S. HRG. 110–360

OVERSIGHT HEARING ON PERFORMANCE AND STRUCTURE OF THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

HEARING

BEFORE THE

COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

NOVEMBER 7, 2007

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NOVEMBER 7, 2007

SENATORS

WITNESSES

OVERSIGHT HEARING ON PERFORMANCE AND STRUCTURE OF THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

WEDNESDAY, NOVEMBER 7, 2007

U.S. SENATE,
COMMITTEE ON VETERANS' AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 9:34 a.m., in room SD–562, Dirksen Senate Office Building, Hon. Daniel K. Akaka, Chairman of the Committee, presiding.

Present: Senators Akaka, Brown, Burr, and Craig.

OPENING STATEMENT OF HON. DANIEL K. AKAKA, U.S. SENATOR FROM HAWAII

Senator AKAKA. Aloha. This hearing will come to order.

This hearing continues the Committee's efforts to ensure that veterans' claims are processed and adjudicated in a timely and accurate manner. Our focus today will be on the performance and structure of the Court of Appeals for Veterans Claims. I am pleased that we are once again joined by Chief Judge Bill Greene. A few months ago, I had the opportunity to meet with Judge Greene in his chambers. I want to say thank you for being a most hospitable host. I appreciated the time the Court and its staff took to meet with me, and I look forward to expanding my understanding of the Court's operation and its operations today.

For many veterans, the claims process can be an arduous ordeal. By the time a claim reaches the Court of Appeals for Veterans Claims, a veteran may have spent years navigating through the VA system awaiting final resolution of a claim. Veterans deserve to have their pending issues resolved fairly and in a reasonable amount of time. Ensuring the Court has adequate staffing and resources and uses them in an efficient manner will go a long way to meeting these goals.

Today I hope we will hear what is working well at the Court and what areas might be in need of additional oversight or legislative assistance.

Judge Greene, I hope to get a status update from you about the various means that you are utilizing for the Court to reduce its pending caseload. In addition, I hope that you will expound on the legislative changes that you have recommended which might benefit the Court and, therefore, this Nation's veterans.

I want to thank you again and all of our witnesses for joining us today, and I look forward to today's discussion.

Senator Burr?

STATEMENT OF HON. RICHARD BURR, RANKING MEMBER, U.S. SENATOR FROM NORTH CAROLINA

Senator BURR. Mr. Chairman, thank you for holding this hearing. Judge Greene, welcome, as I welcome all of our witnesses today.

Almost 20 years ago, Congress created this Court for a very important purpose: to provide "fundamental justice" to veterans and their families who are seeking veterans' benefits. In my view, to fulfill that purpose, everyone who comes before the Court must be provided with a prompt decision because, as we all know, justice delayed is justice denied.

Chief Judge Greene took a big step in that direction last year by bringing retired judges back to work, and, Judge Greene, I would like to thank you for that. In fact, with the help of those retired judges, the Court provided over 4,800 decisions to veterans and their families last year. That is almost 50 percent more decisions than any year in the Court's history. It is an impressive milestone.

While I congratulate the Court on that accomplishment, today we need to focus on how to meet the current and future challenges that the Court is facing. And there are many.

The Court is receiving record levels of incoming cases.

In fact, there were over 4,600 new cases in fiscal year 2007, which is almost 25 percent more than in any prior year.

The Court today has almost 6,300 pending cases, which is 36 percent more than 2 years ago and 4,000 more than 10 years ago.

At least 750 cases are already awaiting action by the Court, and 3,700 more may be ready for a decision within the next year.

The median number of days to decide cases is now 416, which is almost 20 percent higher than just last year.

And as some of our witnesses will testify today, the Court will often take 1 to 2 years to resolve even simple cases.

With these staggering statistics, it seems clear that something must be done soon to make sure no veteran will have to wait so long for a decision, now or in the future. I know that the Court and some of our witnesses today have made suggestions for how to do that. Some of those options include adding more judges, authorizing magistrates, and using alternative dispute resolution.

But, the way I see it, before we can find the right path forward we need to have a clear understanding of the Court's workload, who is actually doing the work, and where are the bottlenecks. For example, we need to know how many cases are ultimately decided by a judge, how many are handled by the clerk of the Court, and how many are resolved after the parties have reached an agreement. We need to know how long it takes for the parties to fulfill their responsibilities, such as filing briefs, and how long it takes the Court to make a decision once the parties have done their part.

It seems to me that we cannot take steps to eliminate delays until we know the answers to these questions. I hope today the Committee will get some answers so that we can start working on solving these problems now and for the future.

Also, Mr. Chairman, as we consider what actions this Committee should take, I think it is important for the Court to take steps to effectively use all of the existing resources they have. As long as the Court has such a massive caseload, I hope the Court will continue to rely on the experience and the expertise of its retired judges for whatever assistance they can provide. We pay these judges as though they are active so they can be called on in a time of need. And I think it is clear to all that the need is now and it is urgent.

Mr. Chairman, I look forward to the testimony today. I look forward to working with you and the other Members as we move forward to address solutions to this issue.

I thank the Chair.

Senator AKAKA. Thank you very much, Senator Burr.

Now we will have the opening statement of Senator Craig.

STATEMENT OF HON. LARRY E. CRAIG,
U.S. SENATOR FROM IDAHO

Senator CRAIG. Chairman Akaka, thank you very much for holding this hearing, and I appreciate what Senator Burr has said. I do not know, Judge Greene, of anything more important to a veteran than a timely adjudication of a claim.

Let me also recognize Judge Al Lance, who is here with us today. Judge Kasold is with us. Thank you all for being here.

Mr. Chairman, I have had the privilege over the last several years of going to the Court on at least two occasions, and I did so because of the very issues and the questions both you and Senator Burr have brought before us that are timely and important for all the right reasons.

Part of the purpose for this hearing, I think, is reflective of legislation that you have authored, Mr. Chairman, to expand judgeships from seven to nine. So for just a few moments, I want to relate to you my experience—you have picked up on some of it already—that I think is extremely important as we work our way through this. It is my role, I believe, to be as objective as I possibly can with one single purpose in mind, and that is to handle the caseload coming in, in a timely fashion for our veterans.

CBO estimates that it will cost $13 million over 10 years to create two new judgeships. There is also legislation pending in Congress to increase judges' salaries by 50 percent. That is not factored into these current estimates.

I have in the past opposed expanding the Court because there is no evidence that the current caseload they are experiencing will continue. We need to look at that factor in reality because if it will continue, if it does continue, then clearly we have a concern that we ought to be dealing with. In fact, just about 10 years ago, the Court requested that the size of judges be reduced, from seven to five, because of the caseload that they thought was pending or would be out there.

Last year, during a hearing on the Court of Appeals for Veterans Claims, I specifically insisted that the Court utilize the recall of judges, and here is why: They had not been.

Quite simply, they had not been. The ability to get retired judges back into the system for a limited period of time to help with the

backlog in the Court—since that time, of course, you reflected on the change that has occurred. The Court has decided and/or terminated more cases than ever before because they used recalled judges. And I applauded the Court for that. I went back to the Court after that was happening, even met with one of the recalled judges, and here is one of my pieces of logic: Retired judges continue to receive 100 percent of their salary for life. And I think if we are talking dollars and cents and timeliness and responsibility, we have to put all of this in context.

So, they are going to get paid whether they work or they do not work, but part of the agreement is that they do work. Over the last 10 years, the output of work has not kept pace with the dramatic increase in funding for new staff and clerks for the judges. We have looked at that over time. The argument was just more money would solve the problem. It was not solving the problem, until we began to look at all of the tools, and Judge Greene responsibly did that. And I applauded them for that at the time as those numbers began to level out a little bit and we began to see a greater timeliness to that.

In fiscal year 2006, the Court received $500,000 for its electronic case filing initiative, critically important. One of the reasons to visit the Court, Mr. Chairman, is just to go look at the paper stacked around. It is phenomenal. They have utilized every nook, every cranny, every closet of files. Some of these claims bring with them a small truckload of files, and we have not modernized it. It has not turned electronic. It is now doing that. The Court has spent only about $71,000 of the money, with the rest being returned to the Treasury. The Court expects to spend between $600,000 and $700,000 over the next few years on contract support and training, and that will be critical in helping manage this. So technology is now getting in place for the Court. The Court expects to be using the new system by June of 2008. So there are tremendous improvements currently going on that I think are very, very important.

I have looked at language over time to help the Court modernize. I have looked at language—and some of it is in legislation pending—that offers initiatives to judges to do a recall term of 5 aggregated years with the Court. If you participate in the recall, then you would not be eligible for involuntary recall, and all of those kinds of things. I think we need to create a more dynamic process as we look at all of the bits and pieces and work with the Court to accomplish that. I think a great deal has been done under the leadership of Judge Greene. I applaud the Court, the judges that are with us today, and I appreciate the hearing.

Thank you.

Senator AKAKA. Thank you very much, Senator Craig.

Senator Brown?

STATEMENT OF HON. SHERROD BROWN, U.S. SENATOR FROM OHIO

Senator BROWN. Thank you, Mr. Chairman, very much. I would like to thank the witnesses for their testimony today, especially Chief Judge Greene. Thank you for your service and commitment to our Nation's veterans.

Today we are facing, as others have said, a VA system nearly crushed by the exploding number of disability, pension, and benefit claims being filed. Nationally, the backlog of disability claims stands between 400,000 and 600,000. In my State of Ohio, with a veteran population of about 1 million veterans, there is a backlog of over 14,000 claims. Nearly 5,000 of those claims have been pending for over 180 days. Ohio veterans are waiting too long to receive the benefits they have earned. It is unacceptable that after finally navigating the VA claims process a veteran would again face a long wait in backlog of cases in the U.S. Court of Appeals for Veterans Claims.

We must continue to pay special attention to the Court's ability to handle demands that will only continue to grow. We have not felt the full pressure of claims that will be filed by returning soldiers from the ongoing wars in Iraq and Afghanistan. The growth of these claims will bring with them more complexity. A timely and accurate delivery of benefits is of great importance to our veterans. It affects not just the scope of pay and benefits they receive, but, of course, affects their quality of life. Congress cannot simply wait to correct problems that arise when we can and must anticipate these problems and address them now.

Thank you, Mr. Chairman.

Senator AKAKA. Thank you very much, Senator Brown.

I want to welcome our first witness, William P. Greene, Jr., Chief Judge of the United States Court of Appeals. I hope that we can continue to build on our positive foundation that we have started, and I want to add that my visiting the Court was partly due to the good advice of Senator Craig at that time, and his knowledge of Court operations, of course, was intriguing to me at that time.

I would also like to acknowledge the presence of two of the Court's judges in our audience today, and that is Judge Al Lance and Judge Bruce Kasold. In addition, the Clerk of the Court, Norman Herring, is also with us in the audience today. So we thank all of you for joining us at this hearing.

Judge Greene, will you please proceed with your testimony?

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

Judge GREENE. Thank you very much, Mr. Chairman, for that introduction. I also have with me this morning Mrs. Alice Kerns, who is the Counsel to the Board of Judges and the Executive Attorney to the Chief Judge.

To you, Ranking Member Burr, and the Members of the Senate Veterans' Affairs Committee, let me take this opportunity to personally thank you for the great support that you have given to the Court over the past year. You have supported the Court well by providing resources needed to deal with an unprecedented caseload, and your expressions of continuing support are very much appreciated. Indeed, over the past 16 months, the Committee, representing the legislative branch, and the Court, a judicial entity, have engaged in a very constructive and appropriate dialog on how best to allocate the necessary resources to meet the challenges of an ever increasing caseload.

It is within that spirit of mutual cooperation that I appear today wearing my hat as the Chief Administrative Officer of the Court to discuss with you generally the significant actions that have occurred at the Court over the past fiscal year and what actions are anticipated to be taken that should place us in good stead as we fulfill our judicial review responsibilities.

Over the past almost 20 years, there has been created a body of veterans law that serves to promote fundamental fairness and legal process in this often complex area. At the same time, this body of law has developed a number of veterans law attorneys and non-attorney practitioners who are now available to guide veterans not only through the judicial appellate process, but also at certain stages during the administrative adjudication of the claim. This legal representation and the apparent increased awareness by veterans and their families of their appellate rights and the value of judicial review form the foundation for increased appellate litigation, and an increase in VA adjudications of veterans claims, especially at the Board of Veterans' Appeals, surely will provide a substantial increase in appeals that find their way to the Court's doors—doors that are never closed because each veteran as a matter of right may appeal to the Court.

Indeed, the Court has never been more accessible as demonstrated by the over 4,600 cases received this past fiscal year. This number, representing nearly 400 appeals filed per month, exceeds the monthly average of 300 per month received during the previous 2 fiscal years and, indeed, far exceeds the average 200 per month that was the norm in years before fiscal year 2005. Consequently, the numbers are up, and as depicted in the graphs that I provided to you in my prepared statement, the cases derived from these appeals are in various stages of development in the judicial appellate process.

As the pie graph depicts, as of last week we had over 6,200 cases at the Court. Of these, 3,766 cases were awaiting various predecisional development. Appellate review requires preliminary steps to be taken and satisfied before a decision can be rendered. A record has to be established. The appellate briefs must be prepared and filed. And during this process there also are opportunities for the cases to be resolved without briefing.

For example, in fiscal year 2006, our Central Legal Staff conducted 934 conferences and settled 388, or 41 percent of those cases. The numbers for fiscal year 2007 are not yet in, but I expect similar, if not better, results. Also, I must add that in August and September of this year, our Central Legal Staff attorneys received formal mediation training that should enhance their abilities to encourage the parties to narrow and resolve the issues and perhaps come to an agreement before the appellate briefs are filed and the cases come to chambers. The bottom line on these cases is that they are not yet ready for judicial review, nor are they considered backlog.

Also among the 6,200 number are cases that we have decided but that technically remain in the Court's inventory because of appellate procedural rules. 1,181 cases are in this category and 426 more are on appeal to the Federal Circuit. Incidentally, last month's issue of The Third Branch reported that the U.S. Court of Appeals

for the Federal Circuit, which under the Veterans' Judicial Review Act reviews decisions appealed from our Court, is quite concerned about the large number of cases that may reach its level. That leaves 366 cases in judges' chambers awaiting decision and 385 undergoing review by the attorneys in the Central Legal Staff. These figures represent approximately 100 cases per active judge, a very challenging caseload.

Here is what we are doing to respond to the steady increase. We are ramping up our approach to mediation or alternative dispute resolution. I continue to recall at the right time our retired judges. And I am encouraging the acting sitting judges to use their gained experience to suggest and develop innovative ways to improve how we decide cases. We are becoming one of the busiest appellate courts in the Federal judicial system, and we must constantly look for the best ways to review these cases thoroughly, efficiently, and expeditiously. Here are some of the steps we have taken or are considering.

We are promulgating rules that will streamline our access to the record on appeal. Through the filing of a Joint Appendix or a condensed record, judges can focus on the documents that the parties contend are relevant to the specific issues on appeal.

We are still looking at the practicality of issuing summary dispositions in the appropriate cases.

We are emulating the many Federal and State appellate courts that have implemented electronic filing. E-filing should help us reduce some of the administrative delay that accompanies the voluminous filings that are associated with appellate litigation.

This month, we plan to begin the process of requiring electronic filing of Equal Access to Justice Act applications, and by June 2008, we will require all pleadings to be filed electronically. Thus, Senate bill 2090 should be enacted to authorize us to take the steps needed to protect the sensitive information that will soon be transmitted through cyber space.

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

We need your committed support for this endeavor. We support the section in Senate bill 1315 requiring GSA to conduct a study on the feasibility of converting our current space to a Courthouse and Justice Center. Indeed, such a study is being conducted now.

The challenge facing the Court is significant, but it is the challenge that was anticipated when the Court was created almost 20 years ago: to conduct independent judicial review of thousands of adverse decisions made by the Board of Veterans' Appeals. We will strive, to the best of our abilities, to meet that challenge effectively and efficiently. I am proud to state that in fiscal year 2007 the Court decided or terminated 4,877 cases, an all-time record high. But we are mindful of what is coming. In addition to the thousands

of cases in the briefing stages already at the Court, we expect to receive even more numbers than the record 4,644 this past year. If Congress approves the additional adjudicators, attorneys, and veterans law judges for VA and the Board of Veterans' Appeals, there will be a proportional increase in the number of Board decisions that potentially may be appealed to the Court. Indeed, it is reported that the Board expects to issue at least 41,000 cases in fiscal year 2008. I am sure there were even more in fiscal year 2007. Just that pool of cases alone would be overwhelming to the Court's caseload. The courthouse feasibility study predicted that by 2010 we would need not only more space, but also two additional active judges in addition to the use of retired recall judges to manage our caseload. The circumstances supporting that prediction are being realized. Consequently, I ask for your support to increase the numbers of active judges on the Court, as proposed in Senate bill 2091.

Again, I thank you for the opportunity to discuss these matters with you today. It is imperative for us to do that which is necessary to perform our independent roles in this very important process. Now I will respond to your questions.

[The prepared statement of Judge Greene follows:]

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

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to testify today. As the Chief Judge of the U.S. Court of Appeals for Veterans Claims, I exercise responsibilities as the Chief Administrative Officer of the Court. It is in that capacity that I welcome this chance to continue a very important dialog with the Committee on the challenges currently facing the Court. Mr. Chairman, as you have pointed out several times in our communications and conversations, it is critical that we work together to promote a discourse between legislative and judicial entities to ensure that the proper resources are provided to enable the Court to carry out its judicial responsibilities. It is within that spirit of mutual cooperation that I depart from the normal custom of testifying generally only about budget matters and join you today to report on the significant measures that the Court has taken to enhance its abilities to meet the challenges of an ever-increasing appellate caseload, and to offer views on pending legislation that will impact the Court's operation.

THE COURT'S CASELOAD

A few months ago 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 (Rules), observed that the U.S. Court of Appeals for Veterans Claims is one of the busiest Federal appellate courts nationwide. The following table reflects the trends from fiscal year 1995 through fiscal year 2006 for Board of Veterans' Appeals (BVA or Board) total denials and appeals and petitions to the Court: [1]

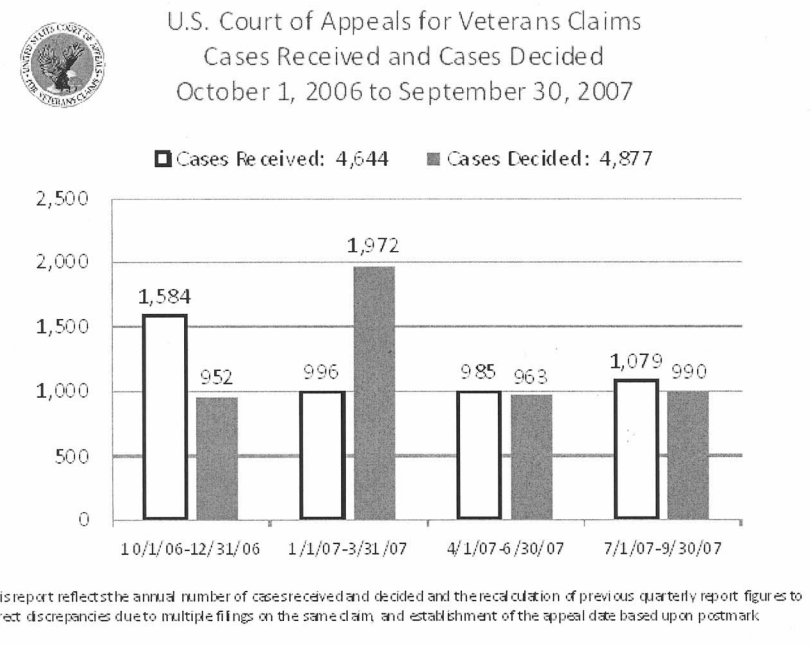
[1] This table and the graphs included throughout this testimony are reproduced in full size and included as attachments.

	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 USCAVC	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%

Professor Allen pointed out that in fiscal year 2006, the Court received more new cases (3,729) than received by the following Circuit Courts of Appeal: First (with 1,852 cases), Seventh (3,634), Eighth (3,312), Tenth (2,742), District of Columbia (1,281), and Federal (1,772). With seven active judges, our Court's per-judge average yearly intake of 533 cases is about twice as many as the 263 average cases per judge for the Article III Circuit Courts of Appeal. Indeed, our caseload presents a significant challenge. Thank you for your past and continued support in our efforts to meet that challenge.

Since March 2006, I have provided to the Committee quarterly reports on the numbers of cases received and decided by the Court. These reports present a snapshot of the Court's caseload. The annual report, a reconciliation by the Clerk of the Court of the actual filings and dispositions, offers a more comprehensive and precise picture of the Court's yearly statistics. We have provided this report to the public for the past 20 years. Accordingly, we support S. 1315, Title V, § 503, which recognizes the Court's current practice and should obviate the need for the quarterly reports.

The following chart shows the numbers of cases filed and cases decided for fiscal year 2007. The 4,644 cases received and 4,877 cases decided in fiscal year 2007 represent an all time record high for the Court.

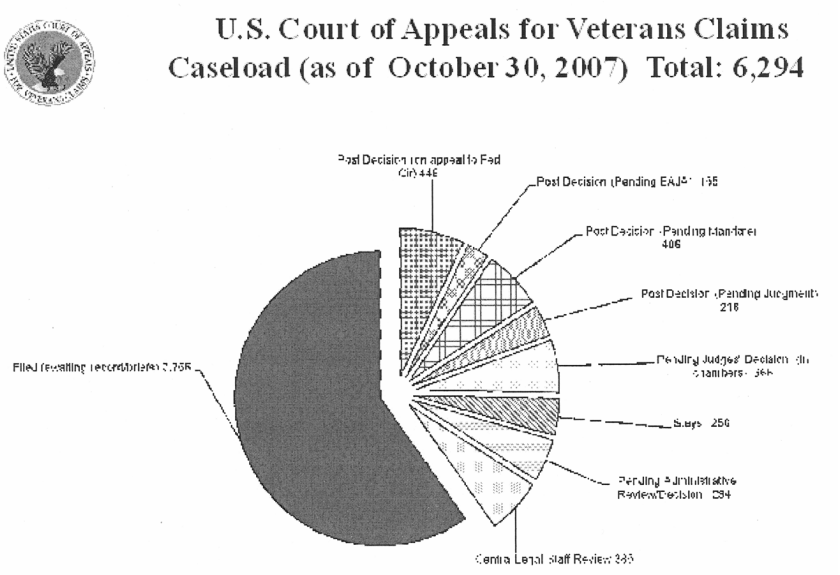


*This report reflects the annual number of cases received and decided and the recalculation of previous quarterly report figures to correct discrepancies due to multiple filings on the same claim, and establishment of the appeal date based upon postmark.

The growth in number of appeals filed may be attributed to several circumstances. Increased productivity of the Board of Veterans' Appeals, including a higher number of denials of benefits, produces more potential appeals to this Court. The number of distinct issues within a BVA decision is also on the rise. The emphasis and financial support the Senate and House Committees on Veterans' Affairs have placed toward increasing the numbers of personnel at the regional offices and Board, and toward improving claims processing times at the Department of Veterans Affairs (VA), inevitably have and will continue to lead to more decisions by the Board. Further, claimants are appealing not only total denials of benefits, but also Board decisions awarding benefits where the claimant believes that he or she should have been assigned a higher disability rating or earlier effective date for a benefit awarded. Public awareness of the Court, now in its twentieth year, coupled with the growing number of attorneys and non-attorney practitioners practicing veterans benefits law produces potentially more claimants becoming aware of and exercising their right to appeal. The recent enactment of legislation authorizing attorneys to charge a fee for representing claimants while a claim is being adjudicated at VA likely will further increase the number of cases with complex legal issues presented for appellate review.

MEETING THE CHALLENGE OF A HEAVY CASELOAD

The following pie graph depicts the Court's case inventory as of October 30, 2007.



Of the 6,294 cases in our inventory, 3,766 are being developed by the parties, i.e., the appeal has been filed and the parties have been ordered to file their appellate briefs. Conversely, 1,227 have already been decided but are temporarily kept in the Court's inventory for a variety of reasons (448 cases on appeal to the Federal Circuit, 155 cases pending action on Equal Access to Justice Act applications, 406 cases awaiting the time to run for mandate, and 218 cases awaiting the time to run for entry of judgment). The remaining 256 cases are stayed upon request of the parties or awaiting disposition of the appeal in a related case; 385 cases are ready for review by the Court's Central Legal Staff (CLS); 366 cases are pending a decision by the judges; and 294 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).

During my State of the Court Address at the Court's Ninth Judicial Conference in April 2006, as the Court's new Chief Judge, I identified several measures that I thought could assist us in handling a large caseload efficiently. Recalling retired judges was an obvious option, as was increasing the numbers of judicial law clerks per judge. During FY2007, five of the six retired recall-eligible judges were recalled for statutorily authorized 90-day periods and performed substantial service to the

Court. The Court has also benefited from the increase, to four, in the number of judicial law clerks each judge has to assist him or her in conducting judicial review and preparing decisions on cases, as well as an increased number of attorneys in our Central Legal Staff (CLS). We have gained judicial experience, with our four newest judges having each completed nearly 3 years on the bench. I am pleased to report that in fiscal year 2007 the Court responded to the surge of appeals and decided a record high number of cases. I express my appreciation to the Committee for your continued support in assisting us to respond to our growing demands, and for ensuring that we have adequate resources to render thorough and timely judicial review.

There are other measures that are being implemented and considered that should further assist us in managing our increased caseload:

First, I announced at our Judicial Conference the Court's desire and intent to develop an electronic case filing/case management system. Electronic filing systems have proven effective in administrative case management in many Federal and state court jurisdictions. With the support of Congress, we received the resources to acquire such a system. The Court has partnered with the Administrative Office of the U.S. Courts to obtain and use the software and e-filing system already developed for Article III Courts. Indeed, 10 of the 13 Circuit Courts of Appeals now have that capability. This system promises to produce many administrative efficiencies, including complete remote record access, 24-hour filing access that will significantly reduce mailing/courier costs, reduction of space for record retention, opportunities for multiple or simultaneous authorized user access to records, and efficient and cost-effective electronic notification procedures. A committee comprised of Court personnel, VA staff, and members of the veterans' bar continue to shepherd this project and we are on target to implement the first phase of e-filing. This month, an order will be announced requiring attorneys to file electronically all Equal Access to Justice Applications and pleadings in support thereof. Full adoption and implementation of e-filing for all appellate pleadings is scheduled for June 2008.

Second, I have in the past discussed the possibility of the Court shifting from the current requirement of a Record on Appeal to a more condensed Joint Appendix. Pursuant to the Court's current Rules, prior to the submission of any briefs, the Secretary must file with the Court the designation of the Record on Appeal, which is to include all material in the record of proceedings before the Secretary and the Board that was relied upon by the Board in making the decision on appeal. Following the appellant's opportunity to counter-designate materials, the Secretary then transmits to the Court the Record on Appeal. Ninety days are allotted to accomplish this. In practice, the Record on Appeal is often voluminous and includes documents immaterial to the claim. On the other hand, a Joint Appendix is a condensed record on appeal, submitted to the Court after briefing is completed, that is limited to those documents from the claims file or Record Before the Agency that are identified or relied upon by either the appellant or the Secretary as necessary for the Court to review in deciding the appeal. The Joint Appendix proposal is in the final stages of implementation; the Court's Rules Advisory Committee has recommended adoption of such procedure, and proposed Rule changes have been received and reviewed. We believe that use of a Joint Appendix will better focus appellate review on the documents relevant to the precise issues argued on appeal, and will decrease the amount of time needed to prepare an appeal for decision.

Third, through dispute-resolution efforts employed at pre-briefing conferences with the parties, the Court's Central Legal Staff has contributed to increasing the Court's case output. Again, I thank you for your support in authorizing an increase in the number of CLS attorneys for the Court. We are embracing dispute resolution as an important part of the Court's function and working to better assist the parties in narrowing and resolving issues prior to submitting their appellate pleadings. In August and September 2007, all attorneys assigned to CLS received formal mediation training that will better enable them to engage the parties in an effective negotiation process. Indeed, we want the parties coming to the table with full authority to commit to a thoughtful alternative resolution consistent with the law, due process, and the interests of justice. Toward this end, the Court's policy committee is currently drafting revisions to the Court's Rules which will clarify for the parties what is expected of them during pre-briefing mediation and conferencing.

Fourth, in appropriate cases where the appellant is represented, we are considering adopting a practice often used in other Federal courts of summarily disposing of some cases without extensive explanation. The pros and cons of this option were considered at the Court's Bar and Bench Conference held in April 2007, and will be the subject of more discussion by the Board of Judges. Summary disposition holds significant potential for moving simple, straightforward cases to a judicial decision quickly. A summary disposition states only the action of the court, without

giving its rationale. For example, an order may state: "On consideration of the record on appeal and the briefs of the parties, the decision of the Board is hereby Affirmed/Reversed/Remanded." The decision could be explained to the appellant by his or her counsel. However, since the Court's inception, one of its hallmark policies has been to provide to a veteran an explanation of the reasons for the Court's decision. The benefits of that approach are obvious and we have adhered to that policy in disposing of single-judge matters, as well as in panel decisions. Summary action would be a departure from that practice but is an action worth considering in light of the dramatic increase in the number of appeals.

Furthering these initiatives should sustain our efforts in meeting the challenges of the increasing caseload. As I have stated many times in our discussions, we are constantly looking for ways to best meet the demands of an increased docket—but not at the expense of limiting due process or short-circuiting full and careful judicial review.

COMMENTS ON PENDING LEGISLATION

S. 2090—Limiting Access to the Record on Appeal to Protect Veterans' Privacy

The Court is, by statute, a National "court of record." 38 U.S.C. § 7251. Generally, the law requires that "all decisions of the Court of Appeals for Veterans Claims and all briefs, motions, documents, and exhibits received by the Court . . . shall be public records open to the inspection of the public." 38 U.S.C. § 7268(a). Section 7268 also provides that "[t]he Court may make any provision which is necessary to prevent the disclosure of confidential information, including a provision that any such document or information be placed under seal to be opened only as directed by the Court." 38 U.S.C. § 7268(b)(1). The Court has developed a process to seal, on its own, individual cases involving certain conditions. *See* 38 U.S.C. § 7332(a)(1). Moreover, motions by appellants to seal case records for good cause shown are routinely granted. Even where case records remain unsealed, public access to these records presently is limited to onsite review in the reading room of the Court's Public Office. However, with the Court's implementation of the e-filing of records, the present logistical limitation on access to unsealed records will not exist.

I have already highlighted the benefits of e-filing. Along with its benefits, however, e-filing potentially makes sensitive material in court records widely accessible. These records generally include appellants' Social Security information and medical records. As other Federal courts implement e-filing, they too are attempting to achieve the balance between maintaining court records public while providing parties with protection from internet data mining and identity theft. The need to reach a balance is urgent. A Google search of the term "identity theft" produces more than 20,600,000 hits. Statistics made available by the U.S. Department of Justice, Secret Service, and Federal Trade Commission reveal that there are 700,000 instances of identity theft per year in the United States. Some veterans who filed copies of their DD–214 at local courthouses have already been targets of identity theft.

Under section 205(c)(3) of the E-Government Act of 2002 (Pub. L. No. 107–347, as amended by Pub. L. No. 108–281), the U.S. Supreme Court is granted authority to prescribe rules to address privacy and security concerns arising from electronic availability of records in the Article III Courts. Now pending before the Judicial Conference of the United States is proposed Rule 5.2 of the Federal Rules of Civil Procedure to promote privacy and security. Civil Procedure Rule 5.2 would require parties to redact from paper and e-filings such information as Social Security numbers or tax identification numbers, the names of minors, birth dates, or financial account numbers (proposed Rule 25(a)(5) of the Federal Rules of Appellate Procedure would apply the privacy protection provisions of Civil Procedure Rule 5.2 to the Article III Courts of Appeals). However, redaction of records filed at this Court may not be the best approach. Records before this Court, culled from VA claims files, are rife with sensitive identification information, as well as personal health records and financial data. Redaction would not only be time consuming and burdensome for VA, the Court's appellants, or Court staff, but also the sheer number of redactions required would open the door to the possibility of some sensitive information inadvertently remaining unredacted.

The drafters of proposed Civil Procedure Rule 5.2, the Judicial Conference's Committee on Rules of Practice and Procedure (Committee), have recognized the special difficulty of adequately redacting sensitive information from Social Security appeals and immigration cases. The Committee noted in its report (referred to the Committee on the Judiciary on April 30, 2007) that the Social Security Administration and Department of Justice had requested that special treatment be given to these cases "due to the prevalence of sensitive information and volume of filings." Accordingly, proposed Civil Procedure Rule 5.2(c) would limit remote electronic access to

the case file, including the administrative record in such a proceeding, to the parties and their attorneys. Remote electronic access to the record would be unavailable to any other person; however, the Court's docket, an opinion, order, judgment, or other disposition issued in the case would be publicly accessible. Access to the full case file would be available to a member of the public only at the courthouse.

Case files before this Court are analogous to those given special protection in proposed Civil Procedure Rule 5.2(c) in the prevalence of sensitive information and the relative volume of filings. At a minimum, they should be given the protection that will be accorded to Social Security actions and medical records under HIPPA. The Court is working to promulgate a Rule to effect this protection, but statutory recognition of this important issue would be welcomed. Therefore, I ask for the Committee's support in passing S. 2090 and amending 38 U.S.C. § 7268 to give the Court authority similar to that provided to the Article III courts pursuant to section 205(c)(3) of Pub. L. No. 107–347. Safeguarding appellants' personal information is highly important. The method to provide adequate protection will need to be carefully balanced with the benefits to be derived from electronic information transmission and storage, and with the Court's status as a "court of record."

S. 2091—Increase in the Number of Active Judges

Great interest has been expressed in assuring that the Court has the ability to conduct effective, efficient, and expeditious judicial review. Your support in providing resources to handle a heavy caseload is very much appreciated. However, it is time to consider whether more must be done. As previously noted, in fiscal year 2007 the Court received and decided the highest number of cases in its history. All of the Court's seven active judges now are experienced and their chambers are fully staffed; all five available recall-eligible judges provided substantial service to the Court during fiscal year 2007. These factors have led to increased productivity, but new cases continue to arrive at an growing rate, and despite our success in increasing output, there remain over 4,000 cases pending before the Court. Thus, the need exists to increase, by two, the authorized number of active judges, and the Court supports passage of S. 2091.

If H.R. 2642, the 2008 Military Construction and Veterans Affairs Appropriations Bill, is enacted as presently written, the Veterans Benefits Administration of VA will be authorized to hire 1,100 additional staff members to process claims. In addition, the BVA anticipates approval for significant increases in attorneys and veterans law judges and support staff for fiscal year 2008 and fiscal year 2009. If this increased staffing is funded, the BVA expects to generate anywhere between 41,000 and 43,000 decisions in fiscal year 2008, and even more in fiscal year 2009. The BVA's number of total denials increased from 13,033 (out of 34,175 decisions) in fiscal year 2005 to 18,107 (out of 39,076 decisions) in fiscal year 2006, with appeals to the Court ranging from 20.6 percent to 26.6 percent of the denials. As already mentioned, as the number of BVA decisions and total denials increases, we expect the Court's incoming caseload to increase proportionally. It is therefore likely that the Court's case inventory will continue to grow unless the number of active judges is increased.

There are a number of reasons why fiscal year 2008 is the critical time for increasing the authorization for active judges, and thus for supporting S. 2091. First, authorizing two more judges in fiscal year 2008 would permit Congress to modify the number of judges in response to major workload shifts. Congress could reexamine the need for nine judges when the terms of two Judges expire in 2016. If at that time Congress determines that nine judges are no longer needed, those vacancies could simply not be filled. Second, all judges, except for me, complete their terms in either 2016 or 2019. Creating two new positions in fiscal year 2008 would avoid a significant number of simultaneous vacancies followed by a period of time when a majority of the Court's judges would be new and unseasoned. This was, in fact, a cogent reason for the temporary authorization of nine judges between 2000–2004.[2] Third, any proposal to alter tenure or recall service in the future would not have an impact until more judges retire. Indeed, I am the only judge eligible for retirement before 2016. No doubt, two additional active judges, once established, would significantly reduce the length of time that cases are pending at the Court.

S. 1315—Title V—§ 502 Practice and Registration Fees

The Court supports the provision in S. 1315, Title V, § 502 that amends section 7285(a) of title 38 of the U.S. Code. Currently, that statute limits the Court's registration and practice fee to $30 per year. Section 502 of S. 1315 would eliminate the $30 limit, and would give the Court discretion to impose a "reasonable" fee. The

[2] *See* 38 U.S.C. § 7253(h).

Court currently charges a one-time $30 registration fee when a person is first admitted to practice as a member of its bar. The $30 limit presently imposed makes this Court's registration and practice fee the second lowest of Federal appellate courts, with only the U.S. Court of Appeals for the Seventh Circuit charging a lower fee ($15). Various other Federal appellate court practice fees are as follows: U.S. Courts of Appeals for the Fourth Circuit and Eleventh Circuit—$170; U.S. Court of Appeals for the Federal Circuit—$175; U.S. Courts of Appeals for the District of Columbia Circuit, Second Circuit, Third Circuit, Eighth Circuit, and Ninth Circuit—$190; U.S. Courts of Appeals for the Fifth Circuit, Sixth Circuit, and Tenth Circuit—$200. While the U.S. Tax Court and the U.S. Court of International Trade charge, respectively, $35 and $50 for admission to practice, the U.S. Court of Federal Claims charges $250.

The Court is authorized to use the practice and registration fees to defray costs connected with conducting attorney disciplinary proceedings, the Court's judicial conferences and other Court continuing legal educational programs, and sponsoring public Court commemorations and other ceremonial events. The Court has a large bar that participates actively in these educational opportunities. As with all things, the cost of supporting such events is increasing. Further, as more attorneys represent claimants at VA and continue their appeals to the Court, even if the percentage of disciplinary actions stays constant, we may face an increase in disciplinary proceedings. Through the reasonable assessment of these non-appropriated funds, the Court could continue timely investigations of disciplinary charges and provide quality educational events, both designed to improve the quality of practice before the Court. The initial admission-to-practice fees would be reasonably assessed to permit broad participation.

S. 1315—Title V—§ 504 Veterans Courthouse and Justice Center—GSA Feasibility Study

The Court is continuing its efforts with the General Services Administration (GSA) to work toward making a Veterans Courthouse and Justice Center a reality. Our present space is inadequate for the type of caseload we are now experiencing and anticipate will continue. The current lease of the commercial building expires in October 2010, so there is some urgency to this effort, because every feasible option for 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 the Court.

On July 14, 2007, Court representatives met with representatives of GSA and their consultants, HOK Advance Strategies and Staubach Realty, and established a structure and timetable for the study that GSA is undertaking to determine the feasibility and cost effectiveness of converting 625 Indiana Avenue, NW., to a Veterans Courthouse and Justice Center. The study will conform to the GSA reporting requirements of the provisions of section 504 of S. 1315, should those provisions be enacted. As part of the study, GSA's consultants will meet with the Federal tenants who occupy the 3rd, 4th, 5th, 7th, and 8th floors of the Court's current building to gather data needed to analyze the impact on these tenants, their space needs, and costs involved. GSA and its consultants expect the study to be completed in December 2007. We appreciate the Committee's ongoing support in creating a tangible symbol of the Nation's commitment to justice for veterans.

CONCLUSION

In conclusion, rest assured that no week at the Court goes by without a dialog among the judges and staff on how to decide our veterans' cases efficiently and thoroughly. On behalf of the judges and staff of the Court, I express my appreciation to the Committee for your consideration of the Court's operational needs, and for your support on the pending legislation that will further our common goal of ensuring swift and sure justice for those who have borne the battle and served our Nation honorably.

BOARD OF VETERANS' APPEALS

DENIALS, APPEALS, PETITIONS

TO THE

US COURT OF APPEALS FOR VETERANS CLAIMS

FY 1995 - FY 2006

	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 USCAVC	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%

Senator AKAKA. Thank you very much, Judge Greene.

You mentioned that you are going to need more judges by 2010. Between the increased output of active judges and the assistance provided by the recalled judges, the Court had a record-setting year in terms of numbers of cases decided.

Now, you did mention that by 2010 you feel that you would need two new active judges. Can you explain to me how you have come to that decision of having more full-time and active judges?

Judge GREENE. I will try my best, sir, in terms of the clairvoyance that I have, but I think in a nutshell, when the feasibility study was drafted and presented, they used the guidelines from the Administrative Office of the U.S. Courts as to how many judges would be needed for the numbers of cases coming into the system. At that time they were looking at what was coming into the Court in fiscal year 2005 and fiscal year 2006, when we were receiving around 300 cases per month. If that trend continued from fiscal year 2005 forward into fiscal year 2010, then that met the standards of increasing the size of the Court to nine, because with 3,600 cases, which was clearly 1,200 to 1,400 more cases than the Court ever has received in any particular year, that is what was going to be needed to handle the type of caseload that we have given the types of dynamics involved with the appellate process.

Stepping back from that, this past year we obviously received over 4,600 cases. Now, some of that is related to a specific case that VA had decided and the Court had decided that involved bilateral tinnitus with a lot of veterans filing claims in that regard. But it was an indicator as to what could happen at the Court. Based upon what is happening at the Board and the statistics that they put out each year in terms of the requirements for veterans law judges to produce so many decisions per year or per month, and given the types of cases that can be appealed to our Court, which are all not just total denials but adverse decisions including disagreements with awards of benefits, there is every reason to believe that the Court will continue to receive the numbers of cases that we received this past fiscal year.

With those kinds of numbers, and looking forward in terms of the time it takes to get individuals nominated, and the time it takes to get them confirmed, then we predict that by 2009–2010, we would be in a situation where we would have to have that kind of court to meet the numbers of cases that we have. With 3,700 cases still pending at the Court right now, after having done 4,800, add to that the 4,000 more coming in that we will not be able to get to until 2009, it just seems to be a very practical thing to start preparing for.

Senator AKAKA. What can you explain is the difference between the two quarters of output this year? That is, the Court decided 1,972 cases, whereas from April to June—1,972 cases, of course, from January to March, and from April to June the Court decided just 963 cases.

Judge GREENE. Just 963.

Senator AKAKA. This is why I ask that question about, you know, how you are deciding you need more judges.

Judge GREENE. Well, that 1,900 figure, sir, is a blip, admittedly. In fact, the month of February was a very big month for the Court,

because in 28 days I think we took credit for almost 1,000 cases. That stems directly from the *Smith* v. *Nicholson* case, where our Court had decided in favor of the veteran, the Government appealed that decision to the Federal Circuit, which through the system that we have, with the serial appellate review, they can do; and the Federal Circuit disagreed with us, so they reversed. And when they reversed, all those cases that we had been holding and waiting to decide were able to be decided quite expeditiously.

Senator AKAKA. Thank you.

Senator Burr?

Senator BURR. Thank you, Mr. Chairman.

Judge Greene, given the Court's extraordinary caseload, have you asked any retired judges to voluntarily serve more than 90 days?

Judge GREENE. I have.

Senator BURR. And how many?

Judge GREENE. All of them.

Senator BURR. All of them have served more than the 90 days, voluntary?

Judge GREENE. I have asked them, and all of them have not been able to.

Senator BURR. And how many have been willing to serve longer than 90 days?

Judge GREENE. None.

Senator BURR. None have served longer than 90 days?

Judge GREENE. Right.

Senator BURR. You have requested of all of them to work longer.

Judge GREENE. That is correct.

Senator BURR. Thank you for that.

The National Organization of Veterans' Advocates points out in their testimony this morning that many cases are resolved without the involvement of a judge. Can you tell us how many cases last year required a decision by a judge and how many were decided by the clerk of the Court?

Judge GREENE. The predicate of the question was that there were a number of decisions that did not require——

Senator BURR. Cases that were resolved without the involvement of a judge.

Judge GREENE. I can tell you that approximately 2,200 cases were decided by judges.

Senator BURR. And is that based on an agreement reached by the parties?

Judge GREENE. The 2,200 or the remainder? Because the 2,200 were decided by judges.

Senator BURR. Were decided by a judge.

Judge GREENE. The remainder come from dismissals because of failure to file briefs or failure to file the filing fee, administrative procedural dismissals of the case. There are other instances where, through the Central Legal Staff conducting their mediation process during the pre-briefing stage, they are able to get the parties to narrow the issues and come to agreement as to a resolution. That agreement or resolution turns into the parties' agreeing to jointly remand the matter back to the Board of Veterans' Appeals for further adjudication.

Senator BURR. Does the Court track the median time for the filing of briefs to the Court from the standpoint of the Court's disposition of the cases?

Judge GREENE. We do not, and I am thinking about taking a closer look at that given some of the statements and concerns that have been made. Our rules allow for 254 days to get the case started—designating the record, then after designating the record, the parties file the briefs—254 days. Inevitably, there are going to be requests for extension of time by either the appellant or the Government. In fact, 13,000 such requests were made last year, and all of them were granted. If we deny any of those requests, it basically throws that party out of court because they have not filed the necessary papers. We do not want to do that.

Consequently, the time that is expended in these extensions certainly is counted in this median time that we are reporting now.

Senator BURR. Does the Court track separately the median time it takes to decide a case by a judge versus the median time it takes when the clerk handles the case?

Judge GREENE. No.

Senator BURR. OK. DAV suggests that cases decided by a single judge are less complex than cases decided by a panel of judges. Does the Court track separately the median time to decide cases by a single judge and cases decided by a panel of judges?

Judge GREENE. Not formally. I as the Chief Judge take a look at the numbers of cases in chambers and see how they are moving through chambers, but I do not have a specific report on——

Senator BURR. Even informally, it is not looking at the median times and comparing them. Is that correct?

Judge GREENE. That is correct.

Senator BURR. OK. Does the Court track separately the time it takes to decide cases where veterans or a family member is not represented and cases where there is a representative?

Judge GREENE. We do track the time of—the number of pro se cases at the time of filing and then at the time of disposition. In other words, it gives us some litmus point as to what is the number of individuals filing their appeal that do not have representation. That drives our efforts to get these individuals representation through the Pro Bono Consortium or some other way in which they will be in contact with legal representation. Then we take a look at the disposition of——

Senator BURR. Well, let me say, you mentioned in your testimony—and this is the root of the question. You mentioned in your testimony that having more lawyers involved in the cases at VA may, and I quote, "increase the number of cases with complex legal issues presented for appellate review."

Judge GREENE. That is correct.

Senator BURR. So, specifically, if we track the median times on cases where there is no representation and cases where there are representations, does, in fact, the tracking of those median times suggest exactly what you said in your testimony, that if we have more people who are represented, the length of the cases is going to be extended?

Judge GREENE. Not necessarily, because deciding the case of a pro se veteran may take more time than a represented case.

Senator BURR. Well, maybe I am just having difficulty understanding from your testimony if having more lawyers involved in the cases at VA may increase the number of cases with complex legal issues—I sort of take that as you are telling us those are going to take more time.

Judge GREENE. No. It is going to give us more appeals. It is going to bring more appeals to the Court.

Senator BURR. OK. Does the Court separately track the requests for extraordinary relief where they were dismissed, granted, or denied?

Judge GREENE. Yes.

Senator BURR. OK. Mr. Chairman, I see my time has run out.

Senator AKAKA. Thank you, Senator Burr.

Senator Craig?

Senator CRAIG. Mr. Chairman, thank you.

Judge Greene, thank you. You have mentioned a variety of changes that you have made in claims processing procedures and strategies over the last year, and I think we have already seen positive movement in the speed and the volume process by this Court over the past fiscal year.

Do you expect this trend to continue with the upcoming implementation of improvements such as e-filing and the Joint Appendix proposal, despite the higher volume of claims coming in? How have you analyzed that to anticipate what this will produce?

Judge GREENE. The implementation of e-filing is designed to reduce some of the administrative burdens that the clerk's office faces in compiling the case to get it ready for appellate decision. The hard-copy documents that you saw at the Court will disappear. Hard copies will be kept by the parties in their own respective offices, but the idea is that we would have these electronic briefs and what have you.

The Joint Appendix is designed to reduce the time it takes to get the case to chambers. Right now there is a designated record time that consumes almost 3 months—or more than 3 months, just to get a record to the Court. Under the Joint Appendix concept, that would go away. The Secretary would be required to produce a record before the agency which would not necessarily be filed at the Court, but it very well could be. And then from that record, the parties would designate the particular documents that are related to the issues that they want to appeal.

We see that as an ability to perhaps reduce the time significantly through the preparation process from the beginning until the time the case gets to the Central Legal Staff. The Central Legal Staff then would review the case and get it ready for a decision in chambers.

Senator CRAIG. What additional changes in procedural rules and dispute resolution—I should say with those, what information is currently available regarding the proportion of decisions made by—well, I think that has already been handled. I will stop there. Senator Burr asked that question.

Let me ask this question: There are obvious visible problems with space. E-filing comes along; I am anticipating that a great deal of that space is currently consumed by files that might be stored somewhere else. At the same time, if the volume continues

and it is clearly justifiable that we need another couple of judges and those judges' staffs, can the Court in its current location house two more judges and their staffs?

Judge GREENE. No, sir.

Senator CRAIG. No. So if we have got 2010 out there as a possibility, looking at trend lines of need, and reports are projecting that—and I say this not only to you but to the Committee—we have got a space problem. I have grown to believe that, and I have talked to you, obviously, about how we get through that issue. But time is a factor here. Here we are in 2007, headed into 2008. Nothing is working its way through the process that would allow a new space, a new building, a new court facility. And we are looking at timelines needed for judges and staffs to be ramped up. Are we not on a collision course if all of these issues become reality? Or how timely can—how timely do you believe we could move, pending Congress' movement, as it relates to space and that which would be necessary to service two judges and their staffs?

Judge GREENE. I believe best case is, as expressed in the recent legislation, to require the Administrator of General Services to do this feasibility study of our current location. If it was feasible that the individuals—the other Federal tenants in that building were relocated——

Senator CRAIG. We have discussed that, yes. If they go.

Judge GREENE. Then we are in place to—with that additional space, we could accomplish what we need.

Senator CRAIG. The reality of taking the current location and dedicating that——

Judge GREENE. As the Veterans courthouse——

Senator CRAIG. As the Veterans courthouse. From a time standpoint, that would appear to be most expeditious in relation to a new facility and the movement of everybody from one to another and all that would have to be stood up. OK. Thank you.

Thank you, Mr. Chairman.

Senator AKAKA. Thank you very much, Senator Craig.

To follow up on the question of space, we know that the Court's present location ends in 2010, and it is less than 3 years away, and you will have to have a new location. And action is needed to secure an appropriate facility for the Court to occupy and also to consider some of these expansions that we are mentioning as well.

Let me ask from your side, what do you think are the next steps in Court space in this effort? And what has the Court already done and, also, what can Congress do to assist in that effort?

Judge GREENE. When we received the feasibility study, the GSA did recommend that we go with a private developer and build to suit. It did not consider the option that I was just explaining to Senator Craig about converting the present location to the Veterans Courthouse and Justice Center.

We have been working closely with GSA since 2005 on this, and, in fact, they have already begun doing the report that the Senate bill would require them to do. And, in fact, we are expecting a report from GSA next month about the feasibility of converting 625 Indiana Avenue to the courthouse. If that is a positive report, then obviously I think we can hopefully rely upon them and the other

sources to do that which is necessary to move to convert that location.

We need Congress to encourage GSA to move with priority on this project. It was delayed somewhat because of other priorities GSA assessed to its schedule. But they promised us now that we will get a report in December, and if that report does come, we should be in a position to take a close look at what the next steps need to be.

Senator AKAKA. Thank you.

Senator Burr?

Senator BURR. Thank you, Mr. Chairman.

Judge Greene, just one quick follow-up. Since you began recalling retired judges, how many cases have they handled?

Judge GREENE. 297.

Senator BURR. 297. Can you give us any expectations as to what—reasonable expectations as to how many cases those judges could handle in a year?

Judge GREENE. I think fully ramped up, I would—I can give you a better answer after this year. The first year was really the learning process. Some judges were able to catch on quicker than others. I mean, they had been out of it for a while. The cycle has started again as of September.

Senator BURR. Let me ask this, since I am sure at some point in this assessment of the future that you go through as Chief Judge, especially as you begin to build the case for additional judges, the need for them, and staff, if you will, share with the Committee at the appropriate time what you believe your expectations of the retired judges would be for next year and how you look at their capacity over the next 5 years since that seems to be a timeframe that we are focused on relative to a decision.

Judge GREENE. For 5 years. I am sorry, I——

Senator BURR. Well, I am hearing conversations about 2010 and——

Judge GREENE. Oh, OK.

Senator BURR. Yes. I am just trying to get some understanding as to what your expectations are of the retired judges over the next 5–year period and how that might impact the decisions we make and the timing of what we make.

Judge GREENE. All right.

Senator BURR. Thank you.

Judge GREENE. Thank you.

Senator AKAKA. Thank you so much. Thank you for your testimony, Judge Greene, Chief Judge. We appreciate it, and we appreciate your responses. We may have additional questions that we would submit, further questions from other Members as well, and we want to wish you well. You know that we want to try to help you, and the Court as well, in trying to help our veterans out there and to reduce the number of cases that you deal with as we go along here.

Judge GREENE. Thank you, Mr. Chairman.

Senator AKAKA. So we thank you, and we wish you and the Court well.

Judge GREENE. Thank you very much.

RESPONSES TO WRITTEN QUESTIONS SUBMITTED BY HON. RICHARD BURR, RANKING MEMBER, DIRECTED TO THE HON. WILLIAM P. GREENE, JR., CHIEF JUDGE, UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

Question 1: During fiscal year 2007, the U.S. Court of Appeals for Veterans Claims (hereinafter, "Court") decided 4,877 cases. At the hearing, you testified that approximately 2,200 of those cases were decided by judges and the rest were handled by the Clerk of the Court.

A. Of the cases decided by judges, how many were decided by a single judge and how many were decided by a panel of judges?

Response: In fiscal year (FY) 2007, 66 appeals were assigned to panels. Because of various circumstances, such as settlement or the appeal being returned to a single judge, ultimately 36 panel decisions were issued in fiscal year 2007. In most instances, panel dissolutions occurred only after considerable judicial resources had been invested in resolving the appeal.

B. How many of those approximately 2,200 cases were decided by recalled retired judges?

Response: Approximately 300.

C. How many law clerks did the Court have in total during fiscal year 2007 and, on average, how many draft decisions did each law clerk prepare?

Response: In fiscal year 2007 the Court employed 28 law clerks. The Court does not track the number of drafts prepared by law clerks. That number is controlled by each Judge, who decides on a case-by-case basis how many drafts are needed to produce a final decision.

D. What is a reasonable level of productivity to expect from law clerks, in terms of how many cases per week or per year they should draft?

Response: It is reasonable to expect an average of 70 initial drafts per year per clerk, considering the time spent for new clerks to gain experience, and the time necessary for preparing other orders and researching and preparing panel memoranda.

E. Have the total number of decisions drafted by law clerks increased proportionally as the total number of law clerks has been increased?

Response: Although the Court does not track the number of draft decisions by law clerks, I am certain that there has been a concomitant rise in the total number of drafts as the total number of law clerks at the Court has increased.

F. How many employees in the Clerk's office handled the approximately 2,200 cases that were decided by the Clerk of the Court in fiscal year 2007?

Response: The Clerk acted on most of those matters, although on occasion when the Clerk was absent, his two deputy clerks, both attorneys, reviewed matters and acted on the Clerk's behalf. Generally, before the Clerk acts on these cases, employees in the Court's Public Office process the appeal, obtain the designated record, and in represented cases, forward the file to attorneys in the Court's Central Legal Staff for pre-briefing conference.

Question 2: The Court's annual report reflects that in fiscal year 2007 there were 3,211 merits decisions.

A. What percent of the approximately 2,200 decisions that were made by judges were merits decisions?

Response: Approximately 95 percent. I note that in the Annual Report, for accounting purposes, the Court identifies dispositions in two categories: "merits decisions" and "procedural decisions." This distinction, however, should not be used as a measure of the complexity of an appeal. Each case is unique, and just as a "merits decision" may ultimately result in the grant of a joint motion for remand, a "procedural decision," not counted under the "merits" column, may involve a complex legal question and result in a panel or full court opinion of the Court.

B. How many merits decisions were the result of joint motions by the parties?

Response: Approximately 1,100.

Question 3: One factor considered by the Judicial Conference of the United States in assessing a court's need for additional judgeships is how much service is provided by senior judges.

A. During fiscal year 2008, how much service do you expect the recall-eligible judges to perform and how many cases do you anticipate they will be able to decide?

Response: In fiscal year 2008 I would expect that the recall-eligible judges would provide the same length of service as in fiscal year 2007. I would anticipate that with 1 year's experience with the process the recall-eligible judges would decide at least as many cases in fiscal year 2008 than they did in fiscal year 2007.

B. Do you anticipate any change in the number of recall-eligible retired judges during the next 5 years?

Response: Yes. I anticipate that there may be one additional recall judge available.

C. Do you anticipate any change in the contribution (either an increase or a decrease) of the recall-eligible retired judges over the next 5 years?

Response: I would anticipate that they would respond to the needs presented.

D. In the next 5 years, what size caseload could reasonably be handled by recalled retired judges?

Response: I do not anticipate great change in the caseload handled by the recalled judges.

E. If legislation is enacted to provide all judges, including the recall-eligible retired judges, with a nearly 50 percent pay raise, would that impact the expected number or contribution of recall-eligible judges?

Response: Under any of the numerous pay equity proposals it is not anticipated that the number of cases decided by the recall eligible judges would be impacted. Each case is decided on its own unique factual pattern and often complex legal question. It is impossible to estimate the number of cases which might be considered and decided during any given period.

Question 4: The Court's annual report reflects that the median time from filing to disposition of cases was 416 days in fiscal year 2007. It also reflects that this statistic was changed to use *median* time in fiscal year 2006.

A. Prior to fiscal year 2006, did the Court report the average time to disposition?

Response: Yes. However, because all other U.S. courts report median time for case disposition, the Court changed its reporting to conform to that practice.

B. If so, in order to provide a comparison to prior years, would you please provide the Committee with either the average time for fiscal years 2006 and 2007 or the median times for prior years, if possible?

Response: Average time for fiscal year 2006—439 days. Average time for fiscal year 2007—437 days.

Question 5: The Court's annual report also reflects the number of Equal Access to Justice Act applications that were granted, denied, or dismissed.

A. Does the Court track the number of Equal Access to Justice Act applications that are filed each year? If so, how many were filed during fiscal year 2007?

Response: No, the Court does not track the annual number of EAJA applications filed.

B. Does the Court track the median time to decide those applications? If so, what was the median time during fiscal year 2007?

Response: No.

C. In fiscal year 2007, what percent of the applications acted on by the Court were resolved by the parties reaching an agreement?

Response: Over 90 percent.

Question 6. The National Organization of Veterans Advocates noted in their testimony that the Court has a practice of deciding appeals without addressing all allegations of error and that this leads to some veterans returning to the Court "three, four, or five times."

A. Does the Court track how many veterans or their family members have appealed the same case to the Court more than once?

Response: No.

B. If so, how many of the cases filed during fiscal year 2007 were before the Court for at least the second time?

Response: N/A.

Question 7: In your testimony, you noted that there are 6,294 cases pending before the Court and that 366 of those cases are pending in judges' chambers and 385 are pending review by the Central Legal Staff.

A. Have any cases been pending review by a judge for more than 3 months, more than 6 months, or more than 1 year?

Response: Yes. I must add, however, that the judges preliminarily review all cases when they are received in chambers, and that many of the appeals pending a decision for over 3 months and all of those over 6 months are being stayed, either formally or informally, pending a decision by the U.S. Court of Appeals for the Federal Circuit, a panel decision of this Court, or for some other specific further legal review by this Court.

B. Have any cases been pending review by the Central Legal Staff for more than 3 months, more than 6 months, or more than 1 year?

Response: There are appeals at the Court that have been pending review by CLS for more than 3 months, but none that have been pending for more than 6 months.

C. Does the Court track the average or median amount of time that all cases have remained pending at the Court? If so, what is that statistic currently?

Response: The Court tracks and provides in its annual report the median time for case disposition.

D. What steps are taken to try to resolve long-pending cases?

Response: Absent reason to expedite a particular case, CLS and chambers generally operate on a "first in-first out" basis of review and decision. For cases that are stayed for legal reasons, every effort is made to adjudicate those appeals once the underlying predicate for the hold is resolved.

Question 8: For Federal appellate courts, the Judicial Conference of the United States weights pro se cases as one-third of a case. How would you weight pro se cases that come before this Court?

Response: Pro se cases at the Court are considered whole cases and receive full consideration. Indeed, consideration of a pro se case may be more detailed than one where the arguments are presented by counsel. Many cases filed pro se ultimately receive legal representation through the pro bono program. Additionally, the Court early on decided that all cases warrant a written decision and one line decisions are not used, as they are in the other Federal appellate courts. Accordingly, the Court does not assign less weight to cases filed pro se.

Question 9: At the hearing, you mentioned that the Court's Central Legal Staff conducted 934 conferences during fiscal year 2006 and that there were settlements in 388 of those cases. You also mentioned that the fiscal year 2007 statistics were not yet available.

A. How many employees conducted these conferences during fiscal year 2006 and during fiscal year 2007?

Response: In fiscal year 2006 eight (8) CLS attorneys conducted conferences, and in fiscal year 2007 ten (10) attorneys conducted conferences.

B. Would you please provide the Committee with the fiscal year 2007 statistics when they are available?

Response: In fiscal year 2007, pre-briefing conferences were scheduled in 872 appeals. Of those, 506 appeals (58 percent) settled.

C. What criteria are used in determining whether a conference is appropriate?

Response: In determining whether a conference is appropriate, the single most significant factor is whether the appellant is represented, because conferences are not conducted in cases appealed pro se. A represented cases is forwarded to a CLS attorney who conducts a general review of the case. Criteria for determining whether a conference would be useful in a particular case include the number of issues decided by the Board decision; the type of issues decided by the Board; and the likelihood, in the opinion of the CLS attorney, of a conference resulting in a narrowing or possible resolution of some of the issues presented on appeal. Prior to January 2008, CLS exercised greater discretion in determining whether to schedule a conference. However, this year the Board of Judges modified the protocol for conferencing, and now virtually all represented cases are being scheduled for conference.

Question 10: You mentioned at the hearing that you had requested that recall-eligible retired judges serve more than 90 days but that none had been able to do so.

A. In an emergent situation, would it be helpful to the Chief Judge of the Court to be able to require additional service by retired recall-eligible judges?

Response: I believe the current provisions of 38 U.S.C. § 7257(b)(1) and (2) are sufficient to meet the needs of the Court, absent the type of emergent situation that would justify authorization of additional full-time judges. I note that Article III senior judges—the equivalent of our recall judges—are required to take only a 25 percent work-load, or the equivalent of the 90-day recall period applicable to our recall-eligible judges. I believe that parity within the Federal judiciary should remain.

B. Are there other steps that either the Court or Congress could take to ensure that the Court will receive the help it needs from recall-eligible retired judges?

Response: No. By definition, retired recall-eligible judges are judges who have retired. They each receive pay of the office if they accept senior or recall-eligible status to encourage their continued participation so that their experience and knowledge can be maximized to the benefit of the Nation. Our recall judges are performing admirably.

Question 11: During fiscal year 2007, the Court denied 66 requests for extraordinary relief and granted 2. What was the median time to decide those requests?
Response: This information is not tracked or available.

Senator AKAKA. Let me introduce the second panel to our hearing today. I appreciate each of you being here and look forward to your testimony.

Mr. R. Randall Campbell, Assistant General Counsel of Professional Staff Group VII, is here representing the Department of Veterans Affairs. Mr. Campbell is a member of a group that practices before the Court on behalf of VA.

I also welcome Richard Cohen, President of the National Organization of Veterans' Advocates; Christine Cote, Litigation Attorney for the National Veterans Legal Services Program; and Joe Violante, National Legislative Director of Disabled American Veterans.

Each of your statements will appear in the record of today's hearing, and I ask that you each limit your direct testimony to no more than 5 minutes so that we can have time for questions.

Senator BURR. Mr. Chairman, could I exercise this opportunity to personally apologize to this panel? I have got to go over to the joint session.

The Chairman has graciously committed to represent the entire Committee, and I can assure you that I am going to follow very closely the questions that the Chair has. And I hope, Mr. Chairman, I would ask unanimous consent if it is not already, that I can send to you questions that I might get you to answer in writing for me. I do apologize, but I do appreciate your willingness to come in and share with the Committee your testimony.

Senator AKAKA. Without objection, that will be it, and I appreciate your work here with the Committee, Senator Burr.

Mr. Campbell, will you please begin with your statement?

STATEMENT OF R. RANDALL CAMPBELL, ASSISTANT GENERAL COUNSEL, PROFESSIONAL STAFF GROUP VII, U.S. DEPARTMENT OF VETERANS AFFAIRS

Mr. CAMPBELL. Mr. Chairman, Ranking Member Burr, and Members of the Committee, it is an honor today to present the views of the Secretary of Veterans Affairs regarding the performance and the operation of the Veterans Court.

As you mentioned, my office represents the Secretary in every case that comes before the Veterans Court, and we understand from firsthand experience the daunting challenges faced by the Court in managing the explosive growth in new cases. By our numbers, nearly 6,300 new cases were filed in the fiscal year just ended. That is because we count not only appeals that are filed from Board of Veterans' Appeals decisions, but also the writs of mandamus that are filed that we must respond to and also applications for attorney fees under the Equal Access to Justice Act.

That 6,300 number was on top of nearly 5,000 new cases that were filed with the Court in the preceding year. What is more, my office alone filed more than 29,000 pleadings this past year, which provides some idea of the incredible workload that confronts the Court.

You have asked for VA's views on two bills. S. 2091, if enacted, would expand the number of active judges sitting on the Veterans Court from seven to nine. We defer to the Court on how effective this increase will be and whether this will be more effective than exercising the current recall authority. What is clear, however, is that the Court's use of recalled judges over the past year and, thus, its expansion of the number of judges deciding cases has had a dramatic effect on the Court's caseload. Indeed, the Veterans Court decided more decisions in the past—or issued more decisions in this past year than at any time in its history.

S. 2090, if enacted, would require the Veterans Court to adopt rules to protect the privacy and security of electronically filed documents. This proposal is essentially an extension of the Veterans Court's existing authority and anticipates the upcoming conversion from paper filing to electronic filing. The proposal also requires the Veterans Court to adopt rules that are consistent with other Federal courts and to take into account the best practices in Federal and State courts.

The importance of safeguarding sensitive information from veterans' files cannot be overemphasized. Consequently, we support enactment of S. 2090. The proposal is logical and it is timely given the impending conversion from paper filing to electronic filing.

Mr. Chairman, that concludes my testimony, and I would welcome any questions that the Committee might have.

[The prepared statement of Mr. Campbell follows:]

PREPARED STATEMENT OF R. RANDALL CAMPBELL, ASSISTANT, GENERAL COUNSEL, U.S. DEPARTMENT OF VETERANS AFFAIRS

Mr. Chairman, Ranking Member Burr, and Members of the Committee:

Thank you for your invitation to testify today regarding the performance and structure of the U.S. Court of Appeals for Veterans Claims, and as to two pending bills: S. 2090 and S. 2091. Before beginning my testimony, I would like to provide a brief overview of my organization, which is Professional Staff Group VII of the Office of the General Counsel, and is otherwise known as the Veterans Court Appellate Litigation Group.

My office represents the Secretary of Veterans Affairs in all cases coming before the Veterans Court. Whether the case is an appeal from a final decision of the Board of Veterans' Appeals, a petition for a writ of mandamus, or an application for fees and expenses under the Equal Access to Justice Act, 28 U.S.C. § 2412, my office is responsible for handling the administrative and legal aspects warranted by the litigation.

That provides a segue to the main topic of today's hearing—the performance and structure of the Veterans Court. My office has watched the caseload steadily increase since the Veterans Court opened its doors for business in 1989. We can appreciate the daunting management challenges that flow from such a caseload. For example, my office alone filed more than 29,700 pleadings with the Veterans Court during FY07. It is impossible to predict with accuracy the number of new cases that will be brought to the Veterans Court in the coming years, but based on the increasing number of disability claims expected, we do not believe the caseload has hit a plateau.

A couple of examples of why the Court may see more cases include VA's initiative to decrease remands. This has led to an increase in the number of final decisions issued by the Board of Veterans' Appeals and, hence, an increase in the number of decisions that can be appealed to the Veterans Court. Also, there is a heightened awareness among veterans of their access to the judicial process. Veterans are now more knowledgeable about the Veterans Court and the availability of this legal remedy. Their heightened awareness, coupled with a growing and very active appellants' bar, has undoubtedly led to an increase in the number of new appeals.

Empirics, however, do not tell the entire story. From our perspective, cases tend to involve much larger records these days and issues that are more numerous and complex. 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 hundreds of cases that must be re-briefed, thereby delaying the ultimate decision in those cases. Also, if a case is scheduled for oral argument, that delays processing of others while the subject case receives priority treatment. All of these factors add to the case management challenge.

The Veterans Court clearly 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 adjudication system and benefit programs administered by the Secretary. These factors call for careful deliberation and consistency, which, in turn, affect the amount of time the Veterans Court must spend on each case.

You have asked for VA's views on two bills. S. 2091, if enacted, would expand the number of active judges sitting on the Veterans Court from seven to nine. We defer to the Court on how effective this increase will be and whether this will be more effective than the current recall authority available to them. We have glimpsed the efficacy of the Court's recall authority during the last year when the Court recalled judges to temporarily boost productivity.

S. 2090, if enacted, would require the Veterans Court to adopt rules to protect the privacy and security of electronically filed documents. This proposal is an extension of the Veterans Court's existing authority and anticipates the upcoming conversion from paper filing to electronic filing. The proposal also requires the Veterans Court to adopt rules that are consistent with the other Federal courts, and to take into account the best practices in Federal and State courts to protect private information.

Current U.S. Vet. App. Rule 11(c)(2) permits the Veterans Court, on its own initiative or on motion of a party, to "take appropriate action to prevent disclosure of confidential information." Rule 48 permits the Veterans Court to seal the Record on Appeal in appropriate cases. Rule 6 currently provides: "Because the Court records are public records, parties will refrain from putting the appellant's or petitioner's VA claims file number on motions, briefs, and responses (but not the Notice of Appeal (see Rule 3(c)(1))); use of the Court's docket number is sufficient identification. In addition, parties should redact the appellant's or petitioner's VA claims file number from documents submitted to the Court in connection with motions, briefs, and responses." The idea is to prevent the public from easily accessing a veteran's Social Security number, which the Department of Veterans Affairs often uses as a claims number.

The importance of safeguarding sensitive information in a veteran's files cannot be overemphasized. Consequently, the VA supports enactment of S. 2090. The proposal is logical given the impending conversion from paper filing to electronic filing.

Mr. Chairman, that concludes my testimony. Thank you for the opportunity to present these ideas to the Committee.

Senator AKAKA. Thank you very much.

Mr. Cohen?

STATEMENT OF RICHARD PAUL COHEN, PRESIDENT, NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC.

Mr. COHEN. Thank you, Mr. Chairman and Members of the Committee, for providing me this opportunity to address you on behalf of the National Organization of Veterans' Advocates concerning S. 2090. I agree with Mr. Campbell and also with the written testimony of the Chief Judge and note with approval his comments regarding proposed Civil Procedure Rule 5.2(c), regarding making only a portion of the records available electronically on the Internet. This is very important, as the Chief Judge notes, because these records include medical records which have sensitive information, like Social Security numbers, dates of birth, and sensitive information regarding medical conditions.

Regarding S. 2091, in general NOVA supports any measures that would decrease the time in the Court from filing an appeal to decision. And as explained by the Chief Judge and recognized by this

Committee, the Court has already taken certain steps which should go toward reducing the time problems in the Court, but there still is a serious problem with timeliness in the Veterans Court. It takes at least 8 months from the date of docketing until an appeal is sent to a judge.

We looked at the reported cases, and we saw that most cases take 2 years from the date of filing to the date of disposition. As recognized by this Committee, there is additional information which Congress should require from the Court in order to adequately monitor what goes on in the Court. Specifically things like the time from the date the case is fully briefed until a decision is reached; like the number of cases resolved by the parties before a judge issues a decision; and like the number of cases in which a single judge decides a case as opposed to a panel.

But the one thing that NOVA would like to bring to this Committee is the fact that there are three reasons why there is a backlog in the Court and why there are so many cases. First is inaccurate and bad VA decisionmaking. Second there are too many Court remands leading to repeat appeals. And, third, there are too many cases narrowly decided by the Court.

Regarding wrongly decided cases, only 20 to 35 percent of the cases that are decided by the Board of Veterans' Appeals are affirmed by the Court. The rest lead to remands and reversals. Looking at the number of cases that come up to the Court, we know at least 10 percent of all appeals to the Board will result in a Court appeal. Chief Judge Greene said on page 13 of his testimony that 21 to 27 percent end up there. If cases are not decided correctly below, they will result in appeals that the Court will have to decide.

Furthermore, when a case comes up to the Court and there are multiple issues raised, the Court tends to decide the case narrowly and usually sends the case back for more reasons and bases instead of saying "there is enough evidence in this case to decide it, let's decide the case." This has been known as "hamster wheel" justice. It is referred to in the *Coburn* case, *Coburn* v. *Nicholson*, 19 Vet. App. 427, a 2006 case.

Congress attempted to correct this when it added to 7261(a)(4) the term "reverse," but the Court has not yet taken into its jurisprudence the idea that it should reverse a large percentage of these cases when the evidence is clearly in favor of the claimant. In addition, what the Court tends to do is decide the cases very, very narrowly. If there are five issues presented to the Court and the Court can resolve one procedural issue that requires a remand, the Court will remand it on that procedural issue, leaving the other four issues to be resolved below. Frequently they are not, and it comes back to the Court.

Thank you for the time, and I will take any questions from the Committee.

[The prepared statement of Mr. Cohen follows:]

PREPARED STATEMENT OF RICHARD PAUL COHEN, PRESIDENT, NATIONAL ORGANIZATION OF VETERANS ADVOCATES

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to present the views of the National Organization of Veterans Advocates (NOVA) on S. 2090, S. 2091, and other legislation pending

before the Committee that touches on the operation of 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 CAVC and on remand before the Department of Veterans Affairs (VA). NOVA's dedication to training veterans' advocates and to advocacy on behalf of veterans has included submitting many amicus briefs on behalf of claimants before the CAVC and the United States Court of Appeals for the Federal Circuit (Federal Circuit) and led to recognition of NOVA's work on behalf of veterans, by the CAVC, 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 fourteen-year experience representing claimants at all stages of the veterans' 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 triggering date for all filings. NOVA believes there are two critical time spans in the judicial review process that should be discussed. First, 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 well 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 a timely appeal or lacks a final BVA decision; or (2) the parties agree to a disposition of the claim, typically, by remanding the case to the Board due to an error committed by the VA.

NOVA is not aware of any data that captures the amount of time 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 in the months of September and October 2007 shows the following:

Appeal Filed	Decided September 2007	Decided October 2007
2004:	9	2
2005:	82	34
2006:	36	34
2007:	10	11

This table shows that the CAVC takes over two years to render a decision on most appeals from the time the appeal is filed. From 1995 through 2004, the number of appeals filed in the CAVC remained fairly steady in the 2,100 to 2,500 range. However, in 2005, the CAVC docket increased by one-third as the number of appeals filed that year rose to 3,400, in 2006 the number of appeals filed was 3,700 and in 2007 the number of appeals filed was 4,643.[2] NOVA believes the increase in the number of appeals filed is due to two primary reasons. First, the Board of Veterans' Appeals has issued more decisions over the last two years denying claims, and these veterans are appealing their claims to Court.[3] Second, the CAVC has an established practice of deciding only one issue appealed by a veteran, regardless of any other issues simultaneously appealed and fully briefed for the Court's consideration. *See Best* v. *Principi*, 14 Vet. App. 18 (2001); *Mahl* v. *Principi*, 15 Vet. App. 37 (2001). Perhaps this practice was well-intentioned but the practical result is that many,

[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.*

many veterans are stuck on a proverbial hamster wheel because those issues left unaddressed by the CAVC get re-adjudicated by the VA, oftentimes erroneously, thereby sending the veteran back to the CAVC for another appeal and another single-issue decision. Sadly, it is not unusual for a veteran with a meritorious claim to have to appeal to the CAVC three, 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. First, over the last year, Chief Judge Greene has recalled all five available retired judges, each of whom served for ninety days. Unfortunately, this has not increased the number of precedential decisions issued by panels. Instead, almost all the decisions of the Court have been decided by single judges rather than by a panel and result in a non-precedential decision. Thus, in October 2007, there were 78 single judge non-precedential decisions but only 3 panel decisions. Similarly, in September 2007, there were 133 single judge non-precedential decisions and only 2 panel decisions. The serious and deleterious effect of so many single judge decisions results from the risk of lack of uniformity and the negative effect on the Court's jurisprudence caused by issuing a large number of decisions which carry no precedential weight.[4]

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 pre-briefing 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.

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

1. CONGRESS SHOULD EXPAND THE NUMBER OF JUDGES ON THE CAVC.

Specifically responding to S. 2091, NOVA has observed that the number of notices of appeals filed with the CAVC has continued to increase, with the number of appeals filed in the CAVC during FY 2007, setting an all time high of 4,643. Because NOVA expects this trend of new appeal filings to continue, we support S. 2091 which would authorize adding two more judges. The addition of these two new judges will help to maintain current processing times in Court. NOVA believes that Congress needs to be proactive in this area given the trend of increasing appeals filed because the number of appeals is likely to continue to increase at the CAVC. Indeed, Congress should also consider adding two judges for every two thousand additional appeals filed.

2. CONGRESS SHOULD PASS LEGISLATION TO CLARIFY THAT REVERSAL IS PROPER IN THE CAVC.

NOVA's experience suggests that a significant portion of the current backlog is related to the Court's historical treatment of cases and claims; i.e., it has typically remanded, not reversed, when it deemed that the Board of Veterans' Appeals erred. And, once it determines that remand is proper, it will generally decline to review other errors. *Best* v. *Principi*, 14 Vet. App. 18 (2001); *Mahl* v. *Principi*, 15 Vet. App. 37 (2001). As a result, many cases on appeal to the Court are there for the second, third, or fourth time, often with the same issues to be decided. Add those to the cases that are on appeal for the first time, and a backlog cannot help but be created. Even the most hard-working and productive Judges will not be able to keep up.

NOVA believes that there has been resistance to reversal of Board decisions by the Court. This has discouraged the VA from realistic efforts at settlement of some or all issues in a case. Veterans' representatives accept offers to remand cases on terms that do not resolve many issues because they perceive that the odds of obtaining greater relief from the Court are very low and because the delays are so long. It appears to NOVA that the Office of the General Counsel could understandably believe that, because the odds of reversal are low, they have nothing to lose by re-

[4] Haley, Sarah M. "Single Judge Adjudication in the Court of Appeals for Veterans Claims and the Devaluation of Stare Decisis." Administrative Law Review, Volume 56, No. 2, available on line at *www.wcl.american.edu/journal/alr.* Smith, Ronald L. "The Administration of Single Judge Decisional Authority by the United States Court of Appeals for Veterans Claims." The Kansas Journal of Law & Public Policy, Vol. XIII, Number III, Spring 2004, available on line at *www.ku.edu/~*kulaw/oldsite/jrnl/index.htm.

fusing to resolve issues in a meaningful way and instead force a decision from the Court.

Congress attempted to correct the relatively small percentage of reversals in 2002 when it added the phrase or reverse to 38 U.S.C. § 7261(a)(4). Veterans Benefits Act of 2002, § 401, Pub. L 107–330, 116 Stat. 2832 (2002). The Court has not yet established parameters through its case law that would support a greater percentage of reversals. Rather, the Court has long held that reversal is only possible when the only permissible view of the evidence is contrary to the Board's decision, see *Hersey* v. *Derwinski*, 2 Vet. App. 91, 95 (1992). Only when the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate, remand is generally the appropriate remedy. *Washington* v. *Nicholson*, 19 Vet. App. 362, 371–372 (2005). But if the evidence does not preponderate against the claim, or where the Board has made all the necessary factual findings, the Court could—and should—reverse. See Washington, at 375 (dissent by Kasold, J.); *Rose* v. *West*, 11 Vet. App. 169, 172 (1998). (This is not to say that medical evidence of nexus could not be rebutted, in an appropriate case, by medical evidence that demonstrates the significance of a lack of continuity of symptomatology. However, no such evidence exists and it is not the function of judicial review simply to accord the government a remand to obtain such evidence.)

3. CONGRESS SHOULD AMEND TITLE 38 TO PERMIT SUBSTITUTION OF PARTIES.

Similarly, although not contained in any current legislation under consideration, another suggestion would be to allow the substitution of parties in claims that are pending and the veteran passes away before a decision is made. This would provide a large measure of relief to our aging veteran population. Under the CAVC's current 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. A veteran who is 85 years of age will have a life expectancy of about 6 years and will have a 42 percent 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, more than a few of my clients have died during the appeals process. Other attorneys report as many as 10 deaths during the appeal 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 anew 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. CONGRESS SHOULD REQUIRE THE CAVC TO ADD TO THE INFORMATION REPORTED ANNUALLY

Detailed review of the content of the CAVC's Annual Report compels NOVA to suggest that the following additional information should be included to provide valuable insight into the operation of the CAVC. This additional information will assist Congress in analyzing the CAVC's case load and work load:

- The number of appeals filed annually.
- The number of petitions filed annually.
- The number of applications filed under section 2412 of title 28 annually.
- The number of cases resolved by the parties 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 requested and held.
- 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.

Obviously, NOVA is concerned with protecting the privacy and security concerns of veterans whose appeals are filed in Court and this concern is heightened by the

move to provide for electronic filing and retrieval of records. For that reason we support S. 2090.

Since 1992, Mr. Cohen has been representing veterans before the United States Court of Appeals for Veterans Claims (CAVC) and the Department of Veterans Affairs (DVA). In that time, he has successfully represented veterans in Court and before the Department of Veterans Affairs. In addition, Mr. Cohen has represented veterans before the United States Court of Appeals for the Federal Circuit. In November 2006, Mr. Cohen was elected to serve as the President of the National Organization of Veterans Advocates, Inc. ("NOVA") and he continues to serve in that capacity. Mr. Cohen has presented at the CAVC Judicial Conferences and is a member of the CAVC Bar Association.

EDUCATION: B.M.E., JUNE 1968, THE CITY UNIVERSITY OF NEW YORK, SCHOOL OF ENGINEERING; J.D. JUNE 1973, FORDHAM UNIVERSITY SCHOOL OF LAW

COURT ADMISSIONS

NY 1974
WV 1979
Supreme Court of United States of America 1977
United States Court of Appeals for the Federal Circuit 1994
United States Court of Appeals for Veterans Claims 1993
United States Court of Appeals for the 2nd Circuit 1974
United States Court of Appeals for the 4nd Circuit 1985
United States District Court for the Southern District of New York 1974
United States District Court for the Southern District of West Virginia 1979
United States District Court for the Northern District of West Virginia 1979

ASSOCIATIONS AND ORGANIZATIONS

American Bar Association
CAVC Bar Association
West Virginia State Bar

National Organization of Social Security Claimants Representatives
National Organization of Veterans Advocates-Board Member since 2005, President since November 2006

Neither Mr. Cohen nor NOVA have received any federal grant money or contract work in the last two years related to this testimony.

Senator AKAKA. Thank you, Mr. Cohen.
Ms. Cote?

STATEMENT OF CHRISTINE COTE, LITIGATION ATTORNEY, NATIONAL VETERANS LEGAL SERVICES PROGRAM

Ms. COTE. Mr. Chairman, I am pleased to be here this morning to speak on behalf of NVLSP as you address the performance and structure of the Court. My testimony will touch on S. 2090, to protect privacy and security concerns in court records, and our support of S. 2091, to increase the number of the Court's active judges.

I will also relay some of the frustration experienced by disabled veterans and their families as they maneuver this judicial appeal process—some frustrations that could be alleviated through legislation.

In his September 2007 letter to this Committee, Chief Judge Greene proposed that section 7268 be amended to provide CAVC with the same authority to limit public access to records as provided to the Article III courts in light of the sensitivity of the case records or simply to amend the language of 7268 to allow that only decisions and orders of the Court or motions and briefs of the party be accessed by the public. We agree with this. Redaction of certain Court documents versus limiting the public's access to these documents would increase the workload of the Court and the parties to an appeal drastically, and in the event that documents are not

properly redacted, we are looking at the release of sensitive information to the public.

As we all talked about this morning, since Chief Judge Greene recalled several retired judges to assist in the handling of the Court's caseload, we have seen almost a 30 percent increase in productivity. It follows that a permanent increase in the number of seated judges could meet that level, and as I noted in my written testimony, when one considers that permanent judges will not be facing the multiple learning curves that multiple recalled judges will typically, the productivity level may even exceed the current level. Therefore, NVLSP strongly supports passage of S. 2091.

As I indicated, I also want to talk about a couple other nagging problems that could be corrected through amendments to Chapter 72. The first involves the cases of *Best* and *Mahl*. As Mr. Cohen discussed, CAVC held that when it concludes that there is a legal error in a board decision requiring remand, it will generally decide the case on the narrowest possible grounds and address the other errors raised in briefing. And it is true that in the short term it is a good thing. It allows the Court to dispose of cases more quickly. However, it allows the board to reject all of the other allegations of error not touched on by the Court, and this vicious remand-appeal cycle starts all over again, adding years to the adjudication process and duplication of work by not only the appellant and his representatives in the Government but the Court. And this is what we are here to talk about. Chapter 72 should be amended to require that all disputed issues raised in briefing be resolved by the Court.

Another nagging problem is the inability of survivors to step in and substitute for a deceased veteran whose appeal is pending before CAVC. In April of this year, I testified before the House Committee's Disability Assistance Subcommittee on this very issue.

As a general rule, qualifying survivor under the accrued benefits statute, 5121, cannot continue a claim and have to start a brand-new claim for accrued benefits at the regional office level regardless of where the claim was in the adjudication process. It could have made it all the way up to the Court. It could have been fully developed. The Court could have worked it. And yet they have to go to the back of the line and go back to the RO. This is unjust and inefficient.

The Federal Circuit carved out a very narrow exception to this in *Padgett* v. *Nicholson* this year, but in order to be able to substitute, they held where the veteran or other claimant had appealed his claim all the way to the CAVC, the death occurred after all of the legal briefs were filed and the CAVC has interpreted it to mean that this includes also the reply briefs, and there is nothing left to do but issue a decision and there is an identifiable survivor for accrued benefits purposes, then CAVC is free to keep the decision on the books. Mrs. Padgett was lucky. Most veterans will not be as lucky, will not fit into this criteria, and we urge that qualifying survivors be able to step in and continue a claim started by the deceased when it is pending before the CAVC.

The final relevant problem I would like to address involves class action certification, class action authority. Prior to the VJRA in 1988, district courts had authority to certify lawsuits challenging

VA rules and policies as a class action on behalf of large groups of similarly situated veterans. With the introduction of the VJRA, jurisdiction shifted to the newly created CAVC and the Federal Circuit, and the Congress did not address the authority to certify a class. The courts took that to mean they did not have the authority.

The *Haas* case and cases like it illustrate why class action authority would be a good thing. After 10 years of granting disability benefits to Navy blue water veterans suffering from one of the Agent Orange presumptive diseases, VA abruptly changed course and issued a manual provision that, in order to receive service-connected benefits based on this presumption, the veteran must have set foot on the land mass of Vietnam. Thousands of blue water veterans were denied benefits under this manual provision, and many had their benefits severed based on this 2002 rule change. The VA manipulated the system oftentimes by settling with certain blue water veterans when their case is pending before the CAVC could issue a precedential decision addressing the legality of this "set foot in Vietnam" rule. Last year in *Haas* the Court decided that the "set foot on land" rule was actually illegal. VA appealed the decision to the Federal Circuit. It is being argued today down the street.

So until a decision is issued by the Federal Circuit in *Haas*, which could be more than a year away, VA staffers are under a moratorium not to adjudicate these blue water veteran claims. So VA will now have successfully withheld benefits from veterans from the rule change in 2002 through next year at a minimum, and this is a 6-year period in which benefits are being withheld from blue water veterans. Not only would class action authority make sense because it creates greater efficiencies by allowing the Court to dispose of cases consistently and in greater numbers, but it would also prevent such agency abuses in the future.

I thank you for your time.

[The prepared statement of Ms. Cote follows:]

PREPARED STATEMENT OF CHRISTINE COTE, LITIGATION ATTORNEY, NATIONAL VETERANS LEGAL SERVICES PROGRAM

Chairman Akaka and Members of the Committee:

I am pleased to have the opportunity to appear before you on behalf of the National Veterans Legal Services Program (NVLSP) to offer our views on issues relating to the U.S. Court of Appeals for Veterans Claims (CAVC).

NVLSP is a non-partisan, non-profit veterans service organization, which expressed support for bills throughout the 1980's to repeal the longstanding bar to judicial review of VA adjudication of claims for benefits. Since the CAVC was created in 1988, NVLSP has represented over 1,000 VA claimants before the Court. NVLSP is one of four veterans service organizations making up the Veterans Consortium Pro Bono Program. As part of that program, NVLSP recruits, trains, and mentors volunteer lawyers to represent veterans who appeal to the CAVC. 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 publishes educational manuals that have been distributed to thousands of veterans advocates to assist them in their representation of VA claimants.

NVLSP commends Chief Judge Greene, and the other CAVC judges and staff, for the steps they have taken to date to promote the expeditious handling of cases. My testimony will touch on our support of S. 2090, to protect privacy and security concerns in court records, and S. 2091, to increase the number of the Court's active judges.

I will also relay some of the frustration experienced by disabled veterans and their family members in navigating the VA claims judicial appeal process. (These

issues are addressed in Sections III and IV below.) We will call attention to a few significant problems in the appeal process in need of legislative action.

I. S. 2090

The CAVC will shortly roll out an e-filing system similar to those of other Federal Appellate Courts. E-filing will create efficiencies in the delivery of legal documents to the Court, including paperwork reduction, and convenience in filing and in accessing uploaded records. NVLSP welcomes the implementation of this system. 38 U.S.C. § 7268 provides that "[t]he Court may make any provision which is necessary to prevent the disclosure of confidential information, including a provision that any such document or information be placed under seal to be opened only as directed by the Court." 38 U.S.C.§ 7268(b)(1).

In his September 13, 2007 letter to this Committee, Chief Judge Greene suggested that section 7268(a) be amended to limit remote access to the full case file to the parties to an appeal, and their attorneys. Judge Greene astutely noted that veterans cases should be afforded the same considerations provided to Social Security and Immigration appeals by the Judicial Conference's proposed Rule 5.2 (of the Committee on Rules of Practice and Procedure)—in light of the sensitivity of information contained in such case files.

Judge Greene proposed that section 7268 be amended to provide the CAVC with the same authority to limit access to Court records given to Article III Courts; or simply to amend the language of section 7268 to allow that only decisions and orders of the Court, and briefs and motions of the parties, are accessible by the public. We feel strongly that redaction of certain Court documents rather than limiting access to these documents, as noted above, would increase the workload of the Court and the parties to an appeal exponentially, and, more importantly, could permit sensitive information being inadvertently released to the public in the event of errors in redaction.

II. S. 2091

There has been a dramatic increase in the number of cases being received by the CAVC, and it is expected that over 4,500 appeals will have been filed this year. According to the Board of Veterans' Appeals 2006 Annual Report, the Board's denial rate has increased from 24.2 percent for FY2004 to 38.1 percent for FY2005 to 46.3 percent for FY2006—this is a nearly twofold increase over a 2-year period. This increase, particularly if it continues, could mean that the number of cases appealed to the CAVC could be proportional.

Since Chief Judge Greene recalled several retired judges to assist in the handling of the CAVC caseload, the Court's productivity has increased almost 30 percent. It stands to reason that a permanent increase in the number of seated judges could meet the productivity shown in the recall project. In fact, when one considers that permanent judges will not require repeated "learning curves," as multiple recall judges may, the productivity from the additional permanent judges may very well exceed the productivity levels of Judge Greene's recall project. As such, NVLSP strongly favors the enactment of S. 2091.

III. THE HAMSTER WHEEL

Those who represent disabled veterans before the CAVC with any regularity use a certain phrase to describe the system of justice these veterans often face: "the Hamster Wheel." This phrase refers to the phenomenon of a claim being sent back and forth between the CAVC and the Board, and the Board and the RO, before it is ever finally decided. This system often results in veterans having to wait years before there is a final decision on their claim.

We have identified several aspects of the CAVC decisionmaking process that contribute to this "Hamster Wheel" including: (1) the policy adopted by the CAVC in 2001 in *Best* v. *Principi*, 14 Vet. App. 18, 19–20 (2001) and *Mahl* v. *Principi*, 15 Vet. App. 37 (2001); and (2) 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."

CONSIDER THIS SCENARIO:

• 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 decision and files a brief arguing that the Board made various legal errors in denying the claim. In response, the VA files a brief defending the VA actions;
• 5 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. Then, a year later, a single judge issues a decision resolving only one of the many errors raised by the parties. The single judge issues a decision stating that the Board erred in one of the ways discussed in the veteran's brief and vacates and remands the BVA decision as to the one error, but does not resolve the other alleged errors raised by the parties because the veteran can raise the error 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 again rejects the allegations of Board error that the CAVC refused to resolve when the case was before the CAVC. Six or more 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.

Best and *Mahl* may benefit the Court in the short term by allowing a judge to finish an appeal in less time than would be required if he or she had to resolve all of the other disputed issues. However, the CAVC is likely not 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*, Court staff and at least one judge, not to mention veterans and their advocates, will have to duplicate the time expended on the case during the first go-around. Congress should amend Chapter 72 of Title 38 to correct this obstacle to efficiency and justice.

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

If an individual, who has filed a claim for VA benefits, dies while the claim is pending before a VA regional office, the Board of Veterans' Appeals, or a reviewing court, the pending claim dies as well. This is true for claims for disability compensation, pension, dependency and indemnity compensation (DIC), and death pension. *See Richard* v. *West*, 161 F.3d 719 (Fed. Cir. 1998); *Zevalkink* v. *Brown*, 102 F.3d 1236 (Fed. Cir. 1996); *Landicho* v. *Brown*, 7 Vet. App. 42 (1994). A survivor may not step into the shoes of the deceased claimant to continue or to appeal the claim—no matter how long the claim has been pending in the VA claims adjudication process.

1. THE ROUTE SURVIVING FAMILY MEMBERS HAVE TO TRAVEL TO OBTAIN BENEFITS BASED ON THE DECEASED CLAIMANT'S CLAIM

In order to obtain the benefits that the deceased claimant was seeking at the time of death, a brand new claim for benefits, called accrued benefits, must be filed. See 38 U.S.C. §5121, 38 C.F.R. §3.1000. Only certain surviving family members may pursue a claim for accrued benefits. An individual satisfying the definition of a surviving spouse may apply for accrued benefits. If there is no surviving spouse, a surviving child may qualify as a claimant, but only if he or she is: (a) unmarried and under the age of 18; or (b) under the age of 23, unmarried, and enrolled in an institution of higher education. If there is no surviving spouse or qualifying surviving child, a surviving parent may apply for accrued benefits but only if he or she was financially dependent on the claimant at the time of the claimant's death. No brothers or sisters or other family members may apply for accrued benefits. See 38 U.S.C. §§101, 5121; 38 C.F.R. §3.1000(d).[1]

2. TIME LIMITS

The application for benefits must be filed within 1 year of the date of the claimant's death. VA regulations do allow for extensions of time to file outside of the 1–year period, but only if the survivor is able to demonstrate "good cause." 38 C.F.R.

[1] There is one narrow exception: Accrued benefits may be paid to reimburse any individual who bore the expense of the last sickness or burial—but only to the extent of the actual expenses incurred.

§ 3.109(b). Thus, the VA may allow for an extension of time, but is not required to do so.

3. NO NEW EVIDENCE CAN BE SUBMITTED

The survivor also cannot submit new evidence to show that the deceased claimant is entitled to the benefits sought. Accrued benefits determinations can only be "based on evidence in the file at date of death." 38 U.S.C. § 5121 The VA regulations provide that "evidence in the file" means evidence within the VA's constructive possession, on or before the date of death, but that would only include evidence like existing service personnel records or existing VA medical records. See 38 C.F.R. § 3.1000(a); 67 Fed. Reg. 65,707 (2002).

4. LIMITATIONS ON THE TYPES OF BENEFITS THAT QUALIFY AS ACCRUED BENEFITS

The opportunity for a qualified survivor to receive accrued benefits under section 5121 is restricted to pending claims of the deceased for "periodic monetary benefits." To be a claim for "periodic monetary benefits", the benefits must be the type that are "recurring at fixed intervals", such as disability compensation.

Many claims are for benefits that are not periodic monetary benefits. For example, in *Pappalardo* v. *Brown*, 6 Vet. App. 63 (1993), the Court held that a claim for a one-time payment for specially adapted housing reimbursement assistance under 38 U.S.C. Chapter 21 did not qualify as a claim for periodic monetary benefits for purposes of Section 5121. This is so even though the family had already incurred the expense of remodeling the home in accordance with standards approved by the Boston VARO to meet the needs of the veteran, who had lost the use of both lower extremities due to a service-connected disease, and who died while the housing assistance claim was pending.

5. THE RECENT COURT DECISION CARVING OUT AN EXCEPTION TO THE HARSH RULES THAT CURRENTLY EXIST

When a claimant with a pending claim dies before a final decision is rendered, the survivor must start the claim all over again at a VA regional office, regardless of how far the pending claim had proceeded in the adjudication process. The inability of the survivor to substitute and pick up where the claimant left off can add years to the claims process by requiring the agency to address an entirely new claim where there had already been development of another claim raised by the deceased.

Frustrated survivors have long sought to continue to prosecute a deceased claimant's disability compensation claim at the Court level. *See, e.g., Zevalkink, supra; Landicho, supra* at 47. In *Padgett* v. *Nicholson*, 473 F.3d 1364 (Fed. Cir. 2007), the Federal Circuit carved out a very limited exception to the harsh rule that a claim dies with the claimant.

In *Padgett, more than twelve years* after Mr. Padgett initiated his claim, the Court issued a decision reversing the Board's denial and ordering the VA to grant the veteran's disability claim for a hip condition. However, counsel for the veteran learned that Mr. Padgett died in November 2004, shortly before the Court's decision. The Secretary filed a motion to rescind the reversal and dismiss the appeal. The veteran's surviving spouse filed a motion to be substituted as a party to the appeal. The CAVC granted the VA's motion to dismiss—wiping the victory off the books, and denied Mrs. Padgett's motion for substitution, following the normal rule that the claim died when Mr. Padgett died.

NVLSP appealed the Veterans Court's decision on Mrs. Padgett's behalf to the U.S. Court of Appeals for the Federal Circuit. The Federal Circuit responded by carving out a *very narrow exception*. In a case like Mr. Padgett's, in which: (a) the veteran had appealed his claim all the way to the CAVC; (b) the CAVC issued its decision before it became aware that the veteran had died; and (c) the death occurred after all of the legal briefs had been filed with the CAVC so that there was nothing left to do but to issue a decision; then (d) the CAVC could keep its decision on the books by making it effective retroactive to the date of the veteran's death, and allow the surviving spouse to substitute for the veteran in the appeal before the CAVC.

Although Mrs. Padgett received the 12 years' worth of disability benefits for Mr. Padgett's hip disability, most family members of a veteran who dies while his claim is pending before the VA will not be this lucky-and NVLSP urges that family members of a veteran who dies while his or her claim is pending before the agency be permitted to substitute for the veteran and continue the claim.

IV. INEFFICIENCY AND INJUSTICE DUE TO THE LACK OF CLASS ACTION AUTHORITY

NVLSP would also like to address the inefficiency from the Federal courts lack of clear authority to certify a veteran's lawsuit as a class action. Prior to the Veterans' Judicial Review Act (VJRA) in 1988, U.S. district courts had authority to certify a lawsuit challenging VA rules or policies 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 rule or policy was unlawful, it had the power to ensure that all similarly situated veterans benefited from the court's decision.

With the enactment of the VJRA, 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 CAVC. However, Congress failed to address the authority of the Federal Circuit and the CAVC to certify a case as a class action and the CAVC and Federal Circuit ruled that the CAVC does not have authority to entertain a class action. *See, e.g., Lefkowitz* v. *Derwinski*, 1 Vet. App. 439 (1991); *Liesegang* v. *Secretary of Veterans Affairs*, 312 F.3d 1368, 1378 (Fed. Cir. 2002).

From 1991 to 2002, the VA granted 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 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, VA denied all pending and new disability claims filed by Navy blue water veterans for an Agent Orange-related disease unless there was proof that that veteran actually set foot on Vietnamese soil and severed benefits that had been granted to Navy blue water veterans prior to the 2002 rule change.

In November 2003, the CAVC set panel argument to hear the appeal of Mrs. Andrea Johnson, the surviving spouse of a Navy blue water veteran who was denied service-connected DIC by the BVA because the deceased husband, who died of an Agent Orange-related cancer, never set foot on Vietnamese soil. See *Johnson* v. *Principi*, U.S. Vet. App. No. 01–0135 (Order, Nov. 7, 2003). Mrs. Johnson's attorneys challenged the legality of the 2002 Manual M21–1 provision mentioned above and it appeared that the CAVC would issue a precedential decision deciding the legality of VA's set-foot-on-land requirement.

Six days before oral argument, the VA General Counsel's Office offered the widow full DIC benefits retroactive to the date of her husband's death, the maximum benefits that she could possibly receive. Once Mrs. Johnson signed the settlement agreement, oral argument was canceled and the appeal was dismissed. The settlement allowed the VA to continue 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 veterans and survivors who were denied benefits based on the 2002 rule gave up and did not appeal the RO decision. Some appealed the RO denials 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 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 pursued his claim all the way to the CAVC was former Navy Commander, Jonathan L. Haas. Commander Haas filed his appeal in March 2004. The CAVC ultimately scheduled oral argument before a panel for January 10, 2006. This time, 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).

In October 2006, the VA appealed the decision in *Haas* to the U.S. Court of Appeals for the Federal Circuit. The matter is scheduled for argument today and will be argued by NVLSP Joint Executive Director, Barton Stichman.[2]

Then-Secretary of Veterans Affairs Nicholson ordered a moratorium, in effect until the Federal Circuit issues its decision, which prevented the 57 VA ROs and the BVA from deciding any claim filed by a blue water veteran or survivor based

[2] S. 2026, currently pending before this Committee, would nullify the CAVC decision in Haas and would rob thousands of Navy blue water veterans of disability compensation and free medical care for Agent Orange related diseases as well as retroactive disability compensation under the Nehmer stipulated agreement. NVLSP urges swift defeat of this measure.

on an Agent-Orange related disease unless there is evidence that the veteran set foot on land.[3]

If the CAVC or Federal Circuit had authority to certify a case as a class action on behalf of similarly situated VA claimants, and certified Mrs. Johnson's lawsuit case as a class action, the VA would not have been able to end the case by settlement. 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.

If the Federal Circuit rules in favor of the Navy blue water veterans, no law requires the VA to identify similarly situated claimants, not included in the moratorium, or to notify these similarly situated claimants about the Court's decision. Even if these claimants somehow find out about the Court decision and reapplied, the VA could refuse to pay them the retroactive benefits that it paid to the claimants subject to the 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."[4] Legislative action is needed to ensure that situations like this do not occur in future.

Thank you for holding such an important hearing and inviting our participation. Thank you also for allowing us to highlight some of the problems faced by disabled veterans and their families during the judicial appeal process.

Senator AKAKA. Thank you very much.

Joe Violante?

STATEMENT OF JOSEPH A. VIOLANTE, NATIONAL LEGISLATIVE DIRECTOR, DISABLED AMERICAN VETERANS

Mr. VIOLANTE. Aloha, Mr. Chairman. On behalf of the Disabled American Veterans, I want to thank you and the Committee for conducting this timely hearing on the United States Court of Appeals for Veterans Claims.

For the most part, the superimposition of judicial review on the administrative processes of the Department of Veterans Affairs has had a positive effect. On a personal note, let me say that I spent 5 years at the Board of Veterans' Appeals, and in 1990, I was hired by DAV to represent veterans before the newly formed Court.

As a veterans' advocate, I became frustrated with the Court's failure to deal with the legal arguments presented by appellants; that is, their reluctance, the Court's reluctance, to reverse rather than remand a case. And we have heard that previously this morning.

For example, after presenting a brief which argued for the reversal of a BVA decision, counsel for the Secretary would confess error, alleging that the board failed to provide adequate reasons or bases for its decision; whereupon, the Court would remand the case to the board, and the evidentiary record would be open for further development, notwithstanding the appellant's argument that the record was insufficient to establish entitlement to the benefits sought. Unfortunately, 18 years after the Court began hearing appeals, this practice continues. In too many cases, an appellant must appeal to the Court at least twice to receive a decision on the merits of his or her appeal.

For the record, at least year's hearing, Robert Chisholm, Past President of the National Organization of Veterans' Advocates,

[3] Even if VA loses its challenge to the CAVC decision, it will still have succeeded in withholding disability benefits from thousands of blue water veterans and survivors for the period 2002 to 2008.

[4] Revision of a final VA decision requires a showing of CUE, a high evidentiary burden.

noted that the Court's practice of refusing to reverse board decisions resulted in many cases on appeal to the Court are there for the second, third, or fourth time, often with the same issues to be decided. And Mr. Cohen this morning mentioned the fifth time. So it is not being corrected.

In those cases where the board has obviously failed to provide adequate reasons or bases, it would make more sense to require the board on remand to explain its decision based on the evidence of record at the time of the original board decision, provided the appellant has not argued that the record on appeal was defective. By requiring the board to explain its decision based on the evidence of record, the VA would be prohibited from going on a fishing expedition to develop evidence to support its prior erroneous denial of benefits. Allowing VA to develop evidence after having seen the appellant's arguments regarding defects in the prior denied decision provides VA with a distinct advantage of appellants.

Accordingly, I would recommend that when the Court determines the board's decision is defective for failure to state adequate reasons or bases and the appellant has not alleged any defects in the evidence of record, the board should be required to articulate its decision based on the evidence of record. In all other cases where the evidence is sufficient to establish entitlement to the benefits sought, the Court should and must reverse the BVA decision.

Another frustration experienced by appellants is delays in obtaining a disposition from the Court, especially in single-judge decisions. In the Court's requirements in *Frankel* v. *Derwinski*, 1 Vet. App. 23, these cases could be summarily decided by order on appeal when the case on appeal was of relative simplicity and does not establish a new rule of law, does not alter, modify, criticize or clarify an existing rule of law, does not apply to an established rule of law, to a novel fact situation, and does not constitute the only binding precedent on a particular point of law, does not involve a legal issue of continuing public interest, and the outcome is not reasonably debatable. Unfortunately, many of these single-judge decisions take a year or longer to decide. It is difficult to understand why an appeal of relative simplicity should take an inordinate amount of time to decide.

Mr. Chairman, I believe that this Committee should re-examine the Court's reporting criteria and require the Court to provide a more detailed summary of case dispositions and processing times as discussed in my written statement and as discussed previously.

This concludes my remarks, and I would be happy to answer any questions.

[The prepared statement of Mr. Violante follows:]

PREPARED STATEMENT OF JOSEPH A. VIOLANTE, NATIONAL LEGISLATIVE DIRECTOR OF THE DISABLED AMERICAN VETERANS

Mr. Chairman and Members of the Committee:

On behalf of the more than 1.5 million members of the Disabled American Veterans (DAV) and its Auxiliary, I wish to express my appreciation for this opportunity to present the views of our organization on the performance and structure of the United States Court of Appeals for Veterans claims (the Court or CAVC), and draft legislation. DAV shares your interest in ensuring veterans and their families have effective and efficient claims and appeals processes.

Since Congress enacted legislation in 1988 authorizing judicial review of decisions by the Board of Veterans' Appeals (the Board or BVA), and establishing what is now

the United States Court of Appeals for Veterans Claims with special jurisdiction for that purpose, the complexion of the claims and appeals processes for veterans and other claimants has changed dramatically. For the most part, the superimposition of judicial review on the administrative processes of the Department of Veterans Affairs (VA) has had a positive effect.

Prior to judicial review, almost two-thirds of BVA decisions were denied. About 20 percent of BVA decisions were remanded, and roughly 10 percent were allowed. In fiscal year (FY) 1990, for example, the BVA decided 46,556 cases; 62 percent were denied, 24 percent were remanded, and 13 percent were allowed. By fiscal year 1992, remands soared to 51 percent, denials dropped to 33 percent, and allowances inched up to 16 percent. That year BVA decided 33,483 appeals. Fast forward to fiscal year 2007 when BVA decided 40,399 cases, and about 21 percent of the appeals were allowed, a little more than one-third were remanded, and 41 percent were denied. With independent review from outside VA, we have seen the law examined to ensure it is carried out according to congressional intent, and to ensure that correct application of the law takes priority over administrative expedience.

Expedience and efficiency are, of course, not synonymous. Neither does efficiency mean solely speed nor a constrained expenditure of resources, but rather that a thing is done as well as possible with optimum speed and with the fewest resources necessary. There must be a balance among quality, speed, and resources. Because, in the name of efficiency, political forces often unrealistically press administrative agencies to produce more with less, real efficiency suffers. When that happens with VA, as it so often does, veterans suffer the consequences of the adverse impact. Judicial review can correct the injustices that result; however, more must be done to ensure that justice prevails.

By design, courts operate independently of these kinds of political pressures, and are therefore theoretically better guardians of the law and justice. Autonomy brings with it a special obligation to conscientiously pursue efficiency without outside pressure, however. Increasing caseloads and slower processing times in a court may simply be the product of more work without a commensurate increase in resources, or it could signal declining efficiency, or both.

The Court rightfully has a great deal of independence, but it should not operate without any oversight. As an "Article I" court, CAVC is an instrumentality of Congress, unlike Article III courts. So long as it does not affect the independence of the decisionmaking, or encroach upon the broad discretion as to internal operating procedures, the DAV believes that limited oversight is appropriate. Should Congress find an imbalance between resources and workload, it is Congress' responsibility to remedy the shortfall through additional funding or any authority necessary to use available resources in different ways. Should Congress conclude that increasing case backlogs are the product of inefficiency, it can leverage improvement through more general pressures and without direct interference in the operations or decisionmaking processes. These principles involve no mysteries or concepts of which this Committee is unaware, but we believe they merit restating to provide an analytical foundation for consideration of the matters to be addressed.

In his July 13, 2006, written statement to this Committee, Chief Judge William P. Greene, Jr., discussed "the sudden increase in appeals filed with the Court." In April 2005, the Court reportedly started receiving more than 300 appeals per month, compared with a monthly average of 200 appeals during the previous 8 years. That trend had continued during the second quarter of 2006 through June 30, 2006. On a positive note, he reported that the Court was on pace to dispose of more than 2,700 appeals—more than in all but one of the last 10 years.

The Chief Judge pointed to an increased number of denied appeals by BVA in fiscal year 2005. In fiscal year 2005, BVA issued over 13,000 denials, compared with 9,299 the previous year. In addition, he noted not only that there was an increased awareness among veterans and their families, but also "a growing perception among veterans of the value of judicial review."

VA's fiscal year 2008 Budget Submission indicates the number of veterans filing initial disability compensation claims and claims for increased benefits has increased every year since 2000, with disability claims increasing from 578,773 in fiscal year 2000 to 806,382 in 2006. By our calculation, this represents an average annual increase of more than 6 percent in the 6 years from the end of fiscal year 2000 to the end of fiscal year 2006. VA projects it will receive 800,000 claims in fiscal year 2007 and 2008.

Although the number of appeals listed as denied by BVA may be the best indicator of potential workload for the Court, appeals to the Court come from the total number of cases decided on the merits that is, not remanded. Cases listed by BVA as "allowed" may not have been decided fully favorably or favorably on all issues. Of the 31,397 total BVA decisions in fiscal year 2003, the allowed and denied to-

gether totaled 16,874; for fiscal year 2004, this total was 15,860; for fiscal year 2005, it was 20,128; for fiscal year 2006, it was 25,644; and, for fiscal year 2007, the total was 25,062. The caseload volume upstream can be expected to influence the workload volume downstream, with some lag time. The input volume at the Court is an indicator of resource needs; the output volume is an indicator of efficiency.

In his written statement, Chief Judge Greene acknowledged that for the first time in 6 years, the Court was fully staffed; although four judges had very little experience in the first half of 2005, and did not have a full complement of staff until October 2005. However, he cautioned that he expected the upward trend of new cases to continue. He referenced a feasibility study by the General Services Administration and two consultant companies, which estimated an incoming caseload of 3,600 or more cases per year requiring a total of nine full-time judges and additional staff.

Chief Judge Greene reported that as of June 30, 2006, the Court's docket contained 5,850 cases. Of those, 3,598 cases were awaiting action by either the appellant or the appellee and were not ready for screening or review by the Court. There were 436 cases that had been decided, but were on appeal to the United States Court of Appeals for the Federal Circuit. Additionally, 414 cases were decided, but were pending entry of judgment or awaiting mandate. There were 153 cases waiting for a decision on applications for attorney fees under the Equal Access to Justice Act. The Court's central legal staff was in the process of screening or engaged in alternative dispute resolution in 326 cases. That left 923 cases in chambers for judicial review and decision.

According to the Court's annual reports, the number of new cases declined from 2,442 in fiscal year 2000 to 2,296 in 2001 and 2,150 in 2002. That number increased to 2,532 in 2003, declined to 2,234 in 2004 and rose to 3,466 in fiscal year 2005. Increases were reported in fiscal year 2006 and fiscal year 2007, 3,729 and 4,643, respectively. The total cases decided for those years were: 2,164 in fiscal year 2000; 3,336 in 2001; 1,451 in 2002; 2,638 in 2003; 1,780 in 2004; 1,905 in fiscal year 2005; 2,842 in fiscal year 2006; and 4,877 in fiscal year 2007. Cases that went to a full decision on the merits, presumably those that most reflect the Court's production, increased from 1,619 in fiscal year 2000 to 2,853 in fiscal year 2001, dropped precipitously to 972 in 2002, increased to 2,152 in fiscal year 2003, dropped substantially again to 1,337 in fiscal year 2004, declined even more to 1,281 in fiscal year 2005. They increased substantially to 2,135 and 3,211 in fiscal year 2006 and fiscal year 2007, respectively. We note that the Court received 2,532 new cases in fiscal year 2003, and decided a total of 2,638, of which 2,152 were merits decisions, as compared with fiscal year 2005 when it received 3,466 and decided a total of 1,905, of which 1,281 were merits decisions. In 2005, the Court issued 56 fewer merits decisions than in fiscal year 2004. Decisions on the merits increased substantially in fiscal year 2006 and 2007. We note that the Court counts cases remanded on joint motions by the parties as merit decisions.

The Court's annual reports show the average "Time from filing to disposition" was 379 days for fiscal year 2005 and in fiscal year 2007, it was 416 days. Chief Judge Greene stated in his testimony: "We are reviewing and evaluating innovative ways to be as productive as we can to reduce our pending caseloads and to achieve currency—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 Chief Judge reported seven actions he had implemented or was considering:

1. Carefully tracking the productivity of all segments of the court.
2. Using retired judges eligible for recall under title 38, United States Code, section 7299.
3. Looking at using judges or retired judges for settlement conferences.
4. The use of a joint appendix as the record on appeal.
5. Summary disposition of cases without explanation, where the appellant is represented.
6. Implementation of a case management/electronic case files system (e-filing).
7. Making a Veterans Court House and Justice Center a reality based on the need for adequate space for recalled judges or any additional full-time active judges and staff.

Unfortunately disabled veterans who are often elderly and quite sick must wait for unacceptably long periods of time for resolution of their appeals, and substantial percentages prevail ultimately. No doubt protracted delay creates a hardship for many.

Although we can draw some inferences from the data publicly reported by the Court, much about the Court's internal operations is not transparent to the public, and more precise efficiency determinations would require data on the flow of cases,

timelines, and volume of cases pending in each judge's chambers, as well as delays attributable to motions for extension of time by VA and appellants' counsel.

To make the Court's internal operations more transparent, we would recommend that the Court provide: Specific data showing the time that transpired following the date on which the appellant's reply brief was filed would be one avenue to serve this purpose. Once the appellant's reply brief is filed, or 20 days following the appellee's brief if no reply brief is filed, the case is before the Court for resolution. According to the Court Annual Report, the judges of the Court disposed of approximately 3,200 appeals during fiscal year 2007. Sixty four of those were resolved in three-judge decisions, and only forty six of those were precedent decisions. The remaining were decided in single-judge orders or memorandum decisions. Each of the 3,136 were therefore, under the Court's *Frankel* precedent, 1 Vet. App. 23 (1990), of relative simplicity, controlled by the existing case law, and not reasonably debatable. Id. at 25–26. Nonetheless, the Court not infrequently takes between one and 2 years to resolve similar cases.

We understand that information about long-pending cases is gathered by the Court but not widely distributed. It appears that a list, the extent of which is not known to DAV, is compiled by the Clerk and that the list shows the long-pending cases in chambers. However, the information for all chambers is only made available to the Chief Judge. The associate judges receive information from the list only with respect to their chambers. Judges are not encouraged by their colleagues to complete old cases because their colleagues are unaware of these older cases.

DAV believes that there is no need to unduly embarrass any judge of the Court. However, if the Clerk were required to include on the list all cases in which a reply brief had been filed 6 months or more earlier, and the complete list were required to be circulated to all of the judges of the Court, this action would encourage judges to complete the older cases. The Committee could consider asking the Court to provide the list to the Committee at a future date if efficiency did not improve.

DAV believes that Congress should require an annual report from the Court that requires the following information:

(1) The number of appeals filed.
(2) The number of petitions filed.
(3) The number of applications filed under section 2412 of title 28, United States Code.
(4) The number and type of dispositions, including settlements, cases affirmed, remanded, denied, vacated and appealed to the Federal circuit.
(5) The median time from filing to disposition.
(6) The median time from the filing of briefs to disposition.
(7) The number of cases disposed by the Clerk of the Court, a single judge, multi-judge panels and the full Court.
(8) The number of oral arguments.
(9) The number and status of pending appeals and petitions and of applications for Equal Access to Justice Act fees.
(10) A summary of any service performed by recalled retired judges during the fiscal year and an analysis of whether any of the caseload guidelines established under section 7257(b)(5) of title 38, United States Codes, were met during the fiscal year.
(11) The number of cases pending longer than 18 months.

From the inception of judicial review of claims for veterans' benefits, the DAV has been a major participant in providing free representation to appellants before the Court, to complement our free representation of a large share of claimants throughout the administrative claims and appellate processes. In support of our primary mission of service to veterans, we provide all resources necessary to enable our staff of attorneys and non-attorney practitioners to effectively represent appellants before the Court. We believe disabled veterans, and their eligible family members, should be able to obtain the benefits a grateful nation provides for them without undue burdens or cost to them.

I am pleased to submit DAV's views of the bills under consideration today.

If enacted, S. 2091 would increase the Court's number of active judges from seven to nine. While the DAV does not have a current resolution from its membership on this specific legislation, we question the need for more judges at this time, especially in light of the lack of confirmation available on the Courts operations, as noted above. For example, the Court has issued over 3,200 decisions on the merits as of September 30, 2007, only 358 cases more than in its previously most productive year, fiscal year 2001.

Before DAV could support an increase of two more judges, we would request that this Committee require the Court included the item mentioned above in its annual

report. Until this information is made available to Congress, it is, in our estimation, premature to expand the number of judges to nine full-time active judges.

If enacted, S. 2090 would initiate legislation that authorizes the Court to establish rules governing the privacy and security of certain information concerning the Court's upcoming electronic filing system. Many Federal Courts now operate under an electronic filing (e-filing) system. Congress has authorized appropriations for the Court to begin utilizing an e-filing system that is expected to be in progress by June 2008. However, there is currently no legislation authorizing the Court to promulgate rules regarding the privacy and security of electronic records.

Essentially, S. 2090 empowers the Court to prescribe rules as it determines necessary to carry out its pending functions under an e-filing system. The proposed legislation does not dictate to the Court any details requiring inclusion in such rules, but merely authorizes the Court to prescribe such rules "consistent to the extent practicable with rules addressing privacy and security issues throughout the Federals Courts." DAV has no opposition to S. 2090.

The DAV appreciates the Committee's interest in this aspect of the backlogs and delays claimants must cope with in pursuing claims and appeals for veterans' benefits.

Senator AKAKA. Thank you. Thank you very much.

This question I will pose now is for each of the panelists, and it is to reach at what is the greatest impediment to the Court's efficiency. Please identify and describe what you believe to be the No. 1 element in the Court's operation or structure that would inhibit veterans from obtaining justice in the Court in a timely and efficient manner. Mr. Cohen?

Mr. COHEN. Mr. Chairman, I think we have all articulated and probably would agree that the Best-Mahl doctrine of narrowly deciding the issues, of picking a procedural issue and deciding that but not deciding the substantive issues and sending it back is the single thing that causes delay in ultimately getting the justice to which the veterans are entitled. It is also the single fact that contributes to the large caseload because it necessarily requires the case to come back to the Court many, many times to get those issues decided.

So that, narrowly deciding cases, is something that is very detrimental to the time concerns and to the justice given to veterans. And if you couple that with the reluctance of the Court to actually reverse decisions, as Mr. Violante was talking about, then you have a perfect storm where, again, you are going to increase the number of cases that come back.

Senator AKAKA. Thank you.

Mr. Campbell?

Mr. CAMPBELL. Mr. Chairman, if the question is really about delay, I would note that the Court is soon going to be adopting electronic filing for all pleadings in the Court. This is the fruition of an initiative by the judges on the Court with the consultation of the practitioners at the Court, including the Government counsel. We met together in Virginia earlier this year, in the spring of this year through the Bar Association, to talk about ways to implement time savings. And that, I think, will be one of the major time savings by eliminating what is currently a protracted process for preparing the record before the Court. If the goals are realized from this conversion from paper to electronic filing, it can be predicted that months will be removed from the front end of most cases so that the judges can reach decision earlier.

Another thing that is worth pointing out is that time saving is very important to my office also. We have instituted a triage team

that looks at every new appeal that is filed in the Court as soon as we receive notice of docketing, to find those cases that can be resolved earlier rather than later in the proceedings, usually through a joint motion or perhaps a jurisdictional motion of some kind. And by that process, we are able to screen off perhaps as many as 20 percent of the cases in order to save resources and save time in dealing with the other cases that require a more intensive effort.

Senator AKAKA. Just to make it clear, my question was not only focusing on timeliness or delaying, but also on efficiency of the Court as well. Ms. Cote?

Ms. COTE. Yes, I would like to follow up on that. I do think it is a good move to move to the Joint Appendix process. It will save a matter of months at the Court level that veterans have to wait to get their claims decided. But as Mr. Cohen talked about and Mr. Violante talked about, until you shore up the Best-Mahl problem and the Court's reluctance to reverse decisions, which they can, you know, freely do under Chapter 72, it does not eliminate the years and years of claims rotation from the RO to the board to the Court, back down to the board, back down to the RO. I mean, a few months at the Court, a wonderful thing, we would all welcome that. But it does not eliminate the years that veterans have to wait until their claims are finally and properly adjudicated and fully adjudicated.

Senator AKAKA. Joe Violante?

Mr. VIOLANTE. Mr. Chairman, I agree with my colleagues. There is not much more you can say. The Court needs to address all of the legal arguments raised by the appellant and needs to reverse when it is warranted. And they are not doing that, and I think that would take care of a lot of the backlog that is currently occurring, not only at VA and the board but also at the Court.

Senator AKAKA. Thank you.

I would like to ask a question about training, Ms. Cote. As you note in your testimony, NVLSP recruits, trains, and mentors volunteer lawyers to represent veterans who appeal to the Court. In addition to its activities with the pro bono program, you note that NVLSP has trained thousands of veterans service officers and lawyers in veterans benefits law.

The question is: Is it difficult to train attorneys in the area of veterans law where court decisions and new legislation add another layer to its complexity?

Ms. COTE. Is it difficult? I find it very rewarding. In fact, I am headed off to Seattle for training tomorrow. What I am finding in all of these training programs is that for many years, and particularly since the Walter Reed scandal and the other problems, attorneys want to do more to make a difference, so I am finding a wonderfully receptive audience and people who are willing to put in the time to be current on the Court's case law. And we are very aggressive in mentoring. There is communication. There is no case handoff. We work with them as they prepare their pleadings. They are the attorney of record, but we are with them every step of the way to make sure that they are up on everything. And it allows us to indirectly help many more veterans, and that is our goal.

Senator AKAKA. Joe, do you have any comment on that question?

Mr. VIOLANTE. Well, Senator, we have also had a lot of success with large law firms approaching us not only in wanting to represent veterans before the VA, but also assisting active-duty military at Walter Reed go through the medical evaluation boards and physical evaluation boards. And it is a quick learning process for them with the assistance of the organizations that are out there to help them, and I think it is doing a lot to improve the quality when these attorneys step forward and provide this free service to the men and women of the Armed Forces and to our veterans. It is very rewarding to see that.

Senator AKAKA. Mr. Cohen?

Mr. COHEN. Yes, Mr. Chairman. NOVA has had the experience of training lawyers to represent veterans since 1993. We have semiannual seminars in the spring and in the fall, and the first day of that seminar is devoted solely to new practitioners.

We have seen our membership grow from a stable number of 70 over a year ago to 300 at the present time and still growing. We get calls every day from people who want to learn how to represent veterans. We find that it is not easy for someone to make the transition from doing Social Security disability, personal injury, workers' comp, to veterans law because it is so complex and because it is ever changing. But as noted by my colleagues here, we all three do that and have been effective in doing that.

One of the key things is, as you mentioned, mentoring. So we have a bulletin board. We have attorneys available to help new practitioners with questions that they have. But I would mention that ever since the veterans were given the right to hire lawyers and that became known to the veterans and they started going to lawyers and asking them for help, more lawyers have come to us and said, "Would you please train us? Because we understand that there are veterans who want help, and we want to know how to best help them."

And so we are doing training programs likewise all over the country now for various bar associations and various groups to teach these lawyers how to represent veterans effectively.

Senator AKAKA. Mr. Cohen, what in your view explains the Court's historical reluctance to reverse cases, choosing instead to order remands? This has been mentioned. Can you explain that or make any comments on the historical reluctance to reverse cases and instead choosing remands?

Mr. COHEN. Yes, I think there has been some concern on the part of the Court to see itself in a very strict appellate posture as opposed to recognizing that it is an Article I specialized Court. And it has been very, very concerned about not doing any fact finding and taking that to the extreme of not only not doing fact finding, but when the facts are there in the record, as long as the VA failed to recognize those facts, the Court seems reluctant on its own to say, "well, it is in the record, there is no need to go back."

Many times these remands, instead of reversals, are out of an abundance of caution to say, "well, you did not articulate why you rejected all the evidence which is clearly in favor of the veteran, so we will send it back, you can articulate the reason why you did not take all this evidence which is favorable and render a favorable decision."

What will happen in that instance is very often the VA will send it out for another exam, will develop to deny, and then say, "well, we have some evidence here, some evidence there. We are not going to apply the benefit of the doubt. We are going to say our evidence is more—the new evidence is more believable, we deny the claim." But, actually, the Court could reverse, if it understood specifically the legislation that was recently passed where Congress said "you have the power to reverse." I think Congress can make that very clear by new legislation saying that "where there is sufficient evidence in the record, there is no need to send it back." And the Court now has enough experience with veterans law to understand what is in the record and to actually reverse these decisions.

Senator AKAKA. Would any of you—Mr. Campbell?—make any other comments on that?

Mr. CAMPBELL. I think I would bring up two things. First of all, the Court does not remand for the VA to develop negative evidence or to deny the veteran the benefit of the doubt. That is not the way the system works. But I harken back to when the Court was established with the Veterans Judicial Review Act, and I think the concern there was that VA had nearly 75 years at that point as the expert fact finder in assessing veterans' claims, and that in establishing a court of review, Congress did not intend to invade that domain. Congress wanted to strike a balance, recognizing that VA was the expert in fact finding, developing the evidence, and applying its regulations, but that in pure questions of law, then the judges would step in and exert de novo review. And there are quite a few reversals of pure questions of law from the Veterans Court or the Federal Circuit when a pure question of law is involved.

Senator AKAKA. Thank you.

Ms. Cote, please share your views on the relatively limited number of precedential decisions decided by panels of the Court's judges. Do you believe that prevalence of single-judge, non-precedential decisions has hindered the Court's efficiency?

Ms. COTE. Has hindered the Court's efficiency. I do not know if I can answer that. I think it is still part of the problem Mr. Cohen talked about, this overabundance of caution. I think we see the same thing in the volume of single-judge opinions. Certainly as a practitioner, we would like to see more precedential opinions and would find that more useful in arguing our cases. But I do not want to presume why the Court does what it does, but I do think it is the same rationale that makes them remand for reasons and bases, things like that. I am not sure why they do it, but I do feel it is a bit of a hindrance when there is often useful language, useful interpretation of cases, and because the Court's rules prohibit citing two non-precedential decisions in our pleadings, I find that a hindrance certainly.

Senator AKAKA. Thank you.

Mr. Cohen, I want to thank you for your last response about legislative action, and we will certainly take note of what you said. And maybe that would improve the timeliness as well as the efficiency of the courts. So I thank you very much for that.

Mr. COHEN. Thank you, Mr. Chairman.

Senator AKAKA. Mr. Campbell, you note in your testimony that the office filed more than 29,700 pleadings in fiscal year 2007. How

do you forecast your staffing needs for this daunting workload? Is your office budget based on claims receipts, the number of pleadings you file, or some other factor?

Mr. CAMPBELL. That is an excellent question, Mr. Chairman. We are somewhat in a reactive stance, of course, because we have no control over the number of cases that get filed. We have some experience over time in understanding the number of cases that can be handled well by a particular attorney, and we try to project our anticipated caseload in the coming years, and then factor in what we regard as the number of cases that each attorney should be handling, ideally. And we use that in trying to forecast our budget and making our submissions for resources.

Senator AKAKA. Well, I want to thank you all for your testimony and your responses. In closing, I want to tell you that you have been helpful. I hope that we can bring about some legislation that would help the cause here. So I really truly appreciate your taking the time to give us your views on the operation and performance of the Court, and I look forward to continuing to hear from you and to work with you also in helping veterans across the country.

So, with that, this hearing is adjourned.

[Whereupon, at 11:04 a.m., the Committee was adjourned.]

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