

***TESTIMONY OF  
THE HONORABLE WILLIAM P. GREENE, JR., CHIEF JUDGE  
U.S. COURT OF APPEALS FOR VETERANS CLAIMS***



***FOR SUBMISSION TO THE  
UNITED STATES SENATE  
COMMITTEE ON VETERANS' AFFAIRS  
NOVEMBER 7, 2007***

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**THE HONORABLE CHIEF JUDGE WILLIAM P. GREENE, JR.**  
**UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS**  
**BEFORE THE**  
**UNITED STATES SENATE COMMITTEE ON VETERANS' AFFAIRS**  
**NOVEMBER 7, 2007**

**MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:**

Thank you for the opportunity to testify today. As the Chief Judge of the U.S. Court of Appeals for Veterans Claims, I exercise responsibilities as the Chief Administrative Officer of the Court. It is in that capacity that I welcome this chance to continue a very important dialogue with the Committee on the challenges currently facing the Court. Mr. Chairman, as you have pointed out several times in our communications and conversations, it is critical that we work together to promote a discourse between legislative and judicial entities to ensure that the proper resources are provided to enable the Court to carry out its judicial responsibilities. It is within that spirit of mutual cooperation that I depart from the normal custom of testifying generally only about budget matters and join you today to report on the significant measures that the Court has taken to enhance its abilities to meet the challenges of an ever-increasing appellate caseload, and to offer views on pending legislation that will impact the Court's operation.

**The Court's Caseload**

A few months ago Associate Professor Michael Allen of the Stetson University College of Law, when commenting on proposed changes to the Court's Rules of Practice and Procedure (Rules), observed that the U.S. Court of Appeals for Veterans Claims is one of the busiest federal appellate

courts nationwide. The following table reflects the trends from FY 1995 through FY 2006 for Board of Veterans' Appeals (BVA or Board) total denials and appeals and petitions to the Court:<sup>1</sup>

	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04	FY 05	FY 06
BVA												
Total	6407	10444	15865	15360	14881	14080	8514	8606	10228	9299	13033	18107
Denials												
Case												
USCAVC												
Filings to	1279	1629	2229	2371	2397	2442	2296	2150	2532	2234	3466	3729
Case												
Filings as	20.0%	15.0%	14.0%	15.4%	16.1%	17.3%	27.0%	25.0%	24.0%	24.2%	26.6%	20.6%
% of												
Denials												

Professor Allen pointed out that in fiscal year 2006, the Court received more new cases (3,729) than received by the following Circuit Courts of Appeal: First (with 1,852 cases), Seventh (3,634), Eighth (3,312), Tenth (2,742), District of Columbia (1,281), and Federal (1,772). With seven active judges, our Court's per-judge average yearly intake of 533 cases is about twice as many as the 263 average cases per judge for the Article III Circuit Courts of Appeal. Indeed, our caseload presents a significant challenge. Thank you for your past and continued support in our efforts to meet that challenge.

Since March 2006, I have provided to the Committee quarterly reports on the numbers of cases received and decided by the Court. These reports present a snapshot of the Court's caseload. The annual report, a reconciliation by the Clerk of the Court of the actual filings and dispositions, offers a more comprehensive and precise picture of the Court's yearly statistics. We have provided

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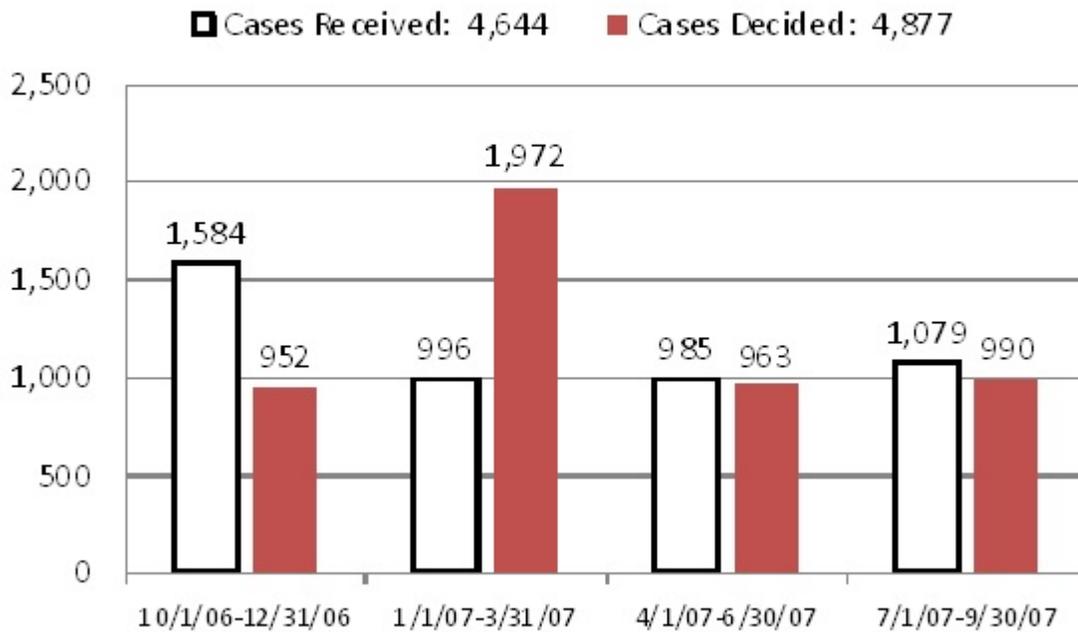
<sup>1</sup>This table and the graphs included throughout this testimony are reproduced in full size and included as attachments.

this report to the public for the past 20 years. Accordingly, we support S.1315, Title V, § 503, which recognizes the Court's current practice and should obviate the need for the quarterly reports.

The following chart shows the numbers of cases filed and cases decided for FY 2007. The 4,644 cases received and 4,877 cases decided in FY 2007 represent an all time record high for the Court.



### U.S. Court of Appeals for Veterans Claims Cases Received and Cases Decided October 1, 2006 to September 30, 2007



\*This report reflects the annual number of cases received and decided and the recalculation of previous quarterly report figures to correct discrepancies due to multiple filings on the same claim, and establishment of the appeal date based upon postmark

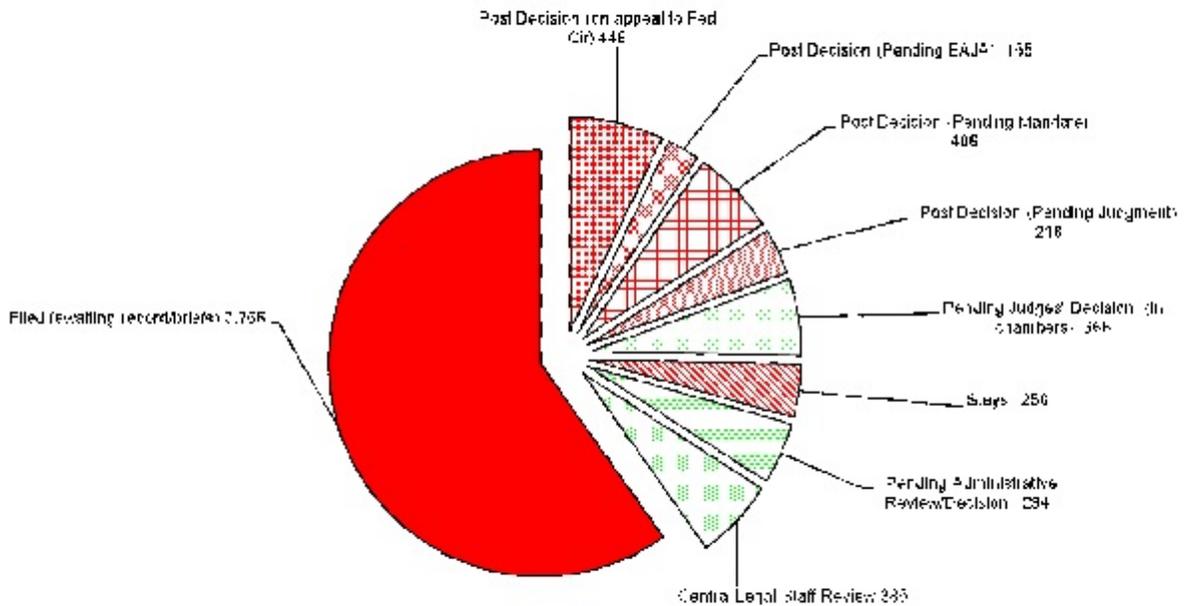
The growth in number of appeals filed may be attributed to several circumstances. Increased productivity of the Board of Veterans' Appeals, including a higher number of denials of benefits, produces more potential appeals to this Court. The number of distinct issues within a BVA decision is also on the rise. The emphasis and financial support the Senate and House Committees on Veterans' Affairs have placed toward increasing the numbers of personnel at the regional offices and Board, and toward improving claims processing times at the Department of Veterans Affairs (VA), inevitably have and will continue to lead to more decisions by the Board. Further, claimants are appealing not only total denials of benefits, but also Board decisions awarding benefits where the claimant believes that he or she should have been assigned a higher disability rating or earlier effective date for a benefit awarded. Public awareness of the Court, now in its twentieth year, coupled with the growing number of attorneys and non-attorney practitioners practicing veterans benefits law produces potentially more claimants becoming aware of and exercising their right to appeal. The recent enactment of legislation authorizing attorneys to charge a fee for representing claimants while a claim is being adjudicated at VA likely will further increase the number of cases with complex legal issues presented for appellate review.

## Meeting the Challenge of a Heavy Caseload

The following pie graph depicts the Court's case inventory as of October 30, 2007.



### U.S. Court of Appeals for Veterans Claims Caseload (as of October 30, 2007) Total: 6,294



Of the 6,294 cases in our inventory, 3,766 are being developed by the parties, i.e., the appeal has been filed and the parties have been ordered to file their appellate briefs. Conversely, 1,227 have already been decided but are temporarily kept in the Court's inventory for a variety of reasons (448 cases on appeal to the Federal Circuit, 155 cases pending action on Equal Access to Justice Act applications, 406 cases awaiting the time to run for mandate, and 218 cases awaiting the time to run

for entry of judgment). The remaining 256 cases are stayed upon request of the parties or awaiting disposition of the appeal in a related case; 385 cases are ready for review by the Court's Central Legal Staff (CLS); 366 cases are pending a decision by the judges; and 294 are pending action by the Clerk (either on a joint motion of the parties or awaiting a response to a motion for dismissal for jurisdictional reasons).

During my State of the Court Address at the Court's Ninth Judicial Conference in April 2006, as the Court's new Chief Judge, I identified several measures that I thought could assist us in handling a large caseload efficiently. Recalling retired judges was an obvious option, as was increasing the numbers of judicial law clerks per judge. During FY2007, five of the six retired recall-eligible judges were recalled for statutorily authorized 90-day periods and performed substantial service to the Court. The Court has also benefitted from the increase, to four, in the number of judicial law clerks each judge has to assist him or her in conducting judicial review and preparing decisions on cases, as well as an increased number of attorneys in our Central Legal Staff (CLS). We have gained judicial experience, with our four newest judges having each completed nearly three years on the bench. I am pleased to report that in FY 2007 the Court responded to the surge of appeals and decided a record high number of cases. I express my appreciation to the Committee for your continued support in assisting us to respond to our growing demands, and for ensuring that we have adequate resources to render thorough and timely judicial review.

There are other measures that are being implemented and considered that should further assist us in managing our increased caseload:

First, I announced at our Judicial Conference the Court's desire and intent to develop an electronic case filing/case management system. Electronic filing systems have proven effective in

administrative case management in many federal and state court jurisdictions. With the support of Congress, we received the resources to acquire such a system. The Court has partnered with the Administrative Office of the U.S. Courts to obtain and use the software and e-filing system already developed for Article III Courts. Indeed, 10 of the 13 Circuit Courts of Appeals now have that capability. This system promises to produce many administrative efficiencies, including complete remote record access, 24-hour filing access that will significantly reduce mailing/courier costs, reduction of space for record retention, opportunities for multiple or simultaneous authorized user access to records, and efficient and cost-effective electronic notification procedures. A committee comprised of Court personnel, VA staff, and members of the veterans' bar continue to shepherd this project and we are on target to implement the first phase of e-filing. This month, an order will be announced requiring attorneys to file electronically all Equal Access to Justice Applications and pleadings in support thereof. Full adoption and implementation of e-filing for all appellate pleadings is scheduled for June 2008.

Second, I have in the past discussed the possibility of the Court shifting from the current requirement of a Record on Appeal to a more condensed Joint Appendix. Pursuant to the Court's current Rules, prior to the submission of any briefs, the Secretary must file with the Court the designation of the Record on Appeal, which is to include all material in the record of proceedings before the Secretary and the Board that was relied upon by the Board in making the decision on appeal. Following the appellant's opportunity to counter-designate materials, the Secretary then transmits to the Court the Record on Appeal. Ninety days are allotted to accomplish this. In practice, the Record on Appeal is often voluminous and includes documents immaterial to the claim. On the other hand, a Joint Appendix is a condensed record on appeal, submitted to the Court after

briefing is completed, that is limited to those documents from the claims file or Record Before the Agency that are identified or relied upon by either the appellant or the Secretary as necessary for the Court to review in deciding the appeal. The Joint Appendix proposal is in the final stages of implementation; the Court's Rules Advisory Committee has recommended adoption of such procedure, and proposed Rule changes have been received and reviewed. We believe that use of a Joint Appendix will better focus appellate review on the documents relevant to the precise issues argued on appeal, and will decrease the amount of time needed to prepare an appeal for decision.

Third, through dispute-resolution efforts employed at pre-briefing conferences with the parties, the Court's Central Legal Staff has contributed to increasing the Court's case output. Again, I thank you for your support in authorizing an increase in the number of CLS attorneys for the Court. We are embracing dispute resolution as an important part of the Court's function and working to better assist the parties in narrowing and resolving issues prior to submitting their appellate pleadings. In August and September 2007, all attorneys assigned to CLS received formal mediation training that will better enable them to engage the parties in an effective negotiation process. Indeed, we want the parties coming to the table with full authority to commit to a thoughtful alternative resolution consistent with the law, due process, and the interests of justice. Toward this end, the Court's policy committee is currently drafting revisions to the Court's Rules which will clarify for the parties what is expected of them during pre-briefing mediation and conferencing.

Fourth, in appropriate cases where the appellant is represented, we are considering adopting a practice often used in other federal courts of summarily disposing of some cases without extensive explanation. The pros and cons of this option were considered at the Court's Bar and Bench Conference held in April 2007, and will be the subject of more discussion by the Board of Judges.

Summary disposition holds significant potential for moving simple, straightforward cases to a judicial decision quickly. A summary disposition states only the action of the court, without giving its rationale. For example, an order may state: "On consideration of the record on appeal and the briefs of the parties, the decision of the Board is hereby Affirmed/Reversed/Remanded." The decision could be explained to the appellant by his or her counsel. However, since the Court's inception, one of its hallmark policies has been to provide to a veteran an explanation of the reasons for the Court's decision. The benefits of that approach are obvious and we have adhered to that policy in disposing of single-judge matters, as well as in panel decisions. Summary action would be a departure from that practice but is an action worth considering in light of the dramatic increase in the number of appeals.

Furthering these initiatives should sustain our efforts in meeting the challenges of the increasing caseload. As I have stated many times in our discussions, we are constantly looking for ways to best meet the demands of an increased docket – but not at the expense of limiting due process or short-circuiting full and careful judicial review.

## **Comments on Pending Legislation**

### **S. 2090 – Limiting Access to the Record on Appeal to Protect Veterans' Privacy**

The Court is, by statute, a National "court of record." 38 U.S.C. § 7251. Generally, the law requires that "all decisions of the Court of Appeals for Veterans Claims and all briefs, motions, documents, and exhibits received by the Court . . . shall be public records open to the inspection of the public." 38 U.S.C. § 7268(a). Section 7268 also provides that "[t]he Court may make any

provision which is necessary to prevent the disclosure of confidential information, including a provision that any such document or information be placed under seal to be opened only as directed by the Court." 38 U.S.C. § 7268(b)(1). The Court has developed a process to seal, on its own, individual cases involving certain conditions. *See* 38 U.S.C. § 7332(a)(1). Moreover, motions by appellants to seal case records for good cause shown are routinely granted. Even where case records remain unsealed, public access to these records presently is limited to on-site review in the reading room of the Court's Public Office. However, with the Court's implementation of the e-filing of records, the present logistical limitation on access to unsealed records will not exist.

I have already highlighted the benefits of e-filing. Along with its benefits, however, e-filing potentially makes sensitive material in court records widely accessible. These records generally include appellants' Social Security information and medical records. As other federal courts implement e-filing, they too are attempting to achieve the balance between maintaining court records public while providing parties with protection from internet data mining and identity theft. The need to reach a balance is urgent. A Google search of the term "identity theft" produces more than 20,600,000 hits. Statistics made available by the U.S. Department of Justice, Secret Service, and Federal Trade Commission reveal that there are 700,000 instances of identity theft per year in the United States. Some veterans who filed copies of their DD-214 at local courthouses have already been targets of identity theft.

Under section 205(c)(3) of the E-Government Act of 2002 (Pub. L. No. 107-347, as amended by Pub. L. No. 108-281), the U.S. Supreme Court is granted authority to prescribe rules to address privacy and security concerns arising from electronic availability of records in the Article III Courts. Now pending before the Judicial Conference of the United States is proposed Rule 5.2 of the Federal

Rules of Civil Procedure to promote privacy and security. Civil Procedure Rule 5.2 would require parties to redact from paper and e-filings such information as Social Security numbers or tax identification numbers, the names of minors, birth dates, or financial account numbers (proposed Rule 25(a)(5) of the Federal Rules of Appellate Procedure would apply the privacy protection provisions of Civil Procedure Rule 5.2 to the Article III Courts of Appeals). However, redaction of records filed at this Court may not be the best approach. Records before this Court, culled from VA claims files, are rife with sensitive identification information, as well as personal health records and financial data. Redaction would not only be time consuming and burdensome for VA, the Court's appellants, or Court staff, but also the sheer number of redactions required would open the door to the possibility of some sensitive information inadvertently remaining unredacted.

The drafters of proposed Civil Procedure Rule 5.2, the Judicial Conference's Committee on Rules of Practice and Procedure (Committee), have recognized the special difficulty of adequately redacting sensitive information from Social Security appeals and immigration cases. The Committee noted in its report (referred to the Committee on the Judiciary on April 30, 2007) that the Social Security Administration and Department of Justice had requested that special treatment be given to these cases "due to the prevalence of sensitive information and volume of filings." Accordingly, proposed Civil Procedure Rule 5.2(c) would limit remote electronic access to the case file, including the administrative record in such a proceeding, to the parties and their attorneys. Remote electronic access to the record would be unavailable to any other person; however, the Court's docket, an opinion, order, judgment, or other disposition issued in the case would be publicly accessible. Access to the full case file would be available to a member of the public only at the courthouse.

Case files before this Court are analogous to those given special protection in proposed Civil Procedure Rule 5.2(c) in the prevalence of sensitive information and the relative volume of filings. At a minimum, they should be given the protection that will be accorded to Social Security actions and medical records under HIPPA. The Court is working to promulgate a Rule to effect this protection, but statutory recognition of this important issue would be welcomed. Therefore, I ask for the Committee's support in passing S. 2090 and amending 38 U.S.C. § 7268 to give the Court authority similar to that provided to the Article III courts pursuant to section 205(c)(3) of Pub. L. No. 107-347. Safeguarding appellants' personal information is highly important. The method to provide adequate protection will need to be carefully balanced with the benefits to be derived from electronic information transmission and storage, and with the Court's status as a "court of record."

#### **S. 2091 – Increase in the Number of Active Judges**

Great interest has been expressed in assuring that the Court has the ability to conduct effective, efficient, and expeditious judicial review. Your support in providing resources to handle a heavy caseload is very much appreciated. However, it is time to consider whether more must be done. As previously noted, in FY 2007 the Court received and decided the highest number of cases in its history. All of the Court's seven active judges now are experienced and their chambers are fully staffed; all five available recall-eligible judges provided substantial service to the Court during FY 2007. These factors have led to increased productivity, but new cases continue to arrive at an growing rate, and despite our success in increasing output, there remain over 4,000 cases pending before the Court. Thus, the need exists to increase, by two, the authorized number of active judges, and the Court supports passage of S. 2091.

If H.R. 2642, the 2008 Military Construction and Veterans Affairs Appropriations Bill, is enacted as presently written, the Veterans Benefits Administration of VA will be authorized to hire 1,100 additional staff members to process claims. In addition, the BVA anticipates approval for significant increases in attorneys and veterans law judges and support staff for FY 2008 and FY 2009. If this increased staffing is funded, the BVA expects to generate anywhere between 41,000 and 43,000 decisions in FY 2008, and even more in FY 2009. The BVA's number of total denials increased from 13,033 (out of 34,175 decisions) in FY 2005 to 18,107 (out of 39,076 decisions) in FY 2006, with appeals to the Court ranging from 20.6% to 26.6% of the denials. As already mentioned, as the number of BVA decisions and total denials increases, we expect the Court's incoming caseload to increase proportionally. It is therefore likely that the Court's case inventory will continue to grow unless the number of active judges is increased.

There are a number of reasons why FY 2008 is the critical time for increasing the authorization for active judges, and thus for supporting S. 2091. First, authorizing two more judges in FY 2008 would permit Congress to modify the number of judges in response to major workload shifts. Congress could reexamine the need for nine judges when the terms of two Judges expire in 2016. If at that time Congress determines that nine judges are no longer needed, those vacancies could simply not be filled. Second, all judges, except for me, complete their terms in either 2016 or 2019. Creating two new positions in FY 2008 would avoid a significant number of simultaneous vacancies followed by a period of time when a majority of the Court's judges would be new and unseasoned. This was, in fact, a cogent reason for the temporary authorization of nine judges between 2000-2004.<sup>2</sup> Third, any proposal to alter tenure or recall service in the future would not

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<sup>2</sup>See 38 U.S.C. § 7253(h).

have an impact until more judges retire. Indeed, I am the only judge eligible for retirement before 2016. No doubt, two additional active judges, once established, would significantly reduce the length of time that cases are pending at the Court.

**S. 1315 – Title V – § 502 Practice and Registration Fees**

The Court supports the provision in S. 1315, Title V, § 502 that amends section 7285(a) of title 38 of the U.S. Code. Currently, that statute limits the Court's registration and practice fee to \$30 per year. Section 502 of S. 1315 would eliminate the \$30 limit, and would give the Court discretion to impose a "reasonable" fee. The Court currently charges a one-time \$30 registration fee when a person is first admitted to practice as a member of its bar. The \$30 limit presently imposed makes this Court's registration and practice fee the second lowest of federal appellate courts, with only the U.S. Court of Appeals for the Seventh Circuit charging a lower fee (\$15). Various other federal appellate court practice fees are as follows: U.S. Courts of Appeals for the Fourth Circuit and Eleventh Circuit – \$170; U.S. Court of Appeals for the Federal Circuit – \$175; U.S. Courts of Appeals for the District of Columbia Circuit, Second Circuit, Third Circuit, Eighth Circuit, and Ninth Circuit – \$190; U.S. Courts of Appeals for the Fifth Circuit, Sixth Circuit, and Tenth Circuit – \$200. While the U.S. Tax Court and the U.S. Court of International Trade charge, respectively, \$35 and \$50 for admission to practice, the U.S. Court of Federal Claims charges \$250.

The Court is authorized to use the practice and registration fees to defray costs connected with conducting attorney disciplinary proceedings, the Court's judicial conferences and other Court continuing legal educational programs, and sponsoring public Court commemorations and other ceremonial events. The Court has a large bar that participates actively in these educational

opportunities. As with all things, the cost of supporting such events is increasing. Further, as more attorneys represent claimants at VA and continue their appeals to the Court, even if the percentage of disciplinary actions stays constant, we may face an increase in disciplinary proceedings. Through the reasonable assessment of these non-appropriated funds, the Court could continue timely investigations of disciplinary charges and provide quality educational events, both designed to improve the quality of practice before the Court. The initial admission-to-practice fees would be reasonably assessed to permit broad participation.

#### **S.1315 – Title V – § 504 Veterans Courthouse and Justice Center – GSA Feasibility Study**

The Court is continuing its efforts with the General Services Administration (GSA) to work towards making a Veterans Courthouse and Justice Center a reality. Our present space is inadequate for the type of caseload we are now experiencing and anticipate will continue. The current lease of the commercial building expires in October 2010, so there is some urgency to this effort, because 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.

On July 14, 2007, Court representatives met with representatives of GSA and their consultants, HOK Advance Strategies and Staubach Realty, and established a structure and timetable for the study that GSA is undertaking to determine the feasibility and cost effectiveness of converting 625 Indiana Avenue, NW, to a Veterans Courthouse and Justice Center. The study will conform to the GSA reporting requirements of the provisions of section 504 of S. 1315, should those provisions be enacted. As part of the study, GSA's consultants will meet with the federal tenants who occupy

the 3rd, 4th, 5th, 7th, and 8th floors of the Court's current building to gather data needed to analyze the impact on these tenants, their space needs, and costs involved. GSA and its consultants expect the study to be completed in December 2007. We appreciate the Committee's ongoing support in creating a tangible symbol of the Nation's commitment to justice for veterans.

### **Conclusion**

In conclusion, rest assured that no week at the Court goes by without a dialogue among the judges and staff on how to decide our veterans' cases efficiently and thoroughly. On behalf of the judges and staff of the Court, I express my appreciation to the Committee for your consideration of the Court's operational needs, and for your support on the pending legislation that will further our common goal of ensuring swift and sure justice for those who have borne the battle and served our Nation honorably.

# **Appendix**

**BOARD OF VETERANS' APPEALS**  
**DENIALS, APPEALS, PETITIONS**  
**TO THE**  
**US COURT OF APPEALS FOR VETERANS CLAIMS**  
**FY 1995 - FY 2006**

	<b>FY 95</b>	<b>FY 96</b>	<b>FY 97</b>	<b>FY 98</b>	<b>FY 99</b>	<b>FY 00</b>	<b>FY 01</b>	<b>FY 02</b>	<b>FY 03</b>	<b>FY 04</b>	<b>FY 05</b>	<b>FY 06</b>
BVA Total Denials	6407	10444	15865	15360	14881	14080	8514	8606	10228	9299	13033	18107
Case Filings to USCAVC	1279	1629	2229	2371	2397	2442	2296	2150	2532	2234	3466	3729
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