

REVIEW OF VETERANS' DISABILITY COMPENSATION:  
WHAT CHANGES ARE NEEDED TO IMPROVE THE APPEALS PROCESS?

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WEDNESDAY, FEBRUARY 11, 2009

United States Senate,  
Committee on Veterans' Affairs,  
Washington, D.C.

The Committee met, pursuant to notice, at 9:35 a.m., in Room 418, Russell Senate Office Building, Hon. Daniel K. Akaka, Chairman of the Committee, presiding.

Present: Senators Akaka, Tester, Begich, Burr, Burr, Isakson and Johanns.

OPENING STATEMENT OF CHAIRMAN AKAKA

Chairman Akaka. This hearing will come to order.

Good morning, everyone. It is good to see all of you here this morning. I am pleased that all of you can join us today for a continuation really, a continuation of hearings that we began last year to look at VA's disability compensation process.

Today's hearing will focus on improvements that can address delays in appeals.

During the last Congress, the Committee held four hearings concerning disability compensation: delays in claims processing, the work of the Veterans' Disability Benefits and Dole-Shalala Commissions, a review of the CNA

Corporation and Institute of Medicine reports on disability compensation and the relationship between compensation and rehabilitation for disabled veterans.

The goal of the Committee is to ensure that claims are adjudicated accurately, in a timely fashion and as close to the veteran's home as possible. Everyone involved realizes that there is no quick fix to solving problems with disability claims, but the Committee, working with the Administration and with those who work with veterans, intends to do all it can to improve this situation.

Tackling the problems will require action on many fronts. At a very basic level, VA must get claims files organized. Last November, I wrote then Secretary Peake suggesting that the Department improve existing paper files. In response, BVA formed a working group to make improvements, and I really appreciate VA's prompt response to my request at that time.

Another facet is greater use of technology. Moving to a paperless file system with electronic medical information must remain a top priority for VA

VA and DOD must continue to build upon the collaboration we have seen in recent years such as through the disability evaluation pilot program and the recent plan to expedite claims, the claims of service members seriously injured in combat.

The problems in VA's claims adjudication process affect appellate review. Also, problems in the appeals system can compound delays and lead to inadequate decisions. Once a claim has been appealed from an initial decision, many new concerns may arise.

As Judge Kasold notes in his testimony, judicial review has now been in place for 20 years. The time is ripe to see what is working, what improvements can be made and to define the purpose and value of several levels of appellate review.

The Board of Veterans' Appeals is a part of VA. It reviews benefit claims appeals and issues decisions on those appeals. The Board began and evolved when there was no judicial review. BVA was created in an attempt to provide independent review of VA decisions. Now that there is judicial review of VA decisions, we can begin to ask about the proper role of the Board.

The Court of Appeals for Veterans Claims is an independent judicial entity and, as such, must be accorded a greater degree of autonomy, but at the same time the Committee must be certain that the statutory authority for the Court is appropriate.

While there have been some positive steps in recent years, especially the addition of new staff at all levels, the progress is unsatisfactory. We are 20 years into the era of judicial review, and I know that it has made a great

difference. At the same time, there have been consequences, much of which were not anticipated when the Court was established.

There are some very interesting, compelling suggestions that will be made in today's hearing, and I intend for the Committee to pursue them.

I reiterate that our goal is to provide veterans with accurate and timely resolution to their cases. No idea is too bold. We must act quickly, yet responsibly, to address the current situation and to find solutions.

I, again, welcome everyone to today's hearing and look forward to a productive session here this morning.

So I would like now to call on Senator Isakson for any opening remarks he may have.

OPENING STATEMENT OF SENATOR ISAKSON

Senator Isakson. Thank you, Mr. Chairman. My remarks would be very brief, to thank you very much for calling this timely hearing.

I have a veteran in my office this morning, a Purple Heart veteran, by the way, who had a 9:30 appointment. I told him I had to excuse myself and leave him with staff because I was going up to a hearing on the timely determination of disability claims for VA, where he shared with me his final disposition of his 100 percent disability took 8 years.

So, since he was down there today and since you called this timely session, I think it is important that we hear from the people at the Veterans' Administration to address it.

Thank you very much, Mr. Chairman.

Chairman Akaka. Thank you very much, Senator Isakson.  
Senator Tester.

OPENING STATEMENT OF SENATOR TESTER

Senator Tester. I, too, want to thank you Chairman Akaka. I look forward to the testimony that will be presented at this hearing.

I want to thank the witnesses for being here, of course, and to share their recommendations to address what I think is the single biggest challenge that faces the VA right now.

Every one of these hearings, I start by saying we have 100,000 veterans living in Montana. It is over 11 percent of the population that served in our military. And I say it every time because I am proud of it. I think the folks in Montana are proud to serve. They are proud to send their kids to service, and these great men and women form a core of American values in these Montana communities.

Everywhere I go in Montana, I hear about the great health care in the VA, but I also hear veterans tell me about how hard it is to get their foot through the door, and

that is a reflection of the disability claims process. It takes too long, it is subject to too many errors, and it costs the veterans too much.

The mere fact that 70 percent of the BVA decisions appealed to the Court are sent back to the VA is astonishing. According to the Court, the most common error is a failure to sufficiently explain the basis for a decision. And how can the VA explain issuing ratings that it cannot support?

It is a waste of time. It is a waste of money. And, it is a waste of resources.

This Committee has provided more resources to the VA to begin to correct this funding and staffing deficiency, and I want to make sure that the money is actually serving the good purpose of serving our veterans.

I believe that as we continue to wage two wars the demand is going to increase on the entire system from the individual claims processor working at the RO at Ft. Harrison, all the way up to the Court of Appeals. So we need to get it right, and we need to get it right fast.

I want you to know that you have my ear. You can count on me as an ally, and I am listening. I am listening for viable, common-sense recommendations that reduce waste, improve care and save lives of our veterans.

Our veterans do not have months or years to wait for a

decision about their health care from the VA. They need it right now.

I want to thank the witnesses for being here. It means that you and your organizations want to be a part of the solution. So I want to thank you for your willingness to roll up your sleeves and get after it.

I am interested in hearing from the panel about what they see the VA doing with that money and what else needs to be done to fix the mess we are in.

The folks who have been in service to our Country deserve nothing less than full, fair hearings before our government, and when we do not give them that, we fail them.

So, with that, I want to thank you, Mr. Chairman. I look forward to the hearing.

Chairman Akaka. Thank you very much, Senator Tester. Senator Johanns, for the opening statement.

OPENING STATEMENT OF SENATOR JOHANNS

Senator Johanns. Mr. Chairman, I also say thank you for putting this hearing together.

I am, as many of you know, very new to the Committee. But I will say one of the things when I talk to my veterans in Nebraska. The first thing they say is we are so happy you are on the Committee, but then they almost always raise this issue as the second issue.

Here is what I am interested in hearing about, and

again part of what I am asking the witnesses to do is give me a little education when you testify. I am just wondering if there is, for lack of better terminology, a triage system in place for these disability claims.

For example, it occurs to me that some would be just be clear, that it is just a matter of moving through the process quickly and doing it and getting to a result just simply because the disability leads to that conclusion under any reasonable definition. I wonder if we have that kind of system that would move these veterans through the process lickety-split.

And then, of course, there are other cases that maybe require more time, more information from the doctor, whatever it is, and those go into a separation determination.

So, again, Mr. Chairman, I really thank you for this.

Help me be educated here. Help me understand what you are trying to do to deal with this system and count me in, in terms of trying to figure out a way to solve the problem.

Chairman Akaka. Let me call on Senator Begich.

OPENING STATEMENT OF SENATOR BEGICH

Senator Begich. Thank you, Mr. Chairman, and thank you very much for holding this hearing. I will be very brief, but what I am looking for, and again thank you for both of your being here.



What I am looking for is kind of a three-stage approach in what would be those realistic short-term ideas that we can move forward on and then kind of the mid and long-term, knowing that we sometimes have great, grandiose ideas to try to solve it all in one fell swoop. That is not practical. But how do we step through it?

Coming from a State like Senator Tester's where a large percentage of veterans, 11 percent of our State's population are veterans, and so this is an issue of big concern for me. So I am looking forward to your comments but also just very practical approaches and realistic resources that are going to be necessary for short-term as well as long-term.

So, thank you very much for being here.

Thank you, Mr. Chairman.

Chairman Akaka. Senator Burris.

Senator Burr. Aloha, Mr. Chairman.

Chairman Akaka. Burr. Senator Burr, yes.

OPENING STATEMENT OF SENATOR BURR

Senator Burr. My apologies for my tardiness. I am going to ask that my opening statement be part of the record.

I am anxious to hear those individuals who are here to testify, and I thank you for calling this hearing.

[The prepared statement of Senator Burr follows:]

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Chairman Akaka. Thank you.  
Senator Burris.

OPENING STATEMENT OF SENATOR BURRIS

Senator Burris. I do not think Senator Burr's family knew how to spell.

Mr. Chairman, I will put my opening statement in the record because I do have to make another markup over at another Committee, but I will be back here.

So I do want to make sure that we are taking care of veterans. That is key.

Thank you, Mr. Chairman.

[The prepared statement of Senator Burris follows:]

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Chairman Akaka. Thank you very much, Senator Burris. We will see you back here with the Committee.

I want to welcome our first panel of witnesses to today's hearing, and I appreciate your being here this morning and look forward to your testimony.

First, I welcome the Honorable Bruce E. Kasold, a Judge of the United States Court of Appeals for Veterans Claims. The Court is part of the Judicial Branch of government and fully independent of VA. I appreciate your participation today so that the Committee might hear the Court's views as part of our oversight of the appellate process.

I also welcome James Terry, the Chairman of the Board of Veterans' Appeals of the Department of Veterans Affairs.

And I thank you both for joining us today. Your full statements will appear in the record.

Judge Kasold, will you please begin with your testimony?

STATEMENT OF THE HONORABLE BRUCE E. KASOLD, JUDGE,  
UNITED STATES COURT OF APPEALS FOR VETERANS  
AFFAIRS

Judge Kasold. Thank you, Mr. Chairman, and aloha.  
Chairman Akaka. Aloha.

Judge Kasold. Members of the Committee, I have the prepared statement, and I present it to the Committee for the record. My comments now will be brief.

Our Chief Judge Greene sends his personal regrets that he would not be here today. But on his behalf and that of my colleagues, we appreciate the Committee's continued interest and oversight into the administrative functioning of the Court and the administrative process from which we receive appeals.

It is also a personal honor to be present here today.

As noted in my statement for the record, the Court recently recognized the 20th year of the passage of the legislation that created the Court, and this coming fall we will celebrate the 20th year of the actual convening of the Court.

I look forward to addressing any questions you might have.

[The prepared statement of Judge Kasold follows:]

Chairman Akaka. Thank you very much.  
Mr. Terry.

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STATEMENT OF THE HONORABLE JAMES P. TERRY,  
CHAIRMAN, BOARD OF VETERANS' APPEALS, DEPARTMENT  
OF VETERANS AFFAIRS

Mr. Terry. Thank you, sir, and good morning. It is a pleasure to be here today on behalf of the Board of Veterans' Appeals to provide information to you and the members of the Committee on the important issues that have been outlined in your letter of invitation.

Turning first to the initial issue, how to mitigate the delay in processing appeals through several targeted approaches, we look first to our effort to increase effective training at the Board, to establish meaningful performance goals--and by that I mean the performance goals for both our attorneys and our judges--and effective communication up and down the Department between our Board, BVA and VHA and, of course, to the extent consistent with our relative roles with the Court.

In looking at our staffing, sir, it is important that we recognize the superb work of this Committee and also your House counterpart in providing us with additional funding for staff hiring over the past three years, and we greatly appreciate that. It has been extremely significant. We have increased our FTE total from 434 to 487.

Certainly, in order to help the new staff achieve their full potential, we have a comprehensive training plan in

place, and that is one that is led by a group of mentors. Certainly, it develops young attorneys, and it enhances the judges' knowledge of substantive areas of law.

Along with training, of course, our rigorous performance goals further enhance our ability to serve our veterans in the most positive way possible.

As you are well aware from our annual report to this Committee, we have been increasing our productivity over the last five years. In the four years that I have been there, we have gone from 39,000 decisions issued to, last year, 43,757 decisions, and we have taken advantage of every communication opportunity to reach out to those who share our responsibility to deliver timely and accurate appellate decisions.

The Board fully supports, and it is important to know that, VA's goal of increasing the use of paperless claims in appeals processing. In fiscal year 2008 we rolled out our first complete start to finish paperless appeal process, and we are expanding that process with the help of BVA and actively preparing to provide timely service to these claims which are right now being processed through the Benefit Delivery and Discharge Program, which is a critical program for those folks coming back from both Iraq and Afghanistan. Their system is a paperless process right now, and that system is being integrated now through BVA and will be at

the Board during the course of the next two years.

You asked us, finally, sir, to address legislative and policy recommendations which would be helpful. As a consequence of recent changes in the law that provide for increased opportunities for attorney representation, the time may be ripe, Mr. Chairman, for shortening statutory and regulatory response periods for purposes of expediting the processing of claims and appeals without--and I stress without--taking any rights or protections from the veteran.

This is at the heart of the Expedited Claims Adjudication Initiative which I will address in a moment. But it is important that we look at this as well as enhanced videoconferencing rather than sending travel boards to each of the regional offices, and these are the types of things that can enhance and promote more expeditious processing of claims.

We certainly promote those, and we ask your support in giving us more flexibility in using more video hearings. We have certainly found, sir, that there is no difference whatsoever in the grant right for someone who is in a room with a judge as opposed to watching the judge on television and the judge watching him from two big screens on different sides of the world, but it enhances our ability to get that case out more effectively and more timely.

In responding to your query concerning the relationship



between BVA and the Court and whether it should be modified, I think it is important to note the high volume of cases before each body, and I think that relative difference in case load is instructive. The Court last year saw 4,446 cases. We saw more than 43,000--43,757, we decided. That is a significant difference, and the resources that are required are very different.

But it is important to note that we can best serve veterans when we eliminate avoidable remands, and we do that by taking due account of the rule of prejudicial error contained in 38 U.S.C. 7261.

As to material fact-finding made by the Board, appropriate consideration must be given to the deferential clearly erroneous standard of review provided in law. We have found that this deferential standard of review ensures that the responsibility for making the highly technical factual determinations required in adjudicating complex medical compensation cases is not removed from the statutorily-appointed fact-finder and transferred to a judicial body.

Finally, I would like to mention just for a moment the ECA. I mentioned to you this is a pilot program. It began just a little bit more than a week ago, sir, on February 2nd.

This program offers accelerated claims and appeals

processing for eligible claimants at four select regional offices, and these are Nashville, Seattle, Lincoln, Nebraska and Philadelphia. We believe that this program will serve as an excellent role model for a systemwide expedited claims adjudication system after this trial period is concluded.

Thank you for the opportunity to testify this morning, Mr. Chairman.

Thank you, members of the Committee, for the opportunity to be here and explain our programs. I would be delighted to answer any questions.

[The prepared statement of Mr. Terry follows:]

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Chairman Akaka. Thank you very much, Mr. Terry, for your testimony.

Before I begin with questions, I would like to acknowledge the presence in this room of Judge L. Lance. Judge, welcome. He is from the Court of Appeals for Veterans Claims.

We are glad to have you here with us today.

Chairman Terry, the Board began and evolved in a time where there was no judicial review. We needed a way to provide independent review of decisions from regional offices, simple checks and balances.

Now that the Court has been in existence for 20 years, what do you see as the current value of the Board and, most especially, the need for and value of a de novo review?

Mr. Terry. Sir, as you know, the 57 regional offices hear each year about 840,000 cases. Of these 840,000 claims, 55 percent are older, are people who are already in the system, and 45 percent are people who are new in the system.

Of that number, they grant at the regional office level approximately 61 percent of those cases or better than 500,000.

There are 300,000 that are denied for one reason or another. Of those 300,000, the pool of some 40-odd thousand cases comes to our Board.

So about 12 percent of those that are denied at the regional office level come to our Board. That is a huge number of cases.

You have to remember we have the facility in our Board, with 60 judges and nearly 300 attorneys, to adjudicate timely and fairly, and we do it timely. We have a cycle time right now of 116 days or between 3 and 4 months to adjudicate a case from the time it arrives on our doorstep. That does not include the time that the case is being reviewed by the Veterans Service Organization.

But that is, in effect, a very positive number when you consider that it was 154 days only 2 years ago. We are making tremendous strides to reduce that cycle time.

When you compare that to the Court cycle time of 444 days and you compare the fact that they dismiss a great percentage of their cases, so their actual time for those that they adjudicate is somewhat longer, I think it puts in perspective how well the Board is actually doing.

To get to your question of why it is critical that the Board function and improve its functioning, the number of cases alone would overwhelm the Court of Appeals for Veterans Claims. They receive, as I said, some 4,000 cases, and they adjudicated last year a number in excess of that which they actually received and to their credit. But they would be overwhelmed by a system in which they had that many

claims to adjudicate. So, just in numbers alone, there would be no way that one body of the presently structured Court could handle that number.

That doesn't mean they do not do an extremely fine job and aren't totally professional in what they do. We all concede that, sir

Thank you.

Chairman Akaka. Chairman Terry, I am very concerned that 70 percent of the cases appealed to the Court are remanded for further adjudication. How do you explain this very high remand rate?

Mr. Terry. I thank you for asking that because I was quite concerned with the written testimony of Judge Kasold where he talked about a 70 percent remand rate. I have the Court's statistics from last year here right in front of me. They decided 4,446 cases and remanded 1,625 which is 35 percent by anybody's calculation and not 70 percent.

And when you take into account, sir, and I think this is critically important, that 60 percent of the remands coming out of the CAVC--60 percent--are never seen by a CAVC judge but instead are the result of settlement actions as joint motions for remand by the parties before the Court. I think that is critically important.

Some 900 of those 1,625 are not the subject of remands by the Court but are processes that are administrative in

nature, agreed to by the parties. I think that needs to be kept forefront in the minds of the members when you are considering this.

I have the statistics from the Court of Appeals for Veterans Claims for last year, and I would be glad to share that with the Committee if they would desire to see that.

Chairman Akaka. Judge Kasold, will you please respond to that?

Judge Kasold. Well, obviously, I will defer to the Chairman's numbers until we get back to the Court and I find out where the discrepancy is.

With regard to the number of appeals that are remanded, accepting the numbers presented by the Chairman, and I have no reason to doubt them. I assume there is a mistake in the numbers that we presented.

But with regard to the numbers that he just mentioned, with regard to those that are remanded, the fact of the matter is the joint remands came because there was an appeal to the Court, and then it had to be looked at more closely by the Secretary, and then the Secretary determined that in the Secretary's view the Board had made an error, and so a remand had been provided.

With regard to the 30-some odd percent versus the 70, we will get back with you, Mr. Chairman.

Chairman Akaka. Thank you. Thank you very much.

Judge Kasold, you stated in your testimony that efforts should be taken to reduce the number of errors made, in particular, repetitive errors in cases appealed from the Board. Can you elaborate on what kind of repetitive errors the Court is seeing and what efforts would you recommend?

Judge Kasold. Well, we see an awful lot of inadequate notice errors. We see an awful lot of reasons and bases errors which is the explanation that is provided by the Board for their decision, which then ties into whether or not a medical exam should have been given, for example. That is frequently tied into that. We see a number of inadequate medical opinions that have been obtained, and we see inadequate effort taken to secure other evidence or documents. Those are the ones that we generally see there that are the subject of a remand.

I have to defer to the Chairman and the Secretary because just naturally you would think it is either a resource situation or a training situation, and I believe the Chairman has indicated he is aware of that. But any other specific things, I think I would have to defer to the Chairman who is on top of that.

Chairman Akaka. Senator Burr.

Senator Burr. Thank you, Mr. Chairman.

Judge and Mr. Chairman, welcome.

I am going to try and look at this as a layman for just

a second. One of the difficulties we have had in the past I think is accurate numbers, but I am going to assume the numbers I have are accurate for the purposes of this.

Fiscal year 2008, the VA regional offices received 891,000 and some change claims from veterans, the Board of Veterans' Appeals received 40,916 appeals and the Court of Appeals received 4,128 appeals.

In the fiscal year 2008, the VA regional offices decided 899,000 and some change, the Board of Veterans' Appeals, 43,757 and the Appeals Court, 4,446.

Now that shows we are actually processing more than we are receiving. That is a positive trend.

I have some questions about where we go from here, and the question I think at the heart of everybody is how do we get rid of the backlog because clearly we have in place a structure that, under the number that come in, we can process back out in one of the three areas that number and possibly a little bit more. Now to get rid of the backlog, we are talking about years and years and years.

So one of the things I will pursue with the Chairman is: Is there is a surge strategy that we can use that is short-term, that is targeted and that is temporary, that we can dispose of this backlog that is in the system because clearly we have a structure right now that is able to handle and process the number of new claims that are coming in the



system regardless of which area they come into?

Let me go specifically to some question, though. In 2005, Chief Judge Kramer offered recommendations to this Committee on how to stop "almost a never-ending cycle of both the Board of Veterans' Appeals and Court-ordered remands, which in his view "clog the system and prevent timely justice for all claimants."

One, do either of you share Judge Kramer's view about remands clogging the system and do you have any specific recommendations to reduce the number of remands from either the Board or the Court? Judge?

Judge Kasold. Yes and no is the answer, Senator.

The 800,000-some odd processed has about a 5 percent appeal to the Board, has about a 10 or 15 percent appeal to the Court.

Again, I do not know and I cannot speak authoritatively to the processing at the Board and what might be needed at the Board for their particular decisions, but they process a significant number of decisions.

Within the Court, as you indicated, we are now processing claims as they come in, the appeals as they come in.

Our Chief Judge recently implemented this past spring an aggressive mediation process which is having some favorable results. Taking rough numbers, half of the

claims, actually more than that, come in pro se. But those that come in with attorneys go through the mediation process, and about half of those are being remanded without going through the judicial process.

Within the Court, I might add that you switch from an administrative process below where the veteran gets his de novo review by the regional office and a de novo review by the Board. He gets two absolute fresh looks down below. Whether that should be continued or not might have been raised by the Chairman's question, but certainly that is beneficial, I would think, to the veteran.

And that is non-adversarial. The Secretary is duty-bound to assist the veteran.

He then moves into what is the judicial arena, an adversarial arena. Now we have two parties. Yes, the veteran disagrees with it, but the Secretary most often agrees with the Board decision. Obviously, with the number of agreements and settlements we get in mediation, the Secretary even disagrees with some of the Board decisions, and because they got the appeal right they then looked at it closer and that was sent back.

But you get into the judicial arena, and now we have two parties, and so you have 60 days, actually in the past. Just recently we changed it, trying to shorten it down. But 60 days to prepare a record, 30 days to respond to it and 30

days to then submit it to the Court. You have 100 and whatever that number of days is right there.

You then have 60 days for briefing for the appellant, 60 days for the Secretary and 30 days to respond.

This is traditional, normal processing. You have 170 days or something, 270 days in that process.

The Court has changed its rules to eliminate about 30 days of that processing with the record, and I cannot say at this point that we have gotten the full benefit of that because there are some changes being made down at VA that it is not fully implemented at this time, but we are working towards it. The copying of the record electronically, et cetera, they are adjusting for all of that.

But you cannot shorten that much more because you have an adversarial system with two parties coming up and making a presentation.

Obviously, I am not the Chief, so I do not usually get into these numbers but in preparation for here, although I may have made a mistake on the information they gave me with the other 70 percent. When you look at the numbers that go to Court, we have a single judge decision process which I might add is very favorable to the time processing of these claims and favorable to the veteran because the Court has taken the position that we will give a reason why the case is being remanded.

We might have some discussion later about summary disposition which is a yes or no. You win or lose with no decision. That doesn't really help the veteran. It doesn't help the Board. It doesn't give them guidance with regard to why it was appealed. Yes, other appellate courts do it in a number of cases, but we haven't seen it to be appropriate with this case.

Anyway, back to what I was saying. Those cases that present no new, novel issues, those cases that present a fact scenario that is not reasonably debatable are decided by single judges, and those are most of our cases.

And those cases are being decided well within a 60-day period when they get to chambers. Some are in the 90-day period, and a few of them that are more complex go longer. Those that go to panel go longer. That is another issue. They present new, novel issues that will impact the entire system down below, et cetera.

But the actual processing, the judicial review processing is taking in the 60 to 90-day process for most of those cases. I know those numbers haven't been put together for the Court, but when you go through this, it is something that I am going to recommend to the Chief Judge, that he then present back to the Committee so that it can see that particular part of it in the judicial process.

You also have at the end of it, and these are all kept

in the time processing at the Court, you have at the end of it a process for reconsideration of panel requests. It takes 21 to 51 days, 51 days if you are overseas, 21 days though, generally. If you do not seek that, you then have 60 days before the mandate issues to take an appeal to the Federal Circuit.

If you do seek a reconsideration by the single judge or a panel, he will then get that type of a decision, and that is more time that will be implemented. I haven't seen those figures, but just you can imagine there is additional briefing possibly, et cetera, on that.

Then you bring in judgment, and then you bring in mandate. If they go to the Federal Circuit, all of that time is included in the 400 and some odd days that you see accounted for the Court. It is kept on our records.

At the Federal Circuit, we just had statistics for this past year. A hundred and some odd cases have been up there well over a thousand days. So, while they have an overall processing time that is less than that, this past year in fact, which has impacted I believe our numbers, they had again over 100 and some odd cases that that they kept up there for over 1,000 days.

All that impacts the time. If you look at the actual judicial judge's time that is put on these, you are getting a decision on most of them 60 to 90 days. Then our panel

cases, as I indicated, are longer.

That pre part, I do not think you can reduce very much because you have an adversarial system and the briefing has to be done, et cetera.

The post part, frankly, it is a result of this dual, unusual judicial appellate review that we have within this system and something that I recommended in my testimony be looked at.

This Court has been around for 20 years. There are two other Appellate 1 Courts. Both of them have cert directly to the Supreme Court. The Court of Appeals for D.C. did not originally. It went to the D.C. Federal Court, and then after time it was given cert to the Supreme Court. That will take out the back portion of all this numbered processing, and it has an effect downhill, if you will, because those that are decided on the merits by the Federal Circuit can have precedential effect that impacts an awful lot more cases.

So it is very interesting, looking at these numbers and seeing them. Again, I will ask the Chief Judge to present them to the Committee because the judicial processing I believe is going in a normal process. I think the appellate time at the end is unusual for our reporting purposes.

Senator Burr. Chairman Terry, did you have anything you would like add to that question?

Mr. Terry. Thank you, sir.

I agree with what Judge Kasold has said. The issues right now in terms of how cases are delayed are so tied to a regulatory and statutory structure in terms of absolute guaranteed times to submit evidence and to provide an opportunity to submit all available information, and that is one of the areas that I think the Expedited Claims Adjudication Initiative will really help. If this in fact does provide a template for some changes in statutory and regulatory practice, I think it would be tremendously helpful.

We agree that certainly we look at changes in the law and the failure to exhaust administrative review and settlement action and failure to properly apply and consider prejudicial error of standard as just other reasons why the remand problem exists and also why we have delays as a result of that remand problem.

Bringing down the remand rate both at the Court and from the Board is one of our principal and continuing endeavors it is at the Court. If we can bring down that remand rate, there is no question that we can improve the timeliness of our decisionmaking overall within the system.

Senator Burr. I thank you.

Thank you, Mr. Chairman.

Chairman Akaka. Thank you very much, Senator Burr.

Senator Begich.

Senator Begich. Thank you, Mr. Chairman.

As a new member to the Committee, I will have probably some very naive questions. But to be very frank with you, as I am sitting here, watching you two, I am glad there is a chair between you. But I am not sure that is healthy, to be very frank with you. So I am one of these that look at things that I am sure later I will be told by many different organizations this is the way it is, this is the way it has been.

But I am trying to figure out, and I use my experience as a former mayor, strong executive process. When people have an issue, we have a hearing officer. They make a decision, and then that is it. If they do not like it, they go to court, and that is it.

In your comments you made, the dual system has been around for a long time. I just want a very simple answer. I do not want an explanation. I do not want a defense of numbers and all that because numbers can go all kinds of ways.

The goal is to streamline the process, make it more effective, and benefits that are owed to veterans are paid for and dealt with. Is it time to take a real serious look and change the system and streamline it?

I will start over here with Mr. Terry.



Mr. Terry. I think we have been in the process of streamlining the approach taken, and I think that is reflected in the number of cases and the error rate. For example, the number of cases reversed last year by the Court of Appeals for Veterans Claims of Board decisions were seven in number.

Senator Begich. Seven total out of how many, gross number?

Mr. Terry. Well, they decided 4,446 or 7 pure reversals, and we can certainly get you those cases.

Senator Begich. You are arguing my comment here.

Mr. Terry. But I think my concern is that we have a process where we have the opportunity to make decisions as provided by law presently, and the Court likewise follow the procedures that are set forth for the Court's determination. If we are both scrupulous in our attempts to do that, then the process works exceedingly well, and I think the Court and the Board are trying very, very hard to do that.

There is no question that at times there are differences of view of how the system can best be organized and managed. But at the same time, overall, despite your perception, I think we have an excellent relationship with the Court, and I think we have the ability through our conferences and through training that we do within VA and certainly the communications we have with the Court to

really make some inroads and improve it further.

But I think that is everybody's intent. I know it certainly is ours, and it certainly is the Court's. I know, talking to Judge Greene and Judge Kasold, all of whom we have known for years and years and years, having served in the military together. But I can tell you we have the greatest respect for the personnel on the Court, and I think they share that respect for us.

Sometimes there is a difference of view of how to get to Point B, but I think we are all working to get to Point B.

Senator Begich. Great.

Judge Kasold. First, let me say that any implication I gave that there was bad blood here, I was surprised he was surprised by the 70. That is all, to be honest with you.

Senator Begich. Okay. Good.

Judge Kasold. If we are wrong, we will absolutely correct it.

Senator Begich. Good.

Judge Kasold. Obviously, the answer is yes with regard to the judicial appellate system. We believe that 20 years of developed case law now allows this Court to proceed and allow a cert to go to the Supreme Court. Even the Chief Judge of the Federal Circuit in talking to our Chief Judge, I am told because I didn't have that conversation but as it

was relayed back to me, agrees that that judicial review is extra and not needed.

So should a commission be put together or whatever is done to review that particular aspect, yes, I think it is the appropriate time to do that.

And we have precedent in the D.C. Court of Appeals, which went through a very similar process, and the Court of Appeals for Armed Forces, which didn't have an intermediate court but had a tremendous habeas corpus route that was going on, now has direct cert to the Supreme Court to eliminate, to cut down on that. Both of those are the other two Article I appellate courts. So it does seem appropriate.

With regard to the Board, again, I have to defer to others. But I would say, just looking at it from the outside and as an appellate judge down, two de novo reviews below, the ability to gather evidence through that entire process is of benefit to a veteran, it seems to me.

When you look at 800,000 claims being processed, I guess we have numbers of 600,000 being paid or whatever. I do not want to get into their numbers. I defer to other people.

Senator Begich. Right.

Judge Kasold. But the point is should it be looked at? Sure. There is nothing ever wrong with looking at a system,

but it does provide, it seems to me, two de novo reviews and the continuum of evidence-gathering on their part. A lot of their remands, for example, go down to the RO, additional evidence-gathering and resolved at the RO.

A lot of times, you file an NOD which I do not know if he reports them as his statistics, but you file an NOD which begins the appellate process, and from that appellate process you get a statement of the case that explains what the issues are in the case, and then new evidence is submitted and an RO decision is rendered in that case. Again, I do not know if they are his numbers or not, but it is a two de novo review with continuum of evidence processing down below.

Senator Begich. Is that because there is more discussion that causes that or is it because they have more time?

Judge Kasold. Which?

Senator Begich. In other words, when more evidence is brought. I am trying to figure out what because the number you used. I want to make sure I get this right. You indicated seven cases last year.

Mr. Terry. That is by the Court of Appeals for Veteran's Claims, pure reversals.

Senator Begich. Right. That is what I am talking about. So I am trying to figure out. The ones that you

described that had been remanded back, is that because the time allotment gave more time for the person to bring more evidence or is it that there was no evidence given at the front end that should have been and just was missed?

I am trying to figure out what caused.

Judge Kasold. And the Chairman can talk about the difference between the RO and the Board, and I can give two cents on it, I guess.

But within the Court, what happens clearly is the Board is independent. It is the final decision of the Secretary.

Now, when you go to Court, you have a Secretary, I mean a counsel's arm that looks at these cases and through this aggressive mediation process.

Senator Begich. You are looking at it.

Judge Kasold. You are looking at it from the side, and now someone else is saying, the Secretary himself on a number of them. Fifty percent of those that go through the mediation process, since we started in April, are being remanded without the actual judicial review.

The second thing that happens is the briefing. The briefing goes on. Well, you have attorneys involved. You may not have attorneys involved in all of these cases. Now you get briefing, identification of issues. That can help both in the mediation process and then in the judicial appeal process, identifying issues that maybe the Secretary

didn't agree to, his counsel didn't agree to.

But when it gets before a Court, we say, yes, your reasons and bases are wrong. Yes, you should have gotten a medical statement. Yes, something along those lines.

With regard to an outright reversal, the facts have to be fully developed to give an outright reversal. So, if you are remanding because of the lack of a medical exam, because of a reasons and bases issue, because of inadequate notice that was provided to the veteran which caused inadequate development down below, your absolute actual reversals are going to be less.

There are more reversals on actual facts and things like that than were mentioned, but seven actual reversals I suspect that is correct.

Senator Begich. Great.

I know my time is up, Mr. Chairman.

Chairman Akaka. Thank you very much, Senator Begich. Chairman Terry?

Mr. Terry. Sir.

Chairman Akaka. At present, decisions by the Board are not precedential, meaning that regional offices are free to ignore decisions of the Board. Do you believe that this is an appropriate outcome?

Mr. Terry. Let me explain, Mr. Chairman, why I believe that it is. When you render this many decisions per year,

if they were to be published and circulated and bound and provided to each and every litigant attorney practicing before either the Court or before our Board, it would be a system that would be simply unmanageable.

When you look at how precedential decision bodies work and how they publish decisions and when you remember that each one of our cases are fact-specific in which the judge has to give the benefit of the doubt to the veteran, making that nuance in each case so very different, under our law, both cases approaching equipoise and in equipoise have to be rendered in favor of the veteran, and we do so. If we were to try to capture that in precedential decisions, which are fact-specific, it would be a nearly impossible task as well as daunting with respect to the number of published decisions that we would have coming out each month.

For example, sir, in the last four weeks, our Board has rendered an average of one thousand decisions per week. That is a daunting number when you consider they are between 15 and 40 close-typed pages and specifically look at the facts and circumstances of that veteran's case and apply the law in a way which gives him the benefit or her the benefit of the doubt. If we were to try to make that a precedential system where you had head notes and you were trying to go back through 1,000 cases and ensure that the benefit of the doubt rule as applied in this case looked the same as

applied in that case, you would really have an impossible task and a daunting task.

I think the Board is entirely consistent. We do training to ensure that our judges' decisions are consistent, but giving the opportunity for the judge to render the benefit of the doubt to the veteran is, I am sure, not something that can be carefully captured in precedential decisionmaking at this time.

Chairman Akaka. Chairman Terry, what would happen if the time period for filing a notice of disagreement was reduced from 1 year to 180 days?

Mr. Terry. Sir, we would certainly support that. We would support that. I know that many of our Veterans Service Organizations and, specifically DAV, have suggested that. We support them in every respect.

That is a basis for which the ECA was developed, trying to make the system fairer for our veterans by ensuring that they had all necessary time to submit information and evidence before our Board and before the regional offices but, at the same time, ensuring that we are able to process their cases most fairly for them.

So, yes, sir, I certainly think that would be a tremendously beneficial process.

Chairman Akaka. Chairman Terry, are there enough veterans' law judges at the Board and can you please tell



the Committee how performance of veterans' judges are assessed?

Mr. Terry. Sir, we have I think a very different review process than any other board of our kind. We have a peer review process. We have an evaluation process by our senior judges of each of the judges within the four teams each year. A panel sits and evaluates the error rate, the productivity, the care in which the judge performs, the leadership he provides or she provides over their teams each year. In fact, we certify to the Secretary each year each of the judges on the Board.

It is a complete review process, and certainly this is a process that we take great pride in, sir.

Chairman Akaka. Are there enough veterans' law judges at the Board?

Mr. Terry. Sir, we have 60 judges. The Secretary gave us authorization to increase by four last year. We think that the judge number is right. We develop with our senior attorneys and use them as acting judges on occasion, and this allows us to train our fine senior attorneys as judges.

I do not believe there is a lack of judges as expressed by the fact that we are certainly turning out more decisions than we have coming in right now.

Just for the record, sir, when I came in, the number of the backlog was about 24,000. It is now below 16,000 for

the first time in 5 years, and we take great pride in that.  
Chairman Akaka. Senator Burr.

Senator Burr. Mr. Chairman, just one question.

Mr. Terry, you said in your testimony the time might be ripe for shortening certain statutory and regulatory response periods for the purposes of expediting and processing of claims and appeals. Can you explain?

You also raised a question about without taking away rights or protections of the veterans. Explain how you shorten the periods and how you draw the distinction that you are not infringing?

Mr. Terry. Certainly, sir.

In today's veterans' environment, nearly all our veterans or a great majority of them are represented by either veterans' service officers, very capable veterans' service officers, or by attorneys. In representing these clients, each of our veterans, they are assisting them along the path of making sure that all their evidence is submitted.

What we are simply suggesting is, as in the Expedited Claims Adjudication Initiative, when a veteran has an opportunity to submit all evidence he has indicated he possesses and indicates that to either the regional office or to our Board and then makes it possible for us to move forward to the next stage. What we are saying is if we

institutionalize that to some degree, it may be helpful for those represented clients.

That is if in fact they have submitted everything and indicate to the system that they have, then we should not have to wait for the entire year or six months. We should be able to move forward and process their case more expeditiously.

And I think there are ways we can do that. The Expedited Claims Adjudication Initiative is a first step, and we certainly appreciate the support that we have gotten from the Committee on that initiative.

Senator Burr. Thank you.

Thank you, Mr. Chairman.

Chairman Akaka. Senator Begich.

Senator Begich. If I can just follow up on the Chairman's question in regard to judge review, I think that is great that you do that, especially on an annual basis. Do you also do an analysis by judge of the levels of denials and of appeals?

Mr. Terry. We do. We have. We catalogue each of the judge's decisionmaking exactly, and we ensure that it is within appropriate ranges, yes, sir.

Senator Begich. I do not know if this is the right phrase, but after you have gone through the process of a kind of recertification or gone through the review, have you

ever, the phrase I will use I guess is decertify the judge?

Mr. Terry. I have been there four years, sir. We had one conditional recertification that I was in.

Senator Begich. So there is a process.

Mr. Terry. Yes, absolutely.

Senator Begich. Okay. Then I am curious. You had mentioned. Actually, I am not sure which one mentioned, but I think it was you that mentioned about the videoconferencing, that you would like more authority. Is there something legislatively that has to be done to give you that authority?

Mr. Terry. There is because guaranteed in law at this point there is an opportunity for an individual to have an in-person hearing with a judge, and that has been interpreted not to include a video hearing even though you can see the individual back and forth.

We would like the flexibility to do what is most expeditious for the veteran. They have the opportunity for our Board. If it is going to be a travel board, that is fine, but if it is a case where it is most effective to have a video hearing and we have the resources available wherever the veteran is, with his representative, we would like to be able to do that. We would like to have that simple change.

Senator Begich. Yes, I would be very, very supportive of that. So, if there is anything.

Mr. Terry. Thank you very much, sir.

Senator Begich. I think it is a great idea. I mean we do it in Alaska with our judicial system. Because of the distance between here and Alaska, my six and a half-year-old and I can talk through video every night. So if we can do it there, we can sure do it here.

The other question I would just be curious on, the judges that you have. You had mentioned you have about 60 judges. All positions filled?

Mr. Terry. Yes, sir.

Senator Begich. Is there support staff that you have at a level that is filled or needed additional resources?

Mr. Terry. Sir, we have been tremendously well supported by this Committee, and we feel we have the right mix at this point. I think that we are able. We were able to hire in the last 3 years between 434 and 447, and we are going to go to about 500 pursuant to already allocations that are made by the Department for this year.

Therefore, I believe, sir, that we have the resources to really eat into that backlog and bring it down, I believe, to 10,000 before the end of this year.

Senator Begich. Great. So you have the support staff for the judges, which is critical.

Mr. Terry. Yes, sir. Absolutely. Each of the judges is supported by 6 attorneys who write for the judge, and

each of the attorneys is asked to provide 156 quality and timely drafts a year. Each of the judges is asked to sign 752 decisions a year. Last year, each of our line judges did far in excess of that as did our attorneys.

Senator Begich. Great. Thank you very much.

Chairman Akaka. Thank you very much, Senator Begich.

I want to thank this panel for your testimony and your responses. It will be helpful for the Committee. I want to wish you well, and this panel is excused.

Judge Kasold. Thank you very much, sir.

Mr. Terry. Thank you, Mr. Chairman.

Chairman Akaka. I want to now welcome our second panel of witnesses. They are here to share their thoughts on how the appeals process for disability compensation can be modified. I look forward to hearing your statements.

First, I welcome Kerry Baker who is Assistant National Legislative Director for Disabled American Veterans. I also welcome Richard Cohen, the Executive Director of the National Organization of Veterans' Advocates, Inc., and I welcome Bart Stichman, the Joint Executive Director for the National Veterans Legal Services Program.

Thank you all for joining us today. Your full statements will appear in the record of the Committee.

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

STATEMENT OF KERRY BAKER, ASSISTANT NATIONAL  
LEGISLATIVE DIRECTOR, DISABLED AMERICAN VETERANS

Mr. Baker. Thank you, Mr. Chairman and members of the Committee. I am glad to be here today on behalf of the DAV.

As you know, the appeals process is extremely complex and extremely lengthy. The VA estimates that it will decide over 940,000 claims in 2009 which will likely generate as much as 132,000 appeals. This represents at least a 30 percent increase in appeals. Such an increase in appellate workload severely affects VA's ability to devote resources to initial claims processing.

Our recommendations are intended to simplify the process while preserving resources and reducing expenditures. Some of the recommendations contained herein may appear novel or controversial at first. They may even draw criticism. However, such responses would be misdirected.

These recommendations are carefully aimed at making efficient a rather inefficient process without sacrificing a single earned benefit. They include removing administrative burdens in the appeals process by, one, incorporating the appeal election letter into the notice of appellate rights that VA provides with initial rating decisions and, two, eliminating to the extent feasible the requirement to issue supplemental statements of the case or SSOCs.

We also propose larger recommendations such as reducing the period in which an appeal can be initiated from one year to six months and disbanding the Appeals Management Center.

By including the appeal election letter along with a copy of a rating decision, which VA must already provide the veteran with appellate rights, the VA will no longer have to generate and mail approximately 100,000 letters annually.

Additionally, by no longer issuing SSOCs in most cases, the VA will reduce an extra 50,000 mailings. Some SSOCs are substantially complex and therefore time-consuming.

These two actions alone could save VA approximately 100,000 annual work hours. This may even be a conservative number. That amount of reduced work is equivalent to 625 VA employees working for 4 full weeks. That is significant, we believe.

The DAV also believes that the time has come to reduce the one-year appellate period currently allowed for filing a timely NOD following the issuance of a rating decision from one year to six months. Reducing the appellate period from one year to six months would not reduce veterans' benefits. Rather, it would further reform and streamline the actual administration of the claims process which includes appeals.

Finally, the DAV believes the AMC should be dissolved. Regional offices should be held accountable for their own mistakes. In fiscal year 2007, over 7,000 cases or nearly



20 percent of appeals reaching the Board cleared the local rating board and local appeals board with errors that were elementary in nature, errors that were either not detected or ignored. Such basic errors would not occur if RO personnel were held responsible for their own work.

Further, the AMC is succeeding at resolving less than 2.8 percent of VA's appellate workload. The AMC completed nearly 12,000 appeals in 2008, far less than the number received from the Board, out of which nearly 10,000 were returned to the Board, 89 were withdrawn and only 1,789 were granted. In fact, 2,500 appeals were returned to the AMC at least a second time because of further errors in carrying out the Board's instructions. That is a 25 percent error rate.

These reasons support the proposition to dissolve the AMC.

In closing, the VA will never be able to maximize its recent increases in staffing without making processes more efficient. If such changes are made, the VA will see vast improvements in its entire claims process that are essential to achieving the broader goals of prompt and accurate decisions on claims.

Likewise, only then, will the VA be able to incorporate training, quality assurance and accountability programs demanded by the veterans' community.

It has been a pleasure to appear before this honorable  
Committee today.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Baker follows:]

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Chairman Akaka. Thank you very much, Mr. Baker.  
Mr. Cohen, your testimony, please.

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

Mr. Cohen. Good morning and aloha.

Chairman Akaka. Aloha. Good morning.

Mr. Cohen. I thank the Committee for the opportunity to present the views of the National Organization of Veterans' Advocates.

We have a unique perspective because our 300 members actually represent veterans and are in the trenches with them. Many of our members are veterans.

We know that the VA is facing a storm of claims coming out of the global war on terror. We also know there is a tremendous backlog. And, we know that Congress has been doing everything it could, including passing the Veterans' Benefits Improvement Act of 2008 which mandated monitoring the training and certification in the VA. That has all been helpful.

But when the reports come back showing that the training is inadequate, because we believe it is, and that the work credit system is a disincentive to reaching correct decisions, we would hope Congress would revisit this issue and pass legislation to require good training, adequate training and get rid of the work credit system.

One of the things, I need to change the thrust of my

testimony because of things that were said previously. One of the suggestions that was reported by the Court was to get rid of the Federal Circuit. That would be a big mistake because without the Federal Circuit there would be no place where a veteran could challenge a rule of the VA. That is done in the Federal Circuit.

In addition, the Federal Circuit has been instrumental in developing veterans' jurisprudence in the area of equitable tolling when the Veterans' Court would not reach any precedential decisions. Rather, it did single judge decisions which carried no weight and which did not develop the law.

Furthermore, just recently, there was a case named Moore that came down on the duty to assist, where the Federal Circuit was instrumental in reversing what the Court did. It was in error.

So the Federal Circuit provides to the Court what the Court provides to the BVA.

I would also state that the idea of doing remote hearings in all cases or in many cases is not a good idea especially with the flood of veterans who are suffering from PTSD and from TBI or who are elderly. They cannot understand on remote. It presents a problem. There is a time delay on the equipment that is being used right now.

And the biggest problem is the record cannot be in two

places at the same time. So, if I want to tell a veterans' law judge, look on page so and so, look at this document, I cannot because we do not have the same documents in front of us.

I would also want to call the Committee's attention to the fact that the information in the Court's testimony regarding the remand rate is correct. It is 60 percent. If you take the number of merit decisions and subtract from that, the extraordinary relief decisions, you will find pure merit decisions. Then if you look at the number that were remanded, you come up with the 60 percent figure.

It is important to remember that the figure that is remanded for bad decisionmaking by the Board does not represent all of the bad decisions. Most of the bad decisions, the decisions that have inadequate reasons and bases, inadequate explanation are remanded by agreement of the parties. Those are the ones that, in mediation, go away.

There is a tremendous number of bad decisions coming out of the BVA. Bad decisions are what contributes to the backlog, bad decisions from the front end to the back end.

What can we do about this? We need to restructure the system. Congress was right years ago when you said that VCAA is important. Notice, advance adjudicatory notice is important. What we need is a notice up-front telling the

veterans what they need to submit and where they can get it.

Many times when our people get involved in the case it is after the NOD, and we say to the veteran, oh, you just need to do this and that. You should not have been arguing that you were injured in service. What they want to know is if you have a present disability.

They say, no one told us.

What we need to do is get rid of the six separate regional office teams that they have, pre-determination rating, post-determination.

Have one team that can issue a case-specific notice that is helpful and veteran-friendly. Have the veteran contribute with the VA in developing the records. They can get their medical records and bring them in. They can get an opinion from the doctor.

The other thing that would do a long measure to reduce the time is amending 5125. Where a veteran requests that their doctor's report be accepted in lieu of a compensation and pension exam, that should be mandatory if it is an adequate exam sufficient for rating. That saves tremendous amount of time.

If we rework the system, if the VA would remanage the way they handle their claims process, they could save a lot of time by making correct decisions.

The problem with the backlog in the Court and the

problem with the backlog in the VA is all bad decisions that keep coming around.

I notice my time is up.

Thank you.

[The prepared statement of Mr. Cohen follows:]

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Chairman Akaka. Thank you very much, Mr. Cohen.  
Now we will hear from Mr. Stichman.

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STATEMENT OF BARTON F. STICHMAN, JOINT EXECUTIVE  
DIRECTOR, NATIONAL VETERANS LEGAL SERVICES PROGRAM

Mr. Stichman. Thank you, Mr. Chairman and members of the Committee. The National Veterans Legal Services Program appreciates this opportunity to address you and address the questions that are before the Committee today.

One of the major problems in the appellate system at the VA is what advocates call the hamster wheel system of justice in which veterans are constantly having their claims moved from the regional office to the Board back to the regional office to the Board to the Court, remanded back to the Board for additional decisionmaking. That is a major problem in the system today, and there are four major reasons for that problem.

The first is premature decisionmaking by the regional offices. What I mean by that is the regional office makes a decision prior to gathering all the evidence it is required by law to gather.

Why does it do that? Because it has a work credit system that rewards decisionmakers for making decisions quickly without punishing them for making decisions inaccurately. And so, that is why over 30 percent of cases are remanded by the Board to the regional office because they have not gotten the evidence needed before making the decision.

The second reason for the hamster wheel is the poor decisionmaking at the Board of Veterans' Appeals. As a number of witnesses including Judge Kasold have stated, over 70 percent of the decisions of the Board that have been appealed to the Court have been sent back because the Board made one or more errors. That is a terrible grade, and that has consistently been true for the last 14 years.

It has not only been true on Chairman Terry's watch. It has been true on previous chairman's watches, and nothing changes. The same mistakes are made time and time again.

They do not explain, the Board doesn't, why they rejected positive evidence in the record. They do not assess lay testimony that is submitted by the veteran. They act as if, if the evidence is not in the service medical records or in the service personnel records, then despite what the veterans and witnesses have to say occurred during service, it did not happen. Those cases are remanded by the Court to the Board because they didn't assess the credibility of the lay testimony.

Another reason is duty to assist. Again, while the Board remands a lot of cases, it does not send back to the regional office all the cases it should because the Agency has not gotten the evidence needed to decide the claim in compliance with the duty to assist.

What is the solution to this at the Board? We believe

the solution, when 14 years have passed and nothing has changed, is a new system for selection of judges, the one used at most other administrative agencies. Have administrative law judges selected based on merit, the way most judges at other agencies are selected, from outside the system for the most part.

These judges are selected within the system and have the same attitudes that have been inculcated in the system over the years, and they just keep making the same mistakes.

A third reason for the hamster wheel is at the Veterans' Court they have adopted a rule, in the Best and Mahl cases, not to address all allegations of error raised by the appellant.

So what happens is you appeal. You allege four allegations of error that the Board made. The Court finds one or the parties agree on one, and they do not address the other three because it is quicker to do it that way.

So the case is sent back to correct the one error, but the other three, since the Board was not required to change those errors, the Board agrees with what it did before. And if the claim isn't granted on remand, then you find yourself appealing to the Court again and relitigating the same issues that were fully briefed by the Court to the Court the first time. This creates more hamster wheel remands and appeals.

Finally, you heard the Chairman of the Board brag that only 7 percent of his decisions were reversed by the Court--only 7, not 7 percent. The reason for that is the Court has a very narrow view of what it is allowed to reverse.

You have decisions where the overwhelming state of the evidence is favorable to the veteran. The Veterans' Court decides they didn't explain it enough, rather than actually looking at the evidence and finding that, in the veteran's case, the Board's decision was clearly erroneous. Instead of just ending it, granting the benefits, ordering the VA to pay the benefits, it sends it back for more adjudication due to a lack of adequate explanation.

That is a problem that is ripe for Congress to try to amend the scope of review. It tried once. It ought to try again to encourage the Court to exercise its authority to review findings of fact with more scrutiny.

Finally, I see I am over my time. I do not have much time to talk about it, but there is a need for class action authority.

Prior to the Veterans' Judicial Review Act, veterans could file class actions and did. The benefit of class actions is sometimes a large group of claims are affected by the same legal issue, and if you can resolve all those by a class action, you do not need multiple adjudication within the VA system. It can all be decided at one time, rather

than piecemeal.

My testimony describes that further.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Stichman follows:]

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Chairman Akaka. Thank you very much, Mr. Stichman.

Mr. Baker and Mr. Stichman, do you agree with Mr. Cohen that the Federal Circuit serves some value in the appellate process and should not be removed?

Mr. Baker?

Mr. Baker. The DAV does agree with him. We do not believe that should be removed.

The issue has been presented quite recently. We have not had a chance to discuss it in great detail, but we did briefly discuss it, and we would be opposed to that type of situation.

Chairman Akaka. Mr. Stichman?

Mr. Stichman. And I also agree that the Federal Circuit serves a very important purpose, and let me illustrate that with an example.

In the nineties, the Veterans' Court ruled that not all veterans had the right to the duty to assist them in getting evidence, the VA duty to assist. And they ruled, wrongly in my view and wrongly in the view of many others, that the veteran had to come forth with some medical evidence on their own in order to earn the right to VA assistance. That unfortunate ruling was true for many years.

Finally, it was appealed to the Federal Circuit which decided to convene en banc, the whole Court of the Federal Circuit, to review that decision. I believe they were going

to strike that down when Congress came to the rescue before the Federal Circuit needed to decide the case and passed the Veterans Claims--the VCAA--Assistance Act which basically repealed the Court's case law.

Now sometimes you can rely on Congress to come in. It takes a while. But the Federal Circuit, that additional layer, it does not review a lot of cases, but it is very important. It increases the quality of the system of justice.

Chairman Akaka. Thank you.

To each of you, I asked Chairman Terry this a moment ago, but I would like to hear from each of you. What difference would it make if the time period for filing a notice of disagreement was reduced from 1 year to 180 days?

Mr. Baker?

Mr. Baker. We believe it would simply add to the efficiency in the process. DAV is looking at small changes in various places that have a large impact with no expenditures if we can get there.

We believe that enough changes like that in the appellate process, which there is room for, and changes like that in the initial appeals process, which there is room for, if many of those changes were implemented, that one change is simply part of that to make the entire system much more streamlined.



We do not know if it would cut down the number of appeals. That is obviously not our goal. We want the system to flow better.

As far as Senator Burr's question to the other panel, when he asked about is it reducing benefits, we do not believe so because right now a veteran would have to fill out about two sentences on a piece of paper and mail it in. Or, call up his rep and indicate that he disagrees or she disagrees with the decision. Or, go into a regional office and do the same thing, call the VA if they are following their intricate roles and fill out a report of contact and state they disagree with the decision. So, all these different methods, and they have six months to do it.

So this is something that takes a very minute period of time that you have six months to do.

That appellate period is cut down by two months to go from the Board to the Court and then cut down by another two months go to from the Veterans' Court to the Federal Circuit. So you are still allowing an extra 60 days at each appellate level, starting with the initial appellate level being the longest period.

We simply think it would be a good move without taking anything away from veterans.

Chairman Akaka. Mr. Cohen?

Mr. Cohen. We are not sure because one of the problems

that we see with this is very similar to what is going on with the expedited claims process. It is an initiative pilot project to see if the time to resolve claims could be reduced, but it imposes no deadlines upon the VA. All the deadlines are imposed upon the veterans, upon the claimants.

This one year time period is not something that is required. In other words, it is not required that the veteran take one year to put the notice of disagreement in place.

But there are situations where the notice doesn't get to the veteran until months later, where the veteran wants a service representative to help them with putting in a notice of disagreement or an attorney to help them put in a notice of disagreement. And the first thing the representative said is: I will need to look at your claims file because I need to know if there are other pending claims here that need to be in this notice of disagreement. I just cannot go by what you said or what the decision is.

If you have a shorter period, the likelihood of being able to get the claims file to review, to get the medical evidence to review before putting in the notice of disagreement and actually putting in a meaningful notice of disagreement, the likelihood that that happens is shortened.

The way to reduce time in the system is not to reduce time on the back of the veteran, but there are time periods

that are in there because of fumbling around to develop the claim. If veterans were told what they needed up front and were asked to work as partners with the VA, we could develop these claims quicker and reduce the time rather than putting time limits on the veterans.

Chairman Akaka. Mr. Stichman?

Mr. Stichman. I would like to commend DAV for its testimony. They have a number of interesting and perhaps valid suggestions for change. I haven't had an opportunity to review all of them, but with regard to the reduction of the time within which to file a notice of disagreement I would have to think about that more.

I worry, as Senator Burr alluded to, do all people have enough time to consider what to do in filing a notice of disagreement. Many accredited service representatives for the service organizations have a tremendous number of claims assigned to them to represent--some, close to 1,000 per individual service officer. So the veteran is often left without hands-on service for a long period of time.

And so, I would worry, and I need more time to think about whether they would be hurt by not having the full year.

Chairman Akaka. Thank you very much.

Mr. Burr.

Senator Burr. Well, let me thank all three of you for

your testimony.

I am going to ask you to do something for me, rather unique. Not today, but I would like you to go from this hearing, and I would like you to take a clean piece of paper. I would like you to design the system if we were standing up a process of processing claims and allowing for appeals. I would like you to design for us what you think that system would look like today.

In other words, do not build it based upon the faults you find with the existing system. Do it from the standpoint of what you said. How does it flow right?

I understand exactly where DAV is coming from, from the standpoint of the one year.

I understand where the reservations might be from the standpoint of making sure that every veteran has the full time that they need to seek help in filing what it is they need.

I also understand from a reviewer's standpoint if every time you send something out you know it might be up to a year, then you are sort of putting something back even if it came in, in 30 days. The likelihood is you are not inclined to pull that file out in 30 days and start processing it because you have sequenced your flow of cases in a way that you will get back to that at a certain time frame.

So I understand the need. I also understand the

results of what a one-year time frame would do to the flow, and that is the built-in design of the flow.

If you will, take a clean piece of paper, design us a system. I would like to see how different each one of the three might be. I would also like to see how different would it be from where we are today.

Now I made the statement to the last panel that if you merely look at it from a standpoint of how many claims came in and in all three baskets how many were received and how many you processed, we have a system right now that works. I know we all agree that is not the case.

But if we are purely looking at in and out flow, then you have to say we are processing a few more than what we are taking in.

The problem is that with a 30,000 plus backlog, based upon the numbers in each, that is about 10 years to work through that backlog. I think we would all agree that is unacceptable.

By the same token, I hope everybody understands that we have an obligation not to build an infrastructure that 5 years from now, 10 years from now has an over-capacity of 30 percent because we never get rid of anything in Washington. I think that we have to hit this fairly accurately from a standpoint of the size of these institutions.

Let me just move to one area if I could. I think, Mr.

Baker, you have been very clear--and I appreciate it--on the Appeals Management Center. You have called for it to be closed.

Clearly, it was a creation in 2003 by the VA to hopefully address questions that were being raised by either you or people that preceded you and veterans around the Country, that we could do this better, faster. If we didn't need to go through the whole process, let's stand up this new Appeals Management Center and see what we can alleviate with that piece.

And I think all of us can question, did we train people to the degree that we should have? Did we do this? Did we do that?

I only want you to focus on should it continue to exist. Does it help today? Could it potentially help with change? Or, should we just can it and take it out of the system because it contributes to the ineffective flow?

Let me move to you, Mr. Cohen.

Mr. Cohen. Thank you, Senator Burr.

This is an easy question. From our perspective, it does not work and it needs to be removed.

The reason why it does not work is for the unrepresented veterans and claimants whose claims end up there, they do not get timely, good decisions out.

For the represented claimants and veterans, it is a

black hole because the AMC will not adjudicate any claims where there is representation. Yet, the BVA remands those claims when there is representation to the AMC, and it may take a year or more to get it out. During that period of time, nothing happens. It just sits in the black hole.

So it doesn't add value to the system anyway around. It would be much better to just remand back to the agency of original jurisdiction and have the development occur there.

Senator Burr. Mr. Stichman?

Mr. Stichman. I am inclined to agree with my colleagues that it has not worked out well.

I think part of the reason for creating it was to have a centralized authority that you would have better control of, that would have better quality in their decisionmaking.

It would be, DAV argues, that that takes the regional office off the hook. So they do not care about their quality because they are not going to have to suffer the consequences because a Board remand will go to a different entity. I think there is merit to that criticism.

At any rate, they haven't been speedy in their decisionmaking. They make decisions away from where the veteran is, not at the local level like the regional office, which causes problems in representation, et cetera. So, all in all, I agree with my colleagues that it has not worked out well.

Senator Burr. Great. Thank you.

Thank you, Mr. Chairman.

Chairman Akaka. Thank you very much, Senator Burr.

Senator Begich.

Senator Begich. Mr. Chairman, thank you very much.

And, Senator Burr, I like that idea of asking each one of them to prepare kind of if you had a clean slate how would it flow. But I would also say--I think this was your intent too--do you have the capacity, as all of three of you, to actually create a system that you agree on?

Mr. Stichman. No.

Senator Begich. Then I think that is where you also were going, I am assuming.

Senator Burr. I knew better than to go there.

Senator Begich. Because that is what I am interested in, to be very frank with you. I think it would be great to have three plans, but for the Senate to decide on one, let alone three, the backlog will get done quicker.

So let me also add to that, I would be interested in, as you think about this idea, but also if there is a way to look at a new system, what are those resources and technology that you would need to make it happen?

Mr. Cohen, your comment, and I agree to a certain extent with you on the video component. But the technology that exists today is incredibly advanced, and I know there



is a time delay but not like it used to be. Also, the capacity to look at documentation is unbelievable today than it was six months ago, let alone a year ago, let alone five years ago.

But I do recognize your point on elderly that may not have that capacity to utilize that technology or those that have medical conditions.

But I want to make sure I am clear on one thing. You did not say that it should not be utilized as much as possible, where possible, right?

Mr. Cohen. Yes.

Senator Begich. I do not want to put words in your mouth, but it sounded almost at one point that you did not think technology was, or the videoconferencing.

To me, I mean you are talking to someone who believes in it, uses it. The technology is far advanced. I mean I talk to Senators around here, when I talk to them about how I talk to my son by Skype, they are still trying to figure out what Skype is.

But the reality is we are in a new age, and we would be foolish not to deploy that for the benefit of our veterans who want to use it and know it. I mean I get tons of emails from veterans, and I get videoconference requests from veterans all the time.

Mr. Cohen. Well, Senator Begich, my problem is not

with using it all because I agree with you that there are circumstances where it can provide tremendous benefits in terms of having speedier hearings, in terms of not requiring people to travel.

My concern is there are certain people who cannot have that. There are certain situations where credibility is important, and you cannot judge that over a video screen. The Social Security Administration that uses videoconferences has a provision for not using it under certain circumstances where the impairment of the individual would make a further impediment to using it.

Senator Begich. Good point. That is great.

Also, I know, Mr. Chairman, that the format here is very structured. So I am just going to ask a question, not for a response but really to kind of pass through the bodies that are here, to Chairman Terry.

I would be interested in your comments back too, Mr. Stichman.

The way we do it in local government is I would have those folks sitting here, you folks sitting here and we would not mess around with this formal five-minute process. We would get to it and get on with the show. But I know we have tradition and structure here, so I do not want to get in trouble and get thrown off the Committee.

So I am kind of going through you and Chairman Terry,

but that is the question because I would be very curious.

Mr. Stichman. The statistics, you mean?

Senator Begich. Statistics and kind of the concerns that you brought because I think your concerns are very valid because you do not want to get into a situation where all you are doing--I think Senator Burr said it--just counting data points because you can do that all day.

Really, the goal is how do we deliver services to those are in need that clearly qualify but the system has eaten them up? I think the words you used, the hamster wheel, that you are chewed up, and you give up at some point.

So I would be very interested. It is not for you to do. But, Chairman Terry, I hope you took notes, and I would be very interested in your response back to the concerns.

The other one which I do not know enough about, and I will get some additional information from staff, and that is the work credit system. I agree with you. I did not realize that was part of the system.

That is just a production number. It is get your widget done and move on. That is very dangerous when you are dealing with service requirements or trying to make sure someone has services.

So I would be interested in all three of you, not right now because the time is limited, but some additional material on how you see that could be eliminated, reformed.

But that was new to me, and I did not realize that piece of the equation. So I thank you for that.

Part of what I am doing here is getting educated on elements of it. So I thank you for all you guys' testimony.

Mr. Baker, yours was very bam, bam, bam, and I appreciate that because I could sense there was a little disagreement on a couple things, but that was good because that helps me understand a little bit where the issues are.

So I thank you all.

Chairman Akaka. Thank you very much, Senator Begich.

I want to thank our panelists. We do have other questions we will submit for the record.

I want to extend my thanks to all of our witnesses for appearing today. Your testimony has given us insight into a variety of different proposals on how to amend the current system for the appeals process for disability claims.

I look forward to continuing to work together to improve the ways in which claims for benefits are handled. We have heard some good testimony today. You have given us some ideas. We still need to work with you and with our Committee here on this.

So, again, thank you very much for being here.

This hearing is adjourned.

[Whereupon, at 11:12 a.m., the Committee was adjourned.]