THE CHALLENGES FACING THE U.S. COURT OF APPEALS FOR VETERANS CLAIMS

HEARING

BEFORE THE

SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS

OF THE

COMMITTEE ON VETERANS' AFFAIRS
HOUSE OF REPRESENTATIVES

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TUESDAY, MAY 22, 2007

U. S. HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON DISABILITY ASSISTANCE
AND MEMORIAL AFFAIRS,
COMMITTEE ON VETERANS' AFFAIRS,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:11 a.m., in Room 334, Cannon House Office Building, Hon. John Hall [Chairman of the Subcommittee] presiding.

Present: Representatives Hall, Rodriguez, Hare, Lamborn.

OPENING STATEMENT OF CHAIRMAN HALL

Mr. HALL. Good morning, everyone. First I will ask everybody to rise for the Pledge of Allegiance. The flags are in the front and rear of the room.

[Pledge of Allegiance.]

Mr. HALL. Thank you all for joining us for the House Subcommittee on Disability Assistance and Memorial Affairs hearing on the challenges facing the U.S. Court of Appeals for Veterans Claims (CAVC).

I would first like to thank the witnesses for appearing today before the Subcommittee. I know the issues pertinent to the Court of Appeals for Veterans Claims and the ease of the administration of justice for our veterans is of the utmost importance to you.

I also want to commend Judge Greene of the Court of Appeals for Veterans Claims for the exceptional job he has done with a relatively young bench. He has been successful in increasing the Court's efficiency and productivity through innovative management approaches, especially with the recall of retired judges.

I know that you are also going to benefit from successful efforts by this Committee to increase veterans' funding that will provide additional resources to your office.

You deserve it. You have certainly stepped up to the plate for our veterans and I want you to continue to call on this Subcommittee and this Congress for the resources you need.

However, no one will deny that more needs to be done to create a better system of appellate justice for our veterans. The merry-go-round of the appeals process, from the Regional Office to the Board of Veterans' Appeals to the Court, and the usual "hamster wheel"

of remands back and forth between the three has turned into a system of injustice for some of our veterans.

[Charts.]

Mr. HALL. I would direct everyone's attention to the charts displayed that show the appeals process for veterans' claims. As the retired judges of the Court have indicated in previous statements before Congress, with four levels of appeals, the one administrative to the board and three possible levels of judicial appeal, "This is just more justice than the system can bear."

Also, we would like to submit into the record two news articles in the print media, one from Washington Date Line and one from USA Today about the issue. Hearing no objection, they will be added to the record.

[The articles referenced by Chairman Hall, *"Disability Claims Appeals Swamp Veterans Court," USA Today, Gannett News Service, July 13, 2006, by Dennis Camire,* and *"Some Veterans Die Waiting for Benefits," Washington Dateline, Media General News Service, October 13, 2006, by James W. Crawley,* appear on page 53.]

Firstly, as you know, the veteran can appeal the Regional Office decision to the Board of Veterans' Appeals, the BVA. This process can take on average 2 years. From there, the veteran can appeal the BVA decision to the Court of Appeals for Veterans Claims where the average time from filing to disposition is 351 days. From there, an appeal can be made to the U.S. Court of Appeals for the Federal Circuit and from this Court, an appeal can be made to the Supreme Court.

This cycle can repeat itself a few times for veterans in many different variations before final adjudication. The question becomes, at what cost to the administration of justice does this cycle represent for our veterans?

For instance, I know that many take pause with the review of one Federal intermediate appellate court, the CAVC, by another Federal intermediate appellate court, the Federal Circuit Court. I am wondering what is gained by this unique additional bite at the apple.

Additionally, the veterans appeals process is interlaced with vacated and remanded decisions, cases sent back for a new decision or correction resulting in an appeals cavalcade of sorts that ends up creating extensive and unacceptable delays in the adjudication of veterans' claims.

This process adds years to the process and the Subcommittee has been alerted to cases pending on appeal for more than a decade. In fact, many appellants die while waiting for finality in their appeals. At that point, the CAVC appeal usually dies as well with little recourse for surviving dependents, spouses, and estates. This is not the desired result for our veterans' beneficiaries.

I look forward to hearing the witnesses' views on these phenomena of the veterans appeals process. Likewise, I look forward to hearing testimony on ways to improve processes within the Court itself. Particularly I am interested in examining the issue pertaining to expanding the interpretation of prejudicial error which to date has been interpreted as narrowly as possible by the Court.

I am aware in many instances that often for the sake of expediency, the Court will not resolve all issues raised on appeal and will vacate and remand on only one aspect of error raised on brief.

I also realize that the Court by statute is not allowed to make findings of fact or review cases de novo, to weigh BVA or RO findings of evidence and law anew under 38 USC, section 7261. However, I would like to examine the value of allowing the Court to review cases de novo and make determinations of fact without first remanding to the Board of Veterans' Appeals to supplement the record or to correct the error.

I know the National Veterans Legal Services Program, the National Organization of Veterans' Advocates, and Disabled American Veterans have ideas in this area and I am anxious to explore them.

Lastly, I look forward to hearing from the U.S. Department of Veterans Affairs (VA), represented today by Chairman Terry of the BVA, accompanied by the Mr. Randy Campbell, an Assistant General Counsel with the VA's General Counsel's Office that represents the agency before the Court, on how it can reduce the number of remanded cases by increasing the accuracy of its decision-making.

I also would appreciate hearing about problems it sees systemwide and the role it plans to take in lessening the appellate "hamster wheel," as they say, for our veterans especially in light of the expected surge in filings by our returning OEF/OIF veterans.

The VA as the gateway in the appeals process as well as the creator of the record that forms the basis for appellate review, should amplify its role in the overall improvement of the benefits claims adjudication process.

Thank you. I would now like to recognize Ranking Member Lamborn for his opening statement.

[The statement of Chairman Hall appears on page 32.]

OPENING STATEMENT OF HON. DOUG LAMBORN

Mr. LAMBORN. Thank you, Mr. Chairman, for recognizing me and I thank you for holding this hearing on the Court of Appeals for Veterans Claims and its role in the efficient processing of the disability compensation claims.

I welcome our witnesses, especially Chief Judge Greene, and thank you all for your contributions to our veterans. The Court has come far since its 1988 founding and by all accounts is largely producing quality decisions.

Judge Greene, you are to be commended for making use of Title 38 and recalling five retired judges to increase your productivity. I note the emphasis you place on a dedicated courthouse and adequate room for a growing Court, and I am most interested in ensuring that you have the facilities you need.

We face an unprecedented challenge as the number of compensation and pension claims increase faster than the VA's ability to process them. Further, accuracy is not what it should be, driving up appeals, and we are seeing among veterans a growing propensity to appeal.

These factors have already had a dramatic effect on the Court's workload which has essentially doubled in the last 10 years. The number of pending cases has doubled the number pending 3 years

ago and more than 3 times the number pending a decade ago. We must be attentive to the Court's ability to handle demands which presumably will continue to climb.

I am, therefore, interested in learning more about the efficiency of the Court's operations. The phenomenon called the "hamster wheel", and the Chairman mentioned that a moment ago, has caught my eye also. Perhaps there is a good rationale. It seems inefficient for a veteran to appeal a multi-issue denial from the Board of Veterans' Appeals only to see one issue addressed and perhaps remanded or vacated by the Court at a time.

According to testimony we have received, this stretches the appeals process for often aging veterans by years. I do not believe that the Court is required to do business this way nor would it appear that it contributes to higher Court productivity. Our veterans deserve the best benefits delivery system we can provide.

In my brief period as Ranking Member, I have learned much about that system. I was pleased to work with Chairman Hall over the past few weeks on legislation that would improve how we serve veterans applying for benefits that they have earned.

In the testimony, we have read numerous suggestions regarding the Court's operations and I now look forward to our discussion on this essential facet of the benefit system.

Mr. Chairman, I yield back.

[The statement of Congressman Lamborn appears on page 33.]

Mr. HALL. Thank you, Mr. Lamborn.

After the first panel is finished giving their testimony, Members will be recognized for 5 minutes to make opening remarks or ask questions.

Chief Judge Greene, thank you for coming this morning. I know you have a busy schedule and we will try to get you out of here as soon as possible. If you would please introduce yourself for the record?

Judge GREENE. Thank you, Mr. Chairman, Ranking Member Lamborn, and Members of the Committee, for inviting me here today to discuss the challenges facing the U.S. Court of Appeals for Veterans Claims.

With me at the table, I have judges Mary Schoelen and Al Lance who constitute my Legislative Committee as part of the Board of Judges at the Court. That is why they are sitting with me today.

Mr. HALL. Thank you, Judge Greene. You will be recognized for 5 minutes for oral remarks and your complete written statement will be made part of the official record.

Judge GREENE. Thank you very much.

Mr. HALL. You are recognized for 5 minutes.

STATEMENT OF HON. WILLIAM P. GREENE, JR., CHIEF JUDGE, U.S. COURT OF APPEALS FOR VETERANS CLAIMS

Judge GREENE. Chairman Hall, let me initially start by saying the Court, as a Federal Court of Appeals, is a national Court of record charged with conducting a legal review of adverse final Board of Veterans' Appeals' decisions on veterans' claims.

Thus, the judges of the Court do not adjudicate the facts of the claims as would a VA adjudicator or a Board of Veterans' Appeals

veterans' law judge. Rather, like other Federal appellate Courts, we must determine whether the Board decision is legally correct or otherwise free of any prejudicial error affecting the fairness of a previous adjudication.

Judicial review of decisions of veterans' claims is relatively new. It has been a tremendous challenge since 1989 where there had not been any legal antecedent. There were statutes exempting the Department of Veterans Affairs decisions from judicial appellate review unlike other executive agencies or departments who had to face that appellate review.

Congress provided that independent review when it created the Court in 1988. Thus, over the course of almost 20 years, there has been created a body of veterans' law that serves to promote fundamental fairness and legal process in this very complex area. At the same time, this body of law has produced a bar of experienced veterans' law attorneys who are now available to guide veterans and others through this judicial appellate process.

Incidentally, before 1988, attorneys could not charge more than $10.00 for representing a veteran before VA. Once the Court was established, a veteran could not be charged a fee for representation at VA, but a lawyer could represent a veteran after the Board made its first final decision.

Now we see the upcoming event of lawyers representing veterans at VA starting this summer. Thus, with this attorney involvement, it comes as no surprise to the Court that there have been unparalleled increases in our caseload.µ Additionally, because we are 20 years old and have matured, a growing awareness among veterans and their families of the existence of veterans' appellate rights and the value of judicial review has played a significant role in that regard.

And most importantly, an upswing of VA adjudications of veterans' claims, especially at the Board of Veterans' Appeals, has certainly opened the door to many appeals coming to the Court and our doors are always open because every veteran as a matter of right has an appeal to our Court.

The charts that I provided in my prepared statement give you a snapshot of our current caseload inventory. Most of the cases are in one stage or the other. The majority of them are still in the prebriefing stage or the briefing stage and will not be ready for review for quite some time.

As cases move toward the review stage, I am directing our available resources toward meeting the challenges accompanying this caseload. These available resources include ramping up our options in alternative dispute resolution. Increased use of the staff attorneys and retired judges may pay even greater dividends in this area. Indeed, appointment of mediators or magistrates to perform this important work is an attractive avenue to consider.

Recalling at the right time our retired judges has proved helpful in moving some of the cases and by continuing to build on the gained experiences of the sitting judges, we will be able to erect a Court structure that will sustain our ability to decide these cases efficiently and thoroughly.

These efforts can be enhanced further by promulgating rules that revise the way we acquire a record on appeal and defining when we may issue summary actions in the appropriate cases.

And on the technical side, we have initiated a plan to emulate many of our Federal and State sister courts by implementing electronic filing. Such technology will help us reduce some of the administrative delay that accompanies the voluminous filings that are associated with appellate litigation.

Lastly, but certainly not least, a sustained increase in work will require a sustained increase in work force and space. Our present space is or will be inadequate for the type of caseload we are now experiencing. The Court is the only national Court of record without its own dedicated courthouse.

What better time than now to have a courthouse that will serve as a lasting symbol and beacon of justice that expresses the Nation's gratitude and respect for the sacrifices of America's sons and daughters who have served in our Armed Forces and their families. We need your commitment to support this endeavor.

The challenges facing the Court are significant, but they are challenges that were anticipated when the Court was created almost 20 years ago to conduct the independent judicial review of thousands of decisions made by VA. We will strive to the best of our abilities to meet the challenge effectively and efficiently.

We appreciate your interest in the Court. Our discussions ensure that our compatible goals mesh properly in advancing the concepts of judicial review of decisions on veterans' claims. I look forward to answering your questions.

[The statement of Judge Greene appears on page 34.]

Mr. HALL. Thank you, Judge Greene.

First of all, I will ask you a couple of questions myself. You mentioned that recalling retired judges has been useful, but that acquiring sufficient staff when recalling a judge is a problem. Is there a need to hire more staff and is recalling a judge a long-term solution?

Judge GREENE. Recalling a judge for the 90-day period is certainly a helpful solution. When we initiated this last April, I was very much concerned that we would not be able to provide adequate support for them. A judge at the Court has four clerks and a secretary and we certainly did not have that kind of capability.

Nevertheless, with the caseload, when I made the decision to recall the judges, I had to take staff attorneys from the central legal staff who would be otherwise reviewing cases for chambers and use them as clerks for the recalled judges. That worked to some extent, but it is not enough because at that point, it was difficult to get additional cases out of the central legal staff and get them sent to chambers.

Consequently in my budget request and in the current continuing resolution, I have been able to acquire three additional staff attorneys for the central legal staff and when a recalled judge is called, those individuals or at least three of those individuals will be identified specifically as support clerks for the retired recalled judges. And we think that perhaps with that type of support we will be able to increase their productivity.

Mr. HALL. Would you comment, please, on the Court's interpretation of the Rule of Prejudicial Error?

Judge GREENE. The statute clearly tells us to take due account of the Rule of Prejudicial Error. We have been trying to do that over the past 20 years. At every turn, there has been some indication, at least by the Federal Circuit who reviews our decisions, that we either are not fact finders to make those determinations or that in the paternalistic beneficent environment that is VA, the error is presumed, prejudicial error is presumed. And as a result, we are tackling that issue now.

We recently decided a couple of cases addressing prejudicial error with an attempt to describe and define how this Court would indeed take due account of the Rule of Prejudicial Error. It was accepted halfway by the Federal Circuit. I do not know whether the Federal Circuit will decide to define that for us, but it would be my hope that we would be able to define it ourselves.

Mr. HALL. Thank you.

Another topic you addressed in your statement was that veterans or qualifying family Members may file an appeal. Can you define what you mean by qualifying family Members?

Judge GREENE. What I mean by it? My definition is the same as the statute and it is the surviving spouse of the veteran or qualifying children of the veteran.

Mr. HALL. Simple enough. Thank you.

Do you have an opinion on the effect on the overall process of the veteran's option to go to the Circuit Court. Do you have an opinion on the possibility mentioned that perhaps the next level of appeal should be the Supreme Court, rather than a lateral move?

Judge GREENE. In a nutshell, I would like to have the opportunity to provide you a written response to that question as well. But for now we have to examine why the Federal Circuit was created or this serial appellate review was created initially.

[The information was provided in a followup letter from Judge Greene, which appears on page 55.]

And one can say that perhaps it was designed to promote uniformity in the system that was new. There was no legal antecedent in veterans' law. And as a result, as a new Court like the then U.S. Court of Veterans Appeals was finding its way or blazing the trail of veterans' law, there needed to be perhaps some type of further Article 3 review of those decisions.

But now we have developed 20 volumes of veterans' law and in most cases, the Federal Circuit receives about 350 to 400 appeals per year of the 3,000 cases perhaps that we decide, maybe 10 percent. And of those, a substantial number of them are dismissed. That leaves a very small percentage of cases that either are remanded back to us or reversed over different opinions on how the law should be addressed.

Whenever you have a higher court, it is inevitable that there will be reversals, but that does not necessarily mean that justice is better done because there is that higher court. We are not infallible because we are not final. And as a result, until we are able to employ our expertise appropriately to the veterans law arena, we will always have this dichotomy with the Federal Circuit second guessing the decisions of the Court.

Mr. HALL. Thank you very much, Judge Greene.

Now I will recognize our Ranking Member, Mr. Lamborn.

Mr. LAMBORN. Thank you, Mr. Chairman.

Chief Judge Greene, why do appeals require approximately 4 months of processing by the Court's central legal staff after the final pleading is filed before the case is assigned to a judge, especially in light of the fact that each judge is authorized four law clerks?

Judge GREENE. I was not familiar exactly with that particular timeframe. But once a case is joined, that is the briefs have been filed by the parties, the cases are then assigned to the central legal staff.

One of the initial steps the central legal staff takes when receiving a case in that manner is to determine in a pre-screening of those cases whether or not any of them perhaps can be worked for settlement. They have already done it once before, but perhaps the second time around they might be able to do it once the issues have been joined and the briefs have been filed.

But currently, until I got the 3 additional central legal staff attorneys, there were 8 attorneys to handle those 400 to 500 cases. And as a result, I think experience has shown that it just takes that time for them to go through the file, prepare a memorandum, and they prepare a recommendation that then goes back to the public office. And when the public office receives the case, they then on our assignment wheel assign the case to a judge. And then, that whole packet along with the recommendation from central legal staff, comes to chambers for the pre-screening by the judge.

Mr. LAMBORN. Okay. Thank you.

How many retired judges would be willing to work longer than the required 90 days if recalled? Do you have any idea?

Judge GREENE. I know that they were not willing to do so this time because I, quite frankly, did not ask them because I wanted all of them to participate. We do not have the space to have five judges sitting around in our courthouse.

So, once I decided to initiate the recall, I wanted to make sure everyone had a fair opportunity and so all five that were available did serve. And as I go into this next iteration, we will then start looking at the possibilities to see if they will serve longer.

Mr. LAMBORN. Okay. Thank you.

Now, we have talked about the "hamster wheel" a little bit. Can you maybe explain that a little better and also provide your response to other testimony that states that the Court sometimes unnecessarily prolongs the appeals process for veterans by remanding to the Board single issues within a given claim?

Judge GREENE. Well, the "hamster wheel", that is a new concept, I suppose. I think it is more associated with the fact that once the "Veterans Claims Assistance Act" was passed in 2000, it changed the way we did business. We had a well-developed body of law up until that time about how we go about reviewing a case and what it took for a claim to be actually processed at VA.

With the notice provisions associated with the "Veterans Claims Assistance Act," it created another right for the veteran that we had to then ensure that the Department of Veterans Affairs carried out and that was making sure that the veteran was made aware

of the way to substantiate his or her claim at VA. Without finding that any error was harmless, we had no other choice, but once we knew that that error existed, to return the case to give the veteran that opportunity to participate fairly in the adjudication process at VA. And as a result, we would remand the case to VA to do it correctly.

If there were other issues associated with that case and those issues did not give the veteran any more remedy than a remand, in other words, there was no likelihood of there being a reversal as to any of those issues but simply a remand for that error, then to preserve judicial economy, the case was still returned to the VA for the veteran to be able to make those other arguments before VA.

Remember, VA is a nonadversarial setting. At the Court, it is adversarial. And as a result, the veteran for the first time perhaps has raised this issue to the Court. Now the veteran can raise that issue to the Board or to the Regional Office and perhaps receive the remedy that he or she seeks below. If the remedy is going to be the same no matter how many issues we decide, i.e., a remand, we just simply, to preserve that judicial economy, send the case back on remand.

Mr. LAMBORN. Okay. Thank you.

Mr. HALL. Thank you, Mr. Lamborn.

And the Chair will now recognize Mr. Rodriguez.

Mr. RODRIGUEZ. Thank you, Mr. Chairman, and let me thank you for allowing me to comment and also for conducting this hearing.

With some 1,000 World War II veterans dying daily, do you prioritize cases based on the severity of their situation or anything such as that?

Judge GREENE. We have no specific rule for expediting a case other than the veteran showing cause because of extreme severe health or imminent death to expedite the case.

Now, informally, as a Board of Judges, we have agreed that each chambers will certainly consider cases as they see fit. And as a result, I would suspect that there are many occasions where if a particular case looks as though it has the characteristics that you describe, that a judge certainly has the option to bring that case forward.

Mr. RODRIGUEZ. Do you think that there should be concern, because my understanding is that when the case goes before them, where they might spend 2 or 3 years fighting it and then when the person dies, the appeals and the process has to start from scratch?

Judge GREENE. The counsel representing the veteran, and in most cases, even though there is a large number of veterans not represented at the time they file the appeal, by the time the case gets to chambers, many of those veterans are indeed represented. And counsel certainly has the option of notifying the Court with a motion to expedite those cases for whatever reason. And looking at that reason, if there is good cause shown, the judge certainly can expedite the case.

Mr. RODRIGUEZ. Okay. It is based on the judge making the determination?

Judge GREENE. That is right.

Mr. RODRIGUEZ. Okay. Let me ask you, based on judges, and the regions, we have heard reports that in certain areas, they are able to get certain benefits much easier under certain conditions than in other areas. Do we have any studies that reflect this, that there might be some disparities between regions?

Judge GREENE. Well, that is certainly an area that we never get to address. One of the purposes of the Court is to promote uniformity across the system.

Mr. RODRIGUEZ. I would hope so. So are you aware of any disparities?

Judge GREENE. I am not aware of any.

Mr. RODRIGUEZ. Has anybody conducted an assessment regarding how many are on the waiting list that might be African-Americans or from a certain region more so than others?

Judge GREENE. I am sure that the Department of Veterans Affairs has that information and that they would be able to provide that to you.

Mr. RODRIGUEZ. Okay. Maybe we can get a GAO study to look at the waiting list to see the disparities in ethnicity and race as well as region and the type of benefits that they appeal for, Mr. Chairman.

Judge GREENE. If I may, I might add, too, that if there was such an incident, the Court does exercise writ of mandamus authority. And if an individual thinks that because of ethnicity or what have you that they are not getting a fair shake at a Regional Office and that the Secretary is acting unlawfully or withholding action that is unreasonable, they can seek relief from the Court to compel the Secretary to act accordingly.

Mr. RODRIGUEZ. It just makes sense in some areas that there might be some judges who are tougher than others and they might feel that they get, just like the regular courts, might get a better chance in one area or another. I know I have heard those criticisms and I just want to make sure. Maybe we can do an assessment of that and make sure that that is not occurring.

I would hope that you would do that on your own, that you, yourselves, would check and balance how you operate and which ones. You do not do that?

Judge GREENE. No, no. No, sir. That has all been done already. All the adjudication on the claim has been done before it gets to us.

Mr. RODRIGUEZ. Okay, so nobody looks across the board in terms of possible disparities occur in terms of benefits?

Judge GREENE. No.

Mr. RODRIGUEZ. Okay, and no one looks across the board to see if prioritizing those individuals whose life expectancy is just a few years and that is just done by the individual?

Judge GREENE. Oh, no. Well, a judge does not know what case he or she is going to receive until it is assigned to them by the public office. When they conduct the screening, they can certainly determine if a case is from the greatest generation.

Mr. RODRIGUEZ. You do not know if they are screened for that purpose and prioritized for those or for some other purpose?

Judge GREENE. They are not, not at the Court.

Mr. RODRIGUEZ. Okay.

Judge GREENE. They may be at VA.

Mr. RODRIGUEZ. If I can just ask one open-ended question. What would be your recommendations as it is getting worse in terms of the numbers as we do have some 700,000 on the waiting list?

Judge GREENE. To expedite the 700,000 cases?

Mr. RODRIGUEZ. Yeah.

Judge GREENE. Well, I have not commented on how VA should do its business because we have to review how they have done their business. But I think it is very critical that when we provide legal precedents involving the adjudication of claims that that law has to be disseminated throughout all the 54 Regional Offices so that every Regional Office adjudicator is working on the same sheet of music. And if they do that, that is the first step, and then you have got to get the regulations easier to read and easier developed so that the adjudications do flow uniformly and fairly.

Mr. RODRIGUEZ. Thank you very much. I ran out of time. Thank you.

Mr. HALL. Thank you, Mr. Rodriguez, and Chief Judge Greene, both of you for your colloquy and your suggestions.

The Chair will now recognize the Honorable Mr. Hare.

Mr. HARE. Thank you, Mr. Chairman, and thank you for holding this hearing.

Judge, I am sorry I got in a little bit late, so I did not get to hear all of your testimony. I just have a couple questions for you.

Why do you think the Court is seeing such a dramatic increase in its caseload, and do you think this is due to the returning servicemen and women in Iraq and Afghanistan? Do you believe the Court is prepared to handle expected increases from these recently deployed troops?

Judge GREENE. As I indicated in my opening remarks, it has not really come as a huge surprise, at least at the Court, that these numbers are what they are. If you look at the number of decisions that the Board of Veterans' Appeals renders each year, you see that their total denials of a case amounts to in the numbers of twelve, thirteen thousand. Those twelve or thirteen thousand cases are potentially appeals to the Court of Appeals for Veterans Claims.

And as a result, we feel very fortunate that with our seven judges that we are not receiving those thirteen thousand. And you add on to that the number of appeals that just because a veteran may have been awarded a benefit but is not happy with the rating or not happy with the effective date, they can still appeal that case to our Court. So the numbers of appeals from the Board or the number of decisions produced by the Board creates a potentially huge bubble.

The involvement of attorneys certainly provides better access to the courts for the veterans. And we have a very mature veterans' bar association at this point. And as a result, veterans are finding their way to judicial review of decisions made by VA.

As to the question about the current Iraq veterans and the Afghanistan veterans, I am happy to say that we do not receive any appeals from them at this time. It is just too soon. In our process, those cases have to go to the Regional Office and to the Board of Veterans' Appeals before ever coming to the Court.

I would hope that at least from what we are seeing that many of those claims would not be denied. There are, of course, cases such as Post Traumatic Stress Disorder (PTSD) claims that we anticipate receiving somewhere down the road, but it is far too soon now for us to see appeals from veterans of Iraq or Afghanistan.

Mr. HARE. Just one last thing, I apologize if you mentioned this. Is there an average time that the claim takes from the time it gets to you until it is decided or adjudicated?

Judge GREENE. If I recall, I think in my annual report, we had something like 359 days, 351 days was the time from filing to disposition. That was a median time.

Mr. HARE. I am sorry?

Judge GREENE. That was median, a median time. Now, because we are an appellate court, there are certain appellate steps that have to be taken before a judge can ever begin to decide a case.

At our Court, because we have no record of trial at the very beginning, the rules of Court allow 254 days to prepare a case for sending it to chambers. Last year, we had 13,000 requests for extensions of time of that 254 days. All of them, as I recall, were granted because if we do not grant them, the end result is that if the appellant fails to get something in on time, the appellant veteran, the veteran is thrown out of court.

Mr. HARE. Excuse me. Is this the veteran that is requesting additional time?

Judge GREENE. Both sides, veterans and the general counsel.

Mr. HARE. Okay. Thank you very much.

Thank you, Mr. Chairman.

Mr. HALL. Thank you, Mr. Hare.

I think since we have two more panels to go and you have been very forthcoming and offered to submit further answers and more detail in writing, Chief Judge Greene, then we will thank you for your testimony, and thank your staff for being here with you, and excuse you.

Judge GREENE. Thank you.

Mr. HALL. You probably have a full day's work ahead, so enjoy.

Judge GREENE. Thank you very much.

Mr. HALL. Thanks again.

We will now invite Panel Two to join us at the witness table, Bart Stichman, the Joint Executive Director of National Veterans Legal Services; Robert Chisholm, Past President of the National Organization of Veterans' Advocates; and Brian Lawrence, Assistant National Legislative Director of Disabled American Veterans.

STATEMENTS OF BARTON F. STICHMAN, JOINT EXECUTIVE DIRECTOR, NATIONAL VETERANS LEGAL SERVICES; ROBERT VINCENT CHISHOLM, PAST PRESIDENT, NATIONAL ORGANIZATION OF VETERANS' ADVOCATES; AND BRIAN LAWRENCE, ASSISTANT NATIONAL LEGISLATIVE DIRECTOR, DISABLED AMERICAN VETERANS

STATEMENT OF BARTON F. STICHMAN

Mr. STICHMAN. Thank you, Mr. Chairman. My name is Bart Stichman, Co-Director of National Veterans Legal Services Program.

I am pleased to present testimony today on behalf of the National Veterans Legal Services Program and I do so from the perspective of veterans and their survivors who appeal their cases to the Veterans Court.

We commend the Chief Judge for the steps he and the other judges and staff of the Court have taken to try to speed up the process from filing an appeal to decision.

There are, however, four improvements that we suggest in order to either eliminate or minimize the "hamster wheel" situation, the phenomenon that too many veterans face in which the Court does not issue a final decision on the claim, but rather remands the case back to the Board of Veterans' Appeals which then may remand it back to the Regional Office, and cases sometimes bounce back and forth a number of times and go back to the Court a second time.

And one of the reasons for this problem is a policy the Court adopted in the case called Best and Mahl. I think the Chairman referred to it and other Congressmen have this morning. That policy is to have piecemeal adjudication at the Veterans Court.

And what I mean by that is that the veteran briefs a number of different legal errors that the veteran says the Board of Veterans' Appeals made. The VA files a brief contesting those allegations of error. Under Best and Mahl, if the Court decides that one of the allegations of error by the veteran is correct and that error deserves a remand to correct the error, it will not address the other allegations of error. The Court will allow the case to go back with those errors unresolved because those errors would not lead to a reversal and a grant of benefits even if the Court were to include there was error.

So the Court avoids deciding all the issues. The problem is what happens thereafter when the Board corrects the one error found by the Court, but it does not change its position on the other grounds for error that the veteran had alleged and the Court did not resolve. So it makes the same error over again because the Court did not require it to change what it did in that regard.

So what often happens is if the claim is denied after correction of the one error identified by the Court, then the veteran is back in the same position, appeals again to the Veterans Court, briefs the exact same legal issues, and we have the "hamster wheel" phenomenon playing again. That, I think, contributes to injustice at the Veterans Court and it is an unfortunate policy.

Second is the Court's reluctance to overturn erroneous Board of Veterans' Appeals findings of fact. The Board is responsible for weighing conflicting evidence on critical points in the case and resolving reasonable doubt in favor of the veteran. Sometimes the Board does not do that. It resolves conflicting evidence. But, even though the evidence weighs in the veteran's favor, it decides that the claim should be denied. The veteran appeals to the Court.

Congress has told the Court you can overturn the Board's findings of fact only if you decide it is clearly erroneous. That is the statutory phrase. The Court interprets that phrase very extremely. It will only overturn a Board finding in extreme circumstances.

So if the Court feels that the finding of fact is probably wrong, but not rising to the level of clearly erroneous, it will send the case back for a better explanation. Hence, the "hamster wheel" again.

A third contributor to the "hamster wheel" is another phenomenon that has been talked about earlier this morning and that is the fact that if the veteran or survivor who appeals to the Court dies while the appeal is pending at the Court, the claim dies with the claimant and a qualified survivor can only pursue the benefits that the veteran who just died was seeking by starting at square one and filing a claim with the Regional Office for those benefits.

And so the years of the process come to a halt and the person has to start from square one. We presented testimony last month before this Subcommittee about that problem and we think there is a legislative solution to allow the qualified survivor to substitute for the person that just died and continue the appeal on at the Court without requiring that person to start at square one.

Finally, our testimony talks about another injustice that was inadvertently created by Congress when it enacted the "Veterans Judicial Review Act" in 1988. Through oversight, Congress did not provide either of the Courts that it sends cases to, the Court of Appeals for Veterans Claims or the Federal Circuit, with authority to certify a case as a class action. Prior to that, veterans could file a case in U.S. District Court which operates under class action rules.

But when Congress transferred jurisdiction from District Courts to the Veterans Court and the Federal Circuit, it did not provide for class actions. It was silent on the subject and both Courts as a result have said they do not have class action authority. That results in both injustice and inefficiency in the process.

And we discuss in our testimony a case study, a real case study of a battle that is currently going on between Navy veterans who served in the waters offshore Vietnam and the VA. Thousands of Navy Blue Water Veterans, they are called, who served offshore, but did not set foot on land in Vietnam, have been denied benefits by the VA and that battle has been going on for 5 years in a way that promotes inefficiency. And if a class action mechanism had been in force, both the VA and claimants would have been better served.

And just to briefly discuss some of the facts involved, in 2003, a widow named Andrea Johnson applied for death benefits due to the fact her husband died of cancer which she said was caused by an Agent Orange related disease. The VA said you are not entitled because your husband did not set foot on land in Vietnam, a rule the VA adopted in 2002.

She briefed that case before the Veterans Court in 2003. The Court scheduled that case for oral argument and convened a panel of three judges. Six days before oral argument was scheduled to take place, the VA General Counsel made the widow an offer she could not refuse. They agreed to pay her all death benefits retroactive to the date the veteran died. She could not legally recover any more money. So she, of course, accepted that offer.

When she accepted that offer, the case was dismissed, the panel was disbanded, and the oral argument was canceled. She got her money, but the VA continued for the next 3 years, because no precedential decision had been issued, to deny similarly situated veterans and survivors' claims based on the same fact pattern, because the veteran did not set foot on land.

Finally, in August 2006, the Veterans Court ruled, in a different case called Haas filed by a Navy commander who appealed all the way to the Court, that the VA's set-foot-on-land rule promulgated in 2002 was illegal.

Now, the VA has appealed that to the Federal Circuit. They will either win or they will lose. If they lose, then Commander Haas and those people with pending claims now will get benefits. But all those people who were denied in the prior years after Andrea Johnson's case was mooted out because they bought her off, those people will never get benefits.

They will never get benefits because the VA is not required to identify them and tell them about the new Court decision. And even if they were required to tell them about the new Court decision, the rules are that that decision, since it is final, can only be overturned based on clear and unmistakable error and the VA would find that that is not clear and unmistakable error.

All that is due to the fact that there are no class action rules at either the Federal Circuit and the Veterans Court. That is an area that Congress should look into.

[The statement of Mr. Stichman appears on page 39.]

Mr. HALL. Thank you, Mr. Stichman. Do you want to summarize or was that your summary right there?

Mr. STICHMAN. I think I have covered amply the four recommendations.

Mr. HALL. Thank you. Your full statement is in the record.

Mr. STICHMAN. Yes. Thank you.

Mr. HALL. We will get back to you with questions.

The Chair will now recognize Robert Chisholm, the Past President of the National Organization of Veterans' Advocates.

STATEMENT OF ROBERT VINCENT CHISHOLM

Mr. CHISHOLM. Good morning, Mr. Chairman, and thank you for inviting me to testify this morning on behalf of the National Organization of Veterans' Advocates. I am just going to jump right in with my recommendations and get right to it.

The first issue that sort of echoes what Mr. Stichman just said, one way to get veterans off the "hamster wheel" is to maybe consider changing the Court's scope of review and allowing them to engage in de novo fact finding.

Since the advent of judicial review, decisions from the Board of Veterans' Appeals in 1988, the CAVC has remanded roughly 65 to 75 percent of the cases. And as we have discussed earlier, this puts the veteran back on the "hamster wheel" and final decisions are hard to come by.

Many of these cases are remanded from the CAVC to the Board because of inadequate findings and conclusions. Under the present statutory scheme as set forth at 38 USC 7261(c), the CAVC is expressly forbidden from engaging in fact finding, de novo fact finding of an adverse determination by the Board.

Under such a scheme, if they were permitted to, they would be required to apply the benefit of the doubt which is codified at 38 USC 5107(b). The net result of such an amendment would be fewer cases remanded from the Court to the Board due to inadequate findings.

Many of these veterans are elderly and oftentimes do not survive the remand process. Permitting the Court to engage in de novo fact finding will provide veterans with a resolution they deserve during their lifetime. And a model for this could be the Courts of Criminal Appeals for the military under title 10, U.S.C. § 866(c) where the courts are permitted to do some fact finding.

I recently represented a veteran who went to the court four times. Four times the case was remanded due to inadequate findings by the Board. I finally got the veteran benefits after 12 years of litigation. They should not have to endure that kind of process.

The second issue we also talked about this morning is permitting veterans the right to substitution in court so that if a veteran dies while the claim is in court, his next of kin or estate should be allowed to substitute and continue that appeal in court and not go all the way back to the beginning and start the process anew.

The third area I would like to touch on is the issue of annual reports by the Court of Appeals for Veterans Claims. I think the Court should be required, and I outline a number of different things, to report annually. And they do report some of this data, but to me, we do not have concrete data in one specific area, the median time it takes from the date a case is fully briefed until a decision is reached. We have data on the time it takes for the initial process until the case is fully briefed. But once it is fully briefed until the case is actually decided by a judge, I think Congress should ask for that data as well.

The next issue has also been touched upon and that is the increasing number of appeals being filed. We have not yet seen in the Court the OIF and OEF veterans because those cases are still down at the agency. None of them have actually made it to the Court to my knowledge. Nevertheless, in 2005, the caseload jumped by a third from about 2,400 to 3,600, 3,700.

NOVA is concerned in the future as this caseload increases Congress should be proactive and think about expanding the number of judges because at some point, even with the recalled judges, it will be very difficult to meet the number of appeals and keep the decisions on the same pace that they are being made presently.

Our suggestion is that if the notice of appeals reach 5,000 or more, you may want to consider adding two additional judges at that point to the Court.

The last issue I will touch upon is the issue of the jurisdiction of the Federal Circuit Court of Appeals. This is the most critical piece that I would like to speak to this morning because the Federal Circuit's jurisdiction over this appeals process is a limited one and it only governs appeals regarding regulatory interpretation or statutory interpretation.

Many veterans appeal to the Federal Circuit, but their cases are dismissed because it does not fall within that narrow jurisdictional window. In NOVA's view, the jurisdiction of the Federal Circuit is critical to veterans' cases and should not be contracted or eliminated. And at some point in the future, it may be necessary to enlarge it.

Chairman Hall, you recently asked about the issue of prejudicial error. On, I believe it was, May 16th, the Federal Circuit issued a landmark decision called Sanders which more broadly interpreted

the Rule of Prejudicial Error in favor of veterans and overturned part of the Court's decision in a case called Mayfield and acknowledged the beneficial system in that the burden of proof on prejudice should not be on the veteran, but rather should be on the VA in those instances.

I would like to thank you again for permitting me to testify this morning and I would be pleased to answer any questions you may have.

[The statement of Mr. Chisholm appears on page 44.]

Mr. HALL. Thank you, Mr. Chisholm.

We will now recognize Mr. Brian Lawrence, the Assistant National Legislative Director for Disabled American Veterans for 5 minutes. Your full remarks will be entered into the record.

STATEMENT OF BRIAN LAWRENCE

Mr. LAWRENCE. Thank you, Mr. Chairman and Members of the Subcommittee. On behalf of the Disabled American Veterans, I am pleased to present our views on challenges facing the U.S. Court of Appeals for Veterans Claims.

The greatest challenge facing the Court is the backlog of appeals. A veteran with an appeal before the Court has already been through a lengthy VA claims process and an even longer appeal process at the Board of Veterans' Appeals. It can take years for appeals to reach the Court. Because a significant number of disabled veterans are elderly and in poor health, many do not live long enough for their appeals to be resolved. Those who do survive are understandably discouraged. Veterans deserve to have issues resolved in a reasonable amount of time.

Last summer, Senator Craig noted that the accumulation of appeals at the Court was unacceptable. Hearings were held to address the problem and recalling retired judges was an agreed upon solution. As Senator Craig noted last January, the increase to the Court staff had a positive effect and productivity is high.

The DAV did and does support recalling retired judges as a partial remedy to the backlog. However, it does not address a primary cause for accumulation of cases at the Court.

Over the years, the Court has shown a reluctance to reverse errors by the Board. Rather, there is a propensity to remand cases to the Board based on admission of error by the Secretary. Once this occurs, the Court will not review other alleged errors raised by an appellant.

Such remands leave issues unresolved and require appellants to invest many more months and perhaps years to obtain a decision that should have come from the Court on the initial appeal. As a result, many cases before the Court are there for a second, third, or fourth time.

In addition to prolonging the appeal process, the Court's reluctance to reverse Board decisions provides incentive for the VA to avoid settling appeals before they reach the Court. If reversals were more frequent, we believe the VA would be discouraged from standing firm on decisions that are likely to be overturned.

We also believe that if the Court were required to address all assignments of error presented by an appellant, it would help break the perpetual cycle of remand and appeal.

To provide Congress with an accurate measure of the Court's performance, the Court should submit an annual report that includes three categories: One, the number of Board decisions affirmed; two, number of dispositions based on joint motion for remand and settlement; and, number three, the number of dispositions reversed or remanded by a judge's decision.

Actions that fall under category two are of an administrative nature that are generally accomplished by the Clerk of the Court. Categories one and three must be accomplished by the Court's judges so presenting the information in this format would give Congress a clearer picture of the Court's accomplishments. The annual report should also include the number of memorandum decisions made by each judge.

Finally, the DAV supports the establishment of a dedicated veterans' courthouse and justice center. The space currently leased by the Court is inadequate for the level of staff necessary to complete its caseload.

During our most recent national convention, DAV Members voted to again adopt a longstanding resolution calling for the Court to have its own facility. This resolution envisions an architectural design and location reflective of our Nation's respect and gratitude for military veterans.

Rather than designating the office building where the Court currently leases space as the permanent facility, we encourage the Subcommittee to support the construction of a new veterans' courthouse and justice center that features a design and location worthy of its status.

Mr. Chairman, this concludes my statement. I will be happy to answer any questions you may have. Thank you.

[The statement of Mr. Lawrence appears on page 47.]

Mr. HALL. Thank you, Mr. Lawrence, and thank you to all of our panelists.

Mr. Stichman, in your statement, you said that many veterans have been to court for the same issue multiple times. Do you think there is a way to help get these veterans off the so-called "hamster wheel" and smooth the appeals process to alleviate problems such as the one stated above?

Mr. STICHMAN. Yes. And we have made a number of recommendations in our testimony. One, Congress can amend, I think it is 7261, the section in Title 38 that talks about the Court's scope of review and require the Court to address all allegations of error made by the veteran appellant if it is going to affect the proceedings on remand so that all the briefed issues are resolved. And that will help bring things to a close even if the case is being sent back. It is much less likely the case will come back up to the Court.

Second, I think all the panelists on this panel have talked about the problem of the Court not overturning BVA findings that are unfavorable to the veteran when the evidence supports a different result because the Court is very reluctant to reverse. Congress should amend the Court's scope of review in that same statutory provision, to allow the Court not to show such extreme deference to the Board findings.

We have talked about, three, the problem of when claimants die while their appeal is pending before the Court, the Court dismisses

the appeal and the surviving heirs have to start from square one at the Regional Office.

And then finally, I talked about the class action problem where there is no class action mechanism currently in either of the two Federal courts with jurisdiction.

Mr. HALL. Thank you.

Could you elaborate a little bit more on the e-filing system and whether you think it will significantly alleviate the backlog issues?

Mr. STICHMAN. At the Court, it should help speed the process, a combination of the e-filing system and having a joint appendix which the Court has proposed now in its rules. That will lower the amount of time it takes prior to the case reaching the judge.

Now, that is not going to affect how long the judge takes to decide the claim, but it will shorten the process up to the point that the case is sent to the judge.

Mr. HALL. Thank you.

I would just quickly ask all three of you if you agree on allowing de novo evidence to be considered by the Court. Would that seem like a positive step?

Mr. STICHMAN. Well, I know that both, I think it is fair to say, Mr. Chisholm for NOVA and DAV, is that fair to say that you support de novo review?

Mr. LAWRENCE. Yes.

Mr. STICHMAN. And I want to think about going to the full extent of de novo review of findings of fact and think about that a little further. But I think we all support a change in the scope so the Court does not have to show such extreme deference.

Mr. HALL. Right. Okay. I am just looking for the most consensus possible.

Another question would be, all of you, if I recall correctly, would support qualified surviving Members being able to pick up an appeal without having it go back to square one?

Mr. CHISHOLM. Absolutely.

Mr. LAWRENCE. Yes, sir, Mr. Chairman. DAV recently testified in support of that issue before the Veterans Disability Benefits Commission. So, yes, I would reiterate the position of my panelists in that regard.

Mr. HALL. Mr. Stichman?

Mr. STICHMAN. Yes.

Mr. HALL. You agree with that?

Mr. STICHMAN. I agree with that.

Mr. HALL. I think we are hearing everybody say that we need more judges and I guess that is an obvious part of the solution.

With regard to the building of a new Court facility, Mr. Lawrence, I am wondering, given the time that it takes for a building to be designed and built, is there a concern that that may further delay the expansion of space for staff and judges, that perhaps we could get by using existing structures?

Mr. LAWRENCE. Well, I think in the long term, it is the best solution. Perhaps they can expand the spaces that they are leasing now until the design and the construction of the courthouse is complete. But, again, it is going to provide the long-term solution that best serves the needs of the courthouse.

Mr. HALL. Thank you.

I have used my 5 minutes. I will recognize Ranking Member Lamborn.

Mr. LAMBORN. Thank you, Mr. Chairman.

Mr. Stichman, I asked Judge Greene a question earlier about the "hamster wheel" phenomenon and he gave an answer. And I would just like to see if you had any followup or commentary on his answer to my question.

Mr. STICHMAN. He referred to one situation where the Court remanded a lot of cases when the "Veterans Claims Assistance Act" went into effect. But this problem transcends that one-time event. It is a continuing problem. It does not deal just with cases involving the "Veterans Claims Assistance Act."

Any group of errors that the veteran alleges that would result not in a reversal, but rather further proceedings to correct the errors is subject to this policy of piecemeal adjudication. It does not matter what the issues are, whether it is the "Veterans Claims Assistance Act" he referred to or not.

And they have decided as a matter of policy in these cases—they are not required to have this policy—but they have decided as a matter of policy to get rid of the case quickly if they can resolve—if they see one error, they do not have to spend the time on the others. And I think that is myopic. I do not think that helps veterans in the long run.

Mr. LAMBORN. Okay. Thank you.

And, Mr. Chisholm, a question for you. There are a number of proposals out on the table. You have made several. If you had to prioritize and pick just one out, what do you think would be the highest priority?

Mr. CHISHOLM. I think the highest priority as you heard here from the panel is changing the scope of review by the Court and not to give such deference to the Board's findings. And whether it is my proposal for de novo fact finding or what Mr. Stichman is arguing for, giving less deference, I think it has to be tweaked in some fashion so that the veterans can get better finality in Court.

Mr. LAMBORN. Thank you.

Mr. HALL. Thank you, Mr. Lamborn.

Mr. Rodriguez?

Mr. RODRIGUEZ. Let me go back to my initial questions that I asked of the previous panel. I really believe, I think you have answered my question, because my feeling back home was that they were just waiting for them to pass away and that was it so they would not have to deal with it, which is unfortunate.

Should we look at prioritizing some of those cases? And hopefully if we change that, because I really feel strongly that if we change that and maybe even put a penalty, when we have not acted on some of those cases.

I just want to get your feedback on whether we should prioritize those individuals. I just mentioned the reasons that they are in pretty bad shape, or they are going to pass away. Should there be other reasons to prioritize?

Mr. CHISHOLM. There is a rule in the Court and if you are representing a veteran and the veteran is seriously ill and that is specifically set forth in the rule and you submit a doctor's report say-

ing that the veteran is seriously ill, the Court will expedite in that situation.

Unfortunately, if the veteran is 85 or 86 or 90 even and is in fairly good health, that veteran does not get expeditious treatment in Court unless they have a serious illness. And under those circumstances, you know, you could amend the statute to allow for prioritization based on age. At the VA level, that age is 75 years old, they will expedite the case.

Mr. RODRIGUEZ. If, for example, the person does pass away, what kind of benefits do the survivors get?

Mr. CHISHOLM. There are two kinds of benefits that are potentially available. The veterans' surviving spouse or dependent child steps in the shoes on what they call an accrued claim of the benefits that were at stake at the time the veteran died. But they have to go all the way back to the Regional Office to file for that.

In addition, if the veteran died due to a service-related injury, then they would be eligible for dependency and indemnity compensation.

Mr. RODRIGUEZ. Most of them would not be that with the exception of the spouse?

Mr. CHISHOLM. Yes. That would be for the spouse or child only, right.

Mr. RODRIGUEZ. Okay. The other question that I had is whether there is discrimination that occurs from region to region in terms of findings on benefits.

Mr. STICHMAN. Well, there were newspaper articles and I think a GAO study that showed that in PTSD cases there was a big difference in the success rate at different VA Regional Offices. I think that came out in the last 2 or 3 years. But there has always been some differences among Regional Offices.

Mr. RODRIGUEZ. Do you know of any studies that have been done or GAO assessments that have been done of those people that have been denied, those that have not, and percentagewise based on individual judges or regions?

Mr. STICHMAN. Outside of that one study, that is one situation. I do not know off the top of my head of others.

Mr. RODRIGUEZ. Okay, because I can see where some people have a different perspective, especially if they have been in the military, when it comes to posttraumatic stress disorders or those mental health problems.

I saw a number, and I do not know how accurate this is, that some 5,000 soldiers commit suicide every year. What was it with the VA, two or three? I do not have that. That is a pretty substantial number. Have there been any cases that have resulted from suicides?

Mr. STICHMAN. I know there are cases where the survivors file for death benefits because the veteran had a mental disorder related to service that led to the suicide. Those are difficult cases to win. We have one right now that is in the Federal Circuit. We lost it at the Veterans Court. But people do file claims based on the allegation that the suicide was related to the mental disorder that they got as a result of service.

Mr. RODRIGUEZ. Now I am going to do something personal. I have a case of a soldier serving in Iraq. Supposedly there are some

problems with documents, and she is not a veteran yet because it was still active. First it was said that she accidentally got killed, but now they claim suicide which means her parents do not get any benefits. They have been chastised by the veterans organizations. I am getting individual here.

What do you suggest, as a Congressman, I can do to help clear the air because she might have committed suicide, she might have not? I do not know.

Mr. STICHMAN. I would refer them to a good lawyer.

Mr. RODRIGUEZ. Okay. They do not have the resources unfortunately.

Mr. LAWRENCE. Mr. Rodriguez, I would be happy to speak with you more specifically about that case following the hearing. And I am sure we can have one of our DAV national service reps in that area——

Mr. RODRIGUEZ. I need some help with that. It is a young lady. I would appreciate that.

Mr. LAWRENCE. We would be delighted to help in any way we can.

Mr. RODRIGUEZ. Thank you very much.

Mr. HALL. Thank you, Mr. Lawrence and Congressman.

The Chair will now recognize Mr. Hare.

Mr. HARE. Thank you, Mr. Chairman.

Let me first of all thank all three of you for your service and help to our veterans. Obviously they need all the help they can get.

I said the other day when the Secretary was here, it just seems to me, and I am still trying to figure out why we always seem to err on the side of the VA and not the veteran. It is so sad, this whole "hamster wheel" that there are people who have given everything they had and now they are on the "hamster wheel". What a wonderful way of thanking them for their service. I just think that we can do much better.

I am interested, Mr. Chisholm. You were talking about for surviving spouses, when somebody dies in the middle, how the claimant dies and they have to start all over again and have been in the system 5 to 7 years. How much additional time then is added for that survivor to be able to get through this process?

Mr. CHISHOLM. Well, since they step into the shoes of the veteran and the accrued claim, you can figure that the VA is going to deny the claim all the way back up the line again for the same reasons they denied the veteran the first time. So they are going to go right back through 5, 6, 7 years.

And I have had situations where I represented the veteran. Veteran dies. We go back, file the claim for the surviving widow, and then the widow dies in the process coming back through. And it is just not fair.

Mr. HARE. Just from your perspective, maybe all three of you, why is it that the VA seems to be so cantankerous about this whole issue? What is it that is motivating them to make this veteran have to continue to do this process from your perspective? Is it just bureaucracy? I don't get it.

I will be honest with you. I am a freshman Member here. But it would seem to me that if a person goes through this process and they file a claim, I believe that that veteran is honest. When we

file our taxes we are not assumed to be cheaters, and there are ways of auditing our taxes. I do not understand the logic. Is there any here? If you folks can help me out to understand this a little bit.

Mr. LAWRENCE. The DAV has pointed out along with the other Independent Budget organizations that three things need to occur to help clear up the backlog within VA's claims process. They need to have a level of resources to have the number of employees to take on the caseload. Number two, they need to have adequate training. But, number three, they need to have accountability and there is a problem within the VA that if the people continually make poor decisions, there is not any accountability. There should be remedial training to make sure that they understand the laws and the regulations. And past that, if they are unable to perform in their job, they need to be put into a different position or removed from that decisionmaking position in some fashion. And that does not seem to happen.

Mr. CHISHOLM. I think the other thing, if I could, that happens is that once a claim is made and denied, the VA has a tendency to continue that denial and it becomes very difficult to get them to reverse their position.

Mr. HARE. Why is that?

Mr. CHISHOLM. It is institutional in that respect.

Mr. STICHMAN. Well, one problem I know is that there is a rush to judgment at the beginning of the VA process. The adjudicators are judged based on the number of cases they turn out and there is a great pressure on them to decide a case quickly before the evidence has been fully developed. They get work credits for deciding cases quickly regardless of whether all the evidence is there. And that, I think, is the beginning of the problem in the process. If they spent more time and did the case right in the first instance, then there would not be as many appeals as we have.

I think it is a little bit of Congress' fault as well. There is such pressure that Congress puts on the VA to decide cases at the beginning in a quick period of time. There are statistics Congress calls for all the time, whether it will take the VA 154 days or 160 days to decide a claim. And so the situation now is the VA will send the claimant a letter saying you have 1 year to submit evidence to support your claim. But because of the pressure to decide cases quickly, they will decide it in 60 days. They will tell the claimant you still have the rest of that 1 year to submit the evidence, but we want to get this case out the door and they deny the claim. A lot of veterans give up at that point. And so I think the problem starts at the beginning.

Mr. HARE. Thank you very much.

I yield back.

Mr. HALL. Thank you, Mr. Hare.

I just wanted to ask one more question, if I may, before we excuse our panel, and that is of Mr. Chisholm. I want to ask you to elaborate on the statement in your written testimony about what you believe is the BVA's poor decision making, those were your words, and why you think this is having a profound effect on the CAVC.

Mr. CHISHOLM. Well, first of all, the number of decisions that were actual denials has increased dramatically over the last few years by the Board and the overall number of decisions being made by the Board has also increased.

But when I refer to poor decisionmaking, I am referring to the cases that are actually appealed to the Court and the Court is finding error at a rate of 65, 75 percent. And those are only the cases that are being appealed. I imagine across the board to the extent that a veteran's claim is denied by the Board, if all those cases were appealed, the numbers would not change dramatically.

Many of those veterans are not represented by counsel down at the Board at this time, although the statute has been amended, and I think those veterans that do have the tenacity to keep the fight going have a better than 65, 75 chance of finding error and getting another shot at the case down below. So that is why I used the words poor decisionmaking by the Board.

Mr. HALL. Thank you very much.

I want to thank all three of our witnesses, Mr. Stichman, Mr. Chisholm, and Mr. Lawrence. We appreciate and are grateful for your testimony and your service to our veterans community. You are now excused.

I would ask for our third panelists, the Honorable James P. Terry, Chairman of the Board of Veterans' Appeals, U.S. Department of Veterans Affairs, to come to the witness table along with Randy Campbell, Assistant General Counsel, Professional Staff Group IV, Veterans Court Appellate Litigation Group, Office of the General Counsel, U.S. Department of Veterans Affairs.

Welcome to both of you, and we appreciate your patience in waiting to be in the third panel and for coming to give us your view and the benefit of your expertise and your experience.

Mr. Terry, your statement, of course, will be entered into the written record, so you can use approximately 5 minutes and save that version of it. Thank you.

STATEMENT OF HON. JAMES P. TERRY, CHAIRMAN, BOARD OF VETERANS' APPEALS, U.S. DEPARTMENT OF VETERANS AFFAIRS; ACCOMPANIED BY RANDY CAMPBELL, ASSISTANT GENERAL COUNSEL, PROFESSIONAL STAFF GROUP VII, VETERANS COURT APPELLATE LITIGATION GROUP, OFFICE OF THE GENERAL COUNSEL, U.S. DEPARTMENT OF VETERANS AFFAIRS

Mr. TERRY. Thank you very much, sir, and good morning.

Mr. HALL. Good morning.

Mr. TERRY. I am happy to discuss with you and with Ranking Member Lamborn and Members of the Subcommittee and your staff the challenges facing the Court of Appeals for Veterans Claims. Certainly we have heard very interesting testimony this morning from the first two panels.

With me today is R. Randall Campbell, Assistant General Counsel, Professional Staff Group VII of the Office of General Counsel. This is also known as the Veterans Court Appellate Litigation Group.

Group VII is responsible for handling the administrative and legal matters involved in all litigation before the Veterans Court

and certainly, sir, that group has experienced firsthand the effects on its own resources of the increasing caseload before the Veterans Court.

It is clear that the Veterans Court's caseload has increased continually since it opened its doors in 1989. For example, 10 years ago, sir, in 1997, the Court received 2,229 cases. In fiscal year 2006, last year, last fiscal year, it received 3,729. Sir, this 3,729, of course, is less than 10 percent last year of the cases we decided at the Board of Veterans' Appeals. We decided in excess of 39,000 last year and certainly this represents just one small part of those cases that we decided.

So far this fiscal year, the Veterans Court is averaging in excess of the number of cases it received last year and I fully expect that caseload to continue to increase for a number of reasons.

Firstly, we at the Board of Veterans' Appeals, Mr. Chairman, are doing our utmost to increase the number of final decisions we produce. As you know, the Veterans Benefit Administration, led by Admiral Cooper, decides in excess of 750,000 cases a year. Of those, some 40,000 are appealed to our Board. A very small percentage, but a very large number.

And certainly the Veterans Court's potential workload is directly dependent on the number of final decisions on the merits issued by the Board in which a benefit sought remains denied or, if allowed, not granted to the fullest extent the claimant is seeking.

As I testified before the full Committee last year, two of the Board's most important initiatives are to contain and reduce the backlog and, two, to improve the timeliness and service to veterans by eliminating avoidable remands. And I am happy to report that we have had great success in working toward both goals.

To illustrate, in fiscal year 2003, the Board issued 31,000 appeals decisions with a remand rate of 42 percent. In fiscal year 2006, last fiscal year, we issued 39,076 decisions with a remand rate of 32.8 percent.

And the reason this is incredibly important is that remands in our system are reflective of a number of things. The record is continually open and, consequently, until we kick a case out the door, until it is finally signed, that case can receive additional evidence. That judge who is hearing that case before our Board must take that evidence and unless there is a waiver signed by that veteran who is seeking that claim, that adjudication, it has to go back to the Regional Office for a complete readjudication.

So it is important that you understand that this remand process is one that we have only limited control over. And while we certainly do aspire, if we feel we can adequately decide the claim with the new evidence and that it would not in any way prejudice the veteran, we will certainly ask for that waiver. But if, in fact, the veteran feels he would like to have it totally readjudicated, it goes back. And that happens in a great number of cases.

Now, next year, of course, we expect in excess of 40,000 appeals decisions by the end of that year, of fiscal year 2007, and we expect to maintain as low a remand rate as possible. Certainly in the same neighborhood as last year which is significantly lower than in prior years.

Now, the result for the Court of Appeals for Veterans Claims, of course, over the past few years has been that with the significant increase in the number of Board decisions, there are going to be more cases that are final decisions that can be appealed to that Court.

Now, as I mentioned to you, of the almost 40,000 decisions we decided last year, less than 10 percent were appealed to that Court.

Now, other factors that may affect the increase in appeals to the Veterans Court are not so readily quantifiable, but there is certainly a heightened awareness among veterans of their access to the judicial process and we commend that. Our role is to try to serve veterans to the extent we possibly can.

In addition, there have been changes in the jurisprudence that have influenced the caseload. The courts have determined that the Veterans Court possesses authority to consider petitions for extraordinary relief under the "All Writs Act." This, of course, has increased their workload.

And, additionally, the Federal Circuit has played a significant role in increasing the number of appeals at the Veterans Court by applying the equitable tolling doctrine on timely appeals, that is appeals that would otherwise not be entertained, but, therefore, are entertained and, therefore, making them appeasable.

Statutory changes as well have played an important role. For example, the "Equal Access to Justice Act" was amended in 1992 in order to authorize the Veterans Court to award fees and expenses to veterans' attorneys. Thereafter, the caseload at the Veterans Court jumped monumentally and that increased its total caseload by a good 20 percent, and that number has held.

Similarly, enactment of the "Veterans Claims Assistance Act" has had an enormous impact on the workload of the Court.

Finally, all of us involved in the adjudication system agree that cases have grown far more complex with more numerous issues and much larger records to review and consider. Even a case with just a few simple issues takes more time to process and, as is increasingly common, the record on appeal may constitute thousands and thousands of pages.

When there are changes in law during the pendency of an appeal, there will be dozens or even hundreds of cases that must be rebriefed, thereby delaying the ultimate decision in those cases, and that has to be taken into effect as well.

With respect to potential remedies, I think it is notable that the Veterans Court is evaluating new means for alleviating or managing the press of business. For example, several years ago, it adopted new procedures to reduce the amount of time expended by the parties' motions for continuances, a very, very good result. It also reinforced its rules governing submission of pleadings.

The Veterans Court is currently considering a fundamental change to the procedures for preparing the record on appeal, and this was mentioned by Mr. Stichman as well as Chief Judge Greene, with only those documents cited by the parties in their briefs to be required in cases where the veteran is represented. This is a very, very positive result in terms of the way in which the Court does business. And this will certainly speed the submission of cases to the Court for decision.

Now, the Veterans Court is also studying the feasibility of electronic rather than paper filing and this, likewise, will have a significant impact.

The Court, likewise, could better use certain tools it already has available to it. For example, the Veterans Court could adopt procedures that welcome summary motions in appropriate cases.

In a recent judicial conference hosted by the Court, the Court carefully discussed this possibility and we are hopeful that the plan to revamp the preparation of the record on appeal, which is currently under study and active consideration by the Court, will facilitate the filing of these summary motions.

The Veterans Court, we feel, could also be more open to the idea of consolidating cases or granting motions to stay cases where there is a commonality of issues.

Now, these changes, as you know, Mr. Chairman, would affect cases that have already been filed. As noted earlier, however, the sheer number of potentially appealable decisions from the Board is staggering. The problem of backlogs will be a theme that continues into the future unless steps are taken to meaningfully reduce the actual number of appeals or to employ an expeditious means to dispose of them.

We at VA are also doing our part. Group VII, for example, is carefully screening all cases that go to the Court of Appeals of Veterans Claims to assist that Court. We at the Board are ensuring that cases going forward are clean, well-reasoned, and focused.

I know you have heard some testimony to the contrary, but I think when you handle in excess of 40,000 cases a year as we are this year and you have less than 10 percent appealed to the Court despite the fact that these folks are represented by Veteran Service Organizations' representatives or attorneys, it tells you something about the decision making on our Board.

Finally, I would like to note that the Veterans Court, to their credit, had their most productive year ever in 2006. They not only decided a total of 2,842 cases, but they adjudicated 1,152 "Equal Access to Justice Act" applications, heard 22 oral arguments while processing 382 appeals to the Federal Circuit.

This concludes my testimony, Mr. Chairman. Mr. Campbell and I would be happy to respond to any questions you or your colleagues might have.

[The statement of Mr. Terry appears on page 49.]

Mr. HALL. Thank you very much, Mr. Terry, for your testimony and thank you for the work that you and your people are doing. We know that it is not an easy situation and that, as you have noted, it is expanding and getting more difficult and more challenging. We are here to help.

I would like to ask you to explain the "Equal Access to Justice" payments. Roughly how much has the VA paid for these cases so far?

Mr. TERRY. I am going to turn to Randy Campbell. He probably has more of an insight into the EAJA process. That is not something that comes to our Board. That is something they deal with on appeals.

So, Randy, maybe you can——

Mr. CAMPBELL. Yes. Chairman Hall, the "Equal Access to Justice Act" provides that where the veteran prevails in a case, and has an attorney, and the government was not substantially justified, then the Court is authorized to award reasonable attorney fees for the prosecution of that appeal.

I could certainly provide the Subcommittee with figures for "Equal Access to Justice Act" payments over the last few years. I do not have an accurate figure with me right now. But it is in the magnitude of several million dollars at this point given the number of cases that come to the Court.

Mr. HALL. Do you recall last year what approximately that total was?

Mr. CAMPBELL. I think the amount claimed was between three and four million dollars, although I am working from memory. And like I say, I would prefer to provide more accurate figures once I can research it.

Mr. HALL. Okay. That is fine, Mr. Campbell. We think it is in the neighborhood of over $5 million, but we would like to get a written response from you.

[Subsequently, Mr. Campbell provided the following information for the record:]

> According to figures maintained by Professional Staff Group VII, the total EAJA claimed by appellants in Fiscal Year 2006 $5,862,952.12, and the total actually paid by the Court was $5,454,836.632. In Fiscal Year 2005, the total EAJA claimed by appellants was $4,344,393.63, and the total EAJA actually paid by the Court was $3,887,180.77. In Fiscal Year 2004, the total EAJA claimed by appellants was $3,775,795.73, and the total EAJA actually paid by the Court was $3,444,821.79.

Mr. CAMPBELL. It could very well be. And then, of course, the amount that is claimed is different than the amount that the Court actually pays out.

Mr. HALL. Mr. Terry, in your testimony regarding fiscal year 2006 you discussed the 39,000 plus decisions with a remand rate of 32.8 percent. Can you estimate how long these cases have been waiting?

Mr. TERRY. We have a number of measures that we use to look at how well our case processing is progressing. For example, we have a cycle time, which is the amount of time it takes from the time the case is taken off the shelf until the time it is actually signed out of the Board. And that is right now at 150 days. We would like it to be less, but that is the complete review of the case, the drafting of the decision, the review by senior attorneys and senior judges, and the time it is actually signed out. But that cycle time does not take into account the time it is with the Veteran Service Organizations in their review, but it is a time that actually the Board is spending with a case.

Mr. HALL. Do you have any suggestions further than what are in your written remarks other than recalling retired judges, to help address the backlog of cases?

Mr. TERRY. Well, as I mentioned, there are a number of things that the Court is considering. Certainly, one, preparing the record in a more fundamentally sound way consistent with other courts of appeals, that is listing in the record just those matters which are cited in briefs is, I think, entirely appropriate. And hopefully the

Court will adopt that. They are looking at it very carefully right now.

Going to an electronic record as opposed to a paper record is going to help tremendously. I think that some of the things that some of the other panel members mentioned are very, very good changes.

We likewise feel that the wife or the spouse or children should have the opportunity to substitute. That is going to take a change in law. Certainly I know the Secretary supports that and certainly I hope that will be forthcoming.

We also, just for the Subcommittee's information, work very hard through regulations and statutory provisions which apply to our Board to advance on the docket any case in which there is either an age in excess of 75 years, infirmity of the individual, or if there is a financial hardship. And we have huge numbers of those applications by motion that come to the Board each day and we traditionally grant those.

And that is 1 of the reasons why our 150-day number is as high as it is, because those cases are going to the head of the line and certainly we expect that and we fully believe in that system. Now, those regulations do not apply to the Court's activities, but they certainly are fully applicable at the Board.

Mr. HALL. In your written statement, you mentioned the success you have had in reducing backlog appeals and eliminating avoidable remands. I wanted to ask you if you could summarize quickly what you have done differently, given the current staffing and the current regulation. How much more do you think that remand rate can be reduced, and what do we need to do to help you do that?

Mr. TERRY. The remand rate is really an exercise that is applicable to each of the organizations within the Department of Veterans Affairs. It includes the Veterans Health Administration, the Veterans Benefit Administration, and our Board. Each has to play a part in ensuring that we get a full and proper diagnosis in the medical examination. There has to be a complete development of the record at the Veterans Benefits Administration.

And we have to ensure that we search all four corners of the case file to find a way to decide that case properly. Cases are remanded because they have not been fully developed and the veterans' rights are not fully protected. We remand a number of cases each year, and it is because the case has not been fully developed and the veteran has not been served.

And, consequently, it is our effort through working with VBA in a training program we jointly developed and working with Dr. Kussman in the Veterans Health Administration to ensure that there is a nexus examination in every case, that is the doctors who are looking at our veteran, he or she, making sure that they are actually looking at what the complaint is and addressing that complaint in the medical examination.

We are asking the Veterans Benefits Administration, each rating specialists to make sure that they are looking at every concern that is raised by the veteran and have that evidence which addresses that concern in the file. And when we get a case and it is not fully developed, then we cannot decide in fairness to the veteran that case in a proper way. So it requires all of us working together.

The Deputy Secretary instituted a program 2½ years ago, Deputy Secretary Mansfield, and we began working as a group, Veterans Health Administration, Veterans Benefits Administration, and the Board as trainers and working together to ensure that there was a sensitivity on the part of all concerned to get that information and get it properly developed before it got to the Board. And when that happens, our remand rate goes way down.

There are certain things we cannot control, of course, if some new information or some new medical diagnosis comes forward. Then, of course, no matter how well the development has gone and we in fairness to the veteran have to make sure that that is considered and the veteran has the absolute right to have it go back to the agency of original jurisdiction, the Regional Office, and have that occur.

But those that we can control, those that we can ensure are developed to the extent possible, we will and we are right now. I think we have made tremendous strides.

Mr. HALL. Thank you.

Lastly, I just wanted to ask your thoughts on the Rule of Prejudicial Error and de novo review by the Court.

Mr. TERRY. Prejudicial error is exactly that. It is prejudicial to the claimant. When there is no prejudice, we are very concerned that the Court of Veterans Claims and the Court Appeals for the Federal Circuit treat our cases like other cases in the Federal system.

We have been working very hard with the Court and with our staff to ensure that we handle those cases where there is prejudice at the lowest possible level and correct that prejudice.

The "Veterans Claims Assistance Act" deals with notification and assistance. Most prejudicial error cases are addressed in terms of that Act. And the question becomes one of has the individual been properly notified, did he have an understanding of every opportunity to present evidence and provide that evidence, and when he has, although it may not have gone in quite the sequence provided for by that Act, we simply ask the Court of Appeals of Veterans Claims and the Court of Appeals of the Federal Circuit to treat our process like other processes within the Federal system.

It is as simple as that. We are trying to minimize any concerns with regard to the information that is provided to the veteran, but I think it is important that where there is no prejudice to the veteran that the case be allowed to be moved forward.

Randy, do you have any additional comments you would like to make?

Mr. CAMPBELL. I would just touch on changing the standard of review. I do not know that changing the standard of review is going to address or alleviate the theme of this hearing, eliminating the backlogs at the Court. It would be changing the process fundamentally, changing the Appeals Court into a fact-finding court, but it would be a fundamental change.

Mr. HALL. Thank you.

Our Ranking Member has had to leave for another engagement. In his absence, Minority Counsel, Jeff Phillips, would like to ask a question.

Mr. PHILLIPS. Thank you, Mr. Chairman.

Mr. Terry, under the heading "Stopping the Hamster Wheel," do you see any reason for the Court not to consider all issues in a given case contested by a veteran?

Mr. TERRY. We would hope they would.

Mr. CAMPBELL. If I might weigh in on that. When the Court of Appeals for Veterans Claims issued their precedents in Mahl and Best, they explained their thinking, their reasoning on why they would not necessarily delay the processing of a veteran's claim to address each and everything raised in the brief.

One thing the Court does routinely is it permits the veteran, if a veteran can demonstrate he or she is entitled to greater relief than a remand to correct error, then they will consider that before they remand the case.

One of the things that is unique about veterans' jurisprudence is that when a case is remanded from the Court back to the Board of Veterans' Appeals or to the agency of original jurisdiction, the veteran gets a fresh bite at every issue and it is incumbent upon VA to provide a new decision on every issue that the veteran wishes VA to pursue so that the Court did not look at the Best, Mahl rule as one that cuts off veterans' rights but actually preserves veterans' rights without clogging up the Court's docket with cases that are going to be remanded anyhow and the veteran would not get any greater relief.

But the other thing is, the rule is a discretionary one, as I understand it, and there are instances where the individual judges in exercising their discretion will address additional issues and not just cut the veteran off at one issue. They will address all the different assignments of error. So it is really a case-by-case thing and it is left to the judge's discretion.

Mr. PHILLIPS. Thank you.

Thank you, Mr. Chairman.

Mr. HALL. Thank you, Mr. Phillips.

Thank you, Chairman Terry and Mr. Campbell, for your testimony and everybody who stayed here with us listening and all the staff. This now concludes our hearing. Thank you.

[Whereupon, at 11:59 a.m., the Subcommittee was adjourned.]

A P P E N D I X

Opening Statement of the Hon. John J. Hall, Chairman, Subcommittee on Disability Assistance and Memorial Affairs

Good Morning,

I would ask everyone to rise for the Pledge of Allegiance—flags are in the front and rear of the room.

I would first like to thank the witnesses for coming today to appear before the Subcommittee. I know the issues pertinent to the Court of Appeals for Veterans Claims and the ease of the administration of justice for our veterans is of utmost importance to you.

I also want to commend Chief Judge Greene of the Court of Appeals for Veterans Claims for the exceptional job he has been doing with a relatively "young" bench in increasing the Court's efficiency and productivity through innovative management approaches, especially with the recall of retired judges.

I know that you are also going to benefit from successful efforts by this Committee to increase Veterans' funding in the FY 08 Budget Resolution which passed this Congress with additional resources to expand your staff. You deserve it. You have certainly stepped up to the plate for our veterans and I want you to continue to call on this Subcommittee and this Congress for the resources you need.

However, no one will deny that more needs to be done to create a better system of appellate justice for our veterans. The merry-go-round of the appeals process from the Regional Office to the Board of Veterans' Appeals to the Court (the Court) and the usual merry-go-round of remands back and forth between the three has turned into almost a ***system of injustice*** for our veterans.

I would direct everyone's attention to the charts displayed that show the appeals process for veterans' claims. As the retired judges of the Court have indicated in previous statements before Congress, with four levels of appeals, the one administrative to the Board and three possible levels of judicial appeal, "this is just more justice than the system can bear."

First the veteran can appeal the Regional Office decision to the Board of Veterans' Appeals, known as the BVA. This process can take up to 3 years. From there, the veteran can appeal the BVA decision to the Court of Appeals for Veterans claims, where the average time from filing to disposition is 351 days. From there an appeal can be made to the U.S. Court of Appeals for the Federal Circuit. The Federal Circuit Court usually takes up to a year to make a decision which then can be appealed to the Supreme Court. This cycle can repeat itself a few times for one veteran in many different variations adding up to between 5–7 years to final adjudication.

The question becomes at what cost to the administration of justice is this cycle for our veterans. For instance, I know that many take pause with the review of one Federal intermediate appellate court (the CAVC) by another Federal intermediate appellate court (the Federal Circuit Court) and wonder what is gained by this unique additional bite at the appeals apple.

Additionally, the veterans' appeals process is interlaced with vacated and remanded decisions (cases sent back for a new decision or correction), resulting in an appeals cavalcade of sorts that end up creating extensive and unacceptable delays in the adjudication of veterans' claims. This process adds years to the process and the Subcommittee has been alerted to cases pending on appeal for more than a decade. In fact, many appellants die while waiting for finality in their appeals. At that point, the CAVC appeal usually dies as well, with little recourse for surviving dependents, spouses and estates. This is not the desired result for our veterans' beneficiaries.

I look forward to hearing the witnesses' views on these phenomena of the veterans appeals process.

I likewise look forward to hearing testimony on ways to improve processes within the Court itself. I particularly am interested in examining the issue pertaining to

expanding the interpretation of *prejudicial error*, which to date has been interpreted as narrowly as possible by the Court.

I am aware in many instances that often for the sake of expediency the Court will not resolve all issues raised on appeal and will vacate and remand on only one aspect of error raised on brief.

I also realize that the Court by statute is not allowed to review cases *de novo* (weigh all of the BVA and RO findings of evidence and law), under 38 U.S.C., Sec. 7261. However, I would like to examine the value of allowing the Court to weigh *de novo* evidence and make determinations of fact without first remanding to the Board of Veterans Appeals to supplement the record or to correct the error. I know the National Veterans Legal Services Program (NVLSP), the National Organization of Veterans' Advocates (NOVA) and the Disabled American Veterans (DAV) have ideas in this area and I am anxious to explore them further.

Lastly, I look forward to hearing from the VA represented today by Chairman Terry of the BVA, accompanied by Mr. Randy Campbell, an assistant general counsel with the VA's General Counsel's office that represents the agency before the Court, on how it can reduce the number of remanded cases by increasing the accuracy of its decisionmaking.

I also would like to hear about the problems it sees systemwide and the role it plans to take in lessening the appellate "hamster wheel" for our veterans.

With the expected surge in filings by returning OIF/OEF veterans, the VA, as the "gateway" in the appeals process as well as the oft-creator of the record that forms the basis for appellate review, should amplify its role in the overall improvement of the claims adjudication process.

Thank you.

Opening Statement of the Hon. Doug Lamborn, Ranking Republican Member, Subcommittee on Disability Assistance and Memorial Affairs

Thank you Mr. Chairman for recognizing me. I thank you for holding this hearing on the Court of Appeals for Veterans Claims and its role in the efficient processing of disability compensation claims.

I welcome our witnesses, especially Chief Judge Greene, and thank you all for your contributions to the veterans' affairs system.

The court has come far since its 1988 founding, and by all accounts is largely producing quality decisions.

Judge Greene, you are to be commended for making use of Title 38 and recalling five retired judges to increase your productivity. I note the emphasis you place on a dedicated courthouse and adequate room for a growing court, and am most interested in ensuring you have the facilities you need.

We face an unprecedented challenge as the number of compensation and pension claims increase faster than VA's ability to process them. Further, accuracy is not what it should be, driving up appeals; and we are seeing among veterans a growing propensity to appeal.

These factors have already had a dramatic effect on the court's workload, which has essentially doubled in the last 10 years. The number of pending cases is double the number pending 3 years ago and more than 3 times the number pending a decade ago.

We must be attentive to the court's ability to handle demands which presumably will continue to climb.

I am, therefore, interested in learning more about the efficiency of the court's operations. The phenomenon called the "hamster wheel" has caught my eye.

Perhaps there is good rationale, but it seems inefficient for a veteran to appeal a multi-issue denial from the Board of Veterans Appeals, only to see one issue addressed, and perhaps remanded or vacated by the court at a time.

According to testimony we have received, this stretches the appeals process for often aging veterans by years. I do not believe that the court is required to do business this way, nor would it appear that it contributes to higher court productivity.

Our veterans deserve the best benefits delivery system we can provide. In my brief period as Ranking Member, I have learned much about that system. I was pleased to work with Chairman Hall over the past few weeks on legislation that would improve how we serve veterans applying for benefits that they earned.

In the testimony we have read numerous suggestions regarding the court's operations, and I now look forward to our discussion on this essential facet of the benefits system.

Mr. Chairman, I yield back.

Statement of the Hon. William P. Greene, Jr.,
Chief Judge, U.S. Court of Appeals for Veterans Claims

MR. CHAIRMAN AND DISTINGUISHED MEMBERS OF THE SUBCOMMITTEE:

On behalf of the Court, I appreciate the opportunity to present testimony on the challenges facing the United States Court of Appeals for Veterans Claims. As Chief Judge, I lead the Court in its daily operations, which includes determining how best to use our judicial resources. I have great assistance from my colleagues—who form the Board of Judges, the Clerk of the Court, and a very competent judicial staff. The Court is a national appellate court of record. Our primary responsibility is to provide independent judicial review of final Board of Veterans' Appeals (BVA or Board) decisions that are adverse to a veteran's claim for benefits.

Initially, let me state that less than 2 years ago, in August 2005, I became the Chief Judge of a relatively new Court. We had just experienced the first complete turnover or retirement of all of the original judges on our Court. By statute, judges of this Court are appointed by the President, with the advice and consent of the Senate, to 15-year terms. The Court was created in November 1988 by the Veterans' Judicial Review Act, and it opened its doors in October 1989 after the first three judges had been confirmed. Four more judges joined the bench the following year, bringing the Court up to its statutory full strength of seven active judges. I was appointed to the Court in November 1997 after the death of Judge Hart T. Mankin, one of the original seven, created a vacancy.

Since all judges had been appointed within a few months of one another, as we approached the 15-year mark of the Court's operations, the terms of the remaining original judges began to expire, in succession, in order of seniority. We went from seven judges, to five judges, as we awaited nomination and confirmation of new judges. As appointments were made, we returned to seven judges, to temporarily (as provided by statute) nine judges, then—in August 2005—back to seven judges, with six being new. From once being a junior judge, I suddenly overnight became the most senior and the Court's Chief Judge, with two colleagues who had served just over 1 year, and four new colleagues who had served for only several months. This transformation was indeed challenging.

Now, I am happy to report that our four newest judges have completed 2½ years of service on the bench, and two judges are approaching 3½ years. We are now a far more experienced Court. That experience level has produced positive results that I will highlight today.

However, before discussing caseload and case processing, I would like to tell you a little more about the Court in the context of the Federal judicial system. The Court is a federal appellate judicial tribunal. It stands with the U.S. Court of Appeals for the Armed Forces as one of two specialized Federal appellate courts, created under Article I of the U.S. Constitution, joining the 13 Article III circuit courts of appeal and the specialized U.S. Court of Appeals for the Federal Circuit, as a part of the Federal appellate judiciary. When the Court was created, veterans and their families got—for the first time—the right to judicial review of final BVA decisions. And they are making use of that right.

Recently, Associate Professor Michael Allen, of the Stetson University College of Law, when commenting on proposed changes to the Court's Rules of Practice and Procedure, observed that the U.S. Court of Appeals for Veterans Claims is one of the busiest Federal appellate courts, nationwide. Professor Allen points out that, in 2006, with 3,729 new cases, the Court's incoming caseload was greater than the First (with 1,852 cases), Seventh (3,634), Eighth (3,312), Tenth (2,742), District of Columbia (1,281), and Federal (1,772) Circuits. With only seven active judges, this Court's per-judge average is 533 cases, about twice as many cases as the 263 average per judge for the Article III circuit courts of appeal. This workload presents a significant challenge.

For many years, the veterans' benefits process, administered by the Department of Veterans Affairs (VA), operated without any right by a veteran to independent judicial review of a decision by VA on a claim. As the possibility of providing judicial review of final agency decisions adversely affecting veterans was debated, good arguments were raised for a variety of proposals as to how that judicial review ought to be provided. Those who favored judicial review pointed out that there would be significant problems in trying to develop veterans law expertise in any of the courts of more general jurisdiction. That lack of specialized expertise was perceived to be

a potential detriment to veterans and to VA because of the complexity of this area of the law.

One concern that needed to be addressed in creating a specialized appellate court was that, because there had not previously been a right to judicial review, there was not an existing body of veterans law appellate jurisprudence. Therefore, a structure unique within the Federal court system was created. The Congress established an independent court of appeals that handled only veterans' cases. The U.S. Court of Veterans Appeals, now the U.S. Court of Appeals for Veterans Claims, was created as an appellate court, applying general principles for appellate review of agency final decisions; and the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) was given limited appellate jurisdiction to review decisions of this Court affecting only questions of law. The serial appellate review by two separate appellate courts achieved the purpose envisioned by its advocates, and we now have the settled body of specialized jurisprudence that was lacking when the system was designed. Indeed, there are now 20 volumes of law in the West Reporter Series: West's Veterans Appeals Reporter.

Appeals to the Court are, as a matter of right, without any jurisdictional filter. Veterans and their qualifying family Members who have received from the BVA (in whole or in part) an adverse decision affecting benefits may file an appeal. They need only file within 120 days after the date of the Board decision, citing the Board decision that is being appealed. A modest filing fee of $50.00 is required, but that fee is often waived upon a showing of financial hardship. Thereafter, the Secretary and the appellant (or the appellant's counsel) determine which documents within the veteran's claims file should constitute the Designated Record for the Court's review. After the record has been designated, the parties must present written briefs, may request oral argument, and can make such other motions affecting the appeal as may be appropriate. During this period, unrepresented appellants frequently obtain counsel (in fiscal year (FY) 2006, 63% of appellants were unrepresented when they filed an appeal, but only 24% continued to be unrepresented at closure). Generally, the Court's rules allow 254 days for this appellate process. The appellant and the Secretary frequently request additional time to accomplish the preparation (about 13,000 requests for extension of time were filed by the parties in FY 2006; more than 10,000 such requests have already been filed in FY 2007).

Before the case is fully briefed and ready for screening for assignment to a judge for decision, the parties may agree on a disposition that does not require action by a judge or panel of judges. The Secretary and the appellant can agree jointly to vacate the Board decision and remand the case to the Board so that it can address the issues raised on appeal. Attorneys in the Central Legal Staff are key facilitators in this process.

The case is then assigned to a judge, who must review the case to decide whether it presents a novel issue requiring a panel decision or whether it involves the application of settled law. If it involves the application of settled law to the facts of the case, a single judge is permitted to decide the case and issue a memorandum decision. This single-judge decision authority is absolutely essential to the Court's ability to handle a large caseload with only seven judges. If, during this screening process, the judge believes that the case involves a novel issue of law, the judge will ask the Clerk to assign the case to a three-judge panel. That panel can then proceed to a decision, with or without oral argument by the parties.

It is the Court's practice to circulate among all of the judges for review the single-judge decisions and panel opinions. In the case of single-judge decisions, if two judges believe the case requires decision by a panel, it must be referred to a panel. This review process assures that single judges do not make decisions that should be the subject of precedential panel decisions and that there are not potential conflicts in precedential panel opinions. During the circulation of a draft opinion by a three-judge panel, there may be a call for consideration of the matter by the full court when it is believed that the proposed opinion addresses issues of exceptional importance or creates a conflict in the Court's jurisprudence that must be resolved.

Once a decision or opinion issues, either party may request reconsideration and/or panel review of a single-judge decision. If that request for reconsideration is denied by the single judge, any request for panel review will be considered. Similarly, there may be a request for full Court consideration of a panel opinion.

But the appeal process does not end here. Following a final decision by our Court, the unique statutory jurisdictional scheme adopted for the creation of appellate review of VA final decisions permits a veteran or the Secretary to file an appeal to the Federal Circuit. The Federal Circuit has jurisdiction to review our decisions that interpret the statutes and regulations, but not those decisions that apply the law to the facts of a particular case.

Many of the cases appealed to the Federal Circuit today are dismissed at that level for lack of jurisdiction when that Court concludes that the case had involved the application of law to fact. In areas where questions of law are interpreted by our Court, the Federal Circuit reviews our decisions without deference to our interpretation. During FY 2006, 366 cases from our Court were appealed to the Federal Circuit.

Finally, following review in the Federal Circuit, either party may seek review by the U.S. Supreme Court by filing a Petition for a Writ of Certiorari. Since 1989, the Supreme Court has considered two of our cases.

Now I turn to the challenges created by the Court's greatly increased caseload. Last year, I advised the Court's congressional authorizing and appropriations Committees that I anticipated that new case filings to the Court would continue to rise and could reach 3,600. In fact, in FY 2006 the Court received 3,729 new case filings; and we decided 2,842 cases, the third highest number in our history. The rolling wave of new cases received in FY 2007 continues the previous year's trend of substantial increases in the Court's workload over that experienced from FY 1989 through FY 2004.

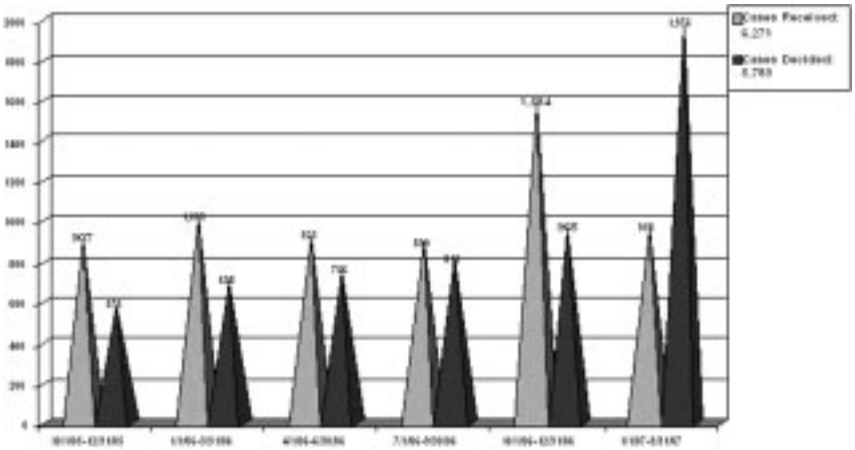
The following table, which also appears on page 4 of the Court's FY 2008 Budget Submission, reveals the trends from FY 1995 through FY 2006 for Board of Veterans' Appeals (BVA or Board) total denials and appeals and petitions to the Court:

	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04	FY 05	FY 06
BVA Total Denials	6407	10444	15865	15360	14881	14080	8514	8606	10228	9299	13033	18107
Case Filings to USCA-VC	1279	1629	2229	2371	2397	2442	2296	2150	2532	2234	3466	3729
Case Filings as % of Denials	20.0%	15.0%	14.0%	15.4%	16.1%	17.3%	27.0%	25.0%	24.0%	24.2%	26.6%	20.6%

In the first two quarters of FY 2007, we have received the highest numbers ever (2,542 new cases in 2 quarters). Although many of those cases related to a single issue in a particular case (over 1,100 cases were appeals of decisions on bilateral tinnitus claims, controlled by *Smith v. Nicholson)*, even without counting those cases, there remained an average of 300 appeals per month.

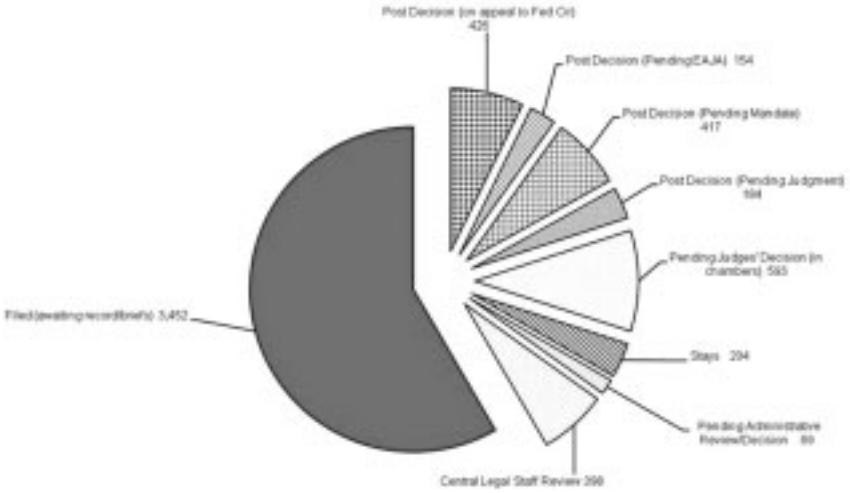
Additionally, the following chart shows cases filed and cases decided from the first quarter of FY 2006 through the second quarter of FY 2007:

U.S. Court Of Appeals for Veterans Claims Cases Files and Decided From October 1, 2005 to March 31, 2007



At the same time, the Court decision rate has risen as indicated by an increasing number of cases decided per quarter. In the first and second quarters of FY 2007, the Court decided 2,941 cases, as compared to 1,274 in the first 2 quarters of FY 2006. The number of cases decided thus far in 2007 exceeds the number of incoming cases, which was 2,542. Nevertheless, new cases continue to arrive at a high rate—between 300 and 400 every month. The pie graph that follows depicts the Court's case inventory as of May 10, 2007. Of the 6,080 cases in our inventory, 3,452 are being developed by the parties, and 1,181 have already been decided but are temporarily kept in the inventory for a variety of reasons (426 cases on appeal to the Federal Circuit, 154 cases pending action on Equal Access to Justice Act applications, 417 cases awaiting the time to run for mandate, and 184 cases awaiting the time to run for entry of judgment); 204 cases are stayed upon request of the parties or awaiting disposition of the appeal in a related case; 398 cases are ready for review by the Central Legal Staff; 593 cases are pending a decision by the judges; and 89 are pending action by the Clerk (either on a joint motion of the parties or awaiting a response to a motion for dismissal for jurisdictional reasons).

U.S. Court of Appeals for Veterans Claims Caseload
(as of May 10, 2007) Total: 6,080



There is no single factor that accounts for the Court's sustained high level of new cases. The increase, however, may be attributable to several circumstances: Firstly, the increased productivity of the Board, including a higher number of denials of benefits, produces more potential appeals; second, increased awareness among veterans and their families of the Court's 19-year existence; and, third, the availability of a larger number of attorneys who practice veterans benefits law who may be advising their clients to appeal to the Court. Even Board decisions that are not total denials, but rather grants of benefits, may result in an appeal to the Court if the claimant believes that he or she should have a higher rating or an earlier effective date for benefits than that awarded by the Board.

The Court's success in productivity over the last fiscal year can be attributed to 3 factors: the additional experience acquired by the Court's judges, the increase in the number of law clerks to help the judges prepare cases for decision, and my decision as the Chief Judge to recall retired judges for statutorily authorized periods of 90 days to assist in case resolution. To date, five retired judges have been recalled to provide service to the Court. Although their service does add to the Court's output, there are challenges in supporting them adequately. Presently, we must redirect the efforts of our Central Legal Staff attorneys from their routine case screening to law-clerk duties for our recalled judges. Continuing through fiscal year 2008, three new attorney positions within the Central Legal Staff will allow us to address

the staff workload imbalance or shortage created by the need to provide adequate support for recalled-retired judges.

We are considering these and other initiatives to enhance our ability to reduce our pending caseload—but not at the expense of forfeiting due process or limiting the opportunity to give each case the benefit of our full and careful judicial review. The following actions potentially will assist us in meeting the challenges presented by the upsurge in appeals to this Court:

Firstly, our retired judges are recall eligible under 38 U.S.C. § 7299. If recalled, a retired judge is statutorily obligated to serve 90 days each year. If a retired judge's circumstances permit and the judge so chooses, another 90 days of service may be provided for a maximum of 180 days in a calendar year. The critical piece in deciding to recall judges is to recall them at a time when their availability can be most useful. But, there are space and staffing issues accompanying any recall decision that must be addressed. The Court is currently budgeted with three staff attorneys to support recalled judges. To recall at least two judges at one time requires additional space, support staff, and security arrangements. We are also looking for ways in which their service might practically and productively be used that is most compatible with the Court's existing operations and procedures.

Second, the Court's Rules Advisory Committee has recommended the creation of a joint appendix as the record on appeal instead of using the current Designated Record. A joint appendix is a condensed record on appeal that is limited to just the documents from the claims file that principally are relied upon by both parties. It is the form of record used by the Federal Circuit when it reviews appeals from decisions of our Court. Use of a joint appendix could expedite review at the Court by focusing consideration only on documents relevant to issues argued on appeal. Currently, the rules of Court afford the parties at least 90 days to agree upon documents from the claims file that are relied upon for creating the record on appeal. Requests or motions to extend that time period normally are granted to insure a complete and accurate record. Using an agreed-upon joint appendix would reduce the required review of voluminous records, as well as shorten the time to have the case ready for a judge's review. The Court is presently receiving and reviewing public comments submitted upon this proposed rules change.

Third, in appropriate cases where the appellant is represented, we are considering adopting a practice often used in other federal courts of summarily disposing of such cases without explanation. This option holds significant potential given the caseload in chambers. A summary disposition states only the action of the court, without giving its rationale. It might state something like, "On consideration of the record on appeal and the briefs of the parties, the decision of the Board of Veterans' Appeals is hereby Affirmed/Reversed/Remanded." However, since the Court's inception one of its hallmark policies concerning the resolution of veterans' cases has been to provide to a veteran an explanation of the reasons for the Court's decision. We have always adhered to that policy in disposing of single-judge matters, as well as in panel decisions. Summary action is a departure from that policy but an action worth considering. The Court's rationale could be explained to the appellant by his or her counsel. This option, as well as all the other options I have listed, was highlighted at the Court's Judicial Conference in April 2006, which was attended by many of the Court's practitioners—both private attorneys and VA counsel as well as Veterans' Affairs Committee congressional staff. The subject was also raised in a Bar and Bench Conference held last month.

Fourth, we are working on implementing a case management/electronic case filing system (e-filing). The Court has partnered with the Administrative Office of the United States Courts to acquire and use the software and e-filing system already developed for the Article III courts. Indeed, 10 of the 13 circuit courts of appeals now have that capability. Our goal is to have the first phase of e-filing implemented by June 2008. The availability of electronic filing should enable us to reduce some of the administrative delays associated with processing an appeal. Briefs could be filed faster, and if the Department of Veterans Affairs moves to a compatible paperless claims file, significant time savings could be achieved in obtaining an appellate record. It would also alleviate our current shortage of space for file storage.

The Court's Central Legal Staff has contributed mightily to case disposition, through their dispute-resolution efforts. We are considering other creative ways to make even greater use of these attorneys, retired judges, and perhaps appointed magistrates or mediators in deciding cases faster. Certainly, for alternative dispute resolutions, we want the parties coming to the table to have full authority to commit to a thoughtful resolution consistent with the law, due process, and the interests of justice.

Finally, the Court is continuing its efforts with the General Services Administration, to work toward making a Veterans Courthouse and Justice Center a reality.

Our present space is or will be inadequate for the type of caseload we are now experiencing. Significantly, the current lease of three floors of a commercial building that is our courthouse expires in October 2010. Thus, we need to explore every feasible option quickly because having an appropriate court facility for handling this increased appellate caseload requires several years of lead time. Adequate space is crucial if we are to make efficient use of recalled judges and any future full-time active judges in residence at theclass=Section7>

Court. More importantly, the U.S. Court of Appeals for Veterans Claims is the only Federal national court without its own dedicated courthouse. It is especially time now to have a dedicated courthouse that is a lasting symbol of justice and an expression of the nation's gratitude and respect for the sacrifices of America's sons and daughters who have served in the Armed Forces, and their families. We look forward to your committed support for this worthy project.

Simply stated, we are implementing actions to best meet the demands of an increased docket—but not at the expense of forfeiting due process or limiting the opportunity to give each case the benefit of our full and careful review. I take my caseflow management responsibilities very seriously and have full support from all judges. We are properly motivated, collegial, and dedicated to rendering thorough and timely decisions. It must be remembered that the Court does not adjudicate the facts of these cases for VA. The appellants already have received perhaps many adjudications and have a decision on their claims. The Court provides independent judicial review of VA's decisions for legal error and in doing so provides legal precedent that will promote uniformity and fairness in the claims adjudication process. All may rest assured that no week at the Court goes by without a dialog among the judges and staff on how to decide these cases efficiently and thoroughly.

That summarizes the Court's challenges and our work to meet them. On behalf of the judges and staff of the Court, we appreciate very much your past support and continued assistance.

Statement of Barton F. Stichman,
Joint Executive Director, National Veterans Legal Services Program

Mr. Chairman and Members of the Committee:

I am pleased to be here today to present the views of the National Veterans Legal Services Program (NVLSP) on the challenges facing the U.S. Court of Appeals for Veterans Claims ("the CAVC").

NVLSP is a nonprofit veterans service organization that supported throughout the eighties bills to repeal the then longstanding bar to judicial review of VA decision-making on claims for benefits. Since the CAVC was created in 1988, NVLSP has represented nearly 1,000 VA claimants before the Court. NVLSP is one of the four veterans service organizations that comprise the Veterans Consortium Pro Bono Program, and in that Program, NVLSP recruits and trains volunteer lawyers to represent veterans who appeal to the CAVC without a representative. In addition to its activities with the Pro Bono Program, NVLSP has trained thousands of veterans service officers and lawyers in veterans benefits law, and has written educational publications that have been distributed to thousands of veterans advocates to assist them in their representation of VA claimants.

At the outset, NVLSP wishes to acknowledge and commend Chief Judge Greene, the other judges, and the staff of the CAVC on the affirmative steps they have taken and are scheduled to take in the future to minimize the time lag between the filing of an appeal and a decision by the Court. These efforts are already bearing fruit. The continuing increase in the number of appeals that are annually filed at the CAVC makes these ongoing efforts doubly important.

My testimony today is informed by the frustration and disappointment in the claims adjudication system experienced by many disabled veterans and their survivors. They face a number of serious challenges, including in the judicial appeal process. As we describe below, there are several significant problems that cry out for a legislative fix.

I. The Hamster Wheel

For many years now, those who regularly represent disabled veterans before the CAVC have been using an unflattering phrase to describe the system of justice these veterans too often face: "the Hamster Wheel". This phrase refers to the following common phenomenon: the veteran's claim is transferred back and forth between the CAVC and the Board, and the Board and the RO, before it

is finally decided. The net result is that frustrated veterans have to wait many years before receiving a final decision on their claims.

There are at least three aspects of the CAVC's decisionmaking process that contribute to the Hamster Wheel phenomenon: (1) the policy adopted by the CAVC in 2001 in *Best v. Principi*, 15 Vet.App. 18, 19–20 (2001) and *Mahl v. Principi*, 15 Vet.App. 37 (2001); (2) the CAVC's reluctance to reverse erroneous findings of fact made by the Board of Veterans' Appeals; and (3) the case law requiring the CAVC to dismiss an appeal if the veteran dies while the appeal is pending before the Court.

A. How *Best* and *Mahl* Contribute to the Hamster Wheel

In *Best* and *Mahl*, the Court held that when it concludes that an error in a Board of Veterans' Appeals decision requires a remand, the Court generally will not address other alleged errors raised by the veteran. The CAVC agreed that it had the power to resolve the other allegations of error, but announced that as a matter of policy, the Court would "generally decide cases on the narrowest possible grounds."

The following typical scenario illustrates how the piecemeal adjudication policy adopted by the CAVC in Best and Mahl contributes to the Hamster Wheel phenomenon:

- after prosecuting a VA claim for benefits for 3 years, the veteran receives a decision from the Board of Veterans' Appeals denying his claim;
- the veteran appeals the Board's decision within 120 days to the CAVC, and files a legal brief contending that the Board made a number of different legal errors in denying the claim. In response, the VA files a legal brief arguing that each of the VA actions about which the veteran complains are perfectly legal;
- then, four and a half years after the claim was filed, the Central Legal Staff of the Court completes a screening memorandum and sends the appeal to a single judge of the CAVC. Five years after the claim was filed, the single judge issues a decision resolving only one of the many different alleged errors briefed by the parties. The single judge issues a written decision that states that: (a) the Board erred in one of the respects discussed in the veteran's legal briefs; (b) the Board's decision is vacated and remanded for the Board to correct the one error and issue a new decision; (c) there is no need for the Court to resolve the other alleged legal errors that have been fully briefed by the parties because the veteran can continue to raise these alleged errors before the VA on remand.
- on remand, the Board ensures that the one legal error identified by the CAVC is corrected, perhaps after a further remand to the regional office. But not surprisingly, the Board does not change the position it previously took and rejects for a second time the allegations of Board error that the CAVC refused to resolve when the case was before the CAVC. Six years after the claim was filed, the Board denies the claim again;
- 120 days after the new Board denial, the veteran appeals the Board's new decision to the CAVC, raising the same unresolved legal errors he previously briefed to the CAVC.
- the Hamster Wheel keeps churning . . .

The piecemeal adjudication policy adopted in *Best* and *Mahl* may benefit the Court in the short term. By resolving only one of the issues briefed by the parties, a judge can finish an appeal in less time than would be required if he or she had to resolve all of the other disputed issues, thereby allowing the judge to turn his or her attention at an earlier time to other appeals. But the policy is myopic. Both disabled veterans and the VA are seriously harmed by how *Best* and *Mahl* contribute to the Hamster Wheel. Moreover, the CAVC may not be saving time in the long run. Each time a veteran appeals a case that was previously remanded by the CAVC due to *Best* and *Mahl*, the Central Legal Staff and at least one judge of the Court will have to duplicate the time they expended on the case the first time around by taking the time to analyze the case for a second time. Congress should amend Chapter 72 of Title 38 to correct this obstacle to justice.

B. How the Court's Reluctance to Reverse Erroneous BVA Findings of Fact Contributes to the Hamster Wheel

Over the years, NVLSP has reviewed many Board decisions in which the evidence on a critical point is in conflict. The Board is obligated to weigh the conflicting evidence and make a finding of fact that resolves all reasonable doubt in favor of the veteran. In some of these cases, the Board's decision resolves the factual issue against the veteran even though the evidence favorable to the veteran appears to strongly outweigh the unfavorable evidence.

If such a Board decision is appealed to the CAVC, Congress has authorized the Court to decide if the Board's weighing of the evidence was "clearly erroneous." But the Court interprets the phrase "clearly erroneous" very narrowly. The Court will reverse the Board's finding on the ground that it is "clearly erroneous" and order the VA to grant benefits in only the most extreme of circumstances. As the CAVC stated in one of its precedential decisions: "[t]o be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must . . . strike us as wrong with the force of a 5-week-old, unrefrigerated dead fish. . . . To be clearly erroneous, then, the [decision being appealed] must be dead wrong. . . ." *Booton v. Brown*, 8 Vet.App. 368, 372 (1995) (quoting *Parts & Electric Motors, Inc. v. Sterling Electric, Inc.*, 866 F.2d 228, 233 (7th Cir. 1988)).

The net result of the Court's extreme deference to the findings of fact made by the Board is that even if it believes the Board's weighing of evidence is wrong, it will not reverse the Board's finding and order the grant of benefits; instead, it will typically vacate the Board decision and remand the case for a better explanation from the Board as to why it decided what it did—thereby placing the veteran on the Hamster Wheel again. Congress should amend the Court's scope of review of Board findings of fact in order to correct this problem.

C. How the Case Law Requiring the CAVC to Dismiss an Appeal if the Veteran Dies While the Appeal is Pending Contributes to the Hamster Wheel

On April 24, 2007, Christine Cote testified on NVLSP's behalf before this Subcommittee about another contributor to the Hamster Wheel: the case law that requires the CAVC to dismiss an appeal if the claimant dies before the appeals process has been completed. Under this case law, a qualified surviving family Member cannot continue the appeal at the CAVC. Instead, the qualified surviving family Member must start from square one and file a new claim at a VA regional office for the benefits that the veteran had been seeking for years at the time of his death. As Ms. Cote explained, Congress should take legislative action to allow a qualified surviving family Member to substitute for the deceased veteran and continue the appeal at the CAVC.

II. Injustice and Inefficiency Due to the Lack of Class Action Authority

The second major set of issues we would like to address involves the injustice and inefficiency that derives from the fact that Federal courts do not currently have clear authority to certify a veteran's lawsuit as a class action. When Congress enacted the Veterans' Judicial Review Act (VJRA) in 1988, it inadvertently erected a significant roadblock to justice. Prior to the VJRA, U.S. district courts had authority to certify a lawsuit challenging a VA rule or policy as a class action on behalf of a large group of similarly situated veterans. *See, e.g., Nehmer v. U.S. Veterans Administration ,* 712 F. Supp. 1404 (N.D. Cal. 1989); *Giusti-Bravo v. U.S. Veterans Administration ,* 853 F. Supp. 34 (D.P.R. 1993). If the district court held that the challenged rule or policy was unlawful, it had the power to ensure that all similarly situated veterans benefited from the court's decision.

But the ability of a veteran or veterans organization to file a class action ended with the VJRA. In that landmark legislation, Congress transferred jurisdiction over challenges to VA rules and policies from U.S. district courts (which operate under rules authorizing class actions) to the U.S. Court of Appeals for the Federal Circuit and the newly created U.S. Court of Appeals for Veterans Claims (CAVC). In making this transfer of jurisdiction, Congress failed to address the authority of the Federal Circuit and the CAVC to certify a case as a class action. As a result of this oversight, the CAVC has ruled that it does not have authority to entertain a class action (*see Lefkowitz v. Derwinski ,* 1

Vet.App. 439 (1991), and the Federal Circuit has indicated the same. *See Liesegang v. Secretary of Veterans Affairs*, 312 F.3d 1368, 1378 (Fed. Cir. 2002).

The lack of class action authority has led to great injustice and waste of the limited resources of the VA and the courts. To demonstrate the injustice and waste that result from the unavailability of the class action mechanism, we have set forth below an illustrative case study taken from real events.

Case Study: The Ongoing Battle Between the VA and Navy "Blue Water" Veterans

This case study involves the 5-year-old battle that is still being fought between the VA and thousands of Vietnam veterans who served on ships offshore the Republic of Vietnam during the Vietnam War (hereinafter referred to as "Navy blue water veterans"). In section A below, we summarize this 5-year-old battle being waged without the benefit of a class action mechanism. In section B, we describe the more efficient and just way the battle would have been waged if a class action mechanism had been available. Finally, in section C, we describe how the piecemeal way the battle is currently being fought will inevitably result in dissimilar VA treatment of similarly situated veterans.

A. The 5-Year-Old Battle Between the VA and Navy Blue Water Veterans

From 1991 to 2002, the VA granted hundreds, if not thousands of disability claims filed by Navy blue water veterans suffering from one of the many diseases that VA recognizes as related to Agent Orange exposure. These benefits were awarded based on VA rules providing that service in the waters offshore Vietnam qualified the veteran for the presumption of exposure to Agent Orange set forth in 38 U.S.C. § 1116.

In February 2002, VA did an about face. It issued an unpublished VA MANUAL M21–1 provision stating that a "veteran must have actually served on land within the Republic of Vietnam . . . to qualify for the presumption of exposure to" Agent Orange. As a result, all pending and new disability claims filed by Navy blue water veterans for an Agent Orange-related disease were denied unless there was proof that that the veteran actually set foot on Vietnamese soil. In addition, the VA began to sever benefits that had been granted to Navy blue water veterans prior to the 2002 change in VA rules.

In November 2003, the CAVC convened a panel of three judges and set oral argument to hear the appeal of Mrs. Andrea Johnson, the surviving spouse of a Navy blue water veteran who was denied service-connected death benefits (DIC) by the Board of Veterans' Appeals on the ground that her deceased husband, who died of an Agent Orange-related cancer, had never set foot on the land mass of Vietnam. *See Johnson v. Principi*, U.S. Vet. App. No. 01–0135 (Order, Nov. 7, 2003). The legal briefs filed by Mrs. Johnson's attorneys challenged the legality of the 2002 Manual M21–1 provision mentioned above. Thus, it appeared that the CAVC would issue a precedential decision deciding the legality of VA's set-foot-on-land requirement.

Six days before the oral argument, however, the VA General Counsel's Office made the widow an offer she could not refuse: full DIC benefits retroactive to the date of her husband's death—the maximum benefits that she could possibly receive. Because Mrs. Johnson did not and could not file a class action, once she signed the VA's settlement agreement, the oral argument was canceled, the Court panel convened to hear the case was disbanded, and the appeal was dismissed. Buying off the widow allowed the VA to continue for the next 3 years to deny disability and DIC benefits to Navy blue water veterans and their survivors based on VA's new set-foot-on-land rule.

Some Navy blue water veterans and survivors who were denied benefits by a VA regional office based on the 2002 rule gave up and did not appeal the RO's decision. Some appealed the RO's decision to the Board of Veterans' Appeals, which affirmed the denial. Some of those who received a BVA denial gave up and did not appeal the BVA's denial to the CAVC. And some of those who were denied by the RO and the BVA did not give up and appealed to the CAVC.

One of those who doggedly pursued his disability claim all the way to the CAVC was former Navy Commander Jonathan L. Haas. He filed his appeal in March 2004. The CAVC ultimately convened a panel of the Court and scheduled oral argument for January 10, 2006 to decide Commander Haas'

challenge to VA's set-foot-on-land rule. This time, however, the VA did not offer to settle. On August 16, 2006, a panel of three judges unanimously ruled that VA's 2002 set-foot-on-land requirement was illegal. *See Haas v. Nicholson ,* 20 Vet.App. 257 (2006).

But this did not end the battle between the VA and Navy blue water veterans. In October 2006, the VA appealed the decision in *Haas* to the U.S. Court of Appeals for the Federal Circuit, where it is currently pending. Last fall, Secretary of Veterans Affairs R. James Nicholson also ordered a moratorium at the 57 VA regional offices and the Board of Veterans' Appeals that prevents the ROs and the BVA from deciding any claim filed by a Navy blue water veteran or survivor based on an Agent Orange-related disease unless there is proof that the veteran had actually set foot on Vietnamese soil. VA estimates that the moratorium covers 1,500 claims pending at the BVA and an untold number of similar claims pending at the 57 ROs. This moratorium will stay in effect at least until the Federal Circuit decides the VA's appeal. A decision by the Federal Circuit is not expected for another year.

Thus, if the VA ultimately loses its challenge to the unanimous CAVC decision at the Federal Circuit, the VA will nonetheless have succeeded in withholding disability benefits from thousands of Navy blue water veterans and survivors for the 6-year period from 2002 to 2008.

B. How This Battle Would Have Been Waged If A Veteran Could File a Class Action

Compare the true events described above with how the battle between the VA and Navy blue water veterans would have been coordinated if a Federal court (the Federal Circuit or the CAVC) had authority to certify a case as a class action on behalf of similarly situated VA claimants. Years ago, Mrs. Johnson could have asked the Court with class action authority to certify her lawsuit as a class action on behalf of the following class Members: (1) Navy blue water veterans who (a) have filed or henceforth file a VA disability claim based on an Agent Orange-related disease and (b) never set foot on the land mass of Vietnam and (2) all surviving family members who filed or henceforth file a DIC claim based on the death of such a Navy blue water veteran from an Agent Orange-related disease.

If the Court certified Mrs. Johnson's lawsuit case as a class action, the VA would not have been able to end the case by buying her off. Class actions cannot be dismissed merely because one class Member is granted benefits. The Court could then have ordered the VA to keep track of, *but not decide*, the pending claims of all class Members until the parties filed their briefs and the Court issued an opinion deciding the legality of VA's set-foot-on-land requirement. This action would have conserved the limited claims adjudication resources of the VA by allowing the agency to adjudicate other claims while the class action was pending. When actually occurred instead is that the regional offices and the Board expended scarce resources adjudicating and denying thousands of claims filed by Navy blue water veterans during the period from 2002 to the fall of 2006, when Secretary Nicholson's moratorium went into effect.

This action would also have conserved the resources of thousands of disabled class Members and their representatives. They would not have to complete and submit notices of disagreement, substantive appeals forms, and responses to VA correspondence in order to keep their claims alive.

Then, after the Court resolved the legality of VA's set-foot-on-land requirement, it could act to ensure that all of the pending claims filed by class Members were uniformly and promptly decided by the VA in accordance with the Court's decision. And all of this would have occurred well before 2008 because Mrs. Johnson's earlier case would have led to the key Court decision, not the later filed case of Commander Haas.

C. Why the Current Battle Will Inevitably Result In Dissimilar Treatment of Similarly Situated Disabled Veterans and Their Survivors

By definition, all of the Navy blue water veterans and their survivors who have been denied benefits due to the VA's set-foot-on-land rule are suffering from, or are survivors of a veteran who died from, one of the following diseases that the VA recognizes as related to Agent Orange exposure: soft-tissue sarcomas, Hodgkin's disease, lung cancer, bronchus cancer, larynx cancer, trachea cancer, prostate cancer, multiple myeloma, chronic

lymphocytic leukemia, and diabetes mellitus (Type 2). These are seriously disabling, often fatal diseases.

Assume that the Federal Circuit ultimately agrees with the unanimous panel of the CAVC and affirms its ruling that VA's set-foot-on-land requirement is unlawful. Further assume that Secretary Nicholson agrees to comply with the Court's ruling, lifts his moratorium, and orders the ROs and BVA to decide all of the claims subject to the moratorium and belatedly pay these disabled war veterans and their survivors—to the extent that they are still alive—the many-years-worth of retroactive disability or death benefits they were long ago denied due to VA's set-foot-on-land requirement.

Even if all this were done, the fact would remain that hundreds, if not thousands of similarly situated Navy blue water veterans and their survivors would never receive the benefits that those whose claims were subject to the moratorium would receive. That is because VA's denial of their claims for disability or death benefits for an Agent Orange-related disease became final before Secretary Nicholson's moratorium. To be specific, the following similarly situated VA claimants are not subject to Secretary Nicholson's moratorium and will never receive benefits based on their claims:

Navy blue water veterans who filed a disability claim and survivors of Navy blue water veterans who filed a DIC claim that was denied by a VA regional office based on its set-foot-on-land rule, and who either

- did not file a notice of disagreement with the RO decision during the 1-year appeal period;
- or filed a timely notice of disagreement, but failed to file a timely substantive appeal to the Board of Veterans Appeal; or
- filed a timely notice of disagreement and a timely substantive appeal, received a decision from the Board of Veterans' Appeals denying their claim based on VA's set-foot-on-land rule, and failed to file a timely appeal with the CAVC.

The number of these similarly situated claimants is likely to be high. Veterans with seriously disabling diseases often give up on their claim when the VA tells them that they are not entitled to the benefits they seek. Their disabilities deplete their energy and their resources. Fighting the VA bureaucracy can seem a very daunting task to a veteran suffering from cancer. Plus, they are not lawyers and are not familiar with the legal authorities relied upon the CAVC in *Haas*. When the VA tells them they are not entitled to benefits because they did not set foot on land in Vietnam, they often believe that the VA must know what it is doing. Thus, many of these disabled veterans simply give up and don't appeal their cases all the way to the CAVC.

If the Federal Circuit rules in the favor of the Navy blue water veterans, no law requires the VA to use their computer systems to identify similarly situated claimants who are not included in the Nicholson moratorium. No law requires the VA to notify these similarly situated claimants about the Court's decision. And even if these similarly situated claimants somehow found out about the Court decision and reapplied, the VA would refuse to pay them the retroactive benefits that it paid to the claimants subject to the Nicholson moratorium because the VA would conclude that its previous final denial of the claim—which occurred before the *Haas* decision—was not the product of "clear and unmistakable error."

Thus, the unavailability of a class action mechanism dooms the claims of all similarly situated Navy blue water veterans and their survivors who are not part of the Nicholson moratorium. Legislative action is needed to ensure that unjust situations like this are not repeated in the future.

Statement of Robert Vincent Chisholm, Past President, National Organization of Veterans' Advocates

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

Thank you for the opportunity to present the views of the National Organization of Veterans' Advocates ("NOVA") on the Challenges Facing the United States Court of Appeals for Veterans Claims (CAVC). NOVA is a not-for-profit §501(c)(6) educational organization created for attorneys and non-attorney practitioners who represent veterans, surviving spouses, and dependents before the Court of Appeals for Veterans Claims ("CAVC") and on remand before the Department of Veterans Af-

fairs ("DVA"). NOVA has written many *amicus* briefs on behalf of claimants before the CAVC and the United States Court of Appeals for the Federal Circuit ("Federal Circuit"). The CAVC recognized NOVA's work on behalf of veterans when it awarded the Hart T. Mankin Distinguished Service Award to NOVA in 2000. The positions stated in this testimony have been approved by NOVA's Board of Directors and represent the shared experiences of NOVA's members as well as my own 16-year experience representing claimants at all stages of the veteran's benefits system from the VA regional offices to the Board of Veterans Appeals to the CAVC as well as before the Federal Circuit.

BACKGROUND ON CAVC

When a veteran files an appeal with the CAVC, the case is docketed with the Court and the docketing date is the trigger date for all filings. NOVA believes there are two critical time spans in the judicial review process that should be discussed. Firstly, the time it takes from the date a case is docketed until it is fully briefed. Second, the time it takes from the date the case is fully briefed until the judge or judges decide the appeal. Without reliable data on these two time periods, Congress cannot accurately assess how the CAVC functions. Under current rules, it takes at least 8 months from the date of docketing until a case is ready to be sent to a judge's chambers.During that 254 day window, the parties prepare the record that the CAVC will review and then file their briefs. Many cases filed with the CAVC never reach a judge's chambers because: (1) they are dismissed for jurisdictional reasons, e.g., the veteran did not file the appeal within 120 days or lacks a final BVA decision; or (2) the parties agree to a disposition of the claim, typically, by remanding the case back to the Board due to an error committed by the VA.

NOVA is not aware of any data that captures the amount of time that it takes from the date a case is fully briefed until it is decided by the Court. While one could review each Court docket sheet to compile this information, that would be burdensome. A quick survey of decisions[1] issued by the Court so far in the month of May 2007 shows the following:

Year Case Began	Number of Cases
2003:	1.
2004:	9.
2005:	13.
2006:	5.

From 1995 through 2004, the number of appeals filed in the CAVC remained fairly steady in the 2100 to 2500 range. However, in 2005, the CAVC docket increased by one-third as the number of appeals filed that year rose to 3400 and in 2006 the number of appeals filed was 3700.[2] NOVA believes the increase in the number of appeals filed is due to two primary reasons. Firstly, the Board of Veterans Appeals has issued more decisions over the last 2 years denying claims, and these veterans are appealing their claims to Court.[3] Second, NOVA Members encounter many instances involving multiple appeals to the CAVC due to the CAVC's high remand rate and the Board's poor decisionmaking, veterans are stuck on the proverbial hamster wheel between the CAVC and the BVA. In some cases, veterans have been to Court three or four or five times on the same issue.

The Court is taking important steps to decrease the amount of time it takes from the date the veteran files an appeal with the Court until a decision is reached. Firstly, over the last year Chief Judge Greene has recalled the retired judges, each of whomserved for 90 days. Second, the CAVC is changing its rules of practice regarding the record process, which could reduce the processing time by 4 to 6 months. Next, at the recent Bar and Bench conference, the CAVC explored methods to resolve cases through such measures as alternative dispute resolution and new prebriefing conference procedures. Finally, the CAVC is committed to using the Federal Court E–Filing process that will also help cases move more quickly through the Court. NOVA supports these measures and believes that they represent realistic steps to help the Court move cases more expeditiously and control its increasing docket.

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[1] This data does not include writs of mandamus or EAJA petitions.

[2] This data is from the annual reports of the CAVC's and is available at http://www.vetapp.gov/documents/Annual—Reports.pdf.

[3] This data was obtained from the "Report of the chairman of the board of Veterans' Appeals for Fiscal Year 2006 available at http://www.va.gov/Vetapp/ChairRpt/BVA2006AR.pdf.

Notwithstanding these positive measures at the CAVC, NOVA believes that Congress should consider the following recommendations to help veterans obtain justice faster in Court.

1. Permit the CAVC to engage in de novo fact finding.

Since the advent of judicial review of decisions from the Board of Veterans' Appeals in 1988, the CAVC has remanded approximately 65%-75% of the cases.[4] A remand decision starts with a determination that the VA mishandled the veteran's case in some way. The Court rarely grants benefits, but instead sends the case back to VA with an explanation of what was done wrong and a direction that the VA "re-adjudicate" the claim. The result of so many remands is a loss of accountability at the VA as there are no negative consequences for the VA. The case is simply returned to the VA for another several years of adjudication. All the negative consequences accrue to the veteran, whose case is returned to years of limbo. It is difficult for the veteran to regard a remand as a victory, even though the VA has been determined to have erred.

Many of these cases are remanded from the CAVC to the Board because of inadequate findings and conclusions. Under the present statutory scheme as set forth in 38 U.S.C. § 7261(c), the CAVC is expressly forbidden from engaging in fact finding in the first instance. NOVA believes this section should be amended to permit the CAVC to engage in de novo fact finding of adverse factual determinations by the Board. Under such a scheme, the CAVC should also be required to apply the benefit of the doubt which is codified in 38 U.S.C. § 5107(b). The net result of such an amendment would be fewer cases remanded from the Court to the Board due to inadequate findings. These veterans are elderly and often times do not survive the remand process. Permitting the Court to engage in de novo fact finding will provide veterans with the resolution they deserve during their lifetime.

The Courts of Criminal Appeals for the military could serve as models for this type of fact finding. Under 10 U.S.C. § 866(c), those courts can "weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses." The authority in § 866 (c) is exercised with restraint. According to the statute, the authority is tempered by deference to trial forums when the trial forum has had the advantage of assessing the credibility of witnesses upon their demeanor and testimony at trial.

NOVA believes the CAVC needs this authority to do for the VA and BVA what they have not done competently to date, and, by assessing evidence on appeal, the CAVC will have a tool that it could use when appropriate the disrupt the "hamster wheel" of veterans benefits law and reach finality.

2. Congress Should Amend Title 38 To Permit Substitution of Parties.

Under the CAVC's case law, when the veteran dies while the case is in Court, substitution is not permitted and the case is dismissed. Congress needs to consider the plight of our World War II veterans who are dying at the rate of 1,056 a day, according to Jose Llamas, a spokesman for the Department of Veterans Affairs as quoted in the Washington Post on April 15, 2005. A veteran who is 85 years of age will have a life expectancy of about 6 years and will have a 42% chance of living to age 90. *See* National Vital Statistics Report, Vol 54, No 14, April 19, 2006, Tables A&V. Congress has the power to truly provide justice for these veterans who are elderly and who do not typically survive. In the past few years, 10 of my clients have died during the appeals process. A quick search on Westlaw revealed that in the last few years over 100 appeals have been dismissed by the CAVC because the veteran died while the case was pending before the Court. The practical effect of this is that a surviving spouse or dependent is not permitted to step into the shoes of the deceased veteran in Court; instead, they are required to initiate proceedings anew at the Regional Office. A veteran who has appealed his case to the Court most likely has been in the system for 5–7 years, and to force the surviving spouse or dependent child to commence this process all over is fundamentally unfair. NOVA recommends that Congress amend Title 38 to permit the substitution of the next of kin or estate when the veteran dies while the case is pending before the Court. If the prohibition on substitution is permitted to stand, the VA is rewarded for its delay and deserving veterans and their heirs suffer the consequences.

[4] See footnote 2.

3. Congress Should Require the CAVC To Report Annually the Following the Information:

- $ The number of appeals filed.
- $ The number of petitions filed.
- $ The number of applications filed under section 2412 of title 28.
- $ The number of cases resolved before a judge issues a decision.
- $ The number of cases in which a single judge, panel of judges or the full court issues a decision.
- $ The number of oral arguments
- $ The median time from filing to disposition.
- $ The median time it takes from the date a case is fully briefed until a decision is reached.

NOVA believes that the information listed above will assist Congress in analyzing the caseload and work load of the CAVC.

4. Congress Should Be Prepared To Expand The Number of Judges on the CAVC.

NOVA believes that if the number of notices of appeals filed with the CAVC continues to increase, Congress should be prepared to expand the number of judges on the Court by two. NOVA believes if the number of appeals filed with the CAVC increases to 5000 or more a year, then Congress should add two more judges. These new judges will be necessary to maintain current processing times in Court. NOVA believes that Congress needs to be proactive in this area because the number of appeals is likely to continue to increase. Furthermore, Congress should also consider adding two judges for every two thousand additional appeals filed.

5. The United States Court of Appeals for the Federal Circuit.

NOVA believes that Congress should not make any changes to the review that is provided by the United States Court of Appeals for the Federal Circuit. Under Title 38 section 7292, a veteran who loses a decision at the CAVC has the right to appeal the decision to the Federal Circuit. Review in the Federal Circuit is limited to questions of statutory interpretation and regulatory interpretation. In addition, when the VA issues a new regulation, a party can file a direct action in the Federal Circuit to challenge the validity of that regulation. This review has been essential for both veterans and the VA as the Federal Circuit has reversed the CAVC in a number of important decisions. In NOVA's view, the jurisdiction of the Federal Circuit in veterans' cases should not be contracted or eliminated, and it may be necessary in the future to enlarge it. In *Hodge v. West*, 155 F.3d 1536 (Fed. Cir. 1998), the Court reversed the CAVC's interpretation of a VA regulation of what constituted new and material evidence to reopen a final claim. Prior to the Federal Circuit's decision in *Hodge*, veterans were required to meet a higher threshold for new and material evidence and as a result many claims were lost by veterans. Recently, the Federal Circuit issued a landmark decision in the VA's favor in *Smith v. Nicholson*, 451 F.3d 1344 (Fed. Cir. 2006) when it found that the CAVC had misconstrued the VA's regulation regarding claims for disability benefits for tinnitus. Finally, the Federal Circuit issued a landmark decision on May 16, 2007 interpreting the Veterans Claims Assistance Act and emphasizing the Congressional intent that the VA system remain pro-claimant.

Statement of Brian Lawrence,
Assistant National Legislative Director, Disabled American Veterans

Mr. Chairman and Members of the Subcommittee:

On behalf of the 1.3 million Members of the Disabled American Veterans (DAV), I am pleased to present our views on challenges facing the U.S. Court of Appeals for Veterans' Claims (the Court). As our Nation prepares to celebrate Memorial Day and commemorate our military veterans, it is important to remember that the best way to honor their bravery and sacrifice is to provide a system of support that is reflective of a grateful nation that cherishes those who defend our safety and free-

dom. We commend the Subcommittee for its continued efforts to improve this system and the benefits and services it delivers to disabled veterans and their families.

The Court is a Federal court of appeals that was established by the Veterans' Judicial Review Act 1988. Congress created the Court to review decisions rendered by Department of Veterans Affairs (VA) Board of Veterans' Appeals (the Board or BVA). Veterans who receive unfavorable benefit claims determinations from their local VA offices may appeal to the Board. Unlike the Court, the Board is a part of the VA. Members of the Board review decisions made by local VA offices and issue decisions on appeals. Should a veteran disagree with the Board's decision, he or she may further appeal to the Court, which is responsible for conducting legal review to determine if the final Board decision contains prejudicial error or is legally correct. section 7252 (a) of title 38 United States Code authorizes the Court to affirm, modify, or reverse a Board decision, or to remand the matter as appropriate. When the Court remands a case, it sends it back to the BVA for further action.

The greatest challenge facing the Court is the backlog of appeals. This translates to potential financial hardship for many veterans awaiting benefits. Due to long delays in claims processing at the VA, it can take years for appeals to reach the Court. Because a significant number of disabled veterans are elderly and in poor health, many do not live to witness resolution to their claims. Those who do survive are understandably discouraged. Veterans deserve to have their pending issues resolved fairly and in a reasonable amount of time. In July of 2006, Senator Larry Craig, then Chairman of the Senate Veterans' Affairs Committee (SVAC), noted that the accumulation of veterans' appeals at the Court was unacceptable. Hearings were held to address the problem and recalling retired judges was an agreed upon solution to help clear the backlog. Senator Craig noted in a press release in January 2007 that the increase to the Court staff attained by recalling retired judges had a desirable effect and that productivity was at or near an all time high.

The DAV did and does support recalling retired judges as a remedy to the backlog problem. However, while this remedy has had an immediate positive effect, it does not address a primary cause for accumulation of cases at the Court. The Court over the years has shown a reluctance to reverse errors committed by the Board in its decisions. Rather than addressing an allegation, or allegations, of error raised by an appellant, the Court has shown a propensity to vacate and remand such cases to the BVA based on the confession of error by the Secretary, who has no right of appeal to the Court, based on the Board's failure to provide adequate reasons or bases. Further, once the Court remands a case based on one alleged error committed by the Board in its decision, the Court will generally decline to review other alleged errors raised by an appellant. Instead, the Court remands the remaining alleged errors to the Board on the basis that an appellant is free to present those errors to the Board even though an appellant is left with the possibility that the Board could repeat on remand the same mistakes that it had previously. Such a remand leaves unresolved the errors allegedly committed by the Board, reopens the appeal to unnecessary development and further delay and further overburdens a system straining to meet growing backlogs, and inevitably requires an appellant to invest many more months and perhaps years of his or her life in order to obtain a decision or decisions that the appellant should get from the Court on an initial appeal. As a result, many cases on appeal to the Court are there for the second, third, or fourth time.

In addition to postponing decisions and prolonging the appeal process, the Court's reluctance to reverse Board decisions provides an incentive for the VA to avoid admitting error and settling appeals before they reach the Court. By merely passing claims along rather than resolving them at the earliest stage in the process, the VA contributes to the backlog by allowing a greater number of cases to go before the Court. If the Court would reverse decisions more frequently, we believe the VA would be discouraged from standing firm on decisions that are likely to be overturned. An indicator of how often this happens is the amount of fees paid under the Equal Access to Justice Act (EAJA). EAJA fees are paid when the VA is in error. In 2006, 1,079 EAJA payments totaling approximately $5.4 million were made by VA.

The DAV encourages the Subcommittee to introduce legislation to amend section 7261 of title 38 United States Code to include the following provisions:

(a) In any action brought under this chapter, the Court of Appeals for Veterans" Claims, to the extent necessary to its decision and when presented, shall——

(1) on a de novo basis:

(A) decide all relevant questions of law:

(B) interpret constitutional, statutory, and regulatory provisions: and
(C) determine the meaning or applicability of the terms of an action of the Secretary

(b) The Court shall decide all assignments of error properly presented by an appellant

We believe that the above noted changes would help break the perpetual cycle of remand and appeal. The DAV also believes that to provide Congress with an accurate measure of the Court's performance, the Court should submit an annual report to Congress that includes three categories:

1. Number of BVA decisions that were affirmed
2. Number of dispositions based on (a) joint motion for remand, and (b) settlement
3. Number of dispositions reversed or remanded by a judge's decision

Actions that fall under category two are of an administrative nature and are generally accomplished by the Clerk of the Court. Categories one and three must be accomplished by the Court's judges, thus presenting the information in this suggested format would give Congress a clearer picture of the Court's accomplishments. The annual report should also include the number of memorandum decisions made by each judge.

The DAV supports the establishment of a dedicated Veterans' Courthouse and Justice Center. The leased space currently occupied by the Court is inadequate for the level of staff necessary to complete its caseload. During the most recent DAV National Convention, our Members voted to again adopt a long standing resolution calling for the Court to have its own facility. Our resolution envisions an architectural design and location that is reflective of the United States' respect and gratitude for veterans of military service. Rather than designating the office building where the Court currently leases space as the permanent facility, we encourage the Subcommittee to support the construction of a new Veterans' Courthouse and Justice Center that features the design and location worthy of its status.

Mr. Chairman and Members of the Subcommittee, the DAV appreciates the opportunity to present our views on this issue. We look forward to our continued work with the Subcommittee to serve our Nation's disabled veterans and their families.

Statement of the Hon. James P. Terry,
Chairman, Board of Veterans' Appeals, U.S. Department of Veterans Affairs

Good morning, Mr. Chairman. I am happy to discuss with you, with Ranking Member Lamborn, the Members of the Subcommittee, and your staff, the challenges facing the United States Court of Appeals for Veterans Claims (Court or Veterans Court). In doing so, we will provide our views as to what we believe are the reasons for the increase in the number of appeals to the Court, whether we can expect that trend to continue, and what measures are being taken to assist the Veterans Court in handling this increased workload.

With me today is R. Randall Campbell, Assistant General Counsel, Professional Staff Group VII of the Office of the General Counsel (Group VII), also known as the Veterans Court Appellate Litigation Group. That Group is charged with representing the Secretary of Veterans Affairs before the Court.

While appeals from the final decisions of the Board provide the primary source of the Veterans Court's workload, its workload includes a variety of other matters, including petitions for a writ of mandamus, and applications for fees and expenses under the Equal Access to Justice Act. Group VII is responsible for handling the administrative and legal matters involved in all litigation before the Veterans Court. This is a complex operation, akin to a large law firm employing a staff of nearly 100 consisting of attorneys and a large complement of administrative professionals who run the docket room, computerized case-tracking system, and copy center, among other things. In order to comply with the Veterans Court's Rules of Practice and Procedure, Group VII prepares, serves and files copies of the record on appeal in cases before the Veterans Court, producing an average of more than one million photocopies per month. Group VII has experienced firsthand the effects on its own resources of the increasing caseload before the Veterans Court.

It is clear that the Veterans Court's caseload has increased continually since it opened its doors for business in 1989. For example, 10 years ago, in Fiscal Year (FY) 1997 the Veterans Court received 2,229 new cases. By contrast, in FY 2005, the Veterans Court received 3,466 new cases, and it received 3,729 new cases in FY 2006. So far this fiscal year, the Veterans Court is averaging in excess of the numbers

of new cases received last year. I fully expect the caseload to increase for a number of reasons.

First, we at the Board are doing our utmost to increase the number of final decisions we produce. As you know, the mission of the Board of Veterans' Appeals (BVA or Board) is to conduct hearings and render high quality, timely and final decisions in appeals of claims for veterans benefits. The vast majority of appeals involve claims for disability compensation benefits, such as claims for service connection, an increased rating, or survivor's benefits, which were denied at the VA Regional Office level.

In order for the Board to reach a fair and just decision in an appeal, the record must contain all evidence necessary to decide the appeal and reflect that all necessary due process has been provided. If the record does not meet these requirements, and the benefits sought cannot be granted, a remand for further development is necessary. Since a remand is a preliminary order and not a final decision on the merits, it generally may not be appealed to the Veterans Court. About three quarters of all remands are eventually returned to the Board for further consideration.

It is those decisions in which the Board denies the appeal, in whole or in part, that the claimant may challenge by filing a Notice of Appeal with the Court.

Hence, the Veterans Court's potential workload is directly dependent on the number of final decisions on the merits issued by the Board in which a benefit sought remains denied or, if allowed, was not granted to the fullest extent that the claimant is seeking.

As I testified before the full Committee last year, two of the Board's most important initiatives are to: 1) contain and reduce the backlog of appeals by increasing decision productivity, while maintaining high quality; and 2) improve timeliness and service to veterans by eliminating avoidable remands in order to issue more final decisions.

I am happy to report that we have had much success in working toward both these goals. While this is good news for the veterans we serve, who benefit from improved service, it has had the ancillary effect of increasing the universe of cases that may be appealed to the Court.

To illustrate, in FY 2003, the Board issued 31,397 decisions, with a remand rate of 42.6 percent. In FY 2004, while the number of decisions issued increased to 38,371, the remand rate increased to 56.8 percent. In FY 2005, during which we began working concertedly together with the Veterans Benefits Administration to avoid remands to the extent possible, we issued 34,175 decisions of which 38.6 percent were remanded in whole or part. In FY 2006, we issued 39,076 decisions, with a remand rate of 32.8 percent. We expect to issue about 40,000 decisions by the end of this fiscal year, while maintaining as low a remand rate as possible.

The result is that, over the last few years, there has been a significant increase in the number of BVA decisions that may be appealed to the Court. For example, while the Board issued nearly 5,000 more decisions in FY 2006 than in FY 2005, the number of decisions in which all benefits sought were denied also increased from 9,300 in FY 2004 to 13,032 in FY 2005, and to 18,107 in FY 2006. While the number of cases in which a grant of benefits was awarded by the Board also increased during this time, from 6,560 in FY 2004 to 7,096 in FY 2005, and to 7,537 in FY 2006, some of these decisions involve a grant of less than all the benefits sought and therefore may be appealed to the Court on those issues.

This trend is likely to continue, especially since the Board's workload continues to grow. The Board received 39,956 cases in FY 2004, 41,816 cases in FY 2005, 41,802 in FY 2006, and expects to receive 43,000 cases in FY 2007.

Other factors that may affect the increase in appeals to the Veterans Court are not so readily quantifiable. There is a heightened awareness among veterans of their access to the judicial process. It appears that veterans and their families have become increasingly knowledgeable about their right to appeal to the Veterans Court and are increasingly willing to avail themselves of that right.

In addition, there have been changes in the jurisprudence that have influenced the caseload. The courts have determined that the Veterans Court possesses authority to consider petitions for extraordinary relief under the All Writs Act, which has led to a significant amount of work at the Veterans Court. Additionally, the Federal Circuit has played a significant role in increasing the number of appeals at the Veterans Court by applying the "equitable tolling doctrine" to untimely appeals. On perhaps a smaller scale, cases like *Bates v. Nicholson,* 398 F.3d 1355 (Fed. Cir. 2005) or *Meakin v. West,* 11 Vet.App. 183 (1998), have expanded the jurisdiction of the Board of Veterans' Appeals and, hence, created the potential for additional cases to be appealed to the Veterans Court.

Statutory changes, too, have played an important role. For example, the EAJA was amended in 1992, in order to authorize the Veterans Court to award fees and expenses to veterans' attorneys. Thereafter, the caseload at the Veterans Court jumped monumentally. Over 20 percent of the Veterans Court's docket in FY 2005 and FY 2006 was comprised of such fee applications, and that percentage seems to be similar this fiscal year. Another instance was the elimination of the date of filing of the "notice of disagreement" limitation of the Court's jurisdiction, which had been originally enacted in the Veterans' Judicial Review Act to help control the workload of the Veterans Court. The statutory amendment that adopted the "postmark rule" for calculating timeliness of appeals has also had an impact on the Veterans Court's docket.

It also should be noted that there have been occasional increases in the number of new cases over the years resulting from organized efforts to present particular legal issues to the courts. For example, over the last few years the docket of the Veterans Court and the docket of the Federal Circuit have been crowded with cases involving the question of dual ratings for so-called "bilateral" tinnitus. There were hundreds of such cases filed in the Veterans Court over the last 3 years until that issue was resolved by the Federal Circuit last year. Such temporary increases are difficult to predict and can be difficult to manage because they are unpredictable in both timing and effect and have immediate applicability to all appeals at all stages in the VA adjudication system.

Finally, all of us involved in the adjudication system agree that cases have grown more complex, with more numerous issues and much larger records to review and consider. Even a case with just a few simple issues takes more time to process, when, as is increasingly common, the record on appeal may constitute thousands and thousands of pages. When there are changes in law, such as a statutory enactment like the VCAA or issuance of a new precedent by a court, there might be dozens or even hundreds of cases that must be re-briefed, thereby delaying the ultimate decision in those cases. Because of the change in law, many of the cases will be remanded to VA by the Veterans Court and then be returned to the Court on appeal, increasing its workload. If a case is scheduled for oral argument, preparing for oral argument delays processing of other cases while the subject case receives priority treatment. The number of cases scheduled for oral argument has doubled over recent years, and that trend is predicted to continue. All of these factors can contribute to a backlog on the Veterans Court.

No doubt the Veterans Court is cognizant that its decisions, even in routine cases, are very important to those veterans who have been waiting for their "day in court." Moreover, precedents issued by the Veterans Court can have a profound and wide-ranging impact on the Department's adjudication system. These factors call for careful deliberation and consistency, which, in turn, affects the amount of time spent on each case.

With respect to potential remedies, it is notable that the Veterans Court is evaluating new means for alleviating or managing the press of business. For example, several years ago it adopted new procedures to reduce the amount of time expended by the parties' motions for continuances. It also reinforced its rules governing submission of pleadings, in order to deal with a rise in the filing of facially unsubstantiated writ petitions. We understand that the Veterans Court is currently considering a fundamental change to the procedures for preparing the record on appeal, with only those documents cited by the parties in their briefs to be required in cases where the veteran is represented. This will speed the submission of cases to the judges for decision. We also understand that the Veterans Court is also studying the feasibility of electronic filing.

The Veterans Court could better use certain tools already available to it. For example, the Veterans Court could adopt procedures that welcome, rather than deter, summary motions in appropriate cases. In a recent Judicial Conference, the Court carefully discussed this possibility. We are hopeful that the plan to revamp the preparation of the record on appeal, which is currently under study and active consideration by the Court, will facilitate the filing of summary motions. As noted above, the Court could be expansive in taking account of the rule of prejudicial error in reviewing the Board's determinations, avoiding remands where justice will permit.

The Veterans Court could also be more open to the idea of consolidating cases or granting motions to stay cases, when there is a commonality of issues. In the instance of the tinnitus rating cases last year, for example, the Veterans Court did not consolidate the majority of the cases on its docket, nor did it grant the Secretary's motions to stay proceedings pending resolution of certain lead cases. Because the cases were permitted to proceed individually, there was an unnecessary expenditure of resources in the individual tinnitus cases and an avoidable diversion

of time and resources from other cases on the docket of the Veterans Court until the Federal Circuit reversed their decision.

These changes would affect cases that have already been filed. As noted earlier, however, the sheer number of potentially appealable decisions from the Board of Veterans' Appeals is staggering. The problem of backlogs will be a theme that continues into the future, unless steps are taken to meaningfully reduce the actual number of appeals or to employ an expeditious means to dispose of them. We should note that the Chief Judge has sought to address this situation by securing the recall of retired judges to help address backlogged cases.

Finally, I note that the Veterans Court has had their most productive year ever in 2006. They not only decided a total of 2,842 cases, but adjudicated 1,152 EAJA applications and heard 22 oral arguments, while processing 382 appeals to the Federal Circuit.

This concludes my testimony. Mr. Campbell and I would be pleased to answer any questions you or your colleagues might have.

MATERIAL SUBMITTED FOR THE RECORD

Disability Claims Appeals Swamp Veterans Court

By Dennis Camire, Gannett News Service

USA Today

Updated 7/13/2006 5:29 PM ET

WASHINGTON—Veterans appealing disability claims and other issues may soon be waiting much longer for decisions.

The U.S. Court of Appeals for Veterans Claims' case backlog has more than doubled in the past 2 years to 5,800. If the trend continues, veterans could be waiting more than 3 years for a decision from the court, said Sen. Larry Craig, R–Idaho, chairman of the Senate Veterans Affairs Committee. Currently, it takes a year, on average, for a case to go through the court.

"With thousands of wounded servicemembers returning from Iraq and Afghanistan, we must ensure that our veterans will receive timely decisions on their claims," Craig said at a Committee hearing on the issue.

For Irving M. Levin, 83, a World War II veteran appealing a disability claim decision by the Veterans Affairs Department to the court for the third time, time is running out.

Levin, a former U.S. Army Air Forces flight engineer who lives in Stuart, Fla., was hit by a flying chunk of metal when his B–29 bomber crash-landed on Iwo Jima in April 1945. Levin, who originally filed his disability claim in 1988, said his injury led to a spinal problem requiring three back surgeries.

"I've had nothing but grief from this thing (VA disability claim process)," said Levin, who uses a walker and a wheelchair to get around. "It's got to the point that it is running my life."

Each time Levin's case has come to the appeals court, it has been sent back to the VA for more development, medical opinions and clarifications. Each step has required months or years.

Irving said it seems like the VA is waiting for him to give up or die. But, he said, "I'm not a quitter."

Joe Violante, legislative director of Disabled American Veterans, said the long processing times for cases "suggest inadequate resources, the need for increased efficiency or both."

"Disabled veterans who are often elderly and quite sick must wait unacceptably long periods of time for resolution of their appeals," he said. "The protracted delay creates a hardship for many."

Still, Appeals Court Chief Judge William P. Greene says he expects a trend in increased caseloads to continue. In the past 2 years, it's increased from 200 to more than 300 a month, outpacing the 7-judge court's ability to render decisions.

In the first half of this year, the court stepped up its decision process, handing down 1,564 decisions but still receiving 1,932 new cases.

Greene said he couldn't fully explain why the increase is taking place but attributes some of it to the VA deciding more cases and more veterans becoming more aware of their ability to appeal VA decisions to the court.

James P. Terry, chairman of the Board of Veterans Appeals in the VA, said cases have grown more complex and increased in the number of issues to decide and the cases create much larger records to review.

"The problem of backlogs will be a theme that continues into the future unless steps are taken to reduce . . . appeals or to employ an expeditious way to dispose of them," he said.

Greene said the court is considering several different ways to increase its productivity without hurting due process or limiting judicial review.

"We are looking for innovative ways to best meet the demands of an increased docket," he said.

One way is to recall the court's six retired judges, who could serve up 180 days each year, to help reduce the backlog, Greene said.

Another strategy would be to have judges preside over settlement conferences, which could decide cases without going through a full court hearing, Greene said.

Other efforts are aimed at reducing the number of documents filed for each case, issuing summary judgments without written explanations in some cases and implementing an electronic case management system.

Some Veterans Die Waiting for Benefits

By JAMES W. CRAWLEY, National Correspondent

Media General News Service

October 18, 2006

WASHINGTON— Thousands of veterans, many who fought in World War II, Korea and Vietnam, have been waiting years for their disability claims to be decided by a little-known appeals court here.

The delays have been so long that some veterans have literally died waiting.

"The backlog has never been longer than now," said Randy Reese, national service director for Disabled American Veterans.

The appeals court is at the crest of a bureaucratic tsunami that has hundreds of thousands of veterans waiting months and, more often, years for disability benefits. With one in four veterans of the battles in Iraq and Afghanistan already filing for VA disability benefits, the wait is likely to get longer.

The U.S. Court of Appeals for Veterans Claims is the last resort for most veterans whose claims for disability payments have been denied.

Its seven judges, appointed by the president for 15-year terms, review cases from the VA's Board of Veterans' Appeals and determine whether the VA erred in denying claims or in determining the level of a veteran's disability.

During the last year, the appeals court received 3,729 new cases—a record, said Norman Herring, the court's clerk and executive officer. At the same time, it decided 2,842 cases.

More than 300 new cases are filed monthly, Herring said, and the court now has 6,080 pending cases.

Congress and veterans organizations are pressuring the appeals court to eliminate the backlog, which is blamed on changes in veterans' benefits law, the loss of experienced judges and a marked increase in claims.

Sen. Larry Craig, R–Idaho, chairman of the Senate Veterans Affairs Committee, predicted the backlog could reach 10,000 cases in 5 years.

"The bottom line is that, if something is not done soon to reverse these trends, veterans seeking justice from the court may have to wait in a line several years long to get their cases in front of a judge," Craig said.

William Bolin is one of those veterans waiting in line.

Bolin of Winston-Salem, N.C., is 75 and a former Air Force pilot. He wants to increase his service-connected disability rating to 50 percent. If he wins, he will likely get free VA medical care and enough money to pay bills and maintain his house.

"I can't get a paying job because I can't keep up with healthy people," Bolin said, referring to a bum leg, injured in a recreational plane crash while in the Air Force. He also suffers seizures, which he blames on head injuries suffered in the crash.

He says he has had trouble holding a regular job since he left the Air Force and therefore doesn't qualify for Social Security benefits.

"We should take care of our veterans, but I don't think they're taking care of me," Bolin said.

He filed his original claim 7 years ago and it finally reached the appeals court in March 2005.

Bolin, who has been hospitalized twice this year, fears he may die before his case is settled.

It is a fear that is too often realized by veterans.

His attorney, Dan Krasnegor who works for a Richmond, Va., law firm that specializes in veterans' appeals, has had about 40 clients die before their cases were decided by the court.

"When a veteran dies, the general rule is their claim dies with them," said Krasnegor.

The backlog of veteran benefit claims is as chronic as an old shrapnel wound.

The Government Accountability Office has written numerous reports illustrating delays and inefficiencies in the claims process.

The veterans appeals court "is at the top of the chain," said Steve Smithson, the American Legion's deputy director of claim services. "You have to look at the bottom of the chain to find the reason for all the appeals."

Veterans' claims for disability payments, educational benefits, home loans or other compensation begin at any of 57 regional offices.

The number of initial disability claims rose from 578,773 in 2000 to 788,298 in 2005, a 36-percent increase.

The Department of Veterans Affairs takes an average of 129 days to make an initial decision. It hopes to reduce that to 115 days, said Michael Dusenbery, the Veterans Benefits Administration's southern area director.

The backlog begins at the regional office, argue many veterans groups.

"If they got the decision right in the first place, there would be fewer appeals to the board and less of a backlog," said Roy Spicer, DAV national appeals officer.

Last year, 47,136 claims were appealed to the Board of Veterans' Appeals. More than half of regional offices' decisions that are appealed to the board are reversed or sent back to local offices for further action.

A recent annual report estimated the average appeal time is 29 months. Add another 190 days on average, if the board sends the case back to the regional office for further work.

If a veteran is still not satisfied, he or she can bump up the case to the veterans' appeals court, which averages more than a year to decide a case, court statistics show.

The situation has shown signs of improvement in recent months.

Two retired judges have been recalled for 90-day terms to help reduce the backlog. As a result, said Herring, the court decided more cases than it received during September.

The delays and red tape irk veterans.

"There's a lot of frustration because a lot of folks want the system to give them something it's not designed to do," said Krasnegor. "If you're trying to get justice, it's not going to give you that."

United States Court of Appeals for Veterans Claims
Washington, DC.
June 5, 2007

Hon. John J. Hall
Chairman
Subcommittee on Disability Assistance
and Memorial Affairs
Committee on Veterans' Affairs
U.S. House of Representatives
335 Cannon House Office Building
Washington, DC 20515

Dear Mr. Chairman:

During the course of the May 22, 2007, hearing on "Challenges Facing the U.S. Court of Appeals for Veterans Claims," you asked for my opinion on appellate review of this Court's decisions by another Federal appellate court, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit). I offered to submit my comments in writing, for the record.

I thank you for your question and again appreciate your interest in the challenges facing the U.S. Court of Appeals for Veterans Claims (USCAVC). There has recently been Congressional inquiry as to whether review of USCAVC decisions by the Federal Circuit should be eliminated and that, like decisions of the United States Court of Appeals for the Armed Forces (USCAAF), appeals of our decisions should go directly to the Supreme Court of the United States (Supreme Court) by writ of certiorari. To proffer an opinion or answer to your question, I believe that it is instructive to examine the history of serial appellate review of the decisions of the USCAAF, which is another Article I court.

I. INTRODUCTION

My initial comment regarding the value of any layer of appellate review must begin with the wisdom of Supreme Court Justice Robert H. Jackson, who observed:

Whenever decisions of one court are reviewed by another, a percentage of them are reversed. That reflects a difference in outlook normally found between personnel comprising different courts. However, reversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final.

Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring.). Accepting that no amount of review can produce results that are infallible, the question becomes: "Does an additional layer of appellate review add benefits that outweigh the associated costs?" I will use this inquiry to frame my comments on this subject.

II. THE POTENTIAL BENEFITS OF ADDITIONAL APPELLATE REVIEW

Firstly, it is necessary to examine whether Federal Circuit review benefits veterans law in a way that USCAVC review does not. Here are my observations:

1) *Independence:* A primary reason for appellate review is to have agency decisions reviewed by a body that is independent of the original decisionmaker. Like the Federal Circuit, the USCAVC is wholly independent of the Department of Veterans Affairs. Structurally, therefore, review by the Federal Circuit is not needed to introduce an independent body.
2) *Uniformity:* A unified appellate tribunal brings clarity and uniformity to an area of law. Uniformity was one of the goals of the creation of the USCAVC, an option selected over the alternative of placing judicial review of VA benefits decisions in the Federal district courts. Within VA, Veterans Law Judges who staff the Board of Veterans' Appeals (Board) are not bound by one another's decisions, and different panels of the Board can reach inconsistent decisions on claims by similarly situated benefits claimants. However, panel opinions issued by the USCAVC are precedential and provide binding law on future cases before the Court and upon claims adjudication within VA.

   Before being issued, every decision of the USCAVC—either by a panel or a single-judge—is circulated to the full court for at least 1 week for comment and input. Comments on circulating decisions are relatively frequent and serve to clarify bases of decisions. In addition to the comment process, the judges of the USCAVC share an internal database of issues that are presently being considered by three-judge panels. This allows each judge to quickly identify pending cases where precedential arguments have already been scheduled, thus promoting efficient case management and consistent, uniform action on such issues. The USCAVC is not permitted to communicate with the Federal Circuit in this manner. Thus, the decisions of the two courts—particularly written during overlapping timeframes and addressing similar issues—may contain language that creates uncertainty when compared to each other.
3) *Experience:* When the USCAVC began operations in 1989, it faced many issues concerning its role as a new Federal court. The Federal Circuit was established in 1982, and that court's early case law addressing its own creation and role was highly relevant in the formative years of the USCAVC. Both courts had to establish their roles in close proximity to each other. However, the USCAVC has now been operating for nearly 18 years; it has decided over 25,000 cases and has written 20 volumes of precedential case law (found in the West Reporter Series, Veterans Appeals Reports) to shape its future decisions.
4) *Expertise:* Once appointed, a judge on the USCAVC reviews only veterans benefits cases. In contrast, the Federal Circuit's jurisdiction is varied and includes review of diverse types of appeals other than veterans law, including patent and trademark claims, government contracts disputes, international trade appeals, and Federal employment actions. Also, because the Federal Circuit's jurisdiction to review USCAVC decisions is limited to reviewing questions of law, see 38 U.S.C. § 7292, that court is not called upon to apply its rulings to the evidence in specific cases. The bottom line is that the USCAVC is a court of special jurisdiction that Congress created to have expertise in veterans law, while the Federal Circuit by its structure and nature is not.

   The issue of focused expertise also applies to the practitioners before the two courts. The appellants' bar is strong and is maturing in expertise before both courts. Before the USCAVC, VA represents itself with its own appellate attorneys who are specialized with years of departmental expertise in veterans law. Before the Federal Circuit, however, VA is represented by the Commercial Litigation Branch, Civil Division, U. S. Department of Justice, whose attorneys are generalists.
5) *Appearance:* Beyond objective structural criteria, an appellate body can have a special relationship with an area of law. As the USCAVC's jurisdiction is solely veterans law, the Court's relationship to that jurisprudence is clear.

   It is worth noting that, during the Federal Circuit's May 2006 Judicial Conference, the panelists discussing "The Most Important Issues Facing the Federal Circuit in the Next 10 Years" mentioned veterans law only once in an hour-long analysis. That reference was a remark by panelist former Solicitor General Seth Waxman that he had never handled a veterans law case before

becoming Solicitor General. No other panelist (District Judge Kent Jordan, Deputy Solicitor General Thomas Hunger, and Professors Christopher Yukins and Kimberly Moore) mentioned the veterans law component of the Federal Circuit's jurisdiction.

III. THE COSTS OF ADDITIONAL APPELLATE REVIEW

1) *Time:* Federal Circuit review lengthens the processing time for veterans' cases. A case appealed to the Federal Circuit may take one or 2 years for development and resolution. Moreover, if the Federal Circuit overrules or reverses a ruling of law by the USCAVC, it usually remands the matter back to the USCAVC for further proceedings, adding yet more months to the process. Often, another remand to the Board is required for a new adjudication. This process can occur more than once in the same case.

   One particular type of delay should also be noted. Often a lead case at the USCAVC will decide an issue common to numerous cases. While the lead case is on appeal to the Federal Circuit, the USCAVC will apply the law of that case to similar pending cases. If the Federal Circuit disagrees with the USCAVC ruling of law in such a case, the net result is mass remands, or the USCAVC stays all related matters pending decision on the lead case by the Federal Circuit. Appeals to the Federal Circuit have also resulted in stays at the VA and Board levels, imposed by the Secretary and Board Chairman. *See Brown v. Gardner*, 513 U.S. 115 (1994); *Smith v. Nicholson*, 19 Vet.App. 63 (2005), *cert. denied*, 127 S.Ct. 1147 (2007)..

2) *Effect on Settlement Negotiations:* Finally, I believe that because jurisdiction exists in another Federal appeals court, parties have less incentive to negotiate settlement in the USCAVC; a losing party can once again argue its case in the Federal Circuit.

IV. COMPARISON OF THE USCAVC TO USCAAF

It is useful to compare the USCAVC to the USCAAF. Firstly, both the USCAVC and the USCAAF are courts of special jurisdiction, created under Article I of the U.S. Constitution. Both have expertise in the area of law they review. Next, the USCAAF provides review of criminal cases within the military, sometimes involving loss of liberty or life by a convicted servicemember; the USCAVC reviews civil actions, appeals of denials of claims by veterans for benefits of monetary value.

The following is a comparison of action and review within the military justice system and the veterans justice system:

	ACTIONS/REVIEW	USCAAF	USCAVC
1)	**Initial Action**	Court Martial (10 U.S.C. § 836)	VA regional office adjudication (38 U.S.C. Chapter 51)
2)	**Below Court Level Review**	Review by military Court of Criminal Appeals established by Judge Advocate General of each Service branch (10 U.S.C. § 866); limited to review on record at Court Martial.	Review by Board of Veterans' Appeals on record of regional office proceeding and "all evidence and material of record" (38 U.S.C. § 7104).
3)	**Article I Specialized Court Review**	Appeal or petition to USCAAF (10 U.S.C. § 837); review on record—no new evidence.	Appeal or petition to USCAVC (38 U.S.C. § 7252); review on record—no new evidence.
4)	**Article III Court of Appeals Review**	None	Appeal to Federal Circuit (38 U.S.C. § 7292); limited to review of matters of law—no review of factual determination or challenge to law or regulation applied to facts of particular case.
5)	**U.S. Supreme Court Review**	Upon petition for writ of certiorari from USCAAF (28 U.S.C. § 1259).	Upon petition for writ of certiorari, from decision of Federal Circuit (38 U.S.C. § 7291).

When USCAAF was founded in 1951, its decisions were not originally appealable directly to the Supreme Court by writ of certiorari. Rather, an appellant was required to seek a writ of habeas corpus at the district court level raising a constitutional issue, which resulted in review as of right by a Federal court of appeals before there was potential for review by the Supreme Court. However, in 1983, Congress changed the USCAAF statute to provide for direct review of USCAAF decisions by the Supreme Court. Pub. L. No. 98–209 (1983); *see* 28 U.S.C. § 1259. Writing to Congress in support of the legislation, then-Secretary of Defense Caspar Weinberger wrote that the legislation would "improve the efficiency and effectiveness of the military justice system by eliminating redundant procedures." (Letter of Hon. Caspar Weinberger to Hon. Melvin Price, Sept. 15, 1983). The legislation was enacted in a manner limiting the number of cases subject to direct Supreme Court review. The Supreme Court was given "complete discretion to refuse to grant petitions for writs of certiorari" and "[c]ontrol over government petitions [would] be exercised by the Solicitor General." H. Rep. No. 98–549, at 17 (1983).

V. CONCLUSION

Whether the role of the Federal Circuit in this area of law is appropriate is a question for Congress to decide. Whether Federal Circuit review has a "good," bad," or "neutral," influence on the substance of veterans law is a policy question upon which I cannot comment. Rather, this response reflects my view of the factors that should be considered by Congress in evaluating the structural usefulness of Federal Circuit review of USCAVC decisions.

I appreciate your interest, and you have my very best wishes.

Sincerely,

William P. Greene, Jr.
Chief Judge

cc: Hon. Doug Lamborn
Ranking Member

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