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STATEMENT OF
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NATIONAL LEGISLATIVE DIRECTOR
OF THE
DISABLED AMERICAN VETERANS
BEFORE THE
COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES SENATE
NOVEMBER 7, 2007

Mr. Chairman and members of the Committee:

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

Since Congress enacted legislation in 1988 authorizing judicial review of decisions by the Board of Veterans' Appeals (the Board or BVA), and establishing what is now the United States Court of Appeals for Veterans Claims with special jurisdiction for that purpose, the complexion of the claims and appeals processes for veterans and other claimants has changed dramatically. For the most part, the superimposition of judicial review on the administrative processes of the Department of Veterans Affairs (VA) has had a positive effect.

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

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

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

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

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

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

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

Although the number of appeals listed as denied by BVA may be the best indicator of potential workload for the Court, appeals to the Court come from the total number of cases decided on the merits that is, not remanded. Cases listed by BVA as "allowed" may not have been decided fully favorably or favorably on all issues. Of the 31,397 total BVA decisions in FY 2003, the allowed and denied together totaled 16,874; for FY 2004, this total was 15,860; for FY 2005, it was 20,128; for FY 2006, it was 25,644; and, for FY 2007, the total was 25,062.

The caseload volume upstream can be expected to influence the workload volume downstream, with some lag time. The input volume at the Court is an indicator of resource needs; the output volume is an indicator of efficiency.

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

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

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

The Court's annual reports show the average "Time from filing to disposition" was 379 days for FY 2005 and in FY 2007, it was 416 days. Chief Judge Greene stated in his testimony: "We are reviewing and evaluating innovative ways to be as productive as we can to reduce our pending caseloads and to achieve currency - - but not at the expense of forfeiting due process or limiting the opportunity to give each case the benefit of our full and careful judicial review."

The Chief Judge reported seven actions he had implemented or was considering:
1. Carefully tracking the productivity of all segments of the court.
2. Using retired judges eligible for recall under title 38, United States Code, section 7299.
3. Looking at using judges or retired judges for settlement conferences.
4. The use of a joint appendix as the record on appeal.
5. Summary disposition of cases without explanation, where the appellant is represented.
6. Implementation of a case management/electronic case files system (e-filing).

7. Making a Veterans Court House and Justice Center a reality based on the need for adequate space for recalled judges or any additional full-time active judges and staff.

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

Although we can draw some inferences from the data publicly reported by the Court, much about the Court's internal operations is not transparent to the public, and more precise efficiency determinations would require data on the flow of cases, timelines, and volume of cases pending in each judge's chambers, as well as delays attributable to motions for extension of time by VA and appellants' counsel.

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

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

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

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

(1) The number of appeals filed.
(2) The number of petitions filed.
(3) The number of applications filed under section 2412 of title 28, United States Code.
(4) The number and type of dispositions, including settlements, cases affirmed, remanded, denied, vacated and appealed to the federal circuit.

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

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

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

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

Before DAV could support an increase of two more judges, we would request that this Committee require the Court included the item mentioned above in its annual report. Until this information is made available to Congress, it is, in our estimation, premature to expand the number of judges to nine full-time active judges.

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

Essentially, S. 2090 empowers the Court to prescribe rules as it determines necessary to carry out its pending functions under an e-filing system. The proposed legislation does not dictate to the Court any details requiring inclusion in such rules, but merely authorizes the Court to

prescribe such rules "consistent to the extent practicable with rules addressing privacy and security issues throughout the Federals Courts." DAV has no opposition to S. 2090.

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