

HONORABLE WILLIAM P. GREENE, JR., CHIEF JUDGE U.S. COURT OF APPEALS FOR VETERANS CLAIMS; Accompanied by Mr. Norman Y. Herring, Clerk of the Court, United States Court of Appeals for Veterans Claims

STATEMENT OF
HONORABLE WILLIAM P. GREENE, JR., CHIEF JUDGE
U.S. COURT OF APPEALS FOR VETERANS CLAIMS
FOR SUBMISSION TO THE
U.S. SENATE COMMITTEE ON VETERANS' AFFAIRS
JULY 13, 2006

MR. CHAIRMAN AND DISTINGUISHED MEMBERS OF THE COMMITTEE:

Thank you, Chairman Craig, and Ranking Member Akaka for inviting me to join you today to examine the current caseload at the United States Court of Appeals for Veterans Claims. Under 38 U. S.C § 7252(a), the United States Court of Appeals for Veterans Claims, a national court of record established under Article I of the Constitution of the United States of America, has exclusive jurisdiction to review decisions of the Board of Veterans' Appeals. To obtain judicial review by the Court of a final decision by the Board of Veterans' Appeals, a person adversely affected by such decision must file a notice of appeal with the Court within 120 days after the date of notice of the Board decision is mailed. Thus, the U.S. Court of Appeals for Veterans Claims provides judicial review of decisions by the Department of Veterans Affairs that are generally final adjudications on claims for veterans benefits. Although it is inappropriate for me to discuss specific cases before the Court and the deliberative process required for each individual judge, I am available to discuss the Court's current caseload including the sudden increase in appeals filed with the Court.

Over the past 10 years, the Court had averaged 2,374 new cases per fiscal year (FY) and resolved an average of 2,114 cases, as well as concluding action on anywhere from 226 to over 1,500 applications for attorneys fees under the Equal Access to Justice Act (EAJA). Additionally, there has been a carry over of cases from year to year, in part because of formal and informal stays of proceedings. These proceedings are typically stayed at the request of the parties or by a judge because of another pending case that will resolve a similar issue. And, pursuant to the time limits provided in the Court's Rules of Practice and Procedure, it takes from 240 to 269 days (with time given to the parties for mailing) for the record on appeal and the briefs to be ready for review. This period can be extended based on motions by the parties. Between July 1, 2005, and June 30, 2006, for example, more than 10,000 motions for extensions of time to designate the record or file a brief, almost all unopposed, were filed and granted. Once the appellate record is ready, it is initially screened and reviewed by one of seven attorneys in the Court's Central Legal Staff to assess the issues and to determine if alternative resolution is possible. The case is then assigned to a judge for decision. The case is decided as quickly as practicable consistent with deliberative due process.

Upon assuming the Chief Judge position in August 2005, I began to see the Court's increasing caseload. Starting in April 2005, we started receiving an average of more than 300 appeals each month compared to a monthly average of roughly 200 appeals during the previous eight years. Accordingly, in FY 2005, we had 3,466 new cases filed and decided 1,905 cases plus an additional 877 EAJA applications. In the final quarter of calendar year (CY) 2005 (which

corresponds to the first quarter of FY 2006), 907 new cases were filed; 573 cases were decided; 224 EAJA applications were resolved. During the first quarter of CY 2006, the upward trend in new cases continued. The first quarter total for CY 2006 (adjusted from figures provided on March 31, 2006) was 1,009 new cases filed (400 received in March alone), 710 cases decided, and 257 EAJA applications acted upon. This increase in appeals has persisted through the quarter just completed on June 30, 2006. A total of 935 new cases were filed in April through June 2006, and 768 cases were decided. A total of 2,552 cases were filed in the first three quarters of FY 2006. During that period, 2,051 cases were decided and an additional 1026 EAJA applications were acted upon. The Court is on pace to dispose of more than 2,700 cases this fiscal year ? more cases decided than in all but one of the last ten years.

I cannot fully explain the increase in new cases, but I attribute it to three factors: First, the Board of Veterans' Appeals is deciding more cases and among those are final decisions denying total or partial benefits. These decisions may be appealed to the Court. It must be noted that at the end of FY 2005, the Board issued over 13,000 total denials. Second, there is an increased awareness among veterans and their families of the existence of veterans appellate rights established by Congress. Third, there is a growing perception among veterans of the value of judicial review. There may be other variables at work, such as the trampoline effect of cases involving interpretations of the Veterans Claims Assistance Act, and increased emphasis on claims processing at VA. I expect this upward trend in new cases to continue. Indeed, a recent feasibility study prepared by the General Services Administration and two consultant companies concerning a potential Veterans Courthouse and Justice Center, estimated that an incoming caseload of 3,600 or more cases per year would ultimately require nine full-time judges and additional staff and the work space to accommodate these personnel. The growth in the number of judges and staff projected by the study assumes the standard of 430 average new cases per judge per year set by the Judicial Conference of the United States. The study also assumes that, for caseload projections beyond 3,600 per year, the Court would top out at nine judges, and small spikes or additional caseload growth could be managed by recalled judges.

More importantly, as to output of completed cases by the Court as presently constituted, by January 2005, for the first time in six years the Court was fully staffed to decide cases on appeal. The significant variable, however, was that -- between January and August 2005 -- four judges had very little experience and did not acquire their full complement of staff until October 2005. Since then, their experience level has increased significantly and there has been a concomitant increase in the number of cases decided. The following comparison reflects these factors (also shown by Graph A, included with this testimony):

CY Quarter

1st Quarter CY 2005

2nd Quarter CY 2005

3rd Quarter CY 2005

4th Quarter CY 2005

1st Quarter CY 2006

2nd Quarter CY 2006

New Cases Filed

793

1,011
981
907

1,009
935 Cases Decided
442
556
539
573

710
768

The Court's current docket, as of June 30, 2006, (figures adjusted July 6, 2006) contains 5,850 cases. See attached Graph B which shows the status of these cases. As depicted in Graph B, 3,598 cases are awaiting designation of the record on appeal and/or filing of appellate briefs by the appellant or counsel for the Secretary of Veterans Affairs, who is the appellee of record. Thus, these cases are not yet ready for screening or judicial review. There are 436 cases that have been decided but now are being appealed at the U.S. Court of Appeals for the Federal Circuit. These cases must be included in our statistics even though on appeal to another Court. Additionally, 106 cases that have been decided are pending entry of judgment, the period of time during which an appellant may seek reconsideration. Upon judgment, an appellant may then appeal to the Federal Circuit. Similarly, 308 cases have been decided but now await mandate, that is, the time the decision is considered final unless appealed. In this regard, Graph B also identifies 153 applications for attorney fees under the Equal Access to Justice Act that are awaiting a decision. These applications may only be filed after mandate. The Court's Central Legal Staff is currently screening and/or engaging in alternative dispute resolution in 326 cases. This leaves 923 cases in chambers for judicial review and decision. Thus, 1,249 or about 20% of the total cases are available for screening, review, and decision. The Court has not defined "backlog," but rather has looked to currency of caseload. However, as offered by a previous Chief Judge during budget testimony, a reasonable benchmark is, generally, to view as "backlog" any case that has been in chambers more than six months. As of the end of June 2006, 354 cases (about 6% of the total docket) fell into that category. We continue to strive to decide those cases as quickly as allowed by the circumstances.

We are reviewing and evaluating innovative ways to be as productive as we can be to reduce our pending caseload 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. Here are some of the actions that I have implemented or am considering to meet the challenges presented by the upsurge in appeals to this Court:

First, I carefully track the productivity of all segments of the Court, including each judge and staff function. We are properly motivated and dedicated to rendering thorough and timely decisions.

Second, our retired judges are recall eligible under 38 U.S.C. § 7299. If recalled, a retired judge is statutorily obligated to serve 90 days each year. If a retired judge's circumstances permit and the judge so chooses, another 90 days of service may be provided for a maximum of 180 days in

a calendar year. The critical piece in deciding to recall judges is to recall them at a time when their limited availability can be most useful. But, there are space and staffing issues accompanying any recall decision that must be addressed. The Court is budgeted to support one recalled judge with a clerk, secretary, and office; a bare-bones situation. To recall at least two judges at one time requires staffing them with three clerks and one secretary each, and to provide any required office space and security, at a cost of approximately \$1.1 million. I am consulting with 5 of the 6 retired judges concerning recall options and their availability within the next six months. We are also looking for ways in which their service might practically and productively be used with the least disruption to the Court and existing operations and procedures, and with most efficiency and efficacy to the appellate system and to veterans.

Third, we are looking at the possible use of judges -- either active or recalled judges -- in settlement conferences.

Fourth, we understand that the Court's Rules Advisory Committee is deliberating whether, in cases where the appellant is represented, to recommend use of a joint appendix as the record on appeal. A joint appendix is an encapsulated record on appeal that is limited to the documents from the designated record that principally are relied upon by both parties. This joint appendix could expedite review at the Court by focusing consideration on relevant documents. Currently, the rules of Court afford the parties at least 90 days to agree upon documents from the claims file that are relied upon for creating the record on appeal. Requests or motions to extend that time period normally are granted to insure a complete and accurate record. Using an agreed joint appendix would reduce the required review of voluminous records, as well as shorten the time to have the case ready for a judge's review.

Fifth, in appropriate cases where the appellant is represented, we are considering adopting a practice often used in other federal courts of summarily disposing of such cases without explanation. This option holds significant potential given the caseload in chambers. A summary disposition states only the action of the court, without giving its rationale. It might state something like, "On consideration of the record on appeal and the briefs of the parties, the decision of the Board of Veterans' Appeals is hereby Affirmed/Reversed/Remanded." However, since the Court's inception one of the hallmarks of this Court's policy concerning the resolution of veterans' cases has been to provide to a veteran an explanation of the reasons for the Court's action. We have always adhered to that policy in disposing of single-judge matters, as well as in panel decisions. Summary action is a departure from that policy but an action worth considering. The Court's rationale could possibly be explained by the appellant's counsel. This option as well as all the other options I have listed was highlighted at the Court's Judicial Conference in April 2006, which was attended by many of the Court's practitioners -- both private attorneys and VA counsel as well as Veterans' Affairs Committee congressional staff.

Sixth, we are working on implementing a case management/electronic case files system (e-filing). The Court is partnering with the Administrative Office of the United States Courts to purchase and use the software and e-filing system already developed for the Article III courts. Indeed, ten of the thirteen courts of appeals now have that capability. Our goal of having e-filing implemented within the next two years now appears realistic. Such a system holds promise of providing a means to reducing some of the administrative delays associated with processing an appeal. Briefs could be filed faster, and if the Department of Veterans Affairs moves to a compatible paperless claims file, significant time savings could be achieved in obtaining an appellate record.

The Court's Central Legal Staff has contributed mightily to case disposition, through their

dispute-resolution efforts. We are considering other creative ways to make even greater use of the seven attorneys in that office in deciding cases faster. Certainly, for alternative dispute resolutions, we want the parties coming to the table to have full authority to commit to a thoughtful resolution consistent with the law, due process, and the interests of justice. Finally, the Court is continuing its efforts with the General Services Administration, to work towards making a Veterans Courthouse and Justice Center a reality. Our present space is or will be inadequate for the type of caseload we are now experiencing. The current lease of the commercial building expires in October 2010, so there is some urgency to this effort, since every feasible option for having an appropriate court facility for handling this increased appellate caseload requires several years of lead time. Adequate space is crucial if we are to make efficient use of recalled judges and any future full-time active judges in residence at the Court. Simply stated, we are looking for innovative ways to best meet the demands of an increased docket ? but not at the expense of forfeiting due process or limiting the opportunity to give each case the benefit of our full and careful review. All may rest assured that no week at the Court goes by without a dialogue amongst the judges and staff on how to decide these cases in a timely manner and consistent with the knowledge that our veterans deserve the very best. On behalf of the judges and staff of the Court, we appreciate very much your past support and continued assistance.