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Statement of Christine Cote
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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 1980s 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 two-fold increase over a two-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 decision-making process that contribute to this "Hamster Wheel" including: (1) the policy adopted by the CAVC in 2001 in Best v. Principi, 15 Vet.App. 18, 19-20 (2001) and Mahl v. Principi, 15 Vet.App. 37 (2001); 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 three 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;
- five 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).

2. Time Limits

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

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

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." 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.