

STATEMENT 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

MARCH 13, 2013

MR. CHAIRMAN AND DISTINGUISHED MEMBERS OF THE SUBCOMMITTEE:

I am pleased to appear before you and present testimony on the fiscal year (FY) 2014 budget request and performance plans of the United States Court of Appeals for Veterans Claims. My remarks today will (1) summarize our budget request, (2) provide an overview and update on the Court, its caseload, and its operations, and (3) touch on two important initiatives I have mentioned in the past – a broad examination of the structure of federal appellate review of veterans benefits decisions, and the Veterans Courthouse project.

I. Budget Request

The Court's FY 2014 budget request totals \$35,407,527. This request is comprised of two parts – the Court's necessary operating expenses of \$32,907,527, and a request by the Veterans Consortium Pro Bono Program (Pro Bono Program) for \$2,500,000. Since FY 1997, the Legal Services Corporation/Pro Bono Program's budget request has been provided to Congress as an appendix to the Court's budget request, although the Court functions merely as a pass-through for that amount. Accordingly, I offer no comment on that portion of our budget request.

As to the Court's operating expenses, our FY 2014 request reflects an increase of \$2,926,827 over our FY 2013 request. With some slight offsets in other areas, this increase results primarily from an increase of \$3.1M in the statutorily required contribution to the Court of Appeals for Veterans Claims Retirement Fund (Retirement Fund or Fund). *See* 38 U.S.C. § 7298. Per section 7298, as Chief Judge of the Court I am charged with securing an "annual estimate of the expenditures and appropriations necessary for the maintenance and operation of the fund," and the Court contracts with an actuary to provide guidance on how best to comply with obligations related to maintaining the Fund. The statute also states: "Subject to the availability of appropriations, there shall be deposited in the Treasury to the credit of the retirement fund, not later than the close of each fiscal year, such amounts as may be required to reduce to zero the unfunded liability (if any) of the fund. Such deposits shall be taken from sums available for that fiscal year for the payment of the expenses of the Court." 38 U.S.C. § 7298(e)(2)(B).

The increased request for the retirement contribution for FY 2014 is based on several drivers, which include the addition of three judges who were appointed to the Court within the last year; changes in the actuarial estimates for length of life; continued, extremely low Treasury yields; and an increase in judicial salaries and retirement pay pursuant to *Beer v. United States*, 696 F.3d 1174 (Fed. Cir. 2012), *petition for cert. filed* (Jan 3, 2013, No. 12-801).

For FY 2014 the Court requests \$18.448M for Personnel Compensation and Benefits, an increase of \$130K from FY 2013. The number of full time employees remains at 127, unchanged over the last two years. The Court's appropriations request covers anticipated expenses for judges and employees including salary, health benefits, insurance, and employee matching contributions to

the Thrift Savings Plan, as well as routine promotions. The request also includes funding necessary to pay the increase in judges' salaries pursuant to *Beer, supra*.

For FY 2014 the Court requests \$7.560M for all other operation expenses ("Other Objects"), a decrease of \$77K from FY 2013, which was a decrease of almost \$200K from the FY 2012 request. These funds are used to satisfy the Court's daily operations needs, and to cover such expenses as rent, contract services, communication and utility expenses, equipment, furniture, supplies, subscriptions, travel and transportation, and printing expenses. The Court takes seriously its obligation to perform efficiently, and continues to strive to reduce those expenses where there is some flexibility, such as supplies, printing, and travel costs.

II. The Court, its Caseload, and its Operations

For the new Committee members, let me provide a brief overview on the unique place our Court occupies in the system that provides benefits to the Nation's veterans and their families. The story really begins well before the Court was created.

For many years the veterans' benefits process, administered by the Department of Veterans Affairs (VA), operated without any right by a veteran to independent judicial review of a decision by VA on a claim. Interested parties debated the possibility of providing judicial review. A variety of proposals were offered as to how that review ought to be provided. Ultimately, in 1988, a unique entity within the federal court system was created when Congress established the U.S. Court of Veterans Appeals, now the U.S. Court of Appeals for Veterans Claims, as an independent appellate court that would handle only veterans benefits cases, applying general principles for appellate review of agency final decisions. Since that creation, a coherent body of specialized veterans law

jurisprudence has developed, and there are now 25 volumes of law in the West Reporter Series: West's Veterans Appeals Reporter.

Briefly, this is how an appeal to the Court works. As a matter of right, veterans and their qualifying family members who have received an adverse benefits decision from the Board of Veterans' Appeals (Board) may file an appeal to the Court within 120 days after the date of the Board decision. A modest filing fee of \$50.00 is required, and that fee is routinely waived upon a showing of financial hardship. When an appeal is received and filed, the Secretary of VA is notified and requested to provide the Court with a copy of the Board decision being appealed. Thereafter, the Secretary and the appellant (or the appellant's counsel) determine which documents within the veteran's claims file constitute the Record before the Agency. After the record has been assembled the parties generally are ordered to participate in a staff conference with an attorney from the Court's Central Legal Staff (CLS). The CLS attorney works with the parties to refine the contested issues, and the Secretary and the veteran may resolve the matter prior to involvement by a judge by agreeing jointly to vacate the Board decision and remand the case to the Board so that it can address the issues raised on appeal. If the case cannot be resolved, the parties must present written briefs, and may request oral argument before the Court. During this period of administrative processing common to all appellate courts, pro se appellants frequently obtain counsel. In FY 2012, 44% of the appeals were filed by appellants without representation, but the number of cases where the appellant remained unrepresented at the time of decision dropped to 27%.

Once the appellate briefs are filed, the case is either assigned to a CLS attorney who prepares a memorandum of law on the case before assignment to a judge, or the appeal is transmitted directly to a judge. The assigned judge, with the assistance of law clerks, then reviews the case to consider

whether it presents a novel issue requiring a panel decision or whether it involves the application of settled law. If it involves the application of settled law to the facts, a single judge is permitted to decide the case and issue a memorandum decision. This single-judge decision authority is essential to the Court's ability to handle its formidable caseload. If, prior to making a decision, the judge determines that the case involves a novel issue of law, the judge will direct the Clerk to assign the case to a three-judge panel. That panel will then proceed to a decision, with or without oral argument by the parties.

It is the practice of the Court to circulate among all of the judges any proposed single-judge decisions and panel opinions prior to issuance. In the case of single-judge decisions, if two judges believe the case requires decision by a panel, it must be referred to a panel. This process assures that single judges do not make decisions that should be the subject of precedential panel decisions. During the circulation of a draft opinion by a three-judge panel, there may be a call for consideration of the matter by the full court when it is believed that the proposed opinion addresses issues of exceptional importance or creates a conflict in the Court's jurisprudence that must be resolved. Further, either party may request reconsideration and/or panel review of a single-judge decision once it is issued, and whenever a request for a panel decision is made, a panel of three judges will review the appeal. Thus, the Court's rules permit single-judge decisions in an effort to expedite case dispositions, but safeguards exist to ensure that single-judge decisions are supported by existing precedents.

Following a final decision of our Court, an additional appeal to the U.S. Court of Appeals for the Federal Circuit may be filed. The Federal Circuit has jurisdiction to review our decisions that interpret the law and regulations, but not those decisions that apply the law and regulations to the

facts of a particular case. Finally, following review in the Federal Circuit, either party may seek review by the U.S. Supreme Court by filing a Petition for a Writ of Certiorari. The Supreme Court has considered a handful of our cases over the years.

Since its creation in 1988, the Court has become one of the busiest federal appellate courts based on the numbers of appeals filed and decided per judge. Historically, approximately 200 appeals to the Court were filed monthly from FY 1999 through FY 2004. Since FY 2005, however, the Court has averaged 343 cases filed per month. In addition to appeals, the Court receives petitions pursuant to its authority to issue extraordinary writs in aid of its jurisdiction under the All Writs Act, (28 U.S.C. § 1651(a)), and applications for representation fees and expenses authorized under the Equal Access to Justice Act (EAJA) (28 U.S.C. § 2412(d)). In FY 2012, in addition to acting on thousands of procedural motions, the Court, as a whole, disposed of 6,992 matters, including over 4,350 appeals, almost 2,300 applications for attorney fees and expenses, over 140 petitions, and almost 200 requests for reconsideration or panel review.

Since becoming Chief Judge I have concentrated on two main areas where I perceived un-programmed delay. One was the time it took to decide cases once they were assigned for judicial review, and the second was the time it took our CLS to prepare case summary and research memoranda in advance of forwarding cases for judicial review. With regard to judicial review, we have kept focused on the quality of the decisions, but have pointedly attacked the number of cases in chambers pending decision. I am pleased to state that we have significantly reduced the time from case assignment to decision by a judge. We likewise have streamlined some of the processes for preparing cases for judicial review, and we have gone from a high of over 800 cases briefed but

pending assignment, to now under 100. We continue to work toward a goal of forwarding cases for judicial decision no more than 30 days after the matter is fully briefed by the parties.

Our Senior Judges continue to be assets to the Court, and their service was particularly essential as we operated with judicial vacancies and awaited appointments of our new judges. With nine active judges now in place, and one retired judge serving in recalled status over the coming year, it does not appear that I will need to recall additional Senior Judges the rest of this year.

III. Examination of the Structure of Federal Appellate Review of Veterans Benefits Decisions, and the Veterans Courthouse Project

Over the past several years, I have testified before our authorizing committees and this subcommittee regarding a proposal to establish a commission to evaluate the process of appellate review of veterans benefits decisions and to make recommendations on how to improve that system. I continue to make that recommendation, because such an independent commission may identify beneficial changes to the current appellate structure that could result in reduced time that veterans wait to have their claims finally decided.

As I mentioned earlier when outlining our review process, the Court is positioned within a unique system of judicial review, where a party dissatisfied with a decision from our Court may appeal, as of right, to yet another appellate court before seeking review at the U.S. Supreme Court. That structure may have been prudent when the Court was in its infancy, but now, with 25 years of veterans law appellate jurisprudence, it seems time to consider the added value of the second layer of federal appellate review. Although each layer of review affords veterans another "bite at the apple" so to speak, which may be desirable to one who has been unsuccessful, that added level of review comes at a cost, and adds delay to the entire process before finality is reached. In the words

of Supreme Court Justice Robert H. Jackson: "Reversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final." The Court supports and encourages a commission to critically review the costs and benefits of the current two-tiered system of appellate review by right.

I also want to follow up on the Veterans Courthouse Project. The United States Court of Appeals for Veterans Claims remains, to my knowledge, the only federal appellate court housed in a leased commercial office building. We were very close to receiving appropriations for the courthouse in our FY 2010 appropriation, but circumstances combined to warrant delay. Specifically, the General Services Administration's estimated cost virtually doubled from the time of our FY 2010 budget testimony before this committee and passage of the FY 2010 appropriations bill, and at the same time the Nation's fiscal crisis was becoming better understood. We remain sensitive to budget constraints and understand that priorities must be set by Congress. However, we stand with Congress in its intent to build a "dedicated courthouse [] symbolically significant of the high esteem the Nation holds for its veterans [that 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) or "to provide the image, security, and stature befitting a court that provides justice to the veterans of the United States" (S. 1315). Also, we support the many Veterans Service Organizations and veterans at large who believe if any federal courthouses are to be funded for construction, their courthouse should be one of them.

IV. 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.