



AMERICAN
BANKRUPTCY
INSTITUTE

2019 Alexander L. Paskay Memorial Bankruptcy Seminar

Giving Back: Representing Veterans and the Acknowledgment of Pro Bono Contributions by the Bar

Hon. Robert N. Davis

*Chief Judge, U.S. Court of Appeals for Veterans Claims
Washington, D.C.*

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U.S. COURT OF APPEALS FOR VETERANS CLAIMS

Appellate Process & Recent Cases

CHIEF JUDGE ROBERT N. DAVIS

AMERICAN BANKRUPTCY INSTITUTE AND
STETSON UNIVERSITY COLLEGE OF LAW'S
43RD ANNUAL ALEXANDER L. PASKAY MEMORIAL BANKRUPTCY SEMINAR
FEBRUARY 8, 2019
TAMPA, FL

Introduction

- CAVC Statistics
- Recent CAVC and Federal Circuit Decisions
- Pending U.S. Supreme Court Cases



CAVC Case Statistics



Fiscal Year 2018 Filings

- **6,802 appeals** (*4,040 filed in FY 2017*)
- **27% pro se** at time of filing (*26% in FY 2017*)
- **265 petitions** (*256 filed in FY 2017*)
- **3,663 EAJA applications** (*2,949 filed in FY 2017*)



Fiscal Year 2018 Dispositions

4,856 Appeals (*Up from 4,095 in FY 2017*)

- **11% pro se** at time of disposition
- **3,452** by the Clerk of the Court
- **1,362** by a single judge of the Court
- **42** by a three-judge panel of the Court
(*Up from 21 in FY 2017*)



Fiscal Year 2018 Dispositions

224 Petitions (*286 in FY 2017*)

- **41% pro se** at time of disposition
- **7** by the Clerk of the Court
- **214** by a single judge of the Court
- **3** by a multi-judge panel of the Court



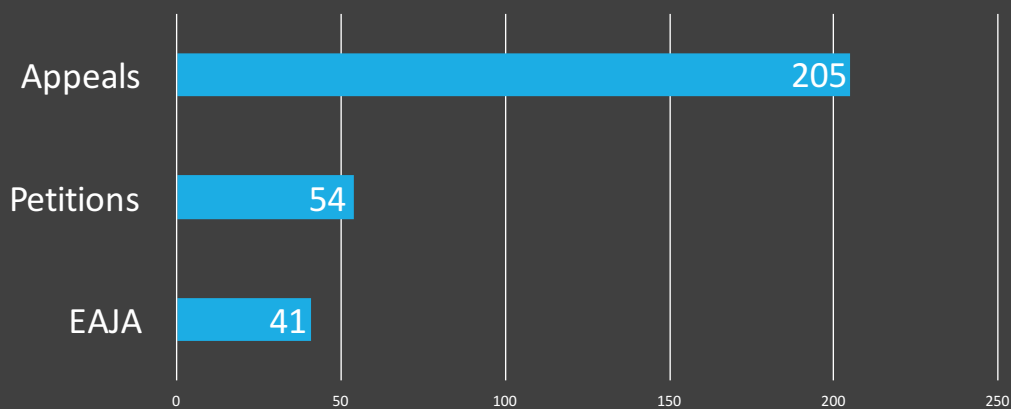
Fiscal Year 2018 Dispositions

3,297 EAJA Applications (2,896 in FY 2017)

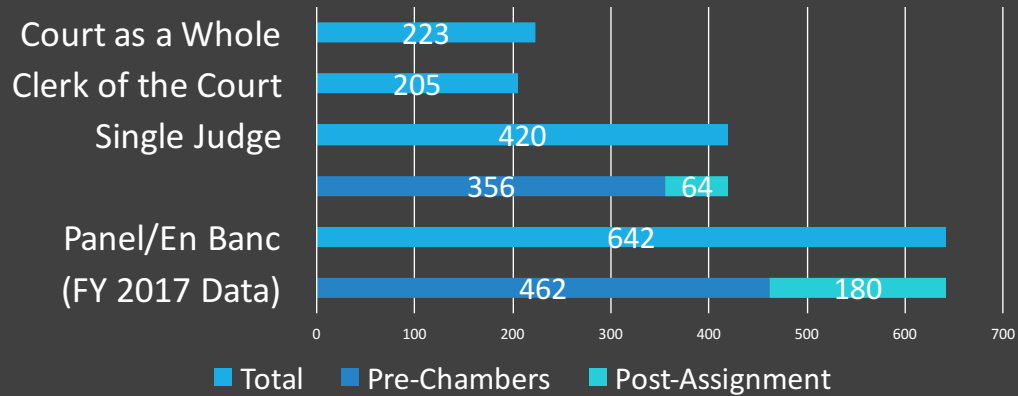
- **3,276** by the Clerk of the Court
- **27** by a single judge of the Court
- **3** by a multi-judge panel of the Court



Average Days to Disposition



Average Days to Disposition—Appeals



Recent CAVC and Federal Circuit Decisions



Monk v. Wilkie

30 Vet.App. 167 (2018)

BACKGROUND

- Petition asking the Court to find delays in the VA adjudication system unconstitutional
- Motion for class certification
- CAVC denied both petition and motion for class certification in 2015
- Federal Circuit reversed in 2017



Monk v. Wilkie

30 Vet.App. 167 (2018) (en banc)

HOLDING

- Motion for class certification denied
- Court will entertain class actions in appropriate petitions, using FRAP Rule 23 as a guide
- Merits still pending before a 3-judge panel
- Class action in appeals context pending in *Skaar v. Wilkie*, No. 17-2574



Thurlow v. Wilkie

30 Vet.App. 231 (2018)

BACKGROUND

- *Johnson v. McDonald*, 762 F.3d 1362 (Fed. Cir. 2014)—Federal Circuit held that VA's extraschedular regulations applied to disabilities on a collective basis, not just individually
- Mr. Thurlow appealed VA's denial of extraschedular referral
- While the case was pending, VA amended its extraschedular regulations to eliminate entitlement on a collective basis, applicable to all pending cases



Thurlow v. Wilkie

30 Vet.App. 231 (2018)

HOLDING

- VA's amended regulation does not have an impermissible retroactive effect and should apply in all pending cases
- Veterans can no longer receive extraschedular ratings for disabilities on a collective basis
- More extraschedular ratings questions are pending before the full Court in *Morgan v. Wilkie*, No. 17-0098



Cook v. Wilkie

908 F.3d 813 (Fed. Cir. 2018)

BACKGROUND

- After an initial Board hearing and a Board remand, Mr. Cook requested a second Board hearing to present new evidence. VA denied his request.
- Mr. Cook appealed to the CAVC. After the Court granted a JMR, the Board again denied a request for a second hearing.
- The CAVC held that Mr. Cook was entitled to a new hearing following the CAVC's earlier remand.



Cook v. Wilkie

908 F.3d 813 (Fed. Cir. 2018)

HOLDING

- The Federal Circuit affirmed the CAVC decision
- A veteran is entitled to a new hearing before the Board after a remand from the CAVC
- Relatedly, in *Clark v. O'Rourke*, 30 Vet.App. 92 (2018), the CAVC held that veterans are entitled to a full, 90-day period to submit new evidence to the Board after a CAVC remand.



Pending U.S. Supreme Court Cases



Kisor v. Wilkie

No. 18-15

- In a single-judge decision, the CAVC affirmed the Board's denial of an earlier effective date for PTSD.
- The Federal Circuit affirmed, deferring to VA's interpretation of its regulation regarding the reopening of claims based on new service records
- U.S. Supreme Court granted certiorari on December 10, 2018
- Sole issue: whether to overturn Auer and Seminole Rock, two cases requiring Courts to defer to an agency's reasonable interpretation of its own regulation



Gray v. Wilkie

No. 17-1679

- Underlying issue is VA's rule concerning whether blue-water Vietnam veterans were presumed to have been exposed to Agent Orange
- The Federal Circuit held that it lacked jurisdiction to review VA's rules published in the M21-1 *Adjudication Procedure Manual*
- Set for argument Monday, February 25, 2019
- Relatedly, the Federal Circuit, sitting en banc, is considering VA's blue-water rules in *Procopio v. Wilkie*, No. 17-1821.



U.S. COURT OF APPEALS FOR VETERANS CLAIMS Appellate Process & Recent Cases

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Helping Veterans: National Pro Bono Opportunities



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CREDO

*We believe our Veterans in need
—our Nation's defenders—
deserve the care, benefits, and
compensation they were promised
and the best legal services,
free of charge,
to meet their challenges.*



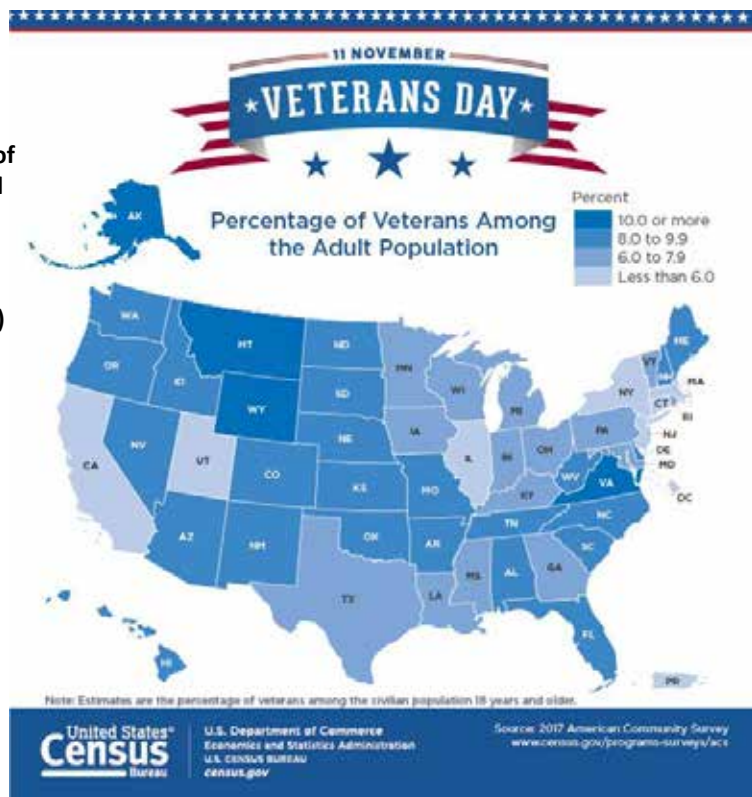
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- ❑ 2017 report by Department of Veterans Affairs (VA) showed 19.9 million veterans
- ❑ U.S. Census data shows 18.2 million in 2017 (under-count)
- ❑ Veterans file benefits claims each year (for treatment, disability, compensation, survivors benefits, etc.)
- ❑ For claims that are denied, Veterans file about 160,500 appeals (Notices of Disagreement) each year



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National Opportunity to Serve: Federal Veterans Pro Bono Program

• CHALLENGE

- Veterans' appeals denied by the VA HQ in Washington, DC may be appealed to the U.S. Court of Appeals for Veterans Claims
- The VA generally assigns two attorneys to represent the agency in each of these cases, nearly 8,000 such cases annually
- About 1,200 pro se Veterans annually ask The Veterans Consortium (TVC) for a pro bono attorney in these cases

• SOLUTION

- The federal Veterans Pro Bono Program provides *pro bono* legal services worldwide to veterans and their families, caregivers, and survivors before federal venues
 - U.S. Court of Appeals for Veterans Claims (CAVC)
 - U.S. Court of Appeals for the Federal Circuit
 - U.S. Supreme Court
- TVC operates the CAVC's Veterans Pro Bono Program

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Case Story: The Sutfin Saga

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- ❑ Shirley Sutfin, widow of an Army WWII Battle of the Bulge veteran
- ❑ 14-year struggle to obtain Dependent and Indemnity Compensation (DIC)
- ❑ Asked for a Pro Bono Program attorney from The Veterans Consortium for her federal CAVC appeal

- ❑ Case taken by Leo Dombrowski, Esq. of Sanchez Daniels & Hoffman (Chicago)
- ❑ Practice: Commercial, ESH, Real Estate, Toxic Tort [not VA law or Benefits law]
- ❑ Won \$195,000 in retroactive benefits plus \$1,233 per month; 100% to client



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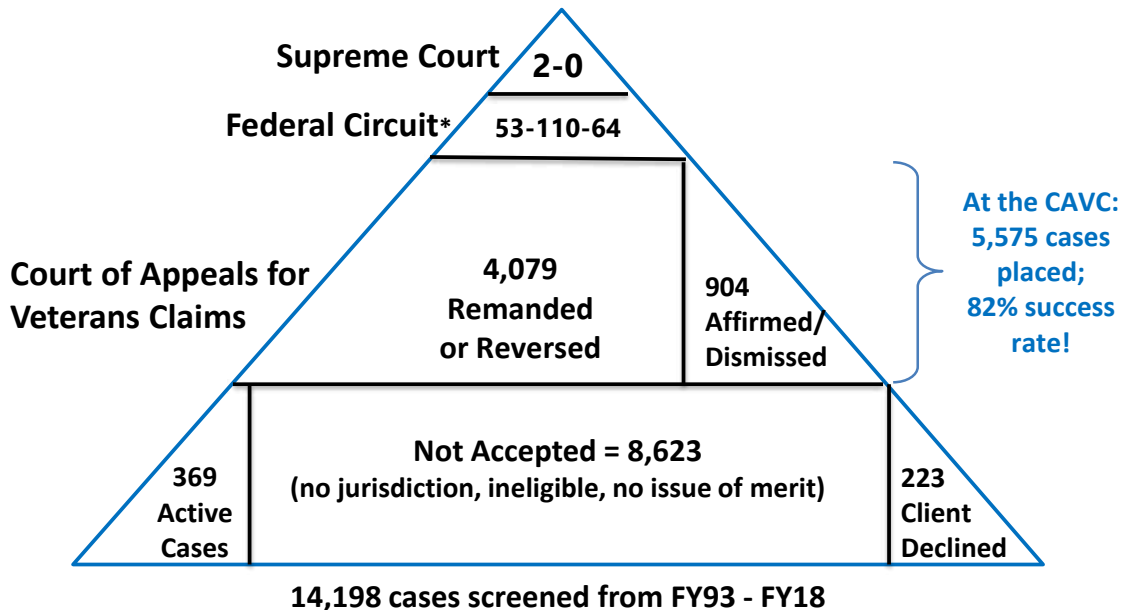
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TVC National Volunteer CorpsSM Track Record in Federal Courts (26 Years)

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*FedCirc is FY17 data
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National Opportunity to Serve: TVC Discharge Upgrade ProgramSM

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• CHALLENGE

- Men and women with Post-Traumatic Stress Disorder (PTSD) and Traumatic Brain Injury (TBI) denied care, benefits, and compensation
- Generally given “Other Than Honorable Discharge” (OTH Discharge)
- Defense Department and VA now encouraging re-adjudication of discharge status, but ~200,000 eligible veterans need help to apply

• SOLUTION

- TVC Discharge Upgrade ProgramSM provides *pro bono* legal services to warriors with OTH Discharges; about 1,500 requests annually
- Mainly cases related to PTSD and TBI, as well as MST
- Venues include military Discharge Review Boards (DRB) and Boards for Correction of Military Records (BCMR)
- Restores benefits eligibility and dignity to our nation’s defenders

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How Do We Do It?

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- ✓ Conduct outreach to pro se Veterans and their loved ones
- ✓ Recruit and train volunteer attorneys and paralegals in veterans law, Court practices, and federal procedures (CLE credits)
- ✓ Carefully screen cases for issue of merit, provide litigation strategy, and maintain secure website with latest cases available
- ✓ Provide experienced mentors, reference materials, malpractice insurance, and support to attorneys and clients throughout the process
- ✓ About 75% of cases can be handled in ≤ 30 hours of pro bono service, while making a true difference for a veteran



USCAVC Distinguished Service Award
(Hart T. Mankin Award) bestowed on
The Veterans Consortium, 2017

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Secure Web Portal for Services

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- ✓ Tools and Resources Volunteers and Pro Se Veterans
- ✓ Robust and secure
- ✓ Significant platform investments by Microsoft and LSC

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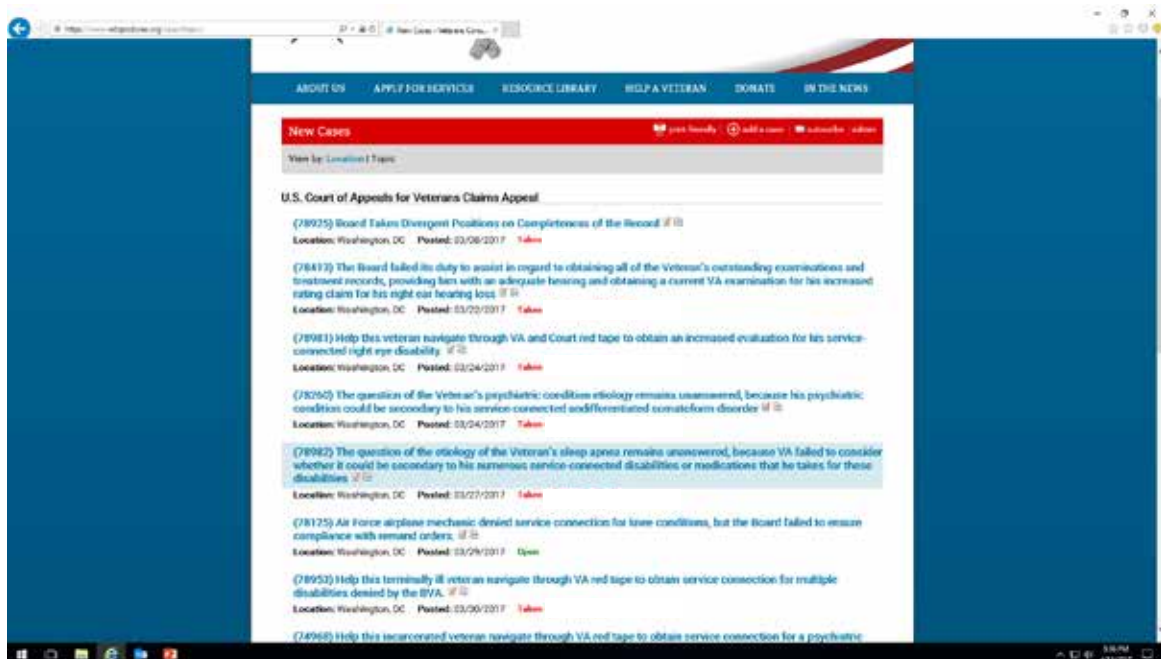
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Web Platform: Volunteers' Cases Tool

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5000th Case Co-Counsel



Judge William H. Webster
former Director of the FBI,
former Director of the CIA,
and Federal Judge



Ms. Linda Klein, Esq.
Immediate Past President, ABA
& Senior Managing
Shareholder, Baker Donelson



Ms. Judy Donegan, Esq.
Director, Litigation &
Case Management
The Veterans Consortium

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Opportunities & Resources for Volunteers

- ✓ Opportunity to help veterans and their loved ones, as part of a *pro bono* program that makes a real difference in clients' lives
- ✓ Can volunteer remotely ("tele-serve"), from any location/jurisdiction
- ✓ Appellate experience in federal court
- ✓ Chance to "make law" in the veterans domain
- ✓ Volunteers get significant support from TVC for each *pro bono* case
 - Reference materials (sample briefs & pleadings, prior decisions, refresher videos, free textbooks)
 - Private volunteer website to see summaries of *pro bono* cases and ability to request them online
 - Mentor (assigned appellate attorney experienced in veterans law)
 - Screened case, with a litigation strategy memo
 - Malpractice coverage (if your firm/legal dept doesn't already provide)
- ✓ First-class training in veterans law (CLE credits available)
- ✓ Our sincere appreciation and the gratitude of deserving clients

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Pro Bono Program and Veterans Consortium Testimonials

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JUDGES (THE COURT)

► "The Pro Bono Program is very helpful to the Court. It is easier to decide a case briefed by a lawyer, assembled by a lawyer. Frequently we get single sided, handwritten sheets. If we don't know what the veteran is seeking how can we respond – that can be very frustrating for us and the veteran. The Veterans Consortium gives the veteran that technical expertise – and a trained lawyer is very helpful for the Court." *Judge Mary Schoelen*

► "For ten years the Veterans Consortium has been the grantee for this Pro Bono Program and the Consortium's educational, screening, and mentoring services have received the highest praise from the Legal Services Corporation during peer reviews. A significant number of lawyers who now practice regularly before the Court got their start as volunteer lawyers with the Program. This multiplication of qualified veterans advocates is an important byproduct of the Consortium's efforts and a testament to the quality of the Program." *Chief Judge Kenneth B. Kramer*

VOLUNTEERS/PRO BONO COORD.

► "Thank you for sending [client's] kind comments to me. I wish that I could take credit for the victory. The real credit should go to the Consortium's outstanding staff. Please pass along my thanks to each and every one of them. The preparation they put into the file before it arrived was incredible. Their suggestions and mentoring made it so easy...I hope that the Consortium will want me to assist with another case soon."

Greg James, Esq.

► "The Veterans Pro Bono Program can only be described as 'first class.' Not only are we able to help deserving clients, our younger lawyers receive superb training and valuable experience. Butler Pappas is a strong supporter of the Program." *W. Douglas Barry, Esq., Managing Partner, Butler, Pappas, Wehmiller Katz Craig, Tampa Florida*

CLIENTS

► "I find what my attorney has accomplished nearly miraculous. The quality of my legal representation could not have been better. The Pro Bono Program is truly a God Send." *California Korean Veteran*

► "My husband was injured three times. He was sent home with no pension. May God bless you all for everything you have done, and I pray you can keep up the good work." *Virginia Widow of WWII Veteran*

► "...I will always be thankful for the Veterans Consortium Pro Bono Program, and will never forget all the hard work that you and your staff have done for me...If it were not for your program a lot of veterans could not appeal their case to the Court of Veterans Appeals." *Colorado WWII Veteran*

► "I was extremely satisfied with the results of my case. Most veterans lack the monetary income to hire capable legal assistance. The Pro Bono program allows a veteran to feel confident that regardless of his finances, he has the ability to secure quality legal representation to act on his behalf." *New York WWII Vet*

► "I'm forever grateful for all that was done in the handling of my case. And if I'm ever called on to show any kind of support for the Pro Bono Program I would honestly do so without a second thought. Thank you." *Vietnam-era Vet*

LSC (PROGRAM REVIEWS)

► "The Consortium is a remarkable program in that it has brought together four veterans organizations . . . to form the Consortium. . . . Another impressive aspect of the Program is that the components work so smoothly together. The coordination and cooperation between the components is noteworthy." (2002)

► "The quality of the case evaluations appears high, the supervision of the work is systematic and very professional, and the placement of cases is expertly done. . . . The training materials are very impressive and the pro bono attorneys . . . we spoke with strongly praised the training the office provided." (2002)

► "The Veterans Consortium is a well-managed and important organization for many veterans around the country. . . . The Veterans Consortium continues to provide excellent services for appellants appearing before the CAVC and has branched out to provide more services to veterans in need. . . . [TVC] is led by a strong executive director and effective management team." (2017)



Recent Awards & Recognitions

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**USCAVC Distinguished Service Award
(Hart T. Mankin Award)
September 2017**



**Congressional Record Commendation
115th Congress, First Session
October 2017**



**DC Mayor's Proclamation
Mayor Muriel Bowser
October 2017**



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TVC Legal Scholars ProgramSM

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- **Expose students at accredited law schools to public interest law careers in general, and veterans law in particular, to help build the bar**
- **Opportunities to serve include**
 - ✓ Clerkships on federal Veterans Pro Bono Program cases
 - ✓ Internships, externships, fellowships, research projects
 - ✓ Pro bono service at Medical-Legal Partnership/weekly legal clinics in DC, pop-up clinics at various locations
- **Support for annual National Veterans Law Moot Court Competition**
 - ✓ Trophy sponsor for team and individual awards
 - ✓ Volunteer support for mentoring, coaching
- **TVC support for new law school projects, program, or clinics**
 - ✓ TVC Veterans Law Boot CampsSM
 - ✓ Shipments of TVC Clinic-in-a-FootlockerTM reference materials
 - ✓ Limited subgrants and scholarships annually

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Why does the bankruptcy code discriminate against disabled veterans?

BY NANCY RAPOPORT AND MARY LANGSNER, OPINION CONTRIBUTORS — 01/24/19 04:00 PM EST
THE VIEWS EXPRESSED BY CONTRIBUTORS ARE THEIR OWN AND NOT THE VIEW OF THE HILL

Just In...

Ocasio-Cortez on Schultz: Why are billionaires who want to run for president never told to 'work their way up'?

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ADMINISTRATION — 17M 43S AGO

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ADMINISTRATION — 19M 2S AGO

Second Trump-Kim summit risks US credibility

OPINION — 21M 1S AGO

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NATIONAL SECURITY
— 26M 12S AGO

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When a person files for bankruptcy, it's a sad day. Although the bankruptcy code was enacted to give a "fresh start to the honest but unfortunate debtor" and a single point of contact for creditors (and to keep our economy going), admitting that your debts are out of control is difficult. So why would Congress make it harder for disabled veterans who need bankruptcy protection?

In 2005, Congress changed the bankruptcy code to force those with income levels at or above the median in their geographic area into Chapter 13 (reorganization), rather than Chapter 7 (liquidation). Chapter 7 is traditionally a fast process, but Chapter 13 takes three to five years.

The rationale was that debtors who could pay part of their debts in Chapter 13 were getting fast discharges in Chapter 7 instead. Although there had been abusive Chapter 7 filings, these amendments have created unintended consequences, especially for disabled veterans. Here's how: "Payments to victims of war crimes or crimes against humanity . . . , and payments to victims of international terrorism ... or domestic terrorism . . ." are excluded from the "current monthly income" calculation. Social security benefits are also excluded. That's fair. But veterans' military disability benefits are included in calculating their current monthly income. That's unfair.

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There is ample data and thoughtful analysis on the challenges of veterans in financial distress. One excellent example is Dr. Jack F. Williams, [Vets and Debts](#), published in 2017 by the American Bankruptcy Institute Law Review.

Yet the “current monthly income” definition prevents disabled veterans’ parity with other disabled Americans. Military service is service in its purest sense. Why should disabled veterans be treated worse than other disabled people, victims of war crimes, and victims of terrorism? Disabled Americans should not worry that their Chapter 7 cases, and their hope for a swift “fresh start,” will be dismissed without receiving their “clean slate” discharge.

If you think that everyone should repay their debts and no one should ever seek bankruptcy protection, imagine what would happen if you or a family member received bad medical news or a layoff notice. Maybe you (or they) could weather the financial deluge of hundreds of thousands of dollars in medical bills or of competing to re-enter the workforce against hundreds of your former work colleagues. We doubt that we could.

Here’s an example: Take a veteran who is married to a teacher. This veteran is considered fully disabled by reason of his service (and receives 100 percent military disability). His debts would make him an ideal candidate for Chapter 7, except that his military disability must be included in his “current monthly income” calculation.

When his military disability is combined with his wife’s income, the total is large enough to eliminate eligibility for Chapter 7 relief — even though his creditors could never attach his military disability. (His creditors cannot attach his military disability under 38 U.S.C. § 5301, a different part of the United States Code). Veterans have run toward danger to protect the rest of us. Should we exclude them from the protections available to those receiving Social Security disability benefits, victims of war crimes, and victims of international and domestic terrorism?

There is a simple fix. Congress can exclude military disability from being counted toward “current monthly income” for bankruptcy purposes. Sens. Tammy Baldwin (D-Wisc.) and John Cornyn (R-Texas) co-sponsored the Honoring American Veterans in Extreme Need (HAVEN) Act. The HAVEN Act would exclude certain veterans’ benefits (including disability benefits) from the definition of “current monthly income.”

The HAVEN Act is the single best way to ensure that our disabled veterans are treated equally with other disabled Americans under the bankruptcy code and is an easy bipartisan win.

We both have relatives who have served our country. We’re extraordinarily proud of them and grateful for their service. Everyone who knows a veteran is just as proud and grateful. Gratitude isn’t enough. It’s time to fix this issue and get the HAVEN Act passed, and soon.

Mary Langsner, Ph.D., is an associate attorney at Holley Driggs Walch Fine Puzey Stein & Thompson and is the co-chair of the American Bankruptcy Institute’s Pro Bono Committee of the Task Force on Veterans and Service Members Affairs and a member of the Task Force’s Legislative Committee. Nancy B. Rapoport is the Garman Turner Gordon professor of law at the William S. Boyd School of Law at the University of Nevada, Las Vegas, and is the reporter and secretary of the Task Force.

TAGS TAMMY BALDWIN JOHN CORNYN DISABILITY BANKRUPTCY CODE

Feature

BY JAY BENDER, ELIZABETH L. GUNN AND JOHN H. THOMPSON¹

Defending Our Veterans

Excluding Veterans' Benefits from Current Monthly Income



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Editor's Note: The authors are members of ABI's Task Force on Veterans and Servicemembers Affairs. Mr. Bender and Mr. Thompson are co-chairs of the Task Force's Legislative Subcommittee. For more information, please contact Task Force Chair **John W. Ames** (Bingham Greenebaum Doll LLP; Louisville, Ky.) at james@bgdlegal.com.

Part of the mission of ABI's newly formed Task Force for Veterans and Servicemembers Affairs is to "remediate and prevent adverse debt concerns and impacts on veterans and servicemembers to ensure that we financially strengthen those that strengthen us with the respect and dignity they deserve." To that end, the Task Force has focused much of its initial attention on the Bankruptcy Code's perplexing and inequitable treatment of veterans' benefits in consumer bankruptcy cases.

While the Code excludes benefits received by individuals under the Social Security Act from the definition of "current monthly income" and thus from an individual's "disposable income," the Code inexplicably provides no comparable exclusions for benefits received through the U.S. Department of Veterans Affairs or otherwise on account of a veteran's service. The disparate treatment of veterans' benefits presents significant hardship to some veterans, compelling them to devote these benefits — including their disability benefits — to the funding of their chapter 13 plans and restricting their ability to seek relief under chapter 7 rather than under chapter 13.

Overview: Veterans' Benefits Pre- and Post-BAPCPA

For years, there was little (if any) debate about whether veterans' benefits paid through the Department of Veterans Affairs should be included in the debtor's "disposable income." Prior to 2005, the Bankruptcy Code allowed bankruptcy judges to exercise their discretion, based on the facts of each case, in determining what constituted a debtor's disposable income. Under the pre-2005 Code, "disposable income" was defined in 11 U.S.C. § 1325(b)(2) as:

[I]ncome which is received by the debtor and which is not reasonably necessary to be expended —

(A) for the maintenance or support of the debtor or a dependent of the debtor, including charitable contributions....

(B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

Under this definition, it was accepted that veterans' benefits should not be considered part of a chapter 13 debtor's "disposable income." No published opinions interpreting the pre-2005 "disposable income" definition even considered that possibility, no less ruled that veterans benefits affirmatively constituted disposable income.

All that changed with the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).² Through BAPCPA, Congress divested bankruptcy judges of the discretion they previously had to decide what would — and would not — constitute "disposable income" in a debtor's case. Congress did so by revising § 1325(b)(2) to make "current monthly income" the starting point for calculating a debtor's disposable income. A new phrase to the Bankruptcy Code, "current monthly income" was generally defined by Congress to mean the average monthly income from all sources that the debtor receives, as well as any other amount paid by an entity other than the debtor for the household expenses of the debtor or the debtor's dependents.³

From this broad definition, Congress specifically excluded three sources of income: (1) benefits received under the Social Security Act; (2) payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes; and (3) payments to victims of terrorism on account of their status as victims of such terrorism.⁴ For reasons that are not clear,⁵ veterans' benefits provided through the Department of Veterans Affairs were not excluded from the Bankruptcy Code's "current monthly income" definition.

Post-BAPCPA Case Law

Following BAPCPA, at least five courts have addressed whether a debtor's disposable income

¹ The opinions expressed herein are provided as a result of Ms. Gunn's own experiences and not as a representative of the Attorney General or the Division of Child Support Enforcement. She is also an honoree of ABI's 2017 "40 Under 40" class. In addition, Mr. Thompson served as a captain and helicopter pilot in the U.S. Army before earning his law degree.

² Pub. L. 109-8, 119 Stat. 23.

³ 11 U.S.C. § 101(10A).

⁴ *Id.*

⁵ BAPCPA's legislative history does not address why veterans' benefits were not excluded from the "currently monthly income" definition.

includes veterans' benefits.⁶ In each of these cases, the bankruptcy court held that because veterans' benefits are not specifically excluded from the Bankruptcy Code's definition of "current monthly income," these benefits must be counted as part of a debtor's disposable income. As a result, the bankruptcy judge denied confirmation of the debtor's proposed chapter 13 plan in each of these cases because the plan failed to commit all of the debtor's disposable income to funding the plan as required by 11 U.S.C. § 1325(b)(1)(B).

The most recent of those opinions is illustrative of these cases. In *In re Brah*, the chapter 13 trustee objected to a husband and wife's joint chapter 13 plan, arguing that it was unconfirmable because the debtors failed to include their veterans' disability benefits in their disposable income calculation upon which the plan was based.⁷ The debtors countered that because their veterans' benefits were not assignable nor subject to levy, seizure or attachment under applicable non-bankruptcy law,⁸ they were not obligated to dedicate those benefits toward funding their plan.

The *Brah* court sided with the trustee, finding §§ 101(10A) and 1325(b)(2) to mandate unambiguously that the debtors include their veterans' disability benefits in their current monthly income. The court surmised that had Congress intended to exclude otherwise-exempt assets from the disposable-income calculation, it could have done so by expressly excluding such assets from the definition of "current monthly income" in § 101(10A).⁹ In reaching its holding, the *Brah* court noted and addressed the puzzling discrepancy between the treatment of Social Security benefits and veterans' benefits in chapter 13 cases:

Although the exclusion of Social Security benefits from current monthly income suggests that [Department of Veterans Affairs] Benefits also should be excluded, the statutory exception applies only to "benefits received under the Social Security Act."... [T]he Court understands why the Debtors seek the same exclusion for their veterans' disability benefits as afforded to recipients of Social Security disability benefits. But creating this exception is a job for Congress, not the Court. The Debtors' ability to exempt these benefits does not remove the [Department of Veterans Affairs] Benefits from the Bankruptcy Code definition of current monthly income. And the fact that the benefits are not subject to attachment, garnishment or other legal process does not render the benefits immune from the disposable income calculation in a voluntary Chapter 13 plan. Accordingly, the Trustee's objection is sustained and the [Department of Veterans Affairs] Benefits should be included in the Debtors' disposable income.¹⁰

Brah and the four cases preceding it all analyzed whether veterans' benefits were a part of a debtor's disposable income in the context of considering confirmation of a proposed

chapter 13 plan. However, the issue has wider implications, extending to the threshold question of the chapters of the Bankruptcy Code under which a veteran can seek relief.

As part of BAPCPA, Congress enacted its "means test" for determining an individual consumer debtor's eligibility to file for chapter 7 relief. Codified in § 707(b) of the Bankruptcy Code, the means test evaluates whether an individual's chapter 7 filing might be abusive by, in part, looking at the amount of his/her current monthly income.¹¹ Under that test, the greater a debtor's current monthly income, the greater the likelihood that the debtor's chapter 7 filing will be presumed abusive. Including veterans' benefits in a veteran's current monthly income calculation might decrease the availability of chapter 7 relief to veterans.

The negative impact of means testing on veterans is tempered to some extent by 11 U.S.C. § 707(b)(2)(D), which provides that a court may not dismiss or convert a chapter 7 case filed by an individual for abuse, based on any form of means-testing, if that individual falls within a limited category of veterans.¹² However, that exclusion is narrow, offering no protection for a veteran whose service ended more than 540 days before his/her bankruptcy filing and whose debts arose primarily after his/her service concluded.

Correcting the Code

There is no sensible basis for the Bankruptcy Code treating benefits paid to veterans through the Department of Veterans Affairs differently than benefits received by individuals from the Social Security Administration. The disparate treatment results in systematic discrimination against veterans, even if wholly unintentional. Consistent with its mission, ABI's Task Force on Veterans and Servicemembers Affairs plans on bringing increased attention to this issue in the hope that veterans will soon be relieved of the adverse effects of the Bankruptcy Code's problematic "current monthly income" definition.

At least one piece of legislation has been drafted to provide veterans with such relief. Written with input from veterans organizations and bankruptcy professionals, the Honoring American Veterans in Extreme Need Act (HAVEN Act)¹³ proposes to amend the Bankruptcy Code's definition of "current monthly income" to specifically exclude from that definition veterans' disability benefits and a wide range of other veterans' benefits.¹⁴ Earlier this year, Sen. Tammy Baldwin (D-Wis.) proposed the HAVEN Act as an amendment¹⁵ to the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (the "NDAA Act"); however, her amendment was not adopted prior to passage of the NDAA Act.

¹¹ 11 U.S.C. § 707(b)(2)(A).

¹² Section 707(b)(2)(D) provides specifically that the court may not dismiss or convert a case based on any form of means testing (1) if the debtor is a disabled veteran and the debtor's indebtedness occurred primarily during a period during which the veteran was (a) on active duty or (b) performing a homeland defense activity; or (2) with respect to the debtor, while the debtor is (a) on, and during the 540-day period beginning immediately after the debtor is released from, a period of active duty of not less than 90 days, or (b) performing, and during the 540-day period beginning after the debtor is no longer performing, a homeland defense activity performed for a period of not less than 90 days; if after Sept. 11, 2001, the debtor, while a member of a reserve component of the Armed Forces or a member of the National Guard, was called to such active duty or performed such homeland defense activity.

¹³ For the complete text of the HAVEN Act, see 164 Cong. Rec. S3633 (daily ed. June 11, 2018) (proposed Senate Amendment 2643 to Senate Amendment 2282 to H.R. 5515).

⁶ *In re Brah*, 562 B.R. 922 (Bankr. E.D. Wis. 2017); *In re Hedge*, 394 B.R. 463 (Bankr. S.D. Ind. 2008); *In re Waters*, 384 B.R. 432 (Bankr. N.D. W.Va. 2008); *In re Wyatt*, 2008 WL 4572506 (Bankr. E.D. Va. Oct. 10, 2008); *In re Redmond*, 2008 WL 1752133 (Bankr. S.D. Tex. April 14, 2008). For a discussion of these cases, see Jay Bender, "The Unequal Treatment of Veterans and Veterans' Disability Benefits Under the Bankruptcy Code," *Norton Bankruptcy Law Adviser*, v. 2017, issue 6 (June 2017).

⁷ 562 B.R. at 923.

⁸ 38 U.S.C. § 5301(a)(1).

⁹ 562 B.R. at 923.

¹⁰ *Id.* at 924, 925-26.

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Defending Our Veterans: Excluding Veterans' Benefits from Monthly Income

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Correcting the Bankruptcy Code's unfair treatment of veterans' benefits is overdue, and the ABI Task Force for Veterans and Servicemembers Affairs is optimistic that the HAVEN Act will soon be passed with the bipartisan support that it deserves. Meanwhile, the ABI Task Force will continue to look for additional ways to improve the bankruptcy process to better meet the needs of financially distressed veterans and servicemembers. We encourage all ABI members to help the Task Force's mission and share your ideas about where such improvements can be made. **abi**

¹⁴ In addition to the existing exclusions under 11 U.S.C. § 101(10A), the HAVEN Act proposes to exclude from "current monthly income" (1) compensation under chapter 11 of title 38; (2) compensation under chapter 13 of title 38; (3) pensions under chapter 15 of title 38; (4) retired pay payable to members of the Armed Forces retired under § 1201 or 1204 of title 10; (5) retired pay payable to members of the Armed Forces placed on the temporary disability retired list under § 1202 or 1205 of title 10; (6) disability severance pay payable under § 1212 of title 10 to members separated from the Armed Forces under § 1203 or 1206 of that title; (7) retired pay payable in accordance with § 1201 or 1202 of title 10, or disability severance pay payable in accordance with § 1203 of that title, to members of the Armed Forces eligible for such pay by reason of § 1207a of that title; (8) combat-related special compensation payable under § 1413a of title 10; (9) any monthly annuity payable under the Survivor Benefit Plan under subchapter II of chapter 73 of title 10 if the participant in the plan with respect to whom the annuity is payable was retired for physical disability under chapter 61 of that title; (10) the special survivor indemnity allowance payable under § 1450(m) of title 10; and (11) any monthly special compensation payable to members of the uniformed services with catastrophic injuries or illnesses under § 439 of title 37.

¹⁵ 164 Cong. Rec. S3633 (daily ed. June 11, 2018).

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History

Until the U.S. Court of Appeals for Veterans Claims (CAVC) was established in 1988, the Nation's veterans had no court of law where they might appeal the Government's decisions on veterans benefits.

The Continental Congress and then the U.S. Congress and the States variously provided veterans benefits until 1930, when the U.S. Congress consolidated Federal entities and programs awarding veterans benefits and created the Veterans Administration, later called the Department of Veterans Affairs (VA). Until CAVC was established in 1988, however, VA remained the only administrative agency that operated virtually free of judicial oversight. VA's Board of Veterans' Appeals (Board or BVA) provided the final decision on a veteran's claim.

A veteran whose claim VA denied was therefore afforded no independent review of VA decisions; that veteran was therefore denied the right to go to court to challenge the decision of an administrative agency, a right afforded to other citizens challenging decisions of other administrative agencies. For decades, the House Committee of Veterans' Affairs consistently resisted the efforts of veterans and their advocates to alter VA's "splendid isolation" as the single Federal administrative agency whose major functions were insulated from judicial review.

With the influx of veterans' post-Vietnam claims in the 1970s and 1980s, however, veterans and their advocates grew more vocal in pressing for judicial review, and in 1988, veterans prevailed. On November 19, 1988, the Veterans' Judicial Review Act under Article I of the U.S. Constitution created the new veterans court, the United States Court of Veterans Appeals. On March 1, 1999, the Veterans' Programs Enhancement Act of 1998 changed the Court's name to the name it now bears, the U.S. Court of Appeals for Veterans Claims.

In addition to establishing CAVC, the Veterans' Judicial Review Act also eliminated the bar to judicial review by allowing lawyers to represent veterans and their survivors, for reasonable fees, in their appeals of BVA decisions.

Moreover, more recent congressional legislation lifted the bar to paid legal representation before the VA.

1/30/2019

US Court of Appeals for Veterans Claims

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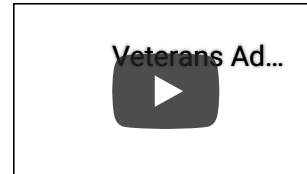
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