

**BATTLING THE BACKLOG PART II: CHALLENGES  
FACING THE U.S. COURT OF APPEALS FOR  
VETERANS CLAIMS**

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**HEARING**

BEFORE THE

**COMMITTEE ON VETERANS' AFFAIRS**

**UNITED STATES SENATE**

**ONE HUNDRED NINTH CONGRESS**

**SECOND SESSION**

—————  
JULY 13, 2006  
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**BATTLING THE BACKLOG PART II:  
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APPEALS FOR VETERANS CLAIMS**

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**THURSDAY, JULY 13, 2006**

U.S. SENATE,  
COMMITTEE ON VETERANS' AFFAIRS,  
*Washington, DC.*

The Committee met, pursuant to notice, at 10 a.m., in room 418, Russell Senate Office Building, Hon. Larry E. Craig, Chairman of the Committee, presiding.

Present: Senators Craig, Burr, Thune, Akaka, Murray, and Jeffords.

**OPENING STATEMENT OF HON. LARRY E. CRAIG, CHAIRMAN,  
U.S. SENATOR FROM IDAHO**

Chairman CRAIG. Good morning, ladies and gentlemen. The Committee on Veterans' Affairs of the U.S. Senate will come to order.

Today, the Committee will continue to look at the veterans' claims adjudication and appeals system. Last year, we held hearings to examine challenges facing the Department of Veterans Affairs in processing and deciding veterans' claims for benefits. This morning, we will discuss some serious challenges facing the U.S. Court of Appeals for Veterans Claims, which hears appeals from those decisions. More importantly, we will discuss what measures could be taken to help the Court deal with these challenges.

For this discussion, we are very pleased this morning to be joined by the Court's Chief Judge, William P. Greene, Jr., and he is accompanied by the Clerk of the Court, Norman Herring. Gentlemen, we thank you very much for joining us this morning.

We are also pleased that the Chairman of the Board of Veterans' Appeals, James Terry, is here for this discussion. He is accompanied by Assistant General Counsel Randy Campbell. They will be joined on the panel today by Joe Violante of the Disabled American Veterans. We welcome all of you.

Before I turn the floor over, I would like to comment on why I have called this hearing today. I think Judge Greene would agree that the past few years have been transitional years for the Court. The last of the original judges—and the Chief Judge who has previously stepped down is sitting in the audience—who were appointed when the Court was first created have all retired and six new judges were confirmed in their places.

Also, the Court experienced a dramatic, unprecedented rise in the number of new cases it is receiving. In fact, in fiscal year 2005,

the Court received over 3,400 new cases, which is 37 percent higher than the Court had ever received in a single year. All this year, the Court expects to receive almost 3,600 new cases.

Those factors have undoubtedly contributed to what is now the highest level of pending cases the Court has ever experienced, over 5,800 cases. That is more than double the number of cases that were pending just 2 years ago, and more than three times the number of cases pending at the Court a decade ago.

Recognizing these trends, the Court has asked for and been provided with funding for additional staff in recent years. But as you can see from the charts behind me, despite recent increases in productivity, we are still in the red and taking more cases on as we go.

If these trends continue, and it is a reasonable projection outward, the number of pending cases may grow to almost 7,000 by the next year and to 10,000 within the next 5 years. As we all know, whatever case comes into the Court must go back out, so as the number of pending cases continues to grow, the workload the Court will have to deal with in the future also grows.

I know that since becoming the Chief Judge last August, Judge Greene has been carefully examining various means of dealing with this situation, such as recalling retired judges and having judges conduct settlement conferences. Today, we will discuss those options and others that may alleviate what I think is a phenomenal caseload.

The bottom line is that if something is not done soon to reverse this trend, veterans seeking justice from the Court, and that is what this is all about, may have to wait in line several years longer just to get their case before a judge. I believe that is an untenable environment, particularly now, with thousands of wounded servicemembers returning from Iraq and Afghanistan. We must ensure that our veterans will receive timely decisions on their claims, whether that decision is to affirm or to remand or to reverse.

So at the end of the day, I hope this Committee and our Nation's veterans will have some assurance that measures will soon be taken to ensure that the Court can promptly dispense justice in all veterans' cases, not just today, but for many years to come. That is what this hearing is about this morning.

I am pleased to be joined by our Ranking Member, Senator Akaka. Danny, I will turn to you for opening comments.

**STATEMENT OF HON. DANIEL K. AKAKA, RANKING MEMBER,  
U.S. SENATOR FROM HAWAII**

Senator AKAKA. Thank you very much, Mr. Chairman. Thank you for calling this hearing today on this very important topic, service to our veterans and justice. This hearing continues the Committee's efforts to ensure that veterans' claims are processed and adjudicated in a timely and accurate manner.

Last year, the Committee held a hearing on the backlog of claims at VA, including the Board of Veterans' Appeals. Today's hearing will examine the appeals process at the Court of Appeals for Veterans Claims.

For many veterans, the claims process can be an arduous ordeal. By the time a claim reaches the Court of Appeals for Veterans

Claims, the veteran may have spent years navigating through the VA system, awaiting final resolution on a claim.

Veterans deserve to have their pending issues resolved fairly and in a reasonable amount of time. Ensuring the Court of Appeals for Veterans Claims has adequate resources and utilizes those resources in an efficient way will help meet this goal.

Today, I hope we will hear what is working well and what is not working so well, especially at the Court. Once we determine where the problems reside, we can then explore what role the Congress might play, alone or with others, in finding common-sense solutions.

Judge Greene, I hope to hear from you about the various means by which you are reviewing the Court to reduce its pending caseload. Although not directly connected with the hearing, I note my regret that Dr. Perlin has resigned as Under Secretary. Personally, I feel badly about that, and we really will miss him. I found Dr. Perlin to be a man of great integrity who had the welfare of veterans as his highest priority. VA has lost an important leader.

Mr. Chairman, I am happy to see that the Committee remains active. Recently, the Committee favorably discharged several important pieces of legislation and I am proud of the good work we have accomplished as a Committee and accomplished together along with our colleagues.

Thank you again, Mr. Chairman, and I thank the witnesses for joining us today.

Chairman CRAIG. Senator Akaka, thank you very much.

We have also been joined by Senator Jeffords.

Jim, do you have any opening comments?

Senator JEFFORDS. Yes, I do, Mr. Chairman.

Chairman CRAIG. Please proceed.

**STATEMENT OF HON. JAMES M. JEFFORDS,  
U.S. SENATOR FROM VERMONT**

Senator JEFFORDS. Thank you for holding this hearing. I appreciate the witnesses taking time out of their busy schedules to help us understand what problems there are with the veterans' claim system and how we can improve its functioning.

Veterans deserve the benefits to which they are entitled. We all know that an exact determination of benefits owed is a tricky matter and the courts are often required to sort out the details in complicated cases. However, the veteran deserves speedy and clear adjudication of the claim of benefits.

Over the years, Congress has worked hard in striking the right balance between assistance to the veterans and expeditious functions of the courts. I believe it is important to revisit that balance at regular intervals to make sure that we have it right.

With a record number of claims coming into the system, it is incumbent upon us to make sure that the system functions properly. I look forward to hearing today's testimony, Mr. Chairman.

Chairman CRAIG. Jim, thank you very much.

We have also been joined by Senator Richard Burr.

Richard, do you have any opening comments?

**STATEMENT OF HON. RICHARD BURR,  
U.S. SENATOR FROM NORTH CAROLINA**

Senator BURR. Thank you, Mr. Chairman. My only statement is that I thank the Chair and the Ranking Member. I think this is one of the most important hearings that we can have. I think it is something we need to look at closely and I believe that it is time we find a solution to the backlog that we have. I thank the Chair.

Chairman CRAIG. Thank you very much.

Judge Greene, before I turn the microphone over to you, let me recognize the retired Chief Judge who is in the audience today, Frank Nebeker. It is great to have you with us, Judge. Also, Judge Al Lance, who is with us, and Judge Mary Schoelen. We thank you for being with us this morning and being a part of the audience and the listening group.

This is a unique hearing in this regard, and I say to my colleagues this. As we know, this Court is not an extension of the Department of Veterans Affairs. It is a court that we created in 1988 for the purpose of serving veterans' needs and veterans' claims. It has seven judges, and as I have mentioned in my opening comment, it has largely rotated out now all of the original judges and we have a full complement of largely new judges. All of that has happened over the last 3 years.

During that period of time, the statistics that are represented by the charts behind me on the mantel, speak in large part to what I believe is a sense of urgency to resolve this issue and to get the Court on a path of declining numbers of claims held over and growing numbers as it relates to serving our veterans.

So with that, Judge Greene, we turn the microphone over to you for your time and your testimony.

**STATEMENT OF HON. WILLIAM P. GREENE, JR., CHIEF JUDGE,  
U.S. COURT OF APPEALS FOR VETERANS CLAIMS; ACCOMPANIED BY NORMAN HERRING, CLERK OF THE COURT, U.S. COURT OF APPEALS FOR VETERANS CLAIMS**

Judge GREENE. Thank you very much, Mr. Chairman. Good morning, Mr. Chairman, Ranking Member Akaka, Senator Jeffords, Senator Burr. It is indeed a pleasure for me to be here with you this morning. I welcome the opportunity to join you after the invitation to discuss the current caseload at the U.S. Court of Appeals for Veterans Claims. With me at the table is Mr. Norman Herring, my Court Executive.

The court is a Federal Court of Appeals, charged with conducting legal review of final Board decisions on veterans' claims. Thus, the judges of the court do not adjudicate those claims, but rather determine if the Board decision contains prejudicial error or is legally correct.

Judicial review of decisions on veterans' claims is relatively new. Until 1989, there were statutes precluding judicial review of that VA agency decisionmaking. Thus, over the past 17 years, there have been developments in veterans' law that include many lawyers gaining expertise in veterans' law, an awareness among veterans and their families of the existence of veterans' appellate rights and the value of judicial review, and there has been an in-



crease in VA adjudications of veterans' claims that produces cases for the court's docket.

Thus, it hasn't been a surprise to me that all of a sudden, we have this increase in appeals at the Court. I didn't know whether that was part of my welcoming reception as the Chief Judge, but if anyone looked at the statistics of the Board of Veterans' Appeals decisions over the past 10 years, one could see that just total denials by the Board were such a number that certainly would overwhelm this Court if all those individuals who receive total denials from the Board sought appeal in our Court. For whatever reason over the past years, they did not, but over the past 17 years with this growing expertise, this maturing bar that we have in veterans' law, it is definitely expected that we now would be receiving more appeals.

The other unique thing about our Court is that no other Federal court would be faced with the transition that we were faced with as of August 2005. Where else in the Federal judiciary system could, I, the junior judge, just a little over 2 years ago, suddenly become the senior judge, and have all of the experience of the court departing? We have, however, received six judges who are extraordinarily talented individuals, who have taken veterans' law by the horn and are making a difference to veterans. They are doing so with well-tempered respect for legal precedent.

Thus, we are now ready to tackle the caseload before us. My biggest challenge since August was to mold an effective, smooth operating group of judges who would gain experience fast to accomplish the task before us. The mission: to decide cases at the Court in a timely, collegial, and quality manner.

As shown in the chart I provided to you in my written remarks, which I ask to be included in the record—

Chairman CRAIG. And without objection, they are, certainly, Judge.

Judge GREENE. The indications are that from the beginning of August 2005 to now, there has been an increase in the number of cases decided by these judges. We are very pleased by that, but we are not stopping at that success. We want to continue that success, and as each year goes by, I am confident that we will be able to decide even more cases. That won't, however, help us at 7 judges to handle a caseload of 6,000, 7,000, 10,000 cases. That is a known fact.

In fact, as you may know, we are pursuing the possibility of moving to a veterans' courthouse and justice center. One observation that developed from the feasibility study is that if this trend continues, just at 3,600 new cases each year, by 2010 when our lease expires in our current commercial facility, we would need to have 9 full-time active judges, and any spikes in the numbers of cases beyond 3,600 could be managed by recalled retired judges. Well, that is based on 3,600, so I have before me now the task of trying to plan on what about 5,000? What about 6,000? That is my next mission.

You have been provided a graph that depicts the numbers of cases at our court. Let us examine that quickly. There are 5,850 cases at the Court. Of these, 3,598 are awaiting various developments. It must be remembered that even though those are cases

coming in, they are not seen or touched by a judge until certain other preliminary steps are taken and completed. These preliminary steps are required in appellate procedure.

Unlike in other Federal appeals courts, in our court there has to be a created an appellate record. In veterans' claims, there is not necessarily a record when the appeal comes forward. A record has to be designated. So there is time consumed in designating the record. Once the record is designated and filed, then the parties can file appellate briefs. After the appellate briefs are filed, then the case is ready for screening by the central legal staff, and then the case is ready for review.

As I indicated in my written remarks, there are at least 240 days encountered in that process, and that is without any requests for delays or motions for extensions of times for acceptable reasons. Indeed, from August 2005 to now, we have had 10,000 motions for extensions of time.

Many Federal courts, of course, have rules to follow and we have adopted those rules. You have 60 days to file a brief. The other party has 60 days to file a brief. If you request a delay, the option is to deny it and you go forward without the case having been briefed or you afford the opportunity for the case to be briefed.

We are not oppressive, of course, in our review because these are veterans' cases and we want the veteran to have his or her day in court and we want the Secretary to have the opportunity to be heard, as well. More importantly, the number of cases that fall in this category, about 58 percent, are *pro se*, i.e., they do not have legal representation. So consequently, we have to be even extra careful to ensure that that veteran who is not represented is afforded every opportunity of due process within our system.

So once that time is consumed, we now have a case ready for judicial review. Under those circumstances, it is very difficult for us to identify that as a backlog. That is a caseload with which we already start off with a year before we can review the case.

The other figures on the graph, represent the numbers of cases that go to the Federal circuit on appeal, which is 436. Of course, decisions from that court also have an impact on the types of cases that we end up having at our court, either by reversing our decisions or remanding cases back to us for whatever legal reason, or indeed, making a ruling of law that impacts not only the cases at the court, but thousands of cases at VA and, as a result, creates the potential for further appeals. Those cases are in our inventory, but as I said, about 850 of them are not—they are cases that we have, in fact, already decided.

That leaves about 920 cases that are in chambers, and that indeed is a heavy caseload for 7 judges, but it is manageable. We have reached the level of experience in this first year that I am confident we will continue to be able to review these cases as fast as possible with quality.

But as the case move toward review, those 3,000 cases, I am monitoring our resources that can be applied to reviewing them. These available resources include using the attorneys in the central legal staff to perhaps conduct settlement conferences based upon rules that have to be established, because the current pre-settlement, or pre-briefing conferences occur much earlier in the system.

A more mediation-type conference would occur probably after briefs are filed.

And, of course, recalling our retired judges. Currently, there is bare bones support for supporting a recalled judge. I have authority for one clerk and one secretary. That would not provide or promote large efficiency of a recalled judge if you were recalling for purposes of dealing with maximum numbers of cases. If I were to call two or three recalled judges for the maximum output that I think they could provide, then I would need the accompanying staff to do so. I am sure that I can come to you and seek that support if the need arises.

The critical piece that I have concluded is that I need to call them at the time that would be most useful to addressing the numbers of cases coming out of that briefing period through the CLS; as they trickle out of CLS at about 120 to 130 cases per month. Thus, we are getting near there, and as the Chief Judge, I have begun consulting with 5 of the 6 retired judges concerning their availability to be recalled within the next 6 months.

In an earlier meeting with the Chairman, I emphasized that the court's challenge was that it was a new court with judges having little experience. We are gaining that experience and we want to continue that success.

We appreciate the interest of the Veterans' Affairs Committee in our mission and productivity. Our discussions are helpful in demonstrating that we have a shared goal in ensuring that judicial review of these veterans' adjudicated cases is conducted in a timely manner and consistent with the knowledge that our veterans deserve the very best.

May I respond to your questions.

[The prepared statement of Judge Greene follows.]

PREPARED STATEMENT OF HON. WILLIAM P. GREENE, JR., CHIEF JUDGE,  
U.S. COURT OF APPEALS FOR VETERANS CLAIMS

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 veteran's 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 8 years. Accordingly, in fiscal year 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 fiscal year 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 fiscal year 2006. During that period, 2,051 cases were decided and an additional 1,026 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 10 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 fiscal year 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 6 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	New cases filed	Cases decided
1st Quarter CY 2005 .....	793	442
2nd Quarter CY 2005 .....	1,011	556
3rd Quarter CY 2005 .....	981	539
4th Quarter CY 2005 .....	907	573
1st Quarter CY 2006 .....	1,009	710
2nd Quarter CY 2006 .....	935	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 percent 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 6 months. As of the end of June 2006, 354 cases (about 6 percent 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 6 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.

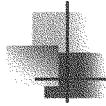
Sixth, we are working on implementing a case management/electronic case files system (e-filing). The Court is partnering with the Administrative Office of the United States Courts to purchase and use the software and e-filing system already developed for the Article III courts. Indeed, ten of the thirteen courts of appeals now have that capability. Our goal of having e-filing implemented within the next 2 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.

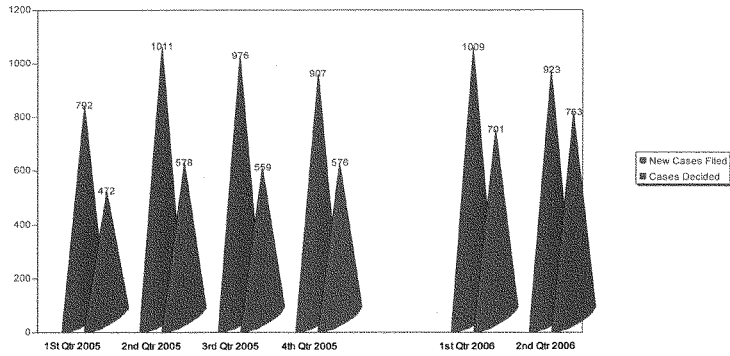
Finally, the Court is continuing its efforts with the General Services Administration, to work toward making a Veterans Courthouse and Justice Center a reality. Our present space is or will be inadequate for the type of caseload we are now experiencing. The current lease of the commercial building expires 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.

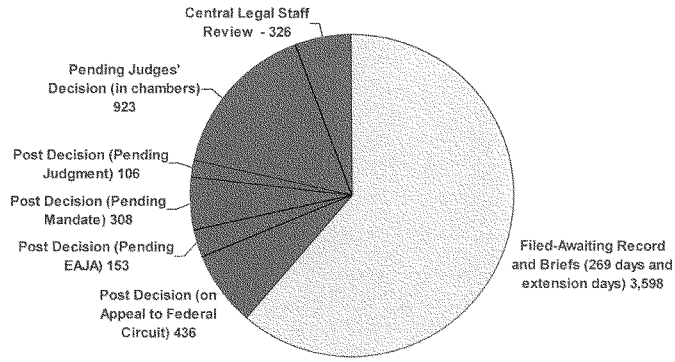


U.S. Court of Appeals for Veterans Claims  
Cases Filed and Decided for Calendar Years (CY) 2005 and 2006



Graph A

# U.S. Court of Appeals for Veterans Claims Pending Cases June 30, 2006 (As Adjusted July 6, 2006)



Total: 5,850  
Graph B



RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. LARRY E. CRAIG TO  
HON. WILLIAM P. GREENE, JR.

*Question 1.* It is my understanding that many cases are terminated by the Clerk of the Court either because of procedural reasons or because the parties come to an agreement about the proper outcome. Do you track the percentage of cases that are ultimately decided by the judges, as opposed to the Clerk of the Court? If not, is it difficult to determine where delays may be occurring within the U.S. Court of Appeals for Veterans Claims (CAVC) or where the CAVC may need additional staffing?

Answer. The Court is able to track which cases have been decided by the Clerk of the Court, and which by the judges. However, under the Court's current case tracking system, this process is not automated. Rather, it requires review of each category of cases and some manual counting of cases that bear the notation that they were decided by the Clerk. The automated system that the Court currently employs was designed to be a cost-effective tool for internal case management by the Chief Judge, and it does not produce automated reports on all variables affecting case completion.

Even without automatic tracking of the percentage of cases decided by judges, as opposed to the Clerk of the Court, the Court is able to determine the most significant area where delays may be occurring. The case management system does track requests for extensions of time by the parties in connection with the steps required for case development, and these extensions appear collectively to be the most significant area of delay. In May and June 2006, for example, appellants or their attorneys filed 675 motions for extension of time; attorneys representing the Secretary filed 1,684 similar motions in the same time period. The parties must demonstrate good cause for these requests for extension, and then they are granted. Notwithstanding delays requested by the parties, and the time consumed by appropriate deliberation on each case, the median time for processing an appeal in this Court is less than the median time for the Federal courts of appeals included in the annual report of the Administrative Office of United States Courts providing Federal Courts Management Statistics for the Article III courts.

The Court's caseload is reviewed constantly to determine if there is a need to adjust assignments or improve performance in any functioning unit within the Court.

*Question 2.* The U.S. Court of Appeals for the Armed Forces annually submits to Congress a report including specific information regarding that Court's workload. For example, that report included charts and graphs setting forth the number and type of cases received during the year; the number, type and stage of cases pending at the end of the year; the number and type of decisions issued during the year; the number of days that elapsed from oral arguments to final decisions; and the number of days from filing of petitions to final decisions. Does the CAVC have the capability of tracking and reporting that type of information?

Answer. No, the Court's automated case-tracking system is designed to provide statistics modeled after the statistical report issued each year by the Administrative Office of the United States Courts. Our annual reports include data on cases filed, the number of cases decided, the type of disposition (procedural or merits), the number of Equal Access to Justice Act (EAJA) applications for attorneys fees received and acted upon (also the nature of the resolution), the number of oral arguments, the number of appeals to the U.S. Court of Appeals for the Federal Circuit, and the average number of days for case disposition. (The Court is considering changing that last computation to that for the median number of days because that is the statistic measured by the Administrative Office of the United States Courts for the Article III courts of appeals, while the average number of days for case disposition is not measured.)

Two of the categories identified in the report of the U.S. Court of Appeals for the Armed Forces (USCAAF) are not statistically significant for the USCAVC. First, in fiscal year 2005, the number of cases in which the USCAVC held oral argument (24) was relatively small, compared to the total number of cases decided (1,905). While the number of oral arguments conducted by this Court has increased, the ratio of argued cases to total cases decided remains small. Accordingly, a calculation of the number of days from argument to decision is not a measurement that would have much statistical relevance, and it is not tracked. Similarly, the number of petitions decided in fiscal year 2005 (144) represents only 8 percent of the 1,905 cases decided; thus the number of days to decision on a petition has not been tracked separately as a statistically relevant figure.

Second, petitions filed with the USCAAF are typically petitions for review of decisions of the lower Courts of Criminal Appeals. The USCAAF may accept or deny those petitions for review. The USCAVC accepts for review all petitions and in half of these petitions directs the Secretary to answer the petition. The answer to a peti-

tion triggers a full merits review in this Court. In fiscal year 2005, the USCAAF received fewer than 1,000 new cases, including 779 requests for review. That Court issued 64 signed opinions. The USCAVC received nearly 3,500 new appeals and petitions, and this Court issued 1,281 merits decisions, including 271 affirmances, 257 reversals and remands, and 71 decisions denying extraordinary relief, all of which were signed decisions.

*Question 3.* Although I recognize that the CAVC's productivity has been improving in recent months—and appreciate your efforts in that regard—the CAVC expects to receive 900 more cases this year than it expects to decide. In your testimony, you mentioned a number of possible measures that could be taken to help deal with this situation by increasing case output. Do you expect to implement any of those measures in the next 6 months or the next year?

Answer. Yes, I do expect to implement some of the measures mentioned in my testimony. They are the same measures I outlined in discussions with you and your staff, as well as with the attendees at the Court's Judicial Conference held in April 2006. Please see my response to Question 5 for a discussion of one of the measures, recalling retired judges. In addition, our active judges, sitting as the "Board of Judges"—the body that sets policy for the Court's operations—soon will be considering the formal proposal from our Rules Advisory Committee that would allow the filing of a joint appendix. The Court continues to study the advisability of summary dispositions under certain circumstances.

*Question 4.* In the CAVC's annual report, the CAVC includes the average time "from filing to disposition" of cases decided during the fiscal year. That performance measure appears to include the time required to dispose of both petitions and appeals. It also appears to include dispositions rendered by a single judge, as well as those rendered by a panel of judges.

*Question 4a.* Would this be a more useful and accurate measure of performance if petitions and appeals were tracked separately?

Answer. Because the total number of petitions filed per year has been holding fairly steady at less than 8 percent of the Court's total caseload, tracking those cases separately does not appear to be a useful case management tool at this time. Also, over the next 2 years, the Court will be in the process of changing its case management system to the CM/ECF system developed by the Administrative Office of the United States Courts. It would appear to be unwise to create new automated tracking and reporting requirements for the case management system that is being phased out. We do not know at this time what the total capabilities of the new system will be when it is fully implemented.

*Question 4b.* Would it be a more fair and useful performance measure if the time to decide single-judge decisions was tracked separately from the time to decide more complex panel dispositions?

Answer. Currently, restructuring the Court's case tracking system to separate single-judge decisions from more complex panel dispositions is not the best use of staffing and technical assets as we begin the transition to the CM/ECF case management system.

*Question 4c.* Does the CAVC track the average time from filing of Equal Access to Justice Act applications to disposition?

Answer. No, the average time from filing of Equal Access to Justice Act applications to disposition is not presently tracked.

*Question 5.* In your testimony, you indicated that you were consulting with several retired judges regarding their availability within the next 6 months and that you were assessing how the CAVC could most effectively use recalled judges. Would you please provide the Committee with an update on the status of those efforts?

Answer. Two recalled judges will begin service in September 2006. Two other recalled judges will be scheduled to begin service on or after January 2007. Modifications to existing space have been made to accommodate these judges and support staff. I will be submitting to Congress a request for a supplemental appropriation for fiscal year 2007 to fully staff chambers for two recalled judges. I will continue to analyze the situation to determine the best uses, availability, and staff needs for these judges so that they are used efficiently. The experience gained from this initial use of recalled judges will provide a basis for these judgments.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. DANIEL K. AKAKA TO  
HON. WILLIAM P. GREENE, JR.

*Question 1.* In your March 2006 testimony before the House Military Quality of Life and Veterans Affairs Appropriations Subcommittee, you stated that you were confident that the Court could continue to reduce the backlog and adjudicate new cases quickly. Given the increase in cases coming before the Court, and resource limitations for recalled judges that you mentioned in your testimony, can you make that same assertion now?

Answer. My assertion in March 2006, was based upon the success the “new” Court had achieved in conducting appellate review and deciding cases since August 2005. The four newest judges and their staffs had gained experience and the numbers of cases decided were increasing. The 400 new cases received after my testimony in March 2006, and the 300-plus new cases per month we have received since then appears to have become the norm rather than a temporary spike. The potential use of summary dispositions, a recall of retired judges, and employing an accompanying staff for the recalled judges should assist in meeting the demands of this heavy caseload. I remain optimistic that we will continue to resolve a large number of cases, keeping in mind that while we must administer justice, every veteran adversely affected by a Board of Veterans’ Appeals decision, by right, may appeal to the Court. Indeed, as was raised during my testimony before the appropriations subcommittee, if appeals continue at the current level, there will be a need to authorize the appointment of two additional active judges to ensure that we provide to veterans timely and quality decisions.

*Question 2.* Judge Greene, you noted today that you will not have an idea of how many judges might not want to be recalled until you send them their recall letter. Retired Tax Court judges must reaffirm annually their availability to be recalled. Do you see a benefit in retired U.S. Court of Appeals for Veterans Claims (CAVC) judges doing the same?

Answer. I do not see a benefit in requiring retired CAVC judges to reaffirm annually their availability to be recalled. Under 38 United States Code section 7257(a)(1), a judge of the Court upon retirement, must provide to the Chief Judge written notice that he or she is available for further service and is willing to be recalled. Although this notice is irrevocable, if a recall-eligible retired judge is recalled but declines to perform the service to which recalled, the Chief Judge shall remove that retired judge from recall-eligible judge status. Thus, there is every reason to believe, or to presume, that if recalled, the CAVC recall-eligible judges will serve. Before recalling them I must be able to accommodate them logistically and to staff them appropriately. Because there are only six judges in this recall-eligible status, it is relatively easy to consult with them concerning their availability.

*Question 3.* How should court efficiency be measured?

Answer. The role of an appellate court is to provide review of decisions of lower tribunals, and as the final arbiter of disputes, to shape and define the law. There are many areas involved with measuring a court’s efficiency. Is the court protecting the rule of law? Does the court develop, clarify, and unify the law? Does the court provide review sufficient to correct prejudicial errors? Does the court give each case adequate consideration and are the decisions based on legally relevant factors, thereby affording every litigant the full benefit of the judicial process? Are the cases managed effectively and resources used efficiently and productively? These standards are part of the Appellate Court Performance Standards promulgated by the National Center for State Courts and are helpful to appellate courts in assessing performance. The CAVC is guided by these performance standards, and in conducting its business, also adheres to the policies of the Administrative Office of U.S. Courts.

Considering the numbers of cases decided as one factor in the overall measurement, I point out that at the end of the third quarter of fiscal year 2006, the Court had decided 2051 cases. During that same period, the Court received 2552 cases. That results in a clearance rate of almost 80 percent. If this trend continues in the last quarter, we will have decided more than 2700 cases, more cases decided than in all but one of the last 10 years.

Further, each fiscal year, the Administrative Office of the U.S. Courts publishes a judicial caseload profile of the U.S. Courts of Appeals. That profile provides specific information concerning appellate caseloads in individual U.S. Courts of Appeals as well as national totals. The reported national median time in fiscal year 2005 (the most current statistics available) from the filing of a notice of appeal to the disposition of a case was 11.8 months. The profile does not include CAVC statistics. Our median time for processing cases (number of days from the filing of the notice

of appeal to disposition) for the first three quarters of fiscal year 2006 was 334 days, or 11.1 months.

In short, appellate court efficiency is not measured solely by numbers of cases received against numbers of cases decided. It is measured by a combination of all of the above factors, to ensure the effective and efficient administration of justice.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN THUNE TO  
HON. WILLIAM P. GREENE, JR.

*Question.* Judge Greene, could you provide feedback to me on the issue of putting the appellate process of the Court of Appeal for Veterans Claims in line with the appellate process of the Court of Appeals for the Armed Forces? What are your thoughts on this idea?

*Answer.* Thank you for your question and for your interest in veterans law and in our Court. You have asked for my input on the issue of bringing the appellate process of the United States Court of Appeals for Veterans Claims (USCAVC) in line with that of the Court of Appeals for the Military (CAM), otherwise known as the United States Court of Appeals for the Armed Forces (USCAAF). Your statement prefacing the question identifies your specific concern on whether review of USCAVC decisions by the United States Court of Appeals for the Federal Circuit (Federal Circuit) should be eliminated and that, like decisions of the USCAAF, appeals of our decisions should go directly to the Supreme Court of the United States (Supreme Court) by writ of certiorari.

#### I. INTRODUCTION

My initial comment regarding the value of any layer of appellate review must begin with the wisdom of Supreme Court Justice Robert H. Jackson, who observed:

Whenever decisions of one court are reviewed by another, a percentage of them are reversed. That reflects a difference in outlook normally found between personnel comprising different courts. However, 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.

*Brown v. Allen*, 344 U.S., 443, 540 (1953) (Jackson, J., concurring.). Accepting that no amount of review can produce results that are infallible, the question becomes: “Does an additional layer of appellate review add benefits that outweigh the associated costs?” I will use this inquiry to frame my response to your question.

#### II. THE POTENTIAL BENEFITS OF ADDITIONAL APPELLATE REVIEW

The specific question you have asked requires an examination, first, of whether Federal Circuit review benefits veterans law in a way that USCAVC review does not. Here are my observations:

(1) *Independence:* A primary reason for appellate review is to have agency decisions reviewed by a body that is independent of the original decisionmaker. Like the Federal Circuit, the USCAVC is wholly independent of the Department of Veterans Affairs. Structurally, therefore, review by the Federal Circuit is not needed to introduce an independent body.

(2) *Uniformity:* A unified appellate tribunal brings clarity and uniformity to an area of law. Uniformity was one of the goals of the creation of the USCAVC, an option selected over the alternative of placing judicial review of VA benefits decisions in the Federal district courts. Within VA, Veterans Law Judges who staff the Board of Veterans’ Appeals (Board) are not bound by one another’s decisions, and different panels of the Board can reach inconsistent decisions on claims by similarly situated benefits claimants. However, panel opinions issued by the USCAVC are precedential and provide binding law on future cases before the Court and upon claims adjudication within VA.

Before being issued, every decision of the USCAVC—either by a panel or a single judge—is circulated to the full court for at least 1 week for comment and input. Comments on circulating decisions are relatively frequent and serve to clarify bases of decisions. In addition to the comment process, the judges of the USCAVC share an internal data base of issues that are presently being considered by three judge panels. This allows each judge to quickly identify pending cases where precedential arguments have already been scheduled, thus promoting efficient case management and consistent, uniform action on such issues. The USCAVC is not permitted to communicate with the Federal Circuit in this manner. Thus, the decisions of the two

courts—particularly written during overlapping time-frames and addressing similar issues—may contain language that creates uncertainty when compared to each other.

(3) *Experience*: When the USCAVC began operations in 1989, it faced many issues concerning its role as a new Federal court. The Federal Circuit was established in 1982, and that court's early case law addressing its own creation and role was highly relevant in the formative years of the USCAVC. Both courts had to establish their roles in close proximity to each other. However, the USCAVC has now been operating for nearly 17 years; it has decided over 25,000 cases and has written 19 volumes of precedential case law (found in the West Reporter Series, Veterans Appeals Reports) to shape its future decisions.

(4) *Expertise*: Once appointed, a judge on the USCAVC reviews only veterans benefits cases. In contrast, the Federal Circuit's jurisdiction is varied and includes review of diverse types of appeals other than veterans law, including patent and trademark claims, government contracts disputes, international trade appeals, and Federal employment actions. From May 1, 2005, to April 30, 2006, only 15 percent (247 of 1,636) of the new cases filed at the Federal Circuit were appeals of USCAVC decisions. Also, because the Federal Circuit's jurisdiction to review USCAVC decisions is limited to reviewing questions of law, see 38 U.S.C. § 7292, that court is not called upon to apply its rulings to the evidence in specific cases. The bottom line is that the USCAVC is a court of special jurisdiction that Congress created to have expertise in veterans law, while the Federal Circuit by its structure and nature is not.

The issue of focused expertise also applies to the practitioners before the two courts. The appellants' bar is strong and is maturing in expertise before both courts. Before the USCAVC, VA represents itself with its own appellate attorneys who are specialized with years of departmental expertise in veterans law. Before the Federal Circuit, however, VA is represented by the Commercial Litigation Branch, Civil Division, U. S. Department of Justice, whose attorneys are generalists.

(5) *Appearance*: Beyond objective structural criteria, an appellate body can have a special relationship with an area of law. As the USCAVC's jurisdiction is solely veterans law, the Court's relationship to that jurisprudence is clear.

It is worth noting that, during the Federal Circuit's May 2006 Judicial Conference, the panelists discussing "The Most Important Issues Facing the Federal Circuit in the Next Ten Years" mentioned veterans law only once in an hour-long analysis. That reference was a remark by panelist former Solicitor General Seth Waxman that he had never handled a veterans law case before becoming Solicitor General. No other panelist (District Judge Kent Jordan, Deputy Solicitor General Thomas Hunger, and Professors Christopher Yukins and Kimberly Moore) mentioned the veterans law component of the Federal Circuit's jurisdiction.

### III. THE COSTS OF ADDITIONAL APPELLATE REVIEW

(1) *Time*: Federal Circuit review lengthens the processing time for veterans' cases. A case appealed to the Federal Circuit may take 1 or 2 years for development and resolution. Moreover, if the Federal Circuit overrules or reverses a ruling of law by the USCAVC, it usually remands the matter back to the USCAVC for further proceedings, adding yet more months to the process. Often, another remand to the Board is required for a new adjudication. This process can occur more than once in the same case.

One particular type of delay should also be noted. Often a lead case at the USCAVC will decide an issue common to numerous cases. While the lead case is on appeal to the Federal Circuit, the USCAVC will apply the law of that case to similar pending cases. If the Federal Circuit disagrees with the USCAVC ruling of law in such a case, the net result is mass remands, or the USCAVC stays all related matters pending decision on the lead case by the Federal Circuit. Appeals to the Federal Circuit have also resulted in stays at the VA and Board levels, imposed by the Secretary and Board Chairman. See *Brown v. Gardner*, 513 U.S. 115 (1994); *Smith v. Nicholson*, 19 Vet. App. 63 (2005).

(2) *Effect on Settlement Negotiations*: Finally, I believe that because jurisdiction exists in another Federal appeals court, parties have less incentive to negotiate settlement in the USCAVC; a losing party can once again argue its case in the Federal Circuit.

### IV. COMPARISON OF THE USCAVC TO USCAAF

You have asked me to compare the USCAVC to the USCAAF. First, both the USCAVC and the USCAAF are courts of special jurisdiction, created under Article I of the U.S. Constitution. Both have expertise in the area of law they review. Next,

the USCAAF provides review of criminal cases within the military, sometimes involving loss of liberty or life by a convicted service member; the USCAVC reviews civil actions, appeals of denials of claims by veterans for benefits of monetary value.

The following is a comparison of action and review within the military justice system and the veterans justice system:

ACTIONS/REVIEW	USCAAF	USCAVC
(1) Initial Action .....	Court Martial (10 U.S.C. § 836) .....	VA regional office adjudication (38 U.S.C. Chapter 51).
(2) Below Court Level Review .....	Review by military Court of Criminal Appeals established by Judge Advocate General of each Service branch (10 U.S.C. § 866); limited to review on record at Court Martial.	Review by Board of Veterans' Appeals on record of regional office proceeding and "all evidence and material of record" (38 U.S.C. § 7104).
(3) Article I—Specialized Court Review	Appeal or petition to USCAAF (10 U.S.C. § 837); review on record—no new evidence.	Appeal or petition to USCAVC (38 U.S.C. § 7252); review on record—no new evidence.
(4) Article III—Court of Appeals Review	None .....	Appeal to Federal Circuit (38 U.S.C. § 7292); limited to review of matters of law—no review of factual determination or challenge to law or regulation applied to facts of particular case.
(5) U.S. Supreme Court Review .....	Upon petition for writ of certiorari from USCAAF (28 U.S.C. § 1259).	Upon petition for writ of certiorari, from decision of Federal Circuit (38 U.S.C. § 7291).

When USCAAF was founded in 1951, its decisions were not originally appealable directly to the Supreme Court by writ of certiorari. Rather, an appellant was required to seek a writ of habeas corpus at the district court level raising a constitutional issue, which resulted in review as of right by a Federal court of appeals before there was potential for review by the Supreme Court. However, in 1983, Congress changed the USCAAF statute to provide for direct review of USCAAF decisions by the Supreme Court, Pub. L. No. 98-209 (1983); see 28 U.S.C. § 1259. Writing to Congress in support of the legislation, then-Secretary of Defense Caspar Weinberger wrote that the legislation would "improve the efficiency and effectiveness of the military justice system by eliminating redundant procedures." (Letter of Hon. Caspar Weinberger to Hon. Melvin Price, Sept, 15, 1983). The legislation was enacted in a manner limiting the number of cases subject to direct Supreme Court review. The Supreme Court was given "complete discretion to refuse to grant petitions for writs of certiorari" and "[c]ontrol over government petitions [would] be exercised by the Solicitor General." H. Rep. No. 98-549, at 17 (1983).

#### V. CONCLUSION

Whether the role of the Federal Circuit in this area of law is appropriate is a question for Congress to decide. Whether Federal Circuit review has a "good," "bad," or "neutral," influence on the substance of veterans law is a policy question upon which I cannot comment. Rather, this response reflects my view of the factors that should be considered by Congress in evaluating the structural usefulness of Federal Circuit review of USCAVC decisions.

## RETIRED JUDGES' STATEMENT

Independent judicial review by the United States Court of Appeals for Veterans Claims (USCAVC) has been a real success by requiring that Department of Veterans Affairs decisionmaking be based on the real evidence and legal analysis often previously missing from such decisionmaking. Judicial review has done much to bring about accurate Board of Veterans' Appeals (Board) decisions and has helped ensure fairness to our nation's veterans.

That said, judicial review has contributed to the intertwined problems of delay and backlog in finalizing decisions. Under existing law, there are four levels of possible appeal—one administrative appeal to the Board and THREE levels of possible judicial appeal to USCAVC, the United States Court of Appeals for the Federal Circuit (Federal Circuit), and the Supreme Court of the United States (Supreme Court). Stated simply, this is more justice than the system can bear. Indeed, justice delayed is justice denied and the problems of judicial delay and backlog cannot be fixed without reforming the present judicial process.

The review of the decisions of one intermediate Federal court of appeals by another intermediate Federal court of appeals is singularly unique in the Federal court system. We are not aware of any comparable situation. It should be noted that the judges of both courts are subject to similar selection, nomination, and confirmation procedures. However, the primary focus and expertise of the Federal Circuit has been and will remain intellectual property matters. On the other hand, USCAVC has far greater expertise in veterans law because the court's sole business is the interpretation of the statutes and regulations applicable to veterans' claims. The wholly redundant review of USCAVC decisions by the Federal Circuit serves no real purpose, other than providing another bite at the apple. That is, the party who has lost at the USCAVC will have a third opportunity to attempt to demonstrate the rightness of that party's view. This superfluous review draws out the appellate process and adds to the caseload of both courts. An appeal to the Federal Circuit often carries with it a year or more of the claimant's life and in the event of a Federal Circuit remand back to the USCAVC, another year can be added on, to say nothing of the additional years that will be involved if the USCAVC must in-turn remand the case back to the Board.

Once a decision is appealed to the Federal Circuit, other cases involving the same or related issues, sometimes amounting to scores of cases, may be put on hold at the USCAVC pending disposition by the Federal Circuit. Moreover, a Federal Circuit remand in one case, because it is precedent, may require that tens, if not sometimes hundreds, of cases at the USCAVC be reworked. Because Federal Circuit rulings are rarely clear-cut as to how they might apply in analogous cases, significant confusion often results, causing further delay in the review of cases pending at the USCAVC. It is our considered view, given our some 70 years of collective full-time experience in veterans law, that Federal Circuit review creates approximately a 35–40 percent increase in the workload of the USCAVC.

Furthermore, it is a needless expense to the litigants and the taxpayers. For example, two groups of appellate lawyers are needed to represent the government. One group, employed by the Department of Veterans Affairs, practices only before the USCAVC. The other group, employed by the Justice Department, largely re-plows the same ground in appeals to the Federal Circuit. Not only is this grossly wasteful to the taxpayer, but it has been the experience of those of us who have served many years as USCAVC judges and are familiar with the briefs filed in both courts, that the Justice Department attorneys are often not as knowledgeable as they sometimes should be concerning the veterans' claims system, thus they fail at times in the important duty of an appellate lawyer, to provide expert guidance to the Federal Circuit concerning the sometimes esoteric bypaths of veterans law.

At some point the question must be asked as to whether there is sufficient value added to the accuracy of decisionmaking to justify the inherent additional amounts of time and money needed, to say nothing of the confusion created, for review in both the USCAVC and the Federal Circuit. Judicial accuracy, unfortunately, is really an art-form, rather than a science, and like beauty, is in the eye of the beholder. Invariably, the winning party believes that the decision is accurate and the losing party takes a contrary view.

Even assuming that the Federal Circuit is always more "accurate" than the USCAVC, a review of the Federal Circuit website shows that the latter reverses the former in approximately 7 percent of the cases it reviews. It is debatable whether a "better" result in about seven of every 100 cases can justify the additional time, work, confusion, and cost inherent in two layers of Federal intermediate appellate review. Again, it is our collective view, that because of the exclusive nature of its work, the USCAVC, rather than the Federal Circuit, has the best understanding of

the subject matter and awareness of the systemic impact of its decisions on the veterans' administrative adjudication system. Accordingly, we conclude that a significant number of reversed cases should not have been reversed so that the value-added accuracy of Federal Circuit review is a much lower percentage than that reflected on the website.

One further point needs to be made about the impact of the present system on the VA adjudication process. The VA is often caught between a rock and a hard place. The USCAVC tells it to do one thing, then the Federal Circuit may or may not tell it to do something else. The net result is that the VA is never sure whether the Federal Circuit will back the USCAVC or scold it. And even where the specific case under consideration is not brought to the attention of the Federal Circuit, the VA still must contend with prior edicts of the Circuit that may seem inconsistent with what the USCAVC is not requiring it to do.

Finally, the interposition of another appellate court inevitably creates the perception that the USCAVC is not quite up to snuff in the same way Congress regards the United States Court of Appeals for the Armed Forces (USCAAF), and is perhaps not a "real" court at all. Whatever reasons led to this redundant review and were thought valid 18 years ago when the USCAVC was established, they have certainly been proven wrong by time in light of the 25,000 cases disposed of by the USCAVC and the 19 volumes of reported cases. The bottom line is that this expensive and wholly unnecessary review by the Federal Circuit makes little sense and certainly does nothing to move cases along. Those who would defend the status quo have a heavy burden to show in a concrete way that the additional time and expense produce real benefits that outweigh the serious defects noted above.

If review of an Article I appellate court by an Article III court is deemed desirable or necessary, surely the appropriate model is the USCAAF. The decisions of the USCAAF, a specialized Federal court of appeals similar to the USCAVC, are directly reviewed by the Supreme Court by means of a Writ of Certiorari. It is our understanding that when Congress, after many years without any type of direct Article III review of military criminal cases, provided for certiorari to the Supreme Court, it wisely turned down an alternative proposal that would have interposed another Federal intermediate court of appeals (the 4th Circuit) between the USCAAF and Supreme Court review.

The USCAAF model is a proven system that is clearly the most appropriate for the USCAVC.

Submitted by:  
 Chief Judge Frank Q. Nebeker, Retired  
 Judge Kenneth B. Kramer, Retired  
 Judge John J. Farley, III, Retired  
 Judge Ronald M. Holdaway, Retired  
 Judge Donald L. Ivers, Retired

Chairman CRAIG. Judge, thank you very much.

We have been joined by Senator Patty Murray. She is managing the floor at this moment on the issue before us, so I am going to turn to her for comments she would like to make prior to her returning to the floor. Patty, thanks for coming over today.

**STATEMENT OF HON. PATTY MURRAY,  
 U.S. SENATOR FROM WASHINGTON**

Senator MURRAY. Mr. Chairman, thank you so much for your accommodation. I really appreciate it. I did just want to come for a few minutes and just thank the Chairman and the Ranking Member for having this really critical hearing on this important issue that is facing our veterans and our families.

I am deeply concerned about this. We have veterans who are waiting 18 months. We have soldiers coming home from Iraq and Afghanistan who are waiting in long lines to get their benefits, and 18 months without an appeal; with an appeal, it can add 9 months to a year more to that and that just to me is unacceptable. I think that we, in fact, heard from the VA 4 weeks—a month ago—that they were worried about allowing veterans access to counsel during



the entire appeals process because it would jam up an already backed-up system.

That, to me, is deeply disconcerting and I want to work with you, Mr. Chairman and Senator Akaka, to do whatever we can do to help speed this up and I really do appreciate your having this hearing and diving into it and trying to find out what the backups are and how we can help alleviate that. I just wanted to let you know I am willing to work with you on that as we go through this.

I do have to manage the floor. My staff is here and I will be following up with all the testimony. Judge Greene, thank you so much for being here to share your insights. Thank you.

Chairman CRAIG. Senator Murray, thank you.

Judge, again, thank you for your presence here this morning as we look at how we might assist you and the Court in stabilizing this workload in a way that produces some immediacy of return or at least a reasonable return to the appeals and the individuals that are before you.

According to a report that the Ranking Member and I recently requested from the Congressional Research Service, and you have already broached this in your final thoughts this morning, an Article I court routinely recalls retired judges, but the Veterans' Court has never done so. The report reflects that the staff at the Veterans' Court explained that no judges have been recalled because the Court has been able to meet its caseload needs with its current complement of active judges.

We all know that times have changed. Looking at the charts behind me, and listening to your comments, they are in sync. I guess I can use the term in the fiscal sense, "The court is in the red." For most of the last 8 years, there has been an unprecedented level of pending cases. Do you believe the court is meeting the workload needs as we speak?

Judge GREENE. If I may preface some of my answers—

Chairman CRAIG. Surely.

Judge GREENE. I have to admit that I wish the Congressional Research Service had asked me that question. I think I would have given a little slightly different answer. You have to know that the recall provision was authorized in 1999–2000 and after that, we only had one judge that was retired. And then we also had legislation saying that we were going to be able to have nine judges temporarily on the Court, so there was a lot of give and take on waiting for those judges to come forth and sit with us. That never occurred.

Consequently, we still didn't have a retired, recall force that was available to do the kind of work for these numbers of cases until four judges all of a sudden retired at once, or within a year of each other. The last two of those judges retired in 2005. So now, I have a recall force, if you will, to commit to the mission.

Chairman CRAIG. I understand and I think the Committee understands those dynamics. I am appreciative of your looking at and putting into the queue of ideas and decisions you may make as it relates to recall. I guess my reaction is, if this situation does not warrant a recall of judges, what would?

Judge GREENE. It does perhaps warrant that, and that is why I am now consulting with the recall judges for their availability in the next 6 months.

Chairman CRAIG. Something else that I think the Committee needs to know, as it relates to recall, is that other Article I courts, such as the U.S. Court of Federal Claims, routinely recall judges. It is part of how they deal with their caseload. One important distinction is that the other courts generally pay retired judges the active judge salary only if they are actually performing the work, whereas retired judges from this court, Court of Appeals for Veterans Claims, receive the same pay as active judges regardless of whether they perform any work. Is that a valid statement, Judge?

Judge GREENE. Is it a valid statement that they receive—

Chairman CRAIG. What I just said, that they receive active pay?

Judge GREENE. They do.

Chairman CRAIG. As a retired judge—

Judge GREENE. If they—

Chairman CRAIG [continuing]. Whereas other courts only if they are recalled?

Judge GREENE. If they indicate that they would be available for recall.

Chairman CRAIG. And my reaction as a fiscally responsible Senator is if we are not getting our bounce for the buck, we are going to cut the buck a little bit. We have people hired, in essence, who are by definition retired, but hired to be active. We are paying them accordingly. I had the privilege of visiting your chambers and visiting with you, and Norman took us around. We looked things over. I know you have two chambers. I know that you utilize them for other purposes at the moment. At the same time, with the appropriate staffing, you have the availability, it is my understanding—am I correct—in adding up to at least two judges in your current facility?

Judge GREENE. I would have to refer that to—

Chairman CRAIG. Norman.

Mr. HERRING. Mr. Chairman, we do have one dedicated chamber for a recalled judge and we have a meeting room, and we would have to convert that, just like you did during the period of time while the Hart Building was closed, this room was used for other purposes. That would be what would happen. We would take an existing meeting room and convert it to a judge's chambers. It wouldn't be like most other judges' chambers that they are used to. But for a recalled judge, it is possible.

Chairman CRAIG. And I will stop at this point and turn to my colleagues. I guess my point is this. If space is an important issue—and I don't disagree with that, you have to have elbow room—I believe you have the room for at least two judges. I think we have visited about that. I understand that in some instances, filing is important, but I also understand that filing can be done somewhere else.

I understand that your lease is up in 2010. That is a long way off in relation to this workload and getting it under control and heading it down. I would have to think that with the resources we could help make available in relation to bringing online judges, this appears, at least to me, to be a responsible decision and forward

movement in dealing with this growing problem. If you don't stem the growth of the backlog, it continues to grow by all definition and that in itself could almost become unsurmountable, whether there are seven judges or nine judges working full-time, or seven judges and recalled judges.

That is how I am looking at the math at the moment, because in all fairness, we have added staff at your request consistently over the last several years as it relates to those who evaluate your cases and do all of that. Yet, our numbers are not changing as significantly as I think the Congress had hoped they would.

With that, let me turn to my colleague, Senator Akaka.

Danny.

Senator AKAKA. Thank you very much, Mr. Chairman.

Judge Greene, you did mention that in the year 2010, you may have a new facility housing the Court. Do you anticipate proposing that the Court be expanded to nine judges at that time or prior to that time?

Judge GREENE. Well, the study was based on the projections from the current trend, 3,600 cases. Obviously, sir, I would certainly support a request to increase the size of the Court if our case number stayed at that level for the next 5 years. There is every indication—I would not certainly predict that it won't. Just last year, the Board decided 13,000 total denials, and if we have legal representation across the board, then there is certainly going to be more possibility for appeals.

So I am monitoring that from now to 2010. At 2010, when we are bursting at the seams where we are currently located, we at least should have a new facility, the necessary space to accommodate the Court as it is configured. If it is at nine judges at that time, then we are set to go.

Senator AKAKA. Judge Greene, can you talk about the potential benefits and pitfalls of employing summary disposition at the Court?

Judge GREENE. The pitfall is that this Court has prided itself for 16 years of giving to the veteran an explanation for the decision, be it a single-judge decision or certainly a panel decision. As I expressed in my prepared statement, this summary disposition would be for cases where veterans are represented, not cases where the veteran doesn't have a lawyer. But if we had the kind of case that could be simply resolved based on legal precedent, that may, in fact, enable us to get rid of the case faster than having to write a decision, circulate it amongst ourselves, because that is part of our internal operating procedures for the protection of the judicial process, and then we would avoid that period of time and then be able to issue the case right away. But the pitfall certainly is that we abandon this well-regarded tradition that we had in providing an explanation to the veteran.

Senator AKAKA. I understand that up to this time, we have not been using retired judges. From your discussions with retired judges, Judge Greene, of those retired judges who are eligible for recall, do you have any sense of how many would be willing to accept recall?

Judge GREENE. I am presuming they all are willing, since they indicated that—they signed up for it.

Senator AKAKA. During your tenure as Chief Judge, why have there been no judges recalled?

Judge GREENE. I have not recalled any, simply because in the 11 months that I have been the Chief Judge, I have been taking a look at the landscape to see what has to be done. I guess I have kind of likened it to a military commander who is fighting a battle and knows the circumstances and depending on the circumstances of that battle, when to commit the Reserves. And so that is why I have given the ready alert and consulting with these judges now to determine their availability in the next 6 months.

Senator AKAKA. Let me ask my final question before my time is up. Realistically, Judge, how many cases do you believe a recalled judge could dispose of in 90 days, and how many in 180 days?

Judge GREENE. Well, the last part of that, the 180 days is critical because that is the period where the recalled judge has to consent to hang around. For the 90-day period—and that is what my challenge is, to determine what best the judge can do in the 90-day period. Can the judge serve on a panel of judges to decide a case that requires oral argument, drafting of an opinion, circulation of that opinion? If so, perhaps one or two.

If it is a single-judge decision, then—this is in the 90-day period—if it is a single-judge decision, depending upon—well, all the judges are experienced, so that is a big factor. We have a very wishful goal of a clerk doing two cases per week. That is based on the experience level of the clerk, too, of course. But if a clerk can do two cases a week, then for the 90 days, you can do the math on that and you would say that is potentially the number of cases of single-judge decisions that a judge could do.

What I am really hoping for, too, is to examine the process to see if these judges can also be more effective in the mediation process, where they perhaps work with the parties before the case even gets to a judge for review, and that is just going to take time to do, but I have got the time, at least while I am Chief Judge and these individuals are recall-eligible.

Senator AKAKA. Thank you, Mr. Chairman.

Chairman CRAIG. Senator Akaka, thank you.

Senator Jeffords, questions of the panel?

Senator JEFFORDS. Yes, I have.

Judge Greene, while I was going through the briefing material yesterday, I noted a rather sharp increase in cases pending before the Court. When these cases reach you, are they certified by the Board of Veterans' Appeals in the same manner that the cases are required to be certified at local level boards before BVA consideration?

Judge GREENE. Well, when a notice of appeal comes to us, we require the VA to provide us with a copy of the Board decision. Then we have the Board decision that is the basis for the appeal. As I indicated in my opening statement, the VA is then required to designate the record for appeal. And that designation of the record falls in the hands of the General Counsel of VA, who must designate the documents that were in the claims file before the Board that would be used as a basis for the decision in that Board decision.

Once the Secretary designates that record, it is then served on the appellant, who has an opportunity to counter-designate the record and add other documents to the record to ensure that the court will have what will become, as you say, the certified record, or the record on appeal. And then once the appellant provides that information, the Secretary then files the record with the court, and that is the record from which we eventually make the decision.

Senator JEFFORDS. Mr. Greene, I remember some discussion in the past few years about modernizing and updating the current ratings schedule for deciding veterans' claims. I have heard complaints about this anticipated antiquated system from VA raters and the service organizations. What is the status for an overhaul of the system?

Judge GREENE. That is in the area of VA, sir. In fact, the court has to be very careful about talking about the rating schedule, in terms of reviewing that.

Senator JEFFORDS. All right. What is the status of the overhaul of the system to increase productivity of the court system?

Judge GREENE. The status is, as I have indicated, the judges have gained significant experience over the past year. There is not a day that goes by that the judges don't have a dialogue about how to be more productive, and that is the right attitude that needs to be in the appellate court system. We have a challenge, but at the same time, we have to be sure that whatever case we touch, we do so with the full understanding that it has to be done with deliberative due process and within the judicial rules of law and procedure that we are bound to follow.

Thus, many cases often get bogged down simply because of technicalities or stays of proceedings and what have you. But the outlook in my estimation is that the status of the overhaul of the court, or the new court or the new beginning of the court, as I like to refer to it, is very positive. I am hoping that sometime in the future, I will be able to come back and tell you that we have certainly made a tremendous dent in those numbers that appear on your charts.

Senator JEFFORDS. Many claims are repeatedly sent back to the Veterans' Claims Board from the Court of Appeals due to incorrect filing. As is apparent from the submitted testimony of both Judge Greene and the Disabled American Veterans, roughly half of the claimants who begin the claims process with no representation retain some form of representation by the end of the process. Professional attorneys are well prepared to handle the complexities of the claim process, thereby reducing mistakes and unnecessary complication. Would attorney representation chosen at the discretion of the claimant improve the efficiency of the system?

Judge GREENE. There is no doubt that certainly in our court, that is the case. We have made great strides in reducing the number of unrepresented veterans that come before the court and it does make a difference. It is very difficult to deal with a veteran's case who is not represented.

The natural choice, if an individual is willing to represent a veteran and the veteran is willing to hire a lawyer, then the veteran should have that choice. I think it would make a difference at every adjudication level, especially, as one of my colleagues, Chief Judge

Kramer, indicated to you in the hearing last year, if there was a revamping perhaps of the system where you had administrative law judges below or somewhere at the RO level, then that would provide the opportunity for lawyers to represent veterans and go before that hearing officer.

But generally as Chief Judge of court, I would not comment on that legislation being enacted. It doesn't really impact on us because a veteran certainly has the right to hire a lawyer before coming to our court.

Senator JEFFORDS. Thank you.

Chairman CRAIG. Jim, thank you.

Now let me turn to Senator Burr.

Richard.

Senator BURR. Thank you, Mr. Chairman.

Judge Greene, welcome. Thank you for your service.

Senator Jeffords asked a question that I need to follow up on because I had written the same thing. He asked you, of the retired judges, if recalled, would they come, and you said you presumed that they would. Now, in your written testimony, let me quote, "I am consulting with five of the six retired judges concerning recall options and their availability within the next 6 months." I assume that you have been in conversation with them.

Judge GREENE. I have.

Senator BURR. Given those conversations, how do I interpret the response "presume"?

Judge GREENE. Presume? We have a regulation that governs the Chief Judge's exercise of the authority under 38 U.S.C. 7257, which is the recall judge provision. The regulation, which was not written by me, was promulgated by the Board of Judges, requires that if I am planning to recall a number of judges, requires consultation concerning their availability before issuing the recall order. So it is just as I indicated before.

Senator BURR. Well, can I assume or can the Committee assume that in the consultation, you have asked them, would they come if recalled?

Judge GREENE. Maybe I should not have said "presume," because I have every reason to believe that they will.

Senator BURR. Do you have any reason to believe that they won't?

Judge GREENE. Not until I send the letter—

Senator BURR. Have you—

Judge GREENE [continuing]. Saying to report on X date.

Senator BURR. Have you been able to distinguish from those five of the six that you have consulted with whether this exercise would be a voluntary or an involuntary recall?

Judge GREENE. Well, it is mandatory. Once I send the letter, it is mandatory.

Senator BURR. You may be new in your capacity as Chief Judge. I think you have got a tremendous amount of experience and I think you probably had a conversation with them as to whether you would have to go the voluntary route or the involuntary route. I think there is a distinction between the two.

Judge GREENE. You mean the voluntary route—

Senator BURR. There is a voluntary route that allows 120 days—

Judge GREENE. A 180 days.

Senator BURR [continuing]. Or 180 days, excuse me, and an involuntary route that obligates them to 90 days, am I correct?

Judge GREENE. Yes, sir.

Senator BURR. Do you have an indication from those five that you consulted with what would be the appropriate option based upon—

Judge GREENE. I don't have a commitment to that. I have an indication that I said, if you are recalled, then the exercise of the 180 days will certainly arise.

Senator BURR. When you use the term "consulted with them about their availability," does their availability dictate as to whether we are going to recall? Walk me through that, if you will.

Judge GREENE. Well, I do have space problems. In other words, if I were to recall four judges, then I would have to have somewhere to put them, and that is why I indicated if I went beyond the spaces of my current confines, I would have to lease facilities somewhere else to bring them on board, or do like in the Navy with the submarines, a hot bed—

Senator BURR. I realize the space limitations. I am just trying to figure out how the conversations with them about their availability are important to your decision as to whether the caseload merits a recall.

Judge GREENE. Once the caseload merits a recall, I need people, whether it is for 30 days, 60 days, or 90 days. If someone can come 30 days in September, you are on. If somebody can come 40 days beginning in October, you are on, and so on and so on and so on. That is to maintain my flexibility.

Senator BURR. Sure. Let me ask you about caseload, and I apologize that I am not near as knowledgeable as the other Members of the Committee right now, but I will be by the time we follow up on this. As we have gone through a period of time where we have increased the number of clerks per judge, we have gone from two to now four clerks per judge, and I think the target of the Committee, the target of the court was that each clerk would process two claims per week and that is sort of the formula that we use to try to determine, do we have enough clerks. I would take for granted that that is in conjunction with do we have enough judges. Two separate issues, though.

In fact, as we have doubled the number of clerks, we have actually fallen to one case per week that is completed by our clerks. I just did some quick math and if we had kept two clerks per judge and they maintained the two cases per week, they would have actually completed over 700 cases. When you look at that for 2005, of the 1,500 cases that came in more than were decided, we would have knocked that in half if we just had the same level of productivity.

Put on top of that the fact that we have doubled the number of clerks. One would assume that if the productivity had stayed the same, that we would have actually closed more cases than came in.

My question to you is, why were our assumptions wrong that we could maintain the two cases decided weekly and do we have a productivity problem with our clerks?

Judge GREENE. Umm—

Senator BURR. Let me give you a third option. Are the cases that much more complex, that our expectations of two cases per week decisions is unacceptable?

Judge GREENE. Sure. Well, let me take that last option. As I indicated in my opening statement, over the 17 years, there has been developed an extensive expertise in the veterans' bar. Twenty-nine percent of the cases that close are represented, as opposed to at the beginning of the court, when there was 80 percent *pro se*. Legal issues have become complex, certainly, and the two cases per week, that goal that I described was presumed—I won't use presumed—was on a basis of clerks doing single-judge decisions. Single-judge decisions are decisions that are considered to be relatively simple, are following precedent; not reasonably debatable.

If a clerk has to work a panel case, then that becomes more complex because there, you are now dealing with preparing to discuss this case with two other judges, two other clerks, perhaps have oral argument, and, of course, the decision that is rendered from that case becomes a precedent that will be applied to other cases. The single-judge decisions are not precedential. So that is a variable in the two-per-week goal.

It is not that we are—the current court—I am not sure you are comparing the current court with the premise of your—

Senator BURR. I am simply using the projections that the court—

Judge GREENE. We went to—

Senator BURR [continuing]. Historical work of the court.

Judge GREENE. When we went to three clerks and then to four clerks, well, more important, when we went to three clerks, we were down six to five judges, as well. So even given that, I guess you still could come up with a two decisions per week, but you have got five deciders now instead of seven deciders. So all those variables come in.

Senator BURR. Yes, but to suggest that that had something to do with the clerks' productivity would suggest that if you were to recall two judges, clerk productivity would go up. Would that happen?

Judge GREENE. I would hope so, and I feel comfortable now. Now, we are at seven full-time judges for the first time in 6 years deciding cases full-time, every day, with four clerks. This is the first year of that, and all I can say is that there is every expectation that we will continue an upward trend in producing two cases a week, given the variables. We have got, like 49, if I recall correctly, 49 cases that are pending or have been referred to panel, and those cases, again, are on the clerks' inventory and they take precedence and importance over the single judge decisions.

Senator BURR. I thank you for making yourself available to us. I thank the Chairman for his willingness to hold the hearing.

Mr. Chairman, I am anxious to see what Judge Greene is able to present to us as it relates to the mix of what our expectations for productivity should be, what our expectations for the need to re-



call and what that structure would look like because I think that has a very significant impact on what we should do as a Committee relative to allocation of funds. I pledge to you today and I pledge to Judge Greene that as the court needs those dollars to perform their work, I will do everything to make sure that they are there. By the same standard, I would expect the Chief Judge to make sure that the productivity level of all facets is, in fact, maintained and that this does not have a tendency that as it grows in size, as it grows in budgets, the expectation of this Committee and veterans is that we produce less product.

Thank you, Mr. Chairman.

Chairman CRAIG. Senator Burr, thank you. Let me add only this thought, and then we are going to have to run and vote. We will be right back, Judge, but it goes right to where Senator Burr is dealing with at this moment, and Richard, you may want to hear this.

From fiscal year 1998 to fiscal year 2007, the budget will more than double, from \$8.5 million to \$18.5 million. Compensation and benefits will increase 112 percent. Employees will increase 23 percent. During that time, the number of law clerks, attorneys, increase from two per judge, as we discussed, to three per judge, then in 2003, four per judge. In addition, the Court authorized each judge to have at least one permanent law clerk at a higher level, a GS-14, to help deal with these more complex cases.

So in looking at all aspects of your situation, Judge, I concur with what Senator Burr has said. I will have a couple of questions when I return and then we will let you get back to work.

Judge GREENE. Thank you.

Chairman CRAIG. We don't want you sitting here answering questions in part when you can be back at the Court solving claims.

We will recess for just a moment. I will run and vote and will be right back. The Committee will stand in recess.

[Recess.]

Chairman CRAIG. The Committee will reconvene, and again, Judge, thank you for your time. I have one last question and then we will get you all out of here so you can get back to work.

Disabled American Veterans and the national organizations of veterans' advocates have suggested that information about the Court's internal operations is not sufficiently transparent to the public. Does the Court disseminate within the Court or to the public information about how many cases are pending and how long they have been pending?

Judge GREENE. I will refer to my Executive on that.

Mr. HERRING. Mr. Chairman, we have upon occasion and special request provided detailed information regarding everything that we do at the Court. As you may know, we are a Federal Court and are not subject to the Freedom of Information Act and we have consistently taken that position pursuant to the advice of General Counsel. So if there have been any times that we failed to do that, it is simply because of our desire to, I guess, uphold our judicial integrity under those traditions.

But as you can see today, we have given pretty much full disclosure concerning the number of cases, where they are, how long

they have been pending, where they are in the decisional process. I am a little concerned about every time someone asks for information, that I have to stop my staff from doing what they are doing and ask them to do a research project. But I think we are pretty transparent. If there is a special request, we try to honor it.

Chairman CRAIG. Beyond the special request, then what you are telling me is that as a matter of routine on an annual basis, you don't do a status report that becomes public?

Mr. HERRING. Well, the annual report that is found on our Web site details a significant amount of information concerning the number of cases that have come in, the cases that have been cited, how many of them are merits decisions, how many have been remanded, whether they have been decided based upon jurisdictional issues, or failure to follow the rules. We try to keep that to a one-page report because of the complexity and the relationship of that data to the data that existed 10 years ago. You have relied upon data that is 10 years old and we don't want to have to say we are changing the rules midstream on how we count cases and how we decide cases. We are trying to be consistent historically, as well. So we are providing the information that we have historically provided both to the public and to individuals.

Chairman CRAIG. Sure.

Mr. HERRING. And upon, like I say, upon special request from Representatives here on the Hill, we do a significant amount of research. We had a special request for how many cases were pending on September 30, 2005, which required one of my IT professionals to spend 4 or 5 hours to research that because our case tracking system is one that is intended to track the cases currently, today's numbers, as opposed to 6 months ago or 12 months ago.

Chairman CRAIG. We have just been joined by Senator Thune. At this time, do you have any comment or questions you might like to ask, John?

**STATEMENT OF HON. JOHN THUNE,  
U.S. SENATOR FROM SOUTH DAKOTA**

Senator THUNE. Mr. Chairman, I know you are trying to move things along here and I have got an Armed Services Committee hearing today, so I need to get back there. I do want to thank you for taking this issue on. This is a very difficult and concerning issue, and getting our arms around it and coming up with solutions to how best to address this backlog, this buildup in the system, is something that I think we all are very concerned about. Clearly, we want to be able to deliver the very best quality service to our veteran community in a timely way and that is being severely compromised. I welcome the testimony from our panelists and hope that there will be some useful and meaningful suggestions about how we can deal with this issue.

So I thank you for holding the hearing and I appreciate the chance to be here.

Chairman CRAIG. Judge, let me thank you and Norm Herring for your openness and your cooperativeness in this. I hope you view this as a constructive effort. It is intended to be.

Judge GREENE. Absolutely.

Chairman CRAIG. As I was on the floor to vote, I had several Senators who were Members of this Committee opine that they were occupied today, as is John, in other hearings of value and they wished they could be here. I say that because that doesn't always happen as we probe through different issues.

We are very intent and concerned. We believe by the numbers you have a significant problem. We want to be constructive in helping you solve that and stabilize these numbers in a way that produces decisions in a timely fashion for our deserving veterans. Your openness, your allowing us access to information, in fact, your presence here this morning before the non-Judiciary committee, if you will, but before the Committee on Veterans' Affairs, I think demonstrates that and we appreciate it. We are intent, as you are. We will work with you and follow you closely through this to be helpful where we can be and assist you in resolving this issue. Thank you.

Judge GREENE. Mr. Chairman, thank you very much for this opportunity. I would just like you to know that I stand ready to continue this dialogue with you or any other Member of the Committee so that we can mutually ride together this road to blazing a trail for veterans' justice.

Chairman CRAIG. Those of the court who also attended, thank you for your presence here today. Judge Nebeker, nice to see you again. Thank you.

Now, we will ask our second panel to come forward. Our second panel is made up of the Honorable James P. Terry, Chairman of the Board of Veterans' Appeals, Department of Veterans Affairs. He is accompanied by Randall Campbell, Assistant General Counsel, Professional Staff Group VII, Department of Veterans Affairs. We also have Joe—it is that good Irish name that always gets me—Joe Violante, National Legislative Director, Disabled American Veterans.

Mr. Terry, thank you for joining us. Please proceed.

**STATEMENT OF HON. JAMES P. TERRY, CHAIRMAN, BOARD OF VETERANS' APPEALS, DEPARTMENT OF VETERANS AFFAIRS**

Mr. TERRY. Thank you, sir. Good morning, Mr. Chairman, Senator Thune, members of the staff.

The Veterans' Court caseload, as you have heard earlier this morning in the first panel, has certainly increased continually since the court opened in 1989. It has many causes. First, we at the Board are doing our utmost to increase the number of final decisions we produce. The Veterans' Court potential workload is directly dependent, as you are all aware, on the number of final decisions on the merits issued by the Board in which a benefit sought remains denied, or if allowed was not granted to the fullest extent that the claimant is seeking.

We testified before the Committee in May 2005, that two of the Board's most important imperatives are: one, to contain and reduce the backlog while maintaining high quality; and two, to improve our timeliness by eliminating avoidable remands in order to issue more final decisions. The Deputy Secretary of the Department has made the reduction of remands certainly a major priority.

But our success in increasing final decisions has had the ancillary effect of increasing the universe of cases that may be appealed

to the court. To illustrate, in fiscal year 2003, the Board issued 31,397 decisions with a remand rate of 42 percent. In fiscal year 2004, while the number of decisions increased to 38,000, the remand rate soared to 56 percent, so there was a fewer number of final decisions.

In fiscal year 2005, during which we began working concertedly with the Veterans Benefit Administration to avoid remands to the extent possible, we issued 34,175 decisions with a 36 percent remand rate, thus increasing again the number of final decisions. So far in fiscal year 2006, through the end of May, we have issued 24,133 decisions with a remand rate of 34 percent, again, a reduction from last year. Therefore, we expect of the 38,000 decisions we expect to issue before the end of this year that we will have a low remand rate, and again, an increase in final decisions that will be subject to appeal to the court.

The result is, of course, that there has been a significant increase in the number of BVA decisions that may be appealed, and certainly in looking at the numbers, while the Board issued 4,196 fewer decisions in 2005 than it did in 2004, the actual number of decisions to which all benefits sought were denied increased from 9,300 to 13,032, as mentioned by Judge Greene.

It is important to note, though, during this same period of time, while the number of decisions that we issued increased in terms of denials, it also increased significantly in terms of those where benefits were granted.

The trend is likely to continue. As I am sure the Committee is well aware, the Board is continuing to receive more cases each year. We received 39,000 cases in 2004, 41,000-plus in 2005, and this year we are expecting 43,000 and more so in 2007.

But other factors also must be considered, Mr. Chairman. In addition to the heightened awareness among veterans and the increased number of cases subject to appeal, the higher courts have determined that the Veterans' Court possesses now authority to consider petitions for extraordinary relief under the All Writs Act, and this has led to a significant amount of work at the Veterans' Court.

Additionally, the Federal circuit has played a significant role in increasing the number of appeals at the Veterans' Court by applying the Equitable Tolling Doctrine to otherwise untimely appeals, therefore allowing those that otherwise might be denied to be considered.

On perhaps a smaller scale, cases like *Bates v. Nicholson*, dealing with an attorney's right to practice, have expanded the jurisdiction of the Board and, hence, have expanded the jurisdiction of the court.

Statutory changes, as well, have played an important role. For example, the Equal Access to Justice Act was amended in 1992 to authorize the Veterans' Court to award fees and expenses to veterans' attorneys. Thereafter, the caseload at the Veterans' Court jumped exponentially. Over 20 percent of the Veterans' Court docket in fiscal year 2005 was comprised of such fee applications, and that percentage is holding true this year, as well.

Another instance was the elimination of the date of filing of the notice of agreement limitation of the court's jurisdiction, which had

originally been enacted in the Veterans' Judicial Review Act to help control the workload of the Veterans' Court.

The statutory amendment that adopted the postmark rule for calculating timeliness has likewise had an impact on the Veterans' Court docket by expanding the cases that can be considered.

Enactment of the Veterans' Claims Assistance Act, the VCAA, has also had an enormous impact on the work of the Veterans' Court. This is due in part to extensive litigation regarding the scope and meaning of that legislation, as well as the reluctance of the Veterans' Court, in our view, "to take due account of the rule of prejudicial error" in making its determinations, an opportunity it certainly has the right to avail itself of. If the court were able to employ this rule to its fullest, it would be able to reduce its workload by rendering more final decisions rather than remands in appropriate cases.

In addition, occasional spikes in the number of new cases over the years can be attributed to organized efforts to present particular legal issues to the courts, such as, for example, the recent spate of bilateral tinnitus cases that are just now being resolved. There have been hundreds of such cases filed in the Veterans' Court. Such temporary spikes are difficult to predict and can be difficult to manage for anybody.

Further, cases have simply grown more complex, sir, with more numerous issues, larger records, and certainly more issues to consider. It is not uncommon to have files of several thousand pages and certainly multiple issues, some cases more than 10, certainly.

Changes in laws, such as the statutory enactment of the VCAA or issuance of a new precedent also impact the court because there might be dozens or even hundreds of cases that must be rebriefed to the court, thereby delaying the ultimate decision in those cases. That is very much a reality this year.

The number of cases scheduled for oral argument has also doubled over recent years and that trend is predicted to continue.

With respect to potential remedies, and I think here is where we need to look very carefully, it is notable that the court is evaluating new means for alleviating or managing the press of business, and I think Judge Greene touched on some of these. For example, it has adopted new procedures to reduce the amount of time expended by the parties' motions for continuances. It has reinforced its rules governing submission of pleadings.

The Veterans' Court is also currently considering a fundamental change to the procedures for preparing the record on appeal. Therefore, if, in fact, it were to make this change, only the matters cited in the pleadings to be submitted would be required as opposed to the DOR, the designation of the record, today, which includes a listing of all documents within the file.

The Veterans' Court is also studying the feasibility of electronic filing. This, of course, would require a rule change in the court's rules, but we think that would be a very, very effective new mechanism.

The Veterans' Court could take better advantage of tools already available to it, in our view. For example, the Veterans' Court could adopt procedures that welcome rather than deter summary motions for dismissal in appropriate cases. The plan to revamp the prepara-

tion of the record on appeal, which is currently under study, would certainly facilitate the filing of summary motions.

As I noted previously, the court could be expansive in taking account of the rule of prejudicial error in reviewing the Board's determinations, avoiding remands where justice will permit. We believe this is a very, very important consideration and we believe that the court could do much in this area.

The Veterans' Court could also be more open to the idea of consolidating cases or granting motions to stay cases when there is a commonality of issues. In the instance of the recently decided tinnitus rating cases, for example, the Veterans' Court did not consolidate the majority of the cases on its docket, nor did it grant the Secretary's motions to stay proceedings pending resolution of the lead cases. These changes would certainly affect cases which have already been filed. However, we must note, and it is a reality, the sheer number of potentially appealable decisions from the Board is staggering and certainly this has to be taken into account, as well.

Mr. Chairman, the problem of backlogs will be a theme that continues into the future, and unless steps are taken to meaningfully reduce the actual number of appeals or to employ an expeditious means to dispose of them, we will continue to have the problem that we face today.

Mr. Chairman, Mr. Campbell and I would be pleased to answer any questions you or any other Member of the Committee might have.

[The prepared statement of Mr. Terry follows.]

PREPARED STATEMENT OF HON. JAMES P. TERRY, CHAIRMAN, BOARD OF VETERANS' APPEALS, DEPARTMENT OF VETERANS AFFAIRS

Good morning, Mr. Chairman. I am happy to discuss with you, Ranking Member Akaka, the members of the Committee, and your staff, what we believe are the reasons for the increase in the number of appeals to the United States Court of Appeals for Veterans Claims (Court or Veterans Court), whether we can expect that trend to continue, and what measures may be taken to assist the Veterans Court in handling this increased workload.

With me today before you is R. Randall Campbell, Assistant General Counsel, Professional Staff Group VII of the Office of the General Counsel (Group VII), also known as the Veterans Court Appellate Litigation Group. That Group is charged with representing the Secretary of Veterans Affairs before the Court.

While appeals from the final decisions of the Board provide the primary source of the Veterans Court's workload, its workload includes a variety of other matters, including petitions for a writ of mandamus, and applications for fees and expenses under the Equal Access to Justice Act. Group VII is responsible for handling the administrative and legal matters involved in all litigation before the Veterans Court. This is a complex operation, akin to a large law firm employing a staff of nearly 100 consisting of attorneys and a large complement of administrative professionals who run the docket room, computerized case-tracking system, and copy center, among other things. In order to comply with the Veterans Court's Rules of Practice and Procedure, Group VII prepares, serves and files copies of the record on appeal in cases before the Veterans Court, producing an average of more than one million photocopies per month. Group VII has experienced first hand the effects on its own resources of the increasing caseload before the Veterans Court.

It is clear that the Veterans Court's caseload has increased continually since it opened its doors for business in 1989. Ten years ago, in Fiscal Year (FY) 1996, for example, the Veterans Court received 1,836 new cases. By contrast, in fiscal year 2005, the Veterans Court received 4,364 new cases. So far this fiscal year, the Veterans Court is averaging in excess of 393 new cases per month. The number of cases pending decision at the beginning of June 2006 was 4,311. I fully expect the caseload to increase for a number of reasons.

First, we at the Board are doing our utmost to increase the number of final decisions we produce. As you know, the mission of the Board of Veterans' Appeals (BVA

or Board) is to conduct hearings and render high quality, timely and final decisions in appeals of claims for veterans benefits. The vast majority of appeals involve claims for disability compensation benefits, such as claims for service connection, an increased rating, or survivor's benefits, which were denied at the VA Regional Office level.

In order for the Board to reach a fair and just decision in an appeal, the record must contain all evidence necessary to decide the appeal and reflect that all necessary due process has been provided. If the record does not meet these requirements, and the benefits sought cannot be granted, a remand for further development is necessary. Since a remand is a preliminary order and not a final decision on the merits, it generally may not be appealed to the Veterans Court. About three quarters of all remands are eventually returned to the Board for further consideration.

It is those decisions in which the Board denies the appeal, in whole or in part, that the claimant may challenge by filing a Notice of Appeal with the Court.

Hence, the Veterans Court's potential workload is directly dependent on the number of final decisions on the merits issued by the Board in which a benefit sought remains denied or, if allowed, was not granted to the fullest extent that the claimant is seeking.

As the Board's then Acting Chairman, now Vice Chairman, Ron Garvin, testified before this Committee on May 26, 2005, two of the Board's most important initiatives are (1) to contain and reduce the backlog of appeals by increasing decision productivity, while maintaining high quality, and (2) to improve timeliness and service to veterans by eliminating avoidable remands in order to issue more final decisions. In regard to the latter initiative, in July 2004, Deputy Secretary Gordon Mansfield specifically directed both the Under Secretary for Benefits and Board's Chairman to do all within our power to eliminate avoidable remands. This effort required close cooperation between our organizations and the Deputy Secretary's office to develop and implement a comprehensive plan to respond to this directive.

I am happy to report that we have had much success in working toward both these goals. While this is good news for the veterans we serve, who benefit from improved service, it has had the ancillary effect of increasing the universe of cases that may be appealed to the Court.

To illustrate, in fiscal year 2003, the Board issued 31,397 decisions, with a remand rate of 42.6 percent. In fiscal year 2004, while the number of decisions issued increased to 38,371, the remand rate soared to 56.8 percent. In fiscal year 2005, during which we began working concertedly together with the Veterans Benefits Administration to avoid remands to the extent possible, we issued 34,175 decisions of which 38.6 percent were remanded in whole or part. So far in fiscal year 2006, through the end of May, we have issued 24,133 decisions, with a remand rate of 34 percent, again a reduction in the remand rate from last year. We expect to issue about 38,000 decisions by the end of this Fiscal Year, while maintaining as low a remand rate as practicable.

The result is that, over the last few years, there has been a significant increase in the number of BVA decisions that may be appealed to the Court. For example, although the Board issued 4,196 fewer decisions in fiscal year 2005 than in fiscal year 2004, the actual number of decisions in which all benefits sought were denied increased from 9,300 in fiscal year 2004 to 13,032 in fiscal year 2005. While the number of cases in which a grant of benefits was awarded by the Board also increased during this time, from 6,560 in fiscal year 2004 to 7,096 in fiscal year 2005, some of these decisions involve a grant of less than all the benefits sought and therefore may be appealed to the Court on those issues.

This trend is likely to continue, especially since the Board's workload continues to grow. The Board received 39,956 cases in fiscal year 2004, 41,816 cases in fiscal year 2005, and expects to receive 43,000 cases in both fiscal year 2006 and fiscal year 2007.

Other factors that may affect the increase in appeals to the Veterans Court are not so readily quantifiable. There is a heightened awareness among veterans of their access to the judicial process. It appears that veterans have become increasingly knowledgeable about their right to appeal to the Veterans Court and are increasingly willing to avail themselves of that right.

In addition, there have been changes in the jurisprudence that have influenced the caseload. The courts have determined that the Veterans Court now possesses authority to consider petitions for extraordinary relief under the All Writs Act, which has led to a significant amount of work at the Veterans Court. Additionally, the Federal Circuit has played a significant role in increasing the number of appeals at the Veterans Court by applying the "equitable tolling doctrine" to untimely appeals. On perhaps a smaller scale, cases like *Bates v. Nicholson*, 398 F.3d 1355 (Fed.

Cir. 2005) or *Meakin v. West*, 11 Vet.App. 183 (1998), have expanded the jurisdiction of the Board of Veterans' Appeals and, hence, created the potential for additional cases to be appealed to the Veterans Court.

Statutory changes, too, have played an important role. For example, the Equal Access to Justice Act was amended in 1992, in order to authorize the Veterans Court to award fees and expenses to veterans' attorneys. Thereafter, the caseload at the Veterans Court jumped monumentally. Over 20 percent of the Veterans Court's docket in fiscal year 2005 was comprised of such fee applications, and that percentage is holding true this year, as well. Another instance was the elimination of the date of filing of the "notice of disagreement" limitation of the Court's jurisdiction, which had been originally enacted in the Veterans' Judicial Review Act to help control the workload of the Veterans Court. The statutory amendment that adopted the "postmark rule" for calculating timeliness of appeals has also had an impact on the Veterans Court's docket.

Enactment of the Veterans Claims Assistance Act (VCAA) has had an enormous impact on the work of the Veterans Court. It is no secret that VCAA remands have been ping-ponging between the Veterans Court and the Department of Veterans Affairs for nearly 6 years. This is due, in part, to extensive litigation regarding the scope and meaning of the legislation, as well as the reluctance by the Veterans Court to "take due account of the rule of prejudicial error" in making its determinations. 38 U.S.C. § 7261(b)(2). I recognize that this has been a rather contentious issue and one that is currently the subject of ongoing litigation. I can offer only that, if the Court were able to employ this rule to its fullest, it may be able to reduce its workload by rendering more final decisions, rather than remands, in appropriate cases. Ultimately, this would better serve our Nation's veterans.

It also should be noted that there have been occasional spikes in the number of new cases over the years that can be attributed to organized efforts to present particular legal issues to the courts. For example, over the last few years the docket of the Veterans Court and the docket of the Federal Circuit have been crowded with cases involving the question of dual ratings for so-called "bilateral" tinnitus. There have been hundreds of such cases filed in the Veterans Court. Such temporary spikes are difficult to predict and can be difficult to manage.

Finally, all of us involved in the adjudication system agree that cases have grown more complex, with more numerous issues and much larger records to review and consider. Even a case with just a few simple issues takes more time to process, when, as is increasingly common, the record on appeal may constitute thousands and thousands of pages. When there are changes in law, such as a statutory enactment like the VCAA or issuance of a new precedent by a court, there might be dozens or even hundreds of cases that must be re-briefed, thereby delaying the ultimate decision in those cases. Because of the change in law, many of the cases will be remanded to VA by the Veterans Court and then be returned to the Court on appeal, increasing its workload. If a case is scheduled for oral argument, preparing for oral argument delays processing of other cases while the subject case receives priority treatment. The number of cases scheduled for oral argument has doubled over recent years, and that trend is predicted to continue. All of these factors can contribute to a backlog on the Veterans Court.

No doubt the Veterans Court is cognizant that its decisions, even in routine cases, are very important to those veterans who have been waiting for their "day in court." Moreover, precedents issued by the Veterans Court can have a profound and wide-ranging impact on the Department's adjudication system. These factors call for careful deliberation and consistency, which, in turn, affects the amount of time spent on each case.

With respect to potential remedies, it is notable that the Veterans Court is evaluating new means for alleviating or managing the press of business. For example, several years ago it adopted new procedures to reduce the amount of time expended by the parties' motions for continuances. It also reinforced its rules governing submission of pleadings, in order to deal with a rise in the filing of facially unsubstantiated writ petitions. We understand that the Veterans Court is currently considering a fundamental change to the procedures for preparing the record on appeal, which will speed the submission of cases to the judges for decision, and that the Veterans Court is also studying the feasibility of electronic filing.

The Veterans Court could take better advantage of tools already available to it. For example, the Veterans Court could adopt procedures that welcome, rather than deter, summary motions in appropriate cases. We are hopeful that the plan to revamp the preparation of the record on appeal, which is currently under study, will facilitate the filing of summary motions. As noted above, the Court could be expansive in taking account of the rule of prejudicial error in reviewing the Board's determinations, avoiding remands where justice will permit.



The Veterans Court could also be more open to the idea of consolidating cases or granting motions to stay cases, when there is a commonality of issues. In the instance of the tinnitus rating cases, for example, the Veterans Court did not consolidate the majority of the cases on its docket, nor did it grant the Secretary's motions to stay proceedings pending resolution of certain lead cases. Because the cases were permitted to proceed individually, there was an unnecessary expenditure of resources in the individual tinnitus cases and an avoidable diversion of time and resources from other cases on the docket of the Veterans Court.

These changes would affect cases that have already been filed. As noted earlier, however, the sheer number of potentially appealable decisions from the Board of Veterans' Appeals is staggering. The problem of backlogs will be a theme that continues into the future, unless steps are taken to meaningfully reduce the actual number of appeals or to employ an expeditious means to dispose of them.

Mr. Campbell and I would be pleased to answer any questions you or your colleagues might have.

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RESPONSES TO WRITTEN QUESTIONS SUBMITTED BY HON. DANIEL K. AKAKA  
TO JAMES P. TERRY

*Question 1.* Mr. Terry, I appreciate your views on the court's workload. However, I believe it is more appropriate to focus VA's input on how the department, including BVA, can better handle claims to reduce the number of decisions appealed to the Court. For those cases which are appealed to the Court, VA's goal should be to ensure that the cases which go forward are fully ready for the Court's review, with no need to remand the cases for further development. What can the Board do to reduce the number of cases remanded from the Court?

Answer. Any claimant adversely affected by a final decision of the Board of Veterans' Appeals (BVA or Board) has the right to obtain judicial review of that decision by filing a timely Notice of Appeal (NOA) with the United States Court of Appeals for Veterans Claims (CAVC or Court). 38 U.S.C. §§ 7266(a), 7252(a). It is the claimant's decision alone to exercise his or her statutory right to appeal and, therefore, the Department nor the board has the authority to "reduce the number of decisions appealed to the Court."

We can, however, "better handle claims" by improving our efforts to explain the rationale for our decisions. A better understanding of the underlying reasons for the Board's decision may persuade some claimants that the decision is correct and should not be appealed. In addition, by providing a clearer, more comprehensible explanation of the bases for our decisions, we also will address one of the leading causes of remands from the Court. Our data show that from the period of December 2000, when we began our current Court remand tracking system, to the end of June 2006, the leading cause of remands (28.4 percent of all issues remanded from the Court) was based on a determination that the Board did not provide an adequate discussion of the rationale for its decision on a material issue of law or fact. To address these concerns, we are working with our Veterans Law Judges (VLJs) and staff counsel to ensure that BVA decisions are clear, concise, coherent and correct. We have recently completed several training initiatives to this end.

The Board's mission is to issue decisions that are just, fair, and legally correct, as well as timely. This applies to all decisions, not just those that may be appealed to the Court. To this end, we have in place a comprehensive Quality Review (QR) program, which has recently undergone favorable scrutiny by the Government Accountability Office (GAO). A "deficiency free" decision is one in which all issues are correctly identified and resolved with appropriate findings of fact, conclusions of law, and order; that ensures that all due process has been provided, including appropriate notice and assistance to develop the claim; and that contains an adequate explanation of the reasons and bases for all material issues of fact and law. We have a robust training program in place to address those particular areas in our decisions in which QR has identified problems. Our quality goal for Fiscal Year (FY) 2006 is a deficiency free decision rate of 92 percent. As of the end of June fiscal year 2006, our deficiency free decision rate stood at 92.4 percent, slightly above our target goal.

Many of the cases that are remanded to the Board by the Court have nothing to do with the correctness of our decisions at the time we made them. Under the Court's jurisprudence, a change in law generally is effective immediately and applicable to all pending cases. Thus, where the law changes while a case is pending on appeal, the case generally must be remanded for readjudication under the new law, regardless of whether the Board's application of the law was correct at the time the decision was issued. Our data show that from the period of December 2000 to the end of June 2006, of all the individual issues that were remanded to us by the

Court, 10.8 percent resulted from a change in case law and another 22.8 percent were remanded for the application of new legislation or regulation.

*Question 2.* Please provide more detail on the Board's workload increase. For the most current fiscal year for which you are able to provide such information, give us a breakdown on the type of claim, including how many are original, how many are seeking an increase in benefits, along with information on the specifics of the claim in terms of the disease or disability claimed. Also please show a breakdown on the period of service of the claimant or, if the claim is from a survivor, the period of service of the veteran.

*Answer.* In response to your question, we have provided relevant information in Attachment A. This data has been extracted from VA's appeals data base, the Veterans Appeals Control and Locator System (VACOLS). We have included charts providing a breakdown of the Board's decisional output for fiscal year 2005 and for fiscal year 2006 through the end of June by type of action, by disposition by program area, and by period of service of the veteran claiming benefits or through whose service derivative benefits are claimed. In addition, for increased rating cases, we have provided a breakdown for both time periods by individual issues correlated with the applicable diagnostic codes.

*Question 3.* You mention that "precedents issued by the Veteran's Court can have a profound and wide-ranging impact on the department's adjudication system." This is certainly how it should be but I am concerned that the impact of a precedent decision is not always fully understood or implemented with VA. Please describe how a precedent decision from the Court is analyzed within VA and, once the analysis is completed, how the meaning of the decision is provided to adjudicators from the regional offices and the Board.

The Board's Appellate Group carefully reviews all decisions of the CAVC and the U.S. Court of Appeals for the Federal Circuit, both precedential and nonprecedential. As soon as possible following their issuance, they circulate all precedential court decisions by electronic mail to our Veterans Law Judges (VLJs) and staff counsel, together with a summary and short analysis of the case. A similar process is employed for the dissemination of new legislation, regulations, and precedent opinions of VA's General Counsel. Selected nonprecedential court decisions of interest are also periodically circulated, with briefer accompanying materials. In addition, all our VLJs and counsel may independently access judicial decisions that are posted on the courts' Web sites or are reported in Westlaw.

Representatives of the Board meet at least monthly and as often as is necessary with their counterparts in the Office of the General Counsel, the Veterans Benefits Administration, and the Veterans Health Administration to discuss the impact of significant decisions of our reviewing courts. Guidance on important decisions may be generated jointly, by each organization individually or be disseminated centrally by the Office of the General Counsel. Training is conducted on important precedent decisions, as well as other pertinent areas of law and medicine, either jointly or by each VA component. In addition, the Board provides training by videoconference with participating VA Regional Offices (ROs), and offers training by our VLJs and counsel on Travel Board visits to the ROs.

The Board's VLJs and counsel are all attorneys and have considerable expertise in the area of veterans law. It is an essential responsibility of their job to interpret and apply the decisions of the Court to the cases before them. In order to ensure consistency and encourage a free exchange of ideas on the interpretation of judicial precedent, the Board conducts periodic "Grand Rounds" training sessions for all our VLJs and counsel covering significant changes in the law, as well as a wide range of ongoing training for our judges and counsel in the various specialized areas of law and medicine within the Board's jurisdiction.

It must be emphasized that the law is an ever-evolving process. Courts generally decide only the specific issue before them and, therefore, controlling precedent is often revealed in a piecemeal fashion. Further, judicial decisions are not always paradigms of clarity. For example, while the Veterans Claims Assistance Act (VCAA) was enacted in November 2000, over the ensuing years the meaning and application of its notice provisions alone have been the subject of numerous and, at times, contradictory decisions of the courts and remain a subject of active litigation. As the law changes with each new precedential decision, actions taken by VA that appeared to be in compliance with existing law may be deemed to be deficient in retrospect. The point is that it is not always possible to immediately grasp the full implications of a decision of the court and that, even if they are correctly understood, subsequent precedent may change that understanding. I can assure you, Senator Akaka, that we at the Board do everything possible to ensure that our VLJs and counsel understand and comply with the law, including all precedential court decisions.

*Question 4.* Mr. Terry, how low can BVA's rate of cases remanded to the Regional Offices realistically go? Of the current number of cases remanded by the Board to the RO's, what percentage are as a result of the regional offices not doing a complete job when they first had the cases?

Answer. In July 2004, the Under Secretary for Benefits and I were charged by the Deputy Secretary, to the extent possible, to eliminate those remands by BVA to the ROs that can be avoided. Part of the Deputy Secretary's charge was to mutually develop a mechanism for tracking the reasons why a case is remanded. Obviously, we need to understand where the problems are in order to remedy them.

As a result, starting in November 2004, we implemented a new system for tracking the reasons why each issue on appeal was remanded. There may be multiple reasons for remand for each case. Our tracking system divides those reasons into those that arose before certification and transfer of the record to the Board—that is, while the case was under the control of the RO—from those reasons arising after certification and transfer of the record to the Board, when the Board has jurisdiction of the case. Our data show that for fiscal year 2005, 60.3 percent of the issues remanded were for pre-certification reasons and that 39.7 percent were for post-certification reasons. So far in fiscal year 2006, pre-certification reasons constitute 52.8 percent of the total and 47.2 percent were for post-certification reasons.

While there clearly is room for improvement throughout the system, cases must often be remanded because of the requirements of current law and events that are beyond either the RO's or the Board's control. As I discussed in my responses to your first and third questions above, a change in law that occurs while the case is on appeal to the Board or to the Court will generally require a remand for readjudication if a due process or substantive right is involved. A remand also may be required for a variety of other reasons while the case is at the Board, such as the submission of new evidence, a revelation that there are pertinent Federal records of which we were previously unaware, an alleged change in the severity of a disability for which increased compensation is sought, additional information concerning alleged stressors in a service connection case for PTSD, a request for a hearing, just to name a few. In these instances, a remand is necessary so that our Nation's veterans and their families receive all the due process to which they are entitled. In view of these factors and with the understanding that we will never achieve perfection, I would estimate that we eventually may bring the remand rate down to between 27 and 30 percent.

*Question 5.* With respect to the claims involving "bilateral" tinnitus discussed in your testimony, could the Board have either consolidated those cases or decided a lead case and held the others pending a decision by the court?

Answer. The Board could not have taken either of these actions. As noted above, in response to your first question, the Board has no control over which of its decisions will be appealed to the Court. By statute, the Secretary cannot appeal a Board decision to the Court. See 38 U.S.C. §§ 7252(a), 7266(a). Hence, it is impossible for the Board to designate a lead case for judicial review.

Nor does the Board have the authority to consolidate cases. By statute, the Board must consider and dispose of the cases before it in the order in which they appear on its docket. The exceptions to this are limited to cases that may be advanced on the docket because of good cause, such as serious illness, financial hardship or advanced age, or remands returned to us, which require expeditious treatment. See 38 U.S.C. §§ 5109B, 7107(a), 7112.

However, the Secretary has maintained that the Department has the authority to stay final action on cases that may be affected by the outcome of a decision on appeal to the courts. This was the action that was taken during the pendency of the Department's successful appeal to the Federal Circuit of the CAVC's decision in the "bilateral" tinnitus case. *Smith v. Nicholson*, 19 Vet.App. 63 (2005), rev'd, No. 05-7168, 2006 U.S. App. LEXIS 14919 (Fed. Cir. June 19, 2006). A stay has an effect similar to that of consolidation, in that it preserves the status of pending appeals until their common controlling legal issue is resolved. However, the Secretary's authority to impose such a stay has been challenged by several petitions for writs of mandamus. See *Caudill et al. v. Nicholson* (No. 06-1541) (U.S. Vet. App. June 23, 2006). Litigation on this matter is continuing.

*Question 6.* In fiscal year 2005, how many cases were decided by the Board where all benefits sought were denied? Where some benefits were denied and others granted? Are mixed decisions counted (for purposes of compiling statistics) as denials or grants?

*Answer.* For reporting purposes, the Board's long-standing practice is to record as a "denial" a decision in which all the benefits sought on appeal are not granted. In the case of decisions with mixed dispositions, we record a decision in which at least one issue was remanded, but none granted, as a "remand." A decision in which at least one of the benefits sought is granted, in whole or in part, is recorded as an "allowance," regardless of the disposition of any other issue.

In FY 2005, 13,027 decisions, representing 38.15% of all decisions issued during that period, were denials.

The chart below reflects a more detailed breakdown of case dispositions for FY 2005 to include additional information on "mixed case" dispositions:

	FY05		
Denied Appeals	13,027		38.15% of total FY 05 decisions
Denied in Whole	12,407	95.2%	
Allowed Appeals	7,089		23.35% of total FY 05 decisions
Allowed in part Denied in Part	2,490	35.1%	
Remanded Appeals	13,164		38.5% of total FY 05 decisions
Remanded in Part Denied in Part	2,947	22.4%	

## Responses to questions from Ranking Member Daniel K. Akaka

Attachment A -- Statistical Data furnished in response to Question 2, covering FY 2005 and FY 2006 through June 30, 2006

DISPOSITION OF  
APPEALS BY TYPE  
ACTION CODE  
FY05

Type Action	Allowed		Remanded		Denied		Other		Total Dispositions
1 - Original	4,144	21.06%	8,755	44.49%	6,331	32.17%	450	2.29%	19,680
2 - Supplemental	1	33.33%	0	0.00%	2	66.67%	0	0.00%	3
3 - Post Remand	2,476	21.36%	3,227	27.84%	5,705	49.21%	184	1.59%	11,592
4 - Reconsideration	5	50.00%	3	30.00%	1	10.00%	1	10.00%	10
5 - Vacate	3	2.65%	2	1.77%	2	1.77%	106	93.81%	113
6 - De Novo	12	11.54%	50	48.08%	24	23.08%	18	17.31%	104
7 - Court Remand	440	17.38%	1,125	44.45%	891	35.20%	75	2.96%	2,531
8 - Designation of Record	0	0.00%	0	0.00%	9	90.00%	1	10.00%	10
9 - CUE	8	7.62%	2	1.90%	62	59.05%	33	31.43%	105
<b>TOTAL:</b>	<b>7,089</b>	<b>20.76%</b>	<b>13,164</b>	<b>38.55%</b>	<b>13,027</b>	<b>38.15%</b>	<b>868</b>	<b>2.54%</b>	<b>34,148</b>

**DISPOSITION OF  
APPEALS BY  
TYPE ACTION  
CODE  
FY06 thru 06/30/06**

Type Action	Allowed	Remanded	Denied	Other	Total Dispositions
1 - Original	3,086 21.60%	5,765 40.35%	5,076 35.53%	359 2.51%	14,286
2 - Supplemental	1 25.00%	1 25.00%	1 25.00%	1 25.00%	4
3 - Post Remand	2,514 22.04%	2,910 25.51%	5,801 50.85%	182 1.60%	11,407
4 - Reconsideration	3 50.00%	1 16.67%	2 33.33%	0 0.00%	6
5 - Vacate	1 1.03%	1 1.03%	1 1.03%	94 96.91%	97
6 - De Novo	12 13.95%	34 39.53%	20 23.26%	20 23.26%	86
7 - Court Remand	326 18.45%	817 46.24%	575 32.54%	49 2.77%	1,767
8 - Designation of Record	0	0	0	0	0
9 - CUE	8 10.67%	2 2.67%	44 58.67%	21 28.00%	75
<b>TOTAL:</b>	<b>5,951 21.46%</b>	<b>9,531 34.37%</b>	<b>11,520 41.55%</b>	<b>726 2.62%</b>	<b>27,728</b>

**DISPOSITION OF  
APPEALS BY  
PROGRAM AREA  
FY05**

PROGRAM AREA	ALLOWED	REMANDED	DENIED	Other	TOTAL DECISIONS
Unspecified Program Area	0 0.00%	1 50.00%	0 0.00%	1 50.00%	2
Burial Benefits	1 2.13%	11 23.40%	33 70.21%	2 4.26%	47
Compensation	6,861 21.30%	12,476 38.73%	12,103 37.57%	771 2.39%	32,211
Education	14 6.03%	75 32.33%	140 60.34%	3 1.29%	232
Insurance	0 0.00%	7 38.89%	10 55.56%	1 5.56%	18
Loan Guaranty	1 5.88%	6 35.29%	7 41.18%	3 17.65%	17
Medical	44 15.22%	121 41.87%	109 37.72%	15 5.19%	289

Pension	68	11.41%	169	28.36%	336	56.38%	23	3.86%	596
VR&C	2	3.70%	17	31.48%	30	55.56%	5	9.26%	54
Other Program	6	18.18%	11	33.33%	16	48.48%	0	0.00%	33
BVA Original									
Jurisdiction	8	7.77%	3	2.91%	58	56.31%	34	33.01%	103
Multiple Program Areas	93	16.06%	284	49.05%	191	32.99%	11	1.90%	579
<b>Totals:</b>	<b>7,098</b>	<b>20.77%</b>	<b>13,181</b>	<b>38.56%</b>	<b>13,033</b>	<b>38.13%</b>	<b>869</b>	<b>2.54%</b>	<b>34181</b>

**DISPOSITION OF  
APPEALS BY  
PROGRAM AREA  
FY06 thru 06/30/2006**

PROGRAM AREA	ALLOWED		REMANDED		DENIED		OTHER		TOTAL DECISIONS
Unspecified Program									
Area	0	0.00%	0	0.00%	1	100.00%	0	0.00%	1
Burial Benefits	1	2.56%	7	17.95%	29	74.36%	2	5.13%	39
Compensation	5,768	21.88%	9,110	34.56%	10,809	41.00%	674	2.56%	26361
Education	18	9.78%	55	29.89%	107	58.15%	4	2.17%	184
Insurance	0	0.00%	4	40.00%	6	60.00%	0	0.00%	10
Loan Guaranty	0	0.00%	0	0.00%	7	100.00%	0	0.00%	7
Medical	29	14.15%	77	37.56%	91	44.39%	8	3.90%	205
Pension	41	10.54%	97	24.94%	238	61.18%	13	3.34%	389
VR&C	0	0.00%	20	45.45%	21	47.73%	3	6.82%	44
Other Program	2	10.00%	9	45.00%	9	45.00%	0	0.00%	20
BVA Original									
Jurisdiction	10	15.15%	1	1.52%	38	57.58%	17	25.76%	66
Multiple Program Areas	82	20.00%	154	37.56%	168	40.98%	6	1.46%	410
<b>Totals:</b>	<b>5,951</b>	<b>21.46%</b>	<b>9,534</b>	<b>34.37%</b>	<b>11,524</b>	<b>41.55%</b>	<b>727</b>	<b>2.62%</b>	<b>27736</b>



DISTRIBUTION OF BVA ISSUES  
FROM: 10/01/04 TO: 09/30/05

Program	Issue	Allowed	Denied	Remand	Other	Total Issues
Compensation	1151 Eligibility	36 4.5%	356 44.3%	386 48.1%	25 3.1%	803
Compensation	Apportionment	6 8.8%	28 41.2%	33 48.5%	1 1.5%	68
Compensation	Automobile or adaptive equipment	8 16.0%	16 32.0%	24 48.0%	2 4.0%	50
Compensation	Clothing allowance	0 0.0%	3 21.4%	10 71.4%	1 7.1%	14
Compensation	Competency of payee	4 12.1%	16 48.5%	11 33.3%	2 6.1%	33
Compensation	CUE (38 C.F.R. 3.105)	36 9.5%	263 69.8%	42 11.1%	36 9.5%	377
Compensation	DIC	227 10.5%	1180 54.7%	700 32.4%	51 2.4%	2158
Compensation	Effective date	393 16.0%	1229 49.9%	726 29.5%	114 4.6%	2462
Compensation	Forfeiture of benefits	5 14.3%	20 57.1%	8 22.9%	2 5.7%	35
Compensation	Increased rate for dependents	11 16.9%	36 55.4%	14 21.5%	4 6.2%	65
Compensation	Increased rating	3018 13.6%	9302 41.8%	9171 41.2%	754 3.4%	22245
Compensation	Overpayment	28 21.9%	36 28.1%	57 44.5%	7 5.5%	128
Compensation	Severance of service connection	29 17.4%	55 32.9%	83 49.7%	0 0.0%	167
Compensation	Service connection	4578 11.7%	16540 42.4%	16676 42.8%	1178 3.0%	38972
Compensation	Status as a veteran	10 4.0%	183 73.2%	55 22.0%	2 0.8%	250
Compensation	TDIU	151 9.8%	362 23.5%	975 63.4%	51 3.3%	1539
Compensation	Reductions	67 29.3%	75 32.8%	76 33.2%	11 4.8%	229
Compensation	Specially adapted housing	7 8.4%	31 37.3%	39 47.0%	6 7.2%	83
Compensation	Survivors & dependents educational assistance (Cha	9 8.6%	44 41.9%	50 47.6%	2 1.9%	105
Compensation	Willful misconduct/LOD	2 9.1%	12 54.5%	8 36.4%	0 0.0%	22
<b>Compensation</b>	<b>Totals</b>	<b>8625 12.4%</b>	<b>29787 42.7%</b>	<b>29144 41.8%</b>	<b>2249 3.2%</b>	<b>69805</b>

**DISTRIBUTION OF  
BVA ISSUES  
FROM: 10/01/05 TO:  
06/30/06**

<b>Program</b>	<b>Issue</b>	<b>Allowed</b>		<b>Denied</b>		<b>Remand</b>		<b>Other</b>		<b>Total Issues</b>
Compensation	1151 Eligibility	48	7.6%	324	51.5%	242	38.5%	15	2.4%	629
Compensation	Apportionment	4	6.3%	28	44.4%	27	42.9%	4	6.3%	63
Compensation	Automobile or adaptive equipment	3	5.4%	38	67.9%	13	23.2%	2	3.6%	56
Compensation	Clothing allowance	0	0.0%	5	27.8%	13	72.2%	0	0.0%	18
Compensation	Competency of payee	4	15.4%	13	50.0%	8	30.8%	1	3.8%	26
Compensation	CUJE (38 C.F.R. 3.105)	23	8.9%	160	62.3%	37	14.4%	37	14.4%	257
Compensation	DIC	146	9.5%	947	61.7%	407	26.5%	35	2.3%	1535
Compensation	Effective date	271	14.1%	1001	52.0%	571	29.7%	82	4.3%	1925
Compensation	Forfeiture of benefits	3	8.1%	28	75.7%	4	10.8%	2	5.4%	37
Compensation	Increased rate for dependents	9	12.9%	36	51.4%	21	30.0%	4	5.7%	70
Compensation	Increased rating	2839	15.1%	9084	48.3%	6164	32.8%	702	3.7%	18789
Compensation	Overpayment	13	13.3%	40	40.8%	40	40.8%	5	5.1%	98
Compensation	Severance of service connection	24	16.6%	63	43.4%	54	37.2%	4	2.8%	145
Compensation	Service connection	3830	11.3%	16330	48.3%	12702	37.6%	936	2.8%	33798
Compensation	Status as a veteran	8	4.2%	129	68.3%	47	24.9%	5	2.6%	189
Compensation	TDIU	118	9.0%	415	31.8%	726	55.5%	48	3.7%	1307
Compensation	Reductions	65	30.2%	85	39.5%	59	27.4%	6	2.8%	215
Compensation	Specially adapted housing	7	9.6%	39	53.4%	24	32.9%	3	4.1%	73
Compensation	Survivors & dependents educational assistance	8	11.4%	34	48.6%	26	37.1%	2	2.9%	70
Compensation	Willful misconduct/LOD	0	0.0%	16	64.0%	9	36.0%	0	0.0%	25
<b>Compensation</b>	<b>Totals</b>	<b>7423</b>	<b>12.5%</b>	<b>28815</b>	<b>48.6%</b>	<b>21194</b>	<b>35.7%</b>	<b>189</b>	<b>3.2%</b>	<b>59325</b>

**DISPOSITION OF APPEALS  
BY PERIOD OF SERVICE  
FY05**

Period of Service	ALLOWED	REMAND	DENIED	OTHER	TOTAL
1 - Pre WWI	0 0.00%	1 25.00%	3 75.00%	0 0.00%	4
2 - WWI (1917-1918)	6 28.60%	4 19.00%	10 47.60%	1 4.80%	21
3 - WWII (9/16/40-7/25/47)	989 19.60%	1,528 30.20%	2,376 47.00%	163 3.20%	5,056
4 - Peacetime	322 18.30%	620 35.30%	758 43.20%	56 3.20%	1,756
5 - Korean Conflict (6/27/50-1/31/55)	783 19.10%	1,445 35.30%	1,732 42.30%	138 3.40%	4,098
6 - Post Korea	1,034 19.20%	2,075 38.50%	2,129 39.50%	158 2.90%	5,396
7 - Vietnam Era (8/5/64-5/7/75)	3,483 21.60%	6,433 39.90%	5,801 36.00%	412 2.60%	16,129
8 - Post Vietnam	2,120 21.70%	4,153 42.50%	3,282 33.60%	207 2.10%	9,762
9 - Persian Gulf (8/2/90-Date)	1,367 24.10%	2,362 41.70%	1,838 32.40%	104 1.80%	5,671
<b>TOTAL</b>	<b>10,104 21.10%</b>	<b>18,621 38.90%</b>	<b>17,929 37.40%</b>	<b>1239 2.60%</b>	<b>47,893</b>

**DISPOSITION OF APPEALS BY  
PERIOD OF SERVICE  
FY06 thru 06/30/06**

Period of Service	ALLOWED	REMAND	DENIED	OTHER	TOTAL
1 - Pre WWI	0 0.00%	1 33.30%	2 66.70%	0 0.00%	3
2 - WWI (1917-1918)	3 17.60%	5 29.40%	9 52.90%	0 0.00%	17
3 - WWII (9/16/40-7/25/47)	637 17.90%	960 27.00%	1,826 51.30%	139 3.90%	3,562
4 - Peacetime	232 17.00%	441 32.30%	660 48.30%	33 2.40%	1,366
5 - Korean Conflict (6/27/50-1/31/55)	613 19.30%	995 31.30%	1,474 46.30%	100 3.10%	3,182
6 - Post Korea	852 20.30%	1,387 33.10%	1,836 43.80%	115 2.70%	4,190
7 - Vietnam Era (8/5/64-5/7/75)	2,936 21.90%	4,769 35.60%	5,326 39.80%	354 2.60%	13,385
8 - Post Vietnam	1,992 23.70%	3,065 36.40%	3,163 37.60%	190 2.30%	8,410
9 - Persian Gulf (8/2/90-Date)	1,292 25.70%	1,833 36.50%	1,799 35.80%	100 2.00%	5,024
<b>TOTAL</b>	<b>8,557 21.90%</b>	<b>13,456 34.40%</b>	<b>16,095 41.10%</b>	<b>1031 2.60%</b>	<b>39,139</b>

**DIAGNOSTIC CODE DISTRIBUTION FOR INCREASED RATING CLAIMS**  
**FROM: 10/01/04 TO: 05/09/30 (FY05)**

Diagnostic Code	Issues				Total
	Allowed	Denied	Remand	Other	
5000 Osteomyelitis	2	4	7	0	13
5001 Bones and joints, tuberculosis of	0	0	1	0	1
5002 Arthritis rheumatoid (atrophic)	5	23	21	0	49
5003 Arthritis, degenerative (hypertrophic or osteoarthritis)	76	138	151	7	372
5005 Arthritis, pneumococcic	0	0	2	0	2
5009 Arthritis, other types	0	7	6	0	13
5010 Arthritis, due to trauma	92	286	260	12	650
5012 Bones, new growths of, malignant	0	0	1	0	1
5013 Osteoporosis, with joint manifestations	1	3	3	0	7
5014 Osteomalacia	1	30	16	2	49
5015 Bones, new growths of, benign	0	11	5	1	17
5017 Gout	1	6	6	0	13
5018 Hydrarthrosis, intermittent	0	0	2	0	2
5019 Bursitis	4	41	47	2	94
5020 Synovitis	5	18	22	1	46
5021 Myositis	5	12	13	0	30
5022 Periostitis	0	0	2	0	2
5023 Myositis ossificans	0	2	1	0	3
5024 Tenosynovitis	13	72	40	3	128
5025 Fibromyalgia (fibrositis, primary fibromyalgia syndrome)	0	15	20	1	36
5051 Shoulder replacement (prosthesis)	0	0	1	0	1
5054 Hip replacement (prosthesis)	2	2	8	0	12
5055 Knee replacement (prosthesis)	12	35	33	4	84
5099 Other musculoskeletal disease	5	27	18	0	50
5125 Hand, loss of use of	1	0	1	0	2
5126 Five digits of one hand, amputation of	0	1	0	0	1
5139 Three digits of one hand, amputation of: Index, middle and little	0	1	0	0	1
5146 Two digits of one hand, amputation of: Index and middle	0	1	1	0	2
5151 Two digits of one hand, amputation of: Ring and little	0	0	1	0	1

5152 Thumb, amputation of	0	0	2	0	2
5153 Index finger, amputation of	0	1	2	0	3
5154 Middle finger, amputation of	2	2	1	0	5
5155 Ring finger, amputation of	0	1	2	1	4
5156 Little finger, amputation of	0	4	4	0	8
5165 Leg, amputation of: At a lower level, permitting prosthesis	0	1	0	0	1
5171 Toe, great, amputation of	0	2	2	0	4
5172 Toes, one or two, other than great, amputation of	0	2	3	0	5
5173 Toes, three or four, amputation of, without metatarsal involvement	0	0	1	0	1
5199 Other amputations	0	1	1	0	2
5200 Scapulohumeral articulation, ankylosis of	1	5	4	0	10
5201 Arm, limitation of motion of	33	117	103	7	260
5202 Humerus, other impairment of	13	27	32	1	73
5203 Clavicle or scapula, impairment of	15	74	71	0	160
5205 Elbow, ankylosis of	0	0	2	1	3
5206 Forearm, limitation of flexion of	5	13	11	0	29
5207 Forearm, limitation of extension of	0	6	6	2	14
5208 Forearm, flexion limited to 100 deg. and extension to 45 deg.	0	1	0	0	1
5209 Elbow, other impairment of Flail joint	0	1	6	0	7
5210 Radius and ulna, nonunion of, with flail false joint	0	1	3	0	4
5211 Ulna, impairment of	5	7	8	0	20
5212 Radius, impairment of	1	7	9	1	18
5213 Forearm, supination and pronation, impairment of	0	8	2	0	10
5214 Wrist, ankylosis of	3	12	4	0	19
5215 Wrist, limitation of motion of	11	70	59	0	140
5216 Five digits of one hand, unfavorable ankylosis of	0	1	0	0	1
5217 Four digits of one hand, unfavorable ankylosis of	1	0	0	0	1
5219 Two digits of one hand, unfavorable ankylosis of	0	0	1	0	1
5220 Five digits of one hand, favorable ankylosis of	3	4	4	0	11
5221 Four digits of one hand, favorable ankylosis of	0	1	2	0	3
5222 Three digits of one hand, favorable ankylosis of	0	2	3	0	5
5223 Two digits of one hand, favorable ankylosis of	4	13	9	0	26
5224 Thumb, ankylosis of	5	19	24	1	49

5225 Index finger, ankylosis of	2	15	6	1	24
5226 Middle finger, ankylosis of	2	15	6	0	23
5227 Ring or little finger, ankylosis of	12	29	34	4	79
5228 Thumb, limitation of motion	2	4	4	0	10
5229 Index or long finger, limitation of motion	3	1	2	0	6
5230 Ring or little finger, limitation of motion	0	3	4	2	9
5235 Vertebral fracture or dislocation	0	5	5	2	12
5236 Sacroiliac injury and weakness	3	5	2	0	10
5237 Lumbosacral or cervical strain	35	86	119	7	247
5238 Spinal stenosis	1	1	0	0	2
5239 Spondylolisthesis or segmental instability	2	0	1	0	3
5240 Ankylosing spondylitis	0	0	1	0	1
5241 Spinal Fusion	0	1	1	0	2
5242 Degenerative arthritis of the spine (see also diagnostic code 5003)	18	17	41	4	80
5243 Intervertebral disc syndrome	54	75	102	5	236
5250 Hip, ankylosis of	0	4	4	2	10
5251 Thigh, limitation of extension of	2	5	11	0	18
5252 Thigh, limitation of flexion of	2	16	17	2	37
5253 Thigh, impairment of	3	2	8	0	13
5254 Hip, flail joint	0	1	1	0	2
5255 Femur, impairment of	7	47	40	4	98
5256 Knee, ankylosis of	0	3	2	1	6
5257 Knee, other impairment of	144	502	454	28	1128
5258 Cartilage, semilunar, dislocated	7	18	13	0	38
5259 Cartilage, semilunar, removal of, symptomatic	20	48	42	3	113
5260 Leg, limitation of flexion of	31	130	130	8	299
5261 Leg, limitation of extension of	35	35	31	3	104
5262 Tibia and fibula, impairment of	31	88	81	4	204
5263 Genu recurvatum	0	2	3	0	5
5270 Ankle, ankylosis of	2	11	7	1	21
5271 Ankle, limited motion of	49	203	158	8	418
5273 Os calcis or astragalus, malunion of	1	5	7	0	13
5274 Astragalectomy	0	1	0	0	1

5275 Bones, of the lower extremity, shortening of	1	5	4	1	11
5276 Flatfoot, acquired	24	117	108	6	255
5277 Weak foot, bilateral	1	2	3	2	8
5278 Claw foot (pes cavus), acquired	3	5	8	1	17
5279 Metatarsalgia, anterior (Morton's disease)	2	8	14	0	24
5280 Hallux valgus, unilateral	5	22	41	2	70
5281 Hallux rigidus, unilateral, severe	2	2	2	0	6
5282 Hammer toe	7	15	12	1	35
5283 Tarsal, or metatarsal bones, malunion of, or nonunion of	0	17	22	0	39
5284 Foot injuries, other	40	122	103	13	278
5285 Vertebra, fracture of, residuals	7	28	19	2	56
5286 Spine, complete bony fixation (ankylosis) of	0	0	1	0	1
5287 Spine, ankylosis of, cervical	0	2	2	0	4
5288 Spine, ankylosis of, dorsal	0	1	1	0	2
5289 Spine, ankylosis of, lumbar	0	0	2	1	3
5290 Spine, limitation of motion of, cervical	26	58	104	3	191
5291 Spine, limitation of motion of, dorsal	2	22	30	0	54
5292 Spine, limitation of motion of, lumbar	39	119	146	10	314
5293 Intervertebral disc syndrome	72	211	319	12	614
5294 Sacro-iliac injury and weakness	3	13	14	0	30
5295 Lumbosacral strain	96	281	390	14	781
5296 Skull, loss of part of, both inner and outer tables	2	5	8	0	15
5297 Ribs, removal of	0	7	15	0	22
5298 Coccyx, removal of	0	4	5	0	9
5299 Other skeletal injury or motion loss	25	86	115	5	231
5301 Muscle injury, Group I	2	10	12	1	25
5302 Muscle injury, Group II	2	12	9	0	23
5303 Muscle injury, Group III	3	15	11	0	29
5304 Muscle injury, Group IV	1	7	10	1	19
5305 Muscle injury, Group V	3	8	8	2	21
5306 Muscle injury, Group VI	2	6	6	0	14
5307 Muscle injury, Group VII	4	20	8	1	33
5308 Muscle injury, Group VIII	1	9	7	3	20

5309 Muscle injury, Group IX	3	17	4	0	24
5310 Muscle injury, Group X	1	10	12	0	23
5311 Muscle injury, Group XI	5	42	39	3	89
5312 Muscle injury, Group XII	2	19	16	0	37
5313 Muscle injury, Group XIII	4	23	23	3	53
5314 Muscle injury, Group XIV	10	24	22	4	60
5315 Muscle injury, Group XV	1	13	18	0	32
5316 Muscle injury, Group XVI	0	1	2	0	3
5317 Muscle injury, Group XVII	4	14	12	2	32
5318 Muscle injury, Group XVIII	0	1	0	0	1
5319 Muscle injury, Group XIX	3	6	7	1	17
5320 Muscle injury, Group XX	5	5	15	4	29
5321 Muscle injury, Group XXI	0	12	9	0	21
5322 Muscle injury, Group XXII	0	3	2	0	5
5323 Muscle injury, Group XXIII	0	3	5	0	8
5325 Muscle injury, facial muscles	1	0	1	0	2
5326 Muscle hernia, extensive	1	2	1	0	4
5329 Sarcoma, soft tissue (of muscle, fat, or fibrous connective tissue)	0	2	1	0	3
5399 Other muscle injury	1	3	9	0	13
6000 Uveitis	0	2	2	0	4
6001 Keratitis	2	4	2	0	8
6002 Scleritis	0	1	0	0	1
6003 Iritis	0	2	2	0	4
6005 Choroiditis	0	1	0	0	1
6006 Retinitis	1	1	5	0	7
6008 Retina, detachment of	1	2	4	1	8
6009 Eye, injury of, unhealed	2	10	11	1	24
6011 Retina, localized scars, atrophy, or irregularities of	0	3	1	0	4
6013 Glaucoma, simple, primary, noncongestive	0	4	7	1	12
6015 New growths, benign (eyeball and adnexa, other than superficial)	0	2	0	0	2
6017 Conjunctivitis, trachomatous, chronic	0	1	0	0	1
6018 Conjunctivitis, other, chronic	1	13	7	1	22



6019 Ptosis, unilateral or bilateral	0	2	1	1	4
6020 Ectropion	0	0	1	0	1
6021 Entropion	1	0	0	0	1
6025 Epiphora (lacrimal duct, interference with, from any cause)	0	0	1	0	1
6026 Neuritis, optic	0	0	3	0	3
6027 Cataract, traumatic	0	0	1	0	1
6028 Cataract, senile, and others	1	4	1	0	6
6029 Aphakia	1	4	7	1	13
6032 Eyelids, loss of portion of	0	0	0	1	1
6034 Pterygium	2	16	5	2	25
6035 Keratoconus	0	2	1	0	3
6063 Anatomical loss of 1 eye; other eye blind (5/200 (1.5/60) or less)	0	1	0	0	1
6064 Anatomical loss of 1 eye; other eye impaired (20/200 (6/60) or less)	0	0	1	0	1
6066 Anatomical loss of 1 eye; other eye normal	0	2	2	1	5
6067 Blindness in 1 eye, having only light perception; other eye blind (5/200 (1.5/60) or less)	1	0	0	0	1
6068 Blindness in 1 eye, having only light perception; other eye impaired (20/200 (6/60) or less)	1	0	0	0	1
6069 Blindness in 1 eye, having only light perception; other eye impaired (20/50 (6/21) or less)	0	2	0	0	2
6070 Blindness in 1 eye, having only light perception; other eye normal	2	12	0	0	14
6074 Blindness in one eye (5/200 (1.5/60) or less); other eye normal	0	1	0	0	1
6076 Partial blindness in one eye (20/200 (3/60) or less); other eye impaired (20/50 (6/21) or less)	0	0	1	0	1
6077 Partial blindness in one eye (20/200 (3/60) or less); other eye normal	1	0	5	0	6
6078 Partial blindness in both eyes (20/50 (6/21) or less)	1	2	1	0	4
6079 Partial blindness in one eye (20/50 (6/21) or less); other eye normal	3	16	13	0	32
6080 Field vision, impairment of	1	8	10	1	20
6081 Scotoma, pathological, unilateral	0	1	0	0	1
6090 Diplopia (double vision)	0	2	5	2	9

6092 Diplopia, due to limited muscle function	0	2	3	0	5
6099 Other eye disability	4	5	11	0	20
6100 Hearing loss	46	686	392	39	1163
6199 Other hearing loss	0	0	2	0	2
6200 Chronic suppurative otitis media, mastoiditis, or cholesteatoma (or any combination)	4	25	18	5	52
6201 Chronic nonsuppurative otitis media with effusion (serous otitis media)	0	10	1	1	12
6202 Otosclerosis	0	0	1	0	1
6204 Peripheral vestibular disorders	6	9	14	0	29
6205 Meniere's syndrome	4	3	4	0	11
6209 Benign neoplasm of the ear (other than skin only)	0	1	0	0	1
6210 Chronic otitis externa	0	6	8	0	14
6211 Tympanic membrane, perforation of	2	17	9	0	28
6260 Tinnitus, recurrent	6	386	43	67	502
6275 Loss of sense of smell, complete	0	2	2	0	4
6276 Loss of sense of taste, complete	0	4	1	0	5
6299 Other sense organ disability	0	4	2	0	6
6304 Malaria	0	32	18	1	51
6305 Lymphatic Filariasis	1	1	0	0	2
6308 Relapsing Fever	0	2	0	0	2
6309 Rheumatic fever	0	1	3	0	4
6310 Syphilis, and other treponemal infections	0	0	3	0	3
6311 Tuberculosis, miliary	0	0	1	0	1
6314 Beriberi	0	0	1	0	1
6319 Lyme Disease	0	0	1	0	1
6350 Lupus erythematosus, systemic (disseminated)	3	3	3	0	9
6351 HIV-Related Illness	2	4	2	0	8
6354 Chronic Fatigue Syndrome (CFS)	3	5	11	1	20
6399 Other infectious disease, immune disorder, or nutritional deficiency	0	1	2	0	3
6502 Septum, nasal, deviation of	6	42	26	4	78
6504 Nose, loss of part of, or scars	0	1	2	1	4
6510 Sinusitis, pansinusitis, chronic	5	19	20	1	45

6511 Sinusitis, ethmoid, chronic	1	3	1	0	5
6512 Sinusitis, frontal, chronic	3	6	13	0	22
6513 Sinusitis, maxillary, chronic	14	41	41	3	99
6514 Sinusitis, sphenoid, chronic	3	5	14	1	23
6515 Laryngitis, tuberculous, active or inactive	0	0	1	0	1
6516 Laryngitis, chronic	1	8	8	2	19
6521 Pharynx, injuries to	0	1	1	0	2
6522 Allergic or vasomotor rhinitis	7	37	42	2	88
6599 Other disease of nose or throat	1	3	8	1	13
6600 Bronchitis, chronic	2	14	23	1	40
6601 Bronchiectasis	1	2	5	1	9
6602 Asthma, bronchial	17	55	51	1	124
6603 Emphysema, pulmonary	1	9	4	0	14
6604 Chronic obstructive pulmonary disease	2	7	9	0	18
6699 Other disease of trachea and/or bronchi	0	2	2	0	4
6703 Tuberculosis, pulmonary, chronic, minimal, active [entitled 8/19/68]	0	0	1	0	1
6721 Tuberculosis, pulmonary, chronic, far advanced, inactive [entitled 8/19/68]	0	3	5	0	8
6722 Tuberculosis, pulmonary, chronic, moderately advanced, inactive [entitled 8/19/68]	0	4	5	1	10
6723 Tuberculosis, pulmonary, chronic, minimal, inactive [entitled 8/19/68]	0	3	3	0	6
6724 Tuberculosis, pulmonary, chronic, inactive, advancement unspecified [entitled 8/19/68]	0	1	1	0	2
6730 Tuberculosis, pulmonary, chronic, active [after 8/19/68]	0	0	1	0	1
6731 Tuberculosis, pulmonary, chronic, inactive [after 8/19/68]	1	1	4	0	6
6732 Pleurisy, tuberculous, active or inactive [after 8/19/68]	0	1	0	0	1
6799 Other tuberculous disease of lungs and/or pleura	0	1	0	0	1
6817 Pulmonary Vascular Disease	0	1	3	1	5
6819 Neoplasms, malignant, any specified part of respiratory system exclusive of skin growths	1	3	6	0	10
6820 Neoplasms, benign, any specified part of respiratory system	0	3	3	0	6
6824 Chronic lung abscess	0	0	1	0	1

6825 Diffuse interstitial fibrosis (interstitial pneumonitis, fibrosing alveolitis)	2	2	0	0	4
6826 Desquamative interstitial pneumonitis	0	0	1	0	1
6828 Eosinophilic granuloma of lung	0	0	1	0	1
6833 Asbestosis	1	17	32	3	53
6834 Histoplasmosis of lung	0	1	0	0	1
6835 Coccidioidomycosis	1	1	2	0	4
6840 Diaphragm paralysis or paresis	0	1	0	0	1
6842 Kyphoscoliosis, pectus excavatum, pectus carinatum	0	0	1	0	1
6843 Traumatic chest wall defect, pneumothorax, hernia, etc	4	15	7	1	27
6844 Post-surgical residual (lobectomy, pneumonectomy, etc.)	0	4	6	0	10
6845 Chronic pleural effusion or fibrosis	2	5	3	2	12
6846 Sarcoidosis	4	9	19	1	33
6847 Sleep Apnea Syndromes (Obstructive, Central, Mixed)	2	5	4	2	13
6899 Other nontuberculous disease of lungs and/or pleura	1	5	4	0	10
7000 Valvular heart disease (including rheumatic heart disease)	3	16	12	3	34
7001 Endocarditis	1	0	0	0	1
7002 Pericarditis	1	1	1	0	3
7005 Arteriosclerotic heart disease (Coronary artery disease)	12	32	33	5	82
7006 Myocardial infarction	0	1	6	0	7
7007 Hypertensive heart disease	2	17	13	0	32
7010 Supraventricular arrhythmias	3	3	5	1	12
7011 Ventricular arrhythmias (sustained)	2	4	4	0	10
7015 Atrioventricular block	1	4	2	0	7
7016 Heart valve replacement (prosthesis)	1	2	4	0	7
7017 Coronary bypass surgery	2	4	6	1	13
7018 Implantable cardiac pacemakers	0	0	1	0	1
7020 Cardiomyopathy	2	5	1	0	8
7099 Other heart disease	0	1	5	1	7
7101 Hypertensive vascular disease (hypertension and isolated systolic hypertension)	20	130	86	9	245
7110 Aortic aneurysm	0	0	1	0	1
7112 Aneurysm, any small artery	0	0	2	0	2
7113 Arteriovenous fistula, traumatic	0	1	0	0	1

7114 Arteriosclerosis obliterans	3	2	6	0	11
7115 Thrombo-angiitis obliterans (Buerger's Disease)	0	0	3	0	3
7117 Raynaud's syndrome	2	6	4	1	13
7118 Angioneurotic edema	1	1	2	0	4
7120 Varicose veins	21	61	52	1	135
7121 Post-phlebitic syndrome of any etiology	8	19	14	0	41
7122 Cold injury residuals	44	59	53	3	159
7199 Other disease of arteries and/or veins	2	3	3	0	8
7202 Tongue, loss of whole or part	1	0	0	0	1
7203 Esophagus, stricture of	2	2	2	0	6
7204 Esophagus, spasm of (cardiospasm)	0	1	0	0	1
7205 Esophagus, diverticulum of, acquired	0	1	0	0	1
7299 Other digestive system injury	0	3	2	0	5
7301 Peritoneum, adhesions of	4	9	9	3	25
7304 Ulcer, gastric	5	3	2	2	12
7305 Ulcer, duodenal	10	70	59	4	143
7306 Ulcer, marginal (gastrojejunal)	1	1	1	0	3
7307 Gastritis, hypertrophic (identified by gastroscope)	2	7	9	1	19
7308 Postgastrectomy syndromes	3	11	15	2	31
7310 Stomach, injury of, residuals	0	0	3	0	3
7311 Residuals of injury of the liver	1	0	3	0	4
7312 Cirrhosis of the liver, primary biliary cirrhosis, or cirrhotic phase of sclerosing cholangitis	1	0	3	0	4
7313 Liver, abscess of, residuals	1	0	1	0	2
7315 Cholelithiasis, chronic	0	0	2	0	2
7316 Cholangitis, chronic	0	0	2	0	2
7317 Gall bladder, injury of	0	0	1	0	1
7318 Gall bladder, removal of	2	8	4	0	14
7319 Irritable colon syndrome (spastic colitis, mucous colitis, etc.)	13	26	30	5	74
7321 Amebiasis	0	1	2	1	4
7322 Dysentery, bacillary	0	1	1	0	2
7323 Colitis, ulcerative	3	15	7	0	25
7324 Distomiasis, intestinal or hepatic	0	3	1	0	4

7325 Enteritis, chronic	1	0	0	0	1
7327 Diverticulitis	0	2	3	0	5
7328 Intestine, small, resection of	0	6	4	0	10
7329 Intestine, large, resection of	3	2	4	0	9
7332 Rectum and anus, impairment of sphincter control	1	4	5	1	11
7334 Rectum, prolapse of	0	0	1	0	1
7335 Ano, fistula in	2	4	4	0	10
7336 Hemorrhoids, external or internal	13	100	76	8	197
7337 Pruritus ani	0	0	2	0	2
7338 Hernia, inguinal	3	61	38	4	106
7339 Hernia, ventral, postoperative	2	10	13	3	28
7343 Malignant neoplasms of the digestive system, exclusive of skin growths	1	2	1	1	5
7345 Chronic liver disease without cirrhosis (including hepatitis B, chronic active hepatitis, etc.)	4	36	36	4	80
7346 Hernia hiatal	15	62	49	5	131
7347 Pancreatitis	0	2	1	0	3
7348 Vagotomy with pyloroplasty or gastroenterostomy	2	3	4	0	9
7354 Hepatitis C (or non-A, non-B hepatitis)	8	17	17	2	44
7399 Other digestive system disease	7	9	19	1	36
7500 Kidney, removal of one	2	6	3	0	11
7501 Kidney, abscess of	0	1	1	0	2
7502 Nephritis, chronic	0	5	3	1	9
7504 Pyelonephritis, chronic	0	3	3	0	6
7505 Kidney, tuberculosis of	0	0	2	0	2
7507 Nephrosclerosis, arteriolar	1	0	1	0	2
7508 Nephrolithiasis	4	13	8	0	25
7509 Hydronephrosis	1	5	3	0	9
7510 Ureterolithiasis	1	1	2	0	4
7511 Ureter, stricture of	0	1	4	0	5
7512 Cystitis, chronic, includes interstitial and all etiologies, infectious and non-infectious	4	11	2	2	19
7517 Bladder, injury of	1	3	2	0	6

7518 Urethra, stricture of	4	5	9	0	18
7521 Penis removal of glans	1	1	0	0	2
7522 Penis, deformity, with loss of erectile power	7	29	20	7	63
7523 Testis, atrophy complete	2	12	6	0	20
7524 Testis, removal	1	5	3	1	10
7525 Epididymo-orchitis, chronic only	1	10	8	0	19
7527 Prostate gland injuries, infections, hypertrophy, postoperative residuals	16	22	25	2	65
7528 Malignant neoplasms of the genitourinary system	22	18	20	3	63
7529 Benign neoplasms of the genitourinary system	0	4	7	0	11
7530 Chronic renal disease requiring regular dialysis	0	0	1	0	1
7531 Kidney transplant	0	0	1	1	2
7532 Renal tubular disorders	0	1	0	0	1
7533 Cystic diseases of the kidneys	0	1	1	0	2
7534 Atherosclerotic renal disease (renal artery stenosis or atheroembolic renal disease)	0	1	0	0	1
7535 Toxic nephropathy	0	0	1	0	1
7536 Glomerulonephritis	0	0	1	1	2
7541 Renal involvement in systemic disease processes (see code for list)	0	0	2	0	2
7542 Neurogenic bladder	1	1	3	1	6
7599 Other genitourinary disability	4	22	15	1	42
7611 Vagina, disease or injury of	2	3	2	0	7
7612 Cervix, disease or injury of	1	1	4	0	6
7613 Uterus, disease, injury, or adhesions of	2	3	2	0	7
7614 Fallopian tube, disease, injury, or adhesions of (including PID)	0	2	8	0	10
7615 Ovary, disease, injury, or adhesions of	0	2	4	0	6
7618 Uterus, removal of, including corpus	0	3	0	0	3
7619 Ovary, removal of	0	2	3	0	5
7623 Pregnancy, surgical complications of	0	0	1	0	1
7626 Breast, surgery of	0	2	2	0	4
7628 Benign neoplasms of the gynecological system or breast	1	2	5	0	8
7629 Endometriosis	2	3	5	0	10
7699 Other gynecological or breast disability	0	4	2	0	6

7700 Anemia, hypochromic-microcytic and megaloblastic	1	8	7	0	16
7702 Agranulocytosis, acute	0	1	0	0	1
7703 Leukemia	0	2	1	0	3
7705 Thrombocytopenia, primary, idiopathic or immune	0	0	0	1	1
7706 Splenectomy	1	1	0	0	2
7707 Spleen, injury of, healed	0	1	1	0	2
7709 Hodgkin's disease	1	5	3	0	9
7710 Adenitis, tuberculous, active or inactive	1	2	0	0	3
7714 Sickle cell anemia	0	2	0	0	2
7715 Non-Hodgkin's lymphoma	1	3	5	0	9
7716 Aplastic anemia	1	0	0	1	2
7799 Other hemic or lymphatic system disability	1	3	3	0	7
7800 Disfigurement of the head, face, or neck	25	61	79	9	174
7801 Scars, other than head, face, or neck, that are deep or that cause limited motion	9	18	17	2	46
7802 Scars, other than head, face, or neck, that are superficial and that do not cause limited motion	3	18	23	0	44
7803 Scars, superficial, unstable	4	6	8	1	19
7804 Scars, superficial, painful on examination	57	171	139	7	374
7805 Scars, other	25	219	183	11	438
7806 Dermatitis or eczema	37	137	153	10	337
7808 Old World leishmaniasis (cutaneous, Oriental sore)	0	1	0	0	1
7809 Discoid lupus erythematosus or subacute cutaneous lupus erythematosus	0	2	3	0	5
7813 Dermatophytosis	17	61	56	7	141
7814 Tinea barbae	2	3	6	0	11
7815 Bullous disorders	0	1	0	0	1
7816 Psoriasis	4	15	17	1	37
7817 Exfoliative dermatitis (erythroderma)	3	9	7	1	20
7818 Malignant skin neoplasms (other than malignant melanoma)	2	3	6	0	11
7819 Benign skin neoplasms	4	39	40	2	85
7820 Infections of the skin not listed elsewhere (including bacterial, fungal, viral, treponemal)	0	2	1	0	3



7823 Vitiligo	0	1	0	0	1
7824 Diseases of keratinization (including ichthyoses, Darier's disease, and palmoplantar keratoderma)	0	1	1	0	2
7825 Urticaria	0	0	2	1	3
7828 Acne	1	2	3	0	6
7829 Chloracne	0	1	0	0	1
7830 Scarring alopecia	0	0	1	1	2
7831 Alopecia areata	1	1	0	0	2
7832 Hyperhidrosis	1	0	0	0	1
7899 Other skin disability	19	45	46	2	112
7900 Hyperthyroidism	0	2	1	0	3
7902 Thyroid gland, nontoxic adenoma of	0	1	0	0	1
7903 Hypothyroidism	3	7	18	1	29
7904 Hyperparathyroidism	0	0	2	0	2
7909 Diabetes insipidus	0	0	2	0	2
7911 Addison's disease (Adrenal Cortical Hypofunction)	0	0	2	0	2
7913 Diabetes mellitus	29	149	158	11	347
7914 Neoplasm, malignant, any specified part of the endocrine system	0	1	1	0	2
7915 Neoplasm, benign, any specified part of the endocrine system	0	2	2	0	4
7919 C-cell hyperplasia of the thyroid	0	0	1	0	1
7999 Other endocrine system disability	0	1	1	1	3
8000 Encephalitis, epidemic, chronic	0	0	2	0	2
8002 Brain, new growth of, malignant	0	1	0	0	1
8003 Brain, new growth of, benign	0	3	1	0	4
8007 Brain, vessels, embolism of	0	0	1	0	1
8008 Brain, vessels, thrombosis of	0	3	1	0	4
8009 Brain, vessels, hemorrhage from	1	3	1	0	5
8011 Poliomyelitis, anterior	0	1	2	1	4
8018 Multiple sclerosis	0	3	5	1	9
8019 Meningitis, cerebrospinal, epidemic	0	0	1	0	1
8022 Spinal cord, new growths of, benign	0	2	0	0	2
8023 Progressive muscular atrophy	0	1	1	0	2
8024 Syringomyelia	0	1	0	0	1

8045 Brain disease due to trauma	5	31	33	1	70
8046 Cerebral arteriosclerosis	0	1	1	0	2
8099 Other central nervous system disease	0	5	6	0	11
8100 Migraine	49	93	116	5	263
8103 Tic, convulsive	1	1	2	0	4
8104 Paramyoclonus multiplex (convulsive state, myoclonic type)	0	0	1	0	1
8108 Narcolepsy	3	2	1	0	6
8199 Other misc. neurological diseases	3	5	10	0	18
8205 Fifth (trigeminal) cranial nerve, paralysis of	1	3	7	0	11
8207 Seventh (facial) cranial nerve, paralysis of	3	8	5	1	17
8210 Tenth (pneumogastric, vagus) cranial nerve, paralysis of	0	2	0	0	2
8211 Eleventh (spinal accessory, external branch) cranial nerve, paralysis of	0	1	1	0	2
8212 Twelfth (hypoglossal) cranial nerve, paralysis of	0	0	0	1	1
8299 Other cranial nerve paralysis	0	2	2	0	4
8305 Fifth (trigeminal) cranial nerve, neuritis	0	4	1	0	5
8309 Ninth (glossopharyngeal) cranial nerve, neuritis	0	0	1	0	1
8310 Tenth (pneumogastric, vagus) cranial nerve, neuritis	0	0	1	0	1
8311 Eleventh (spinal accessory, external branch) cranial nerve, neuritis	0	0	1	0	1
8312 Twelfth (hypoglossal) cranial nerve, neuritis	0	0	1	0	1
8405 Fifth (trigeminal) cranial nerve, neuralgia	1	4	1	0	6
8407 Seventh (facial) cranial nerve, neuralgia	0	0	1	0	1
8409 Ninth (glossopharyngeal) cranial nerve, neuralgia	0	1	0	0	1
8411 Eleventh (spinal accessory, external branch) cranial nerve, neuralgia	0	1	0	0	1
8499 Other cranial nerve neuralgia	0	2	0	0	2
8510 Upper radicular group (fifth and sixth cervicals), paralysis of	0	8	3	2	13
8511 Middle radicular group, paralysis of	1	1	0	0	2
8512 Lower radicular group, paralysis of	2	4	5	0	11
8513 All radicular groups, paralysis of	2	8	11	0	21
8514 The musculospiral nerve (radial nerve), paralysis of	4	5	6	0	15
8515 The median nerve, paralysis of	24	45	53	3	125
8516 The ulnar nerve, paralysis of	15	25	35	2	77

8517 Musculocutaneous nerve, paralysis of	1	1	2	0	4
8519 Long thoracic nerve, paralysis of	0	2	1	0	3
8520 Sciatic nerve, paralysis of	43	53	57	4	157
8521 External popliteal nerve (common peroneal), paralysis of	2	22	28	4	56
8522 Musculocutaneous nerve (superficial peroneal), paralysis of	0	0	7	0	7
8523 Anterior tibial nerve (deep peroneal), paralysis of	1	1	2	2	6
8524 Internal popliteal nerve (tibial), paralysis of	3	3	0	0	6
8525 Posterior tibial nerve, paralysis of	1	5	4	1	11
8526 Anterior crural nerve (femoral), paralysis of	0	4	1	0	5
8527 Internal saphenous nerve, paralysis of	0	1	1	0	2
8528 Obturator nerve, paralysis of	0	1	0	0	1
8529 External cutaneous nerve of thigh, paralysis of	1	4	0	0	5
8530 Ilio-inguinal nerve, paralysis of	0	6	5	0	11
8599 Other peripheral nerve paralysis	0	7	16	3	26
8610 Upper radicular group (fifth and sixth cervicals), neuritis	2	1	0	0	3
8612 Lower radicular group, neuritis	3	0	2	0	5
8613 All radicular groups, neuritis	1	0	1	0	2
8614 The musculospiral nerve (radial nerve), neuritis	0	0	4	0	4
8615 The median nerve, neuritis	2	5	6	0	13
8616 The ulnar nerve, neuritis	2	7	7	0	16
8617 Musculocutaneous nerve, neuritis	2	0	0	0	2
8619 Long thoracic nerve, neuritis	1	0	1	0	2
8620 Sciatic nerve, neuritis	5	6	11	4	26
8621 External popliteal nerve (common peroneal), neuritis	1	5	5	0	11
8622 Musculocutaneous nerve (superficial peroneal), neuritis	0	0	1	0	1
8623 Anterior tibial nerve (deep peroneal), neuritis	1	1	0	0	2
8624 Internal popliteal nerve (tibial), neuritis	7	0	0	0	7
8625 Posterior tibial nerve, neuritis	0	3	0	0	3
8626 Anterior crural nerve (femoral), neuritis	0	1	0	0	1
8627 Internal saphenous nerve, neuritis	1	0	0	0	1
8629 External cutaneous nerve of thigh, neuritis	0	1	0	0	1
8630 Ilio-inguinal nerve, neuritis	0	3	0	0	3
8699 Other peripheral nerve neuritis	0	2	2	0	4

8710 Upper radicular group (fifth and sixth cervicals), neuralgia	0	1	1	0	2
8714 The musculospiral nerve (radial nerve), neuralgia	1	1	0	0	2
8715 The median nerve, neuralgia	0	0	6	0	6
8716 The ulnar nerve, neuralgia	0	3	1	0	4
8717 Musculocutaneous nerve, neuralgia	0	0	4	0	4
8720 Sciatic nerve, neuralgia	3	1	2	0	6
8721 External popliteal nerve (common peroneal), neuralgia	0	1	1	1	3
8723 Anterior tibial nerve (deep peroneal), neuralgia	1	1	0	0	2
8725 Posterior tibial nerve, neuralgia	0	1	3	0	4
8726 Anterior crural nerve (femoral), neuralgia	0	0	1	0	1
8729 External cutaneous nerve of thigh, neuralgia	1	2	0	0	3
8730 Ilio-inguinal nerve, neuralgia	1	0	0	0	1
8799 Other peripheral nerve neuralgia	0	0	6	0	6
8850 Undiagnosed condition, musculoskeletal diseases	2	3	2	0	7
8863 Undiagnosed condition, systemic diseases	0	1	3	0	4
8873 Undiagnosed condition, lower digestive system	0	1	2	0	3
8875 Undiagnosed condition, genitourinary system	1	0	0	0	1
8878 Undiagnosed condition, skin	0	0	0	1	1
8881 Undiagnosed condition, miscellaneous neurological	0	1	0	0	1
8893 Undiagnosed condition, organic mental	0	0	1	0	1
8894 Undiagnosed condition, psychoneurotic	0	0	1	0	1
8910 Epilepsy, grand mal	3	13	11	1	28
8911 Epilepsy, petit mal	3	7	9	1	20
8912 Epilepsy, Jacksonian and focal motor or sensory	0	0	1	0	1
8914 Epilepsy, psychomotor	0	1	1	0	2
8999 Other epilepsy	0	1	2	0	3
9201 Schizophrenia, disorganized type	0	2	5	0	7
9202 Schizophrenia, catatonic type	0	0	1	0	1
9203 Schizophrenia, paranoid type	8	20	11	0	39
9204 Schizophrenia, undifferentiated type	13	8	11	2	34
9205 Schizophrenia, residual type; other and unspecified types	6	7	6	2	21
9208 Delusional disorder	0	0	2	0	2
9210 Psychotic disorder, not otherwise specified (atypical psychosis)	2	2	5	1	10

9211 Schizoaffective disorder	4	4	0	0	8
9299 Other psychotic disorder	0	1	1	0	2
9300 Delirium	0	0	1	0	1
9304 Dementia due to head trauma	7	10	13	1	31
9305 Vascular dementia	0	2	1	0	3
9310 Dementia of unknown etiology	0	0	2	0	2
9312 Dementia of the Alzheimer's type	0	0	0	1	1
9326 Dementia due to other neurologic or general medical conditions, or substance- induced	0	2	5	0	7
9327 Organic mental disorder, other (inc. personality change due to a general medical condition)	0	2	4	0	6
9400 Generalized anxiety disorder	40	63	78	7	188
9403 Specific (simple) phobia; social phobia	3	0	0	0	3
9404 Obsessive compulsive disorder	2	0	1	0	3
9410 Other and unspecified neurosis	3	3	4	1	11
9411 Post-traumatic stress disorder	564	560	773	60	1957
9412 Panic disorder and/or agoraphobia	2	3	3	0	8
9413 Anxiety disorder, not otherwise specified	10	12	12	0	34
9417 Depersonalization disorder	0	0	0	1	1
9421 Somatization disorder	2	1	6	2	11
9422 Pain disorder	0	1	2	0	3
9423 Undifferentiated somatoform disorder	0	3	2	0	5
9424 Conversion disorder	0	5	3	0	8
9425 Hypochondriasis	0	0	1	0	1
9432 Bipolar disorder	9	14	7	6	36
9433 Dysthymic disorder	12	25	25	0	62
9434 Major depressive disorder	29	33	68	5	135
9435 Mood disorder, not otherwise specified	2	2	6	1	11
9440 Chronic adjustment disorder	2	7	8	0	17
9499 Other nonpsychotic emotional illness	3	5	7	0	15
9520 Anorexia nervosa	0	1	0	0	1
9900 Maxilla or mandible, chronic osteomyelitis or osteoradionecrosis of	0	2	1	0	3
9902 Mandible, loss of approximately one-half	0	1	1	1	3

9903 Mandible, nonunion of	0	2	2	0	4
9904 Mandible, malunion of	0	14	11	2	27
9905 Temporomandibular articulation, limited motion of	11	21	13	0	45
9908 Condylloid process, loss of, one or both sides	0	0	1	0	1
9912 Hard palate, loss of less than half of	0	1	0	0	1
9913 Teeth, loss of, due to loss of body of maxilla or mandible without loss of continuity	1	2	6	0	9
9915 Maxilla, loss of half or less	0	2	0	0	2
9916 Maxilla, malunion or nonunion of	0	2	3	0	5
9999 Other dental or oral condition	1	6	2	0	9
<b>Totals:</b>	<b>2920</b>	<b>9011</b>	<b>8809</b>	<b>684</b>	<b>21424</b>

**DIAGNOSTIC CODE DISTRIBUTION FOR INCREASED RATING CLAIMS  
FROM: 10/01/05 TO: 06/06/30 (FY06)**

Diagnostic Code	Issues				Total
	Allowed	Denied	Remand	Other	
5000 Osteomyelitis	1	7	2	1	11
5001 Bones and joints, tuberculosis of	0	0	1	0	1
5002 Arthritis rheumatoid (atrophic)	1	24	15	0	40
5003 Arthritis, degenerative (hypertrophic or osteoarthritis)	67	175	95	12	349
5009 Arthritis, other types	1	6	6	3	16
5010 Arthritis, due to trauma	65	297	199	17	578
5012 Bones, new growths of, malignant	0	0	1	0	1
5013 Osteoporosis, with joint manifestations	2	8	1	0	11
5014 Osteomalacia	7	17	13	0	37
5015 Bones, new growths of, benign	3	10	6	0	19
5017 Gout	7	14	5	0	26
5019 Bursitis	4	39	30	0	73
5020 Synovitis	1	16	9	0	26
5021 Myositis	8	6	18	0	32
5022 Periostitis	0	4	5	0	9
5023 Myositis ossificans	2	1	3	0	6
5024 Tenosynovitis	10	58	30	4	102
5025 Fibromyalgia (fibrositis, primary fibromyalgia syndrome)	7	12	14	0	33
5051 Shoulder replacement (prosthesis)	0	1	0	0	1
5053 Wrist replacement (prosthesis)	0	1	0	0	1
5054 Hip replacement (prosthesis)	4	8	3	1	16
5055 Knee replacement (prosthesis)	8	34	13	4	59
5099 Other musculoskeletal disease	2	20	18	2	42
5110 Loss of use of both feet	0	0	1	0	1
5122 Arm, amputation of: Below insertion of deltoid	0	1	0	0	1
5123 Forearm, amputation of: Above insertion of pronator teres	0	1	0	0	1
5125 Hand, loss of use of	0	0	1	1	2
5153 Index finger, amputation of	1	0	1	0	2
5154 Middle finger, amputation of	1	2	0	0	3
5155 Ring finger, amputation of	0	2	0	0	2

5156 Little finger, amputation of	0	2	1	0	3
5162 Thigh, amputation of. Middle or lower thirds	0	1	0	0	1
5165 Leg, amputation of. At a lower level, permitting prosthesis	0	1	2	0	3
5167 Foot, loss of use of	0	1	0	0	1
5171 Toe, great, amputation of	0	2	2	0	4
5172 Toes, one or two, other than great, amputation of	1	0	1	0	2
5173 Toes, three or four, amputation of, without metatarsal involvement	0	1	0	0	1
5199 Other amputations	0	0	1	0	1
5200 Scapulohumeral articulation, ankylosis of	1	3	3	1	8
5201 Arm, limitation of motion of	36	79	70	6	191
5202 Humerus, other impairment of	10	24	16	1	51
5203 Clavicle or scapula, impairment of	20	80	48	2	150
5205 Elbow, ankylosis of	0	0	1	0	1
5206 Forearm, limitation of flexion of	12	15	15	1	43
5207 Forearm, limitation of extension of	3	7	2	1	13
5208 Forearm, flexion limited to 100 deg. and extension to 45 deg.	0	2	0	0	2
5209 Elbow, other impairment of Flail joint	0	8	2	0	10
5210 Radius and ulna, nonunion of, with flail false joint	0	0	1	0	1
5211 Ulna, impairment of	2	4	4	0	10
5212 Radius, impairment of	1	15	6	1	23
5213 Forearm, supination and pronation, impairment of	2	2	1	0	5
5214 Wrist, ankylosis of	3	9	3	1	16
5215 Wrist, limitation of motion of	9	64	29	1	103
5216 Five digits of one hand, unfavorable ankylosis of	0	1	0	0	1
5217 Four digits of one hand, unfavorable ankylosis of	1	0	0	0	1
5218 Three digits of one hand, unfavorable ankylosis of	0	2	1	0	3
5219 Two digits of one hand, unfavorable ankylosis of	0	0	1	0	1
5220 Five digits of one hand, favorable ankylosis of	2	1	1	0	4
5221 Four digits of one hand, favorable ankylosis of	0	1	2	0	3
5222 Three digits of one hand, favorable ankylosis of	1	5	1	0	7
5223 Two digits of one hand, favorable ankylosis of	0	8	7	2	17
5224 Thumb, ankylosis of	3	14	20	1	38
5225 Index finger, ankylosis of	4	9	8	1	22
5226 Middle finger, ankylosis of	0	7	8	0	15



5227 Ring or little finger, ankylosis of	6	42	24	1	73
5228 Thumb, limitation of motion	3	2	1	0	6
5229 Index or long finger, limitation of motion	2	2	2	1	7
5230 Ring or little finger, limitation of motion	0	5	2	1	8
5235 Vertebral fracture or dislocation	9	10	9	0	28
5236 Sacroiliac injury and weakness	1	1	3	0	5
5237 Lumbosacral or cervical strain	58	140	82	13	293
5238 Spinal stenosis	1	1	0	0	2
5239 Spondylolisthesis or segmental instability	2	3	4	1	10
5240 Ankylosing spondylitis	0	2	2	0	4
5241 Spinal Fusion	1	2	1	0	4
5242 Degenerative arthritis of the spine (see also diagnostic code 5003)	13	37	29	2	81
5243 Intervertebral disc syndrome	58	132	71	11	272
5250 Hip, ankylosis of	0	3	2	0	5
5251 Thigh, limitation of extension of	4	9	7	0	20
5252 Thigh, limitation of flexion of	1	15	14	2	32
5253 Thigh, impairment of	1	2	2	0	5
5255 Femur, impairment of	10	58	36	1	105
5256 Knee, ankylosis of	0	2	1	1	4
5257 Knee, other impairment of	128	512	281	22	943
5258 Cartilage, semilunar, dislocated	7	17	10	1	35
5259 Cartilage, semilunar, removal of, symptomatic	10	37	45	2	94
5260 Leg, limitation of flexion of	36	174	123	8	341
5261 Leg, limitation of extension of	27	60	24	1	112
5262 Tibia and fibula, impairment of	22	72	58	6	158
5263 Genu recurvatum	0	2	1	1	4
5270 Ankle, ankylosis of	4	5	1	1	11
5271 Ankle, limited motion of	47	165	103	15	330
5272 Subastragalar or tarsal joint, ankylosis of	0	0	1	0	1
5273 Os calcis or astragalus, malunion of	0	4	0	0	4
5275 Bones, of the lower extremity, shortening of	0	2	4	0	6
5276 Flatfoot, acquired	30	111	70	5	216
5277 Weak foot, bilateral	0	1	3	0	4
5278 Claw foot (pes cavus), acquired	2	8	5	4	19

5279 Metatarsalgia, anterior (Morton's disease)	3	8	5	0	16
5280 Hallux valgus, unilateral	9	42	19	0	70
5281 Hallux rigidus, unilateral, severe	4	1	0	0	5
5282 Hammer toe	1	12	9	0	22
5283 Tarsal, or metatarsal bones, malunion of, or nonunion of	0	17	6	0	23
5284 Foot injuries, other	38	126	59	10	233
5285 Vertebra, fracture of, residuals	6	15	11	2	34
5287 Spine, ankylosis of, cervical	0	2	0	0	2
5288 Spine, ankylosis of, dorsal	1	0	0	0	1
5289 Spine, ankylosis of, lumbar	1	1	2	0	4
5290 Spine, limitation of motion of, cervical	31	72	68	7	178
5291 Spine, limitation of motion of, dorsal	8	18	12	0	38
5292 Spine, limitation of motion of, lumbar	46	114	108	8	276
5293 Intervertebral disc syndrome	97	250	176	16	539
5294 Sacro-iliac injury and weakness	3	8	6	2	19
5295 Lumbosacral strain	94	285	239	21	639
5296 Skull, loss of part of, both inner and outer tables	0	3	3	3	9
5297 Ribs, removal of	0	14	2	0	16
5298 Coccyx, removal of	0	5	0	0	5
5299 Other skeletal injury or motion loss	28	100	72	7	207
5301 Muscle injury, Group I	6	14	12	0	32
5302 Muscle injury, Group II	3	10	9	1	23
5303 Muscle injury, Group III	3	15	9	1	28
5304 Muscle injury, Group IV	4	5	4	0	13
5305 Muscle injury, Group V	4	8	11	1	24
5306 Muscle injury, Group VI	1	4	11	1	17
5307 Muscle injury, Group VII	3	11	8	0	22
5308 Muscle injury, Group VIII	1	6	4	0	11
5309 Muscle injury, Group IX	3	6	7	0	16
5310 Muscle injury, Group X	0	7	3	0	10
5311 Muscle injury, Group XI	3	26	15	1	45
5312 Muscle injury, Group XII	2	18	13	0	33
5313 Muscle injury, Group XIII	4	20	11	0	35
5314 Muscle injury, Group XIV	2	29	18	2	51

5315 Muscle injury, Group XV	4	8	2	0	14
5316 Muscle injury, Group XVI	0	1	4	0	5
5317 Muscle injury, Group XVII	2	12	9	0	23
5318 Muscle injury, Group XVIII	0	0	3	0	3
5319 Muscle injury, Group XIX	2	8	7	1	18
5320 Muscle injury, Group XX	3	11	6	0	20
5321 Muscle injury, Group XXI	2	15	8	0	25
5322 Muscle injury, Group XXII	1	3	2	0	6
5323 Muscle injury, Group XXIII	0	2	1	0	3
5325 Muscle injury, facial muscles	0	1	0	0	1
5399 Other muscle injury	1	13	1	1	16
6000 Uveitis	1	1	1	0	3
6001 Keratitis	0	1	1	0	2
6002 Scleritis	0	1	0	0	1
6003 Iritis	1	3	1	0	5
6005 Choroiditis	1	1	0	0	2
6006 Retinitis	1	2	2	0	5
6007 Hemorrhage, intra-ocular, recent	1	0	1	0	2
6008 Retina, detachment of	0	3	1	0	4
6009 Eye, injury of, unhealed	2	6	16	1	25
6011 Retina, localized scars, atrophy, or irregularities of	0	4	2	1	7
6012 Glaucoma, congestive or inflammatory	1	0	0	0	1
6013 Glaucoma, simple, primary, noncongestive	0	8	5	0	13
6015 New growths, benign (eyeball and adnexa, other than superficial)	0	1	3	0	4
6016 Nystagmus, central	1	0	1	0	2
6018 Conjunctivitis, other, chronic	0	8	3	0	11
6019 Ptosis, unilateral or bilateral	0	2	2	0	4
6020 Ectropion	0	1	0	0	1
6022 Lagophthalmos	0	1	0	0	1
6025 Epiphora (lacrymal duct, interference with, from any cause)	0	1	1	0	2
6027 Cataract, traumatic	0	4	0	0	4
6028 Cataract, senile, and others	0	2	0	0	2
6029 Aphakia	0	8	3	0	11
6032 Eyelids, loss of portion of	0	1	0	0	1

6034 Pterygium	0	11	9	0	20
6035 Keratoconus	3	0	2	0	5
6064 Anatomical loss of 1 eye; other eye impaired (20/200 (6/60) or less)	0	1	0	0	1
6065 Anatomical loss of 1 eye; other eye impaired (20/50 (6/21) or less)	0	1	0	0	1
6066 Anatomical loss of 1 eye; other eye normal	0	3	0	0	3
6068 Blindness in 1 eye, having only light perception; other eye impaired (20/200 (6/60) or less)	0	0	1	0	1
6069 Blindness in 1 eye, having only light perception; other eye impaired (20/50 (6/21) or less)	0	0	1	0	1
6070 Blindness in 1 eye, having only light perception; other eye normal	0	11	4	0	15
6074 Blindness in one eye (5/200 (1.5/60) or less); other eye normal	1	2	1	2	6
6075 Partial blindness in both eyes (20/200 (3/60) or less)	1	0	0	0	1
6076 Partial blindness in one eye (20/200 (3/60) or less); other eye impaired (20/50 (6/21) or less)	0	1	0	0	1
6077 Partial blindness in one eye (20/200 (3/60) or less); other eye normal	1	8	5	0	14
6078 Partial blindness in both eyes (20/50 (6/21) or less)	0	1	1	1	3
6079 Partial blindness in one eye (20/50 (6/21) or less); other eye other eye normal	4	16	10	0	30
6080 Field vision, impairment of	0	7	5	1	13
6081 Scotoma, pathological, unilateral	0	0	1	0	1
6090 Diplopia (double vision)	0	4	1	0	5
6099 Other eye disability	1	8	8	1	18
6100 Hearing loss	44	621	257	45	967
6200 Chronic suppurative otitis media, mastoiditis, or cholesteatoma (or any combination)	2	22	10	1	35
6201 Chronic nonsuppurative otitis media with effusion (serous otitis media)	0	3	0	0	3
6202 Otosclerosis	0	0	1	0	1
6204 Peripheral vestibular disorders	6	6	7	3	22
6205 Meniere's syndrome	2	2	5	0	9
6210 Chronic otitis externa	0	9	4	0	13
6211 Tympanic membrane, perforation of	0	15	4	1	20
6260 Tinnitus, recurrent	3	17	21	33	74
6275 Loss of sense of smell, complete	0	4	0	0	4
6276 Loss of sense of taste, complete	0	3	0	1	4

6299 Other sense organ disability	1	3	3	0	7
6301 Visceral Leishmaniasis	1	0	0	0	1
6304 Malaria	0	28	9	2	39
6305 Lymphatic Filariasis	1	0	1	0	2
6309 Rheumatic fever	0	3	0	0	3
6310 Syphilis, and other treponemal infections	0	1	0	0	1
6319 Lyme Disease	0	1	0	0	1
6350 Lupus erythematosus, systemic (disseminated)	2	2	2	0	6
6351 HIV-Related Illness	0	7	3	0	10
6354 Chronic Fatigue Syndrome (CFS)	3	4	1	1	9
6399 Other infectious disease, immune disorder, or nutritional deficiency	0	1	1	0	2
6502 Septum, nasal, deviation of	8	33	26	1	68
6504 Nose, loss of part of, or scars	0	0	2	0	2
6510 Sinusitis, pansinusitis, chronic	6	24	11	0	41
6511 Sinusitis, ethmoid, chronic	4	4	3	0	11
6512 Sinusitis, frontal, chronic	2	8	7	1	18
6513 Sinusitis, maxillary, chronic	20	35	29	4	88
6514 Sinusitis, sphenoid, chronic	3	6	3	0	12
6516 Laryngitis, chronic	4	12	5	0	21
6518 Laryngectomy, total	0	0	1	0	1
6519 Aphonia, complete organic	0	1	1	0	2
6520 Larynx, stenosis of, including residuals of laryngeal trauma (unilateral or bilateral)	1	4	1	0	6
6521 Pharynx, injuries to	0	1	0	0	1
6522 Allergic or vasomotor rhinitis	8	41	24	5	78
6599 Other disease of nose or throat	1	6	7	0	14
6600 Bronchitis, chronic	4	18	18	0	40
6601 Bronchiectasis	0	4	3	0	7
6602 Asthma, bronchial	19	52	32	8	111
6603 Emphysema, pulmonary	2	4	3	2	11
6604 Chronic obstructive pulmonary disease	8	8	6	0	22
6699 Other disease of trachea and/or bronchi	1	3	2	1	7
6703 Tuberculosis, pulmonary, chronic, minimal, active [entitled 8/19/68]	0	1	0	0	1

6721 Tuberculosis, pulmonary, chronic, far advanced, inactive [entitled 8/19/68]	0	2	4	0	6
6722 Tuberculosis, pulmonary, chronic, moderately advanced, inactive [entitled 8/19/68]	0	1	1	1	3
6723 Tuberculosis, pulmonary, chronic, minimal, inactive [entitled 8/19/68]	0	1	1	0	2
6724 Tuberculosis, pulmonary, chronic, inactive, advancement unspecified [entitled 8/19/68]	0	1	0	0	1
6731 Tuberculosis, pulmonary, chronic, inactive [after 8/19/68]	0	2	4	0	6
6732 Pleurisy, tuberculous, active or inactive [after 8/19/68]	0	1	0	0	1
6817 Pulmonary Vascular Disease	0	3	1	1	5
6819 Neoplasms, malignant, any specified part of respiratory system exclusive of skin growths	2	3	4	0	9
6820 Neoplasms, benign, any specified part of respiratory system	1	4	2	0	7
6825 Diffuse interstitial fibrosis (interstitial pneumonitis, fibrosing alveolitis)	0	0	1	0	1
6826 Desquamative interstitial pneumonitis	0	0	1	0	1
6832 Pneumoconiosis (silicosis, anthracosis, etc.)	0	3	0	0	3
6833 Asbestosis	9	30	19	1	59
6835 Coccidioidomycosis	0	0	1	0	1
6843 Traumatic chest wall defect, pneumothorax, hernia, etc	2	9	6	0	17
6844 Post-surgical residual (lobectomy, pneumonectomy, etc.)	1	3	11	0	15
6845 Chronic pleural effusion or fibrosis	1	2	5	1	9
6846 Sarcoidosis	4	11	9	0	24
6847 Sleep Apnea Syndromes (Obstructive, Central, Mixed)	3	6	3	1	13
6899 Other nontuberculous disease of lungs and/or pleura	2	5	2	0	9
7000 Valvular heart disease (including rheumatic heart disease)	1	9	11	0	21
7002 Pericarditis	0	3	0	0	3
7003 Pericardial adhesions	0	2	0	0	2
7005 Arteriosclerotic heart disease (Coronary artery disease)	12	33	27	5	77
7006 Myocardial infarction	0	8	2	0	10
7007 Hypertensive heart disease	1	9	11	1	22
7010 Supraventricular arrhythmias	0	7	6	0	13
7011 Ventricular arrhythmias (sustained)	1	3	4	1	9
7015 Atrioventricular block	1	4	0	0	5
7016 Heart valve replacement (prosthesis)	0	3	2	0	5

7017 Coronary bypass surgery	4	8	6	1	19
7018 Implantable cardiac pacemakers	1	0	1	0	2
7020 Cardiomyopathy	0	0	1	0	1
7099 Other heart disease	1	2	6	0	9
7101 Hypertensive vascular disease (hypertension and isolated systolic hypertension)	7	113	74	9	203
7112 Aneurysm, any small artery	0	0	1	0	1
7114 Arteriosclerosis obliterans	4	12	3	1	20
7115 Thrombo-angiitis obliterans (Buerger's Disease)	4	3	0	1	8
7117 Raynaud's syndrome	1	2	2	0	5
7118 Angioneurotic edema	0	3	2	1	6
7119 Erythromelalgia	0	1	0	0	1
7120 Varicose veins	15	57	16	3	91
7121 Post-phlebotic syndrome of any etiology	2	10	9	0	21
7122 Cold injury residuals	23	39	34	2	98
7199 Other disease of arteries and/or veins	1	2	3	0	6
7200 Mouth, injuries of	0	1	0	0	1
7203 Esophagus, stricture of	0	1	2	0	3
7204 Esophagus, spasm of (cardiospasm)	0	1	0	0	1
7205 Esophagus, diverticulum of, acquired	0	1	1	0	2
7299 Other digestive system injury	0	1	1	0	2
7301 Peritoneum, adhesions of	3	4	3	1	11
7304 Ulcer, gastric	1	4	3	0	8
7305 Ulcer, duodenal	10	72	33	4	119
7307 Gastritis, hypertrophic (identified by gastroscope)	0	11	8	3	22
7308 Postgastrectomy syndromes	2	16	4	1	23
7309 Stomach, stenosis of	0	1	0	0	1
7310 Stomach, injury of, residuals	0	2	1	0	3
7311 Residuals of injury of the liver	0	1	1	0	2
7312 Cirrhosis of the liver, primary biliary cirrhosis, or cirrhotic phase of sclerosing cholangitis	1	0	1	0	2
7314 Cholecystitis, chronic	0	1	1	0	2
7315 Cholelithiasis, chronic	0	0	1	0	1
7316 Cholangitis, chronic	0	2	0	0	2

7317 Gall bladder, injury of	1	0	0	0	1
7318 Gall bladder, removal of	2	3	1	2	8
7319 Irritable colon syndrome (spastic colitis, mucous colitis, etc.)	14	31	19	2	66
7321 Amebiasis	0	1	1	0	2
7322 Dysentery, bacillary	0	1	0	0	1
7323 Colitis, ulcerative	2	17	7	0	26
7324 Distomiasis, intestinal or hepatic	0	2	0	0	2
7325 Enteritis, chronic	0	3	0	0	3
7327 Diverticulitis	0	3	1	1	5
7328 Intestine, small, resection of	1	1	0	0	2
7329 Intestine, large, resection of	0	2	0	0	2
7332 Rectum and anus, impairment of sphincter control	5	3	6	0	14
7333 Rectum and anus, stricture of	1	2	0	0	3
7334 Rectum, prolapse of	0	0	1	0	1
7335 Ano, fistula in	3	3	1	0	7
7336 Hemorrhoids, external or internal	15	94	48	9	166
7337 Pruritus ani	1	0	0	0	1
7338 Hernia, inguinal	7	57	30	5	99
7339 Hernia, ventral, postoperative	3	14	6	2	25
7342 Visceroptosis, symptomatic, marked	0	1	0	0	1
7343 Malignant neoplasms of the digestive system, exclusive of skin growths	0	2	0	0	2
7344 Benign neoplasms, exclusive of skin growths	0	2	1	1	4
7345 Chronic liver disease without cirrhosis (including hepatitis B, chronic active hepatitis, etc.)	9	28	21	0	58
7346 Hernia hiatal	6	46	43	4	99
7347 Pancreatitis	0	1	3	0	4
7348 Vagotomy with pyloroplasty or gastroenterostomy	0	3	2	0	5
7354 Hepatitis C (or non-A, non-B hepatitis)	9	15	17	4	45
7399 Other digestive system disease	8	12	18	1	39
7500 Kidney, removal of one	2	1	1	0	4
7501 Kidney, abscess of	1	1	0	1	3
7502 Nephritis, chronic	1	5	6	0	12
7504 Pyelonephritis, chronic	2	1	1	0	4
7505 Kidney, tuberculosis of	0	1	0	0	1



7507 Nephrosclerosis, arteriolar	0	1	0	1	2
7508 Nephrolithiasis	7	9	11	0	27
7509 Hydronephrosis	0	3	2	0	5
7510 Ureterolithiasis	0	4	0	1	5
7511 Ureter, stricture of	0	1	0	1	2
7512 Cystitis, chronic, includes interstitial and all etiologies, infectious and non-infectious	1	2	9	1	13
7515 Bladder, calculus in, with symptoms interfering with function	0	1	0	0	1
7517 Bladder, injury of	1	5	2	0	8
7518 Urethra, stricture of	1	5	2	2	10
7520 Penis, removal of half or more	0	0	1	0	1
7522 Penis, deformity, with loss of erectile power	1	22	15	3	41
7523 Testis, atrophy complete	0	10	5	0	15
7524 Testis, removal	1	7	2	2	12
7525 Epididymo-orchitis, chronic only	2	11	5	0	18
7527 Prostate gland injuries, infections, hypertrophy, postoperative residuals	17	34	22	2	75
7528 Malignant neoplasms of the genitourinary system	13	23	18	5	59
7529 Benign neoplasms of the genitourinary system	2	4	2	0	8
7530 Chronic renal disease requiring regular dialysis	0	1	0	0	1
7531 Kidney transplant	1	2	1	0	4
7535 Toxic nephropathy	1	1	1	0	3
7536 Glomerulonephritis	0	0	2	1	3
7541 Renal involvement in systemic disease processes (see code for list)	0	3	2	1	6
7542 Neurogenic bladder	0	4	1	0	5
7599 Other genitourinary disability	0	24	9	2	35
7611 Vagina, disease or injury of	1	4	1	1	7
7612 Cervix, disease or injury of	0	5	1	0	6
7613 Uterus, disease, injury, or adhesions of	1	1	0	0	2
7614 Fallopian tube, disease, injury, or adhesions of (including PID)	0	3	5	0	8
7615 Ovary, disease, injury, or adhesions of	1	1	2	1	5
7617 Uterus and both ovaries, removal of, complete	0	2	1	0	3
7618 Uterus, removal of, including corpus	0	3	1	0	4
7619 Ovary, removal of	0	1	2	0	3
7621 Uterus, prolapse	0	2	0	0	2

7622 Uterus, displacement of	0	1	0	0	1
7626 Breast, surgery of	0	1	0	0	1
7628 Benign neoplasms of the gynecological system or breast	2	6	1	0	9
7629 Endometriosis	2	0	4	0	6
7699 Other gynecological or breast disability	0	2	3	0	5
7700 Anemia, hypochromic-microcytic and megaloblastic	1	2	0	0	3
7703 Leukemia	0	1	0	0	1
7705 Thrombocytopenia, primary, idiopathic or immune	0	0	1	0	1
7706 Splenectomy	0	1	0	0	1
7709 Hodgkin's disease	1	5	2	1	9
7710 Adenitis, tuberculous, active or inactive	0	0	1	0	1
7714 Sickle cell anemia	0	2	0	0	2
7715 Non-Hodgkin's lymphoma	0	1	4	1	6
7799 Other hemic or lymphatic system disability	1	1	2	0	4
7800 Disfigurement of the head, face, or neck	30	86	48	4	168
7801 Scars, other than head, face, or neck, that are deep or that cause limited motion	0	7	7	0	14
7802 Scars, other than head, face, or neck, that are superficial and that do not cause limited motion	2	23	17	1	43
7803 Scars, superficial, unstable	2	6	6	0	14
7804 Scars, superficial, painful on examination	59	179	96	8	342
7805 Scars, other	38	165	104	22	329
7806 Dermatitis or eczema	57	147	99	11	314
7807 American (New World) leishmaniasis (mucocutaneous, espundia)	0	1	2	0	3
7809 Discoid lupus erythematosus or subacute cutaneous lupus erythematosus	0	1	3	0	4
7812 Verruga peruana	0	1	0	0	1
7813 Dermatophytosis	11	64	48	4	127
7814 Tinea barbae	2	6	5	1	14
7816 Psoriasis	7	19	10	0	36
7817 Exfoliative dermatitis (erythroderma)	1	4	4	1	10
7818 Malignant skin neoplasms (other than malignant melanoma)	3	7	7	0	17
7819 Benign skin neoplasms	13	32	26	4	75

7820 Infections of the skin not listed elsewhere (including bacterial, fungal, viral, treponemal)	0	0	1	0	1
7824 Diseases of keratinization (including ichthyoses, Darier's disease, and palmoplantar keratoderma)	0	0	1	0	1
7825 Urticaria	2	3	1	0	6
7827 Erythema multiforme; Toxic epidermal necrolysis	0	1	0	0	1
7828 Acne	1	2	3	0	6
7829 Chloracne	0	0	1	0	1
7830 Scarring alopecia	0	0	1	0	1
7831 Alopecia areata	0	0	1	0	1
7899 Other skin disability	15	39	37	1	92
7900 Hyperthyroidism	0	4	9	0	13
7902 Thyroid gland, nontoxic adenoma of	0	1	1	0	2
7903 Hypothyroidism	4	17	10	1	32
7904 Hyperparathyroidism	0	0	1	0	1
7905 Hypoparathyroidism	1	0	1	0	2
7909 Diabetes insipidus	0	0	1	0	1
7911 Addison's disease (Adrenal Cortical Hypofunction)	0	1	1	0	2
7913 Diabetes mellitus	31	175	125	11	342
7914 Neoplasm, malignant, any specified part of the endocrine system	1	0	0	0	1
7915 Neoplasm, benign, any specified part of the endocrine system	1	2	0	0	3
7916 Hyperpituitarism (prolactin secreting pituitary dysfunction)	0	1	0	0	1
7919 C-cell hyperplasia of the thyroid	0	1	0	0	1
8000 Encephalitis, epidemic, chronic	0	1	0	0	1
8002 Brain, new growth of, malignant	0	0	0	1	1
8003 Brain, new growth of, benign	0	2	0	0	2
8004 Paralysis agitans	1	1	0	0	2
8007 Brain, vessels, embolism of	0	2	0	0	2
8008 Brain, vessels, thrombosis of	0	0	2	1	3
8009 Brain, vessels, hemorrhage from	0	3	1	2	6
8010 Myelitis	0	1	1	0	2
8011 Poliomyelitis, anterior	1	0	1	0	2
8018 Multiple sclerosis	1	1	3	1	6
8019 Meningitis, cerebrospinal, epidemic	0	3	1	0	4

8045 Brain disease due to trauma	11	23	23	2	59
8099 Other central nervous system disease	0	1	3	0	4
8100 Migraine	43	94	116	9	262
8103 Tic, convulsive	0	0	0	1	1
8108 Narcolepsy	1	0	1	0	2
8199 Other misc. neurological diseases	2	7	7	0	16
8205 Fifth (trigeminal) cranial nerve, paralysis of	0	7	2	1	10
8207 Seventh (facial) cranial nerve, paralysis of	4	6	4	3	17
8209 Ninth (glossopharyngeal) cranial nerve, paralysis of	0	2	0	0	2
8210 Tenth (pneumogastric, vagus) cranial nerve, paralysis of	0	1	0	0	1
8211 Eleventh (spinal accessory, external branch) cranial nerve, paralysis of	1	1	1	0	3
8212 Twelfth (hypoglossal) cranial nerve, paralysis of	0	0	2	0	2
8299 Other cranial nerve paralysis	0	1	0	0	1
8305 Fifth (trigeminal) cranial nerve, neuritis	0	1	0	0	1
8307 Seventh (facial) cranial nerve, neuritis	1	1	0	0	2
8399 Other cranial nerve neuritis	0	1	0	0	1
8405 Fifth (trigeminal) cranial nerve, neuralgia	1	2	0	0	3
8407 Seventh (facial) cranial nerve, neuralgia	0	1	0	0	1
8410 Tenth (pneumogastric, vagus) cranial nerve, neuralgia	0	1	0	0	1
8411 Eleventh (spinal accessory, external branch) cranial nerve, neuralgia	0	0	1	0	1
8510 Upper radicular group (fifth and sixth cervicals), paralysis of	3	9	2	1	15
8511 Middle radicular group, paralysis of	0	1	1	0	2
8512 Lower radicular group, paralysis of	3	7	10	3	23
8513 All radicular groups, paralysis of	8	11	4	2	25
8514 The musculospiral nerve (radial nerve), paralysis of	2	6	3	0	11
8515 The median nerve, paralysis of	17	81	39	0	137
8516 The ulnar nerve, paralysis of	13	17	14	5	49
8517 Musculocutaneous nerve, paralysis of	0	2	2	0	4
8518 Circumflex nerve, paralysis of	0	0	1	0	1
8519 Long thoracic nerve, paralysis of	0	3	3	0	6
8520 Sciatic nerve, paralysis of	48	89	53	12	202
8521 External popliteal nerve (common peroneal), paralysis of	13	29	19	2	63
8522 Musculocutaneous nerve (superficial peroneal), paralysis of	2	2	0	0	4
8523 Anterior tibial nerve (deep peroneal), paralysis of	0	4	2	0	6

8524 Internal popliteal nerve (tibial), paralysis of	2	4	3	2	11
8525 Posterior tibial nerve, paralysis of	0	2	1	3	6
8526 Anterior crural nerve (femoral), paralysis of	2	5	2	0	9
8527 Internal saphenous nerve, paralysis of	0	2	0	0	2
8529 External cutaneous nerve of thigh, paralysis of	0	0	3	0	3
8530 Ilio-inguinal nerve, paralysis of	2	1	3	1	7
8599 Other peripheral nerve paralysis	7	9	20	0	36
8611 Middle radicular group, neuritis	0	0	1	0	1
8612 Lower radicular group, neuritis	0	1	2	0	3
8613 All radicular groups, neuritis	0	1	0	0	1
8614 The musculospiral nerve (radial nerve), neuritis	0	2	0	0	2
8615 The median nerve, neuritis	0	3	6	0	9
8616 The ulnar nerve, neuritis	2	5	3	0	10
8617 Musculocutaneous nerve, neuritis	1	0	0	0	1
8619 Long thoracic nerve, neuritis	0	0	2	0	2
8620 Sciatic nerve, neuritis	4	12	6	0	22
8621 External popliteal nerve (common peroneal), neuritis	1	1	7	0	9
8622 Musculocutaneous nerve (superficial peroneal), neuritis	0	0	1	1	2
8623 Anterior tibial nerve (deep peroneal), neuritis	0	0	1	0	1
8625 Posterior tibial nerve, neuritis	0	3	0	0	3
8629 External cutaneous nerve of thigh, neuritis	0	1	0	0	1
8630 Ilio-inguinal nerve, neuritis	1	1	2	0	4
8699 Other peripheral nerve neuritis	0	3	0	0	3
8710 Upper radicular group (fifth and sixth cervicals), neuralgia	0	1	0	0	1
8711 Middle radicular group, neuralgia	0	0	1	0	1
8712 Lower radicular group, neuralgia	0	2	2	0	4
8715 The median nerve, neuralgia	6	3	0	0	9
8716 The ulnar nerve, neuralgia	2	3	0	1	6
8717 Musculocutaneous nerve, neuralgia	0	1	0	0	1
8719 Long thoracic nerve, neuralgia	0	0	3	0	3
8720 Sciatic nerve, neuralgia	2	4	2	0	8
8721 External popliteal nerve (common peroneal), neuralgia	4	1	0	0	5
8722 Musculocutaneous nerve (superficial peroneal), neuralgia	0	1	0	0	1
8723 Anterior tibial nerve (deep peroneal), neuralgia	0	0	2	0	2

8725 Posterior tibial nerve, neuralgia	3	1	3	1	8
8726 Anterior crural nerve (femoral), neuralgia	1	1	0	0	2
8728 Obturator nerve, neuralgia	0	0	1	0	1
8729 External cutaneous nerve of thigh, neuralgia	0	0	2	0	2
8730 Ilio-inguinal nerve, neuralgia	0	3	0	0	3
8799 Other peripheral nerve neuralgia	0	0	2	0	2
8850 Undiagnosed condition, musculoskeletal diseases	1	3	1	0	5
8863 Undiagnosed condition, systemic diseases	0	0	1	0	1
8873 Undiagnosed condition, lower digestive system	0	2	1	0	3
8876 Undiagnosed condition, gynecological system	0	0	1	0	1
8881 Undiagnosed condition, miscellaneous neurological	1	0	1	1	3
8893 Undiagnosed condition, organic mental	0	0	1	1	2
8894 Undiagnosed condition, psychoneurotic	1	0	0	0	1
8910 Epilepsy, grand mal	3	11	6	1	21
8911 Epilepsy, petit mal	0	9	1	0	10
8914 Epilepsy, psychomotor	1	1	2	0	4
8999 Other epilepsy	0	0	2	0	2
9201 Schizophrenia, disorganized type	1	2	2	0	5
9203 Schizophrenia, paranoid type	5	14	10	4	33
9204 Schizophrenia, undifferentiated type	11	6	9	2	28
9205 Schizophrenia, residual type; other and unspecified types	3	6	4	0	13
9210 Psychotic disorder, not otherwise specified (atypical psychosis)	1	3	1	0	5
9211 Schizoaffective disorder	0	2	2	0	4
9299 Other psychotic disorder	0	0	1	0	1
9301 Dementia due to infection (see code for list)	0	2	0	0	2
9304 Dementia due to head trauma	6	11	13	0	30
9310 Dementia of unknown etiology	0	1	1	0	2
9326 Dementia due to other neurologic or general medical conditions, or substance-induced	0	3	0	2	5
9327 Organic mental disorder, other (inc. personality change due to a general medical condition)	4	1	3	0	8
9400 Generalized anxiety disorder	32	86	48	5	171
9403 Specific (simple) phobia; social phobia	0	1	3	0	4
9404 Obsessive compulsive disorder	0	2	1	0	3

9410 Other and unspecified neurosis	2	5	4	0	11
9411 Post-traumatic stress disorder	442	564	539	47	1592
9412 Panic disorder and/or agoraphobia	2	3	4	0	9
9413 Anxiety disorder, not otherwise specified	4	8	8	3	23
9421 Somatization disorder	0	3	2	0	5
9422 Pain disorder	1	0	2	0	3
9423 Undifferentiated somatoform disorder	0	1	0	0	1
9424 Conversion disorder	2	3	2	0	7
9431 Cyclothymic disorder	0	1	0	0	1
9432 Bipolar disorder	8	8	7	4	27
9433 Dysthymic disorder	7	35	14	3	59
9434 Major depressive disorder	37	42	48	6	133
9435 Mood disorder, not otherwise specified	2	7	4	0	13
9440 Chronic adjustment disorder	6	6	10	1	23
9499 Other nonpsychotic emotional illness	1	2	9	0	12
9520 Anorexia nervosa	0	1	0	0	1
9521 Bulimia nervosa	0	2	0	0	2
9902 Mandible, loss of approximately one-half	0	2	0	0	2
9903 Mandible, nonunion of	0	1	1	1	3
9904 Mandible, malunion of	3	13	5	0	21
9905 Temporomandibular articulation, limited motion of	7	26	10	1	44
9907 Ramus, loss of less than one-half the substance of	0	1	0	0	1
9908 Condylod process, loss of, one or both sides	0	2	0	0	2
9912 Hard palate, loss of less than half of	0	1	1	0	2
9913 Teeth, loss of, due to loss of body of maxilla or mandible without loss of continuity	2	5	1	0	8
9915 Maxilla, loss of half or less	0	1	0	0	1
9916 Maxilla, malunion or nonunion of	1	2	0	0	3
9999 Other dental or oral condition	0	1	1	0	2
<b>Totals:</b>	<b>2762</b>	<b>8792</b>	<b>5948</b>	<b>668</b>	<b>18170</b>

Chairman CRAIG. Thank you very much for that testimony.  
Now let me turn to Joe Violante, National Legislative Director, Disabled American Veterans. Joe, again, welcome before the Committee.

**STATEMENT OF JOSEPH A. VIOLANTE, NATIONAL  
LEGISLATIVE DIRECTOR, DISABLED AMERICAN VETERANS**

Mr. VIOLANTE. Thank you, Mr. Chairman and Members of the Committee. Disabled American Veterans shares your interest in ensuring veterans have effective and efficient claims and appeals processes. We thank you for conducting this timely hearing on the U.S. Court of Appeals for Veterans Claims.

For the most part, the superimposition of the judicial review on the administrative processes of the Department of Veterans Affairs has had a positive effect. On a personal note, I spent 5 years, between 1985 and 1990, as a VA staff attorney at the Board of Veterans Appeals, reviewing thousands of veterans' appeals. In 1990, I was hired by DAV to represent veterans before the newly established U.S. Court of Veterans' Appeals, during which time I reviewed hundreds of potential judicial appeals records and represented hundreds of veterans before the court.

After more than 2½ years of representing veterans before the court, I became frustrated with the court's failure to deal with legal arguments presented by appellants, i.e., their reluctance to reverse rather than remand a case. For example, after presenting a brief which argued for reversal of the BVA decision, counsel for the Secretary would confess error, alleging that the Board failed to provide adequate reasons or bases for its decision, whereupon the court would remand the cases back to the Board and open up the evidentiary record for further development, notwithstanding the appellant's argument that the record was sufficient to establish entitlement to the benefits sought.

Unfortunately, 17 years after the court began hearing appeals, this practice still continues. In all too many cases, an appellant must appeal to the court at least twice to receive a decision on the merits of his or her appeal. In those cases where the Board has failed to provide adequate reasons or bases, it would appear to make more sense to require the Board on remand to explain its decision based on the evidence of record at the time of the original Board decision, provided the appellant has not argued that the record on appeal was defective.

By requiring the Board to examine its decisions based on the evidence of record, the VA would be prohibited from going out on a fishing expedition to develop evidence to support its prior erroneous denial of benefits. Allowing VA to further develop evidence after having seen appellants' arguments regarding defects in its prior denied decision provides VA with a distinct advantage over appellants.

Accordingly, I would recommend that when the court determines, and I might add this should be only in a very small percentage of the cases, that the Board decision is defective for failure to state adequate reasons or bases and the appellant has not alleged any defects in the evidence of record, the Board should be required to articulate its decision based on the evidence of record. In all other



cases where the evidence is sufficient to establish entitlement to the benefits sought, the court should and must reverse the BVA decision.

Another frustration experienced by appellants is delays in obtaining a disposition from the court, as we have heard in testimony and see on your charts, especially in single-judge decisions. In 1990, the court articulated in *Frankel v. Dewinski* that it would summarily decide by order an appeal where the case on appeal was of relative simplicity and does not establish a new rule of law, does not alter, modify, criticize, or clarify an existing rule of law, does not apply an established law rule to a novel facts situation, does not constitute the only binding precedent on a particular point of law, does not involve a legal issue of continuing public interest, and the outcome is not reasonably debatable. Unfortunately, many of these single-judge decisions take a year or longer to be decided. It is difficult to understand why an appeal of relative simplicity should take an inordinate amount of time to decide. Accordingly, I believe both the court and this Committee should closely examine why there are such long delays in cases of relative simplicity.

Mr. Chairman, this concludes my testimony and I would be more than happy to answer any questions.

[The prepared statement of Mr. Violante follows.]

PREPARED STATEMENT OF JOSEPH A. VIOLANTE, NATIONAL LEGISLATIVE DIRECTOR,  
DISABLED AMERICAN VETERANS

Mr. Chairman and members of the Committee:

The Disabled American Veterans (DAV) shares your interest in ensuring veterans 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 (BVA) and establishing what is now the United States Court of Appeals for Veterans Claims (the Court or CAVC) with special jurisdiction for that purpose, the complexion of the claims and appeals processes for veterans 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. With independent review from outside VA, we have seen the law carefully 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. 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 case loads 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, CA VC is an instrumentality of Congress, unlike Article III courts. So long as it does not affect the independence of the decisionmaking 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 March 2, 2006, written statement to the Subcommittee on Military Quality of Life and Veterans Affairs, and Related Agencies of the House Appropriations Committee, Chief Judge William P. Greene, Jr., discussed “a dramatically escalating number of new cases.” In fiscal year (FY) 2005, the Court received 3,466 new cases, compared with a yearly average of 2,400 cases for 8 of the preceding 10 years, an increase of 44 percent during fiscal year 2005 and “the largest number of case filings ever.” That trend had continued during the first quarter of fiscal year 2006.

The Chief Judge pointed to an increased number of denied appeals by BVA in fiscal year 2005. In fiscal year 2005, BVA issued 13,033 denials, compared with 9,299 the previous year. In addition, the number of appeals to the Court as a percentage of BVA denials rose considerably over the level in fiscal year 2000 and earlier years, from 17.3 percent in fiscal year 2000 to 26.6 percent in fiscal year 2005.

According to the Chief Judge’s testimony, the majority of appeals to the Court involve claims for disability benefits, which is consistent with BVA data listed in the fiscal year 2005 Report of the Chairman showing that 94.2 percent of BVA dispositions during fiscal year 2005 involved disability compensation. VA’s fiscal year 2007 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 from returning war veterans and veterans of earlier periods increasing from 578,773 in fiscal year 2000 to 788,298 in 2005. By our calculation, this represents an average annual increase of more than 6 percent in the 5 years from the end of fiscal year 2000 to the end of fiscal year 2005. VA projects it will receive 910,126 claims in fiscal year 2006.

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 fiscal year 2003, the allowed and denied together totaled 16,874. For fiscal year 2004, this total was 15,860. For fiscal year 2005, it was 20,128.

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 case output has fallen off since fiscal year 2002. He attributed the decline to several factors—a spate of remands in 2000 to 2002 for compliance with new legislation that accounted for more dispositions; a full contingent of experienced judges up to 2002, with only five judges from 2003 to the second quarter of FY 2005; and an increase in caseload between fiscal year 2004 and fiscal year 2005. (He did not explain how the increased caseload contributed to fewer dispositions.) In addition, he noted that nearly 60 percent of the new cases were filed by unrepresented appellants, requiring more work by the Court. Although he did not explain whether this represented an increase in *pro se* appellants, the Court’s annual reports show that 70 percent of appellants or petitioners were unrepresented at filing in 2000 and that 58 percent were unrepresented at filing in fiscal year 2005. At the time of closure, 29 percent were unrepresented in fiscal year 2005. In the 5 years from fiscal year 2001, an average of 57.7 percent were unrepresented at the time they initiated action with the Court, and 26 percent were unrepresented at closure.

In response to questioning from members of the Subcommittee, Chief Judge Greene reported that case production began increasing in 2005 as the newer judges became fully staffed and gained experience:

I also would like to note that the number of cases decided in the first quarter of calendar year 2005 was 472. This was when our new judges were hiring staff and gradually receiving cases, and our senior judges were preparing to retire and no longer receiving new cases.

In the last 3 months of calendar year 2005, when the new judges were fully staffed and had more than 6 month’s experience, the number of cases decided increased by over 100 to 579.

In the first 59 days of calendar year 2006, we have already decided 366 cases.

Following that trend, we can expect to decide almost 600 by the end of the first quarter. I have every reason to anticipate that we will continue to process the cases expeditiously.

According to the Court’s annual reports, the number of new cases declined from 2,442 in fiscal year 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, as noted, to 3,466 in fiscal year 2005. The total cases decided for those years were: 2,164 in fiscal year 2000, 3,336

in 2001, 1,451 in 2002, 2,638 in 2003, 1,780 in 2004, and 1,905 in fiscal year 2005. Cases that went to a full decision on the merits, presumably those that most reflect the Court's production, increased from 1,619 in fiscal year 2000 to 2,853 in fiscal year 2001, dropped precipitously to 972 in 2002, increased to 2,152 in fiscal year 2003, dropped substantially again to 1,337 in fiscal year 2004, and declined even more to 1,281 in fiscal year 2005. We note that the Court received 2,532 new cases in fiscal year 2003 and decided a total of 2,638, of which 2,152 were merits decisions, as compared with fiscal year 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 fiscal year 2004. We note that the Court counts cases remanded on joint motions by the parties as merits "decisions."

The Court issued 53 precedent decisions during fiscal year 2005. Through May of this year, CA VC had issued 24 precedent decisions.

The Court's annual reports show the average "Time from filing to disposition" was 379 days for fiscal year 2005. Chief Judge Greene stated in his oral testimony:

I am happy to report that the average number of days from filing to decision has decreased from high of 430 days in calendar year 2005 to currently 370. Further, our statistics show that 64.7 percent of all cases decided in calendar year 2005 were decided within 1 year. This is an increase from 30.8 percent decided within 1 year in calendar year 2004.

Cases taking more than a year have decreased from 41.6 percent in calendar year 2004 to 22.4 percent in calendar year 2005.

(Emphasis added.) Apparently, the fiscal year 2005 processing time of 379 days increased to 430 days for calendar year 2005 and had dropped back to 370 days at the time of the Chief Judge's March 2006 testimony. The cited drop in the cases taking more than a year in 2005 should be considered in light of the fact that the total cases decided in 2005 was made up of a higher number of procedural decisions and a lower number of merits decisions than in 2004 (if the fiscal year numbers we know from the Court's annual report are consistent with the calendar year numbers stated in testimony).

According to the BVA Chairman's annual report for fiscal year 2005, the average length of time between the initiation of an appeal with a VA field office and receipt of the case at BVA was 824 days in fiscal year 2005. Issuance of a BVA decision took another 160 days on average. If we add another 370 days for a decision by the Court, the total time for an appeal is 1,354 days, nearly 4 years. Of course, that being the average, roughly half of all appeals can be expected to take even longer.

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, the 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.

Indisputably, the long processing times suggest inadequate resources, the need for increased efficiency, or both. In any event, with a 44 percent increase in new cases during fiscal year 2005, with that trend continuing into fiscal year 2006, and with approximately 5,000 cases pending before the Court according to the Chief Judge's March 2006 testimony, we must question why the Chief Judge would request funding for only one additional employee or full time equivalent, a 1 percent increase in staffing.

In his testimony, the Chief Judge stated: "I am confident that we will reduce [the] backlog significantly and at the same time process all cases expeditiously." With more than three-quarters of fiscal year 2006 passed, this Committee should look to the Court's most recent data (which DAV was unable to obtain) to determine if that seemingly ambitious and optimistic prediction was warranted.

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.

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.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. DANIEL K. AKAKA TO  
JOSEPH A. VIOLANTE

*Question 1.* Mr. Violante, can you please explain the need for the court to be housed in its own dedicated building, designed to its specific needs and befitting its authority? How could a dedicated courthouse aid in the diminishment of the court's caseload?

Answer. Veterans and other persons claiming benefits from the Department of Veterans Affairs (VA) have benefited substantially and materially from the jurisprudence of the United States Court of Appeals for Veterans Claims (CAVC).

During the almost 17 years since the CAVC was formed in accordance with legislation enacted in 1988, it has been housed in commercial office buildings. The Courtroom, chambers, and other space is inadequate to meet the present and future needs of the Court and those it serves. It is the only Article I court that does not have its own courthouse. The CAVC should have its own dedicated building that meets its specific functional and security needs, projects the proper image, and concurrently allows the consolidation of VA General Counsel staff, CAVC practicing attorneys, and veterans service organization representatives to the CAVC in one place. The CAVC should have its own home, located in a dignified setting, with distinctive architecture that communicates its judicial authority and stature as a judicial institution of the United States.

There is no direct correlation between a dedicated courthouse and the diminishment of the Court's caseload. However, it is in the interests of veterans and their dependents that the Court be accorded the same respect enjoyed by other appellate courts of the United States. It would also allow the Court to have additional space available for the possible recall of judges in the future.

*Question 2.* You noted in your testimony that much of the court's internal operations are not transparent to the public. What more data would be required in order to determine court efficiency?

Answer. Specific data showing the time that transpired following the date on which the appellant's reply brief was filed would serve this purpose. Chief Judge Greene was correct when he stated that both the appellant and VA often file motions for extension of time. Such additional time taken by the parties does not indicate any inefficiency on the part of the Court. 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 Chief Judge, the judges of the Court disposed of approximately 1,300 appeals during Calendar Year (CY) 2005. Fewer than 60 of those were resolved in three-judge, precedent decisions. The remaining 1,240 were decided in single-judge orders or memorandum decisions. Each of the 1,240 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 1 and 2 years to resolve similar cases. Examples of long-pending cases currently awaiting disposition include: *Richer v. Nicholson*, CAVC No. 03–0910 (reply brief filed May 3, 2004); *Washington v. Nicholson*, No. 03–0773 (reply brief filed June 21, 2004); *Wakely v. Nicholson*, No. 04–0196 (reply brief filed December 10, 2004); *Palezewski v. Nicholson*, No. 04–1001 (reply brief filed April 23, 2005); *Clark v. Nicholson*, No. 04–0577 (reply brief filed June 6, 2005); *Jandreau v. Nicholson*, No. 04–1254 (reply brief filed July 5, 2005); *Grant v. Nicholson*, No. 04–1257 (reply brief filed July 7, 2005).

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 6 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.

*Question 3.* How should court efficiency be measured?

Answer. The DAV believes that Court efficiency should be measured in two ways. The first measure should be the number of days that elapse from the date the appellant files the reply brief, or the date following the deadline for appellant's reply brief, until the date on which the Court issues its decision. The standard should be 120 days in the case of single-judge dispositions and 180 in the case of a panel decision. An additional 90 days should be allowed in cases where the Court hears oral argument. These suggestions are in line with the time required for decisions from the United States Court of Appeals for the Federal Circuit. The second measure should be the number of dispositions, by either order or memorandum decision, completed per law clerk. Based on the number of memorandum decisions completed by the Court in CY 2005, approximately, 1,240 and the number of authorized law clerks, 28, the average number of decisions completed per law clerk was less than 1. The standard should be no less than 2, a number which the Court has achieved in the past.

Chairman CRAIG. Well, gentlemen, thank you very much for being before us. I am pleased that your expression of concern and urgency is also that of the Committee's.

A question to you, Mr. Terry, and possibly to Randy Campbell. To help the Court deal with its increasing caseload, the Court is considering using judges to conduct settlement conferences and some practitioners have recommended that the Court adopt a formal mediation system. In your opinion, would adopting either of these measures help speed resolution of cases before the court?

Mr. TERRY. I certainly request Randy's view, as well, but I have seen the process work in other departments and it certainly can be effective if, in fact, the system is well constructed and both sides have the opportunity to be heard. Sometimes a difficulty that I have experienced, and this was both in the Department of State and Department of the Interior where we set up similar systems, is that scheduling settlement conferences of this kind and bringing them to conclusion often is as time consuming as hearing some of the cases. But I would certainly defer to Randy on his thoughts, as well.

Mr. CAMPBELL. Mr. Chairman, I think—

Chairman CRAIG. Randy, before you respond, let me add to that another question that you may want to respond to, and Joe, I will turn to you later. The second question would be—and you started to touch on it, Jim—are there any specific advantages or disadvantages that you would foresee to either of these approaches?

Mr. CAMPBELL. Mr. Chairman, I think that the numbers we have heard today indicate that to address the backlog of cases requires open-mindedness and creativity, and the idea of mediation or something like that certainly is worth consideration. I would note that under the court's current procedures, they have a very active and expert central legal staff that conducts conferences between the parties, where there is a represented veteran, in order to narrow the issues and at times to encourage the parties, when they can, to negotiate a joint disposition.

I don't have the exact numbers with me, but I believe that when one looks at the total number of cases remanded by the court over the last couple of years, that perhaps 50 percent or more were cases remanded on joint motion of the parties. So the parties themselves in the current process communicate, and are very active in trying to find a joint disposition of the case so it doesn't have to go to a judge. And, in fact, in my office with the General Counsel's

Office, we have a team that we call the early intervention team that is devoted to this very purpose.

Chairman CRAIG. OK.

Joe.

Mr. VIOLANTE. Thank you, Mr. Chairman. I would certainly support that type of an endeavor before this court. I have seen it work in civil courts and I think it certainly would be beneficial to have it in this court here on a more active basis. As Randy pointed out, the central legal staff does conduct joint conferences, but it certainly would be nice to elevate that to another level.

Chairman CRAIG. Joe, a question of you. Mr. Terry noted in his testimony that some spikes in the appeal rate result from efforts to present particular legal issues to the Court by filing numerous cases that all raise the same legal issue. For example, you mentioned that hundreds of recent appeals to the Court all sought the same relief, dual ratings for a bilateral tinnitus. In those circumstances, would it be more efficient to allow some type of limited class action rather than having hundreds, if not thousands, of cases which raise the same issue proceeding separately through the system?

Mr. VIOLANTE. Mr. Chairman, that is an interesting question and I am not sure how the mechanics would work, but it certainly would be something to explore. This is an appellate court and how do you get that class together? Fees would have to be determined. But certainly, I think it would certainly make it more expedient to move those through some other way than currently is the process.

Chairman CRAIG. Mr. Terry, Mr. Campbell, do you have any observation in relation to that question?

Mr. TERRY. I certainly think that this can be done and can be worked out. I think we need to adopt some of the procedures that are presently used in other similar courts, similar Article I courts that presently do this. I honestly believe that it can be worked out with relative simplicity, sir.

Chairman CRAIG. Well, gentlemen, that is the extent of my questions. This Committee and my colleagues, as I expressed to the Judge and the judges in attendance, are very intent on this issue. We are going to stay with it and we want you to stay with us as we work through this thing.

If we can't change that trend that is demonstrated behind me, we are going to have an awful lot of our veterans standing in line waiting for a very long time for something they may or may not deserve, and that is why we have this process. I think it is unacceptable that we allow a ping-pong effect in some instances within the legal system to satisfy the legal system more than to satisfy the need of the veteran. And while it may be intent on satisfying the need of the veteran, oftentimes it becomes, if I can be crass enough to use the word, a game in itself. That is just unacceptable.

That is why the Court was developed. It is why we are intent on, where we can, making it effective. We viewed historically a kind of the exception to the rule, but as the world changes, we are recognizing that maybe this Court ought to become more like other Article I courts in many respects. And certainly dealing with the process and procedure as it relates to timely handling of the cases is something that I think we are going to review and have to review

on behalf of the charge of this Committee and its responsibility to veterans.

Your thoughts as we work our way through this and work with the judges to resolve this is going to be extremely important because the Court itself is relatively new. And you are right, this is a dynamic process that is changing based on the character of veterans, their needs, based on statute and all that we do here, and it has to be dealt with in a responsible and timely fashion.

So thank you all very much for being with us this morning and we appreciate your testimony.

The Committee will stand adjourned.

[Whereupon, at 11:43 a.m., the Committee was adjourned.]





## A P P E N D I X

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### PREPARED STATEMENT OF ROBERT V. CHISHOLM, PAST PRESIDENT, NATIONAL ORGANIZATION OF VETERANS ADVOCATES

Thank you for inviting testimony from the National Organization of Veterans Advocates (NOVA) on the issue of the increase in the number of appeals being received by the United States Court of Appeals for Veterans Claims (Court) and the number of cases pending at the Court.

The Court's increasing case load concerns all who work for veterans. NOVA appreciates the Court's openness in trying to resolve this problem, including its recent "Bright Ideas" breakfast at the Court's Judicial Conference where it invited practitioners to share ideas on improving the Court's processes. In addition, NOVA understands that the Court has only recently reached its full complement of Judges. Nonetheless, as the numbers of filings and decisions demonstrate, careful attention by the Court is required. The true nature of the problem, moreover, is not revealed in the statistics provided to Congress because the number of reported "cases decided" includes the decisions the Judges make on the merits after briefing along with entries made by the Clerk based on Joint Motions from the parties to remand a case. (In a Joint Motion to Remand, the parties identify one or more administrative errors and request a remand to the Board of Veterans' Appeals based on that. The entry approving the Motion is made by the Clerk, without review from a Judge.) The "cases received" compared to "cases decided," furthermore, does not reflect the length of time that cases have been pending—some for as long as 2 years after briefing is completed.

NOVA's experience suggests that some of the current backlog is related to the Court's historical treatment of cases and claims; i.e., it has typically remanded, not reversed, when it deemed that the Board of Veterans' Appeals erred. And, once it determines that remand is proper, it will generally decline to review other errors. *Best v. Principi*, 14 Vet. App. 18 (2001); *Mahl v. Principi*, 15 Vet. App. 37 (2001). As a result, many cases on appeal to the Court are there for the second, third, or fourth time, often with the same issues to be decided. Add those to the cases that are on appeal for the first time, and a backlog cannot help but be created. Even the most hard-working and productive Judges will not be able to keep up.

NOVA believes that there has been resistance to reversal of Board decisions by the Court. This has discouraged the VA from realistic efforts at settlement of some or all issues in a case. Veterans' representatives accept offers to remand cases on terms that do not resolve many issues because they perceive that the odds of obtaining greater relief from the Court are very low and because the delays are so long. It appears to NOVA that the Office of the General Counsel could understandably believe that, because the odds of reversal are low, they have nothing to lose by refusing to resolve issues in a meaningful way and instead force a decision from the Court.

Congress attempted to correct the relatively small percentage of reversals in 2002 when it added the phrase "or reverse" to 38 U.S.C. §7261(a)(4). Veterans Benefits Act of 2002, §401, Pub. L. 107-330, 116 Stat. 2832 (2002). The Court has not yet established parameters through its case law that would support a greater percentage of reversals. The Court, rather, continues to hold that reversal is only possible when the only permissible view of the evidence is contrary to the Board's decision; and that, where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate, remand is generally the appropriate remedy. *Washington v. Nicholson*, 19 Vet. App. 362, 371-372 (2005). But if the evidence does not preponderate against the claim, or where the Board has made all the necessary factual findings, the Court could—and should—reverse. See *Washington*, at 375 (dissent by Kasold, J.); *Rose v. West*, 11 Vet. App. 169, 172 (1998) ("This is not to say that medical evidence of nexus could not be rebutted, in an appropriate case, by medical evi-

dence that demonstrates the significance of a lack of continuity of symptomatology. However, no such evidence exists and it is not the function of judicial review simply to accord the government a remand to obtain such evidence.”).

The Court has also attempted to limit the number of cases it must decide through a Pre-Briefing Conference system conducted by attorneys in the Court’s Central Legal Staff. These conferences can be helpful in forcing the parties to communicate about the case and in focusing the issues. But veterans’ representatives have been frustrated by the lack of preparedness by some opposing counsel and the lack of true mediation techniques applied to elicit concessions and limit the issues. Limiting the issues and limiting the cases that need to be briefed would in turn limit the number of decisions the Court needs to make.

Based on the above, NOVA therefore recommends that Congress:

Institute a case-tracking and reporting system based on accurate descriptions of case status, separating cases into cases that have been decided after briefing from other cases in the system; and tracking the time from the completion of briefing to the interim steps of completion of CLS memo and assignment to a Judge. Reporting accurate numbers helps focus on the true nature of the problem and thus helps identify any needed solutions.

Require the Court to adopt a meaningful mediation system that would increase the number of cases resolved prior to briefing and would limit the number of issues the Court would need to address.

Amend the statute to overturn Best/Mahl, so that issues that are likely to be presented again on remand are resolved the first time the case is appealed.

Amend the statute to clarify that the Court is permitted to reverse when the evidence establishes the right to the benefit sought or that an error of law has been committed by the Board.

Amend the statute to clarify that when the evidence of record establishes the right to the benefit sought, the Court should not remand simply to give the agency another opportunity to develop evidence that would support a denial of the benefit.

Thank you again for this opportunity.

