20TH ANNIVERSARY OF THE SIGNING OF THE
VETERANS JUDICIAL REVIEW ACT
TUESDAY, NOVEMBER 18, 2008
2:00 P.M.

Good Afternoon. The United States Court of Appeal for Veterans Claims is now in Ceremonial Session. I would like to thank all of you for coming to this very special event. My colleagues and I are glad to be here on this very historical moment. I am joined today by my active Judges, Judge Bruce Kasold, Judge Lawrence Hagel, Judge Bill Moorman, Judge Al Lance, Judge Robert Davis, and Judge Mary Schoelen, and two of our retired-recall Judges, Former Chief Judge Frank Nebeker and Former Chief Judge Don Ivers. Other retired-recall Judges could not be with us today but send their very best.

The Greek philosopher Plato is credited with saying: "The beginning is the most important part of the work." Today, my colleagues on the bench and I confirm that sentiment as we recognize the Court's 20th anniversary.

On Friday, November 18, 1988, President Ronald Reagan signed into law the Veterans' Judicial Review Act of 1988. That Act brought a sea change to the adjudication and judicial review of decisions by the Board of Veterans' Appeals on claims by veterans of our Nation's Armed Forces and other organizations. Indeed, for the first time in U.S. history, veterans were provided the right to judicial review of adverse decisions by VA concerning their claims for benefits. With the stroke of the President's pen, and sweep of the signatures of the Speaker of the House and the President Pro Tem of the Senate, the legislation displayed before you marked the end of a very long Congressional debate on how to modernize the administration of the veterans benefits system, a system that had enjoyed splendid isolation from any judicial review for a very long time. For sure, adjudications of claims for veterans' benefits had been around for a very long time. However, the authority inherent with those signatures established the beginning of judicial review of those adjudications by the U.S. Court of Veterans Appeals. Thus, there is cause to celebrate today the efforts of all who made the Veterans' Judicial Review Act a reality, and to recognize the twenty years of important work that the Court has done since that historic legal moment.

As background, I must clarify that our nation's concern with the well-being of its veterans is not a new concept. Since before the birth of our Nation, an eligible veteran could receive a yearly stipend by demonstrating to the legislature that he had a certificate of service from his commander. Benefits from a grateful Nation have been provided to disabled veterans of the Revolutionary War, the War of 1812, and the Mexican War.

And, near the end of the Civil War, President Lincoln, in his second inaugural address, implored Congress and the American people "to care for him who shall have borne the battle, and for his widow, and his orphan." Lincoln's words, and more importantly the enormous number of disabled veterans who emerged from the Civil War, captured the nation's mood and created the elaborate system of veterans benefits that exists in the United States today.

Since the Civil War, America's involvement in the Spanish-American War, World War I, World War II, the Korean and Vietnam conflicts, increased drastically the numbers of veterans claims for VA benefits and put enormous pressures on the way these claims were decided.. Early on, in the 19th century, the responsibility for veterans' benefits claims was assumed by agencies such as the Bureau of Pensions as part of the Department of War; and later the Bureau of War Risk Insurance and the Federal Board of Vocational Education. After World War I, the Veterans Bureau was given responsibility for providing these benefits.

In 1930, President Hoover and Congress consolidated the Veterans Bureau, the Bureau of Pensions, and the National Home for Disabled Volunteer Soldiers into one agency – the Veterans Administration (VA). Despite many statutory changes involving compensation and benefits for veterans, the core of our Nation’s commitment to its veterans remains the same.

Although America was committed to taking care of her veterans, veterans faced challenges in pursuing their claims. Before the Veterans' Judicial Review Act, a veteran would file a claim at one of the VA's 58 regional offices and there a three-member panel composed of a medical, a legal, and an occupational specialist would evaluate the claim and the degree of disability. Only the veteran appeared before the panel-no representative from VA-and the panel was required to consider all evidence proffered by the veteran and to offer assistance in developing the claim. No formal rules of evidence applied, and the panel was required to resolve any doubts in the veteran's favor. If the panel denied the claim, the veteran could disagree and ask the Board of Veterans' Appeals to review

the merits of the decision. But, because Board decisions could not be judicially reviewed, those decisions became final.

There also existed limits on the assistance a veteran could obtain in filing a claim. A Civil War-era statute placed a limit on fees that could be charged for work done by lawyers or other claimants representatives before the Government and made a violation of that law a federal criminal offense, punishable by a maximum sentence of two years imprisonment at "hard labor." A statement made in connection with a 1918 amendment to the War-Risk Insurance Act, increasing the fee limit from $3 to $5, makes clear that Congress's intent was to protect veterans from the predatory practices of unscrupulous claims agents and lawyers. Thus, the fee prohibition was aimed at protecting veterans from the perceived threat of greedy attorneys and was based on the perception that because the VA proceedings are non-adversarial, retaining counsel was unnecessary. This fee limitation rose to $10 and then remained untouched for over 100 years. Fortunately, however, veterans could obtain help and advice from veterans service organizations free of charge.

Philosophically, a grateful nation intended that veterans benefits would be adjudicated in a uniquely pro-veteran, non-adversarial way. VA was required to assist veterans with developing their claims. Veterans service organizations were given special liaison roles to aid in assuring that assistance. But, decisions by the Board of Veterans' Appeals, the final step in the agency review, still remained immune from judicial review.

Consequently, there began an intense debate about whether VA adjudications would benefit from judicial review. Some believed that the non-adversarial nature of VA's dealings with veterans would be destroyed by judicial review. Others argued that veterans, a uniquely honored group of Americans, deserved the same opportunity for independent appellate review that applied to other agencies deciding claims for federal benefits. There were many differing views expressed on how to best "care for those who had borne the battle."

Beginning in the 1950s, several pieces of legislation authorizing judicial review of VA decisions were introduced. These bills, however, never gained support, even when the Administrative Procedure Act (APA) mandated judicial review of decisions of virtually all other federal agencies. Advocates for change argued that statutes precluding judicial review of VA decisions needed to give way to more modern concepts of administrative procedure and judicial

review and the principles that underlie them–equitable treatment, consistency, and agency adherence to statutory and constitutional mandates. Those who resisted change maintained that the benevolent VA adjudication process and the medical complexity of many of the claims were areas not suited for review by judges.

The debate during the 1960s continued. A bill was reported that would have created a 5-judge court that could appoint up to 50 commissioners to conduct hearings on VA benefits and make recommendations to the court. That bill was unsuccessful. Meanwhile, hearings and discussions were conducted to propose changes that would ensure that VA was acting accurately and fairly when adjudicating claims. Laws were passed requiring the Board to make findings of fact and conclusions of law and for the VA regional office to prepare a statement of the case when a veteran disagreed with a benefits decision. Legislative history reveals that many in Congress feared that providing for judicial review of VA claims decisions would overburden the judiciary, and that review of claims for benefits rested properly on the shoulders of the popularly elected branches of government.

While Congress was considering legislation to address judicial review, courts were doing what they do and addressing challenges on the ban on judicial review. In the late 1950s the United States Court of Appeals for the District of Columbia Circuit ruled that the preclusion statutes applied only to decisions on an initial claim for veterans benefits, and thus did not preclude review of challenges to VA decisions to discontinue benefits. Despite that decision and the call for judicial review, Congress amended the veterans claims statutes to specifically preclude review of any decisions "on any question of law or fact under any law administered by the Veterans Administration."

In contrast, various provisions addressing judicial review were discussed by Congress in the 1970s, and in 1980, the Senate passed a bill that would give U.S. district courts the authority to review VA decisions. Considering the large number of appeals that these courts would receive, and the courts being courts of general jurisdiction, it was apparent that that bill too would be unsuccessful. One large obstacle toward reaching any agreement was that there was no consensus among the national veterans organizations on the best way to accomplish review of VA's decisions. Indeed, even VA changed its position on whether it advocated judicial review, generally speaking

out against it, then in 1980 stating that it would not object if Congress wished to remove the bar on judicial review. That position, however, was short-lived. In 1983, VA returned to its earlier opposition to judicial review.

By the mid-1980s, the rumblings for judicial review became louder and Congress became more engaged and willing to move in that direction. VA began receiving waves of claims and with a rise in adjudications, there grew more denials and accompanying discontent with the process. Many bills proposed judicial review, but Congress was adamant about maintaining a non-adversarial system for veterans benefits.

The House wanted to model the Board of Veterans' Appeals into a Court similar to the Court of Military Appeals and the Tax Court. Such court would have had a chief judge, 2 deputy chief judges, and not more than 62 associate judges. It would have been authorized to employ medical advisors and employ hearing officers to take testimony and evidence and make recommendations to the Court. There would not be any requirement to give deference to VA decisions, and the court could have substituted its judgment for that of VA decision makers. The chief judge alone could call for the court to review decisions by a panel or a single judge. Everything then at the Board would be transferred to the Court. The Senate's approach was a little simpler. The Senate felt that Board decisions should be reviewed by Article III courts. There was a compromise! Congress passed legislation establishing an Article I national court of record to exercise exclusive jurisdiction in reviewing adverse decisions made by the Board of Veterans' Appeals.

Thus in 1988, two things happened on Capitol Hill that would change the legal landscape on veterans benefits. One, Congress enacted the Department of Veterans Affairs Act, creating the cabinet-level Department of Veterans Affairs. By elevating VA and giving it a seat at the President's table, Congress sent a message that it had heard the chorus for change and was ready to act for veterans. Congress recognized the shortcomings of the claims system and acted to give VA a new organizational structure that would enhance its accountability. Second, Congress also recognized that changing VA was not enough and that veterans deserved a way to have their voices heard beyond the decisions of the Board of Veterans' Appeals. In response to the vast number of claims being filed by veterans and the need for consistency in the decision-making process, Congress thus enacted the Veterans' Judicial Review Act.

The Act made four important changes to the VA claims processing system. First and foremost, it repealed the law that precluded judicial review of individual cases. Next, it lifted the $10 attorney's fee cap imposed by the Civil War-era legislation. Third, it created the U.S. Court of Veterans Appeals. Fourth, the Veterans' Judicial Review Act provided a level of judicial review beyond the Article I court level. There would be an appeal by right on certain narrow issues of law to the U.S. Court of Appeals for the Federal Circuit; and of course, a veteran could seek certiorari at the U.S. Supreme Court.

Today our Court enjoys unique statutory authorization to consider and decide cases by single judge, as well as in panels or en banc. *See* 38 U.S.C. § 7254(b). It seems that Congress invested the Court with single-judge decision authority because it was fairly certain that a considerable volume of appeals awaited the Court's creation. When the statute passed, it was anticipated that as many as 7,500 appeals might be filed annually. That dire prediction has not yet come to pass, although we are clearly on a steady climb. From 1991 to 2008, we have gone from receiving around 2,223 cases to a high of 4,644 in 2007. In 2008, we received 4,128 cases, which really represents our highest number of cases because in 2007 there were over 900 to 1,000 cases involving the same issue. So we are at that juncture after 20 years of jurisprudence for veterans law. Our trailblazers, the first seven judges who were appointed to this Court, did a magnificent job in laying the groundwork for judicial review of these decisions.

What is certain is that with the Nation currently in two wars and as our national security missions become more complex, there will remain an ever-increasing opportunity for our Nation's sons and daughters who as veterans will seek the benefits promised them for their faithful service. The responsibilities of this Court will remain to keep vigil watch over the legal process engaged to provide those benefits by ensuring that independent judicial review will be provided to those individuals in the way that it was contemplated 20 years ago.

On behalf of my colleagues here on the Court, I want to thank each and every one of you for the good and great work you do each and every day in making veterans law the reality that it was intended from 1988. Our challenges are great as we move forward in the next 20 years, and I must say that this is the beginning of two celebrations. The first, of course, was today to recognize the

passing of the Veterans' Judicial Review Act and the next celebration will be in October of 2009, when we will assemble again to recognize the convening of the first three judges of the Court, where the Court in fact first opened its doors and heard its first case. To all of you, thank you for the outstanding work that you do, and we look forward to greeting you personally, which will follow this session. Thank you very much.

The Court will stand adjourned.