STATEMENT OF
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BEFORE THE U.S. SENATE COMMITTEE ON
VETERANS' AFFAIRS

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MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

Thank you for the opportunity to present the views of the National Veterans Legal Services Program (NVLSP) on pending legislation. This testimony focuses on S. 1754, which would make permanent the temporary increase in the number of judges presiding over the U.S. Court of Appeals for Veterans Claims. The temporary increase was to nine full-time judges and this bill would make that number of judges a permanent fixture at the Court.

NVLSP is a nonprofit veterans service organization founded in 1980. Since its founding, NVLSP has represented over 2,000 appellants before the Court of Appeals for Veterans Claims. NVLSP is one of the four veterans service organizations that comprise the Veterans Consortium Pro Bono Program. In conjunction with the Consortium, NVLSP has, since 1992, recruited, trained, and mentored thousands of volunteer lawyers to represent on a pro bono basis veterans who have appealed a Board of Veterans' Appeals decision to the CAVC without a representative. In addition, NVLSP publishes through Lexis Law Publishing the leading treatise on veterans law – the 1900-page *Veterans Benefits Manual* – that is regularly used by those who represent appellants before the CAVC.

NVLSP supports passage of S. 1754. In the past several years, the caseload of the Court has increased significantly. In fiscal year 2013, the Court received 3,724 case initiations (3,531

appeals and 193 petitions for a writ of mandamus). In calendar year 2014, the Court received 4,438 case initiations. In the first nine months of calendar year 2015, the rate of case initiations further increased to an annual rate of 4,988. Over the last several years, the Court has had nine full-time judges. Although the caseload has increased, the nine full-time judges have been able to continue to issue decisions within a reasonably short period of time after the briefs arrive in chambers for a decision. Given the rising caseload and the fact that it is likely to continue, allowing the number of full-time judges to fall below nine would threaten the progress the Court has made in issuing decisions within a short period of time.

An additional reason for NVLSP's support of S. 1754 involves the Court's overuse of a shortcut in disposing of appeals – use of its statutory authority under 38 U.S.C. § 7254(b) to decide cases by a single judge. Single-judge decisions are issued by the Court in the form of a "memorandum decision" and are not precedential. Only published opinions issued by a panel of three judges or more carry precedential value. *See Bethea v. Derwinski*, 2 Vet. App. 252 (1992). No other federal court of appeals has authority to decide cases by single judge; all of these other courts of appeal decide cases in panels of three judges or more. Some of these three-judge decisions in the other federal court of appeals are designated as precedential, while others are designated as non-precedential.

In recent years, single-judge dispositions by the CAVC have come to dominate to a degree far greater than non-precedential decisions are used in the other federal courts of appeals. In fiscal years 2013 and 2014, the CAVC issued a precedential decision (i.e., an appeal decided by a panel of three judges or more) in only 1.8% of the cases decided by chambers (75 of 4,221). By comparison, in fiscal year 2014, the federal geographic courts of appeals handled 12% of

judgments by a precedential opinion.[1] Although there was some variance, no federal court of appeals issued a precedential decision in less than 6% of its decisions.[2]

The relative lack of precedential decision-making by the CAVC is inconsistent with its role as a national judicial interpreter of the law. The Court's aversion to precedential decision-making has an adverse impact on the claims adjudication process. The lack of precedential decisions that interpret the meaning of statutes and regulations leaves veterans, the VA regional offices, and the Board of Veterans' Appeals without binding guidance on how these authorities should be interpreted. When the VA decides claims in situations where the law is not clear, it encourages veterans whose claims are denied to appeal to a higher authority. Thus, the lack of binding precedent on the proper construction of a statute or regulation exacerbates the existing backlog of pending appeals within VA and leads to inconsistent outcomes for similarly situated veterans.

Shortly after the Court was created by Congress, the CAVC took reasonable steps to cabin its authority to dispose of an appeal by a single judge. It announced in *Frankel v. Derwinski*, 1 Vet. App. 20, 25-26 (1990) that a single-judge disposition was only appropriate if "the case on appeal is of relative simplicity" and

1. does not establish a new rule of law;
2. does not alter, modify, criticize, or clarify an existing rule of law;
3. does not apply an established rule of law to a novel fact situation;
4. does not constitute the only recent, binding precedent on a particular point of law within the power of the Court to decide;
5. does not involve a legal issue of continuing public interest; and
6. the outcome is not reasonably debatable.

The CAVC continues to publicly embrace the *Frankel* criteria to this day.

[1] *See* STATISTICS DIV., ADMIN. OFF. U.S. CTS., JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2014 ANNUAL REPORT OF THE DIRECTOR, [hereinafter U.S. COURTS 2014 REPORT] tbl. B-12, *available at* http://www.uscourts.gov/statistics-reports/judicial-business-2014.
[2] *See id.*

But a survey of the single-judge decisions issued by the Court in 2013 and 2014 demonstrates that the Court is not faithful to these reasonable criteria. As the Court's annual reports reflect, there are three possible outcomes to an appeal over which the Court has jurisdiction: the Board of Veterans' Appeal decision denying benefits is either (1) affirmed, (2) reversed, or (3) vacated and remanded for further administrative proceedings. In calendar year 2013, the variance in the affirmance rates among the nine judges in a single-judge decision was between a low of 26% for one judge to a high of 65% for another judge. In other words, in 2013, the first judge was 2.5 times more likely to affirm a challenge to a BVA decision denying a claim for benefits than the second judge. In 2013, three of the nine full-time judges were each over twice as likely to affirm a challenge to a BVA decision denying a benefits claim as either of two other judges.

The variance in the results of single-judge memorandum decisions in 2014 was just as great as it was in 2013. The judge with the highest affirmance rate (60%) in 2014 was the same judge who had the highest affirmance rate in 2013. The judge with the lowest affirmance rate (22%) in 2014 was the same judge who had the lowest affirmance rate in 2013. In 2014, as in 2013, the judge with the highest affirmance rate was over 2.5 times more likely to affirm a challenge to a BVA decision denying a claim for benefits than the judge with the lowest affirmance rate. In 2014, four of the nine full-time judges as an aggregate were over twice as likely to affirm a challenge to a BVA decision denying a benefits claim as three of the other judges as an aggregate.

A statistical analysis of the large variance in 2013 and 2014 in the affirmance rates among the nine CAVC judges is that the magnitude of the variance cannot be explained by chance. That is, the large variance shows that single judges in 2013 and 2014 reached outcomes in some individual appeals that would result in a different outcome had the appeal been adjudicated instead by one or more of the other judges. This is compelling evidence that single judges issued a significant number

of memorandum decisions in 2013 and 2014 that were "reasonably debatable", in violation of the last *Frankel* criterion.

Members of the Court's Bar have communicated with the Court about the problems with the Court's overuse of nonprecedential single-judge decision-making. NVLSP is hopeful that the Court will respond to this constructive criticism by adjusting its decision-making process so that, at minimum, the percentage of cases decided by a panel of three CAVC judges in a precedential opinion approximates the percentage of precedential cases decided by the other federal courts of appeal. NVLSP believes that by providing the Court with a permanent roster of nine full-time judges, S. 1754 will serve as a catalyst to encourage the Court to make this adjustment. The Committee should, however, consider amending S. 1754 by adding a requirement that the Court periodically report to the Senate and House Committees of Veterans Affairs about the steps it is taking to adjust its decision-making process so that the percentage of cases decided by a panel of three CAVC judges in a precedential opinion is equal to or exceeds the percentage of precedential cases decided by the other federal courts of appeal.