in 2005). Dean Fox has recently suggested, however, that in the context of broader veterans benefits issues, the Veterans Court's caseload is disappointing because "many veterans simply give up after a final, negative BVA decision." William F. Fox, Jr., *Deconstructing and Reconstructing the Veterans Benefits System*, 13 KAN. J.L. & PUB. POL'Y 339, 342 (2004) (noting that the BVA docket in recent years has been over 30,000 cases and that the BVA decides about 20,000 cases per year but that only a few thousand cases are appealed to the Court each year); see also Kenneth M. Carpenter, *Why Paternalism in Review of the Denial of Veterans Benefits Claims is Detrimental to Claimants*, 13 KAN. J.L. & PUB. POL'Y 285, 292 (2004) (providing similar statistics based on BVA annual reports).

193. The Veterans Court's dual roles were both undermined by the legislation that created the Court. For example, Congress prohibited the VA Secretary from appealing decisions to the Court. See 38 U.S.C. § 7252(a) (2000). Thus, the Veterans Court is restricted to making law in cases where the veteran is denied benefits, and the Court does not correct errors that favor the veteran. Nevertheless, the Veterans Court does perform the dual functions I have described, albeit only when a veteran has been denied benefits.

194. See *supra* note 65 (explaining the difficulty in obtaining statistics on the frequency of single-judge opinions and presenting some information on that subject).

195. This may have been why Congress expressly provided for the use of single judges in the Veterans Court. See 38 U.S.C. § 7254(b) (2000) ("The Court may hear cases by judges sitting alone or in panels, as determined pursuant to procedures established by the Court."). A commentator recently suggested: "[n]o other federal appellate court may exercise similar power to have a single judge decide an appeal on its merits." Smith, *supra* note 65, at 279. Attorney Smith also suggested that Congress may have permitted single-judge adjudication out of fear that the Court would be overwhelmed with appeals. *Id.*; see also Haley, *supra* note 65, at 543 (making the same point).

not, however, designed to fulfill the lawgiving function and should not be used in that way.

Dissenters may argue that the Veterans Court does not “make law” in single-judge cases because, by definition, single-judge opinions are issued only when no law needs to be made in a given case. It is true that single-judge opinions are not precedential<sup>196</sup> and, by definition at least, cannot be used to establish new rules of law.<sup>197</sup> But this view is overly formalistic and neglects the reality of at least some single-judge adjudication.

This is not the place to engage in a systematic analysis of the Veterans Court’s fidelity to the rule that single-judge adjudication is not proper when rules of law are being formulated or adjusted. But there certainly appears to be reason to question whether single-judge adjudications are in fact as limited as the Court’s rules

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196. See, e.g., *Bethea v. Derwinski*, 2 Vet. App. 252, 254 (1992) (recognizing that en banc and panel decisions are precedential while single-judge resolutions are not); see also VET. APP. R. PRACTICE & P. 30(a) (prohibiting citation to non-precedential decisions of the Court except for matters concerning “the binding or preclusive effect of that action (such as via the application of the law-of-the-case doctrine)”). The continued viability of Rule 30(a) is questionable under proposed amendments to the Federal Rules of Appellate Procedure that the United States Supreme Court recently forwarded to Congress. One of these amendments provides: “[a] court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been: (i) designated as ‘unpublished,’ ‘not for publication,’ ‘non-precedential,’ ‘not precedent,’ or the like; and (ii) issued on or after January 1, 2007.” See Letters of John G. Roberts, Chief Justice, Supreme Court of the United States to J. Dennis Hastert, Speaker of the House of Representatives and Dick Cheney, President of the Senate (Apr. 12, 2006) (on file with the University of Michigan Journal of Law Reform), available at <http://www.supremecourtus.gov/orders/courtorders/frap06p.pdf>.

197. After an appeal has been filed with the Veterans Court, it is assigned to a “screening judge” to determine how that case will be “set for the calendar.” See VET. APP. INTERNAL OPERATING P. I(b) [effective May 25, 2004] (on file with the University of Michigan Journal of Law Reform) [hereinafter IOP], available at <http://www.vetapp.uscourts.gov/documents/IOP2004.pdf>. Thus, the screening judge, which is a rotating position, makes the initial determination as to whether the case will be considered by a single judge or a panel. *Id.* If the screening judge determines that a matter is appropriate for single-judge determination, the screening judge decides the matter. *Id.* at I(b)(4).

To qualify for single-judge treatment, the screening judge must find that the appeal:

- (1) does not establish a new rule of law;
- (2) does not alter, modify, criticize, or clarify an existing rule of law;
- (3) does not apply an established rule of law to a novel fact situation;
- (4) does not constitute the only recent, binding precedent on a particular point of law within the power of the Court to decide;
- (5) does not involve a legal issue of continuing public interest; and
- (6) the outcome is not reasonably debatable[.]

*Id.* at II(b); see also *Frankel v. Derwinski*, 1 Vet. App. 23, 25–26 (1990) (initially setting forth the factors now included in the IOP). A procedure exists whereby two judges of the court may compel panel consideration of an appeal. See IOP, *supra*, at II(c). No statistics are available concerning the frequency with which a screening judge’s decision is overruled.

suggest. For example, critics have asserted recently that the Veterans Court is not following its own Internal Operating Procedures (IOP) and the *Frankel* criteria when deciding whether a case is suitable for single-judge action.<sup>198</sup> As practitioners know, *Frankel* sets forth six criteria by which to determine whether summary disposition is appropriate in a given matter.<sup>199</sup> Those criteria are now largely embodied in the Court's IOP as the means by which to ascertain whether single-judge adjudication is appropriate. Criticisms have also included purported examples of single-judge opinions that did not comport with the Court's professed standards.<sup>200</sup> I reviewed the 2004 cases decided by the Federal Circuit in which the underlying Veterans Court judgment was rendered by a single judge.<sup>201</sup> In a number of these cases, the legal rule at issue was at least arguably unsettled.<sup>202</sup> Thus, either the lawmaking function was being utilized even though that law could not later be cited, or an opportunity to engage in lawmaking was avoided by an inappropriate use of a single-judge disposition.

However, searching for cases in which a single judge violated the Veterans Court's IOP (by, for example, applying a new rule of law) may not be worth the effort. The law evolves through case-by-case application of legal principles, even when the principles are already established and the factual background is familiar. This type of common lawmaking is thwarted, or at the very least stunted, by broad use of non-precedential, single-judge memorandum decisions. As a result, the Veterans Court is not fulfilling its important role as formal lawmaker to the extent it otherwise could.

I suggest that the Veterans Court should reconsider its single-judge procedures in order to better strike the balance between lawgiving and error correction. The Court has the benefit of

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198. See, e.g., Haley, *supra* note 65, at 549-63; Smith, *supra* note 65, at 281.

199. *Frankel v. Derwinski*, 1 Vet. App. 23, 25-26 (1990).

200. See, e.g., Haley, *supra* note 65, at 549-58; Smith, *supra* note 65, at 281-82.

201. See *infra* Appendix A.

202. See, e.g., *Barrett v. Principi*, No. 02-2382, 2003 U.S. App. Vet. Claims LEXIS 417, at \*4-5 (Veterans Court, June 5, 2003) (granting a motion to dismiss granted and rejecting equitable tolling for a mental illness), *rev'd*, 363 F.3d 1316 (Fed. Cir. 2004); *Brandenburg v. Principi*, No. 03-0016, 2003 U.S. App. Vet. Claims LEXIS 406, at \*2-5 (Veterans Court, May 29, 2003) (granting a motion to dismiss and rejecting equitable tolling on the basis that claimant misfiled the NOA with the RO), *rev'd*, 371 F.3d 1362 (Fed. Cir. 2004); *Hayslip v. Principi*, No. 01-0269, 2003 U.S. App. Vet. Claims LEXIS 7, \*2-3 (Veterans Court, Jan. 2, 2003) (applying Veterans Claims Assistance Act retroactively), *rev'd*, 364 F.3d 1321 (Fed. Cir. 2004); *Wagner v. West*, No. 99-419, 2000 U.S. App. Vet. Claims LEXIS 1021, at \*7-15 (Veterans Court, Oct. 19, 2000) (assigning burden of proof for rebuttal concerning the presumption of in-service aggravation of certain injuries/diseases), *rev'd sub nom.* *Wagner v. Principi*, 370 F.3d 1089 (Fed. Cir. 2004).

eighteen years of experience with its caseload as well as the luxury now of established law to govern its operations. These conditions enable the Court to commit itself more directly to the lawgiving function. A good first step is for the Court to reconsider the *Frankel* criteria that govern single-judge adjudication. In addition, to fulfill its lawgiving function more completely, the Veterans Court should consider hearing more cases in panels.<sup>203</sup>

First, Congress made a special place for the Veterans Court in the system of judicial review of veterans benefits decisions.<sup>204</sup> The Court will speak with a more authoritative voice when it does so through opinions formally considered by a group of experts in veterans law. Moreover, an increase in panel opinions will create more precedential law.<sup>205</sup> This is particularly important in an area where, for nearly two-hundred years, agency interpretation was essentially the only law.<sup>206</sup>

Second, as a general matter, group decision-making leads to better opinions than individual judicial consideration.<sup>207</sup> Significant scholarship supports this fundamental position.<sup>208</sup> There are a number of reasons that group decisions are seen as superior. For example, groups of individuals are less likely to suffer from any form of bias (conscious or unconscious) or distorted reasoning than any person acting individually.<sup>209</sup> Fundamentally, the most important feature of group decisions is that they tend to be better reasoned and more considered because of the give-and-take among group members. As described recently by Judge Harry

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203. I make a similar suggestion in the next subpart concerning en banc consideration. See *infra* Part III.A.2.

204. See *supra* Part I.A. (discussing the creation of the Veterans Court as well as its place in the structure of judicial review of veterans benefits decisions).

205. See *supra* notes 196–197 (discussing Veterans Court IOP as well as Court decisions restricting precedential law to opinions rendered by panels or the full court).

206. See, e.g., *Brown v. Gardner*, 513 U.S. 115, 122 (1994) (citing with approval a description of the VA as existing in “splendid isolation” with respect to the provision of veterans benefits before the creation of the Veterans Court).

207. This rationale for increasing panel consideration would apply to both the lawgiver and error corrector functions of the Veterans Court.

208. See, e.g., BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 176–77 (1921) (arguing that appellate decision-making works best when judges work together to craft opinions); Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639 (2003) (arguing that the collegiality among appellate judges leads to better reasoned opinions); Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001) (arguing that group judicial decisions are less likely to be affected by any single judge’s unconscious biases); Harry W. Jones, *Multitude of Counselors: Appellate Adjudication as Group Decision-Making*, 54 TUL. L. REV. 541 (1980) (supporting group decision-making on a number of fronts).

209. See, e.g., Guthrie et al., *supra* note 208 (discussing a variety of cognitive issues that have a lower impact in group decisions).

Edwards of the United States Court of Appeals for the District of Columbia Circuit:

During deliberations, judges must hash out what precisely it is that the court will agree to hold. Arriving at a holding is not a binary phenomenon that reflects either “sincerity” or “strategy.” It is a complex conversation, both in conference and during the drafting of opinions, in which judges, individually and collectively, often come to see things they did not at first see and to be convinced of views they did not at first espouse. As judges engage with their colleagues on a case, from oral argument and conference to opinion drafting and revising, their views evolve out of an interdependent push and pull. . . . If the end product looks different from what a judge had in mind at the beginning of the process, that fact reflects the very nature of the group process in which each judge can only contribute to a group product that is ultimately attributable to the court.<sup>210</sup>

Thus, both the Veterans Court as an institution and individual litigants would be better served by greater use of formal deliberative decision-making.<sup>211</sup>

Three objections could be made at this point. First, one might argue that the Veterans Court does, in fact, utilize group decision-making because it requires single-judge decisions to be circulated to all members of the Court before those decisions are issued.<sup>212</sup> Such a circulation procedure, however, is not a sufficient proxy for more traditional, formal group efforts. To begin with, members of

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210. Edwards, *supra* note 208, at 1660–61; *see also* Jones, *supra* note 208, at 543.

The livelier the discourse, the more open and genuinely collegial the exchange and opposition of ideas among the members of the court, the better reasoned the court's decision is likely to be. And better reasoned decisions are, by and large, sounder decisions in their consequences, for the law and for society. Targets are hit more often by deliberate aim than by happy accident.

*Id.*

211. This conclusion is further supported by the high percentage of pro se litigants before the Veterans Court. *See* VETERANS COURT ANNUAL REPORTS (1996)–(2005), *supra* note 65 (setting forth annual pro se rates of filing and disposition). The adversary process can often compensate for some of the problems inherent in individual decision-making. *See* Jones, *supra* note 208, at 543 (discussing role of adversary system in this respect). In a system that features a large number of pro se litigants, however, the internal check of the adversarial system is diminished, which makes group decision-making all the more important.

212. *See* IOP, *supra* note 197, at II(c).

the Court have only five days to review single-judge opinions.<sup>213</sup> This time constraint will tend to inhibit a full review by the other judges, even if they could seek extensions. In addition, the opinion is essentially in final form by the time it is circulated. At that point, another judge's comments are corrective in nature instead of suggestions that help to shape the opinion in its more formative stages. More importantly, however, the benefits of group decision-making, such as those described by Judge Edwards,<sup>214</sup> do not simply come from another pair of eyes reading a decision. Rather, the benefits flow from a fully integrated, deliberative process that encourages give-and-take at a number of points along the decisional path. Such a rich conversation is not likely to be replicated in a review-before-issuance process.

Second, one might conclude that group decision-making is not necessary given the high affirmance rate of single-judge decisions by the Federal Circuit.<sup>215</sup> A significant affirmance rate, however, does not mean that single-judge *opinions* are equal to those rendered by panels or the full court in other respects. Rather, the affirmance rate suggests that single judges usually reach the correct *results*. While group decision-making may or may not have an impact on the bottom line, its more important role is in enhancing the quality of opinions.<sup>216</sup> In other words, more group decision-making would likely improve the reasoning behind the results.

A third, more meritorious objection concerns what I have described above as the Veterans Court's crushing caseload.<sup>217</sup> Workload unquestionably impacts the deliberative process of any appellate court.<sup>218</sup> It is common sense that a greater number of cases results in less overall effort devoted to any given case. This is a particular problem for the Veterans Court.<sup>219</sup> The sheer number of cases may mean that, even if the Veterans Court were inclined to move away from single-judge dispositions, it could not do so to the

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213. *Id.*

214. *See supra* text accompanying note 210.

215. *See supra* Part I.B, Table 2 (showing that single-judge decisions on which the Federal Circuit considered the merits in 2004–2006 were affirmed in 75.4% of cases).

216. *See supra* note 208 (collecting sources supporting group decision-making, many of which are concerned with the quality of decisions as well as the ultimate results).

217. *See supra* Part I.B.2 (discussing the Veterans Court's workload).

218. Others have made the same observation. *See, e.g.,* Jones, *supra* note 208, at 550.

219. For example, for the 2005 judicial year, the Federal Circuit reported 1555 filings (a number fewer than the Veterans Court's filings) and had eleven judges and four senior judges to consider these cases (more judges than in the Veterans Court). *Compare* Federal Circuit Web Page, *supra* note 61 (setting forth statistics for the Federal Circuit), *with* VETERANS COURT ANNUAL REPORT (2005), *supra* note 65 (setting forth statistics for the Veterans Court).

desired extent. Nonetheless, this obstacle should not dissuade the Court from moving at all.

## 2. En Banc Consideration

A related issue in terms of the Veterans Court's lawgiving function<sup>220</sup> concerns the Court's resistance to considering cases en banc.<sup>221</sup> Indeed, from January 2004 through March 2006, the Veterans Court issued only two en banc opinions.<sup>222</sup> Moreover, of all the opinions the Federal Circuit issued in this period, not a single one addressed an en banc disposition by the Veterans Court.<sup>223</sup> The experience during the past few years seems to match that of the Court during its entire existence.<sup>224</sup> This bias against en banc consideration is reflected in the Veterans Court IOP: "Decisions by a full-Court panel are not favored except where necessary to secure or maintain a uniformity of the Court's decisions or to resolve a question of exceptional importance . . . ."<sup>225</sup>

As a result of its resistance to en banc consideration, the Court is missing a prime opportunity to influence the development of veterans law. Congress established a unique system for this Article I court to resolve all disputes in the area of veterans law.<sup>226</sup> Moreover, the Veterans Court occupies this role largely in a vacuum because judicial review did not previously exist in the area.<sup>227</sup> Thus, the Court is engaged in something that, in many respects, has not been

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220. This is an important consideration even if one assumes that the current standards for single-judge adjudication remain in place and are correctly applied.

221. As a technical matter, the Court refers to en banc consideration as action by the "Full Court." See VET. APP. R. PRACTICE & P. 35.

222. Both en banc opinions came in the same case. The first one dealt with the BVA's authority to obtain and consider medical opinions from within the VA and the Veterans Court's interpretation of the "clearly erroneous" standard of review. *Padgett v. Nicholson*, 19 Vet. App. 133 (2005) (en banc). The second opinion withdrew the first one due to the death of the veteran. *Padgett v. Nicholson*, 19 Vet. App. 334 (2005) (en banc), *vacating as moot*, 19 Vet. App. 84 (2005).

223. See *infra* Appendix A (setting forth all precedential opinions by the Federal Circuit in appeals from the Veterans Court) and Appendix B (setting forth all jurisdictional decisions and summary affirmances by the Federal Circuit concerning appeals from the Veterans Court).

224. A prominent treatise in the area states: "The Court rarely decided cases en banc. Since the Court's inception, it has decided fewer than fifty cases in this manner." VETERANS BENEFITS MANUAL, *supra* note 116, § 15.6.23, at 1220.

225. IOP, *supra* note 197, § V(a).

226. See *supra* Part I.A (discussing place of Veterans Court in judicial review of veterans benefits decisions).

227. See *supra* Part I.A (describing history of judicial review of administrative veterans benefits decisions).



possible since the beginning of the Republic: writing on a clean slate. The forceful statements of the Veterans Court as a whole—that is with all the experts involved—should have a greater impact on relevant audiences like the VA and the Federal Circuit. At the very least, the benefits of group decision-making<sup>228</sup> would be realized if more judges were involved in each decision.

In sum, at this time in its life, the Veterans Court should see *many* issues of “exceptional importance” that justify en banc consideration. With the formal input of all its judges,<sup>229</sup> the Court would improve in its role as lawgiver. At a minimum, the Court should more actively and openly consider whether it hears an increased number of cases en banc in the coming years.<sup>230</sup> Such an increase in en banc hearings would greatly strengthen the Court’s role as lawgiver, even if the Court took no action concerning the single-judge issues discussed above.<sup>231</sup>

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228. See *supra* Part III.A.1.

229. Once again, I say “formal input” because the Court’s IOP provides that opinions are circulated to all judges, any one of whom may request that the Court vote on whether to hear the matter en banc. See IOP, *supra* note 197, § V(b). For many of the reasons I discussed above concerning single-judge decisions, that type of participation in the decision-making process does not substitute for formal en banc treatment.

230. There are some signs that such a discussion might be beginning. In a number of cases in the past two years, concurrences and dissents addressed requests for en banc consideration. See, e.g., *Scarborough v. Nicholson*, 19 Vet. App. 322, 322 (2005) (Kasold, J., dissenting from denial of en banc consideration); *Mayfield v. Nicholson*, 19 Vet. App. 220, 220 (2005) (Steinberg, J., concurring in denial of en banc consideration); *Id.* at 221 (Kasold, J., concurring in denial of en banc consideration); *Id.* at 222 (Hagel, J., dissenting from denial of en banc consideration); *Wells v. Principi*, 18 Vet. App. 33, 34 (2004) (Steinberg, J., dissenting from denial of en banc consideration); *Id.* at 49 (Kasold, J., dissenting from denial of en banc consideration); *Akers v. Principi*, 17 Vet. App. 561, 561 (2004) (Steinberg, J., concurring in denial of en banc consideration); *Id.* at 562 (Hagel, J., concurring in denial of en banc consideration); *Id.* at 564 (Kasold, J., dissenting from denial of en banc consideration). If this trend continues, the Court as a whole may eventually decide to consciously reevaluate the en banc process.

231. There are additional means by which the Veterans Court could address the tension between its two roles. One in particular is the adoption of a class action rule that would enable the Court to address important legal issues in a number of cases at the same time. Such a rule would allow the Court to serve as lawgiver and error corrector simultaneously, while also reducing the delays associated with individual appeals. Adopting a class action rule would require the Court to overrule longstanding precedent. See *Lefkowitz v. Derwinski*, 1 Vet. App. 439 (1991). In my view, such action is warranted. The Court may eventually agree to reevaluate *Lefkowitz*: before he took the bench, Veterans Court Judge Lawrence Hagel advanced an argument in favor of class action treatment of cases at the Court. See *Hagel & Horan*, *supra* note 28, at 65.

*B. The Veterans Court and the Federal Circuit*

The relationship between the Federal Circuit and the Veterans Court is, in operation, unlike the relationship between most, if not all, other superior-inferior tribunals.<sup>232</sup> In reading the opinions of these courts, it appears that there is a certain sense of distrust between them. For example, the Veterans Court seems to believe that the Federal Circuit does not truly understand veterans law or the nature of the Veterans Court.<sup>233</sup> On the other hand, the Federal Circuit seems to believe that the Veterans Court does not understand its own role in this unique area of law.<sup>234</sup> As a result of this

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232. I initially described the structural relationship between these courts above. See *supra* Part I.A. I provide additional analysis of that issue in this subpart of the Article.

233. A prime example of the Veterans Court's attitude in this regard is found in *Bobbitt v. Principi*, 17 Vet. App. 547, 547-48 (2004), a case in which the Veterans Court had to decide whether an NOA was timely when it was misfiled at the BVA within 120 days of the decision at issue. The Veterans Court held that equitable tolling principles rendered the filing timely. *Id.* at 554. The interesting point for present purposes was the Veterans Court's attitude toward the Federal Circuit. For example, the Veterans Court expressed a belief that the Federal Circuit, at some level at least, did not understand the very nature of the Veterans Court. The Court stated: "[T]he Federal Circuit apparently presumes that this Court is part of VA and that placing VA on notice satisfies the section 7266 requirement that an NOA be filed at this Court." *Id.* at 553. The Veterans Court also lectured the Federal Circuit about the fact that the Veterans Court is part of an adversarial system, not a component of the "non-adversarial, pro-claimant adjudication environment" in the VA. *Id.* at 552. Finally, the Veterans Court critiqued the logic underlying the Federal Circuit's various equitable tolling cases even though the Veterans Court ultimately followed them. *Id.* at 552-54.

*Bobbitt* is not an isolated case in terms of the Veterans Court's attitude toward the Federal Circuit. In several cases, the Veterans Court has critiqued the Federal Circuit's reasoning when a matter has been remanded to the Veterans Court. For example, in one case the Veterans Court was called upon by the Federal Circuit to articulate "the proper standard(s) of its review of the Board determination in this case respecting CUE." *Andrews v. Principi*, 18 Vet. App. 177, 181 (2004) (quoting *Andrews v. Principi*, 25 F. App'x 997, 998 (Fed. Cir. 2001)). In response to that directive, the Veterans Court responded: "This Court established more than 11 years ago the proper standard of review for considering Board decisions determining whether CUE had been committed in previous RO decisions . . . . In accordance with the directives of the Federal Circuit, this Court here reiterates [that standard]." *Id.* at 181. See also *Suaviso v. Nicholson*, 19 Vet. App. 532, 534 n.1 (2006) (commenting that, in an earlier decision, the Federal Circuit had "inexplicably cited" only to certain matters); *Pelea v. Nicholson*, 19 Vet. App. 296, 307 (2005) (observing that, even though the Federal Circuit recognized that the Veterans Court had applied a rule correctly, "[n]evertheless, this case has been remanded to us."); *Bates v. Nicholson*, 19 Vet. App. 197, 198 (2005) (noting that the Federal Circuit remanded the case "notwithstanding" a certain regulation the Veterans Court had originally concluded prevented it from issuing the writ that the Federal Circuit was directing it to issue).

These cases reveal a truly unique relationship between an "inferior" and a "superior" court. While the Veterans Court has not refused to carry out the mandates of the Federal Circuit, its attitude in these opinions does not promote a cooperative approach to the growth of veterans law.

234. Prime examples of this attitude are found in the various Circuit Court opinions concerning equitable tolling and the related doctrines discussed above. See *supra* Part II.A.1.

tension, these two courts may not be working together as productively as Congress envisioned when it charged them with creating a uniform and effective means of judicial review in veterans law.

Yet, some of the responsibility for the tension between the Veterans Court and the Federal Circuit can be laid at the collective feet of Congress. Congress created a system in which the Veterans Court is “inferior” to the Federal Circuit in only some ways. Specifically, while the Federal Circuit has the authority to review judgments of the Veterans Court, in the absence of a constitutional question, the Federal Circuit “may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case.”<sup>235</sup> Thus, in a large number of cases, the Veterans Court’s decisions are unreviewable for all intents and purposes.<sup>236</sup> This feature of the statutory relationship between the two courts likely contributes to the sometimes odd interaction between them.<sup>237</sup>

A number of possible solutions might ease the problematic relationship between the Federal Circuit and the Veterans Court. I outline three possibilities below: (1) expanding the Federal Circuit’s appellate jurisdiction; (2) eliminating the Federal Circuit’s appellate jurisdiction; and (3) making the Federal Circuit’s appellate jurisdiction discretionary.<sup>238</sup>

A first possible solution is to make the Federal Circuit *more* involved in the appellate process. For example, perhaps the ban on jurisdiction contained in § 7292(d) should be repealed and replaced with a more traditional appellate relationship.<sup>239</sup> Of course, adopting this option might—but would not necessarily—require

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The upshot of these decisions is that the Federal Circuit appears to view the Veterans Court as too harsh in its jurisdictional decisions given the nonadversarial atmosphere from which veterans emerge. *Id.*

235. 38 U.S.C. § 7296(d)(2) (2000).

236. This explains the significant number of jurisdictional dismissals in the Federal Circuit. See *infra* Appendix B (summarizing jurisdictional dismissals at the Federal Circuit between January 2004 and March 2006).

237. Other commentators have also noted the oddity of the appellate relationship between the Federal Circuit and the Veterans Court. See, e.g., Fox, *supra* note 18, at 221–24; Levy, *supra* note 18, at 322–24; Mills, *supra* note 18, at 702–09. Even Federal Circuit judges have commented on the relationship. See Comments of Federal Circuit Chief Judge Glenn Archer, *The Federal Circuit’s Limited Jurisdiction to Review Decisions of the Court of Veterans Appeals*, contained in the proceedings of THE THIRD JUDICIAL CONFERENCE OF THE UNITED STATES COURT OF VETERANS APPEALS, 8 Vet. App. CLXXXVI-CXCI (Oct. 17, 1994).

238. This Article is not the place to fully debate these possibilities. Rather, this overview is intended to present a roadmap for future discussion.

239. Professor Levy has also recently noted the tensions between the Veterans Court and the Federal Circuit and suggested that Congress expand the Circuit Court’s jurisdiction. See Levy, *supra* note 18, at 322–24.

Congress to reevaluate fundamental aspects of the Veterans Court, including its fact-finding abilities. Ultimately, that might be a reason to reject this solution, but it should not prevent the option from being considered.

A second possibility is to remove the Federal Circuit from the appellate equation completely. Under this model, appeals from the Veterans Court would be to the Supreme Court of the United States via the writ of certiorari. Given the small number of cases the Supreme Court elects to hear each term, however, the likely impact of this proposal would be to make the Veterans Court the final judicial arbiter of veterans benefits in all but the most unusual cases.<sup>240</sup>

Finally, the Federal Circuit could remain involved in the process either as it is or with expanded jurisdiction and the option to refuse cases on appeal from the Veterans Court (i.e., the equivalent of a writ of certiorari). This possibility should be considered carefully before its adoption. If it was enacted without altering the current jurisdictional structure, it might cause additional problems (such as increased delay while a party sought such appellate review) without relieving the tension between the Federal Circuit and the Veterans Court.

In the meantime, the tension remains between the courts. It is critical that these two courts work together to ameliorate the problem while statutory solutions are considered. The turnover in Veterans Court judges in the past two years may help to relieve the tension.<sup>241</sup> But one can never be sure when the “us”/“them” dichotomy will appear. After all, the new judges have agreed to devote a considerable portion of their professional lives to the Court. One concrete, short-term means of addressing this problem would be for the Veterans Court to use its authority under § 7292(b) to certify appeals to the Federal Circuit on controlling issues of law.<sup>242</sup> Doing so might enable the courts to communicate

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240. Such a structure is in place for the United States Court of Appeals for the Armed Forces. See United States Court of Appeals for the Armed Forces, Establishment, [www.armfor.uscourts.gov/Establis.htm](http://www.armfor.uscourts.gov/Establis.htm) (last visited Jan. 24, 2007) (on file with the University of Michigan Journal of Law Reform).

241. See *supra* notes 43–44 (discussing changes in the composition of the Veterans Court in recent years).

242. See 38 U.S.C. § 7292(b)(1) (2000) (setting forth a procedure by which the Veterans Court may certify controlling questions of law to the Federal Circuit for resolution). It does not appear that the Veterans Court has ever used this statutory authority. A search of the LEXIS “US Court of Appeals for Veterans Claims” database for “7292(b)” turns up only five citations to the rule in the history of the Veterans Court, all of them denying motions to certify a question to the Federal Circuit.

with one another in a way that is not dictated by the parties. It could have the additional benefit of expediting a lengthy process. Whatever is decided, this issue should be addressed in an above-board manner. Not doing so could seriously undermine both courts and ultimately disadvantage veterans and the VA alike.

### C. *The Veterans Court and Veterans*

The final tension apparent in the decisions over the past two years is the most important in many respects: the relationship between veterans and the Veterans Court. Do veterans see the Court as a friend, an enemy, a source of delay, or some combination? Certainly, the Veterans Court should not consciously operate to please veterans as a group. Such an attitude would contradict the impartiality that is central to the judiciary in this country. However, given the Veterans Court's unique place in the veterans benefits system, it should concern itself with the impression veterans have of the Court and its operation.<sup>243</sup>

The decisions over the past two years reveal two factors in particular that *could* cause veterans as a group to lose faith in the Veterans Court as an institution: (1) the Court's attitude toward the switch between the "non-adversarial" VA adjudicative process and the adversarial proceedings before the Court; and (2) the Court's use of remands versus reversals. I discuss each of these areas below.

#### 1. Non-Adversarial and Adversarial Processes

The manner in which disputes are resolved within the VA makes the system of veterans benefits unique. The dispute resolution mechanism is formally both nonadversarial and paternalistic. This Article does not join the many debates that rage about these characterizations.<sup>244</sup> For present purposes, it suffices that the VA

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243. Many of the points discussed in this subpart are also applicable to the Federal Circuit, though probably to a somewhat lesser extent. The Veterans Court's role as the first line of appellate review combined with the jurisdictional limitations imposed on the Federal Circuit make the Veterans Court more of a target for dissatisfied claimants. Accordingly, this subpart's focus is on the Veterans Court.

244. See, e.g., Carpenter, *supra* note 192, at 60 (criticizing the paternalistic approach in the current system); Levy, *supra* note 18, at 2 (discussing in a balanced way various attributes of the current system of veterans benefits); Gary E. O'Connor, *Rendering to Caesar: A Response to Professor O'Reilly*, 53 ADMIN. L. REV. 343 (2001) (generally defending the current veterans

describes its benefits mission, including the administrative/adjudicative process, as nonadversarial and paternalistic.<sup>245</sup> Thus, a veteran pursuing benefits through the VA can easily become lulled into complacency by rules such as those requiring the VA to assist claimants<sup>246</sup> and to notify them of information necessary to make out their claims,<sup>247</sup> or those entitling veterans to the “benefit of the doubt” in certain instances.<sup>248</sup> The situation is made to seem even more nonadversarial by the restrictions placed on lawyers in the VA adjudicative process.<sup>249</sup>

All of this changes when a veteran appeals to the Veterans Court. At that point, claimants are immersed in a traditionally adversarial system, even though most of them are still representing themselves when they file their appeals.<sup>250</sup> From a veteran’s perspective, it may seem that the Veterans Court has been less than forgiving when veterans do not make a seamless transition from the nonadversarial VA environment to the world the Court occupies. In many of the cases in which the Veterans Court and the Federal Circuit have clashed, the Veterans Court attempted to rigidly enforce filing deadlines and other procedural requirements.<sup>251</sup> The Court would

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benefits system); James T. O’Reilly, *Burying Caesar: Replacement of the Veterans Appeals Process is Needed to Provide Fairness to Claimants*, 53 ADMIN. L. REV. 223 (2001) (presenting a highly critical assessment of the current veterans benefit system).

245. This approach to the provision of benefits is clear from the VA’s Mission Statement. That document reads in part as follows: “The men and women of the VA are dedicated to fulfilling the Department’s mission and vision and they commit their abilities and energy to continue the rich history of providing for those that have served America.” See Department of Veterans Affairs, Mission, Vision, Core Values & Goals, [www.va.gov/about\\_va/mission.asp](http://www.va.gov/about_va/mission.asp) (last visited Jan. 24, 2007) (on file with the University of Michigan Journal of Law Reform). It then continues by listing the following among the “core values” of the Department: (1) “Veterans have earned our respect and commitment, and their health care, benefits, and memorial services needs drive our actions.”; and (2) “We will value our commitment to veterans through all contingencies and remain fully prepared to achieve our mission.” *Id.*

246. See 38 U.S.C. § 5103A (2000).

247. See 38 U.S.C. § 5103.

248. See 38 U.S.C. § 5107 (2000); 38 C.F.R. § 3.102 (2006).

249. See, e.g., 38 U.S.C. § 5904(c) (2000); see also Levy, *supra* note 18, at 317–19 (discussing restrictions on use of attorneys in the VA adjudicative process). There is currently pending in Congress a bill that would greatly ease these restrictions. See Veterans Choice of Representation Act of 2006, S. 2694, 109th Cong. (2006). As of the writing of this Article, it is unclear whether this legislation will pass.

250. See VETERANS COURT ANNUAL REPORTS (2005), *supra* note 65 (showing a fifty-eight percent pro se rate at the time of filing in 2005). The pro se representation rate drops sharply by the time an appeal is closed, but the number of pro se litigants remains significant. See, e.g., *id.* (reporting a twenty-nine percent pro se rate at closure in 2005).

251. See *supra* Part II.A.1. (discussing cases in this category). Another example of the Veterans Court’s rigid approach can be seen in *Mapu v. Nicholson*, 397 F.3d 1375 (Fed. Cir. 2005). The veteran in *Mapu* was preparing to mail his NOA to the Veterans Court on the last day of the appeal period. *Id.* at 1377. Instead of sending the NOA by mail, which would have

improve its relationship with veterans by more consciously considering the real-world difficulties caused by the switch from the VA process to the Court environment.<sup>252</sup> For example, the Veterans Court could more actively embrace the concept of equitable tolling.<sup>253</sup> Moreover, such a change in attitude is warranted because it would recognize that veterans are at the nip point between two very different types of adjudication when they file their appeals with the Court.

## 2. Of Remands and Reversals

A second, and more practically significant matter, is the Veterans Court's use of remands instead of reversals when reviewing BVA decisions. Academics and practitioners alike have criticized the Court's remand/reversal practices.<sup>254</sup> The statistics suggest why this is so.<sup>255</sup> In a system already beset with delays—and remands within the VA itself between the BVA and the RO—veterans may perceive that the Veterans Court aggravates the situation. The Court must continue to address the remand issue if it is to preserve and augment its relationship with veterans.

Of course, exactly how the Veterans Court could reduce remands is another matter. Yet, certain steps can be taken with little

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resulted in a timely filing under the mailbox rule, the veteran sent the NOA by Federal Express for faster delivery. *Id.* The Veterans Court dismissed the appeal as untimely because it was received one day late and the mailbox rule did not apply to Federal Express. *Id.* The Federal Circuit affirmed. *Id.* at 1382. Both courts are no doubt correct in their interpretations of the statutes. At the same time, the negative response of veterans toward this decision and the courts that rendered it is not surprising. [can you provide a citation for the negative response of veterans?].

252. The transition from the nonadversarial VA system to the adversarial judicial process has long been a subject of concern for those within and outside the VA. *See, e.g.*, Charles L. Cragin, *The Impact of Judicial Review on the Department of Veterans Affairs' Claims Adjudication Process: The Changing Role of the Board of Veterans' Appeals*, 46 ME. L. REV. 23, 30–31 (1994); Hagel & Hogan, *supra* note 28, at 46–47, 62–63.

253. *See supra* Part II.A.1 (discussing equitable tolling).

254. For academic commentary, *see* FOX, *supra* note 18, at 75–83; Fox, *supra* note 192, at 347; Levy, *supra* note 18, at 320–22. For a practitioner's view, *see* generally VETERANS BENEFITS MANUAL, *supra* note 116, § 15.3.

255. *See* VETERANS COURT ANNUAL REPORT (2002)–(2005), *supra* note 65 (noting remand rates per year); *see also supra* Part I.B (discussing remand issue). Others have noted that the remand rates at the Veterans Court appear to be significantly greater than those in other administrative law contexts. *See, e.g.*, Levy, *supra* note 18, at 320. One can be somewhat critical of Professor Levy's generalizations comparing two quite different reviews of administrative action. This is not the place to address whether this is a comparison of oranges and tangerines or oranges and hamburgers. For now, I simply note that others have made such a comparison.

effort. For example, the Veterans Court could remand fewer cases in which the critical issue is one of law.<sup>256</sup> Similarly, the Court could be more aggressive in its review of Board factual determinations. At times, the Court has support for ruling that a finding is clearly erroneous, and yet the Court remands instead.<sup>257</sup> Finally, the Court could resist the temptation to raise, on its own, “remandable matters” that the veteran does not wish to have adjudicated.<sup>258</sup> Each of these approaches would reduce remands independently. However, taken together, they could have a greater impact because they are connected to the Court’s attitude about the remand/reversal issue as a whole.<sup>259</sup>

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The decisions of the Veterans Court and the Federal Circuit concerning veterans benefits over the past two years have been rich in many respects. This Part has discussed three respects in which these decisions illustrate fundamental themes and tensions in the area. First, the decisions reflect the internal tensions at the Veterans Court concerning its roles as lawgiver and error corrector. Second, they provide vivid examples of the institutional tensions between the Veterans Court and the Federal Circuit. Finally, the decisions suggest that at some levels at least there is a potential disconnect between the Veterans Court and veterans as a group. The next Part briefly suggests how one might use these illustrations to fashion a research agenda.

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256. See, e.g., *King v. Nicholson*, 19 Vet. App. 406, 410–11 (2004) (remanding for consideration whether bar to regulation in 38 C.F.R. § 20.101(b) concerns a categorical rejection of medical treatment in all cases or only specific treatment decisions); *Theiss v. Principi*, 18 Vet. App. 204, 208–14 (2004) (concluding that VA regulation was invalid, but remanding for readjudication as to whether home schooling qualified as an “educational institution”).

257. Once again, cases falling into this category are matters of degree. I believe, however, that several cases can be included in this group. See, e.g., *Washington v. Nicholson*, 19 Vet. App. 362, 372–74 (2004) (*Kasold, J.*, concurring in part and dissenting in part) (arguing that the majority erred in remanding the case when it could have held that the Board’s finding concerning medical nexus was clearly erroneous); *Gutierrez v. Principi*, 19 Vet. App. 1, 7–11 (2004) (remanding for consideration of Gulf War Syndrome diagnosis in a situation where the statutory requirements clearly appeared to have been met).

258. See, e.g., *Coburn v. Nicholson*, 19 Vet. App. at 439 (2006) (*Lance, J.*, dissenting) (arguing that the majority inappropriately refused to accept a veteran’s waiver of certain issues that ultimately led to remand); see also *Johnson v. Nicholson*, 127 F. App’x 475, 475–77 (Fed. Cir. 2005) (holding that it is legal error to remand on a basis waived by the veteran).

259. There are, of course, more dramatic ways in which to reduce remands. For example, Congress could remove the barrier that prevents the Veterans Court from finding facts in the first instance. I am not yet ready to advocate such a change, but it may be worthwhile to consider whether such a statutory amendment would be beneficial.



## CONCLUSION AND A MODEST RESEARCH AGENDA

When I began my in-depth exploration of veterans law to prepare for my speech at the Veterans Court's Judicial Conference, I did not fully appreciate the richness of the jurisprudence in the area. The Veterans Court and the Federal Circuit adjudicate an extraordinary breadth of issues that have enormous impact on a large segment of the Nation's population. If nothing else, I hope this Article has piqued interest in a part of the legal system that has received scant attention.

My study has also convinced me that much could be gained by greater academic focus on the Veterans Court and its operations. For example, the Veterans Court's use of single judges as a means of appellate decision-making is largely unique.<sup>260</sup> Studying this device could lead to a reassessment of the means by which overburdened appellate courts consider cases. I have suggested that, as matters currently stand, I am skeptical of this device.<sup>261</sup> But further study may suggest that the single-judge method of decision-making has advantages that are not immediately apparent.

In addition, studying the Veterans Court is important in assessing the utility of subject-specific courts in the federal judiciary (and elsewhere). A wide body of literature already exists on this subject.<sup>262</sup> However, there appears to be renewed interest in the topic prompted in part by calls to create a de facto specialized immigration court by restricting appeals in this area to a single federal court.<sup>263</sup> A concentrated study of the Veterans Court should provide

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260. See *supra* Part III.A.

261. *Id.*

262. See, e.g., Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329 (1991); Christopher A. Chrisman, *Article III Goes to War: A Case for a Separate Federal Circuit for Enemy Combatant Habeas Cases*, 21 J.L. & POL. 31 (2005); George E. Dix, *The Death of the Commerce Court: A Study in Institutional Weakness*, 8 J. AM. LEGAL HIST. 238 (1964); Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1 (1989); James R. Elkins, *The Temporary Emergency Court of Appeals: A Study in the Abdication of Judicial Responsibility*, 1978 DUKE L.J. 113; Michael Landau & Donald Biederman, *The Case for a Specialized Copyright Court: Eliminating the Jurisdictional Advantage*, 21 HASTINGS COMM. & ENT. L.J. 717 (1999); Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 111 (1990); Sarang Vijay Damle, Note, *Specialize the Judge, Not the Court: A Lesson from the German Constitutional Court*, 91 VA. L. REV. 1267 (2005). See also Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915 (1988) (discussing Article I courts generally); Daniel J. Meltzer, *Symposium: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 291 (1990) (discussing Article I courts generally).

263. See Securing America's Borders Act, S. 2454, 109th Cong. tit. 5, § 501 (2006) (restricting appeals in immigration matters to the Federal Circuit).

valuable insights into this potential approach to administering justice.

In conclusion, the Veterans Court is an experiment worthy of study for a number of reasons. I hope that this Article sparks an academic discussion of that bold experiment begun nearly twenty years ago.

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APPENDIX A  
NON-JURISDICTIONAL FEDERAL CIRCUIT DECISIONS (JANUARY 2004–MARCH 2006)<sup>264</sup>

Name and Citation	Issues	Veterans Court Disposition	Veterans Court Structure			Federal Circuit Disposition
			Single Judge	Panel	En Banc	
<i>Conway v. Principi</i> , 353 F.3d 1369 (Fed. Cir. 2004)	<ul style="list-style-type: none"> <li>• Duty to notify (38 USC § 5103 (a))</li> <li>• Prejudicial Error (38 USC § 7261 (b) (2)) (Does prejudicial error rule apply to duty to notify claims?)</li> </ul>	Remands to BVA based on duty to notify; no application of prejudicial error rule	X			Reversed and remanded (Held: prejudicial error rule applies to duty to notify claims) Approximately 45 other cases were remanded to the Veterans Court in light of <i>Conway</i> . See 87 Fed. Appx. 314–318 (Fed. Cir. 2004).
<i>Dingess v. Principi</i> , 85 Fed. Appx. 217 (Fed. Cir. 2004)	Same as <i>Conway</i>	Same as <i>Conway</i>	X			Reversed and remanded Same as <i>Conway</i> . The Veterans Court issued its decision on remand on March 3, 2006. See 2006 U.S. App. Vet. Claims LEXIS 102 (Veterans Court, Mar. 3, 2006).
<i>Patranella v. Principi</i> , 85 Fed. Appx. 217 (Fed. Cir. 2004)	Same as <i>Conway</i>	Same as <i>Conway</i>	X			Reversed and remanded Same as <i>Conway</i>
<i>Szemraj v. Principi</i> , 357 F.3d 1370 (Fed. Cir. 2004)	Does <i>Roberson</i> duty to fully and sympathetically develop the veteran's claim to its optimum (for the unrepresented veteran) apply to CUE claim?	Affirms BVA (Held: <i>Roberson</i> does not apply to CUE)	X			Affirmed BUT (Held: <i>Roberson</i> does apply to CUE claim but error was harmless in this situation)
<i>Sandsstrom v. Principi</i> , 358 F.3d 1376 (Fed. Cir. 2004)	Does 'no interest' rule apply to CUE claims? BVA held it did.	Affirms BVA		X		Affirmed
<i>Moody v. Principi</i> , 360 F.3d 1306 (Fed. Cir. 2004)	Same as <i>Szemraj</i> re: <i>Roberson</i> duty in context of CUE	Affirms BVA on ground that <i>Roberson</i> does not apply	X			Reversed <i>Roberson</i> duty applies and error here was not harmless

<sup>264</sup> Decisions listed in rough chronological order as appearing in the *Veterans Appeals Reporter*. Decisions include those issued through March 31, 2006.

Name and Citation	Issues	Veterans Court Disposition	Veterans Court Structure			Federal Circuit Disposition
			Single Judge	Panel	En Banc	
<i>Davis v. Principi</i> , 88 Fed. Appx. 397 (Fed. Cir. 2004)	Does 38 CFR § 4.15 apply to total disability ratings when 38 CFR § 4.16 also applies?	Affirms BVA in holding 4.15 not applicable	X			Reversed and remanded Held: § 4.15 does apply
<i>Barrett v. Principi</i> , 363 F.3d 1316 (Fed. Cir. 2004) <sup>265</sup>	Can mental illness toll 120-day period in which to file notice of appeal? (38 USC § 7266 (e))	Holds no equitable tolling and dismisses appeal for lack of jurisdiction	X			Reversed and remanded Held: equitable tolling may apply if veteran can show that the failure to file was the direct result of a mental illness that rendered him incapable of rational thought or deliberative decision making or incapable of handling [his] own affairs or unable to function [in] society. Key passage at 1321.
<i>Heyslip v. Principi</i> , 364 F.3d 1321 (Fed. Cir. 2004) <sup>266</sup>	Does VCAA apply retroactively to cases finally decided by BVA before VCAA enactment?	Remands to BVA holding that VCAA applies retroactively	X			Reversed Held: VCAA does not apply retroactively to cases final at BVA before its enactment (even if the veteran's time to appeal or seek reconsideration had not yet run)
<i>Miley v. Principi</i> , 367 F.3d 1343 (Fed. Cir. 2004)	Does 38 USC § 7105 (b) (1) require documentary evidence that reflects the date a notice of decision was mailed?	Affirms BVA and finds no documentary evidence required	X			Affirmed Held: no documentary evidence required
<i>Terry v. Principi</i> , 367 F.3d 1291 (Fed. Cir. 2004)	Does 38 USC § 5121 (a) limit a survivor's benefits to those that accrued in the two years immediately preceding a veteran's death?	Affirms BVA that statute so limits the benefits	X			Reversed Held: statute limits benefits to two years in total but not to those that accrued only in the two years prior to a veteran's death
<i>Perry v. Principi</i> , 95 Fed. Appx. 339 (Fed. Cir. 2004)	CUE issue in which veteran claims earlier BVA decision incorrectly determined a claim under 38 USC § 511	Affirms BVA finding of no CUE	X			Affirmed (Note: one issue dismissed on jurisdictional ground)

265. Some cases were remanded pursuant to *Barrett*. See, e.g., 103 Fed Appx. 387 (Fed. Cir. 2004).  
 266. Several other cases were reversed and remanded on this ground as well. See, e.g., 109 Fed. Appx. 433 (Fed. Cir. 2004).

Name and Citation	Issues	Veterans Court Disposition	Veterans Court Structure			Federal Circuit Disposition
			Single Judge	Panel	En Banc	
<i>Wagner v. Principi</i> , 370 F.3d 1089 (Fed. Cir. 2004)	Must government show clear and unmistakable evidence of both a preexisting condition and a lack of in-service aggravation to overcome the presumption of soundness for wartime service under 38 USC § 1111?	Affirms BVA (and at least implicitly holds that clear and unmistakable evidence standard does not apply to aggravation)	X			Reversed and remanded to apply correct standard (i.e.—that clear and unmistakable evidence applies to both preexisting condition and lack of in-service aggravation under 38 USC § 1111)
<i>Wanner v. Principi</i> , 370 F.3d 1124 (Fed. Cir. 2004)	Issue was CVC jurisdiction concerning review of certain issues involving ratings schedule, specifically whether a certain diagnostic code complied with the statute	Veterans Court holds it has jurisdiction		X		Reversed Held: no jurisdiction—adopts a restrictive interpretation of Veterans Court jurisdiction
<i>Brandenburg v. Principi</i> , 371 F.3d 1362 (Fed. Cir. 2004)	Does a misfiling with BVA instead of misfiling with a RO toll time in which to appeal to Veterans Court?	Holds no tolling	X			Reversed Held: equitable tolling applies in this situation
<i>Sellers v. Principi</i> , 372 F.3d 1318 (Fed. Cir. 2004) (with <i>Hayday v. Principi</i> )	Does 38 CFR § 4.130 concerning rating schedule for PTSD require VA to use symptoms listed in DSM-IV in place of criteria in the general rating formula?	Holds that DSM-IV symptoms supplement but do not replace the general rating formula criteria	X			Affirmed Held: Veterans Court has jurisdiction despite the presence of an issue related to the rating schedule
<i>Natali v. Principi</i> , 375 F.3d 1375 (Fed. Cir. 2004)	CUE in 1945 decision to sever service connection	Affirms BVA in holding no CUE	X			Affirmed Held: VA rebutted with clear and unmistakable evidence the presumptions of soundness and aggravation under <i>Wagner</i>
<i>Norton v. Principi</i> , 376 F.3d 1336 (Fed. Cir. 2004)	Is there an exception to rule of RO decision finality based on a failure of RO to follow a procedural rule (here the requirement to give 'detailed reasons' for reduction of rating under 38 CFR § 3.105 (e))?	Affirms BVA finding of finality	X			Affirmed Held: Court sets forth the 2 avenues to avoid finality—CUE or new and material evidence
<i>Heithome v. Principi</i> , 102 Fed. Appx. 679 (Fed. Cir. 2004)	Request for mandamus from Veterans Court to allow veteran input on YCAA	Denies writ	X			Affirmed
<i>Patrick v. Principi</i> , 103 Fed. Appx. 383 (Fed. Cir. 2004)	Presumption of soundness— rebuttal re: aggravation in-service	Holds VA rebutted presumption of soundness	X			Reversed Based on <i>Wagner</i>

Name and Citation	Issues	Veterans Court Disposition	Veterans Court Structure			Federal Circuit Disposition
			Single Judge	Panel	En Banc	
<i>Shedden v. Principi</i> , 381 F.3d 1163 (Fed. Cir. 2004)	In a CUE context, the veteran argued that 38 USC § 105 (a) created a presumption of service connection if a disease manifests itself during veteran's active service	Affirms BVA that no presumption applies and also that, even if it did, the CUE assertion was not supported	X			<b>Affirmed</b> BUT, Circuit Court disagrees with Veterans Court concerning the presumption and holds that section 105 (a) does create a presumption of service connection if an injury occurs or a disease manifests itself during a veteran's active service
<i>Halpern v. Principi</i> , 384 F.3d 1287 (Fed. Cir. 2004)	The case concerned an EAJA fee application based on a remand to the BVA in which the Veterans Court ordered the BVA to dismiss the case for want of jurisdiction. The matter concerned the payment of attorneys' fees pursuant to a fee agreement that had been rejected by the BVA	Denies fee application		X		<b>Affirmed</b> Uses different reasoning than Veterans Court but ultimately concludes that the petitioner was not a 'prevailing party'
<i>Kent v. Principi</i> , 389 F.3d 1380 (Fed. Cir. 2004)	Does the presumption of soundness in 38 USC § 1111 become irrebuttable if the condition at issue is tested at induction but no problem is found?	Affirms BVA decision and rejects the argument that the presumption becomes irrebuttable	X			<b>Affirmed</b>
<i>Wilson v. Principi</i> , 391 F.3d 1203 (Fed. Cir. 2004)	Does section 403 of the Veterans Benefits Act of 2002 (concerning rates for non-attorney practitioners) apply to all matters pending before Veterans Court when it was enacted?	Grants EAJA application but reduces the amount requested for a non-attorney practitioner. In so doing Veterans Court does not apply section 403		X		<b>Reversed and remanded</b> Held: section 403 applies to all cases pending when it was enacted
<i>Rason v. Principi</i> , 113 Fed. Appx. 411 (Fed. Cir. 2004)	Veteran sought writ of mandamus from Veterans Court directing the VA to act more quickly on his claims	Denies request for writ	X			<b>Affirmed</b>
<i>Mapu v. Nicholson</i> , 397 F.3d 1375 (Fed. Cir. 2005)	Does Fed Ex 'post mark' qualify for 'post mark' rule of 38 USC § 7266 (c) and (d)?	Holds Fed Ex does not qualify		X		<b>Affirmed</b> (Also rejects equitable tolling argument)
<i>Bates v. Nicholson</i> , 398 F.3d 1355 (Fed. Cir. 2005)	Would BVA (and therefore Veterans Court) have jurisdiction over Secretary's termination of accreditation to represent claimants such that Veterans Court could issue a writ of mandamus instructing the Secretary to issue a SOC?	Holds that BVA has no jurisdiction		X		<b>Reversed</b> Interprets jurisdictional statute broadly and instructs Veterans Court to issue the writ

Name and Citation	Issues	Veterans Court Disposition	Veterans Court Structure			Federal Circuit Disposition
			Single Judge	Panel	En Banc	
<i>Durr v. Nicholson</i> , 400 F.3d 1375 (Fed. Cir. 2005)	Timeliness of an NOA	Holds NOA untimely		X		Reversed Criticizes Veterans Court for taking an overly restrictive view of Rule 3 of Veterans Court Rules of Practice
<i>Morris v. Nicholson</i> , 122 Fed. Appx. 473 (Fed. Cir. 2005)	Jurisdiction of BVA to review its prior decision after that decision had been appealed to and finally decided by Veterans Court	Holds that BVA has no jurisdiction under 38 CFR § 20.1400 (b) (1)	X			Affirmed
<i>Jordan v. Nicholson</i> , 401 F.3d 1236 (Fed. Cir. 2005)	May CUE arise from a change in the interpretation of a statute or regulation?	Affirms BVA decision of no CUE, reasoning that change in interpretation of a statute or regulation does not support a finding of CUE		X		Affirmed
<i>Stall v. Nicholson</i> , 401 F.3d 1375 (Fed. Cir. 2005)	Does 38 USC § 1103 (a), barring the attribution of service connection for a veteran's death or disability when due to in-service tobacco use, bar a DIC claim by a widow of a veteran who was granted in-service connection for a tobacco-related disease before the effective date of § 1103(a) (but who had not held that designation for 10 years prior to his death)?	Holds that statute does bar the claim	X			Affirmed
<i>Hauck v. Nicholson</i> , 403 F.3d 1303 (Fed. Cir. 2005)	CUE Issue	Affirms BVA in holding no CUE	X			Affirmed Held: (1) for era before RO was required to submit a statement of its reasons, BVA must analyze the evidence before RO to determine that its conclusions are supported. Thus, doing so is not error. (2) CUE assertion is not supported by claim that BVA 'weighed' evidence in violation of 38 CFR § 3.102 because that 'reasonable doubt doctrine' only applies when there is reasonable doubt to begin with

Name and Citation	Issues	Veterans Court Disposition	Veterans Court Structure			Federal Circuit Disposition
			Single Judge	Panel	En Banc	
<i>Sharp v. Nicholson</i> , 403 F.3d 1324 (Fed. Cir. 2005)	Do dependents have a property interest in 'dependent benefits' under 38 USC § 1115 such that they may pursue those benefits after a veteran's death?	Affirms BVA in holding that dependents do not have a property interest	X	X		Affirmed in part and vacated in part. Affirms answer to listed question but vacates decision by Veterans Court that the accrued benefits to which the dependents were entitled needed to be accrued within the 2 years prior to the veteran's death (per <i>Ferry</i> )
<i>Arkas v. Nicholson</i> , 403 F.3d 1379 (Fed. Cir. 2005)	May physical illness constitute a basis for equitable tolling of time within which to file an NOA?	Holds no equitable tolling	X			Reversed. Held: so long as a physical infirmity prevented an appellant 'from engaging in rational thought or deliberate decision making' or rendered him incapable of handling [his] own affairs or unable to function [in] society, equitable tolling is possible (questioning <i>Barrett</i> )
<i>Jackson v. Nicholson</i> , 124 Fed. Appx. 646 (Fed. Cir. 2005)	Was an issue waived that was raised for the first time in reply brief?	Deems issue waived	X			Affirmed
<i>Leonard v. Nicholson</i> , 405 F.3d 1333 (Fed. Cir. 2005)	Was veteran entitled to an earlier effective date for a TDIU rating when decision at issue was final and no new or material evidence was submitted and no assertion of CUE made?	Affirms BVA decision and reaffirms that the rule of finality may be overcome only in two situations: (1) reopening based on new and material evidence and (2) CUE. Neither was present		X		Affirmed. Rejects the argument that a request for an earlier effective date is not a 'claim' for finality purposes
<i>Johnson v. Nicholson</i> , 127 Fed. Appx. 475 (Fed. Cir. 2005)	Underlying claims concerned a dispute over rating for service-connected PTSD. The legal issue concerned the Veterans Court's remand based on duty to notify and assist	Vacates BVA decision and remands based on breaches of duties to notify and assist. Veteran purports to waive these defects, but Veterans Court orders remand in any event	X			Vacated and remanded. Held: it is legal error to remand on basis waived by veteran, here the duties to notify and assist. Veterans Court is ordered to decide case on the merits
<i>Ashtbaugh v. Nicholson</i> , 129 Fed. Appx. 607 (Fed. Cir. 2005)	Claim concerned veteran's request for an earlier effective date for TDIU. He had not filed a claim upon service separation	Affirms BVA's decision holding that the veteran could not obtain an effective date prior to filing of a claim	X			Affirmed. Held: there can be no 'equitable tolling' concerning the effective date of a claim for benefits because the law concerning effective dates is not a statute of limitations
<i>Van Allen v. Nicholson</i> , 129 Fed. Appx. 611 (Fed. Cir. 2005)	Does equitable tolling save veteran from dismissal of his claim based on the late filing of NOA	Determines that the veteran has not established prerequisites for equitable tolling under <i>Barrett</i>	X			Affirmed. Evidence of incapacity at earlier time is not sufficient to satisfy the 'direct result' standard in <i>Barrett</i>



Name and Citation	Issues	Veterans Court Disposition	Veterans Court Structure			Federal Circuit Disposition
			Single Judge	Panel	En Banc	
<i>Akers v. Nicholson</i> , 409 F.3d 1356 (Fed. Cir. 2005)	Were applicants 'prevailing parties' for purposes of EAJA?	Veterans Court denies fee applications on basis that the applicants were not prevailing parties	X			Veterans Court decision affirmed (Note: this case was consolidated with <i>Bridwell v. Nicholson</i> ) Affirms Veterans Court holding that neither applicant had prevailed on the merits under the <i>Buckhannon</i> standard
<i>White v. Nicholson</i> , 412 F.3d 1314 (Fed. Cir. 2005)	Was the Secretary's position at administrative and judicial portions of the case substantially justified? The issue was related to the consideration of certain regulations by the Federal Circuit.	Holds that the VA's position was substantially justified	X			Affirmed Over a dissent, the Circuit Court held that the VA's position was substantially justified under the totality of the circumstances.
<i>Stigall v. Nicholson</i> , 132 Fed. Appx. 358 (Fed. Cir. 2005)	Was there CUE in a 1983 RO decision denying 100% rating for PTSD?	Holds that CUE issue not adequately presented because not pled with specificity	X			Affirmed Adopts (or reaffirms) the CUE pleading-specificity requirement
<i>Kirkpatrick v. Nicholson</i> , 417 F.3d 1361 (Fed. Cir. 2005)	Was BVA order remanding case to RO appealable?	Holds that the order was not appealable	X			Affirmed Held: a BVA remand order is not a 'decision' within the meaning of 38 USC § 7252 (a), and Circuit Court's doctrine creating some exceptions to the rule of finality with respect to Veterans Court decisions (e.g., <i>Williams</i> ) does not apply to BVA decisions
<i>Jackson v. Nicholson</i> , 139 Fed. Appx. 277 (Fed. Cir. 2005)	Was veteran entitled to writ of mandamus based on VA delay in adjudicating claim at RO level?	Holds that veteran not entitled to writ	X			Affirmed Comments that the delay (at most 7 months) was 'frustrating' but did not yield the basis for issuance of the writ
<i>Andrews v. Nicholson</i> , 421 F.3d 1278 (Fed. Cir. 2005)	The issues on appeal involved the duty to sympathetically read pleading in context of CUE claims	Holds that sympathetic reading duty does not apply to CUE claims		X		Affirmed BUT significant disagreement with reasoning: Circuit Court holds that <i>Roberson</i> requires the VA to sympathetically read all pleadings filed pro se (but not those filed by counsel). Further, the court held that when the VA violates this duty the claim is not unjudicated but rather a CUE claim may be asserted. Finally, and the reason for the affirmation here, a failure to raise an issue in a CUE motion when represented by counsel (as was Mr. Andrews) is fatal to raising it later.
<i>Johnston v. Nicholson</i> , 421 F.3d 1285 (Fed. Cir. 2005)	Another CUE case in which the veteran was represented by counsel	Rejects CUE argument because it was not raised before the BVA	X			Affirmed Reiterates the holdings from <i>Andrews</i> (above)
<i>Voracek v. Nicholson</i> , 421 F.3d 1299 (Fed. Cir. 2005)	Did veteran's submission qualify as 'new' and material evidence?	Holds that submission did not qualify	X			Affirmed

Name and Citation	Issues	Veterans Court Disposition	Veterans Court Structure			Federal Circuit Disposition
			Single Judge	Panel	En Banc	
<i>Bingham v. Nicholson</i> , 421 F.3d 1346 (Fed. Cir. 2005)	Was a failure to consider one theory for service connectedness sufficient to render claim unadjudicated?	Holds that claim was not rendered unadjudicated		X		Affirmed
<i>Thomas v. Nicholson</i> , 423 F.3d 1279 (Fed. Cir. 2005)	What standard of proof is required for the VA to rebut the presumption of service connection for peacetime disabilities under 38 USC § 105 (a)?	Holds that the proper standard is 'preponderance of evidence'	X			Affirmed Held: preponderance of evidence is the proper standard
<i>Wilson v. Nicholson</i> , 2005 U.S. App. LEXIS 21870 (Fed. Cir., Oct. 7, 2005)	Was veteran entitled to writ of mandamus concerning request for 100% rating for PTSD?	No, based on veteran's failure to show a 'clear and indisputable right to the writ' and that there are no alternate grounds for relief	X			Affirmed
<i>McQueen v. Nicholson</i> , 154 Fed. Appx 920 (Fed. Cir. 2005)	Was veteran entitled to a writ of mandamus due to VA's failure to implement terms of remand?	No, because veteran had not exhausted available administrative means to address his complaints	X			Affirmed
<i>Gabhart v. Nicholson</i> , 154 Fed. Appx 207 (Fed. Cir. 2005)	Was veteran entitled to writ of mandamus directing VA not to prescribe him a certain drug?	No, the Veterans Court's All Writs Act authority is limited by the requirement that a matter must come within the BVA's jurisdiction. Matters concerning the prescribing of drugs are not within the BVA's jurisdiction. As such, the Veterans Court had no authority to issue the writ.	X			Affirmed
<i>Cayal v. Nicholson</i> , 429 F.3d 1331 (Fed. Cir. 2005)	Was Philippine citizen who served in Philippine forces in Korea entitled to be considered a 'veteran'?	Holds that Philippine citizen was not a veteran under the language of 38 USC § 107 (a) (3)	X			Affirmed
<i>Teno v. Nicholson</i> , 2005 U.S. App. LEXIS 26915 (Fed. Cir., Dec. 7, 2005)	Was veteran entitled to writ of mandamus as a result of successive remands ordered by BVA?	No, the veteran did not show that the VA was refusing to act or delaying matters in bad faith	X			Affirmed
<i>Jackson v. Nicholson</i> , 433 F.3d 822 (Fed. Cir. 2005)	Did 38 USC § 1151 require that an injury result from actions of the VA before that statute was amended effective 10/1/97?	Held that injury must result from VA actions before effective date	X			Reversed Held: the pre-10/1/97 statute did not require that the injury be caused by an action of the VA

Name and Citation	Issues	Veterans Court Disposition	Veterans Court Structure			Federal Circuit Disposition
			Single Judge	Panel	En Banc	
<i>Kidwell v. Nicholson</i> , 2006 App. LEXIS 633 (Fed. Cir., Jan. 10, 2006)	Was veteran entitled to a writ of mandamus when he had also filed appeals with respect to the same issues?	No, the appeals provided an adequately alternative means of proceeding	X			Affirmed
<i>AF v. Nicholson</i> , 2006 U.S. App. LEXIS 3149 (Fed. Cir., Feb. 8, 2006)	Do principles of equitable tolling apply to determine effective date of benefits awarded under 38 USC § 5110(a)?	Holds that equitable tolling is not applicable in this context	X			Affirmed Held: equitable tolling is applicable to statutes of limitations and the rules concerning effective dates of benefits are not statutes of limitation
<i>King v. Nicholson</i> , 2006 U.S. App. LEXIS 5111 (Fed. Cir., Feb. 27, 2006)	Could Veterans Court hear CUE allegation not presented to BVA first?	Veterans Court holds it does not have jurisdiction	X			Affirmed
<i>McPhail v. Nicholson</i> , 2006 U.S. App. LEXIS 5112 (Fed. Cir., Feb. 27, 2006)	If appellant does not raise an argument before BVA does Veterans Court have jurisdiction to consider the matter?	Veterans Court holds it does not have jurisdiction		X		Affirmed (Declines to consider whether principles of equitable tolling under <i>Barrett</i> apply with respect to the filing of an NOD)
<i>Kalin v. Nicholson</i> , 2006 U.S. App. LEXIS 5760 (Fed. Cir., Mar. 6, 2006)	Was evidence submitted by veteran to support re-opening of claim 'new and material'?	Holds that the evidence submitted was not new and material	X			Affirmed Held: Circuit Court lacked jurisdiction to review whether the evidence at issue was new and material. The court also held that the Veterans Court did not misapply 38 C.F.R. § 3.105 (a) in the context of this case. The court declined to address whether this provision 'requires a claimant, alleging CUE in a prior Board decision not to reopen a claim on the basis of new and material evidence, to show that the error was outcome determinative with respect to the merits of the underlying claim . . .'
<i>Hampton v. Nicholson</i> , 2006 U.S. App. LEXIS 5944 (Fed. Cir., Mar. 9, 2006)	Was dismissal of petition for writ of mandamus as moot appropriate when Veterans Court had taken steps sought in petition in a separate appeal?	Holds that petition is moot	X			Affirmed
<i>Winsett v. Nicholson</i> , 2006 U.S. App. LEXIS 6590 (Fed. Cir., Mar. 15, 2006)	Was claimant entitled to a writ of mandamus based on an alleged failure of the Secretary to comply with mandate of Veterans Court?	No, because alternative remedies for alleged violation were available	X			Affirmed
<i>Hampton v. Nicholson</i> , 2006 U.S. App. LEXIS 6806 (Fed. Cir., Mar. 17, 2006)	Was claimant entitled to a writ of mandamus seeking expedited relief concerning his allegation of CUE in an earlier decision of a VA RO?	No, claimant was not entitled to extraordinary relief and should pursue the normal claim appeal process	X			Affirmed

## APPENDIX B

## FEDERAL CIRCUIT DECISIONS (JANUARY 2004–MARCH 2006)

JURISDICTIONAL, SUMMARY AFFIRMANCE, DIRECT REGULATORY  
CHALLENGES, MISCELLANEOUS*Jurisdictional Dismissals*

1. *Kince v. Principi*, 87 F. App'x 170 (Fed. Cir. 2004) (appeal from interlocutory order).
2. *Caravello v. Principi*, 86 F. App'x 423 (Fed. Cir. 2004) (question of law applied to facts on CUE claim).
3. *Jim v. Principi*, 87 F. App'x 737 (Fed. Cir. 2004) (weighing of evidence and application of law to facts on CUE claim).
4. *Dippel v. Principi*, 87 F. App'x 740 (Fed. Cir. 2004) (one issue lacks jurisdiction due to factual issue; other issues lack jurisdiction due to appeal from non-final Veterans Court order).
5. *Hinkel v. Principi*, 89 F. App'x 216 (Fed. Cir. 2004) (purely factual question).
6. *Matias v. Principi*, 89 F. App'x 737 (Fed. Cir. 2004) (purely factual question).
7. *Maki v. Principi*, 91 F. App'x 133 (Fed. Cir. 2004) (purely question of fact concerning timeliness of appeal).
8. *Rossi v. Principi*, 91 F. App'x 141 (Fed. Cir. 2004) (purely question of fact concerning timeliness of appeal).
9. *Robles v. Principi*, 95 F. App'x 1005 (Fed. Cir. 2004) (purely factual question).
10. *Doherty v. Principi*, 99 F. App'x 899 (Fed. Cir. 2004) (purely factual question).
11. *Milton v. Principi*, 110 F. App'x 101 (Fed. Cir. 2004) (purely factual question).
12. *Peralta v. Principi*, 112 F. App'x 38 (Fed. Cir. 2004) (purely factual question).
13. *Williams v. Principi*, 114 F. App'x 386 (Fed. Cir. 2004) (application of law to facts).
14. *Cabalza v. Principi*, 114 F. App'x 391 (Fed. Cir. 2004) (application of law to facts).
15. *Jackson v. Principi*, 115 F. App'x 54 (Fed. Cir. 2004) (application of law to facts and/or purely factual question).
16. *Henderson v. Principi*, 117 F. App'x 766 (Fed. Cir. 2005) (purely factual question).
17. *Jones v. Principi*, 118 F. App'x 508 (Fed. Cir. 2004) (non-final Veterans Court decision; on remand).

18. *Pelegri v. Principi*, 122 F. App'x 993 (Fed. Cir. 2005) (non-final Veterans Court decision; on remand).
19. *Dolor v. Principi*, 123 F. App'x 988 (Fed. Cir. 2005) (purely factual question).
20. *Montalbano v. Nicholson*, 125 F. App'x 297 (Fed. Cir. 2005) (purely factual question).
21. *Mondero v. Nicholson*, 129 F. App'x 605 (Fed. Cir. 2005) (purely question of fact concerning timeliness of filing of NOA).
22. *Locklear v. Nicholson*, 132 F. App'x 366 (Fed. Cir. 2005) (failure to file a timely NOA with the Federal Circuit).
23. *Johnson v. Nicholson*, 132 F. App'x 367 (Fed. Cir. 2005) (purely factual question).
24. *Wright v. Nicholson*, 143 F. App'x 351 (Fed. Cir. 2005) (non-final Veterans Court decision).
25. *Guillory v. Nicholson*, 144 F. App'x 870 (Fed. Cir. 2005) (purely factual question).
26. *Martin v. Nicholson*, 151 F. App'x 928 (Fed. Cir. 2005) (non-final Veterans Court decision).
27. *Nastor v. Nicholson*, 153 F. App'x 735 (Fed. Cir. 2005) (failure to file a timely NOA with the Federal Circuit).
28. *Frasure v. Nicholson*, 157 F. App'x 272 (Fed. Cir. 2005) (non-final Veterans Court decision).
29. *Edwards v. Nicholson*, 157 F. App'x 272 (Fed. Cir. 2005) (non-final Veterans Court decision).
30. *Lowgren v. Nicholson*, 157 F. App'x 281 (Fed. Cir. 2005) (purely factual question).
31. *Jones v. Nicholson*, 431 F.3d 1353 (Fed. Cir. 2005) (non-final Veterans Court decision).
32. *Lopez v. Nicholson*, 172 F. App'x 1004 (Fed. Cir. 2006) (application of law to facts).
33. *Joyce v. Nicholson*, 443 F.3d 845 (Fed. Cir. 2006) (non-final Veterans Court decision).

#### *Summary Affirmances*<sup>267</sup>

1. *Raguine v. Principi*, 89 F. App'x 734 (Fed. Cir. 2004).
2. *Porter v. Principi*, 112 F. App'x 53 (Fed. Cir. 2004).
3. *Urban v. Nicholson*, 128 F. App'x 154 (Fed. Cir. 2005).
4. *Browne v. Nicholson*, 135 F. App'x 427 (Fed. Cir. 2005).

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267. *Claiborne* and *Urban* were panel decisions at the Veterans Court. All other decisions listed here were rendered by single judges at the Veterans Court.

5. *Yates v. Nicholson*, 140 F. App'x 954 (Fed. Cir. 2005).
6. *Buggs v. Nicholson*, 146 F. App'x 482 (Fed. Cir. 2005).
7. *Paige v. Nicholson*, 145 F. App'x 680 (Fed. Cir. 2005).
8. *Adamczyk v. Nicholson*, 159 F. App'x 999 (Fed. Cir. 2005).
9. *Claiborne v. Nicholson*, 173 F. App'x 826 (Fed. Cir. 2006).

*Direct Regulatory Challenges*

*Disabled Am. Veterans v. Sec'y of Veterans Affairs*, 419 F.3d 1317 (Fed. Cir. 2005) (upholding regulations allowing the BVA to obtain and consider internal VA medical opinions in context of appeal).

*Mandamus re: Veterans Court*

*In re Van Allen*, 125 F. App'x 299 (Fed. Cir. 2005) (rejecting request for writ of mandamus to Veterans Court to direct the clerk to docket his appeal; petitioner refused to identify the BVA decision from which he purported to be appealing).

APPENDIX C  
 VETERANS COURT PANEL AND EN BANC DECISIONS  
 (JANUARY 2004—MARCH 2006)<sup>268</sup>

Name and Citation	Panel or En Banc	Holding/issue(s)	Concurrence	Dissent	Other Info
<i>Baxter v. Principi</i> , 17 Vet. App. 407 (2004)	Panel	<b>BVA decision affirmed in part and appeal dismissed in part.</b> BVA is not required to examine whether presumption of regularity in mailing decision is rebutted unless "at a minimum" the veteran alleges non-receipt.	N	N	
<i>Sharp v. Principi</i> , 17 Vet. App. 431 (2004)	Panel	<b>BVA decision affirmed.</b> Veterans Court holds that widow of veteran lacked standing to claim retroactive benefits under 38 USC § 1115. Court also held that claim for accrued payments dealt only with the immediate two years prior to veteran's death.	N	N	Federal Circuit affirmed Veterans Court standing holding but reversed concerning the two-year requirement. 403 F. 3d 1324 (Fed. Cir. 2005).
<i>Johnson v. Principi</i> , 17 Vet. App. 436 (2004)	Panel	<b>EAJA fee application denied.</b> Veterans Court denies "prevailing party" status when case was remanded due to a Federal Circuit decision concerning VA regulations.	Y (Ivers)	N	
<i>Bates v. Principi</i> , 17 Vet. App. 443 (2004)	Panel	<b>Petition for writ of mandamus dismissed.</b> Veterans Court holds that BVA would be without jurisdiction to adjudicate a claim that the Secretary wrongfully revoked accreditation to practice before the VA and therefore Veterans Court was without power to issue the writ.	N	N	Reversed by Federal Circuit. 398 F. 3d 1355 (Fed. Cir. 2005). On remand, Veterans Court orders writ issued directing the Secretary to issue a SOC. 19 Vet. App. 197 (2005).
<i>Leonard v. Principi</i> , 17 Vet. App. 447 (2004)	Panel	<b>BVA decision affirmed.</b> Veterans Court reaffirms that the rule of finality may be overcome only in two situations: (1) reopening based on new and material evidence and (2) CUE. Neither exception applied in this case in which a veteran was seeking an earlier effective date for a TDIU rating.	N	N	Affirmed on appeal to the Federal Circuit. 405 F. 3d 1333 (Fed. Cir. 2005).

268. This list is presented in chronological order and excludes orders of a procedural nature. It includes cases decided through March 31, 2006.

Name and Citation	Panel or En Banc	Holding/issue(s)	Concurrence	Dissent	Other Info
<i>Breedan v. Principi</i> , 17 Vet. App. 475 (2004)	Panel	Granted VA motion to dismiss appeal (jurisdiction) Non-final orders of BVA, including remands to RO, do not provide jurisdiction to Veterans Court.	Y (Kramer)	N	
<i>Thornhill v. Principi</i> , 17 Vet. App. 480 (2005)	Panel	Granted VA motion to dismiss appeal (jurisdiction) Veterans Court rejects arguments for equitable tolling of time within which to file NOA.	N	N	
<i>Durr v. Principi</i> , 17 Vet. App. 486 (2004)	Panel	Appeal dismissed on jurisdictional grounds Veterans Court holds that veteran's "memorandum" was not a proper NOA and thus the court was without jurisdiction to hear the appeal.	N	N	Reversed by Federal Circuit. 400 F. 3d 1375 (Fed. Cir. 2005).
<i>Bobbit v. Principi</i> , 17 Vet. App. 547 (2004)	Panel	Order determined that jurisdiction was proper Veterans Court holds that a claimant's submission of a document in the nature of an NOA with the BVA instead of the court satisfied the Federal Circuit's requirements for equitable tolling.	N	N	
<i>Long v. Principi</i> , 17 Vet. App. 555 (2004)	Panel	Appeal dismissed as moot Veterans Court dismisses veteran's appeal claiming a violation of priority medical scheduling because VA regulations appear to resolve the issue.	Y (Kramer)	N	
<i>Akers v. Principi</i> , 17 Vet. App. 561 (2005)	En Banc	Request for En Banc consideration denied	Y (Steinberg and Hage)	Y (Kosold)	
<i>Wells v. Principi</i> , 18 Vet. App. 33 (2004)	En Banc	Request for En Banc consideration denied	N	Y (Steinberg and Kosold)	
<i>Acosta v. Principi</i> , 18 Vet. App. 53 (2004)	Panel	BVA decision vacated and remanded Veterans Court holds that (1) the BVA failed to consider whether an earlier claim by the veteran remained pending at an RO and (2) the BVA erred in rejecting an informal letter as an NOD.	N	N	
<i>Canitu v. Principi</i> , 18 Vet. App. 92 (2004)	Panel	BVA decision reversed Veterans Court reverses the BVA's determination that a veteran was not entitled to payment of his medical expenses incurred at a private facility. (The relevant statutory provisions are 38 USC §§ 1710 and 1703).	N	N	



Name and Citation	Panel or En Banc	Holding/issue(s)	Concurrence	Dissent	Other Info
<i>Bissonnette v. Principi</i> , 18 Vet. App. 105 (2004)	Panel	<b>Earlier Veterans Court decision affirmed</b> Veterans Court affirms determination that an earlier Veterans Court adjudication precluded the current claim under doctrine of claim preclusion.	N	N	An appeal to the Federal Circuit was later dismissed. 125 Fed. Appx. 300 (Fed. Cir. 2005).
<i>Pelegriini v. Principi</i> , 18 Vet. App. 112 (2004)	Panel	<b>BVA decision vacated and remanded</b> Veterans Court holds that "duty to notify" requirements of VCAA apply to cases pending before the VA as long as not final at BVA. Veterans Court also provides "guidance" as to how duty to notify should be applied on remand. Finally, Veterans Court holds that the BVA inappropriately treated an open claim as a request to reopen.	Y (Ivers)	Y (Ivers)	An appeal to the Federal Circuit was later dismissed. 122 Fed. Appx. 993 (Fed. Cir. 2005).
<i>Tavares v. Principi</i> , 18 Vet. App. 131 (2004)	Panel	<b>Dismissed appeal due to late filed NOA</b> Court holds, over dissent's objection, that veteran had not demonstrated that conditions for equitable tolling were present. In particular, the majority takes a rather narrow view of conduct that lulls a veteran into believing that VA personnel will perfect an appeal.	N	Y (Kosold)	An appeal to the Federal Circuit was later dismissed. 120 Fed. Appx. 306 (Fed. Cir. 2004).
<i>Urban v. Principi</i> , 18 Vet. App. 143 (2004)	Panel	<b>Dismissed appeal on standing and ripeness grounds</b> Veterans Court holds that veteran was not "aggrieved" by the BVA decision awarding him a TDIU rating without also addressing the effective date question. That question would be addressed by the RO.	N	N	Summarily affirmed. 128 Fed. Appx. 154 (Fed. Cir. 2005).
<i>Andrews v. Principi</i> , 18 Vet. App. 177 (2004)	Panel	<b>BVA decision affirmed</b> This matter was on remand from the Federal Circuit after the Circuit Court had reversed a Veterans Court decision. The BVA had found no CUE in two RO decisions. The Circuit Court remanded with directions that the Veterans Court announce a standard of review for CUE allegations in this context and adjudicate the claim. The Veterans Court "reiterates" the standard of review it had been using (i.e., whether the BVA's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law") and rejects the veteran's claims of error. The Veterans Court also holds that the "sympathetic reading" of error. The Veterans Court also holds that the "sympathetic reading" apply to CUE claims (note the sympathetic reading point was rejected by the Federal Circuit).	Y (Steinberg)	Y (Steinberg)	This decision was affirmed by the Federal Circuit. Importantly, the Federal Circuit did not agree as to the non-applicability of <i>Roberson</i> to CUE claims. 421 F. 3d 1278 (Fed. Cir. 2005).

Name and Citation	Panel or En Banc	Holding/Issue(s)	Concurrence	Dissent	Other Info
<i>Thaiss v. Principi</i> , 18 Vet. App. 204 (2004)	Panel	<b>BVA decision vacated and remanded</b> The VA had denied the veteran an increased pension claimed on the basis of a child over 18 residing at home and attending a home school. The BVA affirmed the denial based on a precedential G.C. opinion. The veterans court vacates the decision and remands, holding that G.C. opinion did not provide an adequate basis for the BVA's decision and that the G.C. opinion and certain regulations were "substantive" and had not been subject to notice-and-comment rulemaking.	Y (Kramer)	N	The court later rejected a motion for an en banc consideration, with Kosold, J. dissenting. 18 Vet. App. 480 (2004).
<i>Marianov v. Principi</i> , 18 Vet. App. 217 (2004)	Panel	<b>EAJA application held timely</b> Veterans Court holds that EAJA fee application must be filed 30 days after judgment becomes final, not 30 days after mandate issues.	N	N	
<i>Bonny v. Principi</i> , 18 Vet. App. 218 (2004)	Panel	<b>EAJA fee application denied</b> Veterans Court holds that the VA position was "substantially justified" at both the administration and litigation stages. At the administrative level the VA relied on then-current law. At the litigation stage, the issue concerned a matter the court deemed difficult and close.	N	N	
<i>Padgett v. Principi</i> , 18 Vet. App. 223 (2004)	En Banc	<b>En Banc consideration denied</b>	N	Y (Steinberg)	Steinberg, J. dissents based on argument that panel decision incorrectly decides a novel issue concerning remand based on medical evidence. The opinion for which en banc consideration was denied was later withdrawn. 18 Vet. App. 188 (2004). It appears that at a later point the Veterans Court granted the parties' request for full court consideration. 18 Vet. App. 404 (2004). Thereafter, the Veterans Court affirmed the BVA decision in part and remanded for further proceedings. 19 Vet. App. 133 (2005). However, after the appellant died while the case remained pending on appeal, the Veterans Court (over two dissents) withdrew the opinion and dismissed the appeal. 19 Vet. App. 334 (2005).

Name and Citation	Panel or En Banc	Holding/issue(s)	Concurrence	Dissent	Other Info
<i>Hines v. Principi</i> , 18 Vet. App. 227 (2004)	Panel	<b>BVA decision vacated and remanded</b> Veterans Court holds that BVA did not provide an adequate statement of basis and reasons for denying CUE claim. The underlying claim concerned hypothyroidism. Veterans Court holds that the BVA did not adequately explain why it believed RO may have relied on a certain regulation.	N	Y (Kramer)	
<i>Corwin v. Principi</i> , 18 Vet. App. 246 (2004)	Panel	<b>BVA decision affirmed</b> Veterans Court holds that the veteran's arguments were barred by res judicata because they could have been raised in an earlier Veterans Court appeal.	N	N	This case applies the same rule as <i>Bissonnette v. Principi</i> , 18 Vet. App. 105 (2004).
<i>Jones v. Principi</i> , 18 Vet. App. 248 (2004)	Panel	<b>BVA decision set aside in part and vacated and remanded in part</b> Case concerned (1) separate ratings for injuries to different muscle groups from a gun shot wound and (2) ratings for scars. Veterans Court holds with respect to issue number 1 that, as a matter of law, the veteran is entitled to separate ratings for each muscle group affected. As to issue number 2, the Veterans Court remands for the BVA to reconsider scar ratings based on the results of additional medical tests.	N	N	
<i>Sizemore v. Principi</i> , 18 Vet. App. 264 (2004)	Panel	<b>BVA decision vacated and remanded</b> Veterans Court holds that "combat with the enemy" in 38 C.F.R. § 3.304 (f) does not require that veteran be on receiving end of enemy fire. Veterans Court also finds violation of duties to assist and notify.	N	N	The opinion also contains some interesting discussion cautioning against VA doctors going beyond medical opinions in their reports.
<i>Evington v. Principi</i> , 18 Vet. App. 331 (2004)	Panel	<b>EAJA fee application granted</b> Veterans Court approves hourly rate of \$126.73 for an experienced non-attorney practitioner.	N	N	The court returned to this issue in a more general way in <i>Apodakis v. Nicholson</i> , 19 Vet. App. 91 (2005).
<i>Wanless v. Principi</i> , 18 Vet. App. 337 (2004)	Panel	<b>BVA decision vacated and remanded</b> Veterans Court remands matter to BVA to more fully address the veteran's claim that the reduction in his benefits under 38 USC § 5313 (a)(1) was improper. The issue was whether a privately managed prison in Oklahoma qualified as a "state . . . penal institution."	Y (Steinberg)	Y (Greene)	

Name and Citation	Panel or En Banc	Holding/Issue(s)	Concurrence	Dissent	Other Info
<i>DeBeard v. Principi</i> , 18 Vet. App. 357 (2004)	Panel	<b>BVA decision affirmed</b> Veterans Court affirms as not clearly erroneous the BVA's determination that the veteran was not "blind" in his left eye under 38 USC § 1160 and 38 C.F.R. § 3383. Veterans Court further holds that BVA was correct to consider the blindness issue under all seven definitions of blindness in the applicable regulations.	N	N	This opinion also contains an interesting discussion of the interplay between <i>Garzher</i> and <i>Chevron</i> .
<i>Anderson v. Principi</i> , 18 Vet. App. 371 (2004)	Panel	<b>BVA decision affirmed in part, vacated and remanded in part</b> Veterans Court deals with numerous issues related to veteran's claims regarding non-service-connected pension, infirmities secondary to in-service tobacco use, and depression secondary to an award of compensation under 38 USC § 1151. The bulk of the opinion concerns whether the veteran had submitted valid NODs for the various issues. The Veterans Court reaches different conclusions for different claims based on the facts of each situation.	Y (Steinberg)	N	<b>Federal Circuit affirmed decision but disagreed with the Veterans Court's reasoning.</b> 421 F.3d 1278 (Fed. Cir. 2005).
<i>Frasure v. Principi</i> , 18 Vet. App. 379 (2004)	Panel	<b>BVA decision vacated and remanded</b> The case concerned whether the appellant qualified as a "veteran" based on his merchant marine status in late 1945 and throughout 1946. Veterans Court holds that the BVA did not adequately explain its reasons and bases for rejecting certain evidence. Thus, a remand was necessary. The Veterans Court also holds that a Form DD 214 is not dispositive as to dates of active service (i.e., other evidence may be taken on this issue).	N	N	An appeal to the Federal Circuit was later dismissed. 156 Fed. Appx. 325 (Fed. Cir. 2005).
<i>Huston v. Principi</i> , 18 Vet. App. 395 (2004)	Panel	<b>BVA decision vacated and remanded in part</b> The case concerned two major issues: (1) a CUE claim and (2) a claim on direct appeal, both of which effectively sought an earlier effective date hearing loss. The Veterans Court severs the two issues, staying the second one. As to CUE, the Veterans Court remands to the BVA because the BVA had adjudicated the issue without offering the veteran the option of remand to the RO in the first instance.	N	N	The Federal Circuit remanded this case to the Veterans Court for proceedings consistent with <i>Conway</i> (i.e., the requirement to take "due account of the rule of prejudicial error"). This opinion is the Veterans Court's action on remand.

Name and Citation	Panel or En Banc	Holding/issue(s)	Concurrence	Dissent	Other Info
<i>Nelson v. Principi</i> , 18 Vet. App. 407 (2004)	Panel	<b>BVA decision affirmed</b> Veterans Court holds that RO decision was final and that the veteran's claim did not remain pending. In so doing, the Veterans Court rejects the veteran's argument that the Federal Circuit's decision in <i>Szeminaj</i> (requiring that the VA sympathetically read pleadings) indicated that the RO had adjudicated the claim at issue. The Veterans Court relies on the Federal Circuit's decision in <i>Norton</i> .	N	Y (Farley)	
<i>Hartman v. Principi</i> , 18 Vet. App. 432 (2004)	Panel	<b>Secretary's motion for panel consideration granted</b> Veterans Court grants motion for panel consideration on an issue of first impression concerning whether the notice provision of 38 USC § 5103 (a) applies to a "downstream" issue and, if so, how it applies.	N	N	
<i>Luevas v. Principi</i> , 18 Vet. App. 435 (2004)	Panel	<b>BVA decision affirmed</b> Veterans Court affirms BVA determination that veteran acted in bad faith in reporting wife's income. Thus, a waiver of recovery for an overpayment was properly denied. The Veterans Court also holds that the duty to notify in 38 USC § 5103 (a) does not apply to matters under Chapter 53 of Title 38.	N	N	
<i>Pierce v. Principi</i> , 18 Vet. App. 440 (2004)	Panel	<b>BVA decision vacated and remanded</b> Veterans Court vacates BVA decision for failing to adequately explain the reasons and basis for decision. The matter is remanded for readjudication.	N	N	
<i>Bingham v. Principi</i> , 18 Vet. App. 470 (2004)	Panel	<b>BVA decision affirmed</b> Veterans Court affirms BVA decision about effective date in a reopened claim concerning hearing loss. Veterans Court holds that veteran's claim was not rendered open and unadjudicated because one theory was not rejected (here the theory of presumptive connection as opposed to direct connection).	N	N	This decision was affirmed by the Federal Circuit. 421 F.3d 1346 (Fed. Cir. 2005).
<i>Desbrow v. Principi</i> , 18 Vet. App. 476 (2004)	Panel	<b>BVA decision vacated and appeal dismissed</b> Veterans Court decision is based on death of veteran in this action for disability compensation.	N	N	
<i>Jones v. Principi</i> , 18 Vet. App. 500 (2004)	Panel	<b>Ordered appellant to develop facts to support equitable tolling</b> Veterans Court rejects argument that duty to assist in 38 USC § 5103 (a) applies to claims of equitable tolling related to filing of NOA.	N	N	An appeal to the Federal Circuit was later dismissed. 431 F.3d 1353 (Fed. Cir. 2005).

Name and Citation	Panel or En Banc	Holding/issue(s)	Concurrence	Dissent	Other Info
<i>Johnson v. Principi</i> , 18 Vet. App. 503 (2004)	Panel	Granted joint motion to vacate BVA decision and remand	N	Y (Kosold)	Kosold, J. dissents arguing that it is improper to vacate a BVA decision on agreement of the parties without a finding of error in the BVA decision.
<i>Augustine v. Principi</i> , 18 Vet. App. 505 (2004)	Panel	BVA decision affirmed Veterans Court affirms BVA determination that there was no CUE in 1972 rating decision dealing with loss of movement in elbow. Veterans Court holds that a loss of forearm supination and pronation does not amount to loss of natural elbow action under relevant law.	N	N	
<i>Duenas v. Principi</i> , 18 Vet. App. 512 (2004)	Panel	BVA decision affirmed in part, vacated in part and remanded Veterans Court holds that BVA erred in not adequately explaining why no VA medical exam was required in this case pursuant to the duty to assist in 38 USC § 5103 (a). The issue in this case centered on the veteran's lay testimony of symptoms of a disability that may have been associated with in-service activity.	Y (Hagel)	N	
<i>Kaltman v. Principi</i> , 18 Vet. App. 522 (2004)	Panel	BVA decision reversed and remanded Veterans Court reverses BVA determination that the veteran had withdrawn his appeal as to certain matters. The opinion underscores the point that withdrawals of appeals to the BVA will not be found lightly.	N	N	
<i>Hatch v. Principi</i> , 18 Vet. App. 527 (2004)	Panel	BVA decision set aside and case remanded Veterans Court holds that it is bound by Federal Circuit decision in <i>Hix v. Gober</i> , 225 F. 3d 1377 (Fed. Cir. 2000), to find that a claim for enhanced DIC payments may be supported by posthumously submitted evidence. A G.C. opinion to the contrary is struck down.	N	N	
<i>Gutierrez v. Principi</i> , 19 Vet. App. 1 (2004)	Panel	BVA decision vacated and remanded The Veterans Court remands to BVA for adequate statement of reasons and basis for decision denying service connection under 38 USC § 1117 for "Gulf War syndrome."	N	N	
<i>Shele v. Principi</i> , 19 Vet. App. 11 (2004)	Panel	Denied VA motion to dismiss Court holds it has jurisdiction because appellant's NOA was timely, and appellant rebutted the presumption of regularity in BVA mailing of decision.	N	N	

Name and Citation	Panel or En Banc	Holding/Issue(s)	Concurrence	Dissent	Other Info
<i>Martins v. Principi</i> , 19 Vet. App. 20 (2005)	Panel	<b>EAJA fee application granted.</b> Court holds that failure to file notice of appearance does not bar fee award.	N	N	
<i>Mathews v. Principi</i> , 19 Vet. App. 23 (2005)	Panel	<b>BVA decision affirmed</b> Court holds that appellant failed to file NOD with BVA within the time mandated after an RO decision.	N	N	The Veterans Court reaffirmed this decision on a motion for reconsideration. 19 Vet. App. 202 (2005).
<i>McPhail v. Nicholson</i> , 19 Vet. App. 30 (2005)	Panel	<b>BVA decision affirmed</b> Court holds that appellant abandoned CUE argument on appeal, and therefore, the court does not address the argument that equitable tolling can apply with respect to RO decision.	N	N	<b>Affirmed on appeal by the Federal Circuit. 2006 U.S. App. LEXIS 5112 (Fed. Cir., Feb. 27, 2006).</b>
<i>Joyce v. Nicholson</i> , 19 Vet. App. 36 (2005)	Panel	<b>BVA decision affirmed in part, reversed in part, vacated in part and remanded</b> This is a complex and lengthy decision dealing with the presumptions of soundness and (principally) aggravation in the context of a CUE claim.	Y (Hegel)	N	An appeal to the Federal Circuit was dismissed on the ground that the decision of the Veterans Court was not "final." 2006 U.S. App. LEXIS 7188 (Fed. Cir., Mar. 30, 2006).
<i>Smith (Ellis) v. Nicholson</i> , 19 Vet. App. 63 (2005)	Panel	<b>BVA decision reversed in part, vacated in part and remanded</b> There were two issues of importance in this case: (1) Veterans Court holds that there should be a dual rating for tinnitus; and (2) Veterans Court holds that it has jurisdiction to consider certain matters that are related to rating schedules (and must try to reconcile decisions of the Federal Circuit on this point).	Y (Ivers)	Y (Ivers)	This case is on appeal to the Federal Circuit. (No. 05-7168)
<i>O'Branovic v. Nicholson</i> , 19 Vet. App. 81 (2005)	Panel	<b>Request for writ denied</b> Petitioner requested writ of mandamus to order the BVA not to remand a case to RO. Veterans Court holds that writ requirements are not satisfied.	N	N	An appeal to the Federal Circuit was dismissed on the agreement of the parties. 2006 U.S. App. LEXIS 6937 (Fed. Cir., Mar. 2, 2006).
<i>Apodakis v. Nicholson</i> , 19 Vet. App. 91 (2005)	Panel	<b>EAJA fee request granted</b> The court establishes a formula for calculating the hourly rate for non-attorney practitioners.	N	N	
<i>Loving v. Nicholson</i> , 19 Vet. App. 96 (2005)	Panel	<b>BVA decision affirmed</b> Veteran's claim that a grate fell on him during a VA exam does not fit within meaning of 38 USC § 1151 (a) (1).	N	N	

Name and Citation	Panel or En Banc	Holding/issue(s)	Concurrence	Dissent	Other Info
<i>Mayfield v. Nicholson</i> , 19 Vet. App. 103 (2005)	Panel	<b>BVA decision affirmed</b> Veterans Court defines meaning of giving "due regard to the rule of prejudicial error" (38 USC § 7261 (b)(2)) and provides guidance concerning burdens of pleading, production, and persuasion on this issue.	N	N	The Veterans Court declined to consider the case en banc, with two judges dissenting. 19 Vet. App. 220 (2005). <b>The Federal Circuit reversed. 2006 U.S. App. LEXIS 8145 (April 5, 2006).</b>
<i>Padgett v. Nicholson</i> , 19 Vet. App. 133 (2005)	En Banc	<b>BVA decision reversed in part, set aside in part and remanded</b> Veterans Court: (1) holds that BVA may obtain and consider VA medical experts opinion (without remand to RO) under 38 USC § 7109 (a); and (2) concludes that a BVA finding of fact may be "clearly erroneous" even if evidence in favor of the veteran is not "uncontroverted."	Y (Hagel)	Y (Hagel)	This opinion was later withdrawn after the death of the veteran. 19 Vet. App. 334 (2005) (over dissents of Steinberg and Kosold, JJ.).
<i>Hopkins v. Nicholson</i> , 19 Vet. App. 165 (2005)	Panel	<b>BVA decision affirmed</b> Veterans Court holds that there was no CUE in a 1979 BVA decision because that BVA decision applied the current law to determine whether the claimant was the "wife" of a veteran where the claimant had married the veteran while still married to another man.	N	N	
<i>Kowalski v. Nicholson</i> , 19 Vet. App. 171 (2005)	Panel	<b>BVA decision vacated and remanded</b> Veterans Court holds: (1) VA has authority to order medical exam for confirmatory purposes over veteran's objection (and in fact might have the obligation to do so under the duty to assist); and (2) the BVA may not reject a medical opinion solely because it is based on a history provided by the veteran.	N	N	
<i>Clabome v. Nicholson</i> , 19 Vet. App. 181 (2005)	Panel	<b>Appeal dismissed</b> Veterans Court dismisses appeal on ground that NOA was not timely filed and Barrett equitable tolling is not applicable. <i>Barrett v. Nicholson</i> , 363 F.3d 1315 (Fed. Cir. 2004). Specifically, the Veterans Court holds that the appellant did not meet the high standard for equitable tolling. Here the key was: (1) conclusory medical evidence regarding the impact of dementia; and (2) even if (1) was not so, the medical opinions only said the veteran was "severely impaired" but not "incapable" as Barrett requires.	N	N	Summarily affirmed by the Federal Circuit. 2006 U.S. App. LEXIS 6962 (Fed. Cir., March 14, 2006).



Name and Citation	Panel or En Banc	Holding/Issue(s)	Concurrence	Dissent	Other Info
<i>Bonner v. Nicholson</i> , 19 Vet. App. 188 (2005)	Panel	<b>BVA decision affirmed</b> Veterans Court affirms BVA determination that effective dates for Agent Orange related benefits could be no earlier than 1/1/94. The claim at issue was a reopened one. Moreover, the evidence about the date of the original claim was not such that DIC claimant was entitled to benefits as of that date.	Y (Hägel)	N	This case is on appeal to the Federal Circuit. (No. 05-7190)
<i>Woznick v. Nicholson</i> , 19 Vet. App. 198 (2005)	Panel	<b>Writ granted</b> Veterans Court grants writ of mandamus directing the Secretary to issue a SSOC with respect to an RO decision. The Secretary had argued that the purported NOD actually dealt with new claims and that the underlying decision could not have been more favorable to the claimant so there was nothing to appeal.	N	N	
<i>Mathews v. Nicholson</i> , 19 Vet. App. 202 (2005)	Panel	<b>Motion for reconsideration granted; prior decision re-affirmed</b> Veterans Court reaffirms its affirmation of BVA decision concerning timeliness of underlying appeal. Veterans Court rules BVA had jurisdiction to determine its own jurisdiction.	N	N	The underlying decision is found at 19 Vet. App. 23 (2005). This case is on appeal to the Federal Circuit. (No. 05-7163)
<i>Jackson v. Nicholson</i> , 19 Vet. App. 207 (2005)	Panel	<b>BVA decision affirmed</b> Veterans Court holds that the phrase "appellate decision" in 38 CFR § 3.156(b) refers to BVA decisions, not those of a judicial body. Thus, in the case at hand, the effective date of the claim could be no earlier than the date "new and material evidence" had been submitted on a claim to reopen.	N	N	This case is on appeal to the Federal Circuit. (No. 05-7187)
<i>White v. Nicholson</i> , 19 Vet. App. 211 (2005)	Panel	<b>EAJA fee application granted</b> Veterans Court grants fee application with the exception of fee for file storage (\$100). Veterans Court determines this is not reasonable and otherwise not recoverable.	N	N	This case is on appeal to the Federal Circuit. (No. 05-7055)
<i>Cromer v. Nicholson</i> , 19 Vet. App. 215 (2005)	Panel	<b>BVA decision affirmed</b> Veterans Court affirms BVA decision of no service connection for dementia. Veteran argued he should be entitled to an adverse presumption based on destruction of his service records in the 1973 fire. Veterans Court holds that it need not decide the issue in the absence of a demonstration of either bad faith or negligence on the part of the government.	N	N	This case is on appeal to the Federal Circuit. (No. 05-7172)

Name and Citation	Panel or En Banc	Holding/issue(s)	Concurrence	Dissent	Other Info
Mayfield v. Nicholson, 19 Vet. App. 220 (2005)	En Banc	<b>En Banc consideration denied</b> Veterans Court denies en banc consideration. There are interesting concurring and dissenting opinions dealing with en banc process.	Y (Steinberg, Kosold)	Y (Hagel (w/ivers))	Underlying opinion at 19 Vet. App. 103 (2005). The decision was reversed by the Federal Circuit. 2006 U.S. App. LEXIS 8145 (April 5, 2006).
Friedsam v. Nicholson, 19 Vet. App. 222 (2005)	Panel	<b>Motion to stay granted</b> Veterans Court grants motion to stay after concluding that a "newly discovered" regulation might moot appeal if parties agree on its application.	N	N	
Bairidge v. Nicholson, 19 Vet. App. 227 (2005)	Panel	<b>EAJA fee application granted but severely reduced</b> Veterans Court establishes detailed requirements for documenting support of EAJA fee awards, particularly in cases with more than one lawyer representing the prevailing party.	Y (Kosold)	Y (Kosold)	
Burton v. Nicholson, 19 Vet. App. 249 (2005)	Panel	<b>BVA decision affirmed</b> Veterans Court affirms BVA's judgment that claimant was not eligible for educational-assistance benefits pursuant to the Montgomery GI bill.	N	N	
Scarborough v. Nicholson, 19 Vet. App. 253 (2005)	Panel	<b>EAJA fee application granted in part</b> On remand from Supreme Court, Veterans Court grants fee application but rejects argument for certain enhanced rates. The Veterans Court holds that practice before the Supreme Court is not specialized enough to qualify for the enhancement.	N	N	The court, over a dissent (Kosold, J.) denied en banc consideration. 19 Vet. App. 322 (2005). This case was on remand from the Supreme Court and the Federal Circuit.
Serra v. Nicholson, 19 Vet. App. 268 (2005)	Panel	<b>Recalled mandate and dismissed appeal as moot</b> The appellant died after judgment was entered but before mandate issued. The appellant's counsel did not notify the VA (or the court) of the death until mandate issued. In these circumstances, the Veterans Court holds that the mandate should be recalled and the case dismissed as moot.	N	N	

Name and Citation	Panel or En Banc	Holding/issue(s)	Concurrence	Dissent	Other Info
<i>Rodriguez v. Nicholson</i> , 19 Vet. App. 275 (2005)	Panel	BVA decision reversed in part, vacated in part and remanded. Case involved DIC benefits under 38 USC § 1318. The real issue involved the potential retroactive application of 38 CFR § 3.22 that purported to remove a claimant's ability to prove entitlement to this benefit under the "hypothetical entitlement" theory. Veterans Court holds that § 3.22, even through interpretive, affects substantive rights. Therefore, the Veterans Court concludes the regulation could not be applied retroactively. The Veterans Court also concludes that the VA breached its duty to notify with respect to the claim and that this breach was prejudicial (or at least the VA failed to show it was not prejudicial).	N	N	This case is on appeal to the Federal Circuit. (No. 06-7023)
<i>Pelea v. Nicholson</i> , 19 Vet. App. 296 (2005)	Panel	BVA decision vacated and remanded. The widow of a Philippine made a claim for DIC benefits. Veterans Court holds that BVA failed to explain the relationship between two regulatory provisions and so the statement of reasons and basis is inadequate. The Veterans Court also determines that the VA breached its duty to notify as to the evidence necessary to support the claim and that this breach was prejudicial under <i>Mayfield v. Nicholson</i> , 19 Vet. App. 103 (2005), <i>rev'd</i> 444 F.3d 1328 (Fed. Cir. 2006).	N	N	An appeal to the Federal Circuit was later dismissed. 2005 U.S. App. LEXIS 28138 (Fed. Cir., Dec. 1, 2005).
<i>May v. Nicholson</i> , 19 Vet. App. 310 (2005)	Panel	BVA decision vacated and remanded. Veterans Court holds that a "CUE claim may not be filed as to a matter that is still appealable to [the Veterans Court], or is pending on appeal [at the Veterans Court] or at a higher court."	N	N	This case is on appeal to the Federal Circuit. (No. 06-7036)
<i>Scarborough v. Nicholson</i> , 19 Vet. App. 322 (2005)	En Banc	En Banc consideration denied	N	Y (Kcosold)	Kosold, J. argues in dissent that it was an error to allow the EAJA fee application to the extent it concerned fees required to cure counsel's own negligence.
<i>McCreary v. Nicholson</i> , 19 Vet. App. 324 (2005)	Panel	Appeal dismissed. Veterans Court adopts test for determining "equitable tolling" based on "extraordinary circumstances." The appellant must show that: (1) the extraordinary circumstances are "beyond [his] control"; (2) the "untimely filing was a direct result of the extraordinary circumstances and (3) he "exercise[d] due diligence" in preserving his appellant rights, meaning that a reasonably diligent appellant under the same circumstances, would not have filed his appeal within the 120-day judicial appeal period." 19 Vet App. at 332.	N	N	

Name and Citation	Panel or En Banc	Holding/Issue(s)	Concurrence	Dissent	Other Info
<i>Padgett v. Nicholson</i> , 19 Vet. App. 334 (2005)	En Banc	<b>Earlier opinion withdrawn, BVA decision vacated, and appeal dismissed</b> Veterans Court holds that because the appellant died while appealing the BVA decision seeking disability compensation, the earlier Veterans Court opinion had to be withdrawn, the underlying decision vacated, and the appeal dismissed. The essential basis for the decision was that claims for disability benefits do not survive the death of a veteran. Judge Kosold's dissent raises a number of issues related to the majority's action.	N	Y (Steinberg and Kosold)	This decision vacates the opinion appearing at 19 Vet. App. 133 (2005). The case is on appeal to the Federal Circuit. (No. 06-7037)
<i>Short Bear v. Nicholson</i> , 19 Vet. App. 341 (2005)	Panel	<b>BVA decision affirmed</b> Veterans Court affirms BVA decision rejecting clothing allowance under 38 USC § 1162 when only underwear was at issue. Veterans Court rejects a duty to notify error (if one was present) as non-prejudicial under <i>Mayfield</i> .	Y (Hagell)	N	
<i>Harris v. Nicholson</i> , 19 Vet. App. 345 (2005)	Panel	<b>Request for writ of mandamus denied</b> Veterans Court holds that: (1) petitioner had not exhausted his administrative remedies; and (2) he was attempting to use the writ as a mean to either revive a lapsed appeal period or appeal a non-appellable event/decision.	N	N	
<i>Hartlin v. Nicholson</i> , 19 Vet. App. 350 (2005)	Panel	<b>BVA decision affirmed</b> Veterans Court holds that "helpless child" benefits are separate from payments to a surviving spouse for purposes of fee agreement with the spouse.	N	N	
<i>Stolasz v. Nicholson</i> , 19 Vet. App. 355 (2005)	Panel	<b>BVA decision reversed and remanded</b> Veterans Court determines that a VA amendment to DC 6260 (concerning dual ratings for <i>limitus</i> ) cannot apply to claims pending when the amendment was adopted in June 2003. Such application would have an impermissible retroactive effect.	N	N	
<i>Washington v. Nicholson</i> , 19 Vet. App. 362 (2005)	Panel	<b>BVA decision vacated and remanded</b> Veterans Court holds that BVA decision did not adequately give its reasons and basis for rejecting veteran's lay testimony regarding in-service occurrence. Also, Veterans Court holds that VA failed in its duty to assist by not informing veteran of additional evidence he could submit when medical records are lost.	Y (Kosold)	Y (Kosold)	Kosold, J., dissents because he would reverse, not remand

Name and Citation	Panel or En Banc	Holding/issue(s)	Concurrence	Dissent	Other Info
<i>Gales v. Nicholson</i> , 19 Vet. App. 376 (2005)	Panel	<b>Motion to dismiss appeal granted</b> Veterans Court holds that pending motion for reconsideration renders BVA decision non-final for appeal purposes.	N	N	
<i>Fritz v. Nicholson</i> , 19 Vet. App. 377 (2005)	Panel	<b>Motion to recall mandate and request to review fee agreement denied</b> Veterans Court holds that it has authority to review fee agreements only in cases pending before the court.	N	N	
<i>Marsh v. Nicholson</i> , 19 Vet. App. 381 (2005)	Panel	<b>BVA decision reversed and remanded</b> The issue concerned whether an NOD was timely. The RO issued a substantive SOC without mentioning the timeliness issue. The BVA sua sponte dismissed. The Veterans Court holds that the presumption of regularity means that the RO would not have issued the SOC if it had believed the NOD was late. Therefore, the Veterans Court presumes it was timely. Moreover, the Veterans Court holds that the VA did not rebut the presumption.	N	N	
<i>Byrd v. Nicholson</i> , 19 Vet. App. 388 (2005)	Panel	<b>BVA decision affirmed</b> Veterans Court rejects veteran's argument that gum disease should be compensable under statute. The Veterans Court holds it lacks jurisdiction to consider the issue under the ratings schedule.	N	N	
<i>Beverly v. Nicholson</i> , 19 Vet. App. 394 (2005)	Panel	<b>BVA decision affirmed in part and remanded in part</b> Veterans Court affirms BVA determination that regulations and statutes prohibit government payment of costs for a community residential care facility. The Veterans Court remands matter to resolve whether the veteran made an informal request to reopen a claim for "special monthly compensation."	N	N	
<i>Stankovich v. Nicholson</i> , 2006 U.S. App. Vet Claims LEXIS 1 (Veterans Court Jan. 3, 2006)	Panel	<b>BVA decision modified in part, set aside in part, and remanded</b> Veterans Court holds that BVA did not provide an adequate statement of reasons and basis for choosing one DC over another in a claim involving Gulf War Syndrome.	N	N	

Name and Citation	Panel or En Banc	Holding/issue(s)	Concurrence	Dissent	Other Info
King v. Nicholson, 19 Vet. App. 406 (2006)	Panel	<p><b>BVA decision vacated and remanded</b>                      Veterans Court remands to BVA for consideration whether 38 CFR § 20.101(b) precludes BVA jurisdiction over categorical rejections of certain medical treatments, as opposed to precluding jurisdiction in case-specific situations.</p>			
Forcierv. Nicholson, 19 Vet. App. 414 (2006)	Panel	<p><b>BVA decision affirmed</b>                      Veterans Court affirms BVA decision rejecting service connection for PTSD based on an alleged sexual assault. Veterans Court holds VA did not breach its duty to assist. In addition, the Veterans Court discusses the effect of a joint motion to remand on later proceedings (a discussion that should be consulted when preparing joint motions to remand).</p>	N	N	
Coburn v. Nicholson, 19 Vet. App. 427 (2006)	Panel	<p><b>BVA decision vacated and remanded</b>                      Case concerned a claim for in-service leg injuries. The case had been remanded for further development, including obtaining a medical exam. On this appeal, the issues involved whether the veteran had voluntarily waived certain issues on appeal. The court holds that the appellant did not knowingly waive the issues of a duty to develop the record, and the court remands for the BVA to provide an adequate statement of reasons and basis.</p>	N	Y (Lance)	
Cokerv. Nicholson, 19 Vet. App. 439 (2006)	Panel	<p><b>BVA decision affirmed in part, set aside in part, and remanded</b>                      Veterans Court affirms BVA decision denying a number of claims due, in part, to a failure of the veteran to articulate error on appeal. The Veterans Court vacates a BVA decision concerning the date of filing of an informal claim for a certain condition. The Veterans Court holds that the BVA must provide an adequate statement of basis and reasons.</p>	Y (Kosold)	N	
Snyderv. Nicholson, 19 Vet. App. 445 (2006)	Panel	<p><b>BVA decision affirmed</b>                      Fees that VA pays directly to an attorney pursuant to 38 U.S.C. § 5904(d) must be based on the amount of past-due benefits the veteran will actually receive.</p>	N	N	

Name and Citation	Panel or En Banc	Holding/issue(s)	Concurrence	Dissent	Other Info
<i>Sims v. Nicholson</i> , 19 Vet. App. 453 (2006)	Panel	<p><b>BVA decision affirmed</b>            Veterans Court holds: (1) duties to assist and notify do not apply to issues under Chapter 55 (they only apply to Chapter 51 claims for benefits); (2) regulations no longer require that a VSCM be involved in the adjudication of a claim; and (3) the presumption of competency under 38 CFR § 3.353(d) applies only when there is "reasonable doubt" as to competency.</p>	N	N	
<i>Dingess v. Nicholson</i> (with <i>Hartman v. Nicholson</i> ), 2006 U.S. App. Vet. Claims LEXIS 102 (Veterans Court, Mar. 3, 2006)	Panel	<p><b>BVA decisions affirmed in part and vacated and remanded in part</b>            This decision is a highly significant one applying the duty to notify (38 U.S.C. § 5103(a)) to the assignment of an initial disability rating and an effective date. While the entire opinion must be read to appreciate it fully, the following general points are especially significant. (1) The duty to notify under § 5103(a) applies to all five elements of a claim, including the rating and effective date. (2) The content of the required notice is fact-specific. However, as a general matter the Court makes clear that the VA is not required "to provide notice on all potential disability ratings that can be awarded, effective dates that may be assigned, or other claims that may be filed, where dispute on those issues is not reasonably raised in the veteran's application." (3) The Court provides guidance on the general outlines of matters that will most often be the subject of the notice for both ratings and effective date. (4) Once an NOD has been received, and assuming that the initial notice was proper, § 5103(a) no longer applies although other aspects of VA-required assistance remain in place. (5) The Court applies <i>Mayfield v. Nicholson</i>, 19 Vet. App. 103 (2005), <i>rev'd</i> 444 F.3d 1328 (Fed. Cir. 2006), in a very detailed manner.</p>	Y (Kcsold)	Y (Kcsold)	
<i>Flores v. Nicholson</i> , 2006 U.S. App. Vet. Claims LEXIS 103 (Veterans Court, Mar. 8, 2006)	Panel	<p><b>BVA decision affirmed</b>            Court affirms BVA finding of fraud and consequent forfeiture of rights to benefits. Significantly, the Court decides for the first time that its review of BVA finding of fraud is under the "clearly erroneous" standard.</p>	N	N	

Name and Citation	Panel or En Banc	Holding/issue(s)	Concurrence	Dissent	Other Info
<p>Majeed v. Nicholson, 2006 U.S. App. Vet. Claims LEXIS 104 (Veterans Court, Mar. 9, 2006)</p>	<p>Panel</p>	<p><b>BVA decision set aside and case remanded</b> The case concerned the proper amount to be recouped from "special separation pay" a veteran received when he also was awarded disability compensation for certain service-connected disabilities. The Veterans Court holds that the BVA did not adequately consider the period for which disability compensation was awarded and, therefore, could not adequately determine if the recoupment at issue was appropriate.</p>	<p>N</p>	<p>N</p>	
<p>Suavisov v. Nicholson, 2006 U.S. App. Vet. Claims LEXIS 105 (Veterans Court, Mar. 10, 2006)</p>	<p>Panel</p>	<p><b>BVA decision affirmed</b> Veterans Court affirms BVA decision that evidence concerning attempt to re-open claim for non-service-connected pension of Philippine widow was not "new and material."</p>	<p>N</p>	<p>N</p>	
<p>Howell v. Nicholson, 2006 U.S. App. Vet. Claims LEXIS 106 (Veterans Court, Mar. 23, 2006)</p>	<p>Panel</p>	<p><b>BVA decision set aside and matter remanded</b> Veterans Court holds that the BVA erred by relying on medical opinions that were "incompetent" with respect to special monthly compensation for aid and assistance. The Court also holds that visits to medical professionals do not negate the possibility of being "housebound."</p>	<p>N</p>	<p>N</p>	
<p>Ramsey v. Nicholson, 2006 U.S. App. Vet. Claims LEXIS 165 (Mar. 31, 2006)</p>	<p>Panel</p>	<p><b>Request for writ of mandamus denied (conditionally)</b> This decision is a highly significant one for a number of reasons. The factual background here concerns <i>Smith v. Nicholson</i>, 19 Vet. App. 63 (2005), <i>rev'd</i> 451 F.3d 1344 (Fed. Cir. 2006) (the decision in which the Veterans Court held that finnitus could result in dual ratings). After that decision, the Secretary issued an order stating that all cases pending at the Board implicated by <i>Smith</i> were to be stayed pending the Secretary's appeal to the Federal Circuit. Two affected claimants sought a writ of mandamus. The Court conditionally denies the writ, but (1) holds that the Secretary (and BVA Chair) have the general inherent authority to issue stays for case management purposes. (2) However, the Secretary (or BVA chair) do not have authority to issue stays pending an appeal of a Veterans Court decision. (3) Instead, the Secretary needs to seek a stay from the appropriate appellate court. Here that would be the Federal Circuit. (The Veterans Court gave the Secretary 30 days to seek such a stay).</p>	<p>Y (Schoelen)</p>	<p>Y (Schoelen)</p>	



Name and Citation	Panel or En Banc	Holding/Issue(s)	Concurrence	Dissent	Other Info
<p><i>Kent v. Nicholson</i>, 2006 U.S. App. Vet. Claims LEXIS 151 (Fed. Cir., Mar. 31, 2006)</p>	<p>Panel</p>	<p><b>BVA decision vacated and case remanded</b>                      The case concerned a claim to reopen certain earlier cases. The significant holdings are as follows. (1) The Court holds that the Federal Circuit's decision in <i>Wagner</i> represents a change in interpretation of law." The change is "procedural" and not "substantive." (2) "New" and "material" have technical meanings and the VA has notice obligations concerning these terms. (3) As to "material" evidence, the Court holds that a notice failure here will almost always be prejudicial. The rationale is explained in detail in the opinion. (4) As to "new" evidence, the Court makes clear that notice failures will generally not be prejudicial. Once again, the Court details its rationale. (5) Finally, the opinion is significant for its future application of the <i>Mayfield</i> standard.</p>	<p>N</p>	<p>N</p>	

## APPENDIX D

*Veterans Law Decisions of Note*

In this Appendix I provide a brief summary of the important veterans law decisions of both the Federal Circuit and the Veterans Court during the past two years. I have not included those cases dealt with at length in the main body of the Article. My test of significance requires that a decision have one of three attributes: (1) it is likely to affect a large number of claimants; (2) it will fundamentally alter the way in which the VA operates; or (3) it announces a jurisprudentially important rule of law.

## ACCRUED BENEFITS

- *Terry*: The Federal Circuit held that the limitation on the recovery of accrued benefits in 38 U.S.C. § 5121(a) refers to any two-year period prior to the veteran's death and not simply the two years immediately prior to the death.<sup>269</sup>

## BVA MAILING PRACTICES

- *Sthele*: The Veterans Court held that an appellant rebutted the presumption of regularity in mailing of a BVA decision. The holding is of particular importance because it casts broad doubt on the ability of the Board to rely on the presumption of regularity in the mailing of its decisions, at least under its current procedures.<sup>270</sup>

## "COMBAT WITH THE ENEMY"

- *Sizemore*: The Veterans Court held that the term "combat with the enemy" in 38 U.S.C. § 3.304(f) does not require that the veteran be attacked and includes the veteran *attacking* the enemy.<sup>271</sup>

## DUTY TO NOTIFY

- *Dingess*: The Veterans Court's decision is a highly significant one applying the duty to notify (38 U.S.C. § 5103(a)) to the assignment of an initial

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269. *Terry v. Principi*, 367 F.3d 1291 (Fed. Cir. 2004).

270. *Sthele v. Principi*, 19 Vet. App. 11 (2004). For an interesting perspective of one practitioner concerning *Sthele* and BVA mailing practices more generally, see TOMMY: A LAWYER'S GUIDE TO VETERANS AFFAIRS, Issue 1, 2005 at 5-6 (published by the Federal Bar Association's Veterans Law Section) (on file with the University of Michigan Journal of Law Reform).

271. *Sizemore v. Principi*, 18 Vet. App. 264 (2004).

disability rating and an effective date for benefits. While the entire opinion must be read to appreciate it fully, the following general points are especially significant. (1) The duty to notify applies to all five elements of a claim, including the rating and effective date.<sup>272</sup> (2) The content of the required notice is fact-specific. However, as a general matter, the VA is *not* required “to provide notice on all potential disability ratings that can be awarded, the effective dates that may be assigned, or other claims that may be filed, where the dispute on these issues is not reasonably raised in the veteran’s application . . . .”<sup>273</sup> (3) The Veterans Court provides guidance about the types of matters that will most often need to be included in notices dealing with ratings and effective dates.<sup>274</sup> (4) Once a Notice of Disagreement has been received (and assuming that the initial notice was proper), § 5103(a) no longer applies, though other aspects of VA-required assistance remain in place.<sup>275</sup>

#### EAJA MATTERS AND OTHER ISSUES CONCERNING ATTORNEYS’ FEES

- *Baldrige*. The Veterans Court’s opinion in this case is significant for several reasons. The Court (1) underscored the importance of detailed billing records in supporting any fee application;<sup>276</sup> (2) held that this obligation to provide detailed billing records is even more important when more than one lawyer is involved in the case;<sup>277</sup> (3) noted that, as a general matter, Veterans Court proceedings are not sufficiently complicated to justify teams of lawyers (although it suggested that the VA could legitimately have teams involved);<sup>278</sup> (4) asserted that when the Court wishes to reduce a fee request it can use gross percentages as opposed to line-by-line editing<sup>279</sup> (a point with which Judge Kasold dis-

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272. *Dingess v. Nicholson*, 19 Vet. App. 473, 484–87 (2006).

273. *Id.* at 488.

274. *Id.* at 486–88.

275. *Id.* at 491–93.

276. *Baldrige v. Nicholson*, 19 Vet. App. 227, 234–35 (2005).

277. *Id.* at 236–41.

278. *Id.* at 238–39.

279. *Id.* at 241–43.

agreed<sup>280</sup>); and (5) provided detailed guidelines about the format of an attorney fee request in cases where more than one attorney represents the claimant.<sup>281</sup>

- *Scarborough*: Any case decided by the United States Supreme Court that touches on veterans law is *ipso facto* significant. In *Scarborough*, the Supreme Court reversed both the Federal Circuit and the Veterans Court and held that a timely EAJA attorney fee application can be amended after the thirty-day filing period has run in order to cure a deficiency in the initial application. In this case, that initial deficiency was the claimant's failure to allege that the government's position had not been substantially justified.<sup>282</sup>
- *Snyder*: The Veterans Court held that fees the VA pays directly to an attorney pursuant to 38 U.S.C. § 5904(d) must be based on the amount of past-due benefits the veteran will actually receive, not simply what he or she is entitled to receive.<sup>283</sup>

#### ENHANCED DIC PAYMENTS

- *Hatch*: The Veterans Court held that enhanced DIC payments may be based on evidence submitted after the veteran's death.<sup>284</sup>

#### JOINT MOTIONS FOR REMAND

- *Forcier*: The Veterans Court was called upon to decide whether a joint motion to remand entered into earlier in the case had an impact on whether the

280. *Id.* at 247–49 (Kasold, J., concurring in part and dissenting in part).

281. *Baldrige*, 19 Vet. App. at 240–41.

282. *Scarborough v. Principi*, 541 U.S. 401 (2004). On remand, the Veterans Court granted the original application and most of a supplemental application. *Scarborough v. Nicholson*, 19 Vet. App. 253 (2005). There were two interesting points in the Veterans Court's actions on remand. First, the Veterans Court refused to award an enhanced hourly rate for attorney Brian Wolfman (and two others) of the Public Citizens Litigation Group. It reasoned (incorrectly in my view) that practice before the United States Supreme Court was not sufficiently "specialized" such that an enhanced rate was warranted. *Id.* at 262–65. Second, the Veterans Court allowed the recovery of fees in the supplemental application, rejecting an argument that those fees did not result from the government's position, but rather from the claimant's lawyer's own mistake in filing the defective fee application in the first place. *Id.* at 261–62. This holding drew a strong dissent from Judge Kasold when the Court refused to hear the matter en banc. *See Scarborough v. Nicholson*, 19 Vet. App. 322 (2005) (Kasold, J., dissenting from denial of en banc consideration).

283. *Snyder v. Nicholson*, 19 Vet. App. 445 (2006).

284. *Hatch v. Principi*, 18 Vet. App. 527 (2004).

BVA decision should be affirmed. The Court held that the joint motion did not affect its decision given the general terms of the remand, among other things. This decision is required reading for any counsel contemplating entering into a joint motion to remand a case.<sup>285</sup>

#### “NO INTEREST RULE”

- *Sandstrom*: The Federal Circuit made clear that the “no interest rule” applies in the context of CUE claims, meaning that a veteran cannot argue that upon the finding of CUE he or she should receive “real” dollars as opposed to “nominal” dollars. In other words, a finding of CUE in a 1969 decision does not mean that a veteran can receive a payment adjusted to reflect 2006 dollar values.<sup>286</sup>

#### PRESUMPTION OF AGGRAVATION

- *Wagner*: The Federal Circuit held that clear and unmistakable evidence is required to rebut *both* the presumption of soundness *and* the lack of in-service aggravation.<sup>287</sup>

#### PRESUMPTION OF SERVICE CONNECTION

- *Shedden*: The Federal Circuit held that 38 U.S.C. § 105(a) creates a presumption of service connection if an injury or disease manifests itself during a veteran’s active service.<sup>288</sup>
- *Thomas*: The Federal Circuit held that the VA may rebut the presumption of service connection in peacetime set forth in 38 U.S.C. § 105(a) by a preponderance of the evidence.<sup>289</sup>

#### RETROACTIVITY GENERALLY

- *Rodriguez*: The Veterans Court held that (1) it is questionable whether the VA has any authority to unilaterally decide that a regulation should apply retroactively; and (2) in any event, a VA regulation

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285. *Forcier v. Nicholson*, 19 Vet. App. 414 (2006).

286. *Sandstrom v. Principi*, 358 F.3d 1376 (Fed. Cir. 2004).

287. *Wagner v. Principi*, 370 F.3d 1089 (Fed. Cir. 2004). In later cases the Circuit Court made clear that it was possible to rebut the presumption, *see Natali v. Principi*, 375 F.3d 1375 (Fed. Cir. 2004), but that it was not easy to do so, *see Patrick v. Principi*, 103 F. App’x 383 (Fed. Cir. 2004).

288. *Shedden v. Principi*, 381 F.3d 1163, 1166–67 (Fed. Cir. 2004).

289. *Thomas v. Nicholson*, 423 F.3d 1279, 1280 (Fed. Cir. 2005).

cannot have a retroactive effect if it would have a negative impact on a claimant.<sup>290</sup>

#### SUBSTITUTION OF PARTY UPON DEATH OF CLAIMANT

- *Padgett*: The Veterans Court (en banc) held that, when a veteran dies while appealing a BVA decision to the Veterans Court, the appropriate disposition is to vacate the Board decision and dismiss the appeal for lack of jurisdiction.<sup>291</sup>

#### TINNITUS RATINGS

- *Smith (Ellis)*: The Veterans Court held that DC 6260 requires a dual rating for tinnitus, at least for claims decided prior to June 13, 2003 when a note was amended to the DC.<sup>292</sup>
- *Stolasz*: The Veterans Court held that the note to DC 6260 purporting to preclude a dual rating for tinnitus cannot be applied to claims that were pending when the regulation became effective (June 13, 2003) because to do so would have an impermissible retroactive effect.<sup>293</sup>

#### VETERANS CLAIMS ASSISTANCE ACT APPLICABILITY

- *Lueras*: The Veterans Court held that the VCAA duties to notify and assist are not applicable to Chapter 53 issues. The duties are applicable only to claims for benefits under Chapter 51.<sup>294</sup>
- *Sims*: The Veterans Court held that the VCAA duties to notify and assist are not applicable to Chapter 55 issues. The duties are applicable only to claims for benefits under Chapter 51.<sup>295</sup>

#### VCAA RETROACTIVITY

- *Hayslip*: The Federal Circuit held that the Veterans Claims Assistance Act did not apply to BVA decisions that were final before its enactment.<sup>296</sup>

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290. *Rodriguez v. Nicholson*, 19 Vet. App. 275, 289–90 (2005), *appeal docketed*, No. 06-7023 (Fed. Cir. Nov. 10, 2005).

291. *Padgett v. Nicholson*, 19 Vet. App. 334 (2005) (per curiam), *appeal docketed*, No. 06-7037 (Fed. Cir. Dec. 13, 2005).

292. *Smith v. Nicholson*, 19 Vet. App. 63, 76–78 (2005), *appeal docketed*, No. 05-7168 (Fed. Cir. Apr. 18, 2006).

293. *Stolasz v. Nicholson*, 19 Vet. App. 355, 360–61 (2005).

294. *Lueras v. Principi*, 18 Vet. App. 435, 438–39 (2004).

295. *Sims v. Nicholson*, 19 Vet. App. 453, 456 (2006).

296. *Hayslip v. Principi*, 364 F.3d 1321, 1325–27 (Fed. Cir. 2004).

## VETERAN STATUS

- *Pelea*: The Veterans Court held that claimants do not lose the right to submit evidence on their claimed status as a veteran merely because the VA has submitted a request to the service department under 38 C.F.R. § 3.203 for service verification.<sup>297</sup>

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297. *Pelea v. Nicholson*, 19 Vet. App. 296, 306–09 (2005), *appeal dismissed*, 159 F. App'x 1003 (2005).