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

STATEMENT OF
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OF THE
NATIONAL VETERANS LEGAL SERVICES PROGRAM

BEFORE THE U.S. SENATE COMMITTEE ON
VETERANS' AFFAIRS

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MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

Thank you for the opportunity to present the views of the National Veterans Legal Services Program (NVLSP) on legislative and policy changes that may help expedite the timeliness of the adjudication of appeals of VA benefit claims without sacrificing accuracy. This testimony focuses on the two major tribunals that decide appeals of VA benefit claims - the Board of Veterans' Appeals (BVA) and the U.S. Court of Appeals for Veterans Claims (CAVC).

NVLSP is a nonprofit veterans service organization founded in 1980. Since its founding, NVLSP has represented over 1,000 claimants before the Board of Veterans' Appeals and the Court of Appeals for Veterans Claims. NVLSP is one of the four veterans service organizations that comprise the Veterans Consortium Pro Bono Program, which recruits and trains volunteer lawyers to represent veterans who have appealed a Board of Veterans' Appeals decision to the CAVC without a representative. In addition to its activities with the Pro Bono Program, NVLSP has trained thousands of veterans service officers and lawyers in veterans benefits law, and has written educational publications that thousands of veterans advocates regularly use as practice tools to assist them in their representation of VA claimants.

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

This testimony is divided into two parts. In part I, I discuss the Hamster Wheel phenomenon. In part II, I discuss the need for class action authority in veterans cases.

I. The Hamster Wheel

For many years now, those who regularly represent disabled veterans before the BVA and CAVC have been using an unflattering phrase to describe the system of justice these veterans too often

face: "the Hamster Wheel". This phrase refers to the following common phenomenon: multiple decisions are made on the veteran's claim over a period of years as a result of the claim being transferred back and forth between the CAVC and the BVA, and the BVA and a VA regional office for the purpose of creating yet another decision. The net result is that frustrated veterans have to wait many years before receiving a final decision on their claims.

There are at least three aspects of the BVA's and CAVC's decision-making process that contribute to the Hamster Wheel phenomenon: (1) the high error rate that exists in BVA decision-making, which delays the decision-making process by requiring disabled veterans to appeal to the CAVC to correct these errors, which, in turn, leads to further VA proceedings on remand; (2) 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 (3) the CAVC's reluctance to reverse erroneous findings of fact made by the Board of Veterans' Appeals.

A. Contributor #1 to the Hamster Wheel: the High Error Rate at Board of Veterans' Appeals

The most prominent fact in assessing the performance of the Board of Veterans' Appeals is the track record that Board decisions have experienced when an independent authority has examined the soundness of these decisions. Congress created an independent authority that regularly performs this function - the U.S. Court of Appeals for Veterans Claims. Each year, the Court issues a report card on BVA decision-making. This annual report card comes in the form of between 1,000 and 2,800 separate final judgments issued by the Court. Each separate final judgment incorporates an individualized judicial assessment of the quality of a particular one of the 35,000 to 40,000 decisions that the Board issues on an annual basis.

For more than a decade, the Court's annual report card of the BVA's performance has been remarkably consistent. The 14 annual report cards issued over the last 14 years yields the following startling fact: of the 23,173 Board decisions that the Court individually assessed over that period (that is, from FY 1995 to FY 2008), the Court set aside a whopping 76.4% of them (that is, 17,698 individual Board decisions). In each of these 17,698 cases, the Court set aside the Board decision and either remanded the claim to the Board for further proceedings or ordered the Board to award the benefits it had previously denied. In the overwhelming majority of these 17,698 cases, the Court took this action because it concluded that the Board decision contained one or more specific legal errors that prejudiced the rights of the VA claimant to a proper decision.

By any reasonable measure, the Court's annual report card on the Board's performance has consistently been an "F". But an equally startling fact is that despite a consistent grade of "F" for each of the last 14 years, no effective action has ever been taken by the management of the BVA to improve the Board's poor performance. Year after year, the Court's report card on the Board has reflected the same failing grade.

To formulate an effective plan to reform the Board and significantly improve its performance requires an understanding of the underlying reasons that the Board has consistently failed in its primary mission (i.e., to issue decisions on claims for benefits that comply with the law). Over the last 15 years, NVLSP has reviewed over 10,000 individual Board decisions and thousands of Court assessments of these decisions. Based on this review, NVLSP has reached three major

conclusions, which are set forth below.

1. The Board Keeps Making the Same Types of Errors Over and Over Again

The decisions of the Board and the final judgments of the Court reflect that the Board keeps making the same types of errors over time. For example, one common error involves the type of explanation the Board is required to provide in its written decisions. When Congress enacted the Veterans' Judicial Review Act of 1988, it expanded the type of detail that must be included in a Board decision to enable veterans and the Court of Appeals for Veterans Claims to understand the basis for the Board's decision and to facilitate judicial review. See 38 U.S.C. § 7104(d).

The Board has consistently been called to task by the Court for faulty explanations that violate 38 U.S.C. § 7104(d). These violations fall into several common patterns. One pattern is that the Board often does not assess or explain why it did not credit positive medical evidence submitted by the claimant from a private physician, while at the same time expressly relying on a negative opinion provided by a VA-employed physician. The problem here is not that the Board decided to believe the VA physician and disbelieve the private physician. The problem is that the Board never explained its analysis (if indeed, it had one) of the private physician's opinion in the first place.

Another common pattern involves lay testimony submitted by the claimant and other witnesses. Despite the statutory and regulatory obligation (38 U.S.C. § 5107(b) and 38 C.F.R. § 3.102) to give the veteran the benefit of the doubt in adjudicating a claim for benefits, in many of the Board decisions that have been set aside by the Court, the Veterans Law Judge has refused in his or her written decision to assess, no less credit, this lay testimony. The decisions of the Federal Circuit and the Court of Appeals for Veterans Claims in Buchanan v. Nicholson, 451 F.3d 1331, 1336-37 (Fed. Cir. 2006), and Kowalski v. Nicholson 19 Vet. App. 171, 178 (2005) chronicle this refusal to analyze the validity of lay testimony.

Sometimes the lay testimony that the Board refuses to analyze involves what happened during the period of military service. The underlying philosophy in these Board's decisions appears to be: "If the event is not specifically reflected in the existing service medical or personnel records, we don't need to assess the lay testimony" - no matter what lay testimony has been submitted.

Sometimes this lay testimony involves the symptoms of disability that the veteran experienced following military service. Despite the legal obligation to consider lay evidence attesting to the fact that veteran continuously experienced symptoms of disability from the date of discharge to the present, the Board often denies the claim on the unlawful ground that the evidence in the record does not show that the veteran was continuously provided medical treatment for the disability, without assessing the lay evidence of continuity of symptomatology.

Another common Board error is to prematurely deny the claim without ensuring that the record includes the evidence that the agency was required to obtain to fulfill its obligation to assist the claimant in developing the evidence necessary to substantiate the claim. The statutory duty placed by Congress on the VA to provide such assistance is a fundamental cornerstone of the nonadversarial pro-claimant adjudicatory process. Unfortunately, the Board often fails to honor this very important obligation.

2. Board Management Does Not Downgrade the Performance of a Veterans Law Judge for Making These Types of Errors

One method of eliminating repetitive types of Board errors would be if Board management downgraded the performance of Veterans Law Judges for repeatedly violating deeply embedded legal principles. This has not been done.

The problem is not that Board management fails to assess the performance of the Board's Veterans Law Judges. Board management does conduct such assessments. The problem lies in Board management's definition of poor performance. As the Chairman of the Board stated in his FY 2006 Report, Board management assesses the accuracy of Board decision-making and its assessment is that Board decisions are 93% accurate.

There obviously is a major disconnect between the annual report card prepared by the Court of Appeals for Veterans Claims and the annual report card prepared by Board management. How can it be that year in and year out the Court consistently concludes that well over 50% of the Board decisions contain one or more specific legal errors that prejudiced the rights of the VA claimant to a proper decision, while at the same time Board management concludes that only 7% of Board decision-making is inaccurate?

NVLSP understands that there is a simple answer to this question. Board management simply does not count as "inaccurate" many of the types of prejudicial legal errors that have forced the Court to set aside the Board decision and place the veteran on the well-known "hamster wheel" of remands and further administrative proceedings. In this way, Board management actually promotes, rather than discourages, these errors of law.

NVLSP's Recommendations

Recommendation 1: Adopt the Long-Standing Process Used and the Protections Afforded to Administrative Judges Who Adjudicate Disputes in Other Federal Agencies.

NVLSP believes that one of the major steps that Congress should take to reform the Board and significantly improve its performance is to change the methodology used to select the individuals who adjudicate appeals at the Board of Veterans Appeals. These individuals, called Veterans Law Judges (VLJs), are usually long-time VA employees who are promoted to this office from within the agency. By the time they become a VLJ, they often have adopted the conventional adjudicatory philosophy that has long held sway at the VA - an adjudicatory philosophy that underlies the failing grade assigned by the Court. Moreover, Veterans Law Judges do not enjoy true judicial independence.

In the federal administrative judicial system outside the BVA, most judges are administrative law judge (ALJs). An ALJ, like a VLJ, presides at an administrative trial-type proceeding to resolve a dispute between a federal government agency and someone affected by a decision of that agency. ALJs preside in multi-party adjudication as is the case with the Federal Energy Regulatory Commission or simplified and less formal procedures as is the case with the Social Security Administration.

The major difference between federal ALJs and the VLJs that serve on the Board of Veterans' Appeals is that ALJs are appointed under the Administrative Procedure Act of 1946 (APA). Their appointments are merit-based on scores achieved in a comprehensive testing procedure, including an 4-hour written examination and an oral examination before a panel that includes an OPM representative, American Bar Association representative, and a sitting federal ALJ. Federal ALJs are the only merit-based judicial corps in the United States.

ALJs retain decisional independence. They are exempt from performance ratings, evaluation, and bonuses. Agency officials may not interfere with their decision making and administrative law judges may be discharged only for good cause based upon a complaint filed by the agency with the Merit Systems Protections Board established and determined after an APA hearing on the record before an MSPB ALJ. See Butz v. Economou, 438 U.S. 478, 514 (1978).

There are many attorneys who have never been employed by the VA who are familiar with veterans benefits law and who are eminently qualified to serve as an administrative judge at the Board of Veterans' Appeals. Moreover, while use of the ALJ process may not always result in the selection of an individual with a great deal of experience in veterans benefits law, it should not take a great deal of time for someone without such experience to become proficient. The experience of the many judges who have been appointed to the Court of Appeals for Veterans Claims without prior experience in veterans benefits law attests to this proposition. NVLSP believes the likelihood of improved long-term performance of a judge selected through the ALJ process greatly exceeds whatever loss in short-term productivity may result if someone who is not steeped in veterans benefits law happens to be selected.

Recommendation 2: The Criteria Used in, and the Results of the Evaluation System of VLJs Employed by Board Management Should Be Publicly Available and Reported to Congress.

This recommendation may not be necessary if Congress adopts the first recommendation. But if Congress does not embrace the ALJ system for the BVA, it should at least require Board management to make publicly available the details of the system it employs for evaluating and rewarding the performance of VLJs and the results of the evaluation as applied to individual VLJs. When the evaluation system employed by Board management results in the conclusion that 93% of all Board decisions are accurate, it is plain that the evaluation system suffers from serious defects. Oversight of this system requires that it be made publicly available and reported to Congress.

B. Contributor #2 to the Hamster Wheel: Best and Mahl

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

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

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

• the Hamster Wheel keeps churning . . .

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

C. Contributor #3 to the Hamster Wheel: the Court's Reluctance to Reverse Erroneous BVA Findings of Fact

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

If such a Board decision is appealed to the CAVC, Congress has authorized the Court to decide if the Board's weighing of the evidence was "clearly erroneous." But the Court interprets the

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

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

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

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

But the ability of a veteran or veterans organization to file a class action ended with the VJRA

In that landmark legislation, Congress transferred jurisdiction over challenges to VA rules and policies from U.S. district courts (which operate under rules authorizing class actions) to the U.S. Court of Appeals for the Federal Circuit and the newly created U.S. Court of Appeals for Veterans Claims (CAVC). In making this transfer of jurisdiction, Congress failed to address the authority of the Federal Circuit and the CAVC to certify a case as a class action. As a result of this oversight, the CAVC has ruled that it does not have authority to entertain a class action (see Lefkowitz v. Derwinski, 1 Vet.App. 439 (1991), and the Federal Circuit has indicated the same. See Liesegang v. Secretary of Veterans Affairs, 312 F.3d 1368, 1378 (Fed. Cir. 2002).

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

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

This case study involves the multi-year old battle that was fought between the VA and thousands of Vietnam veterans who served on ships offshore the Republic of Vietnam during the Vietnam

War (hereinafter referred to as "Navy blue water veterans"). In section A below, we summarize the multi-year battle that was waged without the benefit of a class action mechanism. In section B, we describe the more efficient and just way the battle would have been waged if a class action mechanism had been available. Finally, in section C, we describe how the battle would have inevitably resulted in dissimilar VA treatment of similarly situated veterans even if the Blue Water Navy veterans had won the battle.

A. Description of the Multi-Year Battle

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

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

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

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

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

One of those who doggedly pursued his disability claim all the way to the CAVC was former Navy Commander Jonathan L. Haas. He filed his appeal in March 2004. The CAVC ultimately

convened a panel of the Court and scheduled oral argument for January 10, 2006 to decide Commander Haas' challenge to VA's set-foot-on-land rule. This time, however, the VA did not offer to settle. On August 16, 2006, a panel of three judges unanimously ruled that VA's 2002 set-foot-on-land requirement was illegal. See Haas v. Nicholson, 20 Vet.App. 257 (2006).

But this did not end the battle between the VA and Navy blue water veterans. In October 2006, the VA appealed the decision in Haas to the U.S. Court of Appeals for the Federal Circuit, which reversed the CAVC's decision. Haas petitioned the U.S. Supreme Court, which denied the petition to hear the case last month.

Not all battles of this type result in a VA victory. Sometimes, the courts issue a final decision ruling that the VA has interpreted the law improperly for a long period of time. The injustice due to the lack of class action authority becomes apparent if one assumes that the Navy blue water veterans had ultimately prevailed in its battle with the VA - an assumption we make for the purposes of the discussion below.

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

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

This action would also have conserved the resources of thousands of disabled class members and their representatives. They would not have to complete and submit notices of disagreement, substantive appeals forms, and responses to VA correspondence in order to keep their claims alive.
Then, after the Court resolved the legality of VA's set-foot-on-land requirement, it could act to ensure that all of the pending claims filed by class members were uniformly and promptly decided by the VA in accordance with the Court's decision. And all of this would have occurred

well before January 2009 because Mrs. Johnson's earlier case would have led to the key Court decision, not the later filed case of Commander Haas.

C. Why this Battle Would Have Inevitably Resulted In Dissimilar Treatment of Similarly Situated Disabled Veterans and Their Survivors

By definition, all of the Navy blue water veterans and their survivors who have been denied benefits due to the VA's set-foot-on-land rule are suffering from, or are survivors of a veteran who died from, one of the following diseases that the VA recognizes as related to Agent Orange exposure: soft-tissue sarcomas, Hodgkin's disease, lung cancer, bronchus cancer, larynx cancer, trachea cancer, prostate cancer, multiple myeloma, chronic lymphocytic leukemia, and diabetes mellitus (Type 2). These are seriously disabling, often fatal diseases.

Assume that the Federal Circuit and the Supreme Court reached a different result. Assume that these courts agreed with the unanimous panel of the CAVC and affirmed its ruling that VA's set-foot-on-land requirement is unlawful. The VA, upon issuance of a final court decision, would lift its 2006 moratorium, and orders the ROs and BVA to decide all of the claims subject to the moratorium and belatedly pay these disabled war veterans and their survivors - to the extent that they are still alive -- the many-years-worth of retroactive disability or death benefits they were long ago denied due to VA's set-foot-on-land requirement.

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

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

- did not file a notice of disagreement with the RO decision during the one-year appeal period; or
- filed a timely notice of disagreement, but failed to file a timely substantive appeal to the Board of Veterans Appeal; or

• filed a timely notice of disagreement and a timely substantive appeal, received a decision from the Board of Veterans' Appeals denying their claim based on VA's set-foot-on-land rule, and failed to file a timely appeal with the CAVC.

The number of these similarly situated claimants is likely to be high. Veterans with seriously disabling diseases often give up on their claim when the VA tells them that they are not entitled to the benefits they seek. Their disabilities deplete their energy and their resources. Fighting the VA bureaucracy can seem a very daunting task to a veteran suffering from cancer. Plus, they are not lawyers and are not familiar with the legal authorities relied upon the CAVC in Haas. When the VA tells them they are not entitled to benefits because they did not set foot on land in

Vietnam, they often believe that the VA must know what it is doing. Thus, many of these disabled veterans simply give up and don't appeal their cases all the way to the CAVC.

If the Federal Circuit and Supreme Court had ruled in the favor of the Navy blue water veterans, no law would have required the VA to use their computer systems to identify similarly situated claimants who were not included in the VA's 2006 moratorium. No law requires the VA to notify these similarly situated claimants about the Court's decision. And even if these similarly situated claimants somehow found out about the Court decision and reapplied, the VA would refuse to pay them the retroactive benefits that it paid to the claimants subject to the 2006 moratorium because the VA would conclude that its previous final denial of the claim - which occurred before the Haas decision -- was not the product of "clear and unmistakable error."

Thus, the unavailability of a class action mechanism would have doomed the claims of all similarly situated Navy blue water veterans and their survivors who were not part of the VA's 2006 moratorium. Legislative action is needed to ensure that unjust situations like this do not occur.