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Hearing: Review of Veterans' Disability Compensation: Forging a Path Ahead

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

Thank you for the invitation to testify this morning concerning the current state of appellate review of veterans' benefits determinations and how this review might be improved. It is a distinct honor to be here to discuss this critically important topic for the men and women who have answered the call to serve the nation.

I am a Professor of Law at Stetson University College of Law in Gulfport, Florida. For the past five years, I have had the pleasure of studying the existing system for reviewing veterans' benefits determinations. As I will explain, one should not lightly discount the benefits of the current system given the reality that twenty years ago there was no such review. However, there are clearly steps that could be taken to improve the existing system. The time is ripe to do so. I applaud the Committee for its attention to this important matter.

My testimony this morning is based in large part on prior work I have done in this area. That work is discussed in more detail in two law review articles to which I refer the Committee for additional information: Michael P. Allen, *The United States Court of Appeals for Veterans Claims at Twenty: A Proposal for a Legislative Commission to Consider its Future*, 58 CATH. U. L. REV. 361 (2009) and Michael P. Allen, *Significant Developments in Veterans Law (2004-2006) and What They Reveal About the U.S. Court of Appeals for Veterans Claims and the U.S. Court of Appeals for the Federal Circuit*, 40 U. MICH. J.L. REFORM 483 (2007).

As I explain below, I believe that Congress should appoint a commission or other working group to consider possible improvements in the process by which veterans' benefits determinations are reviewed. While I have my own thoughts about this matter (some of which I will share in my testimony), the key to any successful revision of the system will be buy-in from the widest possible cross-section of interested groups. As such, the commission or working group should be comprised of representatives of all relevant constituencies including veterans, the Department in all its facets, Congress, and the appropriate judicial bodies. Only in this way will the successes of the past twenty years be maintained and the way paved for an even brighter future.

#### The Current System in Context

Until 1988, there was effectively no judicial review of administrative determinations concerning the benefits to which veterans and their spouses and dependants might be entitled under relevant law. As the Supreme Court noted (quoting a congressional report), the Veterans Administration operated in "splendid isolation." *Brown v. Gardner*, 513 U.S. 115, 122 (1994) (quoting H.R. Rep. No. 100-963, pt. 1, p. 10 (1988)). This state of affairs changed with the passage of the

Veterans' Judicial Review Act of 1988 (the "VJRA"), Pub. L. No. 100-687, 102 Stat. 4105 (codified as amended in scattered sections of 38 U.S.C.). The centerpiece of the VJRA was the creation of what is today called the United States Court of Appeals for Veterans Claims (the "Veterans Court").

In order to assess the current state of appellate review of veterans' benefits determinations, and the role of the Veterans Court in that process, it is useful to step back and consider a high-level overview of the system. The Members of this Committee already have a deep understanding of these matters. As such, what follows is simply a general outline of what is a far more detailed system.

A veteran wishing to receive a benefit to which she believes she is entitled begins the process by submitting an application with one of the VA's regional offices (RO). If the veteran is satisfied with the benefits awarded, the process is at an end. However, there are a number of reasons why the veteran may be dissatisfied with the RO's decision.

When the veteran is dissatisfied with the RO's decision, she has the option to pursue an appeal within the Department by filing a "Notice of Disagreement" (NOD) with the RO. The NOD triggers the RO's obligation to prepare a "Statement of the Case" (SOC) setting forth the bases of the decision being challenged. If the veteran wishes to pursue her appeal after receiving the SOC, she must file VA-Form 9 with the RO indicating her desire that the appeal be considered by the Board of Veterans' Appeals ("Board").

Congress provided that veterans are entitled to "one appeal to the secretary [of the Department of Veterans Appeals]" when denied benefits. See 38 U.S.C. § 7104(a). That appeal in actuality is taken to the Board. The Board is led by a Chairperson, appointed by the President and confirmed by the Senate, and a Vice-Chairperson, designated by the Secretary. The Board is comprised of approximately 60 Veterans Law Judges and over 250 staff counsel and other support personnel.

The Board bases its decision "on the entire record of the proceeding and upon consideration of all evidence and material of record and applicable law and regulation." See 38 U.S.C. § 7104(a). In addition to the material developed at the RO, the Board may also conduct personal hearings with the veteran at which new evidence may be added to the record. A final Board decision concludes the administrative process.

If a veteran is dissatisfied with a final Board decision, she may elect to appeal that decision to the Veterans Court, which has exclusive jurisdiction to review such matters. The Secretary may not appeal an adverse Board decision. See 38 U.S.C. § 7252(a). Congress created the Veterans Court under its Article I powers. See 38 U.S.C. § 7251. The Court is comprised of judges appointed by the President with the advice and consent of the Senate to serve fifteen-year terms. See 38 U.S.C. § 7251(a), (b), (c). The Veterans Court has the "power to affirm, modify or reverse a decision of the Board or to remand the matter, as appropriate." See 38 U.S.C. § 7252(a). The Veterans Court is an appellate body that Congress specifically precluded from making factual determinations. See 38 U.S.C. § 7261(c). The Court has ruled that its jurisdiction is limited to denial of (or other dissatisfaction with) individual claims determinations. Specifically, the Court has held that it is without power to adjudicate class actions or other aggregate litigation

concerning more generic issues that may affect groups of veterans. See, e.g., *American Legion v. Nicholson*, 21 Vet. App. 1 (2007) (en banc) (holding that court lacked jurisdiction to adjudicate claims brought by an organization as opposed to an individual veteran); *Lefkowitz v. Derwinski*, 1 Vet. App. 439 (1991) (rejecting contention that court had the authority to adjudicate class actions).

Any aggrieved party may appeal a final decision of the Veterans Court to the United States Court of Appeals for the Federal Circuit. See 38 U.S.C. § 7292. Review of Federal Circuit decisions is available by writ of certiorari in the Supreme Court of the United States. See 28 U.S.C. § 1254 (providing for Supreme Court appellate jurisdiction concerning decisions of the courts of appeals). Review in these Article III courts is limited by statute. Specifically, in the absence of a constitutional issue, the Federal Circuit (and at least by implication the Supreme Court) may review only legal questions; it specifically is precluded from ruling on a factual determination or on the application of law to the facts in a particular case. See 38 U.S.C. § 7292(d)(2).

There is no question that at every stage in the process the current system operates under a staggering workload. This Committee has held numerous hearings over the past few years addressing this very real problem. There is no need here to dwell upon the statistics at the various adjudicatory levels in the process. For present purposes, the summary below is sufficient to establish that the system is operating at (or perhaps above) capacity:

Matters Before the Board

In Fiscal Year 2008, there were 40,916 cases received at the Board (with 43,351 Form-9s filed). In FY 2008, the Board issued 43,757 decisions. See Fiscal year 2008 Report of the Chairman, Board of Veterans' Appeals, available at <http://www.va.gov/Vetapp/ChairRpt/BVA2008AR.pdf>.

#### Matters Before the Veterans Court

In Fiscal Year 2008, there were 4,128 new cases filed at the Veterans Court. The Veterans Court decided 4,446 cases during that period. See United States Court of Appeals for Veterans Claims, Annual Reports, available at [http://www.uscourts.cavc.gov/documents/Annual\\_Report\\_-\\_20081.pdf](http://www.uscourts.cavc.gov/documents/Annual_Report_-_20081.pdf).

#### Matters Before the Federal Circuit

In Fiscal Year 2008, there were 170 appeals filed with the Federal Circuit from decisions of the Veterans Court. See Table: U.S. Court of Appeals for the Federal Circuit – Appeals Filed, Terminated, and Pending During the Twelve-Month Period Ended September 30, 2008, available at <http://www.cafc.uscourts.gov/pdf/b08sep08.pdf>. This accounted for approximately 12% of the Federal Circuit's filed appeals during that period. See Chart: United States Court of Appeals for the Federal Circuit, Appeals Filed by category FY 2008, available at <http://www.cafc.uscourts.gov/pdf/ChartFilings08.pdf>.

#### Evaluation of the Current System

Now is an excellent time to take a step back and consider how the current system of appellate review of veterans' benefits determinations operates. This October, we will celebrate the twentieth anniversary of the first convening of the Veterans Court. This important milestone

provides a time for reflection. That would be so even if the system was not being flooded with claims and even if one believes it is operating without difficulty. In my opinion, we owe it to veterans to evaluate the functioning of the revolutionary changes of two decades ago.

My remarks will focus primarily on the judicial review portion of the process. That is, I will largely confine my testimony to appeals taken from the Board to the federal court system. In this portion of my testimony, I will highlight the successes of judicial review and then mention some of its shortcomings.

#### Successes of Judicial Review

It is easy to focus on areas on which the current system can be improved. However, it is important to remember the many successes that have resulted from the addition of independent judicial review of veterans' benefits determinations. I highlight four such benefits.

First, independent judicial review has produced a body of law that has at least begun to provide uniformity and predictability for those seeking veterans' benefits. When the Veterans Court began operation twenty years ago there were essentially no judicial opinions governing benefits determinations. The "law" in the area consisted almost entirely of the statutes passed by Congress and the actions taken by the Veterans Administration in its "splendid isolation." Today, we are into the twenty-third volume of the VETERANS APPEALS REPORTER containing precedential opinions of the Supreme Court, the Federal Circuit and the Veterans Court. These decisions provide broad rules governing the claims adjudication process throughout the agency and across the country. All actors in the system are in a position to know the law when it is settled and to make reasonable predictive judgments about outcomes in individual cases. Such uniformity and predictability could certainly be said to be staples of the rule of law itself. Their development over the past twenty years is an important success of judicial review under the VJRA.

Second, over the past twenty years the Veterans Court has grown into a strong, independent body. It is easy to forget the challenges that faced the Veterans Court at its inception. The judges of the Court were confronted with a situation almost unheard of in American law. They were not only writing on a clean slate in terms of the content of veterans' benefits law, they were also required to build an institution from the ground up. Where was the Court physically to be located? How was it to pay its bills? How did it fit into other governmental structures? Answering all these questions was as important to the success of the enterprise as was producing solid judicial opinions.

Once it was established physically, the Court then needed to focus on its substantive work. One of the striking aspects of the history of the Veterans Court is the conscious way in which the judges of the Court over time developed the institution as a court. It is one thing for Congress to say that it is creating a court of law; it is quite another for that institution to become one. The Veterans Court's efforts to make itself into an institution commanding respect is itself a benefit of the judicial review process.

Third, judicial review has provided greater procedural protection for veterans that has increased both the actual fairness of the system as well as a perception of fairness in the process. There is

no question that one still hears complaints about fairness, but those complaints pale in comparison to the complaints one heard when there was no independent process to review administrative decisions. One should not lightly discount how important the provision of independent judicial review has been to the actual and perceived fairness of the system as a whole.

Fourth, judicial review has improved the quality of administrative decision-making in the system. Do not get me wrong. There are still deficiencies in the decisions rendered at the administrative level. However, the Veterans Court's rigorous enforcement of the statutory requirement that the Board provide adequate reasons and bases for its decisions, see 38 U.S.C. § 7104(d)(1), has made a real difference in both the transparency of decisions as well as the perception of a fair process.

#### Problems with Judicial Review

Despite its very real successes, the current structure of judicial review has caused or contributed to problems that should be addressed. I briefly highlight four such issues.

First, judicial review has increased delays associated with the review of benefits determinations. As this Committee has noted time and again in hearings, there are unacceptable delays in reviewing benefits determinations at almost every level of the current system. An excellent overview of this issue can be found in the material associated with this Committee's February 11, 2009 hearing concerning Review of Veterans' Disability Compensation: What Changes are Needed to Improve the Appeals Process?. Of course, with no other changes to the system any addition of a review by an independent body would add some measure of delay. The issue is that the way in which judicial review is structured has increased delay beyond that required by providing for such review in the first instance. There are three prime examples of such needless delay:

- The current system has two levels of appellate review (leaving aside the possibility of review by certiorari in the Supreme Court). A veteran dissatisfied with a Board decision may appeal as of right to the Veterans Court. In addition, any party dissatisfied with the Veterans Court's decision may appeal as of right to the Federal Circuit. This double layer of appellate judicial review is unique in the federal system. It certainly adds time to the appellate process. Of course, that time may be justified by other factors, such as a perceived increase in the accuracy of decisions. Nevertheless, any consideration of the current system needs to address this duplicative appellate process.
- As the Committee has noted, the prevalence of remands in the system leads to increased delays in the resolution of disputes. Remands are an issue at the administrative level due to the practice of allowing claimants to have an initial adjudication followed by one review at the Board level. The practical effect of this practice is what has been called a "hamster wheel" process by which cases are shuttled from the Board to the RO and then back again as new facts are adduced. Remands are also a problem at the judicial level. Here, the issue stems in large part from the statutory limitation on the finding of facts at the Veterans Court. The Court was meant to be an appellate body. As such, when an error is found – say, an inadequate statement of reasons and

bases by the Board – the Veterans Court’s usual course is to remand the matter for re-adjudication instead of reversing the Board’s decision and ordering that benefits be awarded. Such remands, even if one assumes them to be mandated by current statute, unquestionably add time to the resolution of disputes.

- A final example in this area concerns the Veterans Court’s holdings that it does not have the authority to entertain class actions or other forms of aggregate litigation. In the cases cited earlier in my testimony, the Court reasoned that it was limited to cases in which a veteran challenged a specific, individual Board decision. Again, assuming that this reading of the law is correct, one cannot avoid concluding that the absence of such authority to address multiple cases at once has an effect on system-wide timeliness of adjudication.

Second, the current system of judicial review has built into it a serious risk of prejudice to veterans. This prejudice flows from the movement of the veteran from the administrative system that is designed to be non-adversarial to the judicial process which is patterned on traditional adversarial litigation. This movement can leave veterans, particularly those unrepresented at the filing of a judicial appeal, at risk of running afoul of rules designed to implement an adversarial system. For example, the time periods within which veterans are required to take certain actions in the administrative system are generally longer and more flexible than the time periods they will confront before a court. Such issues in transition are a significant hurdle for many veterans moving between systems.

Third, there is at times an unusual tension between the Veterans Court and the Federal Circuit. Under the current structure, both these courts play important roles in the system. However, one cannot read the opinions of these bodies without being left with the firm conviction that there are occasions on which each court displays a certain lack of respect for the other. I have discussed this issue in more depth in the articles to which I referred earlier. For now, my point is that this tension is a product of the current structure of judicial review.

Fourth, while the Veterans Court has worked diligently to establish itself as an independent institution over the past twenty years, the Department has not always acted in ways that reflect the respect the Court is due. I believe the Department’s attitude is at least partly caused by the Veterans Court’s status as an Article I tribunal with Article III oversight in the Federal Circuit. A prime example of this attitude can be found in the Department’s actions concerning two Veterans Court decisions with which the Secretary strongly disagreed. One case concerned the Veterans Court’s decision that a veteran was entitled to independent ratings for tinnitus in each ear. *Smith v. Nicholson*, 19 Vet App. 63 (2005), rev’d 451 F.3d 1344 (Fed. Cir. 2006). The second dealt with a statutory presumption concerning exposure to certain pesticides by those persons serving on naval vessels in the in-land waters of the Republic of Vietnam. See *Hass v. Nicholson*, 20 Vet. App. 257 (2006), rev’d sub nom *Haas v. Peake*, 525 F.3d 1168 (Fed. Cir. 2008). In each instance, the Secretary unilaterally ordered that the Board stay the adjudication of all cases affected by the Veterans Court’s rulings while he sought an appeal. In neither instance did the Secretary seek a judicial stay order. It is inconceivable to me that the Secretary would have acted in this respect toward an Article III judicial body. Perhaps he would not have done so if the Veterans Court was the last realistic venue for appellate review (whether the Court retained its

Article I status or not). These actions reflect a serious and dangerous impediment to the recognition of independent judicial review. In both instances, the Veterans Court issued decisions critical of the Secretary's actions. See *Ribaudo v. Nicholson*, 20 Vet. App. 552 (2007) (en banc) (concerning Haas); *Ramsey v. Nicholson*, 20 Vet. App. 16 (2006) (concerning Smith). I am not convinced, however, that the Secretary's attitude will necessarily change if the current structure remains in place.

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In short, while the addition of judicial review has provided many important benefits to veterans, it has also caused or contributed to certain drawbacks in the system. The question then becomes: what should be done?

### What Should be Done?

In past hearings, Members of this Committee have made an important point about changes to the current system of review of benefits determinations. Specifically, Members have noted that one should consider both focused changes in the current system as well as the distinct question concerning more sweeping alterations. I believe that this distinction is important. While my testimony is principally focused on the latter issue, I begin this portion of my comments by mentioning at least some targeted matters that could be undertaken more immediately than any type of sweeping reform.

### Some Targeted Matters

There are certain steps that could be taken within the current system to address some of the drawbacks I have discussed above. I again principally limit my testimony to the judicial review of benefits determinations. I should note that some of the matters I mention are already in the works in one form or another:

- Congress has already taken one critically important step to address some of the issues facing the system as currently constituted: the addition of judges to the Veterans Court. In the Veterans' Benefits Improvement Act of 2008, Pub. L. No. 110-389, 122 Stat. 4145, Congress authorized the addition of two judges to the Veterans Court, bringing its complement to nine. Those additional judges are temporary, with Congress set to re-assess the matter in 2012. I urge Congress and the President to act as expeditiously as possible to fill these positions (which come into force in December 2009) and to monitor the effect of these additional judgeships on the workload of the Veterans Court.
- The Veterans Court itself has also taken steps to address some of the difficulties veterans face, in particular issues involving the movement from the non-adversarial administrative process as well as the delays veterans face in the system generally. For example, under the leadership of Chief Judge Greene, the Court has adopted a mediation program that appears to be helpful in resolving cases. The Court has also taken steps to address the assembly of the appellate record that should help reduce delay. Finally, the Court has largely moved to a paperless system that should also have a positive effect on the time to disposition. I urge Congress to support the Veterans Court in these and similar efforts.
- One of the difficulties with assessing the successes and shortcomings in the current system is obtaining relevant empirical information. Relevant information is collected and disseminated by different bodies (e.g., the Board, the Veterans Court, and the Federal Circuit). As such, it is often difficult to compare apples to apples. Without an empirical foundation, it is both challenging and

potentially dangerous to make changes in the system. I urge Congress to consider whether there are means for a standardized collection of information relevant to issues facing veterans in the system.

- As I mentioned, the Veterans Court has held that it is without the authority to adjudicate class actions or other aggregate litigation. I believe Congress should amend Title 38 of the United States Code to provide that the Veterans Court may adopt a class action/aggregate litigation procedure. I do not believe Congress should mandate that the Veterans Court adopt such a procedure. There are too many interconnected issues for such a mandate to necessarily improve the system. But the Veterans Court should have the clear authority to adopt such a rule if the judges of that Court, in consultation with those who practice in this field, conclude it would be beneficial to the prompt and fair adjudication of claims on a system-wide basis.
- Finally, the Veterans Court could more aggressively exercise its authority to reverse Board decisions instead of remanding them for further factual development. Deciding when a Board decision is inadequate due to the failure to provide reasons and bases for a decision or simply legally erroneous is a matter of degree. It is fair to say that at this point the Veterans Court is far more inclined to find that Board decisions are insufficiently supported by explanations, a decision that leads to remand and delay. The Veterans Court should consider whether more such decisions could actually be considered simply erroneous, a result that would lead to reversal and an award of benefits. While I believe that such a re-evaluation should be done, I do not believe it should be mandated by legislation. The Court is in the best position to make such decisions.

#### The Bigger Picture

This brings me to the more macro-level questions concerning the current system of review of veterans' benefits determinations. As I alluded to at the beginning of my testimony, Congress should establish a commission or other working group to study the judicial review of veterans' benefits determinations. The Commission should be led by a chairperson or chairpersons who are widely respected and seen to be independent, particularly of influence from the Department. The leader or leaders of the Commission must also be politically savvy as well as capable of the follow through necessary to make the Commission's work meaningful in the real world.

The Commission should be composed of representatives of all the relevant constituencies affected by and involved in the award of veterans' benefits. These constituencies include: veterans (and other claimants in the system), most likely represented through the various Veterans Service Organizations; the Department in all its facets (thus the RO adjudicators, the Board, the litigation arm of the Department and the Secretary, probably through the Office of the General Counsel, should all be included); the Veterans Court; the Federal Circuit; and Congress itself.

Congress should also ensure that the Commission has adequate resources with which to perform its functions. The Commission should be provided with a staff for, among other things, data collection and analysis as well as space in which to work. It should also have funds available sufficient to allow the Commissioners to travel so that public hearings can be held to obtain the greatest input of views as part of its work.

The Commission should be charged with evaluating the current state of appellate review of veterans' benefits determinations and making recommendations concerning what changes might



be made to that system. There should be no constraints imposed on the Commission with respect to the options it might consider and/or propose. Finally, the Commission should be directed to submit a report to Congress within a defined period of time. That report should describe the Commission's activities, provide relevant background and statistical information, and set forth specific proposals for changes to the system warranted by the Commission's investigation.

While the Commission should not be limited in terms of the matters it considers, it should keep three interests in mind during its investigation and deliberations:

### The Interests of Veterans

The paramount interest the Commission must consider is that of the veteran. The nation should never forget – and I am confident none of the people involved in the process do – that the entire structure of veterans' benefits law exists for the purpose of providing support to the men and women who served this country. Thus, the Commission must ensure that it proposes nothing that harms the interests of the beneficiaries of the system.

Veterans' interests fall into five broad categories:

- **Accuracy:** Veterans have an interest in ensuring that decisions concerning the award of benefits be as accurate as possible. The gains in accuracy that have likely been achieved over the past twenty years due in part to judicial review should be preserved.
- **Fairness:** It is critically important that the system of awarding benefits and reviewing such decisions both be fair and be perceived as being fair. Veterans need to believe that the system provides an opportunity for their claims to be adjudicated in a manner that is, broadly speaking, consistent with the rule of law. Thus, the gains in the nature of VA decision-making (e.g., better reasoned decisions) need to be preserved. In addition, the substantive fairness of the process needs to be preserved as well. Finally, one needs to be concerned with the speed of the decision-making process.
- **Transparency:** Closely related to fairness is veterans' interest in a transparent process. Largely as a result of the influence of the Veterans Court (although aided by Congress), the process of awarding benefits has become more open. That trend should be preserved.
- **Predictability:** It is important that the Department and veterans and their counsel be in a position to predict how issues will be resolved. Of course, there will always be a level of uncertainty in any legal system populated by humans. Nevertheless, the value of enhanced predictability of results is important systemically.
- **Finality:** No legal system can exist for long in any functional respect if disputes never come to an end. Veterans, as well as the VA, have an interest in having disputes resolved once and for all. The value of finality should not drive the system. There should be means of correcting errors, but those means need to be balanced against the interests of repose. Thus, finality itself is a value that should be considered when evaluating the current – or a future – system concerning the award of veterans' benefits and the judicial review of such decisions.

### Institutional Concerns

A second interest that the Commission must consider concerns the preservation of American

constitutional values. In particular, the importance in the American constitutional order of the maintenance of separate and independent centers of political authority must be a part of the Commission's deliberations. This is a structural concern. Thus, it is important to preserve an independent institutional check on the political branches' authority to award veterans' benefits.

The Veterans Court was created as an Article I tribunal, meaning that its members do not enjoy the tenure and salary protections afforded judges serving in the coordinate Article III judiciary. Under well-established law, there is no structural constitutional violation flowing from the assignment of the adjudication of disputes concerning veterans' benefits to such an Article I tribunal. Veterans benefits are a "public right." That is, entitlement to benefits flows from statutes instead of the common law or the Constitution itself. See, e.g., *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69 n.22 (1982) (describing "payments to veterans" as an example of a public right (citation omitted)); Congress has wide latitude to assign the adjudication of disputes concerning such public rights to non-Article III adjudicators such as the Veterans Court. See, e.g., *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986); *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985).

The institutional concern the Commission must consider is less formalistic than a suggestion that one must necessarily have the Article III judiciary (beyond the Supreme Court) involved in the process to make it legitimate. Of course, that is one way in which one could preserve institutional concerns regarding separation of powers. But there are other ways in which such power divisions can be established and maintained. The key is that one needs to ensure that the system of review employed in the process contains sufficient independence that there is a meaningful check on the unilateral authority of the political branches.

#### The Public Interest

Finally, any consideration of the judicial review of veterans' benefits decisions needs to take into account the public's interest in maintaining a system that, while fair to veterans, also safeguards the great resources devoted to veterans and their dependants. The public has a right to ensure that the funds allotted to the Department for the payment of veterans' benefits are spent according to the directions of Congress.

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As I near the end of my remarks, I wanted to highlight some of the more important issues the Commission for which I have called should address. This list is by no means exhaustive. Rather, it is meant to illustrate some of the matters that I see as most significantly in need of attention. Moreover, I do not necessarily suggest that any of the steps I mention should be taken. The key is that they be considered. I mention five primary matters:

- The Commission should consider whether the Federal Circuit should remain as part of the system for review of veterans' benefits determinations. There is no question that having a second layer of as-of-right appellate review adds delay to the system. On the other hand, some could argue that any additional delay is justified by the error-correcting function of the Federal Circuit. The question the Commission should consider is whether any such error-correcting function is worth the cost in delayed resolution. There is no requirement that the Federal Circuit remain as part of the process. For example, the United States Court of Appeals for the Armed Forces is an Article I court with review by way of the writ of certiorari in the Supreme Court. While I have reached no firm conclusion on this point, I lean towards removing the Federal Circuit from the

process. The fact is that delayed resolution in the system is a significant problem. The removal of the Federal Circuit is a relatively easy way to reduce delay.

- If the Federal Circuit remains in the appellate review system, the Commission should consider whether that court's jurisdiction should be expanded. As I have mentioned, at present the Federal Circuit is precluded from reviewing factual determination or the application of law to fact. This prohibition leads to a fair amount of ink being spilled as to whether a certain issue is one dealing with a pure legal question or rather it concerns the application of law to fact. If the Federal Circuit is deemed to add value to the process, consideration should be given to whether the benefits of the current jurisdictional restrictions outweigh the costs.

- A third issue the Commission should consider is whether the Veterans Court should be converted into an Article III body. Such a conversion, if warranted, could take place regardless of whether the Federal Circuit remained as part of the appellate review process. Article III status could augment the respect the Veterans Court receives from the Secretary as well as other courts. In addition, Article III status would allow the court to more easily utilize the support mechanisms for the federal judiciary. Of course, there are also potential negative effects of a conversion, including less turnover in judges and, perhaps, greater politicization of the appointment and confirmation process.

- The Commission should consider the appropriate place of the Board in the appellate process. As Members of the Committee have noted in the past, the Board came into existence in a time when there was no judicial review. Given the fundamental shift twenty years ago ushering in the current era of judicial supervisor, a fresh look should be taken at the Board's function as well as its structure.

- Finally, the Commission should evaluate the jurisdiction of the Veterans Court. The Court is currently prohibited from making factual determinations. I suspect that any review would likely conclude that the Court should remain an appellate tribunal without fact-finding authority. However, the prohibition on fact-finding does have an effect on delays in the system because the Veterans Court often feels compelled to remand matters in which it has found an error instead of reversing Board decisions outright. The Commission should consider whether there are statutory changes that could be made that would preserve the Veterans Court's status as an appellate body but also decrease needless remands.

## Conclusion

In conclusion, I want to stress that nothing I have said here today should be taken to cast aspersions on anyone involved in the current system for the award and review of veterans' benefits. I firmly believe that the people who have elected to devote a good portion of their professional lives to working in this system have nothing but the best interests of veterans at heart. In many respects, they are heroes themselves because they are a contemporary example of President Abraham Lincoln's call in his famous Second Inaugural Address (as slightly edited to reflect today's society) for the nation "to care for him [and her] who shall have borne the battle and for his widow [or her widower], and his [or her] orphan."

Thank you again for allowing me to testify today.