

**STATEMENT FOR THE RECORD OF
THE HONORABLE ROBERT N. DAVIS, CHIEF JUDGE
U.S. COURT OF APPEALS FOR VETERANS CLAIMS**

**FOR SUBMISSION TO THE
UNITED STATES SENATE
COMMITTEE ON VETERANS' AFFAIRS**

MAY 17, 2017

MR. CHAIRMAN AND DISTINGUISHED MEMBERS OF THE COMMITTEE:

Thank you for the invitation to submit a statement of the Court's views on legislation pending before the Committee, in particular S. 1024, the Veterans Appeals Improvement and Modernization Act of 2017. The Court's comments will be brief.

Although changes to VA's appeals processing will eventually impact the Court, the pending legislation does not amend the statutory provisions governing the Court's function. For this reason, the Court will not speculate as to potential consequences of changes that pertain only to the agency, or comment on specific provisions that may ultimately come before the Court in litigation. We do, however, offer the following thoughts on the need to ensure that claimants are aware of their right to appeal to a court of law, and the potential impact this legislation will have on the Court's workload.

Continued Advisement of Appellate Rights: The proposed legislation on appeals modernization provides veterans unlimited opportunities to repeatedly pursue a claim within the agency and secure the earliest effective date possible following any grant of benefits on a timely supplemental claim. That revised appeals structure could potentially result in a veteran never securing a Board of Veterans' Appeals (Board) decision and accompanying notice of appellate rights, and thus never being informed of the Court's existence. The Court states no opinion on whether or not the proposed changes are "good for" individual veterans or VA's overall system of claims processing. We do, however, want to ensure that veterans remain aware of the full array of options available to them in pursuing a claim, including appealing to the Court, and that no option be painted as more or less favorable or likely for success than another.

Unlike earlier draft bills on appeals modernization, S. 1024 includes language that extends the effective date protection, and in essence permits continuous pursuit of a claim via the submission of a timely supplemental claim following a decision of the Court. The Secretary opposed a similar provision in recent testimony before the U.S. House Committee on Veterans' Affairs, where Acting Chairman of the Board David Spickler stated that affording that effective date protection following a court decision "is contrary to VA's policy interest in encouraging dissatisfied claimants to stay within VA unless it is truly necessary to go to a higher court." We oppose any effort to discourage veterans from exercising their right to appeal to the Court. In light of Mr. Spickler's strong statement, the Court feels it worth highlighting that whether or not S. 1024 passes as drafted, the notices VA includes with its decisions

must present to veterans all of their post-decision options fully and fairly, and leave the decision as to when an appeal to the Court is necessary in the hands of the veteran. At a minimum, any revisions to the post-Board-decision standard notice of appellate rights must leave intact the notification regarding appealing to the Court. Many people fought long and hard to secure impartial review of adverse VA decisions by a federal court that by definition is independent of VA. Veterans and their survivors must continue to know about and understand that right.

Implementation: Generally speaking, appeals filed at the Court come from veterans who are dissatisfied with a decision of the Board. Although not with mathematical precision, history has shown that as the number of Board decisions increases, so too do the number of appeals filed at the Court. It is impossible to predict to what extent, if any, the changes proposed by this broad appeals reform legislation will result in some veterans choosing to pursue their claims at the agency following an adverse Board decision rather than appealing to the Court. It is likewise impossible to predict the extent of the legal and procedural questions that will be raised by sweeping legislative change and that will ultimately come before the Court for decision. What does seem clear is that the manner in which this pending legislation is implemented and how that implementation effects the flow of decisions made by the Board will have a profound and fairly immediate effect on the Court.

The applicability section of S. 1024, Section (x), addresses how VA would implement this legislative change, to include an early applicability option and phased rollout. This provision leaves several questions as to when the new system would ultimately be implemented, when cases under that system would reach the Court, and how legacy appeals would be treated. The certification requirement on VA to confirm its preparedness to implement amplifies the uncertainty. Any implementation plan for sweeping legislative change to the VA claims processing system will certainly have its challenges, and we offer no comment on what those may be. We are, however, attempting to anticipate the impact on the Court and best estimate and prepare for the workload that may result from these changes should they become law.

VA recently testified that more than 460,000 appeals are pending before the agency today. The Board decided in the neighborhood of 52,000 decisions in fiscal year 2016, has pledged to further increase its number of annual decisions, and has and continues to grow its staffing at an extraordinary pace in order to meet those projections. Faced with this data, the Court projects a steady, and likely significant increase in the number of appeals over the next several years. As we anticipate a growth in appeals, let me take this opportunity to thank the Committee for the 2016 authorization to temporarily maintain an expanded Court of nine active judges. Once judicial nominees are announced, we ask for your prompt attention to the confirmation process so that we may return to full strength and ensure that we are prepared and able to conduct effective, efficient, and expeditious judicial review of all matters that come before the Court.

In closing, we appreciate the Committee's consideration of our input, and for the past and continued support of the Court's endeavors, including the establishment of a permanent Courthouse building. Thank you.