House Committee on Veterans' Affairs
Subcommittee on Disability Assistance and Memorial Affairs
Legislative Hearing on Pending Legislation
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Statement for the Record of Prof. Michael J. Wishnie

My name is Michael J. Wishnie. I am the William O. Douglas Clinical Professor of Law at Yale Law School, where I serve as director of the Veterans Legal Services Clinic. I make this statement in my individual capacity. The views set forth below are my own and do not reflect the views of Yale Law School or my clients.[1]

I write today in support of H.R. 7917, the Veterans Appeals Efficiency Act of 2024, which contains several concrete, practical reform proposals that if enacted would meaningfully improve the adjudication of disability compensation claims and appeals. The Subcommittee's focus on the appeals backlog is welcome. H.R. 7917 wisely does not attempt a wholesale revision of the disability compensation system, but it does make important, common-sense changes that are likely to materially assist veterans and relieve the burdens and frustrations of the notorious "hamster wheel" of recycled claims and delayed relief. The reforms in this bill will increase the overall efficiency and efficacy of veterans' benefits decisions.

First, H.R. 7917 would amend the statutes governing judicial review of veterans' claims at the U.S. Court of Appeals for Veterans Claims (CAVC). The bill would grant the CAVC supplemental jurisdiction over certain pending claims in cases that satisfy the court's standard for aggregation. In addition, the bill would enhance the court's authority to issue limited remands without returning a veteran's claim to the hamster wheel of agency review. I urge the Committee to adopt these twin reforms, which provide the CAVC with necessary tools that other federal courts have used to manage mass adjudications in agency contexts, ensure consistent and fair application of judicial rulings, reduce strategic mooting of cases by the agency, and limit the senseless repetition of unpublished single-judge opinions on the same issue of law or fact. There is no reason veterans seeking judicial review of benefits decisions should be denied recourse to tools available to civilians challenging government decisions by other federal agencies.

Second, the bill would codify into statute the authority of the Board of Veterans Appeals (BVA) to aggregate claims in appropriate cases, as do more than seventy other federal agencies, and would encourage the issuance of precedential opinions by the Office of General Counsel (OGC). Each of these measures would relieve the burden on veterans to repeat arguments and evidence before the agency on the same issues again and again. Aggregation and precedential decisions are modern tools employed by many agencies to promote consistency and fairness in mass-adjudication settings. Here too, there is no reason to deny veterans access to tools that

[1] My students and I represented the veterans in several of the cases mentioned in these remarks: *Monk v. Shulkin*, *Skaar v. McDonough*, *Manker v. Spencer*, and *Kennedy v. Esper*.

civilians may invoke before other federal agencies to manage backlogs, promote uniformity of decision, and speed adjudications.

For the reasons outlined below, I support these reforms in H.R. 7917.

CAVC Supplemental Jurisdiction

The CAVC has the authority to aggregate claims where appropriate,[2] a power it has exercised judiciously to ensure efficient and consistent application of its holdings and to address the Secretary's well-known practice of strategically mooting cases on which VA wishes to avoid a judicial ruling.[3] However, a recent Federal Circuit decision adopted a crabbed construction of the CAVC's jurisdictional statute, frustrating the ability of veterans raising a common issue of law or fact to obtain a single, enforceable resolution. In *Skaar v. McDonough*, 48 F.4th 1323 (Fed. Cir. 2022), the Federal Circuit held that the CAVC can aggregate only those claims that are pending at the Court itself, and that the claims of other veterans whose cases are languishing at the Board or before the VA Regional Offices must be excluded.[4] Because few veterans raising the same issue are within the 120-day appeals window at the same time, the *Skaar* decision undermines the ability of veterans to meet the numerosity requirement of class certification.[5]

Recognizing the severe consequences of excluding veterans with pending claims from any class, five of the twelve judges of the Federal Circuit objected to the *Skaar* decision in a dissent from denial of petition for rehearing *en banc*.[6] "For many years, the system for processing veterans' claims has been inefficient and subject to substantial delays," Judge Dyk explained for the dissenters.[7] "The class action mechanism [at CAVC] promised to help ameliorate these problems to some significant extent, enabling veterans in a single case to secure a ruling that would help resolve dozens if not hundreds of similar claims."[8] But the court's decision in *Skaar* "will effectively eliminate class actions in the veterans context."[9]

In my view, the Federal Circuit committed multiple legal errors in *Skaar*. The result has been to undermine the CAVC's ability to use aggregation, when warranted, to "promot[e] efficiency, consistency, and fairness, and improv[e] access to legal and expert assistance by

[2] *Monk v. Shulkin*, 855 F.3d 1312 (Fed. Cir. 2017); CAVC Rules of Practice and Procedure 22, 23.
[3] *Monk v. Shulkin*, 855 F.3d at 1320-21 (noting that "VA's delay in adjudicating appeals evades review" when VA acts to moot mandamus petitions and that "[c]ase law is replete with such examples"); *id.* at 1321 ("Permitting class actions would help prevent the VA from mooting claims scheduled for precedential review" (citing amicus brief)).
[4] In *Skaar*, the Federal Circuit panel rejected CAVC's determination that it had "jurisdiction to certify a class action that includes members who do not have a final Board decision" so long as "(i) the challenged conduct is collateral to the class representative's administratively exhausted claim for benefits—i.e., the class representative has obtained a final Board decision; (ii) enforcing the exhaustion requirement would irreparably harm the class; and (iii) the purposes of exhaustion would not be served by its enforcement." 32 Vet.App. 156, 184-85 (2019) (*en banc*).
[5] *See* CAVC Rules of Practice & Procedure, 23(a)(1).
[6] 57 F.4th 1015 (Fed. Cir. 2023) (Dyk, J., dissenting from denial of rehearing *en banc*).
[7] *Id.* at 1016.
[8] *Id.* at 1017.
[9] *Id.*

parties with limited resources."[10] The CAVC, and as a result veterans, are deprived of an important instrument to "compel correction of systemic error and to ensure that like veterans are treated alike."[11] H.R. 7917 advances a narrow but urgent fix to extend the CAVC's supplemental jurisdiction. This reform will restore aggregation as a vital tool for the CAVC to address VA backlogs and hold the agency accountable to the veterans the agency is charged with serving. That said, the current language in Section 2(d) of H.R. 7917 would be improved by clarifying that the CAVC's supplemental jurisdiction includes claims pending at the Regional Offices, not only those pending final decision at the BVA. I urge that Section 2(d) be amended as proposed by Renée Burbank of the National Veterans Legal Services Program in her testimony.[12]

1. Other federal courts have the jurisdiction to certify mixed classes.

It is well-settled that when civilians challenge federal agency actions in court, those civilians may use aggregation as a procedural tool to treat collectively those cases that have reached the court and like cases still pending at lower levels of the agency decision-making process. The Federal Circuit's interpretation of the CAVC's authority means this tool is effectively denied to veterans.

Section 2(d) of H.R. 7917 remedies this problem by restoring the authority of CAVC to use aggregation to address recurring problems. The CAVC's lack of authority to aggregate non-final claims into class certifications is anomalous. This is a power possessed by other federal courts that review agency actions.[13] In fact, other federal courts hearing claims of former service members are able to aggregate exhausted and unexhausted claims.[14] Without adequate aggregation authority, however, the CAVC class-action mechanism is drained of its utility. This is because veterans appealing final BVA decisions are unlikely to be able to meet the numerosity

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[10] *Monk v. Shulkin*, 855 F.3d at 1320.
[11] *Id.* at 1321.
[12] *Hearing on H.R. 7917 Before the H. Comm. on Veterans' Affairs Subcommittee on Disability Assistance and Memorial Affairs*, Statement of Renée Burbank, Esq., at 8-9 (Apr. 10, 2024).
[13] *See, e.g., Califano v. Yamasaki*, 442 U.S. 682, 703–704 (1979) (holding that the inclusion of future claimants in the class was permissible because recipients may benefit from the injunctive relief in the subsequent treatment of their individual claims); *Newkirk v. Pierre*, No. 19-cv-4283, 2020 WL 5035930 at *12 (E.D.N.Y. Aug. 26, 2020) ("[t]he fact that the class includes future members . . . does not pose an obstacle to certification.") (quoting *Westchester Indep. Living Ctr., Inc. v. State Univ. of New York, Purchase Coll.*, 331 F.R.D. 279, 299 (S.D.N.Y. 2019)) (certifying a class including future claimants because injunctive relief sought would affect future class members); *J.D. v. Azar*, 925 F.3d 1291, 1305 (D.C. Cir. 2019); *Barfield v. Cook*, No. 3:18-cv-1198, 2019 WL 3562021 (D. Conn. Aug. 6, 2019*); Tataranowicz v. Sullivan*, 959 F.2d 268, 272-73 (D.C. Cir. 1992); *Dixon v. Heckler*, 589 F. Supp. 1494, 1512 (S.D.N.Y. 1984), *aff'd*, 785 F.2d 1102 (2d Cir. 1986), *cert. granted, judgment vacated on other grounds sub nom. Bowen v. Dixon*, 482 U.S. 922 (1987) (certifying a class including those who had not yet filed for Social Security benefits at the time of class certification); *R.F.M. v. Nielsen*, 365 F. Supp. 3d 350, 369 (S.D.N.Y. 2019) (explaining that a class can include non-final claims because "[t]he plaintiffs do not seek to litigate individual claims but rather a policy the agency uses to adjudicate those claims").
[14] *See, e.g., Torres v. Del Toro*, 2021 WL 4989451 (D.D.C. Oct. 27, 2021) (certifying class of former sailors and Marines wrongfully denied military disability retirement); *Manker v. Spencer*, 329 F.R.D. 110 (D.Conn. 2018) (certifying nation-wide class of former sailors and Marines challenging procedures at Naval Discharge Review Board); *Kennedy v. Esper*, No. 16-cv-2010, 2018 WL 6727353 (D. Conn. Dec. 21, 2018) (same, as to former soldiers challenging procedures at Army Discharge Review Board).

required in order to certify classes in the first instance, and because, even if a class were to be certified, the court would be constrained from simultaneously applying its decision in all claims where it applies—a core consistency and efficiency benefit of the agency class action.

As practiced in other courts, certification of a mixed class of claims (those that have reached the court and those that are still pending before the agency) would maximize the benefits to veterans. As explained in the Federal Circuit's *Monk* opinion and Judge Dyk's dissent from denial of rehearing in *Skaar*, this would promote consistency, fairness, and efficiency for veterans; advance access to justice by ensuring fuller legal and expert assistance; and prevent the Secretary from strategically mooting cases to evade the CAVC's correction of systemic error.[15]

2. *Supplemental jurisdiction would provide the CAVC a tool for efficiently resolving common issues before remanding cases for merits adjudication.*

The supplemental jurisdiction provided in H.R. 7917, Section 2(d), would usefully permit the CAVC to aggregate non-final claims for the narrow purpose of resolving common issues of fact or law. This is distinct from the class action tool as it often operates in other litigation contexts, where the final disposition of a class action claim may involve the resolution of the individual claims on the merits. In the CAVC, the class action mechanism is used to decide a narrow question of law or fact that undergirds the claims of similarly situated veterans.

The challenge in *Skaar v. McDonough* is an example of this concept: Mr. Skaar asked VA to determine whether the particular methodology on which VA relies to calculate radiation exposure for a small class of veterans—those who participated in a clean-up of radioactive plutonium in Palomares, Spain in 1966—reflects "sound scientific evidence," as required by 38 C.F.R. § 3.311(c). Mr. Skaar, with the assistance of his counsel, was able to marshal expert assistance from a Princeton nuclear physicist who demonstrated that the VA's methodology was junk science. Indeed, in Mr. Skaar's individual case, the CAVC agreed that the Board had failed to justify its reliance on the challenged methodology.[16] Recognizing that the hundreds of other veterans whose claims VA evaluates using the same deficient dosimetry methodology may not have access to the same expert opinion and legal representation, and that individual judges of the BVA or CAVC might render inconsistent, unpublished decisions, Mr. Skaar sought to aggregate the claims of other Palomares veterans with whom he had served in 1966. With a class, once the question of the methodology's validity is answered by the court, individual veterans' claims will return to the agency or court for final resolution on the merits.[17] Aggregation does not necessarily result in a mass grant or denial of benefits, but resolution of the common issue that

[15] *Monk v. Shulkin*, 855 F.3d at 1317; *Skaar v. McDonough*, 57 F.4th at 1017 (Dyk, J., dissenting from denial of rehearing *en banc*) (explaining that the class action mechanism can "help ameliorate" backlog problems "to some significant extent" and "improve access to legal and expert assistance by parties with limited resources.") (internal quotations omitted).
[16] *Skaar v. Wilkie*, 33 Vet.App. 127 (2020).
[17] This is an outcome mandated by the CAVC's limited appellate jurisdiction, which, among other constraining features, prohibits the court from engaging in direct factfinding. 38 U.S.C. § 7261(c).

affects all Palomares veterans' individual claims speeds adjudication of hundreds or thousands of claims. Unfortunately, the Federal Circuit vacated the class on the ground that it improperly included claims pending at the BVA or RO.

Of course, the proposed legislation does not require the CAVC to employ aggregation for every claim. It only ensures that when the court chooses to use the tool, subject to its rigorous standards, it can do so efficiently. The proposed bill would not interrupt the court's discretion in determining which claims are worthy of aggregation, nor would it invite unqualified attorneys to take advantage of the class action mechanism.[18] Rather, extending the court's supplemental jurisdiction to enhance class actions adds a functional tool to the court's toolbox, one familiar in suits challenging federal agency conduct in many other federal courts.

3. Broad aggregation that includes non-final claims would advance equity, judicial economy, and uniformity in the appeals process.

An aggregation authority more akin to that available to other federal courts adjudicating claims of civilians against federal agencies would reduce the agency backlog and benefit veterans. The Supreme Court itself has explained that the potential benefits of aggregation include "provid[ing]the most secure, fair, and efficient means of compensating" claimants.[19]

First, aggregation advances equity interests. Many veterans file their claims pro se or with the assistance of Veterans Services Organizations, but certain claims requiring complex fact-finding and legal analysis will benefit from legal representation.[20] Securing counsel to assist in benefits adjudication can be crucial both for the outcome of the case and for the veteran's dignity throughout the process.[21] By aggregating claims, class members who may lack counsel receive the benefit of legal representation from class counsel.

Beyond access to counsel, aggregation also allows veterans with complex cases to utilize expert witnesses that can otherwise be impossible to find. For example, in *Skaar v. McDonough*, veterans who had developed radiogenic conditions from the 1966 nuclear clean-up in Palomares, Spain, challenged the methodology used by VA to calculate their radiation exposure for disability compensation claims. For the lead plaintiff in *Skaar*, extensive evidence from a Princeton nuclear physicist and medical experts was crucial in detailing the impact of radiation exposure on the development of his radiogenic diseases. However, most veterans do not have

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[18] Rule 23(f) of the CAVC's Rules of Practice and Procedure requires the court to assess the competence of class counsel before certifying a class and appointing class counsel.
[19] *Amchem Products Inc. v. Windsor*, 521 U.S. 591, 628-29 (1997).
[20] *See* James D. Ridgway, *Why So Many Remands?: A Comparative Analysis of Appellate Review by the United States Court of Appeals for Veterans Claims*, 1 VET. L. REV. 113 (2009).
[21] Ctr. for Innovation, *Veteran Appeals Experience: Listening to the Voices of Veterans and Their Journey in the Appeals System*, U.S. DEP'T VETERANS AFF. 5 (Jan. 2016), http://www.innovation.va.gov/docs/VOV_Appeals_FINAL_20160115-1.pdf [http://perma.cc/6HFN-KSVV] (finding that veterans often feel alone in a complex legal process that they do not understand, and having an advocate in the process makes them feel acknowledged and understood).

access to such expert testimony. Aggregation would allow all claimants to benefit from access to expertise and counsel that is currently enjoyed by few.

Additionally, aggregation administers justice for claimants for whom damages are too small to hold agencies accountable or to justify the costs of legal counsel.[22] These plaintiffs may also be unaware of how they have been negatively affected by a policy.[23] A Palomares veteran who has submitted several claims, all of which have been denied, may not know about VA's use of the flawed methodology in adjudicating his claim. The class action device makes visible such issues, to the benefit of both the individual veteran and the CAVC, which otherwise would have limited insight into systemic problems facing many veterans. Veterans deserve streamlined procedures that enable them to band together and benefit from advocacy in challenging the sometimes-nonsensical black box of VA procedures and policies.

Second, aggregation advances judicial economy by targeting resources to resolve issues underlying multiple claims. Efficiency is at the heart of class actions, and the exclusion of non-final claims places this benefit at risk. Veterans serving together often experience similar events or circumstances in service, such as exposure to toxic substances in a particular location. Such shared circumstances can give rise to identical claims, raising the same issue of law or fact. Where a court can aggregate non-final claims, it can avoid repetitive adjudication and its accompanying costs to the agency and to veterans. Instead of the RO adjudicators, veterans law judges of the BVA, or a single judge on the CAVC repeatedly deciding cases on the same facts, same evidence, or same legal issue, aggregation allows the CAVC to make the relevant decisions once and for all.[24] Preventing the Court from including non-final claims in a class introduces a significant inefficiency. This opens subsequent individual judgments to the possibility of error, inconsistency, and further challenges in piecemeal litigation, while forfeiting the benefits of streamlined communication of decisions to veterans.

Class actions result in cost savings, for the simple reason that it costs less to adjudicate a claim once than to adjudicate hundreds or thousands of individual claims raising the same issue of law or fact. Repetitive adjudication clogs the system and delays resolution of claims not only by veterans presenting the same question of fact or law, but also by other veterans languishing in the queue while the same question is decided for the umpteenth time. Aggregation would ameliorate the VA's backlog of cases and bring more finality to claims by removing them from the hamster wheel.

Third, aggregation helps to advance uniformity in decision making. Currently, most CAVC decisions are non-precedential and issued by single judges—just like decisions of the

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[22] Adam S. Zimmerman, *The Class Appeal*, 89 U. Chi. L. Rev. 1419, 1441 (2022).
[23] *See Phillips Petro. Co. v. Shutts*, 472 U.S. 797, 813 (1985) (highlighting the class action device where "the plaintiff [is] so unfamiliar with the law, that he [or she] would not file suit individually.").
[24] *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (highlighting the efficiency benefits of the aggregated resolution of a common question, since "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.").

Board. This can lead to inconsistent outcomes for similar claims.[25] Lack of uniformity can also create issues with enforcement and compliance. If different judges rule in conflicting manners on similar issues, VA will be confused about the proper course of action. Aggregation gets in front of this issue by ensuring a singular outcome that is implementable by the defendant.

Limited Remands at the CAVC

It is no secret that the VA disability compensation process suffers from a substantial backlog of claims. This backlog delays the provision of critical support to veterans and their families that they have earned by their service. A second tool available to courts reviewing civilian challenges to decisions of other federal agencies is the limited remand—returning a case to the agency but only briefly and for a specific purpose, thus ensuring that a procedural or substantive deficiency can be cured that is necessary for the court to fully resolve an appeal. The CAVC also can engage in limited remands to the Board, but its authority to do so is constrained. As a result, the court must often order a full remand, resulting in years more of delay at the Board (or further remand to the RO) before the case can return to the CAVC to reach the merits. This is wildly inefficient. H.R. 7917 addresses this problem by expanding the authority of the CAVC to use the sort of limited remand that is available to civilians on judicial review of other federal agency decisions.

For instance, when appealing to the CAVC, a veteran may raise several errors. However, when the CAVC concludes that a remand is necessary on any one error, it will remand the entire claim to the Board without addressing the other errors raised by the veteran.[26] The Board, unable to conduct fact elaboration or issue medical examinations, will frequently remand the claim to the RO without correcting the errors. If the CAVC's ability to issue limited remands were expanded, the court could retain jurisdiction of a case while remanding it to the Board to address one of several errors. In doing so, the veteran is protected from multiple spins on the hamster wheel.

Federal appellate courts use limited remands in a variety of circumstances for the efficient adjudication of appeals.[27] Limited remands may be directed to agencies as well as to

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[25] James D. Ridgway, Barton F. Stichman & Rory E. Riley, *"Not Reasonably Debatable": The Problems with Single-Judge Decisions by the Court of Appeals for Veterans Claims*, 27 STAN. L. & POL'Y REV. 1, 25-26 (2016) (concluding that "outcomes in some individual appeals [] would result in a different outcome had the appeal been adjudicated instead by one or more of the other judges.").

[26] *See Best v. Principi*, 15 Vet.App. 18, 19-20 (2001) ("[I]t has been the practice of this Court that when a remand is ordered because of an undoubted error that requires such a remedy, the Court will not, as a general rule, address other putative errors raised by the appellant."); *Mahl v. Principi*, 15 Vet.App. 37, 38 (2001) (declining to address more than one of the appellant's allegations of errors, as "if the proper remedy is a remand, there is no need to analyze and discuss all the other claimed errors that would result in a remedy no broader than a remand."). Since errors are addressed piecemeal, claims are often returned to the BVA before all substantial errors are corrected.

[27] *See, e.g.*, *Mendia v. Garcia*, 874 F.3d 1118, 1122 (9th Cir. 2017); *Casanova v. Dubois*, 289 F.3d 142, 147 (1st Cir. 2002); *Cent. States v. Creative Dev. Co.*, 232 F.3d 406, 423 (5th Cir. 2000); *Asani v. I.N.S.*, 154 F.3d 719, 729 (7th Cir. 1998); *Amrine v. Bowersox*, 128 F.3d 1222, 1230 (8th Cir. 1997); *see also* Fed.R.App.P. 12.1(b) (discussing limited remands in the context of an "indicative ruling" by a district court).

district courts.[28] Providing the same practical tool to the CAVC will allow veterans to avail themselves of this efficiency, just as can civilians on review of claims against other federal agencies in other federal courts.

The CAVC has recognized its authority to issue limited remands, but only on narrow grounds, based on an opinion of the Court not long after it was established.[29] As a result, it rarely exercises this power. In *Skaar v. Wilkie*, where the CAVC sitting *en banc* in 2019 did order a limited remand, the court identified only two other times in which the court had done so.[30]

One must not lose sight of the veterans and their families who are stuck in the hamster wheel. Throughout their wait for relief, their disabilities persist, and their hardships can intensify. Some veterans do not survive these trials of bureaucracy. Presently, veterans can expect to wait nearly four years for the BVA to decide their appeal.[31] When the veteran finally reaches the CAVC, their claim may have already been subjected to numerous remands. This cyclical process is a devastating reality for veterans. Therefore, it is paramount that the CAVC have tools that allow it to resolve errors expeditiously, efficiently, and with finality. The inability to issue a limited remand to resolve outstanding errors inevitably leads to further remands, further delays, and further pain for veterans and their families.

Part 2(d) of H.R. 7917 would create a new provision, to be codified at 38 U.S.C. 7252(c)(1), to clarify the Court's authority to remand a matter to the Board to address a question of law or fact, including the Court's authority to direct the Board to act within a prescribed period of time. The authority conferred in this new provision is appropriately scoped. It would be an important step to promote more efficient adjudication by the Court and to reduce the inevitable delays of a full remand back into the hamster wheel for the veteran.

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[28] *See, e.g., Ucelo-Gomez v. Gonzales*, 464 F.3d 163, 172 (2d Cir. 2006); *Caterpillar, Inc. v. NLRB*, 138 F.3d 1105, 1107 (7th Cir. 1998); *Am. Gas Ass'n v. FERC*, 888 F.2d 136, 142 (D.C. Cir. 1989); *Sierra Club v. Gorsuch*, 715 F.2d 653, 661 (D.C. Cir. 1983); *NRDC, Inc. v. Coit*, 597 F. Supp. 3d 73 (D.D.C. 2022); *Shank v. Saul*, No. 19-2400 (JEB), 2021 U.S. Dist. LEXIS 8052 (D.D.C. Jan. 15, 2021).

[29] *Cleary v. Brown*, 8 Vet.App. 305, 309 (1995) ("Nowhere has Congress given this Court either the authority or the responsibility to supervise or oversee the ongoing adjudication process which results in a BVA decision. Hence, this Court has no more jurisdiction to intervene in the adjudication of the 'new' decision of the BVA than it did to intervene in the adjudication process which led to the initial decision which precipitated the initial appeal.").

[30] *See Skaar v. Wilkie*, 31 Vet.App. 16, 18 (2019) (*en banc*) (ordering "a limited remand for the Board to provide a supplemental statement of reasons or bases addressing the appellant's expressly raised argument in the first instance"); *id.* (noting two prior instances of limited remands); *see also Gilbert v. Derwinski*, 1 Vet.App. 49, 59 (1990) ("We will retain jurisdiction and direct that, upon completion of the remand proceeding, the Secretary supplement the record on appeal to include the further action of the Board.").

[31] The BVA currently reports the average wait time to be between 314 and 927 days. *See*, Board of Veterans' Appeals Decision Wait Times, https://www.bva.va.gov/decision-wait-times.asp. However, A recent Freedom of Information Act disclosure to the law firm Chisholm Chisholm & Kilpatrick revealed "data indicating that the average appeal before BVA has been waiting for an average of 43 months — 1308 days — despite BVA claiming that decision wait times are between 314 and 927 days." *See* CAVC Process and Timelines, https://cck-law.com/cavc-process-and-timelines-court-of-appeals-for-veterans-claims/.

BVA Reforms

In addition to its important reforms to the CAVC's supplemental jurisdiction and limited remand authority, H.R. 7917 would also reduce the backlog of veterans' benefits appeals by making key improvements at the BVA. H.R. 7917 contains three provisions to this effect: Section 2(c)(1), confirming that the BVA also has the authority to aggregate appeals; Section 2(c)(2), mandating the Board's "substantial compliance" with certain CAVC remand decisions; and Section 2(c)(3), structuring a process to encourage the use of VA OGC opinions to set precedent for Board cases. Each of these measures is sensible and holds promise to further reduce the backlog of appeals at the Board. I will focus on Sections 2(c)(1) and 2(c)(3).

More than seventy other federal agencies have a class action, joinder, or consolidation practice that facilitates aggregation of administrative appeals.[32] The Board is an outlier in refusing ever to group together appeals raising the same question of law or fact for efficient adjudication. In fact, a 2016 study by the Administrative Conference of the United States (ACUS) encouraged federal agencies to make greater use of aggregation procedures, especially in mass-adjudication settings such as veterans' benefits appeals.[33] In response, ACUS adopted Administrative Conference Recommendation 2016-2, "Aggregation of Similar Claims in Agency Adjudication" (June 10, 2016).[34] ACUS recognized that "[f]ederal agencies in the United States adjudicate hundreds of thousands of cases each year," but unlike courts, agencies "have generally avoided aggregation tools that could resolve large groups of claims more efficiently."[35] The result, found the Administrative Conference, is that "in a wide variety of cases, agencies risk wasting resources in repetitive adjudication, reaching inconsistent outcomes for the same kinds of claims, and denying individuals access to the affordable representation that aggregate procedures promise."[36]

Aggregation authority is consistent with already existing procedures and practices of the Board. For instance, a case may "be advanced on motion for earlier consideration and determination" given one of several reasons.[37] The Board is also required by its Rules of Practice to "secure a just and speedy decision,"[38] which aggregation facilitates. Building on the insights of the ACUS study and these preexisting obligations and practices, Section 2(c)(1) of H.R. 7917 wisely confirms that the BVA has authority to aggregate like claims in appropriate

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[32] Michael Sant'Ambrogio & Adam S. Zimmerman, *Inside the Agency Class Action*, 126 Yale L.J. 1634, 1658-59 (2017).
[33] Michael Sant'Ambrogio & Adam Zimmerman, *Aggregate Agency Adjudication*, ADMIN. CONF. OF THE UNITED STATES (2016).
[34] *See* Administrative Conference Recommendation 2016-2, *Aggregation of Similar Claims in Agency Adjudication* (2016), https://www.acus.gov/sites/default/files/documents/aggregate-agency-adjudication-final-recommendation_1.pdf.
[35] *Id.* at 1.
[36] *Id.*
[37] 38 U.S.C. § 7207(b); 38 C.F.R. § 20.800(c)(1).
[38] 38 C.F.R. § 20.1(b).

circumstances. I also support the request for amended language to clarify the operation of this mechanism, as stated by Renée Burbank, NVLSP, in her testimony.[39]

Moreover, Section 2(c)(3) of H.R. 7917 would structure a process to encourage issuance of VA OGC opinions, a form of agency precedent that would reduce repetitive and inconsistent decisions by individual members of the Board, and therefore reduce the backlog of appeals as well. As the Administrative Conference Recommendation 2016-2 put it: "Agencies should consider using a variety of techniques to resolve claims with common issues of fact or law, especially in high volume adjudication programs. In addition to [aggregation] . . . these techniques might include the designation of individual decisions as 'precedential.'"[40]

In conclusion, I strongly urge the Committee to enact H.R. 7917, especially Sections 2(c) and 2(d). The latter grants the CAVC supplemental jurisdiction and codifies its authority to issue limited remands. The former confirms the BVA's authority to aggregate claims, mandates substantial compliance with certain CAVC remands, and structures a process to promote issuance of more precedential decisions through the VA OGC. Together, these measures will materially reduce the BVA appeals backlog while advancing uniformity and consistency of decisions, fairness to veterans and families, and more equitable access to justice.

[39] *Hearing on H.R. 7917*, *supra* note 12 at 14.
[40] Administrative Conference Recommendation, *supra* note 35 at 3.