


# Veterans and Class Actions: Past, Present, and Future



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October 5, 2023



# Veterans and Class Actions: A Brief History

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- Prior to the establishment of the Court of Appeals for Veterans' Claims (CAVC), the only avenue for veterans to pursue class action litigation was through federal district courts.
  - *Nehmer v. U.S. Veterans' Admin.* 118 F.R.D. 113 (N.D. Cal. 1987) – provided relief to a class of Vietnam veterans exposed to Agent Orange.
- 1988 - Congress passed the Veterans Judicial Review Act, creating a special “Veterans Court” —the CAVC —that it *expected* would review veteran benefit decisions using class actions.
  - A Congressional Budget Office cost estimate released shortly before the VJRA was enacted suggests that Congress intended that the Veterans Court would have the authority to maintain class actions. H.R. Rep. No. 100-963, pt. 1, at 41–42 (1988) (discussing potential litigation challenges to VA regulations, stating, "Again according to SSA, most challenges to regulations are class actions, involving large groups of beneficiaries or potential beneficiaries."





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- But, less than a year into its existence, CAVC determined it did NOT have the power to hear class actions in *Harrison v. Derwinski*, 1 Vet. App. 438 (1991). The CAVC offered three reasons:
  - (1) Jurisdiction of the Court is limited by 38 U.S.C. § 7252 (jurisdiction of this Court limited to the review of Board of Veterans' Appeals (BVA) decisions); 38 U.S.C. § 7261(c) (each person adversely affected by such a BVA decision must file a notice of appeal)
  - (2) "Such a procedure would be highly unmanageable"
  - (3) "Such a procedure is unnecessary in light of the binding effect of this Court's published opinions as precedent in pending and future cases," see 38 U.S.C. § 7269(a)-(b) (decisions of Court have precedential effect)





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## A Brief History

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- So, for years the VA:
  - Avoided judicial review of cases that impacted potentially large numbers of veterans
  - Implicitly encouraged Veterans to abandon claims given the 5-7 year journey through the administrative benefits system before reaching the CAVC
  - Strategically picked off any policy or rule challenges at the Court by resolving individual petitions prior to briefing/hearing





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## A Brief History

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- Finally, in *Monk v. Shulkin*, 855 F.3d 1312 (2017), the Federal Circuit signaled an end to the prohibition on class actions at the CAVC.
- The CAVC could hear class actions under the All Writs Act, which allows courts to create novel procedures to protect their jurisdiction to hear cases.
- The CAVC could write a formal class action rule to hear class actions.
  - On November 11, 2020, and after three years of consultation with government/private attorneys, veteran organizations, and academics, it released Rule 23. <https://www.uscourts.cavc.gov/rule23.php>





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- The *Monk* Court further noted that class actions can help the CAVC exercise its authority by promoting efficiency, consistency, and fairness, and improving access to legal and expert assistance by parties with limited resources.
- Claim aggregation may help the CAVC achieve the goal of reviewing the VA's delay in adjudicating appeals by preventing the VA from evading such review by resolving individual mandamus petitions.
- Increasing its prospects for precedential opinions by preventing the VA from mooting claims scheduled for precedential review.
- Permit the Veterans Court "to serve as lawgiver and error corrector simultaneously, while also reducing the delays associated with individual appeals."





# Veterans and Class Actions: A Brief History

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- Post-*Monk* attempts at class certification:
  - In *Monk II*, 30 Vet. App. 167 (2018), the CAVC ultimately denied class certification.
  - Petitioner proposed a class consisting of all individuals who had been denied VA disability compensation benefits and had not received a decision from the Board of Veterans' Appeals within 12 months.
  - The CAVC determined that certification turned on the issue of commonality: a question of law or fact common to the class as a whole.
  - Members of the proposed class did not meet this prong because they did not seek to certify a class “based on a specific practice or policy.” The Federal Circuit affirmed.





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## A Brief History

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- *Godsey v. Wilkie*, 31 Vet. App. 207 (2019) –The first class certified by the CAVC.
- Petitioner asserted extreme delays by the Secretary in the Board's appeals process under the legacy system. (On average more than 1,000 days)
- The CAVC addressed commonality first:
  - As proposed, there were factual and legal differences among class members' claims that could prove fatal to commonality.
  - So, it modified the proposed class to include only those claimants who had been waiting more than 18 months since filing their appeals.







# Veterans and Class Actions:

## A Brief History

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- *Wolfe v. Wilkie (Wolf I)*, 32 Vet. App. 1 (2019)
  - Issue involved whether it was proper for the VA to deny reimbursement of certain emergency medical expenses associated with non-VA hospital visits.
  - The CAVC certified the class and simultaneously granted the writ of mandamus.
  - In a March 24, 2021, precedential decision, the CAVC granted a motion to appoint a special master, paid for by the court, to enforce the class action judgment. *Wolfe v. McDonough*, 34 Vet. App. 162 (2021).
  - But, the Federal Circuit reversed the decision on the merits. It did not address the class certification issue.





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- *Beaudette v. McDonough*, 34 Vet. App. 95 (2021)
  - Issue involved whether decisions related to the Caregiver Program are insulated from Board review.
  - The CAVC certified the class and simultaneously granted the writ of mandamus on the merits.
  - Whether petitioners had met the superiority test was the main issue.
  - The CAVC found that a precedential decision would not effectively inform past program claimants of their important appellate rights, and that their discovery of that right would be left to chance. Therefore, it concluded, class-wide relief would be superior to a precedential decision in this matter.
  - Pending appeal at the Federal Circuit.





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- However, most motions for class certification have been denied post-*Monk*.
  - *Rosinski v. Shulkin*, 29 Vet. App. 183 (2018).
  - *Thompson v. Wilkie*, 30 Vet. App. 345 (2018).
  - *Prewitt v. Wilkie*, 2018 U.S. App. Vet. Claims LEXIS 1607(2018).
  - *Ward v. Wilkie*, 31 Vet. App. 233 (2019).





# Veterans and Class Actions:

## A Brief History

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- In *Skaar v. McDonough*, 48 F.4<sup>th</sup> 1323 (2022), the Federal Circuit seemed to limit the ability for veterans to bring class actions.
- *Skaar* involved a class of nearly 1,400 elderly veterans who participated in the cleaning up of nuclear debris left when two Air Force planes carrying hydrogen bombs collided over Palomares, Spain, in 1966.
- The Air Force produced a study concluding that the veterans were not exposed to meaningful doses of radiation, and the VA relied on the Air Force's study/methodology to deny the veterans' applications for benefits.
- The class alleged that the standardized method that the Air Force and VA used to estimate radiation doses was scientifically unsound, and the CAVC agreed.





# Veterans and Class Actions:

## A Brief History

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- The CAVC certified a class of all veterans who “have been denied” and “will be denied” benefits, ordered the VA to reconsider its methodology, and instructed the VA to adjudicate the Palomares claims accordingly.
- This was also the first time the CAVC granted class certification on an individual appeal of a Board decision.
- Importantly, the CAVC explained *why* a class action was needed here:
  - Without a class, many of these older veterans would never know of or understand their right to receive a new hearing, obtain counsel, mount a legal challenge to a flawed scientific study, and obtain relief in a consistent way.
  - The class action assured that all affected veterans would get notice and new hearings and benefit from a new methodology with representation that they could not have obtained on their own
- But, the Federal Circuit reversed.





# Veterans and Class Actions:

## A Brief History

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- The Federal Circuit held:
  - Only veterans who had exhausted all of their internal appeals with the VA and were in a position to file an appeal at the CAVC at the time that the class was certified could participate.
  - All the other veterans whose claims were still pending with the VA, whose claims had been wrongfully denied and not timely appealed, or whose claims had yet to be filed, were not entitled to the same relief.
  - Given the administrative backlogs at the VBA and Board of Veterans Appeals, it would be difficult for a potential legal action to ever amass the numbers necessary for a class action.





# Veterans and Class Actions: Present Posture

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- So where are we post-*Skaar*?
  - There are 9 pending class action cases at the CAVC
    - [17-2574](#) : Victor B. Skaar vs. Denis McDonough
    - [20-2365](#) : James M. Kernz vs. Denis McDonough
    - [20-4961](#) : Jeremy and Maya Beaudette vs. Denis McDonough
    - [21-0947](#) : B. Ripley and L. Butler vs. Denis McDonough
    - [21-2890](#) : Timothy J. Dolbin vs. Denis McDonough
    - [22-6299](#) : Douglas E. Helvie vs. Denis McDonough
    - [22-6737](#) : Shane L. Miller vs. Denis McDonough
    - [22-7344](#) : David A. Hamill vs. Denis McDonough
    - [23-3260](#) : Douglas Redwood vs. Denis McDonough





# Veterans and Class Actions: Present Posture

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- Currently pending at the Federal Circuit *Freund v. McDonough*, No. 23-1387 (CAVC No. 21-4168)
  - The VA admitted to improperly closing the appeals of over 3,500 veterans, preventing the Board of Veterans' Appeals from hearing those cases.
  - Many, possibly all, of these veterans have no idea that their appeals were improperly closed and therefore have no ability to bring individual claims to address the issue.
  - But, once the VA becomes aware that an appeal was inappropriately closed, the VA will reactivate that appeal, mooted any individual action seeking that relief.
  - Under Rule 23, petitioners can “adequately” represent the class even though their individual claims have become moot, so long as there is no reason to doubt their continued willingness to “vigorously advocate” for the class.







# Veterans and Class Actions: Present Posture

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- *Freund v. McDonough*, No. 23-1387 (CAVC No. 21-4168)
  - The CAVC concluded that class certification was not appropriate on two separate grounds”
    - “Petitioners' proposed class definition includes an implicit requirement that a class member have been subject to the closure of an administrative appeal without notice. In that case, the Court concludes that the named petitioners are not members of the class they seek to represent and are therefore inadequate representatives of such a class.”
    - “[P]etitioners have not met their burden to present common questions capable of class-wide resolution.”
  - CAVC did conceded that this is a “troubling case” and was “deeply disappointed that it took the Secretary so long to acknowledge the problem this petition highlighted.”





# Veterans and Class Actions: Looking to the Future

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The question remains whether class actions at the CAVC are a:



Powerful weapon      OR      Toothless dragon?

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# Veterans and Class Actions: Looking to the Future

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- There is little question that the ability bring class actions at the CAVC is needed.
  - Important tool in responding to recurring issues unrepresented veterans routinely face at the VA.
  - They could help the VA by reducing the resources needed for hearing, remanding, and re-adjudicating the same common questions.
  - Provide more consistent relief.
  - Precedential decisions are no substitute.
  - Veterans are often injured together.





# Veterans and Class Actions: Looking to the Future

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- But, the overly rigid approach that the CAVC and Federal Circuit seem to be taking in motions for class certification runs the risk of deterring parties from pooling resources to obtain legal representation and systemic relief.
- The Courts' narrowing reading and application of law to potential class actions also violates the pro-veteran cannon – a statutory scheme designed to deliver benefits promised to “a special class of citizens, those who risked harm to serve and defend their country.” *Bailey v. West*, 160 F.3d 1360, 1370 (1998).





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# Questions?

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