

*TESTIMONY OF  
THE HONORABLE BRUCE E. KASOLD, CHIEF JUDGE  
U.S. COURT OF APPEALS FOR VETERANS CLAIMS*



*FOR SUBMISSION TO THE  
UNITED STATES HOUSE OF REPRESENTATIVES  
COMMITTEE ON APPROPRIATIONS  
SUBCOMMITTEE ON MILITARY CONSTRUCTION,  
VETERANS AFFAIRS, AND RELATED AGENCIES  
APRIL 5, 2011*

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CHAIRMAN CULBERSON, REPRESENTATIVE BISHOP, AND DISTINGUISHED MEMBERS  
OF THE SUBCOMMITTEE:

It is both an honor and a pleasure to present testimony to this esteemed body on the fiscal year (FY) 2012 budget request and performance plans of the United States Court of Appeals for Veterans Claims. My remarks today mirror the statement I presented last month to the House Committee on Veterans' Affairs, Subcommittee on Disability Assistance and Memorial Affairs. Herein I will (1) summarize our budget request, (2) provide an overview of the Court, its caseload, and its Operation Plan, (3) suggest a broad examination of the structure of federal appellate review of veterans benefits decisions, and (4) provide an overview of recent developments on the Veterans Courthouse.

**I. Budget Request**

The Court's FY 2012 budget request is best viewed as three parts making up the whole. One piece is a request for \$2,726,363 sought by the Veterans Consortium Pro Bono Program (Pro Bono Program). Another part is the Court's necessary operating expenses, requested at \$28,070,327. The third part is a request for \$25,000,000 for design engineering and site acquisition for a veterans courthouse. In total, our FY 2012 budget request is \$55,796,690.

Our FY 2012 request reflects an increase of \$211,134 sought by the Pro Bono Program. Since FY 1997, the Pro Bono Program's budget request has been provided to Congress as an appendix to the Court's budget request. Accordingly, I offer no comment on that portion of our budget request, although I do commend the Pro Bono Program for its success in providing legal assistance to many appellants seeking judicial review from the Court.

Our FY 2012 request reflects an increase of \$2,438,827 for the Court's operations, which is due primarily to (1) anticipated rent payment for additional space associated with two new chambers, plus the expenses associated with relocating staff to another floor, building out and equipping those offices, the two new chambers, and appropriate chambers for our Senior Judges (\$600K), (2) an increase of \$1 million (M) in the statutorily required contribution to the Judges Retirement Fund (*see* 38 U.S.C. § 7298); (3) the estimated, annual increase in payroll associated with normal promotions and step increases (\$400K), and (4) continued cyclical replacement of IT equipment (\$250K).

With regard to the two new chambers, additional leased space, relocation of staff, and appropriate chambers for our Senior Judges, any funding spent on these matters in the current fiscal year would result in a commensurate reduction in costs incurred in FY 2012. The Court has forestalled implementing these changes in the past, due to a lack of appropriate space and the lack of any known movement on appointment of two new judges. However, it now appears that space will be available in our building this summer and that the two additional judgeships authorized in 2008 likely will be nominated this year; accordingly, we will proceed with these plans as soon as the space is available, if we have the funding.

As to funding the Judges Retirement Fund, on becoming Chief Judge I reviewed past contributions and noted that our internal budgeting for this has been underestimated the past several

years, requiring funds originally planned for other activities, but not used, to be contributed to the Fund at the end of the year. One reason for the past-years under-budgeting was that the estimate was based on an average 5% growth in the Fund, which is invested in Treasury instruments. In reality, there was less than .25% growth, and that alone accounted for a guaranteed \$1M shortfall at the end of each FY. Our budget request for 2012 is based on a more realistic estimate of growth in the Fund.

## **II. The Court, its Caseload, and its Operations**

With the creation of the Court in 1988, veterans became entitled, for the first time, to contest in a court of law adverse final decisions made by the Department of Veterans Affairs (VA) on their benefits claims. Over its 20 years of existence, the Court has grown to become one of the busiest federal appellate courts based on the numbers of appeals filed and decided per judge.

Appeals and petitions from FY 2007 through 2010 averaged almost 4,500, (FY 2007 (4,644), FY 2008 (4,128), FY 2009 (4,725) and FY 2010 (4,341)), compared to an average of about 2,300 from just five years earlier (FY 2002 (2,150), FY 2003 (2,532), and FY 2004 (2,234)). In addition to new appeals and petitions filed, the Court receives hundreds of motions each month, ranging from procedural to dispositive questions. In FY 2010 the Court disposed of 5,141 cases. The Court has implemented several innovations to help process these matters, which I will outline here.

Our pre-briefing dispute-resolution program was expanded significantly over the past few years. Our Central Legal Staff (CLS) attorneys now conduct conferences in essentially all merits appeals where the appellant is represented by counsel—equating to roughly 65-70% of the total number of appeals. Of the cases where consultation is scheduled, approximately 50% are resolved with the parties agreeing to a remand for further adjudication below without judicial review. Further, even in those cases where the appeal is not resolved at conference, the dispute-resolution process

generally is successful in narrowing and focusing the issues on appeal. The feedback from members of the Court's Bar, as well as from our CLS attorneys, is that the conferencing program is efficient and effective in bringing the parties together and resolving issues consistent with the law, due process, and the interests of justice, while conserving judicial resources.

For the past several years, we have recalled our retired Senior Judges. We currently have a total of six Senior Judges eligible for recall, with two judges serving as I speak, and all are on notice that their continued service is needed. The Senior Judges primarily assist with the more straightforward appeals and the Court's motions practice, which in turn affords the regular active judges additional time to focus on the more time-consuming decisions.

Several years ago, the Court also partnered with the Administrative Office of the U.S. Courts (AO) to acquire, adapt, and implement an electronic case management/electronic case filing system (CM/ECF). CM/ECF has now been fully functioning for two years and we now receive most documents electronically and issue most orders and decisions electronically, although we still have paper filing and orders for pro se litigants. CM/ECF permits remote 24-hour filing access, reduced storage space needed for record retention, the opportunity for multiple users to access records, efficient electronic notification procedures, and reduced mailing/courier costs. We just installed an updated version of CM/ECF and will continue working with the AO to acquire future versions to provide ever more useful and time saving features for case processing and management.

The Court decided more appeals this past fiscal year than were filed. This significant accomplishment is due largely to our mandatory conferencing program. However, more than half of the appeals filed, including a significant number of appeals where the appellant is pro se, require judicial review. In FY 2010, more than 2,000 appeals required judicial action, as did another 200

EAJA applications, petitions for extraordinary relief, and hundreds of motions. This level of demand for judicial review exceeds the capacity of our six active judges, who average over 200 appeals a year, in addition to the EAJA applications, petitions, and motions. The current need for judicial review also exceeds the support provided by our Senior Judges who average about a quarter of the production of a regular active judge (Senior Judges decided 284 appeals in FY 2010, as well as numerous motions).

Nevertheless, there is daylight. Once all of our judicial vacancies are filled and the newly appointed judges attain experience and familiarity with veterans law and judicial decision making, I am confident there will be an increase in the annual number of appeals resolved.

### **III. Suggestion for Possible Time and Cost Savings Without Judicial Review Degradation**

Over the past couple of years there has been discussion among various stakeholders of the benefits of establishing a commission to evaluate the process of appellate review of veterans benefits decisions and to make recommendations on how to improve that system. In October 2009 I testified before the House Committee on Veterans' Affairs, Subcommittee on Disability Assistance and Memorial Affairs, supporting an unnumbered draft bill (the "Veterans Appellate Review Modernization Act") that would establish such a commission, and I reiterated that support when I testified before that same subcommittee last month.

As I stated then, the time is right for a working group to step back and review the system we have, critically examine its strengths and weaknesses, and identify measures that could benefit the overall appellate process. Specifically, we support and encourage a commission to weigh the costs and benefits of the unique two-tiered federal appellate review system in place for veterans benefits

decisions. Similar action was taken in the past with regard to the U.S. Court of Appeals for the Armed Forces, where direct appeal to the Supreme Court ultimately was permitted. With two decades of experience in appellate review of veterans benefits claims, and the resultant seasoned body of case law, it is time to consider the added value of a second layer of federal appellate review.

No doubt, continued bites at the apple, so to speak, will be sought by some, but at the end of the day, I suggest it cannot be convincingly argued that a veteran, the taxpayer, or anyone is best served by waiting nearly two years to have a decision of the Veteran's Court overturned by the Federal Circuit, only to wait approximately another two years to have the Federal Circuit overturned by the Supreme Court, as was the situation in the case of *Shinseki v. Sanders*, 129 S.Ct. 1696, 1707 (2009), or to have a veteran wait 18 months to have a decision of the Veteran's Court upheld by the Federal Circuit, only to wait another 9 months to have that decision overturned by the Supreme Court, as was the situation in the recently decided case of *Henderson v. Shinseki*, 131 S.Ct. 1197 (Mar. 1, 2011). Because these cases involve issues of law, their impact is far reaching, often causing cases to be stayed, reconsidered, or readjudicated below. The extra step in the appellate process is unique, time consuming and costly, and worthy of examination for its continued need.

#### **IV. A Veterans Courthouse**

Although now over 20 years old, the United States Court of Appeals for Veterans Claims remains the newest federal court. Under the able leadership of our first Chief Judge – Chief Judge Nebeker – the Court offices and courtroom were constructed in leased commercial space, where the Court is housed today. Since at least 2003, many of our Nation's largest Veterans Service Organizations (VSOs) have supported a dedicated courthouse for veterans seeking judicial review. In 2004, the United States House of Representatives expressed its sense that the Court "should be

housed in a dedicated courthouse" that would be "symbolically significant of the high esteem the Nation holds for its veterans" and would "express the gratitude and respect of the Nation for the sacrifices of those serving and those who have served in the Armed Forces, and their families" (H.R. 3936). That sentiment was echoed in 2007 with the sense of Congress that the Court be provided appropriate office space "to provide the image, security, and stature befitting a court that provides justice to the veterans of the United States" (S. 1315). The Board of Judges fully supports the convictions expressed by Congress and the VSOs.

In 2004, pursuant to Congressional support and funding, an initial and follow-on studies were undertaken by GSA to determine the feasibility of acquiring a dedicated courthouse. In 2009, eight National VSOs collaboratively sent a letter to Congress expressing their strong support of legislation that would authorize the funding and construction of a veterans courthouse. In FY 2009, Congress responded by appropriating \$7M for advance planning and architectural design, and those funds were transferred to GSA for completion of a pre-development planning study (planning study). The Court made no specific funding request for the courthouse project in its FY 2010 budget request because the planning study had not yet been concluded and plans were too uncertain at that time to make such a request prudent.

Following receipt of a GSA estimate that \$50M was needed for construction funding and an additional \$12M for land acquisition, \$62M was requested in the Court's FY 2011 budget submission. In response, the House proposed full funding at \$62M, and the Senate proposed \$25M – sufficient funding, per GSA, to perform more detailed design and planning, and to purchase the necessary land adjacent to GSA property being considered for the courthouse, the next steps in the process. As you know, the FY 2011 budget request has not yet been acted on because we are

operating on a continuing resolution, and therefore no funding has been appropriated for construction of the courthouse in FY 2011.

At the time of my February 2010 testimony before this Committee, I noted that GSA had hired MGA Partners, an architectural firm, to complete a Pre-Development Planning. That study, which was completed this past summer, and verified by GSA this past fall, presents a more specific courthouse cost estimate based on the particular location and general design requirements of a courthouse, and it reflects a significant cost increase for project completion over the FY 2011 budget request. We understand that GSA has either briefed or offered to brief this Committee as to the basis for the cost increase.

We also have learned over the past few months that the local government may not be amenable to closing an infrequently used street on the side of the proposed location for the courthouse, and that there have been no assurances that the additional property needed to site the courthouse can be purchased within the estimated cost. GSA is less concerned about the second factor than it is the first. Should the side street be neither closed nor limited to controlled access, the cost of construction surely would rise. Failure to limit access to the side street, and the impact on cost and design of the courthouse, might also warrant finding another site.

Given the increased cost estimate from GSA and need for close study thereof, as well as the factors just noted, and mindful of the Court's responsibility to ensure fiscal prudence, our FY 2012 request includes \$25M, which GSA advises is the amount necessary for funding the next steps toward construction, i.e., more detailed planning, design, and land acquisition. (This \$25M is not needed in FY 2012 if it is appropriated in FY 2011.) We are sensitive to budget constraints and understand that priorities must be set by Congress; however, if any federal courthouses are to be

funded for construction, we support the veterans who contend that their courthouse should be one of them.

If construction of the courthouse is to be delayed, with no work anticipated for the next several years, it is my understanding the \$7M already appropriated for initial design – which has been transferred to GSA and of which a little over \$6.6M still remains – could be used to fund the construction at our current location of two chambers, the relocated offices, and Senior Judges' chambers, if there is appropriate congressional agreement to do so.

#### **V. Conclusion**

On behalf of the judges and staff of the Court, I express my appreciation for your past and continued support, and for the opportunity to provide this testimony today.