

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

FOR SUBMISSION TO THE
UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON APPROPRIATIONS
SUBCOMMITTEE ON MILITARY CONSTRUCTION, VETERANS AFFAIRS,
AND RELATED AGENCIES

MARCH 12, 2019

CHAIRWOMAN WASSERMAN SCHULTZ, RANKING MEMBER CARTER, AND
DISTINGUISHED MEMBERS OF THE SUBCOMMITTEE:

I am pleased to appear before you and present testimony on the fiscal year (FY) 2020 budget request of the United States Court of Appeals for Veterans Claims. Herein I will (1) summarize our budget request, (2) share an overview of the Court's caseload and operations, and (3) provide an update on the Court's efforts to secure a Veterans Courthouse.

I. Budget Request

The Court's FY 2020 budget request totals \$35,400,000. This request is comprised of two parts – the Court's operating expenses of \$32,701,003 (to include \$800,000 for expenses associated with obtaining a courthouse), and a request by the Veterans Consortium Pro Bono Program (Pro Bono Program) of \$2,698,997. Since FY 1997, the Legal Services Corporation/Pro Bono Program's budget request has been provided to Congress as an appendix to the Court's budget request, although the Court functions merely as a pass-through for that amount. Accordingly, I offer no comment on that portion of our budget request.

As to the Court's operating expenses, our FY 2020 request reflects an increase of \$326,000 over the FY 2019 authority. This overall growth results from an increase of \$1,276,000 in personnel compensation and benefits, offset by a decrease of \$950,000 in operating expenses.

Specifically, for FY 2020, the Court requests \$21,205,000 for Personnel Compensation and Benefits. The Court's personnel and benefits appropriation covers salary, health benefits, insurance, employee matching contributions to the Thrift Savings Plan, and routine promotions and cost-of-living adjustments for all Court employees. The FY 2020 request covers funding for 134 full time employees (FTEs), to include continued funding for nine active judges and their chambers, and a request for four new FTEs in FY 2020. Although the Court has permanent authorization for seven judges, several years ago, in light of the growth in the Court's caseload, Congress temporarily authorized an increase to nine active judgeships pursuant to 38 U.S.C. § 7253(h) and (i). The Court is fortunate to be fully staffed at present with nine judges. Two of the Court's current judges will retire at the end of their terms in December 2019, and with the current surge in appeals, the Court sincerely hopes that those two vacancies will be promptly filled.

The four new positions requested for FY 2020 include two additional judicial law clerks to support the Court's recalled-retired (Senior) judges, a new Special Master position to assist the Court in processing class action litigation, and an administrative assistant to that Special Master. The Court currently has eight retired, recall-eligible judges who are recalled to service on a rotational basis, with our two upcoming retiring judges joining their ranks in December 2019. These Senior Judges provide valuable and substantial service, and the Court needs two additional law clerks to support them. The Court also anticipates the need for a Special Master and an administrative assistant to aid with the orderly processing and management of the Court's new and

growing class action caseload. The Court was recently ascribed class action authority, which is complicated in any setting, and particularly unique for an appellate Court. We anticipate significant novel challenges as we work to process these new claims, and we foresee the need for a Special Master and an administrative assistant to assist in this innovative effort.

For FY 2020, the Court requests \$8,496,000 for all other operation expenses ("Other Objects"), a decrease of \$950,000 from FY 2019. These funds are primarily used to satisfy the Court's daily operational needs, and to cover such expenses as rent, communication and utility expenses, contract services, equipment, furniture, supplies, subscriptions, travel and transportation, and printing expenses. These expenditures allow the Court to maintain all of its essential service agreements, and support enhanced IT initiatives aimed at stability and security. The decrease in Other Objects for FY 2020 results primarily from a one-time credit from the General Services Administration (GSA) attributable to the renewal of the Court's commercial office lease. Included in the Other Objects request for FY 2020 is \$800,000. This figure reflects GSA's estimate of the funding needed for site search, assessment, and the initial planning and design of a Veterans Courthouse.

For FY 2020, the Court requests \$3,000,000 to be used for the statutorily required contribution to the Court of Appeals for Veterans Claims Retirement Fund (Retirement Fund). Per title 38 U.S. Code, section 7298, the Chief Judge of the Court is charged with securing an "annual estimate of the expenditures and appropriations necessary for the maintenance and operation of the fund." The Court contracts with an actuary to provide guidance on how best to comply with obligations related to maintaining the Retirement Fund, and the FY 2020 budget estimate, unchanged from FY 2019, is based on that actuarial estimate.

II. The Court's Caseload and Operations

As many of you know, the veterans' benefits process, administered by the Department of Veterans Affairs (VA), operated for many years without any right by a veteran to independent judicial review of a decision by VA on a claim.

In 1988, Congress established the U.S. Court of Veterans Appeals, now the U.S. Court of Appeals for Veterans Claims, as a national appellate court that would provide independent judicial review to final agency decisions of veterans benefits cases. This year marks 30 years since the Court first opened its doors, and we are busier today than we have ever been.

In brief, a claim for veterans benefits proceeds as follows: A veteran or qualifying family member files a claim with VA. The VA claims process is designed as a paternalistic one, and the Secretary is charged with assisting the claimant to substantiate his or her claim by gathering evidence and providing medical examinations when needed. If dissatisfied with the initial decision, the claimant may seek additional review that includes an appeal to the Board of Veterans' Appeals (Board). The Board is an independent adjudicative body within VA, and following any adverse decision by the Board, the claimant may seek appellate review at the Court as a matter of right. At this point, the claimant leaves the paternalistic agency claims process and enters the traditional, adversarial realm of judicial review.

An appeal is initiated at the Court by filing a notice of appeal. After identifying and assembling the record upon which the appeal is based, the parties generally participate in a pre-briefing staff conference with an attorney from the Court's Central Legal Staff (CLS). The CLS attorney's role is to work with the parties to refine the contested issues, and when possible to assist the parties in reaching a mutually agreed upon resolution of the matter prior to involvement by a

judge – generally a joint agreement to set aside the Board decision and remand the case to the Board for further development and readjudication.

If the case cannot be resolved, the parties prepare written briefs, and may request oral argument before the Court. Once all briefs are filed, the appeal is forwarded to a judge for decision. The assigned judge, with the assistance of law clerks, reviews the case to consider whether it presents a novel issue requiring a panel decision or whether it involves the application of settled law. If the former, the case is assigned to a panel of three judges who decide the matter with or without oral argument by the parties. If the case involves the application of settled law to the facts, a single judge is permitted to decide the case and issue a memorandum decision.

Prior to issuance, all decisions are circulated among all of the judges for review, and in the case of single-judge decisions, any two judges may call the case for panel review and a panel is thereafter assigned to decide the appeal. This process is designed to foster uniformity in the application of the law. Circulating decisions of panels may be called for consideration by the full court when it is believed that the proposed opinion addresses issues of exceptional importance or creates a conflict in the Court's jurisprudence that must be resolved by the Court as a whole. Further, either party may request reconsideration and/or panel review of a single-judge decision once it is issued.

Following a final decision of our Court, an additional appeal to the U.S. Court of Appeals for the Federal Circuit may be filed. The Federal Circuit has limited jurisdiction and may review questions of law but not application of law to facts. Following review in the Federal Circuit, either party may seek review by the U.S. Supreme Court.

Since its creation in 1988, the Court has become one of the busiest federal appellate courts based on the numbers of appeals filed and decided per judge. From FY 1999 through FY 2004, when the Court had seven judges, approximately 200 cases per month were filed at the Court, or roughly 2,400 appeals annually. Since FY 2008, the Court has averaged 376 cases filed per month and, in December 2009, the Court's active judge authorization was temporarily increased to nine judges to respond to significant caseload increases. In FY 2018, the cases filed at the Court surged dramatically and we saw 6,802 appeals filed in FY 2018, up from 4,040 the year before. In fact, FY 2018 started with 591 appeals filed in October 2017, which at that time was the highest number of appeals filed in a single month since the Court was created. That number was exceeded when fourth quarter filings averaged over 634 cases per month. Thus far in FY 2019, the Court is averaging 638 appeals filed per month, putting us on a trajectory to significantly exceed last year.

We are watching our caseload numbers carefully and acknowledging the very real possibility that nine judges may not be sufficient to keep pace with this growth trend. We are at this time, however, most appreciative to be operating at full judicial strength with nine active judges and fully staffed chambers. Their collective effort, plus the assistance of our Senior Judges, and the significant increase in the percentage of cases resolved through the mandatory pre-briefing conferences, allowed us to keep pace with the unprecedented caseload we are experiencing. Thank you for your ongoing support of our mission to provide full, fair, and prompt judicial review of veterans' claims.

As already noted, Judge Schoelen and I will retire this coming December 2019 when our judicial terms conclude. In advance, I ask for your support in promptly filling those vacancies, and perhaps in adding additional judgeships should the current caseload trends continue. The Board of

Veterans' Appeals continues to expand its staff with a goal of accelerating the rate and number of claims it decides. The significant increase in the number of cases the Board decided last year (85,288 in FY 2018 compared to 52,661 in FY 2017) certainly contributed to the surge the Court experienced. The impact of the Veterans Appeals Improvement and Modernization Act of 2017 has yet to be felt, but we are mindful that it may increase the efficiency of the Board in processing appeals, which may in turn increase the number of appeals to the Court. We expect to remain extremely busy and we ask for your assistance in ensuring that the Court may continue to operate efficiently.

III. The Veterans Courthouse Project

Nineteen years ago, the Court's then Chief Judge, the Honorable Kenneth Kramer, met with the Architect of the Capitol to request a site for a Veterans Courthouse. That conversation marked the beginning of what has become a decades-long effort to secure a permanent location for the Court. To be clear, our Court has perfectly acceptable office space and accommodations. But our nation's veterans have been asking for a veterans courthouse for years, and we stand with them in support of that request. As noted above, as part of the Court's FY 2020 budget request we are seeking \$800,000 for expenses associated with obtaining a courthouse.

Courthouses are not just offices, and finding the appropriate setting for one is challenging in an urban location. A courthouse has great symbolic significance. It expresses solemnity, stability, and the values of a nation, as well as the importance it sees in fairness, justice, and the rule of law. A National Veterans Courthouse would demonstrate America's honor and respect for that special class of people who have served in its defense. Congress recognized this need fifteen years ago, when in 2004 Congress expressed its intent to build a "dedicated courthouse []

symbolically significant of the high esteem the Nation holds for its veterans [that would] express the gratitude and respect of the Nation for the sacrifices of those serving and those who have served in the Armed Forces, and their families." (House Report 3936 (2004)). We continue to try and answer this call.

Over the past 19 years, various feasibility studies have been performed to identify and quantify the needs of the Court, and potential locations have been identified and pursued. Unfortunately, due to countless causes and circumstances, none of these efforts proved fruitful. Two years ago, the Court again heard the veterans community speaking out for a courthouse, and we made a concerted effort to renew our search for the right building and location. We were enthusiastic about a vacant federal building on Constitution Avenue in Washington, DC, that had been presented to us as a possible location by GSA. Although we felt that that location was ideal and for many reasons a perfect fit for a Veterans Courthouse, unfortunately that property was ultimately transferred to another government entity. We continue to search for an appropriate permanent location and are pursuing various avenues, including working with GSA to explore potential options. We will keep Congress updated on those efforts and hope to garner your support once a preferred location is identified.

IV. Conclusion

On behalf of the judges and staff of the Court, I express my appreciation for your past and continued support, and for the opportunity to provide this testimony today.