The Honorable James P. Terry, Chairman of the Board of Veterans' Appeals, Department of Veterans Affairs; Accompanied by Mr. R. Randall Campbell, Assistant General Counsel, Professional Staff Group VII, Department of Veterans Affairs

STATEMENT OF JAMES P. TERRY,
CHAIRMAN, BOARD OF VETERANS' APPEALS

BEFORE THE

COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES SENATE

July 13, 2006

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 FY05, 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 towards 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 FY 03, the Board issued 31,397 decisions, with a remand rate of 42.6%. In FY 04, while the number of decisions issued increased to 38,371, the remand rate soared to 56.8%. In FY 05, 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% were remanded in whole or part. So far in FY 06, through the end of May, we have issued 24,133 decisions, with a remand rate of 34.1%. 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 FY 05 than in FY 04, the actual number of decisions in which all benefits sought were denied increased from 9,300 in FY 04 to 13,032 in FY 05. 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 FY 04 to 7,096 in FY 05, 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 FY 04, 41,816 cases in FY 05, and expects to receive 43,000 cases in both FY 06 and FY 07.

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 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% of the Veterans Court's docket in FY05 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 six 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.