RESOLVED, That the American Bar Association urges Congress to expand the jurisdiction of the United States Court of Appeals for the Federal Circuit to include review of all purely legal issues decided by the United States Court of Appeals for Veterans Claims, formerly the Court of Veterans Appeals.
This report is submitted in support of the Recommendation urging Congress to expand the jurisdiction of the United States Court of Appeals for the Federal Circuit ("Federal Circuit") to include review of all purely legal issues decided by the United States Court of Appeals for Veterans Claims, formerly the Court of Veterans Appeals ("Veterans Court").

The Federal Circuit presently has exclusive jurisdiction to review decisions of the Article I Veterans Court. However, that jurisdiction is severely limited. One result of the Federal Circuit's limited jurisdiction is that in some instances when the Veterans Court determines a rule of law that determination is unreviewable.

I. Background

The Secretary of Veterans Affairs ("Secretary") decides claims for benefits under laws administered by the Department of Veterans Affairs ("VA"). Persons whose claims are denied are entitled to one administrative appeal to the Board of Veterans' Appeals ("Board"). 38 U.S.C.A. § 7104 (West 1991 & Supp. 1999). This review is conducted de novo. Final decisions of the Board may be appealed to the Veterans Court, which reviews findings of fact for clear error and legal questions de novo. Any legal question decided by the Board is reviewable by the Veterans Court.

There is a limited right to appeal a decision of the Veterans Court to the Federal Circuit. The statute provides:

(a) After a decision of the United States Court of Appeals for Veterans Claims is entered in a case, any party to the case may obtain a review of the decision with respect to the validity of any statute or regulation (other than a refusal to review the schedule of ratings for disabilities adopted under section 1155 of this title) or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the Court in making the decision.

38 U.S.C.A. § 7292 (West Supp. 1999). The Federal Circuit may review Veterans Court decisions to the extent any such decision either relied on or interpreted a statute or regulation, id., and may "interpret constitutional and statutory provisions, to the extent presented and necessary" to its decision. 38 U.S.C.A. § 7292(e). Federal Circuit review does not extend to ordinary questions of law. See, e.g., Livingston v. Derwinski, 959 F.2d 224, 225-26 (Fed. Cir. 1992). As a consequence, in those cases where a precedent decision of the Veterans Court determines a rule of law, not based on the interpretation of a statute or regulation, unreviewable law is created.
II. Examples

The unavailability of Federal Circuit review has, in many instances, undesirable consequences, which Congress appears not to have anticipated. Where a question of law is decided by the Board, review of that decision is available in the Veterans Court. However, where a question of law, other than the interpretation of a statutory or regulatory provision or a Constitutional issue, is decided by the Veterans Court, that decision is final. The Veterans Court's resolution on the issue is unreviewable and, if contained in a published decision, binding in future cases. For example, in *Kamas v. Derwinski*, 1 Vet.App. 308 (1991), the Veterans Court considered the following issue:

When the law controlling an issue changes after a claim has been filed or reopened but before the administrative or judicial review process has been concluded, the question arises as to which law now governs.

*Id.* at 311. The Veterans Court turned "for guidance, to four contemporary Supreme Court decisions on this subject" rather than basing its decision on a statute or regulation. *Id.* The Veterans Court went on to hold:

If the above cases are read together for purposes of considering appeals to this Court... where the law or regulation changes after a claim has been filed or reopened but before the administrative or judicial appeal process has been concluded, the version most favorable to appellant should and we so hold will apply unless Congress provided otherwise or permitted the Secretary of Veterans Affairs (Secretary) to do otherwise and the Secretary did so.

*Id.* at 312-13. The Veterans Court determined a rule of law without interpreting either a statute or regulation. The *Kamas* decision continues to be the law governing adjudication of veterans' claims, although it has not been considered or reviewed by any other tribunal.

The Veterans Court has determined other similar rules of law. For example, the Veterans Court has decided that expert medical evidence from a physician who treated the claimant is not entitled to greater weight than other medical opinion evidence, such as that from an examining or consulting physician. Social Security claimants have the benefit of a treating physician rule. *However*, the Veterans Court has held that VA claimants are not entitled to a similar rule. *Guerrieri v. Brown*, 4 Vet.App. 467, 471-73 (1993); see *Winsett v. West*, 11 Vet.App. 420, 424-25 (1998). The prevailing rule of law governing claims for VA benefits, therefore, is that expert medical evidence from a treating physician is not entitled to greater weight than that offered by a physician who either: (1) saw the patient only once and for the limited purpose of determining the nature and severity of her or his condition; or (2) never saw the patient and did no more than review the record. Identical treating physician evidence is given less weight in adjudicating a claim for veteran's benefits than in deciding a claim for social security.
benefits. The Veterans Court's implicit legal holding, that Congress intended claimants for VA benefits to receive treatment arguably less favorable than that afforded Social Security claimants, is unreviewable under present law. The foregoing legal principles decided by the Veterans Court affect many thousands of persons.

III. Recommendation

The Section believes that sound public policy should allow for review where any party seeks to challenge a question of law decided by the Veterans Court, even where the question decided is not based on the interpretation of a statute or regulation. The Section recommends that Congress amend 38 U.S.C. § 7292(a) to read as follows:

After a decision of the United States Court of Appeals for Veterans Claims is entered in a case, any party to the case may obtain a review of the decision with respect to any question of law, other than a refusal to review the schedule of ratings for disabilities adopted under section 1155 of this title, that was relied on by the Court in making the decision. Such review shall be obtained by filing a notice of appeal with the Court of Appeals for Veterans Claims within the time and in the manner prescribed for appeal to United States courts of appeals from United States district courts. The Federal Circuit shall not review a determination by the Court of Appeals for Veteran Claims as to a factual matter.

IV. Impact

The number of additional appeals to the Federal Circuit as a result of amending its jurisdiction under 38 U.S.C.A. § 7292(a) as proposed above would likely be minimal. The total number of appeals to the Veterans Court in fiscal year 1998 was approximately 2,484. According to the Veterans Court, it made 1,352 merits determinations during that period. The Federal Circuit, in turn, received 122 appeals from the Veterans Court in 1998. A large number of those 122 appeals was dismissed for lack of jurisdiction. Many decisions of the Veterans Court are limited to reviewing factual determinations made by the Board. It is therefore important to observe that even under the change proposed by the Section, Federal Circuit jurisdiction would continue to be limited by § 7292(d)(2), which provides:

Except to the extent that an appeal under this chapter presents a constitutional issue, the Court of Appeals may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case.
Although the exact number of additional appeals to the Federal Circuit under the Section's recommendation cannot be forecast with certainty, the number would unquestionably be small and the class of cases is deserving of review.

Respectfully Submitted,

John Hardin Young, Chair
Section of Administrative Law and Regulatory Practice

July 2000
GENERAL INFORMATION FORM

Submitting Entity: Section of Administrative Law and Regulatory Practice
Submitted By: John Hardin Young, Chair

1. Summary of Recommendation.

This resolution urges Congress to expand the jurisdiction of the United States Court of Appeals for the Federal Circuit ("Federal Circuit") to include review of all purely legal issues decided by the United States Court of Appeals for Veterans Claims, formerly the Court of Veterans Appeals ("Veterans Court").

2. Approval by Submitting Entity.

Approved at a regularly scheduled meeting of the Section of Administrative Law and Regulatory Practice Council on April 29, 2000.

3. Has this or a similar recommendation been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

None.

5. What urgency exists which required action at this meeting of the House?

The Federal Circuit presently has exclusive jurisdiction to review decisions of the Article I Veterans Court. However, that jurisdiction is severely limited. One result of the Federal Circuit's limited jurisdiction is that in some instances when the Veterans Court determines a rule of law that determination is unreviewable.

6. Status of Legislation. (If applicable)

None.

7. Cost to the Association. (Both direct and indirect costs)

None.
8. Disclosure of Interest. (If applicable)

None.

9. Referrals

A copy of this Resolution and Report have been sent to all ABA Sections, Divisions, and Commissions.

10. Contact Person (Prior to Meeting)

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11. Contact Person. (Who will present the report to the House)

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12. Contact Person Regarding Amendments to This Recommendation

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