



The Vietnam era was a time not only of undeclared counterinsurgency warfare, the first in our history, but of tumultuous cultural, social, and political change. As with many such eras, the dust took awhile to settle. Part of that was the emergence of the Vietnam generation as a political force. The warriors had returned to an unforgiving country unable to distinguish the politics of the war from those who fought it. They demanded of the Veterans Administration and Congress recognition of and treatment for the psychic trauma and the diseases resulting from toxic exposure. Statutory provisions forbade judicial review of the arbitrary decisional process and denied them legal representation. This is the story of the ensuing changes and of a chief judge blessed with vision, innovation, and determination for change.

**By CAROL WILD SCOTT**

# “New Kid on the Block”

## *The U.S. Court of Appeals for Veterans Claims*

Now in its 26th year, the U.S. Court of Appeals for Veterans Claims (CAVC) is still the “new kid on the block” as the newest federal court. Established by the Veterans Justice Review Act in 1988, it provided veterans with their first opportunity to obtain judicial review of denials of benefits by the then Veterans Administration. Prior to that, constitutional issues went through the U.S. district court.<sup>1</sup> The following year, the Veterans Administration was elevated to Cabinet-level status and renamed the Department of Veterans Affairs (VA). Enacting the Veterans Justice Review Act out of necessity required repealing a 50-year statutory preclusion, beginning with the judicial doctrine of sovereign immunity, continued in the Tucker Act of 1887, and culminating with occasional legislative tinkering until the act was

implemented. The basic language of preclusion created a virtually unreviewable, unassailable barrier to any assault on any action of the Veterans Administration in its grant on benefits to veterans, their dependents, and survivors:

The decisions of the [Veterans] Administrator on any question of law or fact under any law administered by the Veterans Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive, and no other official or any Court of the United States shall have power or jurisdiction to review any such decisions by an action in the nature of mandamus or otherwise.<sup>2</sup>

The intense legislative activity that brought judicial review to the VA claims and benefits system took place in the context of considerable political controversy. The Senate Committee on Veterans Affairs had introduced several bills providing for judicial review only to see them rejected by the powerful House Committee on Veterans Affairs, chaired by Rep. Sonny Montgomery (D-Miss.). Veterans service organizations, the Disabled American Veterans, the American Legion, and the Veterans of Foreign Wars (VFW) led the opposition to any form of judicial review. Since their inception shortly after World War I, they had created networks of service officers who assisted veterans in applying for benefits. To a large extent, the growth of their membership depended on the pro-

vision of free representation before the Veterans Administration.

The membership rolls of veterans service organizations burgeoned after World War II and Korea, resulting in a substantial political power base. Additionally, after his military retirement, Omar Bradley virtually rebuilt the VA, hiring large numbers of World War II veterans as rating personnel and in other capacities. The result was the Iron Triangle, a close relationship among the senior management of the VA, the congressional committees—particularly the House committee—and service organizations. These forces arrayed against even a suggestion of judicial review, which would inject not

the late 1980s; yet another little-understood result of jungle-based counterinsurgency warfare.

Two cases brought in the U.S. district courts within this time frame drew public scrutiny to the VA. (Neither addressed the availability of benefits to an individual.) *Nehmer vs. U.S. Veterans Administration* challenged the its obstinacy in failing to comply with the Veterans' Health Programs and Improvement Act of 1979, which required an epidemiological assessment of the long-term effects of exposure to Agent Orange (and the other dioxin-based toxins).<sup>3</sup> *National Association of Radiation Survivors vs. Veterans*

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only judicial scrutiny, but lawyers into the workings of the claims process, which had been immune from legal or judicial review since its inception.

Only the Vietnam Veterans of America, the Veterans for Due Process, and, somewhat late in the discussion, the Paralyzed Veterans of America supported judicial review. The Paralyzed Veterans of America finally recognized that judicial review would enhance its ability to serve the unique needs of its membership. The Vietnam Veterans of America lacked the political power wielded by the Disabled American Veterans, the American Legion, and the VFW, and thus the clout of those organizations before Congress. Membership in the Vietnam Veterans of America was limited to Vietnam veterans. Its origins lay in Vietnam Veterans Against the War, whose leadership was prosecuted by the Nixon administration for conspiracy to disrupt the 1972 Republican Convention in Miami with wrist rocket slingshots and fried marbles. All eight defendants, the Gainesville Eight, were acquitted when the leading advocates of violent protest were shown to be federal agents/provocateurs. While Vietnam Veterans of America leadership was far more conservative by the mid-1980s, established veterans service organizations did not view it favorably, partially because of its origins, but also because of a lack of comprehension of the stresses and trauma experienced in Vietnam's counterinsurgency warfare and the Army's ill-advised system of deployment, which were both unique to prior combat experience.

In the late 1970s and early 1980s, Vietnam Veterans of America membership and Vietnam veterans in general struggled to get the VA to recognize and compensate for illnesses arising from exposure to the toxins of Agents Orange, White, Blue, and Purple, which were sprayed by the ton everywhere in Vietnam. At that time, the VA refused to recognize the toxicity of the defoliants or to grant those claims. In the mid-1980s, Hepatitis C was finally identified, and its long-term devastating effects recognized, but claims arising from it were customarily denied. Veterans saw the continuing unpopularity of the Vietnam War and the lack of distinction in the public's perception of the politics of the war versus veterans' service to their country carried over into the adjudication process. Vietnam veterans were seen as "crybabies" with their significant number of claims for post-traumatic stress disorder, which also was not recognized as such until

*Administration* challenged the \$10 limitation on attorneys' fees, which imposed criminal penalties of up to two years confinement.<sup>4</sup> Discovery in this case exposed to public view serious procedural flaws in the claims system. Originally enacted in 1864, the statutory fee limitation represented roughly 4 percent of a soldier's pay at that time.<sup>5</sup> The original purpose was to protect the veteran from greedy lawyers.

The publication in 2006 of a cartoon in *The Capitol Hill* depicting the hapless veteran on a rocky island surrounded by swimming sharks labeled "Lawyers" during the legislative debate over the expansion of fee-based representation before the VA demonstrated that the sentiment lingered. The continuing political power of veteran service organizations was demonstrated by legislation passed in 2006 that finally allowed fee-based representation before the agency with the following limitations: (1) such representation only at the appellate stage of a claim; (2) certification of good standing in a state bar; (3) good moral character; and (4) demonstrated expertise or specialized training. Lawyers representing veterans' VA challenges must submit all of these annually.

Additionally, fee agreements (contingency only) charging only 20 percent of back benefits and reasonable expenses must be filed with the Secretary. De-certification may be accomplished under a lengthy list of infractions, including "disreputable conduct" and "engaging in any unlawful, unprofessional, or dishonest practice."<sup>6</sup> Fee agreements for representation before the CAVC must also be submitted to the court.<sup>7</sup>

The Veterans Justice Review Act was enacted on Nov. 18, 1988.<sup>8</sup> It contained five crucial provisions:

- The preclusion of judicial review was repealed;
- The new Article I court, the Court of Veterans Appeals, was created as a separate entity from the Department of Veterans Affairs, to review decisions of the Board of Veterans' Appeals;
- The Board of Veterans' Appeals was retained in its then-existing form as the final administrative decisional body within the VA;
- The \$10 attorney's fee cap was abolished; and
- Yet another level of judicial review was created—cases could be taken from the CAVC to the U.S. Court of Appeals for the Federal Circuit on certain narrow issues.<sup>9</sup>

The court was located in Washington, D.C. Seven judges, the chief judge, and six associate judges were appointed over a period of several months in 1989 and 1990 for 15-year terms. The President made nominations, which were confirmed by the Senate. The court now has nine judges. Consistent with other Article I courts, salaries are derived from the pay scale for Article III courts—associate judges are paid at the level of U.S. district court judges, and the chief judge at that of judges on the U.S. Courts of Appeal. The President has the discretion to remove a judge for misconduct, practicing law, neglecting duty, or having a physical or mental incapacity determined to prevent performance of judicial duties. The original judges came from backgrounds in the Department of Defense, Department of Justice, Department of Veterans Affairs, Congress, the legal staff of the Senate Committee on Veterans' Affairs, and the private practice of law. Chief Judge Frank Q. Nebeker had a strong background in the appellate judiciary (District of Columbia Court of Appeals), the Department of Justice, and leadership of the American Bar Association Appellate Judges Conference. The name of the court was changed to the U.S. Court of Appeals for Veterans Claims under the Veterans Programs Enhancement Act in 1999.

The Veterans Justice Review Act altered the landscape of the Veterans Benefits Administration of the Department of Veterans Affairs in the following ways:

- Essentially maintains intact the VA's existing two-tier administrative process for adjudicating claims for benefits—in which a VA regional office renders an initial decision appealable by the claimant to the Board of Veterans' Appeals—by codifying some existing administrative practices and changing others;
- Allows attorneys and agents retained within one year of a final board decision to charge a “reasonable fee” to reopen the claim before the VA or to move the board to reconsider its denial;
- Authorizes review of board denials of individual claims for benefits in a newly created Article I court (the CAVC) with further review in the U.S. Court of Appeals for the Federal Circuit;
- Allows attorneys and others authorized to practice before the CAVC to charge a “reasonable fee” for representation; and
- Transfers jurisdiction from the U.S. district courts to the U.S. Court of Appeals for the Federal Circuit over challenges to VA regulations and other policies of general applicability.<sup>10</sup>

**The Veterans Justice Review Act grants the court exclusive jurisdiction over all issues of law and fact arising from a final adverse decision by the Board of Veterans' Appeals. Finality of an issue is defeated by either remand to the regional office or by a timely request for reconsideration by the board. To be timely, the notice of appeal or request for reconsideration must be filed within 120 days of the date stamped on the Board decision.**

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of discretion, unconstitutional, or contrary to a regulation or statute. The standard of review for findings of fact by the Board of Veterans' Appeals is whether the findings are clearly erroneous.<sup>11</sup>

Neither the Secretary of Veterans Affairs nor any other official of the VA may appeal a decision by the Board. They may appeal an adverse decision of the CAVC to the Federal Circuit. Review by the Federal Circuit is limited to regulatory or statutory interpretation, constitutional issues, and rules challenges. They may not review decisions of law applied to fact. There have been suggestions that the Federal Circuit be eliminated from the review process and review of CAVC decisions be limited to petitions for *certiorari* to the Supreme Court, consistent with that of the U.S. Court of Appeals for the Armed Forces. This results from an erroneous perception of the U.S. Court of Appeals for the Armed Forces, which is a court of discretionary review, reviewing decisions from the courts of appeal of the individual branches of the armed services.

When the CAVC opened its doors for business, it was flooded with *pro se* appeals. During the first few years, the rate of *pro se* appeals exceeded 80 percent for several reasons. First, veteran service organizations tended to instruct their service officers to simply fill out the form for a notice of appeal and send it in. As an Article I court, CAVC permitted non-attorney practitioner membership in its bar. The practice occurred under the supervision of an attorney, who was also a member of the court's bar. However, there was little understanding of the difference between the court and the VA—many veterans and service officers alike perceived the court as an extension of the VA.

Secondly, very few attorneys practiced veterans law. The VA was represented before the court by Group VII of the general counsel's office. Barton Stichman, David Addlestone, and Ronald Abrams, of the National Veterans Legal Services Project (which became National Veterans Legal Services Program), were among the first. A few private practitioners, including Gordon Erspamer of San Francisco; Kenneth Carpenter of Topeka, Kan.; William Smith of Los Angeles; and Keith Snyder of Silver Spring, Md., were also among the early litigators. They had litigated veterans issues prior to the Veterans Justice Review Act within the narrow jurisdictional framework then allowed. The private bar soon organized the National Organization of Veterans' Advocates. These two groups,

along with attorneys joining the appellate staffs of veterans service organizations, particularly the Paralyzed Veterans of America and the Disabled American Veterans, shaped the early jurisprudence of veterans law before the court.

Thirdly, not a single law school included veterans law in its curriculum, even as a footnote to administrative law. The \$10 fee limitation and the preclusion statutes certainly had a limiting effect on any incentive to practice in the area and minimized the availability of legal representation for veterans before the court. Chief

Judge Nebeker found the chaos resulting from the number of *pro se* appellants intolerable for the fledgling court. Not only did many of the appellants misunderstand the jurisdictional timetable for appeals and file late, but numerous requests to re-open claims and other matters completely outside the court's jurisdiction were also being filed.

It was abundantly clear that a resolution required the involvement of legal counsel for *pro se* appellants. The court at this time had been frugal with the appropriations from Congress, having a surplus of approximately \$900,000. Chief Judge Nebeker found Congressional support for a *pro bono* program to provide free representation to these veterans. They would, however, have to obtain waivers of filing fees at the court and meet the indigency standards of the Department of Labor. This was an initiative without precedent in any federal court. The resulting organization would come out of cooperation between two classes of professionals—(1) service officers with a vast knowledge of the application of rules and regulations regarding VA benefits and compensation but little or no knowledge of the judicial process and (2) volunteer attorneys with little or no knowledge of the claims process but having expertise in appellate advocacy.<sup>12</sup>

A meeting on neutral ground was called at the court. The organizations attending included the National Veterans Legal Services Program (NVLSP), the Disabled American Veterans, the Paralyzed Veterans of America, and the American Legion. The VFW declined

to become the first director. He designed the internal framework of the consortium. The advisory committee (now the executive board) consisted of a representative from each member organization as well as nonvoting members from Legal Services Corporation and the court. David B. Isbell, a senior partner at Covington & Burling and a master at calming the turbulence generated by turf protection, became the first chairman.

To avoid the expense of personnel and attendant overhead, each veterans service organization would contribute one or two of their more experienced service officers to screen individual cases. Administrative personnel, including the deputy director, would be on NVLSP's payroll; the director would be an employee of the Paralyzed Veterans of America.

The consortium was divided into two components, case evaluation and placement (CE&P) and outreach and training. In 2012 the consortium reorganized CE&P to have its own organizational and administrative structure, including an executive director, a director, and a deputy director. Case evaluation is now performed by consortium staff: case management attorneys and a veterans law specialist. Financial support still originates with Congress through the court's budget, allocated by grants from Legal Services Corporation and donations from participating firms and individuals.

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**The National Veterans Legal Services Program now manages the outreach and training component entirely, on a contractual basis, and provides two or more eight-hour trainings annually. It also publishes *The Veterans Benefits Manual*, a copy of which is purchased for each volunteer attorney upon accepting a case referral. From the very beginning, private practitioners and large firms have responded extraordinarily well to the consortium.**

to participate. It should be noted that veterans service organizations were less than happy at the prospect of exposing their membership to more attorneys but eventually bowed to the inevitable. It was decided, after intense negotiations, that the service organizations and NVLSP would each contribute time, personnel, and money in equal portions to a new organization that would fulfill this legal need. Program applicants would be required to either obtain a waiver of filing fees for their appeals or submit financial statements demonstrating that they fall within Department of Labor poverty guidelines. It was decided that the money from the court's budget would "pass through" to Legal Services Corporation for further distribution in the form of grants. To enhance the image and financial security of the new organization, a congressional charter was also obtained.

Legal Services Corporation issued a request for proposal to which the Paralyzed Veterans of America was the leading respondent. Lawrence Hagel, the organization's then deputy general counsel and now an associate judge on the CAVC, drew up the response, which detailed the in-kind and financial responsibility of each contributing organization and the allocation of grants. Thus, the Veterans Consortium Pro Bono Program was launched in 1992. Ronald Scholz, a Navy captain and attorney with extraordinary organizational abilities, was persuaded to retire from the military and

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Each consortium volunteer goes through the training and con-

tracts to take at least one *pro bono* appeal. A case management attorney or veterans law specialist screens each case thoroughly for a viable issue. If one is identified, the consortium places the case with a volunteer attorney and provides a mentor. Mentoring tends to be intensive, and the resulting success rate before the court is generally at 85 percent. The consortium sends an annual report to Congress detailing the expenditure of funds and the return on each tax dollar, which is approximately three dollars worth of services rendered for each tax dollar expended. Further mentoring is also provided after a remand should counsel continue to represent the veteran on a *pro bono* basis before the agency.

The relationship between the court and the consortium continues to be relatively close in that occasionally a *pro se* appellant will present an issue or a situation in which, in the court's judgment, representation is appropriate. In those instances, the court will issue an order with a "cc" to the consortium or the order will contain a direct request that the matter be considered by the consortium, either for direct placement or *amicus*, with a response required in 30 days. However, advocacy by the consortium and its volunteer attorneys before the court is at the appropriate arm's length.

One early concern of the CAVC was the lack of education in veterans law. At one time, a committee within the court's bar was formed to further legal education in veterans law. Widener University, under the leadership of Thomas Reed, established the first Veterans Law Clinic, which became the model for many more. There is still an unfortunate lack of educational opportunities in mainstream law school curricula, but the clinic movement has become well established, fueled by the obvious need for advocacy for a new generation of traumatized veterans and to a large extent driven by veterans who have enrolled in law schools across the country. The consortium has become very active in this movement, referring mentored cases and conducting on-site visitation and instruction. The CAVC has concurrently encouraged the clinics and usually holds at least one oral argument a year at a law school. Sometimes a consortium case is selected for argument, as recently occurred at the University of Missouri Law School.

The formation of the consortium in many respects was a grand experiment born of the necessity to ensure that all veterans, their dependents, or their survivors obtain their day in court and a viable, fair opportunity for judicial review of the denial of claims for compensation. The opportunity to be heard was earned in the course of service to their country; Chief Judge Nebeker was determined that veterans would have that opportunity. While the foray into the area of *pro bono* representation on the part of a federal court was and continues to be unprecedented, it is clear that the vision of Chief Judge Nebeker and continuing innovations by this youngest of the federal courts will continue to serve its unique and deserving constituency, our veterans.

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Law Committee of the ABA General Practice Section; and first director of the Staff Attorney's Office of the U.S. Eleventh Circuit Court of Appeals at its inception. After a 10-year stint as a paramedic and small business owner, she returned to the practice of law as deputy director of the Veterans Consortium Pro Bono Program in 1996. She joined the Federal Bar Association soon thereafter and currently serves as chair of the Veterans and Military Law Section. She is also a member of the National Organization of Veterans Advocates. She lives on top of a mountain in Virginia with her husband, Michael, a daughter, the youngest of her seven grandchildren, one dog, and five cats.

## Endnotes

<sup>1</sup>Public L. No. 100-687, 102 Stat 4105 (1988).

<sup>2</sup>38 U.S.C. Sect./214(a) *repealed* by Department of Veterans Affairs Codification Act, Pub. L. No. 102-83 Sect. 2(a), 105 Stat. 578, 386 (1991).

<sup>3</sup>*Nehmer v. U.S. Veterans Administration*, 712 F. Supp. 1404 (N.D. Cal. (1989), filed in 1986 challenging VA's regulation 38 C.P.R. Sect. 3.311 governing eligibility for compensation for diseases associated with exposure to Agent Orange.

<sup>4</sup>*National Association of Radiation Survivors v. U.S. Veterans Administration* 589 F.Supp. 1302 (N.D. Cal., 1984) (NARS I) *reversed* sub. nom. *Walters v. National Association Survivors*, 473 U.S. 305 (1985).

<sup>5</sup>38 U.S.C. Sect. 3404(c)(2) *repealed* by the Veterans Justice Review Act.

<sup>6</sup>38 U.S.C. Sect. 5904 Pub. L. 102-83 Sect. 5©(1), 105 Stat. 406 (Dec. 22, 2006).

<sup>7</sup>Rule 39(a), Rules of Practice and Procedure, U.S. Court of Appeals for Veterans Claims.

<sup>8</sup>4. *Supra*, note 1.

<sup>9</sup>Barton F. Stichman, "The Veterans Judicial Review Act of 1988: Congress Introduces Courts and Attorneys to Veterans Benefits Proceedings," 23 Clearinghouse Review 365, 367 (1989).

<sup>10</sup>William F. Fox, Jr., AN ANALYSIS OF THE JURISPRUDENCE, ORGANIZATION, AND OPERATION OF THE NEWEST ARTICLE ONE COURT Second Ed. Paralyzed Veterans of America (1993).

<sup>11</sup>Stichman, *supra*, .368

<sup>12</sup>David Isbell, chairman, Advisory Committee, Introduction, First Annual Report of the Veterans Consortium Pro Bono Program (1993).