

**“NOT REASONABLY DEBATABLE”: THE PROBLEMS WITH SINGLE-JUDGE DECISIONS BY THE COURT OF APPEALS FOR VETERANS CLAIMS**

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**Abstract:** The U.S. Court of Appeals for Veterans Claims (CAVC) has statutory authority—unique among the federal appellate courts—to allow individual judges to decide appeals. As the CAVC completes the first quarter century of operations since its creation, this article examines the court’s use of this authority. Based upon two years of data developed and analyzed by the authors, this article concludes that outcome variance in single-judge decisions is a serious problem at the CAVC. Not only is there a substantial difference in the outcomes of appeals assigned to the different judges, but there are clear examples of decisions that violate the court’s precedent against deciding novel issues or debatable cases by a single judge. Based upon the more than 4,000 decisions reviewed, it is recommended that substantial changes must be made in how the court exercises single-judge authority. Alternatively, this authority could be abolished altogether so that the CAVC decides all appeals by panel, as is done by the other federal appellate courts. The near-term goal of reform should be to increase the percentage of the CAVC’s opinions that are published from the current average of under two percent to at least twelve percent (the average for federal courts of appeals). Increasing the number of precedential decisions will not only ensure fairness to all of the veterans appealing to the court, but will also improve the guidance provided to the Department of Veterans Affairs because it would resolve more legal issues and also demonstrate how the court believes the law should be applied to difficult or new fact patterns.

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“[The Court of Appeals for Veterans Claims] will, on a case by case basis, decide summarily those relatively simple cases where the outcome is not reasonably debatable.”<sup>2</sup>

For the first two centuries of our nation’s history, there was no judicial review of decisions to deny veterans’ claims for benefits.<sup>3</sup> The Court of Appeals for Veterans Claims (CAVC) was created in 1988 to finally provide veterans a day in court.<sup>4</sup> Today, the CAVC provides independent review of a system that each year distributes over 87 billion dollars in benefit payments and processes nearly 1.3 million claims.<sup>5</sup> Despite the CAVC’s importance and its unique role in the system, after more than a quarter century of operation, there has been no systematic, empirical analysis of whether the court is fulfilling its purpose. This article fills that gap.

As with any appellate court, the CAVC should serve both as a law giver and as an error corrector.<sup>6</sup> The CAVC was structured as a traditional appellate court, with cases decided on the record below after briefing and possible oral argument. However, in addition to its conventional features, the CAVC was also endowed with a unique authority: to allow the merits of appeals to be decided by a single judge acting alone. This authority has long been controversial and the court was initially reluctant to embrace this authority. Nonetheless, single-judge decisions (issued as “memorandum decisions”) have come to completely dominate the resolution of appeals by veterans seeking independent judicial review of decisions by the Department of Veterans Affairs (VA) denying benefits.

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<sup>2</sup>Frankel v. Derwinski, 1 Vet. App. 23, 26 (1990).

<sup>3</sup> See generally James D. Ridgway, *The Splendid Isolation Revisited: Lessons from the History of Veterans Benefits Before Judicial Review*, 3 VET. L. REV. 135 (2011).

<sup>4</sup> See Veterans Judicial Review Act of 1988 [hereinafter “VJRA”], Pub. L. No. 100-687, 102 Stat. 4105 (1988); see also generally Barton F. Stichman, *The Veterans’ Judicial Review Act of 1988: Congress Introduces Courts and Attorneys to Veterans’ Benefits Proceedings*, 41 ADMIN. L. REV. 365 (1989); PAUL C. LIGHT, FORGING LEGISLATION (1992).

<sup>5</sup> See DEPARTMENT OF VETERANS AFFAIRS, 2014 VA PERFORMANCE AND ACCOUNTABILITY REPORT PART I-11, I-33 (2014), available at <http://www.va.gov/budget/report/>.

<sup>6</sup> See Michael P. Allen, *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*, 40 U. MICH. J.L. REFORM 483, 514-15 (2007) (arguing that Congress intended that the CAVC be both a lawgiver and an error corrector).

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Unfortunately, an analysis of over 4,000 single-judge CAVC decisions shows that the use of this authority is causing severe problems in the court's ability to fulfill its dual roles. This article presents a unprecedented analysis of two years of memorandum decisions by the CAVC to demonstrate that the court's single-judge authority has resulted in insufficient development of the law and unacceptable variance in how supposedly established law is applied to the appeals of veterans seeking benefits. Part I examines the origins of the CAVC's single-judge authority, how the court initially developed its related jurisprudence, and how it is used today. Part II establishes the need for an empirical study of single-judge decisions by looking at the general critiques of unpublished decisions and the past scholarship on the CAVC suggesting a close examination. Part III turns to the methodology of the empirical data presented in this article, including a discussion of what is and is not being examined. Part IV presents an analysis of over 4,000 memorandum decisions issued by the CAVC in 2013 and 2014 and demonstrates problems with the court's use of its unique authority, which reveals tremendous variance in outcomes as well as examples of questionable use of the authority. Part V compares the results of this study to other studies of variance, and diagnoses the root cause of the variance at the CAVC. Part VI considers potential internal and statutory changes that could be made to address the issues demonstrated. Finally, Part VII concludes with some thoughts about how curtailing or abolishing single-judge authority would improve decisionmaking by the CAVC and allow it to better fulfill its roles as law giver and error corrector.

## **I. The Origins, Development, and Use of Single-Judge Authority at the CAVC**

### *A. The Origins of Single-Judge Authority at the CAVC*

The creation of the CAVC (originally known as the Court of Veterans Appeals) in 1988 marked only the eighth time in the history of the nation that Congress had created a new court from whole cloth.<sup>7</sup> Despite the fact that there was no antecedent court in this field, the provisions of the Veterans Judicial Review Act [hereinafter "VJRA"]<sup>8</sup> authorized an appellate

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<sup>7</sup> See Remarks of Chief Judge Frank Q. Nebeker, First Judicial Conference of the Court of Appeals for Veterans Claims, 4 Vet. App. XXVIII (1992).

<sup>8</sup> Pub. L. No. 100-687, 102 Stat. 4105 (1988).

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court that largely fit the traditional mold. The court was to be composed of seven appellate judges hearing appeals on a closed record after briefing.<sup>9</sup> The court was required to review fact-finding below deferentially, but was granted de novo review of issues of law.<sup>10</sup> Furthermore, in practice, the court quickly modeled itself after other federal appellate courts. A retired appellate judge was appointed as the CAVC's first chief judge,<sup>11</sup> and the court adopted rules of practice modeled after the Federal Rules of Appellate Procedure.<sup>12</sup> In short order, black-robed judges of the court began hearing oral arguments in panels of three, in proceedings that would be recognizable to any lawyer familiar with appellate practice.

Nonetheless, the VJRA contained a unique provision that would soon set the CAVC on a course to operate in a manner fundamentally different from other appellate courts. The Act created section 4067 of title 38, which authorized cases to be decided not only by panels of three or the court sitting en banc, but also by single judges acting alone.<sup>13</sup> The origins of this provision are not explicitly discussed in the legislative history of the VJRA.<sup>14</sup> However, the provision appears to have been a relic of an entirely different concept of judicial review.

The creation of the court capped decades of struggle to end two centuries in which agency decisions denying veterans benefits were immune from judicial review.<sup>15</sup> The struggle came to a

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<sup>9</sup> See VJRA at § 301 (creating 38 U.S.C. §§ 4053, 4061).

<sup>10</sup> See VJRA at § 301(creating 38 U.S.C. § 4061); James D. Ridgway, *Why So Many Remands?: A Comparative Analysis of Appellate Review by the United States Court of Appeals for Veterans Claims*, 1 VETERANS L. REV. 113, 139-43 (2009) (analyzing the court's case law regarding review of legal and factual issues).

<sup>11</sup> See United States Court of Appeals for Veterans Claims, About the Court: Judge Frank Q. Nebeker, <http://www.uscourts.cavc.gov/nebeker.php>; Bill McAllister, "Ethics Chief Tapped for Veterans Court," WASH. POST Apr. 1, 1989, available at <http://www.washingtonpost.com/archive/politics/1989/04/01/ethics-chief-tapped-for-veterans-court/09475962-c594-435f-9692-fec71776ca41/>.

<sup>12</sup> See CAVC Misc. Order 4-91.

<sup>13</sup> See VJRA at § 301 (creating 38 U.S.C. § 4067) (currently 38 U.S.C. § 7254(b)).

<sup>14</sup> The authors contacted two former senior congressional staff members for the Senate Veterans Affairs Committee who worked heavily on the bill. Neither had any specific recollection as to why the provision was originally added.

<sup>15</sup> See Remarks of Hon. G.V. (Sonny) Montgomery, Second Judicial Conference of the Court of Appeals for Veterans Claims, 6 Vet. App. LXXXVIII (1993) (mentioning proposed legislation dating back to 1940); Remarks of Bill Brew, Staff Director of the Senate Veterans' Affairs Committee, CAVC Ceremonial Session in Commemoration of the Twentieth Anniversary of the First Convening of the Court, 23 Vet. App. LV-LVIII (2009) (describing more than two decades of efforts); see generally Ridgway, *The Splendid Isolation Revisited*, supra note 3, at 135 (describing several instances since the American Revolution in which judicial review of veterans claims was thwarted).

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head in 1988 after Vietnam Veterans of America published a survey showing that veterans themselves overwhelmingly favored judicial review.<sup>16</sup> Nonetheless, there was a fierce struggle over what form judicial review should take. The two principal ideas under consideration were a Senate-favored concept of allowing review by the established Article III courts, and the House-favored idea of converting the Board of Veterans' Appeals (BVA), the appellate body within VA, into an independent tribunal.<sup>17</sup> Ultimately, the VJRA resulted in an eleventh-hour compromise that created the CAVC.<sup>18</sup> Notably, the concept of an independent, Article I appellate court did not arise until a compromise committee was formed to reconcile the wildly divergent bills emerging from the two chambers.<sup>19</sup> As a result, there is no recorded debate on how it should operate, and little explanation of the nuances of the final bill.

Despite the lack of explicit statements regarding single-judge authority in the legislative history, there are some clues to its origins. The legislative history is clear that many provisions regarding the operation of the CAVC were drawn from the enabling act of the United States Tax Court,<sup>20</sup> which has been hearing cases by single judges since 1926.<sup>21</sup> Digging deeper, the concept of single-judge authority originated in the House bill,<sup>22</sup> because there was no comparable provision in the Senate bill. The relevant language of the House bill does not perfectly track the related provision of the U.S. Tax Court,<sup>23</sup> but that is not surprising, given that

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<sup>16</sup> See Laurence R. Helfer, *The Politics of Judicial Structure: Creating the United States Court of Veterans Appeals*, 25 CONN. L. REV. 155, 162-63 (1992).

<sup>17</sup> See LIGHT, *supra* note 4 at 224-25; Remarks of Bill Brew, Staff Director of the Senate Veterans' Affairs Committee, CAVC Ceremonial Session in Commemoration of the Twentieth Anniversary of the First Convening of the Court, 23 Vet. App. LV-LVIII (2009) ("The House passed a bill that abolished the Board of Veterans' Appeals and in its stead created a 65-member court."); H.R. 5288, 100th Cong. § 5 (1988).

<sup>18</sup> See LIGHT, *supra* note 4 at 224-27.

<sup>19</sup> *Id.*

<sup>20</sup> See 134 Cong. Rec. S31470 (daily ed. Oct. 18, 1988) (statement of Sen. Veterans Affairs Committee Chairman Alan Cranston) ("A number of the provisions establishing the Court of Veterans Appeals have been drawn from the Tax Court enabling legislation (26 U.S.C. § 7441 et seq.); a few have been drawn from the Court of Military Appeals (10 U.S.C. § 867) provisions."); Remarks of Hon. G.V. (Sonny) Montgomery, *supra* note 16 at LXXXIX (noting that the Tax Court was one of the courts examined during the drafting of the VJRA).

<sup>21</sup> See HAROLD DUBROFF & BRANT J. HELLWIG, *THE UNITED STATES TAX COURT: AN HISTORICAL ANALYSIS* 735 (2d ed. 2014).

<sup>22</sup> H.R. 5288, 100th Cong. § 5 (1988).

<sup>23</sup> Compare 26 U.S.C. § 7444(c) ("The chief judge may from time to time divide the Tax Court into divisions of one or more judges . . ."), with H.R. 5288, 100th Cong. § 5 (1988) ("The Court may hear cases by judges sitting alone

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the Tax Court's provision is phrased in terms of that court's historic nomenclature of "divisions," rather than "panels."<sup>24</sup> It is notable that the original House bill gave the chief judge the authority to form panels, just as the chief judge of the Tax Court is authorized to form divisions.<sup>25</sup> This is different from the final version of the bill allowing for the creation of panels "as determined pursuant to procedures established by the Court,"<sup>26</sup> and reinforces the notion that the provision allowing single-judge authority was patterned after the Tax Court's statute. Moreover, it was logical for the House to include such a provision as part of its bill to elevate the BVA into an Article I court. Both the Tax Court and the BVA are fact-finding bodies.<sup>27</sup> Before being revamped into an Article I court in 1942, the Tax Court existed as the Board of Tax Appeals.<sup>28</sup> Therefore, the House's proposal was very similar to that used to create the Tax Court.

Not only was using the Tax Court a good historical model, giving the new trial-level court the authority to decide cases by a single judge solved a serious logistical issue that would have otherwise occurred in making the BVA into an independent court. At the time of the VJRA, the BVA sat only in panels. One of the subsidiary issues addressed by the VJRA was expanding veterans' access to hearings by making BVA hearings a right instead of discretionary.<sup>29</sup> The provision allowing for single-judge proceedings makes sense as part of a bill to convert the BVA into an independent court, because it would have allowed the BVA to hold trial-like hearings all

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or in panels, as designated by the chief judge. Any such panel shall have not less than three judges."). The final version was less similar to the Tax Court provision. *See* 38 U.S.C. § 7254(b) ("The Court may hear cases by judges sitting alone or in panels, as determined pursuant to procedures established by the Court.").

<sup>24</sup> *See* HAROLD DUBROFF & BRANT J. HELLWIG, *THE UNITED STATES TAX COURT: AN HISTORICAL ANALYSIS* 56 (2d ed. 2014).

<sup>25</sup> *See supra* note 24.

<sup>26</sup> *See* 38 U.S.C. § 7254(b).

<sup>27</sup> The Tax Court is a trial court. However, it has a unique provision that allows the chief judge to review a decision in circulation to the entire body for review if necessary to establish precedent or maintain uniformity. *See* HAROLD DUBROFF & BRANT J. HELLWIG, *THE UNITED STATES TAX COURT: AN HISTORICAL ANALYSIS* 754-60 (2d ed. 2014). Although the BVA is the appellate body within VA, the Veterans Law Judges review the evidence *de novo* and make their own findings of fact without any deference to the original decisions by the non-attorney adjudicators. Accordingly, the BVA's role is similar to trial-court function of the Tax Court.

<sup>28</sup> *See* *Kuretski v. C.I.R.*, 755 F.3d 929, 933 (D.C. Cir. 2014), *cert. denied*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 2309 (2015) (citing Revenue Act of 1942, ch. 619, § 504(a), 56 Stat. 798, 957); HAROLD DUBROFF & BRANT J. HELLWIG, *THE UNITED STATES TAX COURT: AN HISTORICAL ANALYSIS* 175-94 (2d ed. 2014).

<sup>29</sup> VJRA at § 207 (creating 38 U.S.C. § 4010); 134 CONG. REC. S9178-02 (daily ed. Jul. 11, 1988) (statement of Sen. Cranston) (criticizing veterans limited access to hearings under the quota system then in effect).



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over the country more easily and with less expense than traveling in panels of three.<sup>30</sup> Therefore, giving the proposed Article I trial court the same authority as the Tax Court would have solved a serious logistical issue and been perfectly consistent with the American tradition of trials conducted by an individual judge.

Nonetheless, it is not at all clear why this particular provision from the House bill survived in the compromise to create the CAVC. The little legislative history from after the compromise sheds no light on why this was done. Nowhere is it explained why such authority originally conceived for a trial-level court would be appropriate for an appellate court.<sup>31</sup> Accordingly, it appears quite possible that the provision was an accident of a rushed attempt to draft a compromise out of two wholly inconsistent bills, rather than a conscious choice to experiment with a type of authority previously unknown in federal appellate courts. Should this inference be accurate, that alone would be a strong reason to reexamine the wisdom and use of this authority.

#### B. *The Development of Single-Judge Authority by the CAVC*

Regardless of its origins, the CAVC had to confront the problem of how to use an authority previously unknown to federal appellate courts. The CAVC's first Chief Judge, Frank Nebeker, was originally skeptical of this authority and proposed that it be abolished when Congress asked him to recommend technical amendments to the VJRA after the court began its operations.<sup>32</sup> However, the provision was not eliminated, and the court soon began to develop a framework for deciding cases by a single judge.

The court's unique authority was the subject of one of the very first decisions of the CAVC, *Frankel v. Derwinski*,<sup>33</sup> which was the ninth opinion issued by the court. *Frankel* is interesting because neither party sought a single-judge decision. Rather, the court commented that full briefing of the legal issue in the case was unwarranted and that "it would have been perhaps

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<sup>30</sup> Indeed, not long after the VJRA was passed, Congress amended the BVA's authority to allow it to decide cases by single members. See Board of Veterans' Appeals Administrative Procedures Improvement Act of 1994, § 6(a), Pub. L. No. 103-271, 108 Stat. 740 (1994).

<sup>31</sup> This article's authors have contacted several congressional staffers who were involved in the passage of the VJRA and none has any recollection of how the provision came to be included in the compromise.

<sup>32</sup> See Remarks of Chief Judge Frank Q. Nebeker, *supra* note 8 at XXXI.

<sup>33</sup> 1 Vet. App. 23 (1990).

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more appropriate, given the clarity of the relevant statute, for the Secretary to have moved for summary affirmance.”<sup>34</sup> From this observation, the court launched into an enumeration of six criteria for an appeal that is “summarily decided by order.”<sup>35</sup> Drawing from “standards for summary disposition found in internal operating procedures and local rules for other federal appellate courts,” the opinion in *Frankel* announced that summary disposition was appropriate when “the case on appeal is of relative simplicity” and

- “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.”<sup>36</sup>

Further, the court indicated that the determination of whether single-judge disposition would be appropriate would often fall to the court’s Central Legal Staff,<sup>37</sup> and that such cases identified early in the process could be handled without full briefing.<sup>38</sup>

Two years after *Frankel*, the court clarified in *Bethea v. Derwinski*<sup>39</sup> that single-judge decisions were not precedential.<sup>40</sup> The court explained:

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<sup>34</sup> *Id.* at 24.

<sup>35</sup> *Id.* at 25.

<sup>36</sup> *Id.* at 25-26.

<sup>37</sup> Federal appellate courts have been authorized to have central legal staffs to assist them since 1982. *See* Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 DUKE L.J. 315, 323 (2011). The role of the CAVC’s central legal staff is defined in the court’s internal operating procedures. *See* U.S. Court of Appeals for Veterans Claims Internal Operating Procedures (hereinafter “CAVC IOP”), available at [http://www.uscourts.cavc.gov/internal\\_operating\\_procedures.php](http://www.uscourts.cavc.gov/internal_operating_procedures.php). More details about how the central legal staff operates in practice can be found in the transcripts of the court’s judicial conferences. *See, e.g.*, Update on Staff Conferences Conducted Under Rule 33, Eleventh Judicial Conference of the Court of Appeals for Veterans Claims, 24 Vet. App. LXVI (2010); Report on the Court’s Mediation and Preparation for Mediation, Tenth Judicial Conference of the Court of Appeals for Veterans Claims, 22 Vet. App. LXXXVIII (2008); Inside the CAVC, Eighth Judicial Conference of the Court of Appeals for Veterans Claims, 19 Vet. App. LXIX (2004).

<sup>38</sup> *See id.* at 26.

<sup>39</sup> 2 Vet. App. 252 (1992).

<sup>40</sup> *See id.* at 273-75.

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A single-judge summary disposition or order is, accordingly, based on clear authority already known and constitutes the law of the particular case. As such, it is fully binding on the Board and the Secretary in that case; however, it carries no precedential weight. A single-judge disposition is not binding in another case before a single judge or a panel. It may be cited or relied upon, however, for any persuasiveness or reasoning it contains. Where there is an earlier panel or en banc opinion, we apply a rule that in a subsequent case, a panel or single judge may not render a decision which conflicts materially with such earlier panel or en banc opinion. In this way we assure consistency of our decisions.<sup>41</sup>

Accordingly, the CAVC quickly established a framework in which its single-judge decisions had the same characteristics as the unpublished panel opinions from the other federal courts of appeals.

### C. *The CAVC's Use of Single-Judge Authority*

Once the court experimented with the use of single-judge decisions, the judges quickly became enamored. By the time of the court's first judicial conference, Chief Judge Nebeker called it "one of the best tools an appellate court can have," and recommended it "as a solution to backlog in other appellate courts."<sup>42</sup> Twenty years after the enactment of the VJRA, he reaffirmed that "it's the best thing since sliced bread for an appellate tribunal."<sup>43</sup>

Chief Judge Nebeker's enthusiasm was based upon experience. After *Frankel* was decided, single-judge memorandum decisions quickly became the norm for the court.<sup>44</sup> However, the court's use of the authority did not quite follow that envisioned in *Frankel*. Initially, the court's docket was overwhelmingly pro se and the arguments raised to the CAVC were largely unmeritorious. Chief Judge Nebeker described it as watching "a good tennis player who's pitted against a novice. Can't play worth a damn."<sup>45</sup> Rather than simply affirm virtually all appeals that failed to articulate a meritorious argument, the CAVC interpreted the VJRA as shifting the burden to the Board to sua sponte raise and address every potential theory of entitlement

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<sup>41</sup> *Bethea v. Derwinski*, 2 Vet. App. 252, 254 (1992).

<sup>42</sup> See Remarks of Chief Judge Frank Q. Nebeker, *supra* note 8 at XXXI.

<sup>43</sup> 22 Vet. App. at XXX. However, he also admitted that, despite his enthusiasm, he had been unsuccessful in persuading any other court to adopt the practice. See *id.*

<sup>44</sup> The indexes of "Cases Reported" in the first two volume of West's Veterans Appeals Reporter are dominated by dispositions with the notation "(Table)," indicating the resolution was by unpublished, single-judge action.

<sup>45</sup> 4 Vet. App. at XXX.

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suggested by the record.<sup>46</sup> This doctrine strongly encouraged fact-intensive arguments that required full briefing.

Furthermore, in traditional appellate courts, the high costs of litigation encourage appeals of purely legal questions, for which the *de novo* standard of review makes the chances of success higher. Such appeals (like the one in *Frankel*) are susceptible to resolution without extensive briefing, especially when the legal argument is formulated by an unsophisticated, *pro se* appellant. In contrast, the cost to a claimant of appealing to the CAVC is virtually nothing, which means that the court's case load is not similarly biased toward purely legal issues.<sup>47</sup> Accordingly, the nature of the cases presented to the CAVC, combined with the nature of the court's review, quickly diverged from those of traditional appellate courts in a way such that the vision of *Frankel* never came to pass. As a result, such motions did not become the norm despite the original vision of *Frankel*.<sup>48</sup>

In fact, in recent years, single-judge dispositions have come to dominate to a degree far greater than non-precedential decisions are used in the other federal courts of appeals. In fiscal years 2013 and 2014,<sup>49</sup> the CAVC issued published opinions in only 1.8% of the cases decided by chambers (75 of 4,221).<sup>50</sup> By comparison, in fiscal year 2014, the federal geographic courts

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<sup>46</sup> See James D. Ridgway, *The Veterans' Judicial Review Act Twenty Years Later: Assessing the New Complexities of VA Adjudication*, 66 N.Y.U. ANN. SURV. AM. L. 251 (2010). This expansion of the court's review was predictable. Andrew Coan and Nicholas Bullard have argued that the Supreme Court interprets judicial authority over the executive to conform to the amount of work the judiciary can handle. See Andrew Coan & Nicholas Bullard, *Judicial Capacity and Executive Power*, \_\_ VA. L. REV. \_\_ (forthcoming 2015), available at <http://ssrn.com/abstract=2558177>. Accordingly, it is not surprising that the CAVC would expand its review authority until it felt that its bandwidth was fully utilized.

<sup>47</sup> See Ridgway, *Why So Many Remands?*, *supra* note 11, at 161.

<sup>48</sup> A Westlaw search of CAVC decisions mentioning "summary affirmance" yields only 17 results over the last decade. In similar searches of the early years of the court, mentions of summary affirmance peaked at 333 in 1993, but had declined to 80 by 1996. (No results other than *Frankel* were found for 1990; 27 results for 1991; 168 results for 1992; 333 results for 1993; 185 results for 1994; 110 results for 1995; 80 cases for 1996).

<sup>49</sup> These fiscal years run from October to September, and so are different from the calendar years that were examined above. However, there is no reason to believe that the three-month offset affects the conclusion, given the size of the gap.

<sup>50</sup> In FY2013, the CAVC published 32 opinions, while deciding 2,045 matters by single judge (including 85 in which the memorandum decision remained the decision of the court after panel review). See UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORT FOR FISCAL YEAR 2013 [hereinafter "CAVC FY13 ANNUAL REPORT"] at 1-2, available at <http://www.uscourts.cavc.gov/report.php>. In FY14, the CAVC published 43 opinions, while deciding 2,101 matters by single judge (including 65 for which the memorandum decision remained the

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of appeals handled 12% of judgments by published opinion.<sup>51</sup> Although there was some variance, no court published less than 6% of its decisions.<sup>52</sup>

Notably, the extremely high pro se rate that originally drove the use of single-judge authority is no longer an issue. The CAVC does not make available its earliest annual reports. However, between 1998 and 2007, the percentage of cases in which the appellant was pro se at disposition dropped from 47% to 19%. In fiscal year 2014, only 15% appeals were pro se at disposition.<sup>53</sup> Therefore, the present reality of the CAVC is that it currently decides virtually all cases by single-judge decision, even though attorney representation is now the norm and unsophisticated pro se briefs are a distinct minority.

## II. The Need for Empirical Study

Despite the unique nature and the crucial role that single-judge decisions play in the handling of appeals by the CAVC as described above, this is an area that is woefully under-examined. The need can be seen by surveying literature regarding non-precedential decisions by the other federal courts and the little available scholarship considering single-judge decisions at the CAVC.

### A. *Lessons from the Appellate Courts of General Jurisdiction*

#### 1. The Origins of Unpublished Decisions

The concept of nonprecedential decisions predates their adoption by the circuit courts of appeals. The Tax Court (then known as the Board of Tax Appeals) began using unpublished memorandum decisions in 1927 after concluding that many matters had little value as precedent.<sup>54</sup> The practice of unpublished decisions in the federal courts of general jurisdiction

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decision of the court after panel review). See UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORT FOR FISCAL YEAR 2014 [hereinafter "CAVC FY14 ANNUAL REPORT"] at 1-2, available at <http://www.uscourts.cavc.gov/report.php>.

<sup>51</sup> See STATISTICS DIV., ADMIN. OFF. U.S. CTS., JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2014 ANNUAL REPORT OF THE DIRECTOR [hereinafter U.S. COURTS 2014 REPORT], tbl. B-12, available at <http://www.uscourts.gov/statistics-reports/judicial-business-2014>.

<sup>52</sup> See *id.*

<sup>53</sup> See CAVC Annual Report for FY14 *supra* note 51 at 1.

<sup>54</sup> HAROLD DUBROFF & BRANT J. HELLWIG, THE UNITED STATES TAX COURT: AN HISTORICAL ANALYSIS 750 (2d ed. 2014).

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began in the 1970s.<sup>55</sup> The driving force was the increasing costs of publication and shelf space in a paper-based world.<sup>56</sup> Over time, appellate courts began handling most of their cases by unpublished decisions. “By 1987 the proportion of all federal courts of appeals’ dispositive judgments resulting in published opinions had dropped to 38 percent, and it dropped to just over 25 percent by 1993.”<sup>57</sup> In fiscal year 2014, only 12% of appellate court judgments were handled by published opinion.<sup>58</sup>

At the time the practice of issuing unpublished began, such opinions were effectively unavailable to anyone except the parties in the case.<sup>59</sup> As a result, rules against citations were recommended by the Federal Judicial Center’s Advisory Council on Appellate Justice because “[i]t is unfair to allow counsel, or others having special knowledge of an unpublished opinion, to use it if favorable and withhold it if unfavorable.”<sup>60</sup> However, as the practice of using unpublished opinions grew, the access problem shrank. “Beginning in the late 1980s to early 1990s, ‘unpublished’ opinions began to become available electronically through Westlaw and LexisNexis. Today, virtually all ‘unpublished’ opinions are available via these services.”<sup>61</sup> Accordingly, the original justification for making unpublished decisions nonprecedential has evaporated.

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<sup>55</sup> See William L. Reynolds & William M. Richman, *Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573, 578 (1981). Concerns about whether all opinions should be published can be traced to at least 1831. See John P. Borger & Chad M. Oldfather, *Anastasoff v. United States and the Debate Over Unpublished Opinions*, 36 TORT & INS. L.J. 899, 900 (2001) (tracing the sentiment to a complaint by Justice Story).

<sup>56</sup> In 1964, the Judicial Conference of the United States concluded that the growth of judicial opinions was causing the “ever increasing practical difficulty and economic cost of establishing and maintaining accessible private and public law library facilities.” REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 11 (1964).

<sup>57</sup> Stephen L. Wasby, *Unpublished Decisions in the Federal Courts of Appeals: Making the Decision to Publish*, 3 J. APP. PRAC. & PROCESS 325, 325 (2001) (citing JUDITH A. MCKENNA, LAURAL L. HOOPER, & MARY CLARK, CASE MANAGEMENT PROCEDURES IN THE FEDERAL COURTS OF APPEALS 21 tbl. 13 (Federal Judicial Center 2000)).

<sup>58</sup> See U.S. COURTS 2014 REPORT, *supra* note 52, at tbl. B-12.

<sup>59</sup> See Robert A. Mead, “*Unpublished*” *Opinions as the Bulk of the Iceberg: Publication Patterns in the Eighth and Tenth Circuits of the United States Courts of Appeals*, 93 LAW LIBR. J. 589, 589 (2001).

<sup>60</sup> ADVISORY COUNCIL ON APPELLATE JUSTICE, FED. JUDICIAL CTR., STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS: A REPORT OF THE COMMITTEE ON USE OF APPELLATE COURT ENERGIES OF THE ADVISORY COUNCIL ON APPELLATE JUSTICE 17 (1973).

<sup>61</sup> Amy E. Sloan, *A Government of Laws and Not Men: Prohibiting Non-Precedential Opinions by Statute or Procedural Rule*, 79 IND. L.J. 711, 719 (2004),

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Presently, the practice of designating some opinions as unpublished is driven by different resource concerns: reducing the amount of effort that it takes to produce a decision as well as the body of law that courts are formally obligated to keep consistent. For decades, the workload of the federal appellate courts has far outstripped the growth of the courts.<sup>62</sup> “The number of cases brought before courts of appeals annually . . . jumped from around 11,000 cases in 1970 to around 60,000 in 2002” without a proportional increase in judges.<sup>63</sup> Filings reached 68,473 in 2005 before declining to 54,988 in 2014.<sup>64</sup>

As a result of the increased workload, the basis for issuing unpublished decisions shifted:

A principal justification for unpublished rulings is that they take less time to prepare than do published opinions. An extensive opinion is said not to be needed if the law to be applied is straightforward or if a case is heavily fact-specific and thus is of minimal or narrower applicability. Because unpublished opinions are primarily directed to the parties rather than a larger audience, the statement of facts, which are known to the parties, can be truncated. Also, the law need not be elaborated, with only enough analysis provided to demonstrate to the parties that consideration has been given to the legal issues.<sup>65</sup>

Furthermore, courts need not concern themselves with such decisions after they are issued because they are not precedential. This makes crafting future decisions easier by reducing the amount of precedent that must be considered. The justification for making these opinions non-precedential is that the truncated facts and analysis in an unpublished opinion could easily be misunderstood or taken out of context. By declaring such decisions nonprecedential, it relieves

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<sup>62</sup> Despite the pressure of high caseloads, appellate courts have fought to preserve the panel decisionmaking model. See Harris S. Ammerman, *Three-Judge Courts: See How They Run!*, 52 F.R.D. 293, 293 (1971) (arguing that appellate courts have resisted single-judge decisions because a single judge “is apt to lack objectivity and careful deliberation”).

<sup>63</sup> David C. Vladecka & Mitu Gulati, *Judicial Triage: Reflections on the Debate over Unpublished Opinions*, 62 WASH. & LEE L. REV. 1667, 1668 n.2 (2005); see also William M. Richman, *An Argument on the Record for More Federal Judgeships*, 1 J. APP. PRAC. & PROCESS 37 (1999). In this regard, it must be noted that the federal bench has not been entirely enthusiastic about growing the number of judges. See William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 299-300 (1996) (discussing judicial opposition to creating additional judgeships).

<sup>64</sup> U.S. COURTS 2014 REPORT, *supra* note 52, at tbl. B-1.

<sup>65</sup> Stephen L. Wasby, *Unpublished Decisions in the Federal Courts of Appeals: Making the Decision to Publish*, 3 J. APP. PRAC. & PROCESS 325, 333-34 (2001).

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the author judge of the burden of fully explaining the law and facts in such a way that the opinion can stand by itself when read out of context by someone other than the affected parties.<sup>66</sup>

## 2. Academic Critiques of Unpublished Decisions

Although unpublished opinions have become a major feature of appellate courts, they have generated much criticism.<sup>67</sup> An in-depth review is beyond the scope of this article, the scholarship in the area is overwhelmingly critical of unpublished decisions. One compelling criticism of unpublished decisions is that “limited publication rules are likely to leave ‘hollow places’ in federal case law because they are applied in an inconsistent manner.”<sup>68</sup> Another criticism is that when one looks at unpublished decisions, the application of the law can vary substantially from what would be expected of examining the published opinions alone.<sup>69</sup>

Perhaps the most powerful criticism of unpublished decisions is that they allow appellate judges to safely abdicate some of their responsibilities. “[C]aseload management techniques have resulted in the delegation of decisionmaking processes to clerks and staff, the elimination of oral argument in most cases, and the production of unpublished opinions or judgment orders.”<sup>70</sup> The net result of limited judicial involvement in decisionmaking and few incentives to handle unpublished decisions well is that “the overall quality of the work of the circuit courts has deteriorated markedly,”<sup>71</sup> at least in the eyes of many commentators.

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<sup>66</sup> See *infra* note 74 and accompanying text.

<sup>67</sup> See, e.g., Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435 (2004); David Greenwald & Frederick A.O. Schwarz, Jr., *The Censorial Judiciary*, 35 U.C. DAVIS L. REV. 1133 (2002); William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273 (1996)

<sup>68</sup> See Robert A. Mead, “Unpublished” Opinions as the Bulk of the Iceberg: *Publication Patterns in the Eighth and Tenth Circuits of the United States Courts of Appeals*, 93 LAW LIBR. J. 589, 590 (2001).

<sup>69</sup> See Peter Siegelman & John J. Donohue III, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 L. & SOC. REV. 1133 (1990) (noting this effect in a sophisticated study using federal district court rulings rather than court of appeals rulings).

<sup>70</sup> Stefanie A. Lindquist, *Bureaucratization and Balkanization: The Origins and Effects of Decision-Making Norms in the Federal Appellate Courts*, 41 U. RICH. L. REV. 659, 661 (2007); see also Richman & Reynolds, *supra* note 68, at 275 (“[A]n effective right to appeal error to the circuit courts no longer exists; instead, litigants must petition the staff to obtain access to the judges.”).

<sup>71</sup> Richman & Reynolds, *supra* note 68, at 275.



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### 3. Judicial Commentary on Unpublished Decisionmaking

Judges themselves have been split in the face of criticism. Many judges have risen in defense of unpublished decisions. Boyce Martin argued that limiting the amount of published law benefits the system generally by allowing those researching issues to focus on the most useful examples: “Unpublished opinions act as a pressure valve in the system, a way to pan for judicial gold while throwing the less influential opinions back into the stream.”<sup>72</sup> Other judges have argued in favor of unpublished decisions on the basis that they are realistically necessary, if not ideal. Alex Kozinski and Stephen Reinhardt have emphasized the difference in effort between published and unpublished opinions, and have argued that such practices improve the quality of those opinions that are published.<sup>73</sup> More starkly, Richard Posner has argued that,

Given the workload of the federal courts of appeals today, the realistic choice is not between limited publication, on the one hand, and, on the other, improving and then publishing all the opinions that are not published today; it is between preparing but not publishing opinions in many cases and preparing no opinions in those cases. It is a choice, in other words, between giving the parties reasons for the decision of their appeal and not giving them reasons even though the appeal is not frivolous.<sup>74</sup>

However, many judges have expressed a deep discomfort regarding unpublished decisionmaking. Richard Arnold stated, “[m]any cases with obvious legal importance are being decided by unpublished opinions.”<sup>75</sup> He further argued that the very existence of non-precedential opinions has negative effects “on the psychology of judging.”<sup>76</sup> As to the issue of shifting work to court staff and law clerks, Howard Markey ruefully commented, “[A]ll appellate

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<sup>72</sup> Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 178 (1999)

<sup>73</sup> Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This! Why We Don't Allow Citation to Unpublished Opinions in the Ninth Circuit*, CAL. LAW., June 2000, at 43.

<sup>74</sup> RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 168-69 (1996).

<sup>75</sup> Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 224 (1999), *cf.* Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions & the Nature of Precedent*, 4 GREEN BAG 2D 17, 18-22 (2000) (stating that “it seems clearly wrong to say that courts should decide whether or not to publish opinions . . . based on their perceived general ‘precedential significance’” and noting that “plenty of unpublished decisions have been accepted for review and reversed by the Supreme Court”).

<sup>76</sup> Arnold, *supra* note 76 at 223 (arguing that the availability of the option to issue an unpublished opinion allows judges to handle hard cases by “sweeping the difficulties under the rug”).

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opinions were once the product of judges; today most are the product of an institution.”<sup>77</sup> Despite his defense of unpublished opinions quoted above, Judge Reinhardt has also bluntly asserted, “Those who believe we are doing the same quality work that we did in the past are simply fooling themselves.”<sup>78</sup>

Perhaps the most famous judicial rebellion against unpublished decisionmaking is the short-lived opinion in *Anastasoff v. United States*.<sup>79</sup> In *Anastoff*, a panel of the Eighth Circuit held that rules against citing to unpublished decisions were unconstitutional, and decided the matter based upon a prior, unpublished decision that the court found to be the only circuit case on point.<sup>80</sup> In doing so, the opinion commented that the remedy for heavy caseloads “is to create enough judgeships to handle the volume, or, if that is not practical, for each judge to take enough time to do a competent job with each case. If this means that backlogs will grow, the price must still be paid.”<sup>81</sup> Although *Anastasoff* did not survive en banc review, it fueled a debate that continues both inside and outside the judiciary.<sup>82</sup>

#### B. *Prior Criticism of Single-Judge Decisionmaking by the CAVC*

Given the debate surrounding the use of non-precedential decisions in the federal appellate courts of general jurisdiction, it is not surprising that there have already been some modest efforts to question the practice of single-judge decisionmaking at the CAVC. The criticism focused on the perceived failure of the court to follow the *Frankel* criteria.

First, in a relatively short article published in 2004, Ronald Smith, Chief Appellate Counsel for Disabled American Veterans, observed, “Some practitioners who appear before the CAVC on a regular basis have become increasingly concerned that the court does not always follow its

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<sup>77</sup> Howard T. Markey, *On the Present Deterioration of the Federal Appellate Process: Never Another Learned Hand*, 33 S.D. L. REV. 371, 377 (1988).

<sup>78</sup> Stephen Reinhardt, *A Plea to Save the Federal Courts—Too Few Judges, Too Many Cases*, 79 A.B.A. J., Jan. 1993, at 52.

<sup>79</sup> 223 F.3d 898 (8th Cir. 2000), *vacated*, 235 F.3d 1054, 1056 (8th Cir. 2000) (en banc).

<sup>80</sup> *Id.* at 899.

<sup>81</sup> 223 F.3d 898, 904 (8th Cir. 2000), *vacated*, 235 F.3d 1054, 1056 (8th Cir. 2000) (en banc).

<sup>82</sup> See, e.g., John P. Borger & Chad M. Oldfather, *Anastasoff v. United States and the Debate over Unpublished Opinions*, 36 TORT & INS. L.J. 899 (2001).

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*Frankel* precedent.”<sup>83</sup> Mr. Smith analyzed two instances in which the court had appeared to address novel issues in single-judge decisions.<sup>84</sup> He then recommended that additional study be undertaken to determine whether there is “a lack of uniformity among decisions in similar cases.”<sup>85</sup>

A somewhat more extensive analysis in a 2004 student note argued that “[m]isapplying *Frankel* has resulted in excessive summary dispositions, denied claimants fair adjudication, and threatened common law stare decisis principles.”<sup>86</sup> The article noted that over the course of three years, the CAVC disposed of 93% of its cases by single-judge decisions, while the twelve geographic federal appeals courts decided less than 80% of their cases by unpublished decisions.<sup>87</sup> In addition, the article identified a number of circumstances in which single-judge decisions appeared to address novel legal issues or distinguish established precedent in novel ways.<sup>88</sup> That article concluded that “[t]he CAVC urgently needs to change its current method of issuing single-judge decisions to salvage its reputation and to reconcile stare decisis principles with the court's unique ability to evade the panel tradition,” and suggested that authority may need to be abolished altogether.<sup>89</sup>

Concerns with single-judge decisions have not been limited to academic writings. In 2006, one of the breakout sessions at the CAVC's ninth judicial conference was devoted to the topic, “How Fickle is *Frankel*?”<sup>90</sup> During the panel discussion, one veterans advocate argued that there have been many cases decided by memorandum decision that should not have been single-

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<sup>83</sup> 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, 281 (2004).

<sup>84</sup> *See id.* at 281-83.

<sup>85</sup> *Id.* at 283.

<sup>86</sup> Sarah M. Haley, *Single-Judge Adjudication in the Court of Appeals for Veterans Claims and the Devaluation of Stare Decisis*, 56 ADMIN. L. REV. 535, 573 (2004).

<sup>87</sup> *See id.* at 547 (2004). As outlined above, the rates of publication for both the CAVC and the other federal appellate courts have declined considerably in the decade since the article was published. *See infra* notes 217 and accompanying text.

<sup>88</sup> *Id.* at 549-63.

<sup>89</sup> *Id.* at 571-72.

<sup>90</sup> 21 Vet. App. at CXXX.

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judge cases.<sup>91</sup> A representative of VA's Office of General Counsel respectfully suggested that more precedential guidance might help the agency to be more consistent and to allow everyone to better understand the court's vision of the law.<sup>92</sup> In response to these comments, retired CAVC Chief Judge Kenneth Kramer candidly admitted that,

[H]ad I applied [the *Frankel*] criteria directly, my capacity to use single-judge decision making would have been significantly reduced; and that my own rule of thumb, never called into question in determining whether or not to use single-judge decision making, was whether or not I could decide the case without making new precedent. And that in a nutshell was my approach to *Frankel*, recognizing that I did not pay literal adherence.<sup>93</sup>

Accordingly, the conversation revolved around the ideal role of the court versus caseload pressures, in much the same way as the general debate about non-precedential decisions, outlined above.

In 2007, Professor Michael Allen undertook an extensive review of three years of opinions by the CAVC. He criticized the court's use of single-judge decisions for "creat[ing] an 'iceberg jurisprudence' . . . with . . . much of its law 'below the surface.'"<sup>94</sup> Based upon his survey, Professor Allen rejected the assertion that single-judge decisions do not make law as "overly formalistic and neglect[ing] the reality of at least some single-judge adjudication."<sup>95</sup> Although he did not do an analysis of single-judge decisions, he suggested that such a study may be worth the effort to determine whether the court was being faithful to *Frankel*.<sup>96</sup>

Finally, a 2014 article by practitioner Vicki Franks did not directly criticize single-judge decisionmaking, but did argue that its particular prevalence at the CAVC justified a revision to the court's rules to allow single-judge decisions to be cited for their persuasive value. In particular, she observed that, "although the CAVC's precedential opinions carry authority, given their scarcity, they become exhaustingly cited and never achieve the momentum of driving a

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<sup>91</sup> *See id.* at CXXXI.

<sup>92</sup> *See id.*

<sup>93</sup> 21 Vet. App. at CXXXII.

<sup>94</sup> Allen, *supra* note 6, at 515.

<sup>95</sup> *Id.* at 516.

<sup>96</sup> *Id.* at 517.

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body of common law.”<sup>97</sup> The article, therefore, concluded that memorandum decisions need to be part of the body of law that is considered by the court, in part because the published opinions are simply too sparse to adequately provide guidance.

Accordingly, the ongoing debate about non-precedential decisions in the federal appellate courts of general jurisdiction suggests that the CAVC’s use of single-judge authority ought to be examined closely. Furthermore, the notion that there may be problems with the court’s application of *Frankel* is not new.<sup>98</sup> There have been repeated suggestions that an empirical study of single-judge decisions was warranted. Despite these concerns, evidence of problems has been merely anecdotal until this point. To fill this gap, this article analyzes two complete years of memorandum decisions issued by the CAVC.

### III. Objectives and Methodology

The purpose of this two-year analysis is to test whether the court has been following the *Frankel* criteria. Empirical studies of appellate courts are always challenging. There are many limitations that can make empirical conclusions questionable.<sup>99</sup> “[F]inding a satisfactory vantage point from which to judge the correctness of outcomes is not easy.”<sup>100</sup> Furthermore, attempts to characterize judges or outcomes by ideological valiance are fraught with subjectivity.<sup>101</sup> Some judges have even been motivated to publicly lambast empirical work directed at their courts.<sup>102</sup>

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<sup>97</sup> Vicki Franks, *The U.S. Court of Appeals for Veterans Claims Rule 30(a): Amending the Rule to Allow Citation to Nonprecedential Cavc Opinions for Precedential and Persuasive Authority*, 24 FED. CIRCUIT B.J. 157, 174 (2014).

<sup>98</sup> To be fair, the CAVC is not alone in being criticized for failing to faithfully abide by its rules of publication. See Donald R. Songer, *Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality*, 73 JUDICATURE 307, 313 (1990) (“The data presented above clearly demonstrate that the official criteria for publication do not provide an adequate description of the differences in practice between decisions which are published and those which are not.”).

<sup>99</sup> See generally Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1900 (2009) (arguing that “empirical work in [reviewing appellate courts] suffers from several important methodological limitations that render bold conclusions highly suspect”); Michael Heise, *The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism*, 2002 U. ILL. L. REV. 819, 843-49 (2002) (discussing common methodological challenges in studying appellate courts).

<sup>100</sup> Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62, 78 (1985).

<sup>101</sup> See Daniel E. Ho & Kevin M. Quinn, *How Not to Lie with Judicial Votes: Misconceptions, Measurement, and Models*, 98 CAL. L. REV. 813 (2010) (criticizing many attempts at empirical studies of judicial behavior based upon ideology); Brian Z. Tamanaha, *The Distorting Slant in Quantitative Studies of Judging*, 50 B.C. L. REV. 685 (2009) (arguing that empirical work on judicial behavior is frequently tainted by a bias toward finding an ideological

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This study attempts to avoid the most treacherous pitfalls of empirical analysis by eschewing the questions of which decisions are “correct” and whether ideology plays a role in outcomes. Instead, this article employs a set of logical premises to arrive at an objective formula for testing whether the court has been following the *Frankel* criteria. The formula allows the single-judge decisions to speak for themselves, without the need for independent analysis of the content of the decisions.

A critical underpinning to the validity of this study involves how appeals are assigned to the judges of the court. After completion of the briefing process by the parties and the filing of the record of proceedings, the public office of the court assigns the appeal to one of the judges. With minor exceptions, the public office makes these assignments on a random basis.<sup>103</sup> If the judge to whom the case is assigned decides that the appeal is appropriate for disposition by a single judge “under [the] *Frankel* [criteria],” that judge prepares a memorandum decision and circulates it to the other judges.<sup>104</sup> Unless two judges in regular active service request panel consideration “based on the criteria in *Frankel*”, the authoring judge forwards the final memorandum decision to the clerk for issuance.<sup>105</sup>

A critical *Frankel* criterion provides that a single-judge decision can only be issued if “the outcome [of the appeal] is not reasonable debatable.”<sup>106</sup> It logically follows from the fact that appeals are assigned to the judges on a random basis that the outcomes of appeals decided by a single judge would not vary significantly from judge to judge if the judges adhered to the *Frankel* principle that only appeals whose outcome is not reasonably debatable should be decided by a single judge. Conversely, if the outcomes of appeals decided by a single judge

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effect).

<sup>102</sup> See, e.g., Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1335 (1998) (“My purpose in writing is to refute the heedless observations of academic scholars who misconstrue and misunderstand the work of the judges of the D.C. Circuit. I will show that, even when one looks carefully at the so-called ‘empirical studies’ that purport to analyze the work of my Circuit, it is clear that, in most cases, judicial decision making is a principled enterprise that is greatly facilitated by collegiality among judges.”).

<sup>103</sup> See U.S. VET. APPL. INTERNAL OPERATING PROCEDURES § I(a)(3), available at <http://www.uscourts.cavc.gov>.

<sup>104</sup> *Id.* at §§ I(b)(1)-(3) and II(a) and (b).

<sup>105</sup> *Id.* at § II.(b)(2)-(4).

<sup>106</sup> *Frankel v. Derwinski*, 1 Vet. App. 23, 25-26 (1990).

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varied greatly from judge to judge, it would signal that single judges were reaching an outcome in some individual appeals that would result in a different outcome had the appeal been assigned instead to one or more of the other judges. Furthermore, if different judges would reach different outcomes in the same individual appeal, that would appear to equate to the proposition that the outcome of the appeal would be reasonably debatable.

The study therefore focused on whether there is a significant variance in the outcomes of single-judge cases at the CAVC depending upon which judge was making the decision. To determine the extent to which single-judge decisions yielded different outcomes at the CAVC, a list of was made of all memorandum decisions issued in calendar years 2013 and 2014 by one of the nine, full-time judges, except for those that resolved a motion for attorney's fees, a petition for extraordinary relief under the All Writs Act, or the issue whether the court had jurisdiction over the appeal. In other words, the empirical analysis was limited to single-judge memorandum decisions that reached an outcome on the merits of an appellant's challenge to a BVA decision denying VA benefits. Resolving these challenges is the central role of the CAVC.<sup>107</sup>

As the court's annual reports reflect, there are three possible outcomes to an appeal of a BVA decision over which the court has jurisdiction: the Board decision denying benefits is either (1) affirmed, (2) reversed, or (3) vacated and remanded for further administrative proceedings. For each memorandum decision on the study's list, the list was annotated with the name of the judge and one of the following four possible outcomes: "affirmed;" "vacated and remanded;" "reversed and ordered" (meaning the court both reversed the BVA's denial of a benefits claim and ordered the VA to award benefits) or "reversed and remanded" (meaning the court reversed the BVA's denial of a benefits claim, but remanded for further administrative proceedings without ordering the award of benefits).

In most of the memorandum decisions, the appellant only challenged—and the court only reached an outcome regarding—a BVA denial of one claim for benefits.<sup>108</sup> In some of the

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<sup>107</sup> 38 U.S.C. § 7252(a) provides that the CAVC has "exclusive jurisdiction to review decisions of the Board of Veterans' Appeals," *id.*

<sup>108</sup> More than 90% of the decisions issued by the Board of Veterans' Appeals involve claims for service-connected

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memorandum decisions, however, the judge reached an outcome on the appellant's challenge to the BVA's denial of more than one claim for benefits. In these latter cases, the study separately credited the outcome assigned by the judge to the appeal of each claim. Therefore, if the appellant challenged and the memorandum decision (a) affirmed the BVA's denial of service connection for a mental disorder, (b) affirmed the BVA's denial of service connection for an ankle condition, (c) vacated and remanded the BVA's denial of an increased disability rating for the veteran's service-connected knee condition, and (d) affirmed the BVA's denial of an earlier effective date for the award of service connection for a back disorder, the list was annotated to credit the authoring judge with three affirmance decisions and one vacated and remanded decision.

For purposes of this article, for each calendar year, each affirmance outcome reached by a particular judge in a memorandum decision was added together to obtain the aggregate number of affirmances for that judge in that calendar year. The same process was used to obtain the aggregate number of each of the other outcomes for that judge in that calendar year. The aggregate number of each possible outcome for each of the nine full-time judges was then placed into the three tables that appear in Section IV below. The names of the judges do not appear in the tables; instead, each judge was assigned a different letter and referred to as "Judge A," "Judge B," "Judge C," etc. The letter assigned to each judge is the same for both calendar year 2013 and 2014.

## **IV. Results**

### *A. Summary of Data*

The three tables below contain the results of the survey of single-judge decisions in calendar years 2013 and 2014. The second table contains the results for calendar year 2013, the third

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disability compensation. *See, e.g.*, BOARD OF VETERANS' APPEALS ANNUAL REPORT, FISCAL YEAR 2014, at 26 (reporting that 94.8% of the decisions issued by the Board in fiscal year 2014 were made on these types of claims), available at [http://www.bva.va.gov/Chairman\\_Annual\\_Rpts.asp](http://www.bva.va.gov/Chairman_Annual_Rpts.asp). Therefore, the vast majority of the appeals that come before the CAVC involve a challenge to a BVA decision involving service-connected disability compensation benefits. Some of these BVA decisions deny a claim for service connection for a particular injury or disease. Other BVA decisions deny a claim for an increase in the disability rating for an injury or disease that the VA has already deemed to be service connected. Still other BVA decisions deny a claim for an earlier effective date for the award of service connection or an increased disability rating for a particular injury or disease.



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table contains the results for calendar year 2014, and the first table combines the results of the second and third tables into one table.

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**2013 - 2014 Total**

<b>Judge</b>	<b>Claims Affirmed</b>	<b>Reverse &amp; Order</b>	<b>Reverse and Remand</b>	<b>Vacate &amp; Remand</b>	<b>Other</b>	<b>Total Claims</b>	<b>Affirmance Rate</b>
A	140	6	5	323	3	477	29%
B	246	4	18	196	4	468	53%
C	103	6	7	318	1	435	24%
D	222	4	5	150	1	382	58%
E	286		2	160	8	456	63%
F	260	3	14	158	3	438	59%
G	255	7	5	231	5	503	51%
H	181	2		281	4	468	39%
I	203	4	6	254	3	470	43%
<b>Grand Total</b>	<b>1,896</b>	<b>36</b>	<b>62</b>	<b>2,071</b>	<b>32</b>	<b>4,097</b>	<b>47%</b>

**2013**

<b>Row Labels</b>	<b>Claims Affirmed</b>	<b>Reverse &amp; Order</b>	<b>Reverse and Remand</b>	<b>Vacate &amp; Remand</b>	<b>Other</b>	<b>Total Claims</b>	<b>Affirmance Rate</b>
A	60	1	1	147	1	210	29%
B	120	2	15	119		256	47%
C	48	2	4	128	1	183	26%
D	117	3	2	67	1	190	62%
E	156		1	82	1	240	65%
F	147	2	11	87		247	60%
G	152	5	4	128		289	53%
H	94			125	2	221	43%
I	101	4		114	1	220	46%

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<b>Grand</b>								
<b>Total</b>	<b>995</b>	<b>19</b>	<b>38</b>	<b>997</b>	<b>7</b>	<b>2,056</b>	<b>48%</b>	

**2014**

<b>Row Labels</b>	<b>Claims Affirmed</b>	<b>Reverse &amp; Order</b>	<b>Reverse and Remand</b>	<b>Vacate &amp; Remand</b>	<b>Other</b>	<b>Total Claims</b>	<b>Affirmance Rate</b>
A	80	5	4	176	2	267	30%
B	126	2	3	77	4	212	59%
C	55	4	3	190		252	22%
D	105	1	3	83		192	55%
E	130		1	78	7	216	60%
F	113	1	3	71	3	191	59%
G	103	2	1	103	5	214	48%
H	87	2		156	2	247	35%
I	102		6	140	2	250	41%
<b>Grand</b>							
<b>Total</b>	<b>901</b>	<b>17</b>	<b>24</b>	<b>1074</b>	<b>25</b>	<b>2041</b>	<b>45%</b>

The second table shows that for calendar year 2013, the mean affirmance rate for the nine full-time judges was 48% and the median affirmance rate was 47%. The variance in the affirmance rates among the nine judges was between a low of 26% (for Judge C) and a high of 65% (for Judge E). In other words, in 2013, Judge E was 2.5 times more likely to affirm a challenge to a BVA decision denying a claim for benefits than Judge C. In 2013, Judges D, E, and F were each over twice as likely to affirm a challenge to a BVA decision denying a benefits claim as either Judge A or Judge C.

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A statistical analysis of the second table confirms that the large variance in 2013 in the affirmance rates among the nine CAVC judges cannot be explained by chance.<sup>109</sup> That is, the results show that single judges in 2013 reached outcomes in some individual appeals that would result in a different outcome had the appeal been adjudicated instead by one or more of the other judges. This is compelling evidence that single judges issued a significant number of memorandum decisions in 2013 that were reasonably debatable, in violation of the last *Frankel* criterion.

The third table shows that the results for calendar year 2014 are nearly the same as for calendar year 2013. In 2014, the mean affirmance rate for the nine full-time judges was 45%, and the median affirmance rate was 48%. The judge with the highest affirmance rate (60%) in 2014 was Judge E, the same judge who had the highest affirmance rate in 2013. The judge with the lowest affirmance rate (22%) in 2014 was Judge C, the same judge who had the lowest affirmance rate in 2013. In 2014, as in 2013, Judge E was over 2.5 times more likely to affirm a challenge to a BVA decision denying a claim for benefits than Judge C. In 2014, Judges B, D, E, and F as an aggregate were over twice as likely to affirm a challenge to a BVA decision denying a benefits claim as Judges, A, C, and H, as an aggregate. Each individual judge had a relatively small variance in his or her affirmance rate between calendar years 2013 and 2014.

As with 2013, a statistical analysis of the third table is that the large variance in 2014 in the affirmance rates among the nine CAVC judges cannot be explained by chance.<sup>110</sup> In other words, single judges in both 2013 and 2014 reached outcomes in some individual appeals that would result in a different outcome had the appeal been adjudicated instead by one or more of the other judges. This further confirms the fact that single judges issued a significant number of memorandum decisions in these years that were reasonably debatable, in violation of the last *Frankel* criterion.

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<sup>109</sup> For the second table, the chi square equals 126.9; *df* equals 8, with a *p* of < .001. “Chi square” is a test of significance that allows the user to determine whether the variance in results are simply a function of chance. See, e.g., RICHARD A. WEHMHOFER, *STATISTICS IN LITIGATION*, Ch. 4 (1985). A *p* value of less than 0.05 is considered statistically significant. See generally Alyssa A. DiRusso, *Testacy and Intestacy: The Dynamics of Wills and Demographic Status*, 23 QUINNIPIAC PROB. L.J. 36, 41 (2009) (discussing interpretation of chi-square statistics).

<sup>110</sup> For the third table, the chi square equals 151.9; *df* equals 8, with a *p* of < .001.

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B. *Examples of Inconsistent Outcomes*

The historical record of judicial review provided by the CAVC combined with the large variance in outcomes among the judges in their single-judge decisionmaking suggests that the court may not be following other *Frankel* criteria besides the last criterion. As the Supreme Court has noted, “veterans have a remarkable record of success before” the CAVC.<sup>111</sup> The CAVC has ordered some form of relief in nearly 80% of its merits decisions.<sup>112</sup> In the large majority of the cases in which the court has ordered some form of relief, it has vacated or reversed the Board’s decision denying relief based on the court’s finding that the agency has committed one or more administrative errors.<sup>113</sup> These errors include the agency’s prejudicial failure to comply with its legal obligations to the veteran, including its failure to provide an adequate explanation for its decision to deny relief.

When the court concludes that the agency erred, the court usually bases its finding of error on an interpretation of the statutes, regulations, and other legal authorities that create the legal obligation that the agency violated. Accordingly, the large variance in outcomes among the judges in their single-judge decisionmaking suggests that the court may also be ignoring the first,

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<sup>111</sup> *Henderson v. Shinseki*, 562 U.S. 428, 432 (2011).

<sup>112</sup> See Barton F. Stichman, Ronald B. Abrams, & Louis J. George, VETERANS BENEFITS MANUAL at § 1.1 (2014) (“During fiscal years 1995 through 2013, the CAVC had jurisdiction over and completed its review in 42,305 cases in which the VA claimant had appealed a BVA decision denying benefits. In 32,340 of these 42,305 cases (. . . 76 percent) the Court either reversed the BVA decision or (much more often) vacated the BVA decision (at least in part) and remanded it for readjudication.”); *Henderson v. Shinseki*, 562 U.S. 428, 432 (2011) (“Statistics compiled by the Veterans Court show that in the last decade [from 2001-2011], the court ordered some form of relief in around 79% of its ‘merits decisions.’”).

<sup>113</sup> The statistics kept by the CAVC evidence that most Board decisions that are vacated and remanded or reversed are based on a court finding of error or a concession of error by the Secretary of Veterans Affairs. In order for an appellant to be awarded attorney’s fees by the CAVC under the Equal Access to Justice Act (EAJA), 24 U.S.C. § 2412(d), the appellant must at minimum obtain a court order either reversing or vacating and remanding the Board decision, in whole or in part, and that relief must be “predicated on an administrative error” in that either (a) the court expressly acknowledged error or (b) the government acknowledged error in pleadings filed with the court and the court predicated its relief on that concession of error. *Gurley v. Peake*, 528 F.3d 1322 (Fed. Cir. 2008); see also *Davis v. Nicholson*, 475 F.3d 1360 (Fed. Cir. 2007). In its annual report for fiscal year 2014, the court reported that it reversed or vacated and remanded, at least in part, in 2,629 appeals, and it awarded attorney fees under the EAJA in 2,356 appeals. See CAVC FY14 ANNUAL REPORT, *supra* note 51 at 2-3. Similarly, in its annual report for fiscal year 2013, the court reported that it reversed or vacated and remanded, at least in part, in 2,362 appeals, and it awarded attorney fees under the EAJA in 2,152 appeals. See CAVC FY13 ANNUAL REPORT, *supra* note 51 at 2-3. It therefore follows that in the large majority of the appeals in which the court has ordered some form of relief, the relief is based on a finding that the agency committed one or more errors.

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second, and third *Frankel* criteria. These criteria forbid a single judge from issuing a decision that would, if issued by a panel, “establish a new rule of law”, “alter, modify, criticize, or clarify an existing rule of law” or “apply an established rule of law to novel fact situation.”<sup>114</sup>

Set forth below are two examples of inconsistent single-judge decisionmaking in which the court violated one of the first three *Frankel* criteria as well as the last criterion, which provides that a single-judge decision can only be issued if “the outcome [of the appeal] is not reasonably debatable.”<sup>115</sup>

1. The Proper Construction of the Regulatory Disability Rating Criteria for Mental Disorders

The amount of monthly disability compensation paid to a veteran with a service-connected disability depends upon the magnitude of the disability rating that the VA assigns to the disability.<sup>116</sup> The disability rating criteria for a mental disorder are set forth in 38 C.F.R. § 4.130 and provide for six possible disability ratings: 0, 10, 30, 50, 70 and 100 percent. That regulation provides that a 70-percent disability rating is warranted for “[o]ccupational and social impairment, with deficiencies in most areas, such as work, school, family relations, judgment, thinking or mood, due to such symptoms as: suicidal ideation . . . .”<sup>117</sup> “Suicidal ideation” is referenced only in the criteria for a 70-percent disability. The regulation does not define “suicidal ideation,” and does not include any qualifying factors such as intent, severity, or duration of the suicidal ideations. The criteria for a 100-percent disability rating set forth in 38 C.F.R. § 4.130 are “[t]otal occupational and social impairment, due to such symptoms as: . . . *persistent* danger of hurting self or others,”<sup>118</sup> indicating that the frequency of this danger is to be taken into account for a 100-percent disability rating.

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<sup>114</sup> *Frankel v. Derwinski*, 1 Vet. App. 23, 25-26 (1990).

<sup>115</sup> *Id.*

<sup>116</sup> See 38 U.S.C. §§ 1114, 1115, and 1134.

<sup>117</sup> For precedential decisions interpreting the criteria involved in assigning a disability rating to service-connected mental disorders, see *Vazquez-Claudio v. Shinseki*, 713 F.3d 112, 115 (Fed. Cir. 2013), and *Mauerhan v. Principi*, 16 Vet.App. 436, 442 (2002).

<sup>118</sup> 38 C.F.R. § 4.130 (emphasis added).

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There are many instances in which a veteran with a 50-percent disability rating for a mental disorder has appealed a Board decision that denied a 70-percent disability rating—a rating that would increase the veteran's disability payment by more than \$5,880 per year.<sup>119</sup> In many single-judge memorandum decisions, the court reviewed a BVA decision that denied a 70-percent rating at least in part on one or both of the following two grounds: although the record contained evidence that the veteran suffered from suicidal ideation, the veteran (1) did not experience suicidal ideation on some occasions, and/or (2) had no active intent or plan to commit suicide.<sup>120</sup>

On one side, the following three memorandum decisions held that the Board's denial of a 70-percent rating must be vacated and remanded because this Board rationale is inconsistent with the meaning of the phrase "suicidal ideation" in the VA regulation. In *Hartford v. McDonald*,<sup>121</sup> a single judge held that "[t]he criteria for a 70% disability rating includes 'suicidal ideation' as a symptom; the criteria do not require that the claimant suffer from continual suicidal ideation or endorse that symptom at every medical examination."<sup>122</sup> In *Gordon v. McDonald*,<sup>123</sup> a different single judge held that, "[s]ignificantly, the criteria for a 70% evaluation lists 'suicidal ideation' without requiring that the claimant suffer from continuous suicidal ideation, endorse that symptom at every medical examination, or have formed a plan to act on that ideation."<sup>124</sup> Finally, in *Reel v. Gibson*,<sup>125</sup> the same judge who decided *Gordon* held that "[t]he regulation lists the symptom of 'suicidal ideation' and does not require that a claimant suffer continuous suicidal

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<sup>119</sup> See 38 U.S.C. § 1114(e), (g).

<sup>120</sup> See, e.g., *Street v. McDonald*, 2015 U.S. App. Vet. Claims LEXIS 884 (June 30, 2015); *Hartford v. McDonald*, 2015 U.S. App. Vet. Claims LEXIS 792 (June 17, 2015); *Gordon v. McDonald*, 2015 U.S. App. Vet. Claims LEXIS 37 (Jan. 16, 2015); *Surface v. McDonald*, 2014 U.S. App. Vet. Claims LEXIS 1542 (Sept. 11, 2014); *Reel v. Gibson*, 2014 U.S. App. Vet. Claims LEXIS 1080 (June 24, 2014); *McGee v. Shinseki*, 2013 U.S. App. Vet. Claims LEXIS 1842 (Nov. 5, 2013).

<sup>121</sup> 2015 U.S. App. Vet. Claims LEXIS 792 (June 17, 2015).

<sup>122</sup> *Id.* at \*24.

<sup>123</sup> 2015 U.S. App. Vet. Claims LEXIS 37 (Jan. 16, 2015).

<sup>124</sup> *Id.* at \*14.

<sup>125</sup> 2014 U.S. App. Vet. Claims LEXIS 1080 (June 24, 2014).

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ideation, endorse suicidal ideation at every medical examination, have at least moderate or severe suicidal ideation, or have formed a plan to carry out suicidal ideation.”<sup>126</sup>

On the other side, in *Street v. McDonald*,<sup>127</sup> a third judge construed the 70-percent regulatory rating criteria in a way that is inconsistent with *Hartford*, *Gordon*, and *Reel*. In *Street*, the veteran contended that the Board’s reliance on the fact that, “although [the veteran] had suicidal ideation, she did not have a plan to commit suicide,” is contrary to the 70-percent rating criteria “because a plan to commit suicide is not listed in the rating schedule.”<sup>128</sup> The judge in *Street* rejected this argument, because the “record reflects that Mrs. Street suffered from *passive* suicidal ideation, which, as so qualified, is not a specified rating factor.”<sup>129</sup> This same judge construed the rating criteria in the same way in *McGee v. Shinseki*.<sup>130</sup> In *Surface v. McDonald*,<sup>131</sup> a fourth judge also reached an interpretation of the rating criteria that is at odds with the holdings in *Hartford*, *Gordon*, and *Reel*.<sup>132</sup>

These six memorandum decisions reflect that the court did not follow the first *Frankel* criterion, which forbids a single judge from issuing a decision that would, if issued by a panel, “establish a new rule of law.” No precedential decision of the CAVC exists that addresses whether, as the single judges in *Hartford*, *Gordon*, and *Reel* held, the phrase “suicidal ideation” in the regulatory criteria for a 70-percent disability rating for mental disorders does not require that the claimant (a) suffer from continual suicide ideation, (b) endorse that symptom at every medical examination, or (c) have formed a plan to act on that ideation. Indeed, these three memorandum decisions did not even cite a precedential decision that helped inform them on the proper construction of “suicidal ideation.” Therefore, due to the first *Frankel* criterion, the merit

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<sup>126</sup> *Id.* at \*14.

<sup>127</sup> 2015 U.S. App. Vet. Claims LEXIS 884 (June 30, 2015).

<sup>128</sup> *Id.* at \*3.

<sup>129</sup> *Id.* (emphasis in original).

<sup>130</sup> 2013 U.S. App. Vet. Claims LEXIS 1842 at \*14 (Nov. 5, 2013) (concluding that the Board adequately explained its denial of a 70% rating despite evidence of suicidal ideation, because the Board “noted that [the veteran] had no intent or plan to commit suicide . . .”).

<sup>131</sup> 2014 U.S. App. Vet. Claims LEXIS 1542 (Sept. 11, 2014)

<sup>132</sup> *Id.* at \*10, \*14 (rejecting appellant’s argument—that the Board erred by basing its denial of a 70% rating “on the lack of certain symptoms listed under the criteria for a 70% rating . . . [given] his reports of suicidal thoughts in September 2008,”—because the “Board . . . found that he denied any suicidal ideation multiple other times.”).



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of these interpretations of law should have been decided by a panel in a precedential decision, rather than by a single judge in a nonprecedential memorandum decision—even if all nine judges would have agreed with these interpretations of law (which, as *Street*, *McGee*, and *Surface* show, they would not).

These six memorandum decisions are examples of a court failing in its role as a national lawgiver, which results when the court does not adhere to the *Frankel* criteria. This failure has an adverse impact on the claims adjudication process. Inconsistent nonprecedential decisions on the proper meaning of the 70-percent disability rating regulation leaves veterans, the VA regional offices, and the Board of Veterans' Appeals without binding guidance on how the phrase "suicidal ideation" should be interpreted. Accordingly, the VA regional offices and the BVA are free to continue to interpret the phrase "suicidal ideation" as they did in the cases covered by these six memorandum decisions. This, in turn, generates additional appeals both within VA and to the CAVC. Veterans receiving compensation for a mental disorder who suffer from what the single judge in *Street* called "passive suicide ideation" are encouraged to appeal a VA denial of a 70-percent disability rating to the Board of Veterans' Appeals and the CAVC in the hope that their appeal will be assigned to a judge who authored or agrees with the holdings in *Hartford*, *Gordon*, and *Reel*, rather than a judge who authored or agrees with the holdings in *Street*, *McGee*, and *Surface*. The lack of binding precedent on the proper construction of a statute or regulation exacerbates the existing backlog of pending appeals within VA and leads to inconsistent outcomes for similarly situated veterans.

## 2. The Adequacy of the Board's Explanation for Denying an Extraschedular Rating in Hearing Loss Cases

A second example of inconsistent memorandum decisions involves the most common type of error for which the CAVC has vacated and remanded a Board decision: the Board's failure to provide an adequate statement of its "reasons or bases" for its findings and conclusions on all material issues of fact and law, as required by 38 U.S.C. § 7104(d).<sup>133</sup> Congress enacted this

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<sup>133</sup> See, e.g., Stichman et al. *supra* note 113, at § 14.5.5.

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provision at the same time it created the CAVC in 1988 to “assist the reviewing court to understand and evaluate the VA adjudicative action.”<sup>134</sup>

Generally, disability ratings for hearing loss are derived from the mechanical process of applying the VA rating schedule to the specific numeric scores assigned by audiology testing, but, for exceptional cases, a VA regulation authorizes the assignment of a higher, “extraschedular” rating.<sup>135</sup> The threshold question in determining whether a veteran is entitled to an extraschedular rating under the VA regulation is whether the evidence presents “such an exceptional disability picture that the available schedular evaluations for that service-connected disability are inadequate.”<sup>136</sup> The CAVC held in a 2008 precedential decision that whether a veteran is entitled to an extraschedular rating under the regulation is a three-step inquiry, the first step of which is whether the regulatory rating criteria in the VA rating schedule evaluation contemplates the veteran’s disability level and symptomatology.<sup>137</sup>

In many cases in which the Board denies an extraschedular rating for hearing loss under the first step of the three-step inquiry, the Board’s explanation for its first-step conclusion is limited to the following type of conclusory language:

Considering the first prong under *Thun*, the Board concludes that the evidence in this case does not show such an exceptional disability picture that the available scheduler evaluation for the service-connected hearing loss disability is inadequate. A comparison between the level of severity and symptomatology of the Veteran’s hearing loss disability with the established criteria reasonably describes the Veteran’s disability level and symptomatology.<sup>138</sup>

In some memorandum decisions, a single judge vacated and remanded the Board denial of an extraschedular rating on the ground that this type of conclusory explanation is not an adequate statement of the Board’s “reasons or bases” for its first step conclusion, within the meaning of 38

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<sup>134</sup> *Gilbert v. Derwinski*, 1 Vet. App. 53, 56 (1990) (citing S. REP. NO. 418, 100<sup>th</sup> Cong., 2d Sess. 38 (1988)).

<sup>135</sup> *See Lendenmann v. Principi*, 3 Vet. App. 345, 349 (1992); 38 C.F.R. § 4.85, Diagnostic Codes (DCs) 6100—6110 (2014); 38 C.F.R. § 3.321(b)(1) (2015).

<sup>136</sup> *Thun v. Peake*, 22 Vet. App. 111, 115 (2008).

<sup>137</sup> *Id.*

<sup>138</sup> *E.g.*, Board decision at 11 in *Grant v. McDonald*, 2015 U.S. App. Vet. Claims LEXIS 44 (Jan. 20, 2015).

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U.S.C. § 7104(d).<sup>139</sup> However, in other memorandum decisions involving essentially the same conclusory Board language, single judge affirmed the Board's denial of an extraschedular rating and held that the Board provided an adequate statement of its "reasons or bases" for its first step conclusion, within the meaning of 38 U.S.C. § 7104(d).<sup>140</sup>

These inconsistent decisions on the statutory baseline for a Board conclusion that the veteran's claim for an extraschedular rating for hearing loss does not satisfy the first step of *Thun* leave the Board without binding guidance on the type of analysis it needs to provide. Accordingly, the Board is free to continue to provide conclusory explanations for its conclusion on the first step of *Thun*. This, in turn, encourages veterans to appeal these Board decisions to

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<sup>139</sup> See, e.g., *Grant v. McDonald*, 2015 U.S. App. Vet. Claims LEXIS 44 at \*9 (Jan. 20, 2015) (holding that, although "the Board acknowledged that the appellant's hearing loss is marked by difficulty hearing over the telephone and amidst background noise, [it] failed to explain how the functional effects of his hearing loss are contemplated by the rating schedule"); *Herrera v. Shinseki*, 2013 U.S. App. Vet. Claims LEXIS 1356 at \*22 (Aug. 14, 2013) ("[T]his statement of reasons or bases [is] . . . inadequate. The Board fails to explain why the evidence of the appellant's disability picture is captured by the existing disability rating. As the Board conceded in its analysis . . . , the rating criteria for hearing loss involve a 'mechanical' correlation to audiometric test results. Contrary to the Board's conclusion, it is not obvious that the hearing loss rating criteria contemplate the disability picture reported by the appellant in this case"); *Lighthouse v. Shinseki*, 2012 U.S. App. Vet. Claims LEXIS 1899 at \*5 (Aug. 31, 2012) ("The Board's statement of reasons or bases regarding extraschedular consideration is inadequate. A conclusory statement that there is no objective evidence that Mr. Lighthouse's symptoms of disability are not contemplated by the rating schedule does not explain to the Court or the veteran how a rating criterion that exclusively considers the factors of speech discrimination and puretone threshold averages accounts for Mr. Lighthouse's inability to communicate in certain common situations or his inability to control the volume of his hearing aids.").

<sup>140</sup> See, e.g., *Dedrick v. Shinseki*, 2014 U.S. App. Vet. Claims LEXIS 552 at \*15-16 (Apr. 14, 2014) (holding that the Board's statement of "reasons or bases" was adequate when "the Board discussed the appellant's complaints of difficulty with conversations, inability to hear the doorbell, inability to drive because he cannot hear traffic sounds, and having to work only independently as a carpenter because he cannot hear other workers when working in a group [but] . . . found that none of the symptoms described rendered the schedular criteria inadequate"); *Kinnavy v. Shinseki*, 2013 U.S. App. Vet. Claims LEXIS 1237 at \*11 (July 30, 2013) (stating that "[t]he Board found that difficulty hearing is contemplated by the rating criteria and . . . also found that his symptoms are not so unusual as to take his disability outside the purview of [the hearing loss rating criteria, which are] meant to compensate individuals who suffer from hearing loss. The Court concludes that the Board provided adequate reasons and bases for its decision"); *Mania v. Shinseki*, 2013 U.S. App. Vet. Claims LEXIS 972 at \*7, \*10 (June 18, 2013) (holding that the Board's statement of reasons or bases is adequate when "the Board determined that the *Thun* threshold factor was not satisfied because the schedular rating criteria contemplated the level of severity and symptomatology of the appellant's disability picture [and] . . . stated that '[t]he VA examinations for rating purposes test speech discrimination ability in an effort to consider impairment in the ability to understand speech.' . . . Thus, the Board found that, '[t]he [appellant's] disability picture is contemplated by the rating schedule'").

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the CAVC in the hope that their appeal will be assigned to a judge who believes that these conclusory explanations do not satisfy 38 U.S.C. § 7104(d).

## V. Analysis

### A. Comparison to Other Studies of Variance

In a vacuum, the variance among the judges with the lowest rates of outcomes favorable to appellants in the two-year period from 2013-14 (24% and 29%) and those with the highest rates during this two-year period (59% and 63%) seems pretty extreme. This suggests that, for as much as a third of the time, the outcome of an appeal to the CAVC depends upon the judge to whom it is assigned.<sup>141</sup> Without granular data on how outcomes vary by issue, it is impossible to prepare a precise analysis of just how much an outcome depends upon the assignment. However, the variation across such a large sample suggests that there is a real problem with the court's use of its single-judge authority.

To better appreciate whether the variance seen in this sample is extreme, it is helpful to look at other studies of appellate decisionmaking. No one expects all judges to reach the same conclusion in every case, and a certain degree of variance is inevitable. However, comparing the variance across the two years studied here to other studies on judicial variance suggests that the outcomes at the CAVC are quite extreme.

There are a number of studies that have quantified such variance in other contexts. Some studies have found no variance when looking at potential drivers. An early study of judicial attitudes toward the role of the judge found no variance in outcomes, regardless of whether the judge was oriented as a law interpreter, lawgiver, or pragmatist.<sup>142</sup> Another study found

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<sup>141</sup> The one-third figure is a rough estimate. On the one hand, it cannot be assumed that the judges have perfect concordance, i.e., that a judge with a low affirmance rate would affirm every single case that a judge with a higher affirmance rate would. In fact, it is probable that there are some pockets about which judges with substantially variant tendencies would actually disagree in the opposite way from their dominant outcomes. See Joshua B. Fischman, *Measuring Inconsistency, Indeterminacy, and Error in Adjudication*, 16 AM. L. & ECON. REV. 40, 47-53 (2014) (discussing a mathematical framework for measuring the degree to which judges' with different tendencies overlap in their outcomes). On the other hand, the variance among the other five judges of the court is less extreme, but still substantial.

<sup>142</sup> See J. Woodford Howard, *Role Perceptions and Behavior in Three U.S. Courts of Appeals*, 39 J. POL. 916, 928 (1977).

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appellate panels whose ideology was opposite that of the trial judge were no more likely to reverse the decision below than if they shared the ideology of the trial judge.<sup>143</sup> Furthermore, one of the most exhaustive recent studies of appellate court decisionmaking concluded that outcome variance based upon ideology was very small.<sup>144</sup>

Nonetheless, some studies have found detectable amount of variance in outcomes based upon the judge assigned. One study of civil rights and civil liberties cases found a 6.4% difference between judges appointed by presidents of the different parties.<sup>145</sup> Another study found a difference of 10% to 13% in judges across all types of cases based upon the party of the appointing president.<sup>146</sup> Yet another study of appointees based upon the party of the appointing president found a difference of 20% in civil rights and liberties cases and 10% in economic cases.<sup>147</sup> Virtually all of these variations are substantially smaller than that observed in the sample of CAVC cases. This supports the natural intuition that the variation among single-judge decisions here is unacceptably large.

#### B. *Diagnosing the Root Cause of Variance*

Although the variance discussed above is deeply troubling, it is ultimately just a symptom. An even more important issue is identifying the root cause so that it can be addressed. As outlined by Professor Frank Cross, there are four major theories about what drives appellate decisionmaking.<sup>148</sup> First, the classic legal theory of decisionmaking envisions that “judges decide cases through systematic application of the external, objective sources of authority.”<sup>149</sup> Second, the political theory posits that decisionmaking is driven by the ideologies of the judges.<sup>150</sup> Third, the strategic theory blends the first two theories into a view that judges

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<sup>143</sup> See VIRGINIA A. HETTINGER, STEFANIE A. LINDQUIST & WENDY L. MARTINEK, JUDGING ON A COLLEGIAL COURT: INFLUENCES ON FEDERAL APPELLATE DECISION MAKING 98-99, 117-19 (2006).

<sup>144</sup> See FRANK B. CROSS, DECISION MAKING IN THE U.S. COURT OF APPEALS 38 (2007).

<sup>145</sup> See DONALD R. SONGER ET AL., CONTINUITY AND CHANGE ON THE UNITED STATES COURTS OF APPEALS 115 (2000).

<sup>146</sup> See C.K. ROWLAND & ROBERT A. CARP, POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS 34 (1996).

<sup>147</sup> See Jon Gottschall, *Reagan's Appointments to the U.S. Courts of Appeals: The Continuation of a Judicial Revolution*, 70 JUDICATURE 53 (1986).

<sup>148</sup> See Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CAL. L. REV. 1457, 1459 (2003).

<sup>149</sup> See *id.* at 1462.

<sup>150</sup> See *id.* at 1471.

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consciously try to achieve strategic goals for the development of the law, but do so through sophisticated decisionmaking based upon institutional understanding and recognition of external forces.<sup>151</sup> Therefore, personal preference in an individual case may be subordinate to long-term objectives. Finally, the litigant-driven theory of decisionmaking suggests that it is largely driven by how the cases are framed by the parties.<sup>152</sup>

Professor Cross's empirical work studying the federal appellate courts of general jurisdiction concluded that the classic legal model explains a significant portion of decisionmaking, although some ideological effects are also present.<sup>153</sup> He found little, if any, evidence of that the latter two theories explained appellate decisionmaking.<sup>154</sup> Nonetheless, it is fair to consider whether there are any features of CAVC decisionmaking that would make the strategic or litigant-driven models useful in understanding the variance observed among the judges.

The strategic model would not seem to have an obvious application to single-judge decisionmaking. Single-judge decisions do not require accommodating the votes of other judges to reach a particular outcome. As the decisions are nonprecedential, they are far less threatening to other judges on the CAVC who may disagree with the reasoning and analysis, or challenge the decision if it were binding. Institutionally, the available data does not indicate that deciding a case through a memorandum decision has much strategic effect on whether a case will be appealed to the Federal Circuit or how it will be resolved there.<sup>155</sup> To be clear, strategic considerations may affect a judge's choice not to call a case for a panel opinion,<sup>156</sup> but it is not apparent that they would systematically affect outcomes in a way that could explain the large variance observed.

The litigant-driven model also does not explain the variation. To the extent that litigants make different tactical choices in framing arguments, this should not create variance because

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<sup>151</sup> See *id.* at 1483.

<sup>152</sup> See *id.* at 1491.

<sup>153</sup> See *id.* at 1514.

<sup>154</sup> See *id.*

<sup>155</sup> See James D. Ridgway, *Fresh Eyes on Persistent Issues: Veterans Law at the Federal Circuit in 2012*, 62 AM. U. L. REV. 1037, 1100-01 (2013) (observing that most published Federal Circuit decisions in veterans law in 2011 and 2012 stemmed from single-judge decisions by the CAVC).

<sup>156</sup> See *infra* note 225 and accompanying text.

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cases are assigned randomly, so no judge should see a significantly different mix of tactics across a sample of over 4,000 cases. Moreover, the veterans' bar has historically been small, and a handful of firms handle a large portion of the cases at the court.<sup>157</sup> If anything, to the extent that these firms represent large numbers of similar clients and use similar tactics, the variation in outcome among the judges would reinforce the notion that it is not the specific arguments being made that is driving the variance, but something intrinsic to the judges who are deciding similar cases differently.

Turning to the two views supported by Professor Cross's work—decisions are driven by neutral application of the law and decisions are driven by ideology—there are two basic possibilities for interpreting the variance observed in CAVC decisions. Either the applicable law is determinate and some judges are choosing not to follow it for ideological reasons, or the law is indeterminate, which allows judges to reach opposite conclusions on substantially similar appeals.<sup>158</sup> If the first case were true, then the court would be failing to fulfill its role as an error corrector. If the second case were true, then the court would be failing to fulfill its role as a law giver.<sup>159</sup>

As to the first possibility—willful or unconscious resistance to application of settled law by some judges—willful resistance is an unlikely explanation of the variance at the CAVC. There

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<sup>157</sup> For example, a search of the court's docket database for cases filed in 2013 or 2014 with representation by attorney Glenn Bergmann produced 637 results. See <https://efiling.uscourts.cavc.gov/cmecf/servlet/TransportRoom>. Similarly, a search of the same time period for appellants represented by attorney Robert Chisholm produced 2,630 results. See *id.*

<sup>158</sup> See Joshua B. Fischman, *Measuring Inconsistency, Indeterminacy, and Error in Adjudication*, 16 AM. L. & ECON. REV. 40, 42 (2014) (arguing that legal indeterminacy and legal error are alternatives such that it is possible "to construct an 'indeterminacy-error curve' that demarcates a boundary between feasible and infeasible combinations of indeterminacy and error rates" when looking at variance in outcomes among judges). Of course, it is also possible that the variance is caused by a combination of both factors to varying degrees. However, this article's following analysis suggests that one cause is highly likely to dominate as the cause of the variance.

<sup>159</sup> One could argue that it is also possible that the field of veterans law simply has a greater degree of intrinsic uncertainty than other areas of law, which would limit the law-giving ability of the court. However, it does not follow that such uncertainty would lead to chronic variance on appellate review. Rather, to the extent that the law is subjective or discretionary, it is the role of appellate courts, including the CAVC, to defer to the decision of the agency, absent an abuse of discretion. See 38 U.S.C. § 7261(a)(3). Assuming good faith, chronic variance should be interpreted as a sign that an appellate court is either failing to make the law definite through its published opinions or is failing to recognize that the area of law is inherently subjective or discretionary and to apply the appropriate deference.

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is no available evidence to suggest that is occurring there. Willful resistance is typically associated with strong ideological beliefs or partisan policy preferences.<sup>160</sup> Since World War II, veterans benefits policy has been viewed as an island of bipartisan agreement, even when there have been strong disagreements on other issues.<sup>161</sup> There is no identifiable “conservative” or “liberal” approach to veterans law, and although the court’s organic statute limits each political party to no more than a simple majority of seats on the court,<sup>162</sup> there are no obvious voting patterns based upon the political affiliation of the judges.<sup>163</sup> Moreover, in the opinion of these authors who have decades of combined experience with the court, the CAVC does not suffer from any overt ideological or partisan divides.<sup>164</sup>

Unconscious bias also seems to be an improbable explanation. In addition to Professor Cross’s empirical findings discussed above, there is some recent scholarship that suggests that judges are actually very good at resisting injecting their own policy preferences into the resolution of cases when the outcomes are otherwise clear.<sup>165</sup> Moreover, unconscious bias requires some type of underlying preference or disposition that should not be a factor in the “correct” application of the law, which does not appear to be the situation, as discussed above.

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<sup>160</sup> See Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2161 (1998).

<sup>161</sup> See generally Ridgway, *The Splendid Isolation Revisited*, *supra* note 3, at 175. *But cf.* Stephen K. Trynosky, *Beyond the Iron Triangle: Implications for the Veterans Health Administration in an Uncertain Policy Environment* (2014) (monograph written for the School of Advanced Military Studies, United States Army Command and General Staff College), available at <http://cgsc.contentdm.oclc.org/cdm/singleitem/collection/p4013coll3/id/3283/rec/2>.

<sup>162</sup> See 38 U.S.C. § 7253(b) (“Not more than the number equal to the next whole number greater than one-half of the number of judges of the Court may be members of the same political party.”).

<sup>163</sup> Indeed, one of the strongest pairings among the first generation of judges was between the two judges with the most overtly opposite political backgrounds: Kenneth Kramer, a former Republican congressman, and Jonathan Steinberg, a former Democratic Senate staffer. They frequently joined each other’s opinions. *See, e.g.*, Mitchell v. Principi, 17 Vet. App. 495 (2004); Carpenter v. Gober, 14 Vet. App. 77 (2000); D’Amico v. West, 12 Vet. App. 357 (1999); Black v. West, 11 Vet. App. 15 (1998); Ditrich v. West, 11 Vet. App. 10 (1998); Bailey v. Gober, 10 Vet. App. 454 (1997); Black v. Brown, 10 Vet. App. 279 (1997); Green v. Brown, 5 Vet. App. 83 (1993).

<sup>164</sup> If there were a philosophical issue with which the court struggles, it is how to balance the fundamental principles of veteran-friendly interpretation and deference to the agency administering the system. *See* James D. Ridgway, *Toward a Less Adversarial Relationship Between Chevron and Gardner*, 9 U. MASS. L. REV. 388 (2014).

<sup>165</sup> *See* Dan M. Kahan et al., “Ideology” or “Situation Sense”? *An Experimental Investigation of Motivated Reasoning and Professional Judgment*, 164 U. PENN. L. REV. (forthcoming 2015), available at <http://ssrn.com/abstract=2590054>.



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The second possibility—that the law is substantially indeterminate—is the far more likely explanation for the variance. The fact that appealing to the CAVC is typically without cost to appellants could explain why the court would see a higher percentage of cases that do not present a debatable legal issue.<sup>166</sup> Nonetheless, the evidence of variance strongly suggests that the cases are at least debatable on the application—if not on the interpretation—of the law. There are strong reasons to think that the CAVC has failed to resolve as many issues as it should. Initially, as noted above, the percentage of the CAVC's decisions that are nonprecedential is substantially higher than that of other courts.<sup>167</sup> In particular, one study of publication rates in the geographic courts of appeals found that both small court size and a lower affirmance rate both correlated with higher publication rates.<sup>168</sup> Accordingly, it would seem that the CAVC should handle even more cases by published opinion than the average federal appellate court, instead of having far fewer. Moreover, the twelve percent publication rate of the geographic courts of appeals is roughly consistent with one appellate judge's subjective estimate of the percentage of cases that are “very hard.”<sup>169</sup> Most importantly, the examples of inconsistent decisions analyzed above<sup>170</sup> and in the prior articles examining the CAVC,<sup>171</sup> validate the belief that at least some portion of the variance is driven not by the application of settled law to diverse facts, but by the application of different views on novel legal issues.

Beyond the reasons examined above, at least two institutional reasons may also help explain why the court may overuse its single-judge authority. The first is path dependence.<sup>172</sup> The

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<sup>166</sup> See Ridgway, *Why So Many Remands?*, *supra* note 11, at 159-60.

<sup>167</sup> See *supra* notes 50-53, and accompanying text.

<sup>168</sup> See Stefanie A. Lindquist, *Bureaucratization and Balkanization: The Origins and Effects of Decision-Making Norms in the Federal Appellate Courts*, 41 U. RICH. L. REV. 659, 691-92 (2007).

<sup>169</sup> Hon. Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1898 (2009) (“I have estimated that in only 5 to 15 percent of the disputes that come before me in any given term do I conclude, after reviewing the record and all of the pertinent legal materials, that the competing arguments drawn from those sources are equally strong. . . . I view these cases as ‘very hard.’”).

<sup>170</sup> See Part IV.B *supra*.

<sup>171</sup> See Part II.B *supra*.

<sup>172</sup> Path dependence is the observation that people and institutions often remain rigidly committed to certain behaviors adopted when an initial decision was made, regardless of whether circumstances have changed such that the same decision would not be made today if the matter were considered with a clean slate. See Lawrence

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practice of using single-judge authority so extensively first developed very early in the court's history when the characteristics of the appeals were substantially different than they are today. As discussed above, *Frankel* was decided in an era when formal briefing by an attorney was the exception and many pro se arguments could be summarily rejected by reference to the plain language of the applicable authority.<sup>173</sup> This may have set an internal norm for the court of what types of cases are suitable for panel disposition, which has persisted even though the sophistication of the arguments and the complexity of veterans law have grown substantially over time.<sup>174</sup>

A second reason why the CAVC may overuse single-judge authority is a perception that panel opinions are far more time consuming than single-judge decisions and that the judges simply lack the time to decide more cases by panel than is currently the case.<sup>175</sup> Judge Richard Posner has asserted that “judicial behavior is best understood as a function of the incentives and constraints that particular legal systems place on their judges.”<sup>176</sup> The view that the court struggles with its caseload is certainly supported by public statements like those of retired Chief Judge Kramer quoted above,<sup>177</sup> suggesting that the judges of the court feel compelled to resolve most of the cases by single-judge decisions simply to keep up with the workload.<sup>178</sup>

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Friedman, *Path Dependence and the External Constraints on Independent State Constitutionalism*, 115 PENN ST. L. REV. 783, 799 (2011) (“In general, path dependence theory holds that, once we make the initial decision to pursue a certain path, subsequent decisions necessarily reflect and may perpetuate that initial decision, with the result that it may later prove difficult to change direction. Eventually, we will become ‘locked-in’ to our initial decision.”).

<sup>173</sup> See *supra* note 54 and accompanying text.

<sup>174</sup> For a discussion of the growth of complexity of veterans law, see Ridgway, *VJRA 20 Years Later*, *supra* note 47.

<sup>175</sup> See Allen, *supra* note 6 at 515 (suggesting that the CAVC would likely issue fewer memorandum decisions except for “the crushing caseload at the Court”). The CAVC’s annual reports validate that it takes the court longer to decide matters by panel. In FY2014, single-judge decisions were issued in an average of 69 days after the case was submitted for decisions, while panel decisions took an average of 142 days. CAVC FY14 ANNUAL REPORT, *supra* note 51 at 3.

<sup>176</sup> Richard A. Posner, *Judicial Behavior and Performance: An Economic Approach*, 32 FLA. ST. U. L. REV. 1259 (2005).

<sup>177</sup> See *supra* note 94 and accompanying text.

<sup>178</sup> The idea that courts attempt to minimize the effort needed to decide each case has been used in modeling the behavior of appellate judges. See Matt Spitzer & Eric Talley, *Judicial Auditing*, 29 J. LEGAL STUD. 649, 655 (2000) (“The judicial decision makers within this model . . . wish to avoid bearing the administrative costs of reviewing others' decisions.”).

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On the one hand, there is some justification for the workload argument. First, the CAVC does not resolve any disputed cases by summary order. The geographic courts of appeals dispose of some portion of their cases with orders issued under Rule 36 of the Federal Rules of Appellate Procedure, which say nothing more than the decision below is affirmed. In 2014, such unsigned decisions without comment constituted the final order of the court in fourteen percent of cases.<sup>179</sup> Historically, the CAVC has chosen not to use summary orders on the theory that every veteran deserves at least some explanation from the court as to why his or her appeal was with or without merit. In recent years, there has been some debate as to whether such a practice should be adopted at least for use in cases in which the veteran has an experienced attorney who can explain the result.<sup>180</sup> Nonetheless, that is not currently the case at the CAVC, which means that the court devotes more effort to deciding its easiest cases than do other courts.

Second, the CAVC is a specialized court in an extremely procedure-intensive area of law.<sup>181</sup> When it decides a case by panel, the implications of the opinion are likely to be far broader on average than in the published decisions of other appellate courts. Each published opinion on procedure is likely to have implications for dozens or hundreds of other appeals currently pending before the court. Therefore, it is likely that the court invests more time than average on word smithing opinions in light of the likelihood that it will often be applying the holding immediately to other fact patterns.<sup>182</sup>

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<sup>179</sup> See U.S. COURTS 2014 REPORT, *supra* note 52 at tbl. B-12.

<sup>180</sup> See Summary Disposition: Should the Court Adopt a Summary Disposition Rule?, Tenth Judicial Conference of the Court of Appeals for Veterans Claims, 23 Vet. App. XCIX-CXVII (2008).

<sup>181</sup> See BARTON F. STICHMAN & RONALD B. ABRAMS, VETERANS BENEFITS MANUAL Chps. 12-14 (2014) (detailing the procedures involved in adjudicating claims and the mechanics of raising procedural issues for review); Ridgway, *Why So Many Remands?*, *supra* note 11, at 120-29 (discussing the major procedural aspects of the claims process; cf. Victoria Hadfield Moshiahswili, *Ending the Second "Splendid Isolation"?* *Veterans Law at the Federal Circuit in 2013*, 63 AM. U. L. REV. 1437, 1447 (2014) (arguing that increasing complexity may be leading to "a dysfunctional system [that] is not 'veteran-friendly' by any definition.")).

<sup>182</sup> This is not to say that courts of general jurisdiction do not give much consideration to the implications of their decisions. In fact, the available evidence indicates that individual judges within such courts actually do specialize to improve the coherence of individual areas of law. See Edward K. Cheng, *The Myth of the Generalist Judge*, 61 STAN. L. REV. 519, 548 (2008) ("The empirical results suggest that a number of federal circuit judges diverge from the generalist ideal and disproportionately write opinions in certain subjects."). Rather, the CAVC faces unique pressure in crafting its opinions both because of the percentage of its pending cases affected by its decisions and because all of the judges on a CAVC panel specialize in the same subject and therefore do not have the same

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On the other hand, the argument that panel decisions are so labor-intensive as to necessitate deciding many debatable cases by single judge is largely circular. It may well be that the CAVC's *current* practices for deciding panel cases are so time-consuming that it could not keep up with its case load if it substantially increased the number of panel decisions. However, that does not mean that it would be impossible for the court to develop a panel practice and culture that handled a greater percentage of cases by panel while using the same resources. Many courts, including the Supreme Court, use a hard deadline at the end of the term to force cases to be resolved and cap the effort that can be invested in rewriting opinions. In addition, many of the geographic courts of appeals use their central legal staffs to triage cases and present cases of relative simplicity to panels in batches so that they can be resolved quickly and efficiently.<sup>183</sup> Therefore, as will be discussed further below,<sup>184</sup> care must be taken not to accept the court's current panel practices and culture as a given, but rather as something that can change.

Based upon the analysis above, the variance in single-judge decisions may best understood as a symptom of insufficient development of the law by the CAVC through panel opinions. This may be driven by a judicial culture that has often viewed the court as burdened by a heavy case load<sup>185</sup> and assumes panel-worthy cases are rare and time consuming. As a result, the framework set forth in *Frankel* is simply ignored in practice, as Chief Judge Kramer admitted. In particular, the court does not treat cases as panel-worthy simply because different judges could or actually disagree as to the outcome. As a result, there is huge variance in the outcome of cases at the CAVC that leaves both veterans and VA unable to understand how to judge whether a Board decision was legally correct. This situation is unacceptable and cries out for reform.

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option to defer to a specialist judge on the panel.

<sup>183</sup> See Levy, *supra* note 38, at 335-38 (discussing the internal procedures of the D.C., First, and Fourth Circuits to batch cases for efficient disposition).

<sup>184</sup> See *infra* note 204 and accompanying text.

<sup>185</sup> See Jerry Markon, *Veterans Court' Faces Backlog that Continues to Grow*, WASH. POST, Apr. 22, 2011, available at [http://www.washingtonpost.com/politics/veterans-court-faces-backlog-that-continues-to-grow/2011/04/15/AFFaavRE\\_story.html](http://www.washingtonpost.com/politics/veterans-court-faces-backlog-that-continues-to-grow/2011/04/15/AFFaavRE_story.html) ("The caseload at the U.S. Court of Appeals for Veterans Claims has doubled in recent years, with the court deciding more than 600 cases per judge each year—far more than other federal appellate courts. Judges are working nights and weekends but say they still have difficulty keeping pace.").

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## VI. Reforming the CAVC

### A. *Defining the Goal of Reform*

Reforming a court is no easy endeavor. To have any reasonable chance at success, it must begin with a clear and achievable goal. The debates regarding unpublished decisions make clear that the practice is fundamentally about resources. “[J]udicial attention is a scarce resource.”<sup>186</sup> It must be managed carefully to maximize the benefits that can be provided by a court. Nonetheless, an excess of unpublished decisions fundamentally undermines a court’s role as law giver. This, in turn, undermines the court’s role as error corrector because of the lack of clarity as to what is error. The net result is precisely the type of low publication rates and high variance seen at the CAVC.

As a proxy for the amorphous goal of achieving more clarity of the law, reform of the court’s use of single-judge decisions should target increasing the rate of published decisions and then observing whether this succeeds in decreasing the variance between judges applying the “settled” law. This will necessarily change how the CAVC allocates judicial attention; reducing time spent on lengthy single-judge decisions and perhaps increasing the role of the court’s central legal staff. In the near term, a reasonable goal would be for the CAVC to raise its rate of published opinions to 12% of the appeals submitted for decision, the average rate of published decisions for the other federal courts of appeals. As discussed above, in fiscal years 2013 and 2014, the CAVC issued published opinions in only 1.8% of the cases decided by chambers.<sup>187</sup> Accordingly, it would need to increase its output of published opinions by more than six fold. In other words, in the years studied, the court would have had to have published approximately 250 opinions per year to meet the general appellate court average, rather than 37.

Of course, this may not turn out to be the *ideal* target for bringing variation within an acceptable range. However, the fact that this target is based upon the output of other appellate courts suggests that this goal is at least reasonably *attainable*. Over the long term, variance in

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<sup>186</sup> Marin K. Levy, *Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals*, 81 GEO. WASH. L. REV. 401, 405 (2013).

<sup>187</sup> See *supra* note 51 and accompanying text.

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large samples of memorandum decisions should be examined on a regular basis. There is no obvious target for an acceptable amount of variance. However, if there were a proven correlation between variance and the rate of cases resolved by published opinion then, ideally, the rate of publication should continue to rise until a higher publication rate has no further effect on the amount of variance. Only then will the aspiration of *Frankel* be fully realized.

#### B. *Resource Requirements*

An inherent question in any proposed reform is whether such a rule is practical. As discussed above, caseload concerns have been a major factor in the decline of published opinions by the federal appellate courts of general jurisdiction. Attempting to raise the publication rate of the CAVC is pushing it in the opposite direction of the trend seen elsewhere. Therefore, serious consideration must be given to whether the court could operate in the same manner as a traditional court with available resources. This is a complex problem because one must look beyond the number of judges and dispositions to factor in the nature of the work and the support of judges other than those in active service.

Even initially, calculating the necessary resources for an appellate court is a tricky and often contentious proposition. Although there is no official formula for determining the needs of a federal appellate court, the other federal appellate courts provide an obvious point of comparison. Between fiscal years 2010 and 2014, the federal courts of appeals (excluding the Federal Circuit) decided between 55,216 and 59,526 appeals with 167 authorized judgeships — 330 to 356 appeals per judge. By comparison, in the same five year period, the CAVC decided from 3,686 to 4,959 appeals with nine judges — 409 to 551 appeals per judge. Accordingly, at first blush, the CAVC would need to grow to 13 judges to handle cases in a percentage similar to those courts.

Digging deeper into those numbers, a majority of the appeals at the CAVC are resolved by a joint motion of the parties rather than a decision by a judge.<sup>188</sup> In FY2014, the judges of the

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<sup>188</sup> It is troubling that the court consistently disposes half of appeals through joint motions for remand, which are not reviewed by any judges of the court. These motions do not resolve appeals as settlements of private litigation do, but rather merely frame the future proceedings in the matter. As such, the practice effectively transfers

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CAVC decided 1,615 appeals, while the clerk granted motions in 2,036 cases.<sup>189</sup> Therefore, the judges handled an average of 179 appeals each. Comparing this total to the federal courts of appeals is challenging. In FY2014, the federal courts of appeals decided 34,114 cases on the merits after submission of briefs (either with or without argument).<sup>190</sup> That is an average of 204 cases per judge. By this metric, the CAVC already has the staffing it needs to handle a much larger percentage of cases by panel.

However, looking only at appeals resolved by judges omits all of the non-merits work done by both the CAVC and the geographic courts of appeal. In FY14, the federal courts of appeals of general jurisdiction terminated 18,365 cases on procedural grounds, including 4,935 that were handled by chambers.<sup>191</sup> This amounts to one procedural termination by chambers for every seven merits termination. By contrast, the judges of the CAVC handled 319 petitions for extraordinary relief or Equal Access to Justice fees in FY14.<sup>192</sup> This amounts to one petition for every five merits decisions handled by chambers. Although it is not an apples-to-apples comparison, it is probable that the judges of the CAVC handle more non-merits work than do the judges of the geographic circuits. Treating merits and non-merits actions as equal — which is itself a debatable assumption — the CAVC judges handle 214 matters per judge, compared to 234 per judge for the federal appellate courts of general jurisdiction.

Even this is an oversimplification when one looks further into the details. On the one hand, vacancies are a chronic problem for the federal geographic courts of appeals due to the increasingly difficult confirmation process.<sup>193</sup> Therefore, using their authorized strength to

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responsibility for applying complex procedural law to the facts of individual cases from the court's judges to the parties, who may both have interests other than the development of a coherent body of law. Arguably, joint motions for remand at the CAVC marginalize judges in the application of veterans law in the same way that plea bargains marginalize trial judges in the practice of criminal law. See, e.g., Daniel S. McConkie, *Judges as Framers of Plea Bargaining*, 26 STAN. L. & POL'Y REV. 61, 64 (2015) (“One of plea bargaining’s key infirmities is that it largely excludes judges until the tail end of the process.”).

<sup>189</sup> CAVC 2014 ANNUAL REPORT, *supra* note 51 at 1.

<sup>190</sup> See U.S. COURTS 2014 REPORT, *supra* note 52 at tbl. B-1 (cases terminated on the merits minus those terminated by consolidation).

<sup>191</sup> See *id.*

<sup>192</sup> See CAVC 2014 ANNUAL REPORT, *supra* note 51 at 1-2.

<sup>193</sup> See generally Michael Teter, *Rethinking Consent: Proposals for Reforming the Judicial Confirmation Process*,

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calculate their workload may understate the workload of the judges on those courts. On the other hand, the CAVC's retired judges in recall status are subject to different statutory provisions than are senior judges on the geographic appellate courts.<sup>194</sup> The CAVC's recall judges generally serve for only a few months at a time and handle only certain types of matters, while senior judges generally serve year-round and participate in all decisionmaking except for en banc review.<sup>195</sup> Furthermore, the federal appellate courts of general jurisdiction also regularly receive assistance from district court judges sitting by designation.<sup>196</sup> In 2014, senior and visiting judges provided almost a quarter of the judge labor in the federal appellate courts of general jurisdiction.<sup>197</sup> This amounts to 51 extra judges beyond the authorized strength of those courts. Meanwhile, the recalled retired judges of the CAVC decided just 13 appeals in 2014.<sup>198</sup> To provide similar support to the CAVC, the retired recall judges would have to perform work equivalent to 3 full-time judges. However, in fiscal year 2014, the court had only five recall-eligible retired judges.<sup>199</sup> Even if each of those judges were to handle a one-quarter caseload like a senior judge in the geographic circuits, that would still be only the equivalent of one and one-quarter extra judges. Therefore, the CAVC has far less support beyond its active judges than do the federal courts of general jurisdiction on average.

Beyond those numbers, there is also the difficult question of how much effort it takes to decide a case. On the one hand, it might be expected that the narrow scope of decisions reviewed by the CAVC would make it easier to streamline review of similar cases, compared to

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73 OHIO ST. L.J. 287 (2012); Arthur L. Rizer III, *The Filibuster of Judicial Nominations: Constitutional Crisis or Politics As Usual?*, 32 PEPP. L. REV. 847 (2005); David S. Law, *Appointing Federal Judges: The President, the Senate, and the Prisoner's Dilemma*, 26 CARDOZO L. REV. 479 (2005); Michael J. Gerhardt, *Judicial Selection As War*, 36 U.C. DAVIS L. REV. 667 (2003); William G. Ross, *The Questioning of Lower Federal Court Nominees During the Senate Confirmation Process*, 10 WM. & MARY BILL RTS. J. 119 (2001).

<sup>194</sup> Compare 38 U.S.C. § 7257 ("Recall of retired judges") with 28 U.S.C. § 294 ("Assignment of retired justices or judges to active duty").

<sup>195</sup> Pursuant to 38 U.S.C. § 7257(b), retired CAVC judges may be recalled to service as a judge of the Court for a period of 90 days.

<sup>196</sup> See 28 U.S.C. § 292(a) ("The chief judge of a circuit may designate and assign one or more district judges within the circuit to sit upon the court of appeals or a division thereof whenever the business of that court so requires.")

<sup>197</sup> See U.S. COURTS 2014 REPORT *supra* note 52 at tbl. B-11.

<sup>198</sup> CAVC 2014 ANNUAL REPORT, *supra* note 51 at 2.

<sup>199</sup> See About the Court: Judges, United States Court of Appeals for Veterans Claims, <http://www.uscourts.cavc.gov/judges.php>.



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courts that deal with a far broader portfolio of issues. However, title 38 has been ranked as one of the more complex parts of the U.S. Code,<sup>200</sup> while large portions of the docket of the geographic circuits include petitions from prisoners and other matters that are often disposed of summarily.<sup>201</sup> Moreover, as a specialty court, the CAVC assumes a greater responsibility to address each issue in the context of how it affects the larger system.<sup>202</sup> Accordingly, it is debatable whether the CAVC's specialization should make it easier or harder on average to decide the cases that require merits decisions.

There is no question that the CAVC currently invests a large amount of time in the few cases that it does decide by panel. However, if the CAVC were to switch to deciding all cases by panel, it would not require the court to invest that level of effort in all cases. Instead, the CAVC would have to develop both a process and culture similar to that of the geographic appellate courts, which would conserve energy for the relatively small fraction of cases that are truly difficult.<sup>203</sup> The development of a culture that can reach consensus in most cases should dramatically reduce the extent to which the outcome of a case at the CAVC depends upon the appellant's luck in his or her assignment. Moreover, as this consensus emerges, the court should better be able to articulate in its published opinions what precisely is demanded of VA to produce a decision whose reasons or bases are satisfactory. Ultimately, the desired end state of such a change would be a system in which outcomes are more consistent and remands are less common, because the court would be setting a clear target upon which its members agree and the

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<sup>200</sup> See Daniel Martin Katz & Michael J. Bommarito II, *Measuring the Complexity of the Law: The United States Code*, 22 JOURNAL OF ARTIFICIAL INTELLIGENCE & LAW 1 (2014).

<sup>201</sup> See U.S. COURTS 2014 REPORT, *supra* note 52 at tbl. B-1. In fact, Congress originally authorized the creation of staff attorney offices for the federal appellate courts for the purpose of reviewing pro se prisoner appeals. See Levy Levy, *supra* note 38, at 323.

<sup>202</sup> It is debatable whether this more holistic approach is entirely good. It has been argued that specialist judges tend to "make their specialized area of the law even more complex, rendering it even less intelligible to a generalist judge or attorney." Paul M. Secunda, *Cognitive Illiberalism and Institutional Debiasing Strategies*, 49 SAN DIEGO L. REV. 373, 408 (2012); see also Sarang Vijay Damle, Note, *Specialize the Judge, Not the Court: A Lesson from the German Constitutional Court*, 91 VA. L. REV. 1267 (2005).

<sup>203</sup> See *supra* notes 74-75 and accompanying text. As Judge Arnold has commented, "judges' time would be better spent on hard cases than on tedious explanations of the easy ones." Arnold, *supra* note 76 at 223.

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agency would be hitting that target more frequently because it would better understand what is demanded.

The bottom line is that it is impossible to define the correct amount of resources that the CAVC would need to handle substantially more cases by panel. The available evidence indicates that the federal appellate courts of general jurisdiction handle *all* cases by panel with a level of resources that is relatively similar to the current level of resources provided to the CAVC. Accordingly, even though resource needs should be considered carefully, they should not be considered a barrier to reforming the CAVC. Rather, the primary challenge is creating mechanisms that encourage (or outright force) the court to handle more cases by panel and then allow the court to develop the internal culture and procedures that best distributes scarce judicial attention in a way that produce results that maximize its fulfillment of the roles of lawgiver and error corrector.

### C. *Internal Reforms*

One alternative approach to reform would be to allow the court to reform itself. The management of cases within the CAVC is driven by both formal and informal factors that are within its control. The statutory authority to decide cases by single-judge is formally implemented in the court's rules of practice, as well as its internal operating procedures. However, it is the informal culture of the court in applying the governing authorities that is perhaps more important.<sup>204</sup> Accordingly, it is vital to examine not only the prospects for formal changes, but also the likelihood of an actual impact on outcomes.

#### 1. Formal Changes

The *Frankel* criteria are implemented through the court's rules and internal operating procedures.

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<sup>204</sup> As one researcher has observed, two federal courts of appeals with virtually identical rules on the publication of opinions can have dramatically different rates of unpublished opinions. See Robert A. Mead, "Unpublished" Opinions as the Bulk of the Iceberg: Publication Patterns in the Eighth and Tenth Circuits of the United States Courts of Appeals, 93 LAW LIBR. J. 589, 607 (2001), see also generally Stefanie A. Lindquist, *Bureaucratization and Balkanization: The Origins and Effects of Decision-Making Norms in the Federal Appellate Courts*, 41 U. RICH. L. REV. 659 (2007).

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a. *Rules of Practice and Procedure*

The court's rules of practice provide very few litigant-driven tools for resolving cases by panel instead of by single-judge decision. After a single-judge decision, a party may move for panel consideration under Rule 35(e)(2), which incorporates the *Frankel* criteria.<sup>205</sup> However, such motions are very rarely successful. Overwhelmingly, the court "grants" the motion, but then orders that the single-judge decision remain the decision of the court.<sup>206</sup> Of the 61 panel opinions issued by the court in 2013 and 2014, none indicates that a Rule 35 motion led to the opinion.<sup>207</sup>

Despite the surface statement that the panel granting the motion has conducted de novo review before ordering the single-judge decision to remain the decision of the court, there is little reason to believe that this is true. Judges C and A rule for the appellant in just 24 and 29% of cases, respectively, while Judges E and F rule for the appellants 63 and 59% of the time, respectively. Given the wide disparity, one would expect it would be relatively common for a panel of Judges C, A, and E to reach the opposite conclusion from what Judge E decided alone. Similarly, it would also be expected that a panel of Judges of C, E, and F would disagree with the outcome of a memorandum decision of Judge C. Even with judges of lesser variance, one would expect that a panel considering a Rule 35 motion would disagree with the outcome in a meaningful percentage of the cases. However, Rule 35 motions virtually never result in an outcome other than the panel rubberstamping the memorandum decision. This strongly suggests that when CAVC judges review each other's decisions under Rule 35, they are not voting based upon how they would have decided the case, but whether the original memorandum decision was

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<sup>205</sup> Specifically,

a motion for panel decision also must state why the resolution of an issue before the Court would establish a new rule of law; modify or clarify an existing rule of law; apply established law to a novel fact situation; constitute the only recent, binding precedent on a particular point of law; involve a legal issue of continuing public interest; or resolve a case in which the outcome is reasonably debatable.

CAVC R. PRAC. & PRO. 35(e)(2).

<sup>206</sup> See, e.g., *Williams v. McDonald*, No. 13-1081, 2014 U.S. App. Vet. Claims LEXIS 1947 (Nov. 20, 2014).

<sup>207</sup> A search of the CAVC's published opinions in 2013 and 2014 produces only one result for "Rule 35" or "R. 35," which is reference in a footnote to an argument based upon an interpretation of the rule. See *Solze v. Shinseki*, 26 Vet. App. 299, 303 n.2 (2013).

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an abuse of discretion or something similar.<sup>208</sup> This means that Rule 35 motions are not an effective tool for generating panel opinions or bringing consistency to the outcomes of appeals.

To give Rule 35 teeth, the court could amend its practice such that, if the court were to grant the motion, the memorandum decision would become precedential if no opinion were issued to replace it. However, such a change is likely to be ineffective. As explained by Chief Judge Kasold in a 2011 state of the court speech discussing the current practice, the court previously denied Rule 35 motions when a panel opinion was not forthcoming.<sup>209</sup> Therefore, amending the rule or its implementation as suggested is unlikely to result in more precedent, but rather simply a reversion to the prior approach of denying such motions.

Aside from Rule 35, Rule 34 tangentially relates to having a case resolved by a panel, by addressing when oral argument will be held. As the court only hears argument in cases submitted to a panel,<sup>210</sup> a motion under Rule 34 is effectively a motion for panel review because the motion must be made shortly after briefing, typically before a screening judge has been assigned or had an opportunity to review the case.<sup>211</sup> Rule 34(b) discourages parties from seeking panel review by prohibiting the parties from seeking oral argument in their briefs.<sup>212</sup> This makes filing such motions an additional burden. Although the rule does allow for a

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<sup>208</sup> In fact, the court's own internal operating procedures specify that the panel will direct that the single-judge decision remains the decision of the court if the movant fails to establish that:

- (A) the single-judge memorandum decision overlooked or misunderstood a fact or point of law and that error was prejudicial to the outcome of the appeal, or
- (B) the single-judge memorandum decision is in conflict with precedential decisions of the Court, or
- (C) the appeal otherwise raises an issue warranting a precedential decision.

CAVC IOP III(a)(4). The requirement that a single-judge decision "overlooked or misunderstood" something is a much higher bar than mere disagreement with how the law was applied to the facts of the case.

<sup>209</sup> He explained:

because each of these requests for panel is in fact reviewed by a panel of judges, the standard wording on our panel orders now reflects that the request for a panel decision has been granted. On review, the panel will then either hold that the single-judge decision remains the decision of the Court, or substitute a new opinion in place of the single-judge decision. We believe this change better documents the actual review performed by the judges of the Court.

Bruce E. Kasold, *A Message from the Chief Judge*, VETERANS L.J. 3 (Summer 2011).

<sup>210</sup> CAVC IOP IV(a).

<sup>211</sup> See CAVC R. PRAC. & PRO. 34(b) ("Parties seeking oral argument should submit a motion for oral argument not later than 14 days after the reply brief is due or filed, whichever is sooner.").

<sup>212</sup> CAVC R. PRAC. & PRO. 34(b) ("A motion for oral argument may not be included in any brief.").

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separate motion for oral argument to be filed, these motions are uncommon because most practitioners understand that the court hears oral argument so rarely.<sup>213</sup>

Very recently, the court has proposed to modify Rule 30(a), which presently prohibits citation to memorandum decisions. The proposed change would allow single-judge decisions to be cited “for the persuasive value of their logic and reasoning, provided that the party states that no clear precedent exists on point and the party includes a discussion of the reasoning as applied to the instant case.”<sup>214</sup> Arguably, this change could lead to more panel decisions both by allowing the parties to highlight conflicting single-judge decisions and adding pressure on the judges to call more novel or questionable memorandum decisions to panel while they are still in circulation. However, there is little reason to be optimistic, because a similar change in 2006 to the Federal Rules of Appellate Procedure<sup>215</sup> has not halted the steady decline in publication rates in the federal appellate courts of general jurisdiction.<sup>216</sup>

Of course, it is possible to imagine more radical reform through the addition of new rules or the amendment of the present ones. However, there is little reason to believe that this would give substantially greater power to litigants. Ultimately, it is the court that decides whether to grant motions under the rules. Given that the *Frankel* criteria are already in the rules with little apparent effect, there is no obvious reason why any less direct rule would have a meaningful impact.

#### b. *Internal Operating Procedures*

Perhaps a more fruitful place for internal reform is in the court’s internal operating procedures.<sup>217</sup> These procedures define all the places in the process in which a case may be referred to panel, including the initial screening process, the process for circulating drafts of

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<sup>213</sup> A search of the CAVC’s published opinions in 2013 and 2014 produces no results for “Rule 34” or “R. 34.” In the same two-year time period, the search produces only nineteen memorandum decisions mentioning motions for oral argument, all of which were denied.

<sup>214</sup> CAVC Misc. Ord. No. 07-15 (Jul. 28, 2015).

<sup>215</sup> See FED. R. APP. PRO. 32.1

<sup>216</sup> Compare *supra* note 52 and accompanying text (12% publication rate in 2014), with *supra* note 88 and accompanying text (20% publication rate for 1999, 2000, and 2002).

<sup>217</sup> These rules are available online at the court’s website. See [http://www.uscourts.cavc.gov/internal\\_operating\\_procedures.php](http://www.uscourts.cavc.gov/internal_operating_procedures.php).

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memorandum decisions, and the process for ruling on motions for panel review. There is even a procedure allowing a panel to return a matter to a single judge by majority vote.<sup>218</sup>

Initially, the screening process defaults to the presumption that a case will be decided by a single judge. The court's Central Legal Staff is empowered to divert especially non-controversial cases to be decided by a senior judge of the court working in recall status.<sup>219</sup> However, there is no provision for the staff to recommend a case for a panel review. If a case were not diverted to a senior judge, then the screening of a case would be done by a single judge of the CAVC, who would draft the memorandum decision if he or she did not decide to refer the case for a panel opinion.<sup>220</sup> Accordingly, screening is done without any formal deliberative process by which the judges can exchange views of the case. Rather, the screening judge could easily assume that there is no reasonable view of the appeal other than his or her own, because one would never be offered.

Changes to the screening procedures are easy to imagine. One method of identifying areas of the law that are insufficiently developed is to have the screening involve more than one judge. There are many methods by which this could be accomplished. Cases could be batched and screened collectively, perhaps with the assistance of an attorney from the Central Legal Staff. This would follow how some other appellate courts screen cases to determine whether they are of relative simplicity.<sup>221</sup> Another method would be to assign each case to two chambers. After reviewing the briefs, both judges would have to inform the Central Legal Staff of which side they would rule in favor. If the judges agree on the prevailing party and neither calls for a panel, then one of them would randomly be assigned the case. However, even if neither called the case to panel, if the judges disagreed on the outcome, then a panel would be formed by adding a third judge at random. There are many other possible options, but these illustrate that internal reforms have the potential to reduce the bias in favor of deciding cases by a single judge, even when the outcome is reasonably debatable.

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<sup>218</sup> See CAVC IOP V(e)(1).

<sup>219</sup> See CAVC IOP I(a)(3)(E).

<sup>220</sup> See CAVC IOP I(b)(1)-(3).

<sup>221</sup> See Levy, *supra* note 38, at 333-40.

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Another opportunity during the internal review process to increase the number of panel decisions comes when a draft of a memorandum decision is circulated. Arguably, single-judge decisionmaking is not as isolated as it first appears. All decisions are circulated internally for at least five business days before being issued, and they may be questioned or called to panel during that time.<sup>222</sup> If any two judges call for a panel opinion at that point, then a panel will be created, including the original single judge and two other judges selected at random.<sup>223</sup> There are at least two flaws in this system. First, reviewing a written decision is a far cry from considering the record and briefs in a case. Inevitably, memorandum decisions omit, summarize, or obscure issues in ways that make it impossible for reviewing members of the court to realize that a case presents a novel issue or an outcome that it is reasonably debatable. Indeed, it is typically the express purpose of most appellate decisions of any court to present the matter in a way that makes the outcome appear as uncontroversial as possible. Still, it is hard to imagine, given the variance observed, that all the judges of the court generally agree with nearly all of the circulating memorandum decisions on their faces.

Second, and even more importantly, the system creates a disincentive for calling a circulating decision to panel. To the extent that judges behave strategically,<sup>224</sup> it is generally unwise to call a circulating memorandum decision to panel if one disagrees with it. If the panel call is successful, then the resulting panel is guaranteed to include at least one vote for an outcome with which the caller disagrees. To change the outcome of a case would typically require that the two judges randomly assigned to the panel disagree with the memorandum decision. Unless the caller is reasonably certain that most of the other members of the court agree with the caller, it is safer to let a rogue memorandum slip out quietly than to risk that the dubious analysis becomes precedential if either of the judges would be added to the panel would agree with the screening judge. In other words, if a reviewing judge disagrees with a circulating memorandum decision, then calling a case to panel (or seconding a call by another judge) presents a high risk of an

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<sup>222</sup> See CAVC IOP II(b)(1)-(2).

<sup>223</sup> See CAVC IOP II(b)(2).

<sup>224</sup> See *supra* notes 152, 155 and accompanying text.

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unfavorable precedent, while allowing the memorandum decision to issue creates little, if any, risk. This strategic problem could be addressed by having a case called to panel during circulation assigned to a completely random panel, which may or may not include the original author. However, this would be resource-intensive because the work invested by the original author would frequently be wasted. Another option for changing the circulation process would be to eliminate the need for a second vote and allow any one judge to call a case to panel during circulation. This would not solve the incentive problem, but may mitigate it to the extent that strategic considerations are a relevant, but not overwhelming, factor in why so few cases are called to panel during circulation.

The final opportunity to increase the volume of panel opinions comes during review of motions for panel consideration under Rule 35. As noted above, the IOP arguably sets a high bar by asking the moving party to demonstrate that the memorandum decision “overlooked or misunderstood a fact or point of law.”<sup>225</sup> Theoretically, the *Frankel* criteria are incorporated into the IOP standard by referring to motions that otherwise warrant a precedential decision.<sup>226</sup> However, it simply does not appear that cases are referred for a precedential opinion because one of the judges assigned to the Rule 35 motion disagrees with the outcome or at least believes it to be reasonably debatable.

Again, a solution that could be incorporated into the IOP—if not Rule 35 itself—would be to make a memorandum decision precedential if it were not withdrawn. However, this is less than ideal, because not every case provoking a Rule 35 motion is worthy of publication. Pro se appellants in particular may file such motions in cases that are truly routine. Therefore, such a change could lead to a real problem of “too much law.”<sup>227</sup>

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<sup>225</sup> See CAVC IOP III(a)(4)(A).

<sup>226</sup> See CAVC IOP III(a)(4)(C).

<sup>227</sup> Chief Judge Nebeker has warned that too much precedent can be just as unhelpful as not enough. Based upon his experience prior to being appointed to the CAVC, he has argued the Fourth Amendment law is “a precedential bog . . . [W]hichever result you want to reach you can find precedent for it. So maybe we’d better be careful about how much precedent we want, because it can bog the whole system down.” 21 Vet. App. at CXLI (2006).



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## 2. Cultural Change

Even if the court were to take affirmative steps to change the structures governing single-judge authority, it is questionable what impact such changes would have. The question of whether an appeal is reasonably debatable or involves a truly novel issue is inherently subjective. As a result, it is not clear that changes in the court's rules or procedures would fundamentally create change, as opposed to merely altering the rhetoric and citations used in single-judge decisions and Rule 35 orders. Judges are human and, as such, are susceptible to cognitive bias and motivated reasoning. Indeed, whether driven by ideology or not, an inherent feature of appellate judging is that the same language can be interpreted differently and lead to different outcomes, particularly when it involves some subjective element. As confessed by Judge Joseph F. Weis, Jr. of the Third Circuit,<sup>228</sup> the "thirteen federal courts of appeals function at times as separate sovereignties,"<sup>229</sup> reaching different results in cases governed by the same law. In fact, an important example of variance in application is how the federal courts of appeals have consistently different rates of published opinions, despite ostensibly being governed by the same language from the Federal Rules of Appellate Procedure.<sup>230</sup> However, the prospects for cultural change are not entirely bleak. Culture and cognitive bias are more likely to be overcome when decisionmakers are presented with strong data that facilitates rational action and they take the time to reflect on the implications of the information.<sup>231</sup> Nevertheless, even if the court were to take action, one must be concerned about the longevity of any changes. Old habits are hard to break and a short-term decrease in single-judge decisionmaking may be hard to sustain, particularly if the growing output of the Board of Veterans' Appeals<sup>232</sup> leads to a sustained

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<sup>228</sup> Judge Joseph F. Weis, Jr. was a Judge at the U.S. Court of Appeals for the Third Circuit. See <http://www.post-gazette.com/local/region/2014/03/19/Former-Judge-Joseph-Weis-dies-at-91/stories/201403190178>.

<sup>229</sup> Joseph F. Weis, Jr., *Disconnecting the Overloaded Circuits—A Plug for a Unified Court of Appeals*, 39 ST. LOUIS U. L.J. 455, 458 (1995).

<sup>230</sup> See Haley, *supra* note 87 at 548; U.S. COURTS 2014 REPORT, *supra* note 52 at tbl. B-12.

<sup>231</sup> See generally DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011); Donald J. Kochan, *Thinking Like Thinkers: Is the Art and Discipline of an "Attitude of Suspended Conclusion" Lost on Lawyers?*, 35 SEATTLE U. L. REV. 1 (2011).

<sup>232</sup> See BOARD OF VETERANS' APPEALS, ANNUAL REPORT FOR FISCAL YEAR 2014 4-5(2015) (discussing BVA's record high production of decisions and its expectation that the number of appeals will continue to rise in future years).

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increase in appeals at the CAVC. The pressure to resolve large volumes of cases expeditiously may well be too great to resist if the court retains single-judge authority in any form.

#### D. *Statutory Change*

The obvious alternative to internal reform is for Congress to act. If Congress were to intervene, it is likely that its approach would be more blunt. Although it could legislate rule changes if the CAVC were unwilling to adopt them, it is questionable how much effect could be generated by imposing any of the changes suggested above against the will of the court. Rather, if Congress were to intervene, it would most likely consider abolishing the single-judge authority of the CAVC altogether.

The case for such action is strong. As detailed above, two full years of empirical evidence demonstrates that outcomes at the CAVC are widely dependent on the judge who decides the case rather than any consensus on the understanding of the law. Not only does that problem cry out for correction, but abolishing single-judge authority is historically, normatively, and practically attractive. Historically, appellate decisionmaking by panels has long been the norm in the American system<sup>233</sup> and the available evidence suggests that the exception made for the CAVC was at least as likely created by accident rather than design.<sup>234</sup> Normatively, panel decisions better explore the issues of the case and reduce the opportunity for individual bias and error.<sup>235</sup> In fact, one of the leading scholars in the field of veterans law argued that the CAVC's single-judge authority denies most appellants the "benefits of appellate decisionmaking in which

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<sup>233</sup> Judiciary Act of 1891 (commonly referred to as the Evarts Act or the Circuit Court of Appeals Act) ch. 517, secs. 2-3, 26 Stat. 826 (1891), see Rory E. Riley, *From Closet to Court Room: Asylum as a Judicial Step Towards Full Equality Between Sexual Orientations*, 15 RICHMOND J.L. & PUB. INT. 403, 407 (2011) (discussing the history of the appellate court system).

<sup>234</sup> See *supra* Part I.A.

<sup>235</sup> See, e.g., Tracey E. George & Chris Guthrie, *Remaking the United States Supreme Court in the Courts' of Appeals Image*, 58 DUKE L.J. 1439, 1473 (2009) (discussing how reducing the number of decision makers in a small group creates process efficiencies while increasing the number leads to more thorough deliberation); Miriam A. Cherry & Robert L. Rogers, *Tiresias and the Justices: Using Information Markets to Predict Supreme Court Decisions*, 100 NW. U. L. REV. 1141, 1143-44 (2006) (discussing group decisionmaking and observing that "[o]n the appellate level, federal judges hear cases on three-judge panels, reducing the possibility of error and perhaps tempering ideological leanings").

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one has collegial interchange between judicial actors.”<sup>236</sup> Practically, although abolishing the authority of the CAVC would require a profound adjustment in how the court operates, there would be no need for the CAVC to reinvent how such decisionmaking is done. Rather, the court would have numerous examples from which to choose in how to restructure its operations. Whether it would be advisable to increase the size of the court is an issue that ought to be considered in concert with abolishing single-judge authority. Nonetheless, there is reason to believe that such a change would not require a dramatic expansion of the court, if any at all.

## VII. Conclusion

The CAVC was created by Congress to bring the benefits of judicial review to the realm of veterans law. Although the court has had some admirable success and has been praised for its impact on VA,<sup>237</sup> it is clear that the court is falling short of its potential as an error corrector and lawgiver because of the excessive use of its single-judge authority. To cure this problem, strong action needs to be taken. Although it is possible that the court may be able to correct its course on its own, congressional intervention may be required to amend the CAVC's authority and require it to operate in the same manner as all other federal courts of appeals if the court cannot show rapid progress by increasing its output of published opinions.

Based upon the above data, the burden should be on the CAVC to prove that it can address the problem of variance and insufficient development of the law. It will take some time before a new study is appropriate to determine if the issues have been fully addressed. In the meantime, the goal for the court should be to decide at least 12% of appeals submitted for decision by panel opinion. If the court cannot reach this goal in the near term, then Congress could take that as proof that the CAVC has not been able to fundamentally alter how it handles review to ensure

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<sup>236</sup> Michael P. Allen, *Due Process and the American Veteran: What the Constitution Can Tell Us About the Veterans' Benefits System*, 80 U. CIN. L. REV. 501, 522 (2011)

<sup>237</sup> See, e.g. PARALYZED VETERANS OF AM. ET AL., THE INDEPENDENT BUDGET FOR THE DEPARTMENT OF VETERANS AFFAIRS FISCAL YEAR 2010, at 33 (2009) (“Judicial review of VA decisions has, in large part, lived up to the positive expectations of its proponents.”); WILLIAM F. FOX, JR., THE LAW OF VETERANS BENEFITS: JUDICIAL INTERPRETATION 251 (3d ed. 2002) (“By most measurements, the CAVC is doing a good job.”); 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, 65 (1994) (“I believe the creation of the [CAVC] has begun the restoration of integrity to the adjudication of claims for veterans' benefits.”).

Please cite to 27 STAN. L. & POL'Y REV \_\_\_\_ (forthcoming).

that it is adequately discharging its roles as error corrector and lawgiver. Even without further evidence, Congress may reasonably conclude that the experiment with single-judge decisionmaking by an appellate court ought to be terminated and that the CAVC should be made to conform to the traditional American norm of panel deliberation in all cases.

Ultimately, wide variance is not acceptable. Similarly situated veterans who appear before the court should be able to expect that they will receive similar outcomes. That is an essential element of justice and legitimacy for any court. Moreover, even veterans who do not appear before the court would benefit from the increased guidance that would be provided by more precedential decisions by the court. It will be likely difficult for the court and its practitioners to make the adjustments to handling far more cases by panel. Nonetheless, it must be remembered that, as former Administrator of VA Omar Bradley once said, “We are dealing with veterans, not procedures; with their problems, not ours.”<sup>238</sup>

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<sup>238</sup> DEPARTMENT OF VETERANS AFFAIRS, MYVA INTEGRATED PLAN OVERVIEW 3 (2015), *available at* [http://www.va.gov/opa/myva/docs/myva\\_integrated\\_plan\\_overview.pdf](http://www.va.gov/opa/myva/docs/myva_integrated_plan_overview.pdf).