House Committee on Veterans' Affairs

Subcommittee on Disability Assistance and Memorial Affairs

Legislative Hearing on Pending Legislation

June 24, 2025

Statement for the Record of Prof. Michael J. Wishnie

Introduction

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 have represented the National Veterans Legal Services Program and other veterans' organizations on legislative matters, but 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 the Veterans Appeals Efficiency Act of 2025, H.R. 3835, which contains several concrete, practical reforms that, if enacted, would meaningfully improve the adjudication of disability compensation claims and appeals. The Subcommittee's focus on the appeals backlog is welcome. The Veterans Appeals Efficiency Act 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. These improvements also ensure that veterans have access to similar judicial tools as civilians when contesting government action. The reforms in this bill make two essential changes to the adjudication process of veterans' benefits decisions to increase efficiency and efficacy.

First, the Veterans Appeals Efficiency Act 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, just as civilians are already able to do in judicial review of other government actions.[2] 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. These

[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.*

[2] The CAVC's rules provide for certification of a class where: (1) the class is so numerous that consolidating individual actions is impracticable; (2) there are questions of law or fact common to the class; (3) the legal issue or issues being raised representative parties are typical of the legal issues that could be raised by the class; (2) the representative parties will fairly and adequately protect the interests of the class; and (5) the Department of Veterans Affairs has acted or failed to act on grounds that apply generally to the class. Vet. App. R. 23.

reforms also 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 that veterans seeking judicial review of benefits decisions should be denied recourse to the same 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. More than seventy other federal agencies possess and have exercised this authority, but the BVA has repeatedly held that it is unable to decide like cases together.[3] This measure in the bill would relieve the burden on veterans to repeat arguments and evidence before the agency on the same issues time and again. Many veterans do not have the resources to hire the counsel or experts necessary to argue complex medical or legal issues central to their benefits determination. Where appropriate, aggregation would allow a veteran with such access to present a case on behalf of all similarly affected veterans. Additionally, many agencies use aggregation and precedential decisions to promote consistency and fairness in mass-adjudication settings.[4] Here too, there is no reason to deny veterans access to tools that civilians may invoke before other federal agencies to manage backlogs, promote uniformity of decisions, and ensure speedy adjudications.[5]

For the reasons explained below, I support these reforms in the Veterans Appeals Efficiency Act, with limited amendments noted below.

CAVC Supplemental Jurisdiction

I enthusiastically support the reform set out in section 2(e) of the Veterans Appeals Efficiency Act, which grants the CAVC supplemental jurisdiction over claims "for which the agency of original jurisdiction has issued a nonfinal decision and the claimant has filed a notice of disagreement," including those where the claimant has filed a supplemental claim within one year of a Board decision.

The CAVC has the authority to aggregate claims where appropriate, 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

[3] Michael Sant'Ambrogio & Adam S. Zimmerman, *Inside the Agency Class Action*, 126 Yale L.J. 1634, 1658-59 (2017).
[4] *Id.* at 1644 (2017).
[5] H.R. 3835 would also make other helpful reforms to the BVA, such as directing the Board to prescribe guidelines for advancement of a case on the Board's docket, requiring the Board to ensure compliance with its decisions on remand to the Regional Office, and providing for an assessment of the feasibility of permitting the Board to issue precedential decisions.

a judicial ruling.[6] Already, tens of thousands of veterans have benefited from class-wide relief in cases before the court. However, a recent Federal Circuit decision adopted an improperly narrow 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 have received final Board decisions and are appealable to the Court. The claims of other veterans whose cases are languishing at the Board or before the VA Regional Offices, held the court, must be excluded.[7] Because few veterans raising the same issue are likely to fall 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.

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*.[8] "For many years, the system for processing veterans' claims has been inefficient and subject to substantial delays," Judge Dyk explained for the dissenters.[9] "The class action mechanism [at the 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."[10] But the court's decision in *Skaar* "will effectively eliminate class actions in the veterans context."[11]

The Federal Circuit's ruling in *Skaar* has undermined the CAVC's ability to utilize aggregation to "promot[e] efficiency, consistency, and fairness, and improv[e] access to legal and expert assistance by parties with limited resources."[12] 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."[13] The Veterans' Appeals Efficiency Act advances a narrow but urgent fix. By granting the CAVC supplemental jurisdiction, this bill will allow the court to meet numerosity requirements and certify classes that include veterans with a final Board decision, claims pending at the Board, and supplemental or remanded claims pending at regional

---

[6] *Monk v. Shulkin*, 855 F.3d 1312, 1320–21 (Fed. Cir. 2017) (noting that "[c]ase law is replete" with examples of strategic mooting); *id.* at 1321 ("Permitting class actions would help prevent the VA from mooting claims scheduled for precedential review" (citing amicus brief)).

[7] The Federal Circuit rejected CAVC's determination in that it had jurisdiction to aggregate claims of veterans "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." *See Skaar v. Wilkie*, 32 Vet.App 156, 184-185 (2019) (*en banc*)), *vacated sub nom. Skaar v. McDonough*, 48 F.4th 1323, 1331-1332 (Fed. Cir. 2022).

[8] *Skaar v. McDonough,* 57 F.4th 1015, 1016 (Fed. Cir. 2023) (Dyk, J., dissenting from denial of rehearing *en banc*).

[9] *Id*.

[10] *Id.* at 1017.

[11] *Id.*

[12] *Monk v. Shulkin*, 855 F.3d at 1320.

[13] *Id.* at 1321.

offices after a Board decision. 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.

1. Other federal courts have 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.

The Veterans Appeals Efficiency Act 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 in a certification order is anomalous. This is a power possessed by other federal courts that review agency actions.[14] In fact, other federal courts hearing claims of former service members can aggregate exhausted and unexhausted claims.[15] Without adequate aggregation authority, however, the CAVC mechanism is drained of its utility. This is because veterans appealing final BVA decisions are unlikely to be able to meet the numerosity required for certification 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 aggregation.

As practiced in other courts, aggregating claims that have reached the court and those that are still pending before the agency would maximize the benefits to veterans by promoting consistency, fairness, and efficiency for veterans; advancing access to justice by ensuring fuller legal and expert assistance; and preventing the Secretary from strategically mooting cases to

---

[14] *See, e.g.*, *Califano v. Yamasaki*, 442 U.S. 682, 703–704 (1979) (holding that the inclusion of future claimants in 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) ("that the class includes future members . . . does not pose an obstacle to certification.") (quoting *Westchester Indep. Living Ctr., Inc. v. State Univ. of N.Y., Purchase Coll.*, 331 F.R.D. 279, 299 (S.D.N.Y. 2019)) (including future claimants in certification order 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) (approving aggregation of claims to include those who had not yet filed for Social Security benefits at the time of 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").

[15] *See, e.g., Manker v. Spencer*, 329 F.R.D. 110 (D. Conn. 2018) (certifying nationwide class of former sailors and Marines challenging procedures at the 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).

evade the CAVC's correction of systemic error.[16] Such reform would bring veterans' aggregation authority to parity with that of civilians.

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. 3835 would usefully permit the CAVC to aggregate non-final claims for the narrow purpose of resolving a common issue of fact or law. Each veteran's ultimate benefits determination, however, would still be made on an individual basis, according to their individual circumstances and record, by VA.

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 aggregation mechanism.[17] Rather, extending the court's supplemental jurisdiction to enhance aggregation codifies and clarifies 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 advance equity, judicial economy, and uniformity. The Supreme Court has explained that the potential benefits of aggregation include "provid[ing]the most secure, fair, and efficient means of compensating" claimants.[18]

First, aggregation advances equity interests. Many veterans file their claims *pro se* or with the assistance of Veterans Services Organizations, but certain claims involving complex medical or legal issues or challenging VA systemic practices and procedures will benefit from legal representation.[19] 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.[20] Through aggregation, veterans without lawyers receive the benefit of legal representation from class counsel. Beyond this, aggregation also distributes other resources throughout a class. For

---

[16] *Monk v. Shulkin*, 855 F.3d at 1317; *Skaar v. McDonough*, 57 F.4th at 1017 (Dyk, J., dissenting from denial of reh'g *en banc*) (explaining that aggregation 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)).
[17] Rule 23(f) of the CAVC's Rules of Practice and Procedure requires the court to assess the competence of attorneys before entering a certification order and appointing counsel. Vet. App. R. 23(f).
[18] *Amchem Products Inc. v. Windsor*, 521 U.S. 591, 628-29 (1997).
[19] *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).
[20] Ctr. for Innovation, *Veteran Appeals Experience: Listening to the Voices of Veterans and Their Journey in the Appeals System*, U.S. Dep't of Veterans Affs. 5 (Jan. 2016), https://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).

example, veterans who have a complicated medical claim are able to utilize expert testimony that may otherwise be inaccessible. Additionally, claimants whose damages are too small to hold agencies accountable or to justify the costs of legal counsel are also benefited by aggregation.[21]

Second, aggregation advances judicial economy. Aggregation results in financial 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. Aggregating non-final claims raising the same issue of law or fact (as prevalent here, where veterans serving together often experience similar events or circumstances in service) allows courts to avoid repetitive adjudication and its accompanying costs to the agency and to veterans.

Third, aggregation helps to advance uniformity in decision making. Currently, most CAVC decisions are non-precedential and issued by single judges—just like the decisions of the Board. This can lead to inconsistent outcomes for similar claims.[22]

4. Proposed Amendments to Section 2(e): CAVC Aggregation

To enhance the efficacy of the Veterans Appeals Efficiency Act, I propose two amendments to Section 2(e) regarding the CAVC's aggregation authority.

First, section 2(e) should omit language on writs. Currently, the bill defines "covered proceedings" over which the CAVC has jurisdiction to include both appeals and petitions for a writ. While *Skaar* frustrated the CAVC's ability to aggregate appeals, it did not impact the court's authority to aggregate in writ cases, which presently function reasonably well.[23] The CAVC's writ authority derives from the All Writs Act, 28 U.S.C. § 1651(a), enacted in the First Judiciary Act of 1789 and made available to the CAVC as with other federal courts. By applying the reforms aimed at appeals to writs, the current language of H.R. 3835 risks narrowing the CAVC's authority to aggregate in appropriate writ cases. I do not believe this is the intention of the bill, but reducing CAVC's writ authority would inadvertently undermine the broader purpose of H.R. 3835: to grant additional tools to veterans, the CAVC, and the BVA to manage their large dockets, reduce backlogs, and improve fairness and uniformity of decisions. This change can be accomplished by eliminating lines 1-2 on page 11 and amending page 10, lines 21-24 to

[21] Adam S. Zimmerman, *The Class Appeal*, 89 U. Chi. L. Rev. 1419, 1441 (2022).
[22] 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.").
[23] *See, e.g., Gladney-Chase v. Collins*, No. 24-4472, 2025 WL 1335465, at *6 (Vet. App. Apr. 24, 2025) (granting joint motion to certify class seeking mandamus relief in connection with failure of the BVA to timely docket appeals from Veterans Health Administration).

read "(B) For purposes of subparagraph (A), a covered proceeding means an appeal over which the Court has jurisdiction pursuant to section 7266 of this title."

Second, section 2(e) should omit mention of opt-out procedures. CAVC's rules for class actions do not specifically address opt-out procedures, which are rare in injunctive-relief classes like those that arise in that Court. The references to opt-out procedures thus potentially introduce confusion into the statutory scheme. The basic structure of H.R. 3835 is to incorporate "the rules prescribed by the Court," § 2(e)(2) (adding new 38 U.S.C. § 7252(b)(1)(A)), and that approach makes sense as to opt-outs as well. Removing the references to opt-out procedures from H.R. 3835 would not preclude the Court from adopting such procedures in the future, in its rules for all class actions or in a particular case.

Limited Remands at the CAVC

I also support the reform described in section 2(e) of the Veterans Appeals Efficiency Act, which clarifies the CAVC's authority to issue limited remands to the Board.

The limited remand—briefly returning a case to the agency for a specific purpose—ensures that the CAVC can resolve a procedural or substantive deficiency via a determination from the BVA without losing jurisdiction over the case. The CAVC has recognized its authority to issue limited remands, but only in exceptional cases.[24] Therefore, it rarely exercises this power and instead chooses to order full remands, resulting in years of delay for the veteran.[25] The Veterans Appeals Efficiency Act addresses this problem by codifying the Court's current authority to issue limited remands and directing the Court to establish guidelines for their use, including the authority to direct the Board to act within a prescribed period.

One must not lose sight of the veterans and their families who are stuck in the hamster wheel of appeals. While awaiting a decision, disabilities persist, and 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.[26] When the veteran finally reaches the CAVC, their claim may have already been subjected to numerous remands. This cyclical process

---

[24] *Cleary v. Brown*, 8 Vet. App. 305, 308 (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.").
[25] *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).
[26] The BVA currently reports the average wait time to be 1,091days. *See* Board of Veterans' Appeals Decision Wait Times, https://department.va.gov/board-of-veterans-appeals/wp-content/uploads/sites/19/2025/04/2024_bva2024ar.pdf. A 2023 Freedom of Information Act disclosure revealed "data indicating that the average appeal before BVA has been waiting for an average of 43 months — 1308 days." *See* https://tinyurl.com/4e6snp5e.

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.

BVA Aggregation

In addition to its important reforms to the CAVC's supplemental jurisdiction and limited remand authority, the Veterans Appeals Efficiency Act would also help reduce the backlog of veterans' benefits appeals by implementing a key improvement at the BVA. Section 2(d)(1) contains a provision which aims to reduce the backlog of veterans' benefits appeals by confirming the BVA's authority to aggregate appeals.

While more than seventy other federal agencies have a class action, joinder, or consolidation practice that facilitates aggregation of administrative appeals, the BVA is an outlier in insisting that it lacks power ever to group together appeals raising the same question of law or fact for efficient adjudication.[27] Like other federal agencies, the Board has broad authority to prescribe rules to manage its docket of appeals[28]; unlike other agencies, the Board has repeatedly held that its organic statute does *not* authorize aggregation.[29]

According to the American Conference of the United States (ACUS), the result of this failure to aggregate is that "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."[30] This risk is already a reality at the BVA, where veterans wait years for a decision on their appeal. Consistent with the recommendations of ACUS and with the Board's organic statute, Section 2(d)(1) of the Veterans Appeals Efficiency Act wisely confirms that the BVA has authority to aggregate like claims in appropriate circumstances.

---

[27] Sant'Ambrogio & Zimmerman, *Inside the Agency Class Action*, 126 Yale L.J. at 1658–59.
[28] *See* 38 U.S.C. § 501(a) (2021) (providing that the Secretary has "authority to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department," including the manner and form of adjudication).
[29] *See* Ruling on Motion to Aggregate, Robert C. Scharnberger, Deputy Vice Chairman, Board of Veterans' Appeals, No. C XX XXX 522 (Feb. 13, 2024) (concluding Board lacks legal authority ever to aggregate claims); Letter from Anthony C. Sciré, Jr., Chief Counsel, Board of Veterans' Appeals, to Edward Feeley, No. XX XXX 167 (Oct. 6, 2021) (same).
[30] *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.

In conclusion, I urge the Committee to enact the Veterans Appeals Efficiency Act, particularly the reforms to codify the CAVC's authority to aggregate like claims and issue limited remands, as well as the BVA's authority to aggregate claims. Together, these measures will materially reduce the appeals backlog while advancing uniformity and consistency of decisions, fairness to veterans and families, and more equitable access to justice.