

JUDICIAL REVIEW



Enhancements Needed for the United States Court of Appeals for Veterans Claims (CAVC)

RECOMMENDATION:

Congress should enact legislation that would permanently increase the number of judge appointments to the CAVC from seven to nine.

Congress should enact legislation as described herein to preserve the limited resources of the CAVC and reduce the CAVC's backlog.

Congress should provide all necessary funding to construct a courthouse and justice center in a location of honor and dignity—a location befitting the authority and prestige of the CAVC.

BACKGROUND AND JUSTIFICATION:

Permanently Increase the Number of Judges to Nine

The CAVC's caseload averages roughly 4,600 cases per year. As a result, the CAVC has had one of the highest, if not the highest, caseloads per active judge of any federal appellate court in the country. In response, the CAVC was reauthorized in 2008, as part of the Veterans Benefits Improvement Act to expand, at least temporarily, to nine judges, as of January 2010.

The last temporary authorization to increase the number of CAVC judges expired at the end of 2012. Subsequent to that authority's expiration, two judges have retired, leaving the CAVC with only seven judges.

Congress must enact legislation to permit a permanent increase in judicial appointments to keep pace with an increasing caseload. If these two temporarily authorized appointments become vacant, the CAVC is not authorized to replace them. The statute mandates no more than seven judges, which would adversely impact the CAVC's ability to make timely decisions because the remaining judges would be left to absorb the current and incoming workload.

The CAVC's Backlog

Congress is aware that the number of cases appealed to the CAVC has increased significantly over the past several years. To capitalize on current efforts to reform the claims and appeals process, collateral issues must also be addressed. Nearly half of those cases are consistently remanded to the Board.

The CAVC has attempted to increase its efficiency and preserve judicial resources through a mediation process, under Rule 33 of the CAVC's Rules of Practice and Procedure, to encourage parties to resolve issues before a court briefing is required. Despite this change to CAVC rules, VA general counsel routinely fails to admit error or agree to remand at this early stage, yet later seeks remand, thus utilizing more of the CAVC's resources and defeating the purpose of the practice. In this instance, VA usually commits to defend the Board's decision at the early stage in the process.

Subsequently, when VA counsel reviews the appellant's brief, counsel often changes its position, admits to error, and agrees to or requests a remand. Likewise, VA agrees to settle many cases in which the CAVC requests oral argument, suggesting acknowledgment of an indefensible VA error through the CAVC's proceedings. VA failure to admit error, to agree to remand, or to settle cases at an earlier stage of the CAVC's proceedings does not assist the CAVC or the veteran.

This failure merely adds to the CAVC's backlog; therefore, Congress should enact legislation to help preserve CAVC resources. Such an act would be codified in a note to section 7264; for example, the new section could state that under 38 USC USC § 7264(a), the CAVC shall prescribe amendments to Rule 33 of the CAVC's Rules of Practice and Procedure. These amendments would also contain language stipulating that if no agreement to remand has been reached before or during the Rule 33 conference, the department, within seven days after the Rule 33 conference, shall file a pleading with the CAVC and the appellant describing the bases upon which VA remains opposed to remand. If VA later determined that a remand was necessary, it may only seek remand by joint agreement with the appellant. No time would be counted against the appellant where stays or extensions are necessary when VA seeks a remand after the end of seven days after the Rule 33 conference.

Furthermore, if VA sought a remand after the end of seven days after the Rule 33 conference, VA would waive any objection to and may not oppose any subsequent filing by the appellant for Equal Access to Justice Act fees and costs under 28 USC USC § 2412. The CAVC would have the authority to impose appropriate sanctions, including financial sanctions, against VA for failure to comply with these prescribed rules.

A Dedicated CAVC Building

Finally, the CAVC should be housed in its own dedicated courthouse, designed and constructed to its specific needs and in a location befitting its authority, status, and function as an appellate court of the United States. During the 26 years since the CAVC was formed in accordance with legislation enacted in 1988, it has been housed in commercial office buildings. It is the only Article I court that does not reside in its own courthouse. The CAVC should be accorded at least the same degree of respect enjoyed by other appellate courts of the United States. Congress allocated \$7 million in FY 2008 for preliminary work on site acquisition, site evaluation, planning for construction, architectural work, and associated other studies and evaluations; no further funding has been provided. The issue of providing a fitting and proper court facility must move forward.