LEGISLATIVE HEARING ON H.R. 761, H.R. 2243, H.R. 3485, H.R. 3544, AND DRAFT LEGISLATION

HEARING

BEFORE THE

SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS

OF THE

COMMITTEE ON VETERANS' AFFAIRS
U.S. HOUSE OF REPRESENTATIVES

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CONTENTS

October 8, 2009

Page

SUBMISSIONS FOR THE RECORD

LEGISLATIVE HEARING ON H.R. 761, H.R. 2243, H.R. 3485, H.R. 3544, AND DRAFT LEGISLATION

THURSDAY, OCTOBER 8, 2009

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON VETERANS' AFFAIRS,
SUBCOMMITTEE ON DISABILITY ASSISTANCE
AND MEMORIAL AFFAIRS,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:02 a.m., in Room 334, Cannon House Office Building, Hon. John Hall [Chairman of the Subcommittee] presiding.

Present: Representatives Rodriguez, Lamborn, and Miller of Florida.

OPENING STATEMENT OF CHAIRMAN HALL

Mr. HALL. Good morning ladies and gentlemen, the Committee on Veterans' Affairs, Subcommittee on Disability Assistance and Memorial Affairs legislative hearing on H.R. 761, H.R. 2243, H.R. 3485, H.R. 3544, and draft legislation will now come to order. I would ask everyone to rise for the pledge of allegiance.

[Pledge of Allegiance.]

Mr. HALL. Thank you. I would first like to thank all of the witnesses in advance for your testimony on these five insightful and critical bills concerning memorial benefits, survivor benefits, income exemptions for receipt of the non-service-connected pension, the U.S. Department of Veterans Affairs (VA) claims processing and appeals systems and the jurisdiction of the U.S. Court of Appeals for Veterans Claims (CAVC).

I would also like to recognize a distinguished group of residential management fellows who are here from VA working with the Veterans Benefit Administration (VBA) and two veterans among them. Welcome all, thank you for your service to your country and your service to our veterans.

I would especially like to thank my colleagues, Mr. Filner, the Chairman of the full Committee, Ranking Member Buyer, Mr. Frank, and Mr. Higgins for joining us today. Mr. Higgins I see is here already.

Two of the bills that we will consider today address memorial affairs issues. First, the "National Cemeteries Expansion Act of 2009," H.R. 3544, authored by the Chairman of the full VA Committee, Bob Filner, which would require the Secretary of VA to change its national cemetery establishment requirements of 170,000 veterans in a 75-mile radius to 110,000 veterans in a 75-mile radius.

We will also consider H.R. 731, authored by Congressman Frank that would allow surviving parents to be buried with their fallen son or daughter if no other dependent is eligible for this honor.

Both of these bills also underscore how important it is that we honor our veterans' service and sacrifice, as well as the often silent sacrifice of their survivors.

In H.R. 2243, we will also consider the appropriateness of our current level of Dependency and Indemnity Compensation, or DIC, paid to our survivors, as well as the longstanding SPB/DIC offset. I look forward to hearing from Mr. Buyer on his progress with this legislation.

We will also hear from Congressman Higgins, who is trying to make a difference for blinded veterans in our State of New York with his bill, the "Veterans Pension Protection Act," H.R. 3485.

And last, we will look at draft legislation currently entitled the "Veterans Appellate Review Modernization Act." The provisions of this draft aim to continue the process started with H.R. 5892, now incorporated into law in Public Law 110–389, and to start again the process of making positive changes to the way our veterans' claims and appeals are handled by the VBA, the Appeals Management Center (AMC), the Board of Veterans' Appeals (BVA), and the Court of Appeals for Veterans Claims.

Additionally, this bill would also establish a Commission to examine some of the overarching and longstanding judicial and administrative issues that contribute to what many refer to as the "hamster wheel." I look forward to delving again—I am sorry we have to do it—but I am glad that we are going to look again into these issues with all of the stakeholders in a bipartisan manner.

We have a full agenda today. I know Members are double- and triple-booked, so I will now recognize Ranking Member Lamborn for his opening statement.

[The prepared statement of Chairman Hall appears on p. 38.]

OPENING STATEMENT OF CONGRESSMAN LAMBORN

Mr. LAMBORN. Thank you, Mr. Chairman for yielding, and thank you for the opportunity to discuss the bills before us this morning.

I will start with H.R. 2243, a bill introduced by Ranking Member Buyer to increase Dependency and Indemnity Compensation, DIC, for surviving spouses and dependent children of seriously disabled veterans and military personnel who died while on active duty. The Surviving Spouses Equity Act would base the rate of DIC on an amount equal to 55 percent of the amount of compensation paid to a totally disabled veteran. The 55 percent ratio is what our government pays to dependent survivors of Federal civilian employees who are killed while performing their duties. The current rate of basic DIC is only about 41 percent of the compensation paid to a totally disabled veteran.

While their sacrifices are not readily discernible, spouses of seriously disabled veterans often limit their own careers and other opportunities to serve as caregivers. Consequently these selfless individuals may not reach the level of financial independence they would have otherwise attained.

Our government should compensate surviving spouses of military personnel and seriously disabled veterans at the same rate it com-

pensates dependent survivors of Federal civilian employees. This inequity should not be allowed to continue.

H.R. 3485, the "Veterans Pensions Protection Act," would exclude from consideration as income for VA pension purposes any money paid to a veteran from a State or municipality as a veterans benefit. VA pension is a benefit paid to wartime veterans who have limited or no income and who are age 65 or older, or if under 65, are permanently and totally disabled.

Because eligibility criteria are in part income-based, a veterans' income and net worth are determining factors. There are exclusions to what is considered countable income such as Supplemental Security Income, SSI, and this bill would add State veterans benefits to that list. And I look forward to discussing the merits of this bill in further detail and hearing from our colleague about that.

H.R. 761 would extend eligibility for burial in a national cemetery to the parents of certain veterans, provided that space is available and that the veteran does not have a spouse or child who has been buried or would be eligible.

H.R. 3544, the "National Cemeteries Expansion Act of 2009," would provide new guidelines governing the location of new national cemeteries established by VA.

Finally we will discuss a draft bill, the "Veterans Appellate Review Modernization Act," which would make several changes to the appeals process both at the Board of Veterans' Appeal and at the U.S. Court of Appeals for Veterans Claims.

Mr. Chairman, as you know we have been working on a very similar bill, and I think there are some worthy provisions in both measures. I very much look forward to working with you in a bipartisan manner to resolve any differences, and more importantly to identify our mutual goals to improve the accuracy and timeliness of the claims adjudication system and to move this legislation forward.

Thank you, and I yield back.

[The prepared statement of Congressman Lamborn appears on p. 38.]

Mr. HALL. Thank you, Mr. Lamborn, and I too look forward to working on that project with you and combining the best attributes of our legislation.

I would like to remind all of our panelists that your complete written statements have been made a part of the hearing record.

Mr. Rodriguez, would you like to make a statement now? Okay. Sorry, I forgot to ask you first.

Please limit your remarks to 5 minutes so that we may have sufficient time for follow-up questions once everyone has had the opportunity to testify.

Our first panel we will actually take in two pieces here since Mr. Frank is not here yet. We will first recognize the Honorable Brian Higgins, United States Representative from New York to speak about his legislation.

Mr. Higgins, you are now recognized.

STATEMENT OF HON. BRIAN HIGGINS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. HIGGINS. Thank you, Mr. Chairman and Ranking Member Lamborn, and Mr. Rodriguez. From the founding of our country after the Revolutionary War our government has provided benefits to American veterans in appreciation for their service. Unfortunately, despite Congress' best intentions to provide benefits for those who have served our country, current law unintentionally shortchanges some of our most vulnerable combat veterans.

New York, Massachusetts, Pennsylvania, and New Jersey provide an annuity to blind veterans to help them cope with the difficulties that come with blindness; however, the Department of Veterans Affairs counts this annuity as income and reduces veterans' pension benefits by an amount equal to the annuity. I believe this to be morally wrong and fundamentally unfair.

It is true that this is a small program. In New York the annuity adds 4,484 blind veterans and costs $5.7 million per year, but that does not make this reduction any less unjust. Our veterans should not have their benefits reduced because the State of New York has chosen to provide additional assistance. This reduction is both a drain on State funds and an insult to the disabled veterans.

The reduction of the Blind Veterans Annuity represents what I believe to be an unintentional flaw in how veterans' benefits are provided.

First, the current system favors non-combat veterans over combat veterans. The Veterans Pension Program is restricted to low income elderly or disabled veterans who have served in combat. Non-combat veterans, along with low-income elderly or disabled Americans, qualify for Supplemental Security Income. The Veterans Pension is more generous than the civilian alternative, because it is intended to reward combat veterans for their service; however, differences in the two programs' rules have effectively made it so that some non-combat veterans are treated more favorably than combat veterans.

The 110th Congress passed Public Law 110–245, which allows non-combat veterans to receive benefits from State and local governments without a reduction. This bill was considered by the Ways and Means Committee and did not address the veterans pension offsets, which is in the jurisdiction of the Committee on Veterans' Affairs. Until the offset by the Department of Veterans Affairs is addressed, the law will continue to effectively favor non-combat veterans over low-income elderly and disabled combat veterans.

I would like to point out that under current law, a private foundation can offer the exact same benefit to a Blind Veterans Annuity without any negative effect on the veteran's pension; however, if a State or local government offers these benefits, they are offset. This inequality discourages States from providing aid to low income veterans.

We should be encouraging States and local governments to help veterans, and that is why I have introduced H.R. 3485, the "Veterans Pensions Protection Act." This bill would allow combat veterans to receive the same benefit that non-combat veterans were able to receive with the passage of Public Law 110–245 in the

110th Congress. It would allow States and local governments to offer benefits to veterans without adversely effecting the payments of benefits under the veterans' pension program.

The immediate impact of this legislation in the States of New York, New Jersey, Massachusetts, and Pennsylvania would be to allow State benefits for blind veterans to fully benefit all recipients without being reduced by the Department of Veterans Affairs. These annuities are clearly meant as a gift to help prevent blind veterans from falling into poverty in appreciation for their service to this Nation. These should not be considered additional income by the Department of Veterans Affairs, but instead a special disability benefit for their service to a grateful Nation. This penalty should be removed.

I would like to thank you again, Mr. Chairman, Chairman Hall, for support of the "Veterans Pensions Protection Act" and his continued commitment to helping veterans in New York State and throughout the country.

I would also like to thank Congressmen Joe Crowley, Maurice Hinchey, and Chris Lee who have cosponsored this legislation and who have been leaders in the effort to improve the lives of American veterans.

Finally, I would like to thank Tom Zampieri, the Blind Veterans Association for bringing this issue to my attention and for their support for the Veterans Pensions Protection Act.

Congressman Christopher Lee has written a statement in support of this legislation, and I ask that that be included in the record. Thank you.

[The prepared statement of Congressman Higgins appears on p. 39.]

[The prepared statement of Congressman Lee appears on p. 69.]

Mr. HALL. Thank you, Mr. Higgins. Just briefly a couple of questions. Is it the intent of your bill to allow blinded veterans who are receiving the non-service-connected pension to also receive benefits from States and municipalities without an offset?

Mr. HIGGINS. It is.

Mr. HALL. The States of Massachusetts, New Jersey, and Pennsylvania also provide annuities to some of their non-service-connected veterans. Have members from those States worked with you on this legislation?

Mr. HIGGINS. They have.

Mr. HALL. Well, it is a valuable and important piece of work and I thank you for bringing it forward. And I would recognize Mr. Lamborn for any questions.

Mr. LAMBORN. Thank you, Mr. Chairman. I think this legislation speaks for itself, and so I don't have any questions. You have done a good job of explaining it.

As a housekeeping matter, Mr. Chairman, I would like to note that we are joined this morning by my colleague, Representative Jeff Miller of Florida, and he will be submitting an opening statement for the record.

[No statement was submitted.]

Mr. HALL. Mr. Rodriguez?

Mr. RODRIGUEZ. Let me just go ahead and thank you Congressman for submitting that. I know we have some problems with some

other offsets that occur, and hopefully eventually, we will deal with those and correct them because I know that is a difficult problem. Do we know or do we have the anticipated costs of what would be those offsets right off?

Mr. HIGGINS. The Congressional Budget Office (CBO) has not scored this; however, a similar bill by Mr. Rangel provides, I think, instructive information as to what the cost of this would be, and I think given the enormity of the obligation that we have, I think that cost is minimal.

Mr. RODRIGUEZ. Thank you very much, and I agree with you.

Mr. HIGGINS. Thank you.

Mr. HALL. Mr. Miller, would you like to make a comment or question?

Mr. MILLER. No, thank you.

Mr. HALL. Thank you, Mr. Higgins. Your bill will be given the most serious consideration by this Subcommittee, and we appreciate your testimony.

Mr. HIGGINS. Thank you.

Mr. HALL. You are now excused and free to run around to the rest of your appointments.

Mr. HIGGINS. Thank you, Mr. Chairman.

Mr. HALL. Thank you. Mr. Frank, we hear, is on his way. He is here, not just to represent the legislation, but to accompany Ms. Denise Anderson, a Gold Star Mother. Ms. Anderson, would you like to come up to the table—since Mr. Frank is not—I don't believe he is here yet, but please come and have a seat. Thank you. You are recognized for 5 minutes if you wish to speak to us about the legislation in question.

STATEMENT OF DENISE ANDERSON, MANSFIELD, MA (GOLD STAR MOTHER)

Ms. ANDERSON. I stand before you humbly asking you to amend this bill. This bill will allow me to be interred with my son who was killed in action in Mosul, Iraq. He sacrificed his life for his country, and I sacrifice every day without him.

My son had a big heart, as big as the world. He would be the first one to volunteer or help someone in need, but he would always hesitate to ask for help. He was a lot like me in that way, but today I show my passion for this bill by standing in front of you asking you for your help.

If you knew my son, you would understand what kind of person he was. He was a very respectful young man who would do anything for anybody, his heart and soul, and I cannot express the bond between us. If you had children you might understand, but losing a child is against nature. He should be burying me.

My son was killed by an Iraqi soldier. This soldier was supposed to be working with our troops over in Iraq. He was an Iraqi soldier for 4 years turning against our soldiers. On that terrible day he killed two soldiers, including my son, and wounded six others.

I was not home when the Army came to my door, but my 18-year-old daughter was. She is a very intelligent person and knew why they were there. She called me not telling what was going on, which was probably a good thing, but when I arrived home in

Mansfield, the Mansfield police were there and the Army vehicle was parked in front of my home.

My son had only 1 month left on his tour and he would have been home. After passing out, the police called the paramedics and took me to the hospital. The whole town came together for Corey. They were so involved with the funeral and it was very heartfelt. My son was the only person, and hopefully only soldier from Mansfield that was killed during this war. He is a Mansfield's hero and also an American hero.

I belong to the Veterans of Foreign Wars in Mansfield, and I have spoken to many veterans that are members, and they don't have a problem with me being interred with my son. In fact, everyone I spoke to does not have a problem. He was not married and nor did he have any dependents.

The amendment would not be taking any of the deserving space of any other deserving veteran. My son has three extra plots, but he was not married, as I said. He did not have any time since he was a child himself. I could speak all day regarding my son, but since I only have 5 minutes I won't. But he was a wonderful and respectful young man.

But I am here to ask you to amend the bill number H.R. 761. If you decide to pass this bill it would give me some peace in my life, which I can pay more attention to my husband and my daughter who I feel I have been neglecting. I could finally be able to move forward in my life knowing I would spend eternity with my son. Please listen with your hearts and amend this bill.

I appreciate your time listening to me. This may be a minimal issue to you, but it means everything to me. Thank you for your attention to this matter. Denise Anderson.

[The prepared statement of Ms. Anderson appears on p. 41.]

Mr. HALL. Thank you, Ms. Anderson. I think I speak for the Subcommittee, and the full Committee, and all Members of Congress in thanking you and your son for your sacrifice and for his sacrifice and the gift of his life for our country.

We have Mr. Frank's statement entered in the record. This measure makes eminent sense to me. I just attended a burial on Saturday in my district for a 21-year-old young man.

Ms. ANDERSON. They are children. They are not men, they are children.

Mr. HALL. Yes. When I was 21, now that I look back on it, I wasn't really that grown up yet. But, I offer my condolences and prayers for you and for Corey and your testimony is very powerful. I don't have any questions for you. I will have questions pertaining to the bill to Mr. Frank when we get an opportunity to ask them of him. But I think this is a bill that has significant merit.

Mr. Lamborn, would you like to ask questions, sir?

Mr. LAMBORN. Yes, thank you, Mr. Chairman. And Ms. Anderson, thank you for coming here today, and we sympathize with your loss.

Ms. ANDERSON. Thank you for having me.

Mr. LAMBORN. It is not just your loss, it is your community's loss of Mansfield, and it is our country's loss.

Ms. ANDERSON. Absolutely.

Mr. LAMBORN. So we will give this every consideration, and it is a very important matter, and thank you for being here.

Ms. ANDERSON. I appreciate it, and thank you for listening to me. Thank you.

Mr. HALL. Ms. Anderson, just in case Mr. Rodriguez wants to speak to you, if you would just remain for a second. Mr. Rodriguez?

Mr. RODRIGUEZ. Yes, let me just take this opportunity to express my condolences from a grateful Nation for your son's service to our country, and at the same time we will do what we can. And later, I am not sure that there is any, you know, whether the legislation is unable to go nationwide whether we might be able to take care of individual situations that might come up, I don't know whether the Secretary has that power or not, but we will see what we might be able to do under these circumstances.

Ms. ANDERSON. Thank you so much.

Mr. RODRIGUEZ. So we express our condolences.

Ms. ANDERSON. Thank you very much.

Mr. HALL. And Mr. Miller?

Mr. MILLER. I want to echo my colleagues' comments in regards to the loss of your son, your child, and thank you for your sacrifice and certainly for his. And I have had an exact same thing happen in my district. VA was willing and did do exactly what you are asking, even without a legislative change; however, we shouldn't have to make parents go through hoops in order to be buried with their child. And so you can anticipate support from this side as well. And thank you for your compelling testimony today.

Ms. ANDERSON. Thank you so much.

Mr. HALL. Thank you again, Ms. Anderson.

Ms. ANDERSON. Thank you, Mr. Chairman.

Mr. HALL. You are now excused.

Mr. Buyer will unfortunately not be able to speak, but we have a statement to enter into the record on his behalf.

[No statement was submitted.]

Mr. HALL. So now we would ask our second panel to join us. Hon. Bruce E. Kasold, Judge for the U.S. Court of Appeals for Veterans Claims. Good to see you again.

Judge. KASOLD. Good to see you, sir.

Mr. HALL. Judge, you know how this goes. You have 5 minutes. Your written statement will be entered into the record and the floor is yours for 5 minutes.

STATEMENT OF HON. BRUCE E. KASOLD, JUDGE, U.S. COURT OF APPEALS FOR VETERANS CLAIMS

Judge. KASOLD. Thank you, Mr. Chairman, Chairman Hall, Ranking Member Lamborn, Members of the Subcommittee. On behalf of Chief Judge Greene, who sends his greetings and regrets for not being here today, and the judges of the Court, I thank the Committee for asking for our views on the discussion draft legislation to amend title 38.

As noted in my prepared remarks, sections 2 and 3 of the discussion draft address processes within the VA and the Board, and the Secretary and Chairman are better prepared to comment on those sections.

Taking the sections that affect the Court in reverse order starting with number 6, which deals with the creation of a Commission, I note that Chief Judge Greene and I are both on record as supporting a Commission to review the judicial appellate process, particularly the continued need for the unique right of two judicial appeals.

I do have three drafting comments. One, the title is limited to review of the judicial process, and I would suggest that the text be amended to include that, as noted in my statement.

Second, the discussion draft proposes a Commission of about 17 people. I can tell you working with just seven judges can be challenging, and I am sure you see it on your own Committee, you might be able to reduce that to 11 and still fulfill the needs of four Members from the House, four from the Senate, two from the Executive, and one from the President as the Chairman with confirmation.

And third, you list certain representatives. I would suggest if you are going to list any, you might include the judiciary itself or a retired member of the judiciary, perhaps an academic, and I did note an absence of VA, which of course is a party before us all of the time.

As to section 5 of the discussion draft, which authorizes the Court to permit class actions, we don't see the need for such explicit authority.

First, it is not clear that we don't already have the authority. This issue was addressed by the Court early on. It was noted in *Lefkowitz v. Derwinski* that we may not have the authority, but that was not the basis of the decision there. The Court rejected drafting a rule because it did not feel it was needed. The current Court is of the same belief that class action authority is not needed because our cases are all precedential, and have an effect binding on the Secretary and the Board. Thus, this particular action is not needed.

I will note too that we haven't heard a request, or I haven't heard a request for this in the 5 years I have been on the Court, so this is the first time that I am reviewing an interest in the class action approach, at least to my recollection.

As to section 4 of the discussion draft, which directs the Court to decide all relevant assignments of error, all of the judges of the Court believe that we are already doing that and don't see a need for the legislation. Currently Section 7261 of title 38 already directs the Court to decide all relevant issues to the extent necessary to the decision. As noted, all the judges believe that they are doing that.

The real issue appears to be one of perception—a difference of perception of some members of the Bar apparently who believe that we should be deciding issues that we aren't, and the perception of the judges who believe we are deciding the issues that can be decided. We believe that perception stems from earlier practices at the Court when it does appear as though single issues were being decided resulting in a remand of the case without consideration of other issues that might have been able to be decided.

All the judges of the Court understand the hamster wheel effect—that effect where you remanded on issue one, but issue two

and three were before the Court, could have been decided and weren't, and the matter comes back on issue two and three later on.

We are aware of that effect—it has been presented to the Court at our conferences, and all the judges believe they are addressing that.

Nevertheless, the fact that this is proposed again certainly reinforces the idea that there is that perception difference that exists out there, and we would invite those members of the Bar or other parties who continue to believe that the Court is not deciding the issues that can properly be decided to marshal those facts and bring it to our conferences or bring them up through the American Bar Association and have a dialog with the Court with regard to that, because it is certainly the intent of the judges to decide issues and avoid, when possible, the hamster wheel effect.

As to both the proposals in 4 and 5, if the Commission is created, I might suggest that both of those issues could be brought to the Commission's attention and then this Committee and the Congress could get input from a Commission that reviewed this from an independent basis.

Mr. Chairman, that concludes my remarks, subject to any questions you or the Committee might have.

[The prepared statement of Judge Kasold appears on p. 42.]

Mr. HALL. Thank you, Judge, and just briefly. We have received testimony in the past and for this hearing from other witnesses advocating for the need for the Court to have class action authority where the one organization citing as an example the case where a large number of veterans were denied large awards without knowing that VA personnel service had provided an additional second level of review. Are there instances such as this where giving the Court class action authority might be beneficial? And should the Court have the authority to grant associational standing?

Judge. KASOLD. Mr. Chairman, I guess I recall or don't have a recall of the specifics, and not being the Chief, have not focused on the Committee hearings and what might have been brought in the past.

With regard to a class action, when you look at the Federal Rules of Civil Procedure and the basis for why a rule was not created by our Court, you get into a whole manageability issue—the commonality of legal issues between the particular parties. And as you know, our jurisdiction is over individual Board decisions which generally rely on facts. That doesn't mean you couldn't have a common issue.

We had for example this Smith case which dealt with tinnitus and a legal issue as to whether or not 10 percent was a maximum rating authorized on that, and you could see perhaps a class action being brought to address that. The legislation nevertheless raises additional issues as to how broad that class action would be. Do you include only those parties who have appealed within the 120-day period following their Board decision? Do you include those parties who are still before the VA and don't even have a decision over which we have direct jurisdiction?

Those are issues that, of course, if this legislation got passed, the Court would address, and I don't know what the answer would be at this particular time.

Personally, I would suggest that associational standing is the better approach. You don't have to review individual facts. By the way, class actions normally are established at a lower level, not at the appellate level. Thus, if a class action is established at the appellate level we would have to address all the facts in the particular case, whether the people met the class, et cetera. But with associational standing you would have a more generalized review as to whether or not the association had members within the association that had an interest and then the Court could grant that particular association standing. That issue has been addressed by the Court, and in a 4–3 decision, we did not allow the standing.

Mr. HALL. I noticed Judge that the Court opposes section 4, but you also acknowledge that the perception out there seems to be that there is a need for more to be done, perhaps codifies to reinforce what you are telling us that the judges are already doing or believe they are doing to the extent you are able to or that they are able to. So the question is given that most of the witnesses we have heard from support this measure, is there room for any kind of middle ground to break the impasse or to put into law something that you are already doing? Is there any constitutional reason as to why the CAVC should not be required to decide all errors raised on brief? Do joint motions for remands adequately address all of the relevant issues raised on appeal?

Judge. KASOLD. A multifaceted statement, Mr. Chairman.

Mr. HALL. Sorry, I can repeat them one at a time if you would like.

Judge. KASOLD. With regard to the way you just stated it, I think the Court does have an objection, and I believe you left the word "relevant issues" out of that statement that you just presented.

Currently as this legislation is drafted, it talks about all relevant issues. The Court believes it is doing that. An issue loses its relevance, it seems, if the matter is the type that can't be decided. If you have a statement from the Board that is unclear and issues can't be decided, it is remanded—they can do continued development by the way on all of our remands—another statement from the Board that is clearer so that we can understand what facts they found, et cetera.

If you have a situation where the credibility of a witness has not been determined, we would have to remand that for factual determinations to be made. If you are already going to remand it for another reason, you would make the comment that the credibility has to be determined on remand, but we wouldn't make that decision at the Court. I don't think that the legislation that you presented would change that.

Our concern with putting this in legislation is that you have to see how it intermixes with the other legislative provisions that exist. What changes come about as you get into litigation? As you know attorneys raise issues, and rightfully so, every time there is a change in legislation, so the concern is more of those unintended consequences and where you end up at the end of the day.

The compromise I would suggest might be, if this Commission is created, to refer this issue to the Commission and see what this independent Commission says. I think if they were to come out and say absolutely that the Court is not doing this, and the legislation would help ensure that the Court does that, then I don't know that the Court would have an objection to that.

At this point we think we are doing it, we believe the legislation already requires it and, therefore, this additional legislation does not seem necessary.

Mr. HALL. Thank you. Mr. Lamborn, would you like to ask some questions?

Mr. LAMBORN. Thank you, Mr. Chairman. Just a brief question on class actions. Should they be statutorily permitted wouldn't there still be a need to evaluate every single veterans' claim regardless of the class action proceedings? I mean whether or not they qualified for whatever the class action determined?

Judge. KASOLD. Essentially yes. Certainly if the Secretary did not object, the Secretary being the other party before the Court, you might be able to streamline that somewhat, but essentially to be a member of the class you have to have that commonality of law, facts, et cetera, and so there would have to be an evaluation done. And you have a rule, I believe the proposed legislation actually refers us to the Federal Rules of Civil Procedure 23, and as you will see in that, you have to find that the class is so numerous that joinder of all members is impractical, because we allow joinder right now. A member could come in and seek joinder if they felt their case was being impacted by it. Questions of law, fact, common to the class and so forth, a list of criteria that would have to be evaluated.

Mr. LAMBORN. So my assessment of this is that it would be unnecessary, it would create unintended consequences, and would not produce any savings of time.

Judge. KASOLD. Our view is that is probably the case, yes, sir.

Mr. LAMBORN. Okay. Thank you. No further questions, Mr. Chairman.

Mr. HALL. Mr. Rodriguez. Mr. Miller.

Judge, we have some follow up questions for the Court, which we will submit in writing to you and ask you to respond in writing. Thank you very much for your testimony today.

[No questions were submitted.]

Judge. KASOLD. Thank you for having us, Mr. Chairman, Members of the Subcommittee.

Mr. HALL. You are excused.

Judge. KASOLD. Have a good day.

Mr. HALL. Have a good day.

We are going to backtrack now to Panel 1 and recognize Representative Barney Frank of Massachusetts to speak on H.R. 761. Mr. Frank, welcome.

STATEMENT OF HON. BARNEY FRANK, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MASSACHUSETTS

Mr. FRANK. Mr. Chairman, Members, thank you for accommodating me. I was presiding at a hearing in the Financial Services

Committee, and I have just asked Ms. Anderson, she, I gather, spoke very well, but I just asked that she accompany me.

Let me tell you, I appreciate the difficult job you have, and I think we can be proud of the job we have been trying to do, but what I would say of Ms. Anderson's request is, the disproportion between what this country owes her and what she is asking is just as large as can be. She lost her son. She has a request that she be able to be buried with him when that day comes. As I said, the disproportion makes it almost embarrassing to ask.

We, I hope, can accommodate this. It is done subject to the physical limitations, it is done subject to the Secretary, but I cannot understand any objection. I don't mean to say that there has been one, there may well have been, I haven't done the legislative history I don't know whether it is intention or not, but no one who has known Denise Anderson has seen, the way in which she is borne up under this terrible loss can fail to be inspired by her and eager to accommodate.

And let us be honest, she is not asking for this on her own behalf, she is asking for this on behalf of all mothers and all fathers.

I really have nothing more to add. I cannot imagine that we would, at this stage, refuse to accommodate this request. I thank you for your making time for us this morning.

[The prepared statement of Congressman Frank appears on p. 40.]

Mr. HALL. Thank you, Mr. Frank. And when Ms. Anderson spoke to us, we all expressed similar sentiments of support.

Having said that, I would just ask you a couple of quick questions. The VA has concerns that if enacted, the bill would reduce the number of grave sites available for veterans, and the Committee needs to address or consider that concern. Would you be amenable to modifying the bill to specify that the provisions would apply only in cases involving the death of an unmarried servicemember who died due to combat or training-related injuries?

Mr. FRANK. I think the combat issue is a very important one. And I don't know whether there was a limit on the number of family members, but I think that is something that can be taken into account. Clearly that would cover this case, and that is the overwhelming argument for it, so I would say certainly if that is—and I recognize we are dealing here on a totally non-partisan, non-ideological basis, we are doing the best we can. I would have confidence that the Committee would be dealing with the circumstances to accommodate this to the greatest extent possible.

Mr. HALL. I am not saying that I am offering such an amendment or that I would support it, I am just asking these questions.

Further, would you be amenable to amending your bill to specify that the benefit would become effective only for sole surviving parents?

Mr. FRANK. Sole surviving parents meaning they had no other children? What is a sole surviving parent?

Mr. HALL. Meaning there is only one parent. Or should you extend the bill to apply to both parents?

Mr. FRANK. Look, when you ask me if I am amenable, these days I have been working very hard, I am just not generally amenable

period, but I find if you get a reputation for amenability the number of things you are asked to do multiplies.

But you know, obviously on the first one, I would hope that wouldn't have to be done, and I would hope the kinds of fixes you are talking about in the first place might make that unnecessary.

I certainly think you could set priorities. Given the availability of different areas. If that became a priority category that would be one thing. I would be reluctant to see an absolute cut off.

Mr. HALL. Thank you. We have to ask you some questions or else it looks like we are not doing our job. But I think that we do deal on this Committee in certain regions of the country where there is shortage of burial space.

Mr. FRANK. Right. That is why I would suggest a priority system that could then be applied region by region, depending on the availability.

Mr. HALL. Right. In the case of Ms. Anderson's son, Corey, if I recall correctly he has three or four spaces, so two parents could be accommodated in those spaces. There are obviously cases where this would not be a problem.

Mr. FRANK. Would not be a problem, yes.

Mr. HALL. Right.

Mr. FRANK. Right, this is not to use our words and you hate to get into this, but we have to be practical, and I know Ms. Anderson understands, it does not diminish in any way our emotional commitment here.

Mr. HALL. Absolutely.

Mr. FRANK. We are not talking about this being an entitlement, we are talking about it being an eligibility subject to it being able to be accommodated.

Mr. HALL. Right. Your comment about the disproportion and the request versus the sacrifices sums it up.

I will recognize Mr. Lamborn for questions.

Mr. LAMBORN. Thank you, Mr. Chairman. And Mr. Frank, you are correct, your constituent came in earlier and did an eloquent and wonderful job of explaining the situation, and I think everyone was very touched and understood what she was asking in a great way.

And I would also like to commend you. I think that this piece of legislation is very focused in a way that you are trying to avoid unintended consequences. And as you know, we have many bills that go through this body where unintended consequences, because they are far ranging and sweeping pieces of legislation, are too numerous to count, but this is one that you have focused very well and I commend you for that. Thank you.

Mr. FRANK. Thank you, Mr. Lamborn.

Mr. HALL. Mr. Rodriguez?

Mr. RODRIGUEZ. I was also going to indicate I think that there might be some cases where we might be able to get a letter from the Secretary to make some exceptions under certain circumstances and make that happen. So thank you.

Mr. FRANK. Thank you.

Mr. HALL. Mr. Miller.

Mr. MILLER. Would you be amenable, Mr. Frank, to me signing on as a cosponsor of your legislation?

Mr. FRANK. Absolutely, I would be proud to have you.

Mr. MILLER. I think all the questions that have been answered, and basically because I went through it about a year ago, again with a child who was killed and a mother that was in fact buried with the child. As the caskets are stacked when the child is buried the preparation can be made for the mother and the father if that is what they desire to do based on the landscape and the type of soil in a particular cemetery.

The only thing that concerned me a little bit about the way the legislation was written is it appears that it opens up for a parent to be buried prior to the veteran passing away, and I think that is what——

Mr. FRANK. Yes, and the Chairman's first question clearly anticipated it and that is why we have hearings.

Mr. MILLER. I think it is a great thing. Again, as I said before you entered into the room, some of this is being done on a case by case basis now, but it should not have to be. It should be——

Mr. FRANK. That is right. The last thing a parent needs, stricken as he or she might be with this terrible tragedy, is to have to then start dealing with red tape. So yes, we should make it automatic.

Mr. MILLER. Well and thank you for bringing it to the Committee's attention.

Mr. HALL. Isn't it true that Ms. Anderson's request for an individual exemption was denied?

Mr. FRANK. Yes. Senator Kerry and I both asked and that is why we are here.

Mr. HALL. Okay. So that is good enough reason for us to legislate it.

Mr. FRANK. Thank you very much, Mr. Chairman and Members.

Mr. HALL. You are very welcome. Thank you for your testimony. Thank you again, Ms. Anderson.

Ms. ANDERSON. Thank you, Mr. Chairman.

Mr. HALL. The sympathies and gratitude of this Committee are with you.

Ms. ANDERSON. Thank you, thank you everybody.

Mr. HALL. Let us see, Mr. Filner has been delayed, so we will submit his statement on the "National Cemetery Expansion Act of 2009," H.R. 3544, for the record, and ask Panel 3 to please join us. Barton Stichman, the Joint Executive Director, National Veterans Legal Services Program (NVLSP); John Wilson, Assistant National Legislative Director of Disabled American Veterans (DAV); Lesley Witter, the Director of Political Affairs for the National Funeral Directors Association (NFDA); Richard F. Weidman, Executive Director for Policy and Government Affairs, Vietnam Veterans of America (VVA); Vivianne Cisneros Wersel, Chair of the Legislative Committee, Gold Star Wives of America (GSW); and Thomas Zampieri, Ph.D., Director of Government Relations for the Blinded Veterans Association (BVA); and Richard Cohen, Executive Director, National Organization of Veterans' Advocates, Inc. (NOVA)

Thank you all. Long time no see. Several of us were together in a roundtable discussion yesterday, and it is always good to be with you again.

Your written statements are in the record, so feel free to edit them or deviate from them as you see fit.

Mr. Stichman, you are recognized for 5 minutes.

STATEMENTS OF BARTON F. STICHMAN, JOINT EXECUTIVE DIRECTOR, NATIONAL VETERANS LEGAL SERVICES PROGRAM; JOHN WILSON, ASSISTANT NATIONAL LEGISLATIVE DIRECTOR, DISABLED AMERICAN VETERANS; LESLEY WITTER, DIRECTOR OF POLITICAL AFFAIRS, NATIONAL FUNERAL DIRECTORS ASSOCIATION; RICHARD F. WEIDMAN, EXECUTIVE DIRECTOR FOR POLICY AND GOVERNMENT AFFAIRS, VIETNAM VETERANS OF AMERICA; VIVIANNE CISNEROS WERSEL, AU.D., CHAIR, GOVERNMENT RELATIONS COMMITTEE, GOLD STAR WIVES OF AMERICA, INC.; THOMAS ZAMPIERI, PH.D., DIRECTOR OF GOVERNMENT RELATIONS, BLINDED VETERANS ASSOCIATION; AND RICHARD PAUL COHEN, EXECUTIVE DIRECTOR, NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC.

STATEMENT OF BARTON F. STICHMAN

Mr. STICHMAN. Thank you, Mr. Chairman, the National Veterans Legal Services Program thanks you for the opportunity to present the views of our organization on the draft legislation, entitled the "Veterans Appellate Review Modernization Act."

NVLSP strongly supports the provisions in this draft legislation because it would make the veterans benefits adjudication system more efficient, reduce the backlogs that exist, and make it fairer.

Section 5 of that draft legislation is very important. It would give the Court of Appeals for Veterans Claims class action authority.

When the Veterans' Judicial Review Act was passed in 1988, Congress inadvertently failed to explicitly authorize class action authority in either the Veterans Court or the Federal Circuit. Before 1988, before the Veterans' Judicial Review Act, District Courts entertained class actions from veterans all the time. In other benefit systems, like Social Security, District Courts hear class actions all the time. The consequences of class actions are known. They were known when veterans brought class actions before 1988, and they are known now by the courts that entertain class actions in other benefit systems.

The lack of class action authority forces the VA and claimants to use their scarce resources, to decide and then to re-decide hundreds and thousands of cases of similarly situated claimants every time a court overturns a major VA policy in an individual case.

If a class action was allowed, the VA wouldn't have to continually readjudicate these cases. They could be stayed, pending the determination by the Court of the legality of the action being challenged, saving both claimants and the VA thousands of hours in adjudicating cases.

Section 4 similarly would help reduce VA backlogs. Since 2001, when the Veterans Court decided the *Best* and *Mahl* decisions, the Veterans Court has had a policy to use piecemeal adjudication.

Now I heard Judge Kasold say that they have modified their decisionmaking. I think they have to a degree. But you don't need a Commission to look at this, you don't need a Bar Association to look at this—all you need to do is look at the decisionmaking of the Court by the single judges, and you will see time and again, if you

do a search for every time they cite *Best* and *Mahl*, numerous instances where the Court says we are not going to decide these issues because the case is going back to the VA anyway, and so the hamster wheel continues.

And let me just give one example. One example would be a case in which the claimant says the VA is required by the duty to assist to obtain a medical nexus opinion. I can't win my case without a medical nexus opinion. I can't afford to hire a doctor, because I am disabled and poor, to get the medical opinion that is necessary to win my case. The VA has to get it for me, and the Board has refused to order it.

The veteran brings that claim to the Court, as well as other allegations of error. The Court agrees on one allegation of error that is not the duty to assist error and so doesn't resolve the key issue that the veteran needs resolved in order to win his case. That is unjust and that continues to happen.

Finally, Section 2 of the draft legislation would address the long delay that exists for the regional office to transfer the claims file to the Board for a decision. The draft legislation says after a notice of disagreement (NOD), but I think it would be better if it said a substantive appeal. It would be better if the words "substantive appeal" were substituted for "notice of disagreement."

Right now it takes 1 year and 7 months on average, this is just the average amount of time, after the substantive appeal is filed for the regional office to transfer the file to the Board so the Board can make a decision. And what happens during this period is veterans file additional evidence, the regional office re-decides the case over and over again, delaying it getting to the Board. I am happy to see the VA in its testimony agrees that if you amend the draft legislation to substitute "substantive appeal" for "notice of disagreement" they support this provision, and I think a lot of parties are now agreeing that this would help streamline the process and lower the backlog.

Thank you, Mr. Chairman, and I would be willing to entertain any questions any of the Members may have.

[The prepared statement of Mr. Stichman appears on p. 45.]

Mr. HALL. Thank you, sir. Mr. Wilson, you are now recognized.

STATEMENT OF JOHN WILSON

Mr. WILSON. Thank you, Mr. Chairman. Mr. Chairman, Members of the Committee, I am glad to be here this morning on behalf of the Disabled American Veterans to address the four bills under consideration.

The first bill I wish to address is H.R. 2243, the "Surviving Spouses' Benefit Improvement Act of 2009." We support this legislation as it provides a welcome increase in monthly dependency indemnity compensation to this important group of recipients.

We also request the scope of this bill be expanded through amendment to address the issue of surviving spouses of military members who die on active duty only receiving the basic rate. Congress should increase DIC rates to this group. Currently, law authorizes VA to pay an enhanced amount of DIC, in addition to the basic rate, to surviving spouses of veterans who die from service-connected disabilities after at least an 8-year period of the vet-

eran's total disability rating prior to death. However, surviving spouses of military servicemembers who die on active duty only receive the basic DIC rate.

We, therefore, recommend Congress correct this inequity, because surviving spouses of deceased active duty servicemembers face the same financial hardships as those survivors of deceased service-connected veterans who were totally disabled for this 8-year period.

The second bill is H.R. 3544, the "National Cemeteries Expansion Act of 2009." If enacted, this legislation would establish for the first time veteran population density guidelines by statue for new national cemeteries rather than the current rulemaking process through the *Federal Register*.

DAV supports a change to the calculation used to determine where national cemeteries are to be placed, and has previously offered in the *Independent Budget* a 100,000 figure, as to correct population density base to be used in future cemetery planning.

However, we also recommend caution on the establishment of that population through the legislative process. Rather, the use of the Federal rulemaking process provides the VA an effective and responsive means to changing patterns of veterans needs for such benefits.

So, while we agree that a modified veterans' population density is necessary, the National Cemetery Administration's (NCA's) current rulemaking practice remains an important tool that should continue to be utilized.

The third bill I would like to address is the draft legislation entitled the "Veterans Appellate Review Modernization Act." This draft legislation takes important steps in improving the VA disability claims process that we have previously testified before both Houses of Congress in presenting our 21st century claims process proposal.

The bill in section 2 addresses the issue of new evidence submitted in support of a case for which notice of disagreement has been filed. We agree with the intent of this change, but with one amendment. The NOD reference is actually earlier in the appeals process. With a recommended change of replacing "notice of disagreement" in Subsection (f) with words to the effect that "the claim has been certified to the BVA," Congress would have provided the VA with important flexibility, it would reduce appellate links and appellate confusion, and in our estimation nearly 100,000 work hours through the elimination of the requirement to issue most supplemental statements of the case.

We also agree with the elimination of the Appeals Management Center as we previously testified to. We unfortunately see it as a failure in its effectiveness.

The bill also addresses another critical issue in section 4, Modification of Jurisdiction Finality of Decisions before the Court. DAV has long sought legislation, as noted in Resolution 220, that would require the Court to decide each of the appellant assignments of error, directly order the award of benefits where appropriate to remedy errors found, and accept the appellant's rejection of confessions of error by the VA.

The DAV certainly supports this critical legislation and is pleased to do see it submitted.

The fourth bill I would like to briefly address is H.R. 3485, the "Veterans Pensions Protection Act," which would exclude VA pension benefits paid by States and municipalities to veterans from consideration as income, although outside the scope of our mission, we would not be opposed to the favorable approval to this bill.

That concludes my statement, Mr. Chairman, I look forward to any questions you may have.

[The prepared statement of Mr. Wilson appears on p. 48.]

Mr. HALL. Thank you, Mr. Wilson. Ms. Witter.

STATEMENT OF LESLEY WITTER

Ms. WITTER. Chairman Hall, Members of the Subcommittee, thank you for the opportunity to testify before you this morning. I am Lesley Witter, Director of Political Affairs for the National Funeral Directors Association.

The VA estimates that roughly 654,000 veterans died in the U.S. and Puerto Rico in 2008. Each one of these servicemen and women had a family or friends who grieved their loss, and in each case a funeral director helped ensure that these veterans received the care, honor, and dignity they earned because of their sacrifice for our country.

Mr. Chairman, under current VA rules, only a veteran's spouse and certain dependents are eligible for burial in a veterans cemetery. The current eligibility guidelines do not take into account those veterans who die without a spouse or dependents. For this reason, I would like to express NFDA's strong support for H.R. 761, a bill introduced by Mr. Frank of Massachusetts.

I am honored to be joined at this hearing by Denise Anderson, the mother of deceased soldier, Corey Shea. I have been humbled to get to know Denise, who is as you saw this morning a strong and passionate advocate for her son. Corey was 21 years old when he was killed in action in Iraq on November 12, 2008. Corey was not married and had no children of his own. Corey Shea sacrificed his life for this country. His mother sacrificed her son for this country, and all she is asking in return is to be allowed to spend eternity with her son. Ms. Anderson is not asking for the VA to pay her funeral and burial expenses, nor will she take up any space that belongs to other veterans, as she wishes to be buried in the space that is usually reserved for a spouse or a qualified dependent.

On behalf of funeral directors who care for the families of our Nation's deceased veterans, I ask Congress to amend the burial eligibility guidelines to address unmarried veterans with no eligible dependents.

The passage of H.R. 761 means that Denise Anderson, the mother of one of our Nation's fallen heroes, will be able to be with her son, her hero, even in death.

Additionally, Mr. Chairman, funeral directors support H.R. 3544, a bill introduced by Mr. Filner of California, because the family of every deceased veteran should have easy and convenient access to a national cemetery.

NFDA also supports H.R. 2243, a bill introduced by Mr. Buyer of Indiana.

Additionally, NFDA believes that Congress should enact legislation to adjust the VA funeral and burial benefits for inflation annually.

NFDA also encourages Congress to extend the current veteran burial benefit to cover cremation as a final form of disposition.

Mr. Chairman and distinguished Members of the Committee, on behalf of the members of the National Funeral Directors Association, I want to conclude my testimony today by thanking you for the opportunity to testify this morning. I hope my testimony has been helpful and I will be happy to answer any question you may have.

[The prepared statement of Ms. Witter appears on p. 51.]

Mr. HALL. Thank you, Ms. Witter. We have votes coming up in a few minutes so I will ask you to be as brief as you can while still getting across your message. Mr. Weidman?

STATEMENT OF RICHARD F. WEIDMAN

Mr. WEIDMAN. Mr. Chairman, thank you for the opportunity for Vietnam Veterans of America to present a statement here today.

First and foremost, the "Surviving Spouses' Benefits Improvement Act" is something that is long overdue and the PAYGO needs to be found for that and that be enacted at an early date. It is shameful that we haven't done this heretofore. We are in the 8th year of the war in Afghanistan now and we need to move forward to recognize the spouses in an appropriate way.

The "Veterans Pension Protection Act." Similarly, VVA strongly favors that. The notion that one jurisdiction, a city or a State, can be more generous and that should produce a Federal offset of the Federal responsibility is simply ludicrous from our point of view, and we favor quick passage and enactment of this piece of legislation.

"The Cemeteries Expansion Act," H.R. 3544, we also generally favor. We see nothing wrong with moving to a different way of figuring this with a 75-mile radius and going through census tracks.

What we would caution you on however is that 40 percent of our active-duty force today comes from towns of 25,000 or less. What that means is that a significant proportion of combat vets and those who serve may not be within a 75-mile radius as described in this, so that there needs to be thought through, if I may suggest, sir, working with VA some alternative plan that makes sense for those who come from highly rural areas.

And with regard to H.R. 761, we in our written statement, did not favor that bill. It was extraordinarily compelling testimony this morning. The first question that you asked the witness having to do with the modification for those who are killed in combat or in training, and under those circumstances I believe that we would accept and favor this bill. So I think that would be terrific.

In regards to the main meat, if you will, of what we need to get on this morning in terms of contentiousness any way, the discussion draft of the "Veterans Appellate Review Modernization Act." We laud you for trying to take this on, but the real crux of the issue continuing to remain the fact of the lack of accountability, the lack of proper training, the lack of proper competency based testing of the adjudicators and the supervisors at the regional office level.

Unfortunately no matter how much we try at the appellate level, when it is messed up at the regional office level we are not going to be able to fix this system.

So the fact that I understand that some folks at Veterans Benefits Administration are now blaming the union for the fact that they haven't implemented competency based testing. We do not believe that is the case. We have talked to both John Gauge and to Jay David Cox, as well as to the veterans counsel of the American Federation of Government Employees and they are eager to have their people receive training in order to do their job better. The reason why they work for VA in the first place is because they care about veterans. There are a number of practical things that can be done, but simply aren't being done in the Veterans Benefits Administration. So we encourage you to press hard on that.

One of the cruxes of the issue, Bart Stichman pointed out just a minute ago, it shouldn't be at the basis of the NOD, that would in many cases because of the extraordinary delay in a case file moving forward with a statement certification if new evidence was produced and was sent directly to the Board it would separate that from the actual case file and only make things worse. That is one thing.

The second is the Board does not have the organizational capability to really consider new evidence, and that is really the problem. That is why they created the AMC. But the AMC, as has been stated here, is in fact a black hole that claims, which are remanded seem to disappear never to be heard from again just as if a spaceship went in to antimatter black hole space.

Having said that, in some cases we find it better, the work that they do when it finally emerges from that black hole, to in many cases be more solid than some of the regional offices.

So I come back to what I said before, is that the crux of this issue continues to be a regional office. I understand how frustrated this Committee is, because we share your frustration in that, but we shouldn't ask the Board to do things that they can't do.

The modification of jurisdiction having to do with the class action suits. We are not sure exactly unless you broaden the authority of the Court to all claims at any stage in the process under those kinds of conditions whether we could see them having class action powers.

I will offer one additional thing. Throughout our history, Vietnam Veterans of America has favored what we call "real judicial review." And real judicial review means access to the Federal District Court the same way as a Social Security recipient has access to the real judiciary, if you will. I don't mean it to diminish the qualifications of any of the judges on the Court of Veterans Appeals, but that was the crux of the issue, and this was dreamed up in order to do a lesser degree and a lesser rigor, if you will, of certification.

If we went to real judicial review, which VVA continues to favor where we have access to Federal courts, some of the stuff that goes on now where whether or not your claim is successful and what level it is successful at a regional office depends on whether someone had a good lunch today or a bad pepperoni pizza, would be ended because of the vicariousness of the way in which that process

all too often works, they would be under court order to clean it up and maybe then we would finally get some action.

I am over time and I thank you for the opportunity and look forward to working with you on this issue to perfect this draft and hopefully on a bipartisan basis, sir. Thank you.

[The prepared statement of Mr. Weidman appears on p. 52.]

Mr. HALL. Thank you, Mr. Weidman. Ms. Wersel, you are recognized for 5 minutes.

STATEMENT OF VIVIANNE CISNEROS WERSEL, AU.D.

Dr. WERSEL. Chairman Hall, Members of the Subcommittee, good morning. Thank you for the opportunity to present this statement on behalf of Gold Star Wives of America.

In a press release last week VA Secretary Shinseki stated, "Taking care of our survivors is as essential as taking care of our veterans and military personnel. By taking care of survivors we are honoring a commitment made to our veterans and military members." Today we are asking you to honor that commitment.

I am Vivianne Cisneros Wersel, Chair of the Gold Star Wives' Government Relations Committee and surviving spouse of Lieutenant Colonel Rich Wersel, United States Marine Corp. who died suddenly February 4, 2005, a week after he returned back from his second tour of Iraq.

Two vital issues for Gold Star Wives providing the greatest positive impact for surviving spouses are (1) increasing the Dependency Indemnity Compensation, or DIC, to provide payment to 55 percent of 100 percent disability compensation, and (2) removal of the DIC offset to our Survivor Benefit Plan (SBP).

We are grateful to Congressman Buyer and Waltz who are introducing H.R. 2243, which is addressing both of these inequities. Presently DIC is 43 percent of disability compensation. Increasing the DIC to 55 percent would put military survivors at the same level as other Federal survivor programs. There are approximately 338,000 recipients encompassing from all wars and conflicts.

Helen, a Navy widow whose father was a Federal employee, he was home for dinner, birthdays, never missed a holiday when she was growing up. Helen as a Navy wife moved 26 times in 24 years, sent her husband into harms way, and spent more than half of her marriage alone raising the children. Her mother is now widowed and receives Federal survivor benefits. Helen wants to know why her mother is paid at a higher percentage than Helen herself.

There are some elderly widows whose husbands died in World War II and Korea who are living on DIC alone and do not qualify for Social Security. Many never remarried. They need this increase to help make it through the month. For some it will buy groceries.

We also seek the elimination of the DIC offset to the SBP. They serve two separate purposes, and both should be paid in full without any offset. The offset leaves many widows without any annuity at all.

Katherine is a Marine widow. Her husband is a sergeant who served 11 and a half years. He was a dedicated Marine and was sent to be a lifer. After the DIC offset Katherine receives a check for $14 a month as her SBP annuity. Does this adequately rep-

resent her husband's 11 and a half years of dedication and service to his country?

Recently, the U.S. Court of Federal Claims in *Sharp et al. vs. United States* found that remarried widows were entitled to SBP benefits without the dollar-for-dollar reduction by the DIC. If remarried widows receive the SBP annuity without the offset, why are the unremarried widows left behind?

Jennifer, an Iraq War widow raising three children stated her concerns. "I am confused by the arguments regarding SBP/DIC offset. When I hear from Congress we can't afford to do it, we can't find the mandatory spending offsets, why does the government relinquish itself from this responsibility of payment by way of exercising this offset?"

Gold Star Wives encourages the swift passage of H.R. 2243 to permanently fix these inequities. Passage of this legislation is the right thing to do, and further delay by Congress for any reason is unacceptable.

Removing the offset is a top priority of the military coalition which represents five and a half million members. We are asking you to honor the commitment stated by VA Secretary Shinseki.

Gold Star Wives also supports the "National Cemeteries Expansion Act of 2009," H.R. 3455. The new priority rating will allow veteran survivors to bury their loved ones in a nearby national cemetery with appropriate honors.

Last, Chairman Hall, we support the concept of your draft legislation, but ask that you include survivors.

Thank you again for this opportunity to testify, the issues are real and have long lasting impact on military surviving families. Please make this Congress, the Congress that gets the credit for enacting this legislation. We are the formally silent who work, pay taxes, obey the law, and vote. We now look to you to fix this.

I will answer any questions you may have. Thank you.

[The prepared statement of Dr. Wersel appears on p. 56.]

Mr. HALL. Thank you, Ms. Wersel. Dr. Zampieri.

STATEMENT OF THOMAS ZAMPIERI, PH.D.

Dr. ZAMPIERI. Mr. Chairman, Members of the Committee, on behalf of Blinded Veterans Association we appreciate the opportunity to testify today.

I also want to thank the Committee staff for working with us on the piece of legislation that we are interested in, H.R. 3485 that Congressman Higgins introduced on behalf of this issue of the States that provide a small annuity to blinded veterans who are receiving a pension from the VA. The fact that they offset this is wrong. This is a gift from the States. The few States that actually do this as mentioned in previous testimony is New York, Massachusetts, New Jersey, and Pennsylvania.

It is interesting, you know, it was mentioned in the other testimony that when Mr. Rangel was working on a Ways and Means Committee bill last year, H.R. 3997, that he included a section in there that removed these annuities as considered income for Social Security purposes.

When CBO scored it they said it would be negligible with a total cost impact, even if you included all four States of about $543,000.

I want to stress that like in Pennsylvania there is only 109 veterans who receive this annuity. New Jersey it is only about 200. These are small annuities that have been given to veterans on behalf of the grateful State for their service.

We are supportive of H.R. 3544, the bill introduced by Chairman Filner on guidelines for establishment of the national cemeteries.

We are especially supportive of H.R. 2243, and this needs to be fixed. We can't believe that this has gone on for years and years and this offset continues. We as a country should be ashamed that we are, as I put in my testimony as far as we are considered, a war widow tax on this situation with the SBP/DIC offset.

We support the draft legislation that was discussed about the "Veterans Appellate Review Modernization Act."

And last I would like to comment that we support H.R. 761. At certain times in life I think we are obligated to do the right thing, and if the bureaucracy has barriers to doing the right thing, then we are obligated to try to fix that. And so we are supportive of that bill.

That pretty much covers what I had here. It is kind of interesting. The VA always finds creative and innovative ways to try to persuade people in this room to not do things, but the State annuities in New York go way back to like 1960, and I might want to read opinion of VA General Counsel dated October 5th, 1966. "We held New York State annuity for blind war veterans and widows of such veterans in any similar benefit provided by any other State is a bonus. It is a similar cash gratuity, thus excludable effective January 1st, 1967, from income for VA purposes and pensions, compensation, and DIC compensation cases. General Counsel index 10–389 Department of Veterans Affairs."

Here we sit today, got to do some quick math here, 33 years later and we are still dealing with this? Thank you, Mr. Chairman.

[The prepared statement of Dr. Zampieri appears on p. 58.]

Mr. HALL. Thank you very much. Mr. Cohen, you are now recognized.

STATEMENT OF RICHARD PAUL COHEN

Mr. COHEN. Thank you, Mr. Chairman, for the opportunity to present the testimony of the National Organization of Veterans' Advocates.

NOVA generally supports the "Veterans Appellate Review Modernization Act." At the outset, I would note that the suggestion by the Veterans Court to eliminate appeals Federal Circuit [United States Court of Appeals for the Federal Circuit] is a dangerous idea. We have presented examples before of the need for the Federal Circuit in terms of veterans law jurisprudence, and we have presented cases where the Federal Circuit took the Veterans Court to task for the inability to decide cases correctly.

Just recently in the *Davidson* [*Davidson v. Shinseki*, No. 09–7075] case the Federal Circuit, on September 14th, said that the Veterans Court misapplied section 1154(a) [38 U.S.C. § 1154(a)], ignoring Federal Circuit precedent in *Jandreau* [*Jandreau v. Nicholson*, F. 3d 1372 (Fed. Cir. 2007)] and did not properly consider lay evidence. That is why we need the Federal Circuit.

Regarding section 4, the question of deciding all relevant issues, there is a dichotomy between the short-term interest of the Court to resolve appeals quickly and get them off the docket and the long-term interest of doing the right thing for veterans.

I would agree with Mr. Stichman that you can see the effect in single judge opinions of the Courts continued reliance on *Best/Mahl* [*Best v. Principi*, 15 Vet. App. 18 (2001); *Mahl v. Principi*, 15 Vet App. 37 (2001)]; but in addition, you can see it in the case of joint motions for remand. Many times appellants will agree to a joint motion for remand, which is narrowly construed and gets the case back to the VA because they know that if they wait the 2 years to get a court decision it will be a single judge decision, a so-called *Frankel* decision [*Frankel v. Derwinski*, 1 Vet. App. 23 (1590)], which will be narrowly decided any way, and the Court will not resolve all the issues.

The issues that are not resolved are generally those involving interpretation—well misinterpretation of statute by the VA. The Court is very fond of sending the case back for inadequate reasons and basis by the Board or for failure to comply with a *Stegall* [*Stegall v. West*, 11 Vet. App. 268 (1998)] exam question. But the cases do then come back time and time again to resolve the ultimate legal issue, and that is not taken care of, and the Court still has that problem, and we intend to submit to the Court extensive examples of where they did *Best/Mahl* remands.

Concerning class action, I would again support what Mr. Stichman said that they are done uniformly in District Court, and in District Court they are considered manageable. I don't know why they would be not manageable in Veterans Court.

And furthermore, the precedential effect of decisions does not help another veteran who has the same problem, because the cases are decided on a factual basis. So if the VA regularly fails to provide a deal with the presumption of soundness, getting a decision in one case on that does not help anyone else. And of course Mr. Stichman has experience with this having to go to the Federal Circuit to get a fix on the VA's application of the extraordinary award procedure which affected a large number of veterans and still has not been resolved because there was only a rule challenge because there is no class action jurisdiction.

And the final thing is regarding section 2. There are instances where waiver of regional office consideration of new evidence will save time. We are in favor of it as long as the option to request RO consideration is still maintained.

Thank you, and we will entertain any questions that you have.

[The prepared statement of Mr. Cohen appears on p. 60.]

Mr. HALL. Thank you, Mr. Cohen. There are at least 40 minutes of votes on the House floor pending, and 5 minutes in the current one left, so out of respect for the time of Panel 3 you have submitted complete and powerful testimony, which answered many of my questions.

I would like to submit questions to you in writing and excuse Panel 3. After this series of votes we will reconvene and hear testimony from our fourth panel at that time. This hearing is now in recess.

[No questions were submitted.]

[Recess.]

Mr. HALL. The Disability Assistance and Memorial Affairs Subcommittee hearing will now resume.

Thank you for your patience as we were voting, and we are happy to be joined by our fourth panel, Steve L. Muro, Acting Under Secretary for Memorial Affairs, National Cemetery Administration of the U.S. Department of Veterans Affairs; the Honorable James P. Terry, Chairman, Board of Veterans' Appeals, Department of Veterans Affairs; Thomas Pamperin, Deputy Director of Policy and Procedures, Compensation and Pension Service at the VBA; accompanied by Richard Hipolit, Assistant General Counsel, Office of the General Counsel at the VA.

Welcome gentlemen, and the usual rules apply. You have 5 minutes each, and your written testimony is already entered into the record.

Mr. Muro, you are now recognized.

STATEMENTS OF STEVE L. MURO, ACTING UNDER SECRETARY FOR MEMORIAL AFFAIRS, NATIONAL CEMETERY ADMINISTRATION, U.S. DEPARTMENT OF VETERANS AFFAIRS; HON. JAMES P. TERRY, CHAIRMAN, BOARD OF VETERANS' APPEALS, U.S. DEPARTMENT OF VETERANS AFFAIRS; AND THOMAS PAMPERIN, DEPUTY DIRECTOR, POLICY AND PROCEDURES, COMPENSATION AND PENSION SERVICE, VETERANS BENEFITS ADMINISTRATION, U.S. DEPARTMENT OF VETERANS AFFAIRS; ACCOMPANIED BY RICHARD HIPOLIT, ASSISTANT GENERAL COUNSEL, OFFICE OF GENERAL COUNSEL, U.S. DEPARTMENT OF VETERANS AFFAIRS

STATEMENT OF STEVE L. MURO

Mr. MURO. Thank you, Mr. Chairman and Members of the Subcommittee. I thank you for this opportunity to provide the views on two bills that would affect the VA National Cemetery Administration.

For the record, I offer my condolences to Ms. Anderson for the loss of her son, Corey Shea, and for his sacrifice to our Nation.

The first bill, H.R. 761, would extend eligibility for burial in national cemeteries to parents of certain veterans, provided that VA determines that space is available in open national cemeteries and that the veteran does not have a spouse, a surviving spouse, or a child who has been buried or who, if deceased, would be eligible for burial in a national cemetery. Currently, only a parent who is eligible in their own right as a veteran or a spouse of a veteran is eligible for burial in a national cemetery.

Although we cannot support the bill as currently drafted, VA would support legislation expanding burial eligibility to the parents of unmarried servicemembers with no spouse or dependents who dies due to combat or training-related injuries.

Such legislation would honor the servicemember who made the ultimate sacrifice for his or her country and would recognize the bereaved surviving gold star parent, such as Ms. Anderson, by providing the option of burial in the grave site with their fallen child.

Our concern is that by broadening eligibility for non-veteran burials in a national cemetery, this bill as currently written, would re-

duce the number of grave spaces available for those veterans who have served our Nation.

We believe that preserving significant burial space for veterans should take priority over expanding burial eligibility for non-veteran parents.

Furthermore, under his statutory authority, the Secretary already may permit the burial of a veterans' parents in a national cemetery by designating them other persons or classes of persons eligible for burial.

In 2007 and in 2008, the Secretary approved all three requests made at the time of need for the burial of parents in the same grave as an unmarried, childless servicemember who died as a result of wounds incurred in combat.

This narrower proposal to extend gold star parents eligibility for burial in the same grave with their child would address our concerns that extending eligibility to parents would reduce the number of national cemetery grave sites available for veterans.

Next I will address H.R. 3544, the "National Cemetery Expansion Act of 2009." This legislation would provide new guidelines governing the location of new national cemeteries established by VA.

Specifically, in selecting a location for a new national cemetery, VA would be required to give priority to a location where at least 110,000 veterans resided within a 75-mile radius of that location. VA does not support this bill.

VA's current policy is to locate new national cemeteries in areas of the country with at least 170,000 unserved veterans within a 75-mile service area; based on this standard VA will achieve its strategic goal in 2011 providing a burial option to 90 percent of the veterans in an open VA or State cemetery.

We are concerned that enacting legislation to establish the 110,000 as the veteran population threshold will reduce VA's current flexibility to revise policy in order to more quickly respond to changing needs of veterans based on demographics and other factors.

A statutory mandate to apply the population threshold proposed in this bill would result in prioritizing a new cemetery for the Daytona, Florida, area and Omaha, Nebraska.

In addition, VA does not support the use of census tracts, as opposed to the counties, as a primary geographically test unit to test the identity of potential locations for new national cemeteries. VA believes that the county level method currently employed produces accurate and similar results.

Mr. Chairman, I appreciate the opportunity to explain the views of the Department of Veterans Affairs on these important matters. I would be pleased to answer any questions that you or other Members of the Subcommittee may have. Thank you.

[The prepared statement of Mr. Muro appears on p. 64.]

Mr. HALL. Thank you, sir. Mr. Terry, you are now recognized.

STATEMENT OF HON. JAMES P. TERRY

Mr. TERRY. Thank you, sir. Mr. Chairman, I am pleased to be here today to provide the views of the Department on an unnum-

bered draft bill, the "Veterans Appellate Review Modernization Act."

Section 2 of the draft bill would provide an automatic waiver of regional office consideration for evidence submitted following a notice of disagreement, unless the claimant specifically requests regional office review.

VA supports the concept of an automatic waiver with one important distinction from the current draft provision. The Board does not obtain jurisdiction over an appeal until a substantive appeal, that is a VA Form 9, is filed and the regional office certifies and transfers the appeal to the Board. Thus, the imposition of an automatic waiver should take place only after the filing of the substantive appeal versus the filing of a notice of disagreement.

And sir, with this change the draft provision certainly would be supported by VA and would greatly streamline the current process.

Section 3 of the draft bill would require the Secretary to eliminate the Appeals Management Center, the AMC. VA does not support section 3 because it is unclear and it would unduly limit the Secretary's options and ability to effectively manage the delivery of benefits.

Mr. Pamperin from VBA however is here on this panel and it is within his jurisdiction, and he can certainly explain in more detail why section 3 would greatly limit VA's and VBA's ability to manage its workload.

Section 4 of the draft bill would condition the Court's power to act on its deciding all relevant assignments of error raised by an appellant for each particular claim. VA cannot support this provision in its current form.

This change would overrule the Veterans Court decision in *Best v. Principi* [*Best v. Principi*, 15 Vet. App. 18 (2001)], in which the Veterans Court articulated what has become to be known as the *Best* doctrine, and this was explained in some detail by Judge Kasold.

In *Best*, the Veterans Court remanded an appeal on limited grounds and explained in that case why this is in the best interest of appellants and the sound administration of justice. The Court explained in that case that when it orders a remand the underlying Board decision is vacated and the claim must be adjudicated anew. The Board must re-examine the case and permit the claimant to submit additional evidence and additional arguments. In other words, the claimant is not limited by the specific grounds of the Court's remand order when it is decided on a narrow basis.

Second, the practice of remanding a case on narrow grounds is consistent with the practice in other courts. If the Court were to rule on every allegation raised by an appellant, then any rulings against the appellant would foreclose him from reasserting the issues on remand, and for these reasons we cannot support this provision in its current form.

We would note however, sir, that a more narrowly focused bill dealing with situations such as when a decision addressing other assignments of error raised by an appellant could render the remand proceedings unnecessary, this certainly would be preferable and supported by the Department.

Section 5 of the draft bill would provide the Veterans Court with jurisdiction to conduct class action proceedings. The Veterans Court has cautioned that a class action procedure in that court would be highly unmanageable. It is also pointed out, as Judge Kasold had mentioned, that it would fundamentally blur the Court's role as an appellate court of review because it would be required in the first instance to determine whether it would certify a class, define the class in class claims, and to appoint class counsel. And these are certainly normally not the province of the appellate structure.

The Court has also noted in prior cases that a class action procedure is unnecessary because the Court's precedential decisions bind VA in adjudicating the same or similar claims.

Section 6, sir, of the draft legislation would establish a Veterans Judicial Review Commission. This would be tasked with evaluating the appellate review process of veterans' benefits determinations.

The VA does not at all object to section 6 with one modification. We believe that the Commission would be well served and its membership enhanced by including a representative from the VA Office of General Counsel and one from the Board, as this would provide an opportunity for highly experienced staff to share their ideas for improving the process.

Mr. Chairman, thank you for providing me the opportunity to present our views, we certainly appreciate the opportunity to appear before the Committee.

[The prepared statement of Hon. Terry appears on p. 64.]

Mr. HALL. Thank you, sir. Mr. Pamperin.

STATEMENT OF THOMAS PAMPERIN

Mr. PAMPERIN. Thank you, Mr. Chairman, Members of the Committee. It is a pleasure to be here today on behalf of the VA, and I look forward to providing our views on H.R. 2243, the "Surviving Spouses' Benefit Improvement Act," and H.R. 3485, the "Veterans Pension Protection Act," as well as section 3 of the draft bill.

First, H.R. 2243 would increase the monthly rate of DIC to a surviving spouse. If enacted into law the DIC rate would increase to 55 percent of the 100 percent rate for disability ratings.

Second, the bill would also prohibit the offset of benefits under other provisions of law if such benefits are based on the status as the veteran's surviving spouse if the surviving spouse is also eligible for DIC.

VA opposes increasing the basic DIC rates and opposes eliminating the offset between DIC and other benefits, with the exception of payments under the Survivor Benefit Program for which we defer to the U.S. Department of Defense (DoD).

VA opposes the increase in the DIC because it is unnecessary, and the current rates of DIC appear appropriate.

In October 2007, the Veterans' Disability Benefits Commission (VDBC) assessed DIC rates and found them comparable to or higher than the earnings of surviving spouses in the general population. In addition, 89 percent of the surviving spouses responding to a survey were satisfied with their DIC payments.

A May 2001, VA program evaluation of the survivor benefits made similar findings to those of the VDBC, that DIC is highly competitive compared to employer-provided benefits for survivors of

non-veterans. The report indicated that DIC provides a benefit approximately twice as large as the benefits for survivors of private sector employees and of State employees.

Moreover, VA provides a broader array of non-income benefits for survivors of disabled veterans.

H.R. 2243 would also eliminate the offset of DIC recipients who are eligible for benefits under other provisions of law. The language of this section is broad enough to include annuities not only under SBP, but also under other Federal benefits such as the Radiation Exposure Compensation Act, the Federal Tort Claims Act, and the Federal Employees Compensation Act.

Current law prohibits payment of any other Federal benefit to a survivor who is receiving DIC. If the scope of the offset elimination is intended only for DIC and SBP, VA defers to the DoD, since the impact is on the military trust fund rather than on VA.

H.R. 3485, the "Veterans Pension Protection Act," would exclude from consideration as income for VA pension purposes any money paid to a veteran by a State or a municipality as a veterans' benefit.

VA supports H.R. 3485 because it would prevent a wartime veteran who is eligible for and in need of a VA pension from being deprived of any well-deserved additional benefits from local or State government.

A previous statutory provision allowed a very similar exclusion for bonuses or cash gratuities paid to veterans by a State. Therefore, H.R. 3485 would reserve the State benefit income exclusion and would confer additional benefits of excluding payments from a municipality.

Section 3 of the discussion bill would require the Secretary to eliminate the Appeals Management Center, a facility of 150 employees of which 130 are permanent employees, and which has been authorized an increase in its permanent staff of 50 additional employees.

VA does not support this section because it is unclear and would unduly limit the Secretary's options and abilities to effectively manage the workload and the delivery of benefits.

The language is unclear for two reasons. First it would require the Board remand to be sent to the regional office that had original jurisdiction over the claim. Not all appeals originate at regional offices. Some are from medical centers, national cemetery service, or even general counsel.

Second, even when an appeal originates at a regional office, that office may not have done the decision being remanded.

Finally, VA opposes this section because it would be inconsistent with VA's attempts to improve processing time, enhance specialization, and focus on outcomes rather than jurisdiction and process.

In light of the significant increase in claim volume received by VA in recent years, VA must have the ability to manage its workload in a manner it believes will produce the best outcome for the individual veteran and for all veterans who submit claims.

This concludes my statement. It has been an honor to testify before you today, and I am glad to answer any questions.

[The prepared statement of Mr. Pamperin appears on p. 67.]

Mr. HALL. Thank you very much for your testimony. Mr. Hipolit, I presume you are in a pinch hitting role and have no statement per se?

Mr. HIPOLIT. No, I don't have a statement today. I am here just if legal questions come up.

Mr. HALL. Okay. In that case I will proceed with questions starting with Mr. Muro. If a parent is buried in the same plot with the veteran on the same eligibility basis as his spouse or dependent child, could you elaborate for us on how this might impact the space available to buried veterans?

Mr. MURO. If the parent is already eligible for burial that would just be a burial arrangement that we would do, which we have done, where parents have requested to be buried with their children or their child that was killed in combat. So we wouldn't have an issue there because we are using one grave for two veterans actually, or even three if both parents happen to be veterans.

If they are not veterans, both parents aren't veterans, and as we state in our testimony that we would support expanding authority to bury them in the same grave where we have made provisions. Normally when we get a child that has parents we will accommodate or try to accommodate when the time comes if they choose to come. We will dig the grave deep enough to accommodate two caskets.

They would not take up another veteran's grave, where we have provided space. Our testimony offers changes we would like to see in the bill.

Mr. HALL. Do you know why Ms. Anderson's request was denied?

Mr. MURO. She was actually informed that we made provisions for her and that the decision would be made at the time of need. We don't make those decisions in advance of need.

Mr. HALL. Okay.

Mr. MURO. Because this is consistent policy.

Mr. HALL. I presume that the burial of the veteran who still has a surviving parent is accomplished differently, depending on whether it is anticipated that there will be another person interred on the same site.

Mr. MURO. Whenever we have an active-duty servicemember killed in action and we know there are parents and we know they are not vets or if they are vets, we typically inter the decedent at a lower depth in order to accommodate two other caskets. If they are married and they have children we may even go deep enough, because we don't know if the child may be eligible. We know the spouse would be eligible, but the child would only remain eligible up to the age of 21 or up to the age of 23 if they are going to an accredited educational institution, or if they became physically or mentally disabled before the age of 21, they would be considered adult dependent children and eligible. So we normally make accommodations in advance. We do prepare.

Mr. HALL. The NCA states that it is not clear why the 110,000 threshold is preferable to VA's current threshold. I find this hard to understand after reading the ICF International report which lays out clearly why the 110,000 threshold is preferable, primarily in that it would allow more veterans to be served by a national

cemetery burial option before 2030. Does VA disagree with this finding?

Mr. MURO. Yes. We don't totally agree with the findings of the study. We are looking and reviewing it in depth. We are not comfortable with being locked in at 110,000. We feel this will limit the flexibility we need until we finish our complete review not only of the study, but of what we hear from the families. We are listening to the families about the distance it is to travel, bridges that have to be crossed, mountain ranges that have to be gone over. We are looking at all of that as we prepare for the future and for a future budget request.

So I think the 110,000 veteran population threshold would lock us in and it wouldn't be fair to the veterans nor fair to us because we wouldn't be able to be flexible during this time.

Mr. HALL. How does the 170,000 standard give you flexibility?

Mr. MURO. That is what we are looking at. Should we look at how do we reduce the 170,000 veterans population threshold? And we are looking for any way to bring the gaps together. We know that the 170,000 threshold has been productive. It will get us to 90 percent of veterans served in 2011, but we know we need to look at that and we are reviewing that.

Mr. HALL. The NCA indicates that it does not support H.R. 3544, citing the fact that you are on track with your goal to serve 90 percent of veterans by 2011. That means in 2011 there will be at least 2.5 million veterans, not to mention their survivors, who are still unserved by a viable burial option with no relief in sight until after 2030 under the current NCA standards.

What is the long-term plan to address the burial needs of these veterans and their families, and wouldn't it make more sense to shift the standard now in anticipation of that time coming?

Mr. MURO. It would, and that is what we are looking at. Once we reach our goal, we will be ready to set a new goal to reach, and that is what we are looking at in reference to where do we take it now, where do we go, what is the right number, and locking us in at 110,000 is not what we are looking for. We would like to have the flexibility so that we could come up with the right number of veterans. We know we need to review the 170,000 veteran population threshold.

Mr. HALL. Can you do that as a rule change or is legislative change necessary?

Mr. MURO. Right now we have the authority to do that and we would bring it to Congress, so long as it is approved through our chain of command, we can change it. But once it is put in statute then it would take Congress to change it the next time.

Mr. HALL. This report on the evaluation of the VA Burial Benefits Program, the final report came in August 2008. When do you anticipate reaching a conclusion about where your number, somewhere between 170– and 110–, or other appropriate number might be?

[Mr. Hall held up a copy of a report entitled, "Evaluation of the VA Burial Benefits Program," August 2008.]

Mr. MURO. We are looking at alternatives that would be put in future budget requests. Our final decision will affect the Depart-

ment's budget, we are working to get this accomplished in the near future.

Mr. HALL. Like months?

Mr. MURO. Well, I am not going to say a couple of months, but it is going to take us time, because we haven't finished looking at the rural and the highly rural areas, how are we going to serve them as well. We do have the State grants program to serve these areas and some States have stepped up to request grants, but not all of them have, so we need to look at that so we can determine what is the best number to come back with, what is the best number for us to provide the Secretary so we can put it in our budget request.

Mr. HALL. Of course, the Representatives who are on this Committee or those who are not on this Committee, we hear from our constituents who are veterans, or families of veterans, who are concerned. It would be helpful, as you go through your process, if you would communicate with us about where you are and when you expect to have a decision. Because whether or not this legislation moves forward may be determined by the progress that you are making in the Agency.

Mr. Terry, I wanted to ask about section 3 of the draft bill which I believe you said that limits VA's ability to manage its workload. What alternative would you propose to best ensure accountability and quality so that the claim is actually processed right the first time?

Mr. TERRY. When you are talking about the the AMC, or are you talking about the regional office in terms of adjudicating claims in the first instance?

Mr. HALL. Well maybe Mr. Pamperin might be——

Mr. PAMPERIN. Thank you, sir.

Mr. HALL [continuing]. The person to answer this.

Mr. PAMPERIN. We are doing a number of things. First of all, though we had already started it prior to Public Law 110–389, we are completing the initial roll out now of a certification testing of all employees in regional offices who are responsible for the processing of adjudication claims. We have Veteran Service Representative (VSR) certification testing, pension VSR certification testing, and initial rating certification testing. We have just pilot tested advanced rating. We will be able to offer decision review officer testing this fiscal year, and we will have testing for managers. So we will have the ability to assess the effectiveness of our training programs where there are gaps and determine what needs to be done to fix those.

We also have made it clear that in our job postings, for example, for ratings specialists that it is a requirement to get to a GS–12 level that you successfully pass. Similarly to be a decision review officer, to even apply for that position, you will have had to demonstrate that you can successfully pass the rating skill qualification test.

Additionally, we continue in our STAR reviews to have statistically valid findings at the regional office level. We have done inter-rater reliability test studies, as well as consistency studies comparing the distribution of evaluations across regional offices. In fact, our report will be delivered to Congress in October by the In-

stitute for Defense Analyses that will point to how the variability in compensation payments around the country has been leveled out.

Mr. HALL. So is this the alternative to the AMC?

Mr. PAMPERIN. This past year we had a really incredible claim rate in that our claims that required rating were up 14 percent from the previous year. Our budget for this year projects that while it will not be that high, it is substantially higher than our historical rates. We completed the year having received 1,016,000 disability decisions. We fully expect that that will be over 1,050,000 this year.

In order to deal with that kind of volume we found it effective to consolidate pension out of regional offices and death claims out of regional offices so that they are focusing primarily on the disability claims.

Similarly, we are fielding two Appeals Resource Centers to improve the cycle time once a notice of disagreement has been issued so that timely review, assessment, and statements of the case can be done, they can be certified to the Board, and we can cut the current 600-day timeline for an appeal rendered.

So given the volume of cases that we are currently experiencing and anticipate to experience at least for 2 years following the end of hostilities, we believe it is absolutely critical that we have the flexibility to have an Appeals Management Center to rapidly process remands. The Appeals Management Center did not in the past function as effectively as we had hoped it would. And VA has taken actions. We have a new management team in the Appeals Management Center. In this fiscal year, their output has increased by 35 percent from an average of about 1,000 cases a month to 1,350 cases per month. For fiscal year 2010, we has set as a minimum performance target that they in fact meet 1,350 per month, and with the additional staffing that they have been authorized we expect that that will be substantially higher.

Mr. HALL. Could you explain the implications of the Appeals Resource Centers, vis-à-vis the AMC?

Mr. PAMPERIN. The Appeals Resource Centers, which are located in Waco, Texas, and Seattle, Washington, would manage the appeal from the first instance, from the notice of disagreement. They would do the review and issue the statement of the case and any subsequent supplemental statement to the case that would be necessary to try and shorten that period of time it takes us from notice of disagreement to get it to the Board of Veterans' Appeals. Our intent there is to shorten that time.

Mr. HALL. Mr. Terry, maybe you can answer this too. Does the provision in the draft bill on class action authority for the CAVC limit a veteran's ability to further appeal the case if it is decided in this manner?

Mr. TERRY. It is not so much it would limit the ability of the veteran to seek appellate review, but it simply is unmanageable in a sense of what are asking of an Appellate Court. In our view, and I think this was accurately expressed by Judge Kasold as well, you are asking an Appellate Court to act as a first level court. You are asking an Appellate Court to basically perform the role of a first level court in establishing the class, defining the class and class

claims, and appointing class counsel, and determining whether it should certify the class in the first instance. This is not an appropriate function in our view for an appellate vehicle or Appellate Court.

And certainly the precedential decisionmaking of this Court really binds VA in adjudicating the same or similar claims. And I have to say, I don't see that it is necessary at all in this case.

Mr. HALL. Thank you. Referring to section 3 of the draft bill, if it were modified to include language that specified that VBA issues should be remanded to the regional offices of jurisdiction, would that nullify or eliminate your concerns?

Mr. TERRY. It is important to note I think, and certainly Mr. Pamperin may have additional comments, but right now, for all those cases which are—where there is representation by an attorney, those cases are segregated and sent back to the regional office. And it is simply true that many other cases are factored out by the Appeals Management Center to the regional offices where necessary to find the most effective processing methodology for that group of cases.

So I think we are trying to be as flexible as we can within the Department. We are looking at alternatives like the Appeals Centers, the two that Mr. Pamperin described, so I think we are trying to be extremely flexible and find the best methodology to get the claims or the appeals remands reviewed as quickly as possible.

Mr. Pamperin, do you have anything you could add?

Mr. PAMPERIN. The only thing I would add to that is that since the vast majority of remanded cases and appeals generally have to do with disability rating, we think it is more effective to set up dedicated resources of rating specialists and claims examiners to process the appeal so that the bulk of our resources can focus on giving a timely and accurate initial decision to a veteran who is waiting.

Mr. HALL. Right. Mr. Pamperin, in your testimony you noted that a previous law allows the exclusion of bonuses or gratuities administered by States or municipalities from the calculation of income. Why does the VA instruct the field to count these State annuities as income when the law does not?

Mr. PAMPERIN. The current law does require that these be counted. The reference that I was making is to old law in section 306 Pensions, which are currently protected pension programs for which there can be no new applicants.

Under both of those laws, State benefits were excluded from accountable income similar to the General Counsel opinion cited where they were considered to be bonuses. However, under the current law authorized under Public Law 95–588, there are very limited numbers of exclusions from income.

Mr. HALL. If Social Security has been able to reconcile these State annuities with pension, why can't VA do the same, or do we need to pass this for you to be able to do the same?

Mr. PAMPERIN. I am going to ask Mr. Hipolit.

Mr. HALL. Okay.

Mr. HIPOLIT. As Mr. Pamperin alluded to, prior to 1978 there was a specific provision in the law that allowed VA to exclude the State benefits from pension income calculation; this existed under

both what is now called section 306 and old law pension. Congress eliminated that exclusion in 1978 in the Improved Pension Program. So currently there is no law that allows us to exclude those State veterans' benefits from pension income calculations. So we do need this legislation to be able to do that.

Mr. HALL. Thank you. Mr. Pamperin, back to you again. You stated that the VA notes the duplication of the DIC and SBP. Congress has already begun the process for eliminating concurrent receipts for military retirees, which was once considered a duplicate benefit. Why shouldn't that same logic apply to surviving spouses?

Mr. PAMPERIN. Sir, as I said in my testimony, we defer to the Department of Defense. I will point out that currently veterans who are military retirees, which are the ones we are talking about, who are rated 10 to 40 percent still have the offset requirement even though their military retired pay is being reduced by a minimum of 6 percent in order to fund an SBP program.

There is no cost to the VA for having an elimination of the SBP process. When a survivor of a military retiree is awarded DIC benefits, before we make the payment we contact the Defense Financial and Accounting Service (DFAS) to determine whether or not the member had elected SBP and how much money they had contributed to the SBP fund. If there is sufficient money to cover the amount that we want to pay in retroactive benefits or if they had not been awarded SBP, we award DIC from the date of entitlement. If there is not enough money to cover the entire retroactive benefit, we find out from DFAS what needs to be recouped. We send that money to DFAS to reimburse the trust fund under the notion that they had already gotten part of the DIC as an SBP payment.

So there is no cost to the mandatory account by having a waiver of or an elimination of the dual compensation provision. It is entirely an issue of the cost borne by the Department of Defense, and we would defer to them.

Mr. HALL. Mr. Pamperin, I would like to ask you to respond in writing to two questions.

Mr. PAMPERIN. Sure.

Mr. HALL. One is what type of training is provided for employees who handle appeals and remands? And second, what are the consequences, or are there consequences for employees for an avoidable remand? Perhaps, how you identify what an avoidable remand is and then what are the consequences.

And one last question for Mr. Muro. If you can describe for us, and if you can't do it now maybe you could do it later by corresponding with us. How does the VA currently determine a service area and adjust for market variances or factors you cited before such as geography where veterans may have to travel through difficult terrain or their families or relatives may have to get to a cemetery, as well as heavily congested areas where travel is slower and might take several hours to travel the same distance that in the wide open highway would be only a shorter time? So that is if you can describe that briefly to us you may, or you can respond in——

[The VA subsequently provided the following information:]

Question 1: What kind of training do you provide for employees who handle appeals and remands?

Response: Newly hired Veterans Service Representatives (VSRs) and Rating Veterans Service Representatives (RVSRs) are required to attend Centralized Training, which consists of three phases that build upon one another.

- **Phase I** of Centralized Training provides clearly defined curriculum topics and is completed under supervision at the student's home station.
- **Phase II** is accomplished at the Veterans Benefits Academy in Baltimore, MD and consists of approximately 2 weeks of classroom instruction and practical exercise. Employees receive an overview of Phase I and are introduced to the concept of applying theory to practical application.
- **Phase III** reinforces the skills learned in Phases I and II and is accomplished at the student's home station upon return from the Academy. Centralized Training is supplemented with the Training and Performance Support System (TPSS), which is a computerized cooperative learning program that includes appeals training modules.

In addition, the Department of Veterans Affairs uses the web-based Learning Management System (LMS) to provide and record training. Several appeals processing courses are available in LMS. Details regarding appeal processing are located in the VSR Handbook as well as in the manual and regulations.

The Appeals Management Center (AMC) recently hired a Training Manager to develop training lessons and to ensure that every AMC employee in a technical position meets the minimum of 40 hours of technical training annually. Twenty-five percent of the core technical training is reserved for locally determined issues/topics. AMC training topics often come from trends in local and national quality reviews.

Question 2: How do you hold accountable employees who are responsible for avoidable remands?

Response: All employees involved in processing appeals are subject to monthly quality reviews as part of their overall Performance Standards. Development, rating, and promulgation activities are all reviewed for accuracy. All errors are analyzed to identify additional training needs and are counted against an individual employee's performance. To be considered fully successful in their job duties, Decision Review Officers must maintain an accuracy rate of 90 percent, while VSRs and RVSRs must maintain an accuracy rate of 85 percent. Employees who are unable to meet or maintain their performance standards may be placed on a performance improvement plan. If performance does not improve, employees are subject to performance-based actions, including termination of employment.

Mr. MURO. Let me try and respond to it now. The 75-mile radius is the standard that we have used for many years, we collect data of where the veteran comes from when we do the internment. So we know how far families are willing to travel.

The study did not recommend that we change the distance, because it really didn't look at the difficulties that the families incur when traveling within 30 miles to 75 miles of the cemetery to get there. We are currently looking at how to determine the reasons it takes longer to travel 30 miles compared to places where they can travel 70 miles in less time. We want to determine a better calculation for the future so that we can serve more veterans and provide them easier access to a burial option.

Mr. HALL. Thank you very much. I want to thank all of our panelists for their testimony. And we need to clear this room because there is a 1:00 p.m. meeting of the Economic Opportunity Subcommittee. We are not wasting any space here in the Cannon Building.

So all Members and witnesses have 5 days to revise or extend your remarks. Other Members of the Committee may do the same. Thank you again for your service to our Nation's veterans. This hearing is adjourned.

[Whereupon, at 12:58 p.m., the Subcommittee was adjourned.]

A P P E N D I X

Prepared Statement of Hon. John J. Hall, Chairman, Subcommittee on Disability Assistance and Memorial Affairs

Good Morning:

I would ask everyone to rise for the Pledge of Allegiance—flags are located in the front and in the rear of the room.

I would first like to thank all of the witnesses for their testimonies on these five insightful and critical bills, concerning memorial benefits, survivors' benefits, income exemptions for receipt of the non service—connected pension, the Department of Veterans Affairs' claims processing and appeals systems and the jurisdiction of the Court of Appeals for Veterans' Claims. I would specifically like to thank my colleagues, Mr. Filner, Chairman of our Committee, Ranking Member Buyer, Mr. Frank and Mr. Higgins for joining us today. I look forward to hearing their testimony on their respective legislation.

Two of the bills that we will consider today address memorial affairs issues. First, the National Cemeteries Expansion Act of 2009, H.R. 3544, authored by the Chairman of the Committee on Veterans' Affairs, Bob Filner, which would require the Secretary of VA to change its national cemetery establishment requirements of 170,000 veterans in a 75-mile radius to 110,000 veterans in a 75-mile radius and radius. We will also consider H.R. 731 authored by Congressman Frank that would allow surviving parents to be buried with their fallen son or daughter if no other dependent is eligible for this honor. Both of these bills also underscore how important it is that we honor our veterans' service and sacrifice, as well as the often silent sacrifice of our survivors.

In H.R. 2243, we will also consider the appropriateness of our current level of Dependency and Indemnity Compensation (DIC) paid to our survivors, as well as the long-standing SPB/DIC offset. I look forward to hearing from Mr. Buyer on his progress with this legislation.

We will also hear from Congressman Higgins, a new Member who is trying to make a difference for blinded veterans in our State of New York with his bill, the Veterans Pension Protection Act, H.R. 3485.

Last, we will look at draft legislation currently entitled the Veterans Appellate Review Modernization Act. The provisions of this draft aim to continue the process started with H.R. 5892, now incorporated into law in P.L. 110–389 and to start again the process of making positive changes to the way our veterans' claims and appeals are handled by the VBA, the AMC, the BVA, and Court of Appeals for Veterans Claims. Additionally, this bill would also establish a Commission to examine some of the overarching and long-standing judicial and administrative issues that contribute to what many refer to as the "hamster wheel". I look forward to delving again into these issues with all of the stakeholders in a bipartisan manner.

We have a full agenda today and I know that a lot of the Members are double- and triple-booked, so I'll turn it over now to Ranking Member Lamborn for his opening statement.

Prepared Statement of Hon. Doug Lamborn, Ranking Republican Member, Subcommittee on Disability Assistance and Memorial Affairs

Thank you, Chairman Hall for yielding, and thank you for the opportunity to discuss the bills before us this morning.

I will start with H.R. 2243, a bill introduced by Ranking Member Buyer to increase Dependency and Indemnity Compensation for surviving spouses and dependent children of seriously disabled veterans and military personnel who died while on active duty.

The Surviving Spouses Equity Act would base the rate of DIC on an amount equal to 55 percent of the amount of compensation paid to a totally disabled veteran.

The 55-percent ratio is what our government pays to dependent survivors of Federal civilian employees who are killed while performing their duties.

The current rate of basic DIC is only about 41 percent of the compensation paid to a totally disabled veteran.

While their sacrifices are not readily discernible, spouses of seriously disabled veterans often limit their own careers and other opportunities to serve as caregivers.

Consequently, these selfless individuals may not reach the level of financial independence they would have otherwise attained.

Our government should compensate surviving spouses of military personnel and seriously disabled veterans at the same rate it compensates dependent survivors of Federal civilian employees.

This inequity should not be allowed to continue.

H.R. 3485, the "Veterans Pensions Protection Act," would exclude from consideration as income for VA pension purposes any money paid to a veteran from a State or municipality as a veterans' benefit.

VA Pension is a benefit paid to wartime veterans who have limited or no income, and who are age 65 or older, or, if under 65, who are permanently and totally disabled.

Because eligibility criteria are in part income based, a veteran's income and net worth are determining factors.

There are exclusions to what is considered countable income such as Supplemental Security Income, and this bill would add State veterans' benefits to that list, and I look forward to discussing the merits of this bill in further detail.

H.R. 761 would extend eligibility for burial in a national cemetery to the parents of certain veterans, provided that space is available and that the veteran does not have a spouse, or child who has been buried or who would be eligible.

H.R. 3544, the "National Cemeteries Expansion Act of 2009," would provide new guidelines governing the location of new national cemeteries established by VA.

Finally, we will discuss a draft bill, the "Veterans Appellate Review Modernization Act," which would make several changes to the appeal process both at the Board of Veterans' Appeals and at the U.S. Court of Appeals for Veterans Claims.

Mr. Chairman, as you know we have been working on a very similar bill and I think there are some worthy provisions in both measures.

I very much look forward to working with you in a bipartisan manner to resolve any differences, and more importantly, to identify our mutual goals to improve the accuracy and timeliness of the claims adjudication system and move this legislation forward.

Thank you, and I yield back.

Prepared Statement of Hon. Brian Higgins, a Representative in Congress from the State of New York

Chairman Hall, Ranking Member Lamborn, thank you for the opportunity to testify in support of my legislation, H.R. 3485, the Veterans Pensions Protection Act.

From the founding of our country after the Revolutionary War, our government has provided benefits to American veterans to thank them for their service.

Unfortunately, despite Congress' intentions to provide benefits for those who have served our country, current law unintentionally shortchanges some of our most vulnerable combat veterans.

New York, Massachusetts, Pennsylvania, and New Jersey provide an annuity to blind veterans to help them cope with the difficulties that come with blindness; however, the Department of Veterans Affairs counts this annuity as income and offsets veteran's pension benefits by an amount equal to the annuity. I believe this is unfair.

It is true that this is a small program—in New York State the annuity aids 4,484 blind veterans and costs $5.7 million per year—but that does not make this offset any less unjust. Our veterans should not have their benefits reduced because the State of New York has chosen to provide additional assistance. This offset is both a drain on State funds and an insult to the disabled veterans.

The offset of the Blind Veterans Annuity reveals what I believe to be unintentional, yet consequential flaws in how veterans' benefits are provided.

First—the current system favors non-combat veterans over combat veterans.

The Veterans Pension Program is restricted to low income elderly or disabled veterans who have served in combat. Non-combat veterans, along with other low in-

come elderly or disabled Americans qualify for Supplemental Security Income (SSI). The Veterans Pension is more generous than the civilian alternative because it is intended to reward combat veterans for their service; however, differences in the two program's rules have effectively made it so that some non-combat veterans are treated more favorable than combat veterans.

The 110th Congress passed P.L. 110–245, which allowed non-combat veterans to receive benefits from State and local governments without an offset. This bill was considered by the Ways and Means Committee and did not address Veterans Pension offsets, which is the jurisdiction of the Committee on Veterans Affairs. Until the offset by the Department of Veterans Affairs is addressed, the law will continue to effectively favor non-combat veterans over low income elderly or disabled combat veterans.

I would also like to point out that under current law, a private foundation can offer the exact same benefit as the Blind Veterans Annuity without any negative effect on a veteran's pension; however, if a State and local government offers these benefits, they are offset. This inequality discourages States from providing aid to low income veterans.

We should be encouraging States and local governments to help veterans and that is why I introduced H.R. 3485, the Veterans Pensions Protection Act. This bill would allow combat veterans to receive the same benefit that non-combat veterans were able to receive with the passage of P.L. 110–245 in the 110th Congress—it would allow States and local governments to offer benefits to veterans without negatively effecting the payment of benefits under the Veterans' Pension program.

The immediate impact of this legislation in the States of New York, New Jersey, Massachusetts, and Pennsylvania would be to allow State benefits for blind veterans to fully benefit all recipients without being offset by the Department of Veterans Affairs. These annuities are clearly meant as a "gift" to help prevent blind veterans from falling into poverty and in appreciation for there service to our Nation. These should not be considered additional income by the Department of Veterans Affairs, but instead a special disability benefit for their service to our grateful nation. This penalty should be removed.

I would like to thank Chairman Hall for his support of the Veterans Pensions Protection Act and his continued commitment to helping veterans in New York State and across the country. I would also like to thank Congressmen Crowley, Hinchey, and Lee who have cosponsored this legislation and who have been leaders in the effort to improve the lives of American veterans.

Finally, I would like to thank the Tom Zampieri and the Blind Veterans Association for bringing this issue to my attention and for their support for the Veterans Pensions Protection Act.

Thank you for your time.

Prepared Statement of Hon. Barney Frank, a Representative in Congress from the State of Massachusetts

Mr. Chairman:

Thank you for including today a bill I introduced, H.R. 761, which would give parents of deceased military servicemembers or veterans the same consideration regarding their own burial as is afforded to that member's spouse or children, as outlined in Title 38 of the United States Code.

This bill would permit a parent whose child gave their life in service to our country to be buried in a national cemetery with that child when their veteran child has no living spouse or children.

While I introduced this bill on behalf of my constituent Denise Anderson, who lost her 21-year-old son Corey Shea when the Iraqis sprayed automatic weapons fire at U.S. soldiers at an Iraqi military base in Mosul and who is present with us here today, I believe that this request is not infrequent, especially given that we have lost so many young soldiers to war before they were able or willing to establish new families of their own.

The current law considers family members including a spouse, surviving spouse, minor child and unmarried adult child of the veteran. It also allows the Secretary to designate other persons or classes of persons who can be included. I do not know whether parents were omitted by intent when the legislation was originally drafted. I think that we have an opportunity to ensure that they are included under the same considerations as other immediate family members are.

I believe that rather than having the Secretary designate a case like this one on a one-by-one basis, we can honor the families, including the parents, of those who have given their lives for our country by establishing this category into law.

Our country promises our soldiers, including those who lose their lives in war, that their families will be taken care of. For those who do not have other immediate family members other than their parents, I hope that you will join me in supporting this bill and help it become the law of our fair and just land.

Prepared Statement of Denise Anderson, Mansfield, MA
(Gold Star Mother)

Mansfield, MA.
October 8, 2009

Dear Chairman, Sirs, Madams:

I stand before you humbly asking you to pass or amend this bill number H.R. 761. This would allow me to be interred with my son, who was killed in action in Mosul, Iraq, on November 12, 2008. He sacrificed his life for his country and I sacrifice everyday being without him.

My son, Corey, had a heart as big as the world! He would be the first one to volunteer or help someone in need. But he would always hesitate to ask for help. He was a lot like me in that way, but today I show my passion for this bill by standing in front of you asking for your help. If you knew my son you would understand what kind of person he was. He was a very respectful young man who would do anything for anybody. He was my heart and soul and I cannot express the bond between us. If you have children you might understand, but losing a child is against nature and he should be burying me!

I was a single parent until Corey was about 8 years old. His biological father was not around, in fact he was in prison. He never paid child support and I worked over 60 hours a week just to support him and make sure he had everything he needed. Jeff took over the job of stepfather and Corey gladly accepted him. When he came home on leave we would stay up till the sun came up, I did not want to miss a minute with him.

My son was killed by an Iraqi soldier. These soldiers are supposed to be working with our troops over in Iraq. He was an Iraqi soldier for 4 years before turning on our soldiers. On that terrible day he killed 2 soldiers, including my son and wounded 6 other American soldiers.

I was not home when the Army came to my door but my 18-year-old daughter was there. She is a very intelligent person and knew why they were there. She called me, not telling me what was going on, which was probably a good thing, but when I arrived home the Mansfield police and the Army vehicle were parked in front of my hone. My son had only a month left on his first tour, and he would have been home. After passing out, the police called the paramedics, who took me to this hospital.

The whole town came together for Corey. They were so involved with his funeral and it was very heartfelt. My son was the only and hopefully only soldier that passed away during this war. He is Mansfield's hero! I belong to the VFW in Mansfield, MA, and I have spoken to many veterans that are members there and they don't have a problem with me being interred with my son, in fact everyone I spoke with doesn't have a problem.

This amendment would not be taking up any other deserving space for other veterans, my son has three extra plots, but he was not married nor did he have any dependents, he did not have time, since like I said he was a child himself!

I could speak all day regarding my son and what a wonderful and respectful young man he was. But I am here to ask you to amend bill number H.R. 761. If you decide to pass this, it would give me some peace in my life to which I can pay more attention to my husband and daughter, who I feel I have been neglecting. I could finally be able to move forward in my life just knowing I could spend eternity with my son.

Please listen with your hearts and amend this bill. I appreciate your time to listen to me today. This may be a minimal issue with you, but it means everything to me.

Thank you in advance for your attention to this matter.

Sincerely,

Denise Anderson
Proud Mother of Spc. Corey Shea
My warrior hero!!!! And wonderful son

Prepared Statement of Hon. Bruce E. Kasold, Judge, U.S. Court of Appeals for Veterans Claims

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

Good Morning. On behalf of Chief Judge William P. Greene, who is unable to attend this hearing, I thank you Mr. Chairman and Members of the Committee for asking for the views of the U.S. Court of Appeals for Veterans Claims (Court) on the Committee's draft legislation: the "Veterans Appellate Review Modernization Act." Because sections 2 and 3 (waiver of regional office jurisdiction and elimination of the Appeals Management Center) concern operations within the purview of the Department of Veterans Affairs' (VA), I will leave to the Secretary and chairman of the board to weigh in on those sections.

I. SECTION 4. MODIFICATION OF JURISDICTION AND FINALITY OF DECISIONS OF UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

Section 4 would amend 38 U.S.C. § 7252 to authorize the Court to "affirm, modify, reverse, remand, or vacate and remand a decision of the Board after deciding all relevant assignments of error raised by an appellant for each particular claim for benefits." The proposed legislation also adds: "In a case in which the Court reverses a decision on the merits of a particular claim and orders an award of benefits, the Court need not decide any additional assignments of error with respect to that claim." Similar provisions have been proposed in the past and Chief Judge Greene generally has noted that such an amendment (1) is not needed because, consistent with existing law, the Court routinely decides all relevant issues and (2) any such amendment should be undertaken cautiously because of the law of unintended consequences.

1. As to current law and practice, I note that 38 U.S.C. § 7261(a) already directs that the Court decide all "relevant questions of law" that are "necessary to its decision and when presented." Moreover, the Court is aware of the parties' interest in resolving the maximum number of issues on appeal as possible, and that some members of the Court's bar have expressed their view that the decision in *Best v. Principi*, 15 Vet.App. 18, 20 (2001)—which stands for the proposition that if remand is warranted on one issue, other issues will not be decided—at times may harm the interests of veterans. The *Best* doctrine is premised largely on two concepts: (1) preservation of the right to argue an issue before the fact finder, particularly if further development is undertaken, and (2) judicial economy. As to the first concept, because virtually all of our remand actions permit the development of additional evidence, potentially foreclosing an issue that likely could be affected by further development frustrates proper adjudication of the claim. As to the second concept, if a matter requires remand and readjudication after further development of the claim, other allegations of error might never resurface, or might otherwise be resolved below, so the Court should conserve judicial resources and remand the case without deciding those issues.

Although *Best* has not been judicially overturned, the Court subsequently has made clear that it recognizes the need to balance the interests of preserving issues for further development and adjudication, and conserving judicial resources, with what has been termed "the hamster wheel effect" (where on remand to the Board, issues not addressed by the Court remain unresolved and in contention and the claim ultimately comes back before the Court for decision). Moreover, the practice of our judges for the past several years has been to address all arguments where a final decision on a particular issue is ripe for decision, would resolve the matter, and would ensure that an error is not repeated. As one of our judges stated at the Court's 2006 Judicial Conference: "I believe that the Court has listened to these comments and taken them to heart . . . [W]e are trying to reach more of the issues

[raised on appeal]. But in certain instances, clearly jurisprudentially it makes more sense not to reach them."

Chief Judge Greene also has testified in the past that, in conducting appellate review, the Court recognizes the well established concepts of employing judicial restraint and conserving judicial resources in determining whether to address a particular argument when rendering a decision. Just recently, the Court noted in *Quirin v. Shinseki*, 22 Vet.App. 390, 395 (2009), that although it is "well settled that the Court will not ordinarily consider additional allegations of error that have been rendered moot by the Court's opinion or that would require the Court to issue an advisory opinion," the Court recognizes the need, at times, to address additional arguments and allegations of error "that must be corrected so as to ensure a proper decision on remand."

2. As to the law of unintended consequences, would the proposed amendment be read more strictly than current law? And if so, what is the remedy when a party believes a relevant issue was not decided? More litigation by appealing to the Federal Circuit? Would the Federal Circuit have jurisdiction over such an issue, or would their jurisdictional statute have to be amended? Can the Court fairly address all issues if the Board's statement of reason or bases is inadequate? If the Board failed to address the credibility of certain evidence upon which the need of a medical examination might be dependent, does it make sense to render a judicial decision, binding on the parties, as to the need for a medical exam? If an appeal can be decided on a statutory basis, should the Court, contrary to well settled principles, nevertheless decide an underlying constitutional issue? If a Board decision warrants affirmance as a matter of law on one issue, should the Court nevertheless be required to address all other issues raised by an appellant?

In sum, inasmuch as we believe we are deciding the issues in a case that need to be—and that can be—decided, we do not believe the proposed amendment is warranted, and likely could result in additional litigation and further delay in the adjudication of claims.

As a final substantive note on this issue, we recognize that there is a perception among some practitioners that the Court is not deciding the relevant issues that can and should be decided. To this end, we invite the bar to bring to the Court's attention, either at our judicial conference or through the Court's Bar Association, the basis for the continued belief that there are routine failures to address relevant issues and arguments that fairly can be addressed, or in a specific case, the parties are invited to seek reconsideration if either believes an important issue that should be decided has not been decided. I assure the Members of this Subcommittee that such concerns will be given the proper, judicial, consideration.

We also have one drafting comment on this section. Should the proposed legislation be adopted, we suggest that subsection (c), Effective Date, be modified to apply the change in section 4 to all appeals decided by the Court as of the date of the amendment as opposed to application being contingent upon the date of the Board decisions. REASON: The amendment addresses judicial decisions, not Board decisions.

II. SECTION 5. CLASS ACTION AUTHORITY

Section 5 would authorize the Court to hear class actions conducted in accordance with Rule 23 of the Federal Rules of Civil Procedure "to the extent practicable." As the Committee is no doubt aware, the Court early on indicated that it may not have authority to permit a class action suit, but the actual basis for denying the class action to proceed in that case was that it would be unmanageable and unnecessary. See *Lefkowitz v. Derwinski*, 1 Vet.App. 439 (1991) (noting that it "appear[s]" Court lacks authority to permit class action, and rejecting class action in that case as unmanageable and unnecessary), Judge Kramer concurring in result (noting that the Court has the authority to grant class action where all petitioners meet jurisdictional requirement, and agreeing that granting such status was unwise on policy grounds as stated by majority). Moreover, because our panel and en banc decisions are precedential and binding on the Secretary with regard to all cases he adjudicates, such authority does not appear needed.

Accepting for discussion purposes that we either have the authority to grant a class action, or that such authority explicitly is granted as in the proposed amendment, it would be the rare case in which the criteria in Rule 23 of the Federal Rules of Procedure could be met. To the best of my knowledge, and upon information and belief, the Court has not had a request for a class action over the past 5 years that

I have been on the Court.[1] Of course, should the issue be presented and all criteria for granting a class action are met, (and in the absence of explicit authority), the Court would have to address, definitively, our authority to permit the class action.

Our primary caution to enacting this section is, again, the law of unintended consequences. For example, would granting explicitly the authority to permit a class action simply generate more litigation over the form rather than the substance of veterans appeals, ultimately yielding little or no benefit for veterans or facilitating the timely processing of cases? Because it is the rare case that might meet all criteria for granting a class action, would the costs outweigh the benefits? Based on these very real and weighty concerns, and the fact that our panel and en banc cases are precedential and binding on the Secretary with regard to all claims, we do not see the need for an explicit grant of this authority at this time.

III. SECTION 6. COMMISSION ON THE JUDICIAL REVIEW OF THE DETERMINATION OF VETERANS' BENEFITS

Section 6 would establish a commission to evaluate the process of appellate review of veterans benefits decisions and to make recommendations on how to improve that ystem. Chief Judge Greene and I are on record as supporting the creation of this type of commission, as is the Court's first Chief Judge, Frank Nebeker. After 20 years of judicial review of veterans benefits decisions, the time is right for a working group to step back and review the system we have, critically examine its strengths and weaknesses, and identify measures that could benefit the overall appellate process. Specifically, we encourage a commission to weigh the costs and benefits of the unique two-tiered Federal appellate review system we have for veterans benefits decisions. Similar action has been taken in the past with regard to the U.S. Court of Appeals for the District of Columbia and the U.S. Court of Appeals for the Armed Forces, where direct appeal to the Supreme Court ultimately was permitted.

No doubt, continued bites at the apple, so to speak, will be sought by some, but at the end of the day, as the Supreme Court recently recognized:

> It is the Veterans Court, not the Federal Circuit, that sees sufficient case-specific raw material in veterans' cases to enable it to make empirically based, nonbinding generalizations about "natural effects." And the Veterans Court, which has exclusive jurisdiction over these cases, is likely better able than is the Federal Circuit to exercise an informed judgment as to how often veterans are harmed by which kinds of notice errors.
> *Shinseki v. Sanders*, 129 S.Ct. 1696, 1707 (2009).

As to the specifics of the legislation, the title indicates that the scope of what the commission will consider is limited to judicial review. To this end, the Committee might consider amending subsection (b)(1) by adding "judicial" so that it reads: "evaluate the process of judicial review of veterans' benefits determinations." REASON: This would help ensure the focus of the Committee.

With regard to section 6, subsection (c) "membership," the Court suggests that a 17-member Committee may be larger than necessary, and that this size potentially presents hurdles in efficiently completing the commission's task. We suggest that the proposed language be modified to allow for a smaller group (perhaps 11 members, 4 selected by the House, 4 by the Senate, 2 by the President, with the Chair nominated by the President and confirmed by the Senate). REASON: As stated, efficiency, without sacrificing diversity of ideas.

We also suggest that the "Qualifications" provision be amended to include representatives from the judiciary (current or retired), academics, and the VA (as one of the parties before the Court). REASON: As long as interested groups are to be identified in the legislation, as in the current draft, these groups appear to have the necessary expertise and vested interests to also be included.

IV. CONCLUSION

On behalf of the judges of the Court, I thank the Committee for it's consideration of our views on this proposed legislation.

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[1] We have addressed associational standing. See *American Legion v. Nicholson*, 21 Vet.App. (holding that Court did not have the authority to recognize associational standing), Judges Kasold, Hagel, and Schoelen dissenting.

Prepared Statement of Barton F. Stichman, Joint Executive Director, National Veterans Legal Services Program

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

Thank you for the opportunity to present the views of the National Veterans Legal Services Program (NVLSP) on draft legislation entitled the "Veterans Appellate Review Modernization Act." As explained below, NVLSP strongly supports passage of this draft legislation.

NVLSP is a nonprofit veterans service organization founded in 1980. Since its founding, NVLSP has represented thousands of claimants before the Board of Veterans' Appeals and the Court of Appeals for Veterans Claims (CAVC). NVLSP is one of the four veterans service organizations that comprise the Veterans Consortium Pro Bono Program, which recruits and trains volunteer lawyers to represent veterans who have appealed a Board of Veterans' Appeals decision to the CAVC without a representative. In addition to its activities with the Pro Bono Program, NVLSP has trained thousands of veterans service officers and lawyers in veterans benefits law, and has written educational publications that thousands of veterans advocates regularly use as practice tools to assist them in their representation of VA claimants.

My testimony today is informed by the widespread frustration and disappointment in the VA claims adjudication system experienced by disabled veterans and their survivors. They face a number of serious challenges at both the BVA and the CAVC. We believe that the draft legislation would help make this system more efficient and fairer.

A. *Section 2: Addressing the Longstanding VA Delay in Forwarding Appeals to the BVA*

One of the reasons for the unreasonably long delays that occur in VA decisionmaking is the long time it takes for VA to forward an appeal to the BVA for a decision. This interval occurs after (a) the veterans files his or her claim; (b) the regional office (RO) issues a decision denying the claim; (c) the veteran files a notice of disagreement with the RO decision; (d) the RO issues a statement of the case (SOC); and (e) the veteran files a VA Form 9 (entitled "Appeal to the Board of Veterans' Appeals") on which the veteran states whether he or she wants the Board to decide the appeal based on the record or after a BVA hearing.

The Board reported in its FY2006 Report (at 16) that it took an average of **489** days (1 year and 4 months) after the filing of the Form 9 appeal for the RO to "certify" the appeal (that is, to forward the VA claims file to the BVA for a decision). In its FY2008 Report (at 19), the Board reported that the average time from filing a Form 9 appeal to certifying the appeal had increased to **563** days (1 year and nearly 7 months).

A major reason for this large time lag is the VA policy that governs what takes place if the claimant submits additional evidence after the filing of the Form 9, but before the appeal is certified to the Board. While veterans wait for months on end for their case to be sent to the BVA, they often decide to submit additional evidence in support of their claim. Since they have already appealed to the BVA, they often assume that this evidence will first be reviewed by the BVA. Yet, VA policy is that whenever the veteran submits new evidence during this period, the case is sent to an RO adjudicator who reviews both the new evidence and the claims file and prepares a new decision in the form of a Supplement Statement of the Case (SSOC). Then, if the veteran submits additional evidence after the SSOC, the case is again sent to an RO adjudicator to review the new evidence and the claims file and prepare yet another SSOC. In some cases, the VA has taken the time to prepare four or more SSOCs before the case is forwarded to the BVA for a decision.

Section 2 of the draft legislation would change this VA policy, to the benefit of the veteran and the VA. It would require any evidence submitted after a certain point in the process will be forwarded directly to the Board and will not considered by the RO unless the claimant or the claimant's representative specifically elects to have the additional evidence considered by the RO.

While NVLSP strongly supports a change in policy, it believes that section 2 should be amended in one respect. It provides that this change in policy applies when evidence is submitted after "a notice of disagreement has been filed." This point is too early in the process because an SOC may not yet have been issued and the veteran may not have had time to exercise his or her right to a hearing before a Decision Review Officer. Instead, the change in policy should apply when evidence is submitted after the filing of the Substantive Appeal (VA Form 9).

B. *Section 4: Helping to Dismantle the Hamster Wheel*

For many years now, those who regularly represent disabled veterans before the BVA and CAVC have been using an unflattering phrase to describe the system of justice these veterans too often face: "the Hamster Wheel." This phrase refers to the following common phenomenon: multiple decisions are made on the veteran's claim over a period of years as a result of the claim being transferred back and forth between the CAVC and the BVA, and the BVA and the RO for the purpose of creating yet another decision. The net result is that frustrated veterans have to wait many years before receiving a final decision on their claims.

A major contributor to the Hamster Wheel phenomenon is the policy adopted by the Court of Appeals for Veterans Claims in 2001 in *Best v. Principi*, 15 Vet.App. 18, 19–20 (2001) and *Mahl v. Principi*, 15 Vet.App. 37 (2001). In *Best* and *Mahl*, the CAVC held that when it concludes that an error in a Board of Veterans' Appeals decision requires a remand to the BVA for a new adjudication, the Court generally will not address other alleged errors raised by the veteran. The CAVC agreed that it had the power to resolve the other allegations of error, but announced that as a matter of policy, the Court would "generally decide cases on the narrowest possible grounds."

The following typical scenario illustrates how the piecemeal adjudication policy adopted by the CAVC in *Best* and *Mahl* contributes to the Hamster Wheel phenomenon:

- After prosecuting a VA claim for benefits for three and a half years, the veteran receives a decision from the Board of Veterans' Appeals denying his claim;
- The veteran appeals the Board's decision within 120 days to the CAVC, and files a legal brief contending that the Board made a number of different legal errors in denying the claim. In response, the VA files a legal brief arguing that each of the VA actions about which the veteran complains are perfectly legal;
- Then, 4½ years after the claim was filed, the Central Legal Staff of the Court completes a screening memorandum and sends the appeal to a single judge of the CAVC. Nearly 5 years after the claim was filed, the single judge issues a decision resolving only one of the many different alleged errors briefed by the parties. The single judge issues a written decision that states that: (a) the Board erred in one of the respects discussed in the veteran's legal briefs; (b) the Board's decision is vacated and remanded for the Board to correct the one error and issue a new decision; (c) there is no need for the Court to resolve the other alleged legal errors that have been fully briefed by the parties because the veteran can continue to raise these alleged errors before the VA on remand.
- On remand, the Board ensures that the one legal error identified by the CAVC is corrected, perhaps after a further remand to the regional office. But not surprisingly, the Board does not change the position it previously took and rejects for a second time the allegations of Board error that the CAVC refused to resolve when the case was before the CAVC. Six years after the claim was filed, the Board denies the claim again;
- One hundred twenty days after the new Board denial, the veteran appeals the Board's new decision to the CAVC, raising the same unresolved legal errors he previously briefed to the CAVC.
- The Hamster Wheel keeps churning . . .

The piecemeal adjudication policy adopted in *Best* and *Mahl* may benefit the Court in the short term. By resolving only one of the issues briefed by the parties, a judge can finish an appeal in less time than would be required if he or she had to resolve all of the other disputed issues, thereby allowing the judge to turn his or her attention at an earlier time to other appeals. But the policy is myopic. Both disabled veterans and the VA are seriously harmed by how *Best* and *Mahl* contribute to the Hamster Wheel. Moreover, the CAVC may not be saving time in the long run. Each time a veteran appeals a case that was previously remanded by the CAVC due to *Best* and *Mahl*, the Central Legal Staff and at least one judge of the Court will have to duplicate the time they expended on the case the first time around by taking the time to analyze the case for a second time.

Section 4 of the draft legislation would help end this contributor to the Hamster Wheel phenomenon by requiring the CAVC to decide "all relevant assignments of error raised by an appellant for each particular claim for benefits," unless the Court reverses the Board's decision and orders the grant of benefits. NVLSP strongly supports section 4.

C. *Removing Inefficiency and Promoting Justice by Giving the CAVC of Class Action Authority*

Another reason for the longstanding delays and inefficiency in the VA adjudication system derives from the fact that neither the CAVC nor the Court of Appeals for the Federal Circuit has clear authority to certify a veteran's lawsuit as a class action. When Congress enacted the Veterans' Judicial Review Act (VJRA) in 1988, it inadvertently erected a significant roadblock to justice. Prior to the VJRA, U.S. district courts had authority to certify a lawsuit challenging a VA rule or policy as a class action on behalf of a large group of similarly situated veterans. See, e.g., *Nehmer v. U.S. Veterans Administration*, 712 F. Supp. 1404 (N.D. Cal. 1989); *Giusti-Bravo v. U.S. Veterans Administration*, 853 F. Supp. 34 (D.P.R. 1993). If the district court held that the challenged rule or policy was unlawful, it had the power to ensure that all similarly situated veterans benefited from the court's decision.

But the ability of a veteran or veterans organization to file a class action ended with the VJRA. In that landmark legislation, Congress transferred jurisdiction over challenges to VA rules and policies from U.S. district courts (which operate under rules authorizing class actions) to the U.S. Court of Appeals for the Federal Circuit and the newly created U.S. Court of Appeals for Veterans Claims (CAVC). In making this transfer of jurisdiction, Congress failed to address clearly the authority of the CAVC and the Federal Circuit to certify a case as a class action. As a result of this oversight, the CAVC has ruled that it does not have authority to entertain a class action (see *Lefkowitz v. Derwinski*, 1 Vet.App. 439 (1991)), and the Federal Circuit has indicated the same. See *Liesegang v. Secretary of Veterans Affairs*, 312 F.3d 1368, 1378 (Fed. Cir. 2002).

As we illustrate below, the benefit of class actions in litigation against the government is that they conserve the resources of the government and the courts and help ensure that the government treats all similarly situated individuals in the same way.

Class actions are typically used by courts to resolve efficiently a legal issue that affects a large number of similarly situated individuals. There are literally hundreds of individual VA rules and policies that affect the entitlement to VA benefits for a large number of VA claimants. From time to time, a VA claimant will file an appeal at the CAVC or the Federal Circuit that challenges the legality of one of these rules or policies. Injustice and inefficiency result from the fact that these courts do not have class action authority.

One example is the lawsuit filed by NVLSP and the Military Order of the Purple Heart in the Federal Circuit challenging VA directive (Fast Letter 07–19) issued on August 27, 2007. This Fast Letter instituted a new decisionmaking process for the adjudication of certain claims involving a large amount of benefits. The Fast Letter required the VA, in any case in which a regional office awarded a veteran over $250,000 in benefits or awarded eight or more years of retroactive benefits, to withhold its award decision from the veteran and representative, and send it instead to Washington, D.C. for a review by the Compensation and Pension Service. No regional office decisions denying a large amount of benefits were subject to the Fast Letter.

The Compensation and Pension Service would then decide the claim anew. If it disagreed with the regional office award of a large amount of benefits, it would order the regional office to rewrite the decision to comply with the Compensation and Pension Service's view that benefits should have been denied, instead of granted. Then the regional office was required to send the rewritten decision to the veteran and representative. The Fast Letter required the regional office to destroy or discard the initial favorable RO decision and the instructions of the Compensation and Pension Service that caused the denial.

Thus, when the veteran and representative received the decision denying the large amount of benefits, they would have no idea that a previous favorable decision had been issued by the RO. Nor would they be in a position to know that the Compensation and Pension Service had overturned this favorable decision. The fingerprints of the Compensation and Pension Service were nowhere to be found.

On September 10, 2009, the Federal Circuit ruled that the Fast Letter procedure, "whereby certain regional office decisions are redetermined by the Compensation and Pension Service ... without the knowledge and participation of the claimant, does not comply with the extant Regulations, and that [VA's] promulgation [of the Fast Letter without public notice and comment violated] the Notice and Comment provisions of the" Administrative Procedure Act.

The Federal Circuit invalidated the Fast Letter. The VA then ordered a halt to Compensation and Pension Service review of RO awards of a large amount of benefits.

But the problem with the judicial resolution of this case is that for two full years—from August 2007 to September 2009—the Compensation and Pension Service had been allowed to continue to review RO decisions awarding a large amount of benefits. In fact, over 800 large awards were reviewed, and in over 50 percent of these cases, the large award was overturned by the Compensation and Pension Service. The hundreds of veterans who were each denied hundreds of thousands of dollars in disability benefits have no idea who they are because of the clandestine nature of the Fast Letter review. Thus, they cannot identify themselves as entitled to the benefits initially granted by the RO.

If the courts had class action authority, this injustice and inefficiency would not occur. As soon as the NVLSP and the Military Order of the Purple Heart filed suit, the court could certify the case as a class action, order the Compensation and Pension Service to halt its review until the court could consider the legality of the Fast Letter, and order the VA to keep track of the identity of each of the veterans subject to the Fast Letter. Then, if the court determined that the Fast Letter was illegal, as the Federal Circuit did in this case, it would have authority to order the VA to reinstate each of the RO decisions awarding a large amount of benefits.

Thus, justice would have been served because the hundreds of veterans who were each illegally denied hundreds of thousands of dollars in benefits under the Fast Letter would actually receive these benefits. VA efficiency would have been served because the scarce resources of the Compensation and Pension Service and ROs would never have had to have been expended in deciding whether to overturn the initial RO decisions.

Section 5 would grant the CAVC authority to hear class actions. NVLSP strongly supports this legislation. We suggest two revisions to draft section 5, however. First, section 5 should explicitly state that a VA claimant with a claim pending at the RO or BVA has authority to file a class action with the CAVC. This change will ensure that a VA policy can be challenged on behalf of many VA claimants without the need to wait for many years until one of the claimants has had his or her claim denied by the Board of Veterans' Appeals. Second, section 5 should explicitly state that an organization has authority to file a class action with the CAVC if the organization has members who are or may be adversely by the challenged VA policy. This helps ensure that VA claimants do not have to bear the costs of litigating a class action. It would also avoid situations like those in the Fast Letter case in which it would not be feasible for a VA claimant to file suit because they would not know that their case has been adversely affected by a particular VA policy.

That completes my testimony. I would be pleased to answer any questions the Members of the Subcommittee may have.

Prepared Statement of John Wilson, Assistant National Legislative Director, Disabled American Veterans

Mr. Chairman and Members of the Subcommittee:

On behalf of the 1.2 million members of the Disabled American Veterans (DAV), I am honored to present this testimony to address the various bills under consideration today. In accordance with our congressional charter, the DAV's mission is to "advance the interests, and work for the betterment of all wounded, injured, and disabled American veterans." We are therefore pleased to discuss this legislation insofar as it falls within that scope.

The first bill, H.R. 761, would amend title 38, United States Code, section 2402, to allow for the interment of eligible parents of certain deceased veterans in national cemeteries who, at the time of the parent's death, do not have a spouse, surviving spouse, or child who has been interred, or who, if deceased, would be eligible to be interred, in a national cemetery. The DAV has no resolution on this issue; however, we have no opposition to its favorable consideration.

The next bill is H.R. 2243, the Surviving Spouses' Benefit Improvement Act of 2009, which increases the monthly Dependency and Indemnity Compensation (DIC) payable to surviving spouses by the Secretary of Veterans Affairs. We support this legislation as it provides a welcome increase in compensation to this important group of recipients.

We would also request the scope of this bill be expanded through amendment to address the issue of surviving spouses of military members who die on active duty only receiving the basic rate. Congress should increase DIC rates to survivors of active duty military personnel who die while on active duty. Current law authorizes VA to pay an enhanced amount of DIC, in addition to the basic rate, to surviving spouses of veterans who die from service-connected disabilities after at least an 8-

year period of the veteran's total disability rating prior to death. However, surviving spouses of military servicemembers who die on active duty only receive DIC basic rate. This is inequitable because surviving spouses of deceased active duty servicemembers face the same financial hardship as survivors of deceased service-connected veterans who were totally disabled for 8 years prior to their deaths. We therefore recommend Congress authorize disability and indemnity eligibility at increased rates to survivors of deceased military personnel on the same basis as that for the survivors of totally disabled service-connected veterans.

H.R. 3485, the Veterans Pensions Protection Act, would exclude monetary benefits paid to veterans by States and municipalities from consideration as income for purposes of pension benefits paid by the Secretary of Veterans Affairs. The DAV has no resolution on this issue; however, we have no opposition to its favorable consideration.

H.R. 3544, the National Cemeteries Expansion Act (NCA) of 2009. If enacted, this legislation would establish, for the first time, veteran population density guidelines by statue for new national cemeteries rather than the rule-making provisions via the *Federal Register* that the National Cemetery Administration (NCA) currently employs.

Specifically, the bill would modify section 2404 of title 38, United States Code, reducing the current veteran population computation from 170,000 to 110,000 veterans residing within a 75-mile radius of the new cemetery location. It would also modify the basis of that annual performance measure of the percentage of veterans served by any cemetery and require the VA to use census tracts, rather than counties, as the primary geographic unit to test and identify potential locations for new national cemeteries and to determine the percentage of veterans served.

The NCA has done an exceptional job of providing burial options for 88 percent of the 170,000 veterans who fall within a 75-mile radius-threshold model. However, under this model, no new geographical area will become eligible for a National cemetery until 2015. St. Louis, Missouri, will, at that time, meet the threshold due to the closing of Jefferson Barracks National Cemetery in 2017. Analysis shows that the five areas with the highest veteran population will not become eligible for a national cemetery because they will not reach the 170,000 threshold. [1]

The NCA has spent years developing and maintaining a cemetery system based on a growing veteran population. In 2010, our veteran population will begin to decline. Because of this downward trend, a new threshold model must be developed to ensure more of our veterans will have reasonable access to their burial benefits. Reducing the mile radius to 65 miles would reduce the veteran population that is served from 90 percent to 82.4 percent, and reducing the radius to 55 miles would reduce the served population to 74.1 percent. Reducing the radius alone to 55 miles would bring only two geographical areas into the 170,000 population threshold in 2010, and only a few areas into this revised model by 2030.

Several geographical areas will remain unserved if the population threshold is not reduced. Lowering the population threshold to 100,000 veterans would immediately make several areas eligible for a National Cemetery regardless of any change to the mile radius threshold. A new threshold model must be implemented so more of our veterans will have access to this earned benefit.

To address this and other issues, the VA Office of Policy and Planning contracted a study of the matter titled "Evaluation of the VA Burial Benefits Program" final report. One of the items of consideration in this 2008 report was an assessment of the adequacy and effectiveness of the current policies and procedures that comprise the VA Burial Benefits program, and the type and extent of burial needs for the future. [2] Of the five alternative population thresholds proposed, one correlates closely with the recommendations of the *Independent Budget*. It offered "lowering the population threshold to 110,000 would allow several areas to "qualify" for a new national cemetery under any of the three distance alternatives." [3]

DAV supports a change to the calculation used to determine where VA National Cemeteries are to be placed, and offers 100,000, as the correct population density base figure to be used in future cemetery planning. However, we also recommend caution on the establishment of that population total through the legislative process. Rather, the use of the Federal rulemaking process provides the VA an effective means to respond to the changing patterns of veterans needs for such benefits. It also provides Congress, veterans service organizations and the public ample opportunity to comment on proposed changes. So, while we agree that a modified vet-

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[1] *2010 Independent Budget*, National Cemetery Administration, page 188.

[2] Evaluation of the VA Burial Benefits Program, FINAL REPORT for VA Office of Policy and Planning, August 2008 by ICF International and SAG Corp.

[3] Ibid, pg xvii.

erans' population density is necessary, NCA's current rulemaking practice remains an important tool that should continue to be utilized.

The last bill under consideration today is draft legislation titled the "Veterans Appellate Review Modernization Act," which would amend title 38, United States Code, to, among other things, seek to improve the VA's appeals process and authorize the Court of Appeals for Veterans Claims to hear class actions. This draft legislation takes important steps in improving the VA disability claims process. DAV has previously testified before both Houses of Congress in presenting our 21st Century Clams Process proposal and certain aspects of the proposal are included in this draft legislation.

In section 2, Waiver Of VA Regional Office Jurisdiction In The Management Of Supplemental Evidence For Previously Filed Claims, it adds subsection (f), which stipulates, "if a claimant submits new evidence in support of a case for which a *notice of disagreement* (emphasis added) has been filed, such evidence shall be submitted to the Board directly and not to a regional office of the Department, unless the claimant requests that the evidence be reviewed by the regional office before being submitted to the Board."

We agree with this provision with one amendment to the draft language however. Specifically, the "Notice Of Disagreement" (NOD) reference should be replaced with language that specifies if a claimant submits new evidence in support of a case for which he/she has been informed by the VA Regional Office (VARO) that the claim has been certified by the Board of Veterans Appeals (BVA), then any additional evidence received would be submitted directly to the BVA and not the VARO, unless the claimant opted out.

The NOD currently referenced is actually earlier in the appeals process. Once the claimant informs the VARO of their disagreement with some decision it made on a claim for benefits, this is the NOD. If the appeal is not resolved, the VARO then completes a Statement of the Case (SOC) and mails it along with the VA Form 9, Appeal to BVA, to the claimant. If, after reading the SOC, the claimant decides they want to appeal the rating decision, they complete the enclosed VAF–9 and return it to the VARO. If they submit additional evidence between the time the SOC is issued and before the appeal has been certified to the BVA, the VARO is required to issue a Supplemental Statement of the Case (SSOC). It is only after the VARO completes the VAF–8, Certification of Appeal, which transfers the case file to the BVA that resolves the requirement for SSOCs to be published.

However, with the recommended change of replacing "Notice of Disagreement" in subsection (f) with words to the effect that "the claim has been certified to the BVA," Congress will have provided VA with important flexibility that will have a substantial impact on reducing the VA workload with the near elimination of SSOCs. Such an important change would reduce appellant lengths and appellant confusion, and nearly 100,000 reduced VA work hours by eliminating the requirement to issue most SSOCs. The amendment will explain that evidence submitted after the appeal has been substantiated to the BVA will be forward directly to them and not considered by the regional office *unless* the appellant or his/her representative elects to have additional evidence considered by the VARO. This opt-out clause merely reverses the standard process without removing any choice/right/etc. from an appellant.

We agree with the elimination of the Appeals Management Center as specified in section 3. The Appeals Management Center (AMC) is essentially a failure and should be disbanded. The AMC received nearly 20,000 remands from the Board in fiscal year (FY) 2008. By the end of FY 2008, the AMC had slightly over 21,000 remands on station. By the end of January 2009, they had approximately 22,600 remands on station. The AMC completed nearly 11,700 appeals, out of which 9,811 were returned to the Board, 89 were withdrawn, and only 1,789 were granted. In fact, 2,500 appeals were returned to the AMC at least a second time because of further errors in carrying out the Board's instructions, over a 25-percent error rate. This means the AMC's error rate was higher than its grant rate. Such a poor record of performance cannot be allowed to exist anywhere in the VA claims process. Returning these cases to their respective jurisdictions will help ensure accountability, and most likely reduce the number of cases that proceed to the Board.

The bill also addresses another critical issue in section 4, Modification of Jurisdiction and Finality of Decisions of United States Court of Appeals For Veterans Claims. Specifying that the Court decide ***all*** relevant assignments of error raised by the appellant when remanding a decision for each claim for benefits has long been seen as an important way to stop the hamster wheel effect so often experienced by veterans caught in the appeals process. This provision would also eliminate the confusion and frustration of veterans who are notified of a decision on their appeal only to find that although they have a decision it is only one in part.

DAV has long sought legislation, as noted in Resolution 220, that would require the Court Of Appeals For Veterans Claims to decide each of the appellant's assignments of error, directly order the award of benefits where appropriate to remedy errors found, and accept the appellant's rejection of confessions of error by the VA.

The call for the grant of authority for class action to the Court of Appeals for Veterans Claims (Court) in section 5 is one that we do not have a resolution on but wish to express concern as to the benefit this would provide veterans. It is our view that appeals decided on an individual basis rather than by class offer the appellant the best result for their specific case. Class actions may well benefit those who comprise that class but once decided they in fact preclude further appeal action on the issue decided.

The last area to address concerns the establishment of a commission on the judicial review of the determination of veterans' benefits. The Veterans Judicial Review Commission would evaluate the appellate review process of veterans' benefits determinations; and make recommendations to improve the accuracy, fairness, transparency, predictability, and finality of such appellate review process. We agree with the establishment of this Commission, as it would provide the opportunity for due consideration of all matters relevant to the improvement of the judicial review of veterans' claims.

Mr. Chairman, this concludes DAV's testimony. We appreciate the opportunity to have provided our views on these important issues.

Prepared Statement of Lesley Witter, Director of Political Affairs, National Funeral Directors Association

Chairman Hall, Ranking Member Lamborn, Members of the Subcommittee: thank you for the opportunity to testify before you this morning. I am Lesley Witter, director of political affairs for the National Funeral Directors Association (NFDA). I am testifying today on behalf of the more than 19,000 funeral directors and funeral service personnel who are members of the NFDA.

Every day funeral directors offer comfort and support to families who are dealing with the loss of a loved one. When a family is dealing with the loss of a veteran; funeral directors help the family organize a personalized funeral and burial that both celebrates the life of their loved one and honors their service to our country. The VA estimates that roughly 654,000 veterans died in the U.S. in 2008. Each one of these servicemen and women had a family or friends who grieved their loss, and in each case a funeral director helped ensure that every veteran received the care, honor, and dignity they earned because of their sacrifice for our country. Of those 654,000 veterans who died last year, roughly 13 percent of these individuals opted for burial in a State or national cemetery. In fact, approximately half of NFDA members recently surveyed stated they assisted in planning 21 or more veteran funerals in 2008.

Mr. Chairman, under current VA rules, only a veteran's spouse and certain dependents are eligible for burial in a veterans' cemetery. The current eligibility guidelines do not take into account those veterans who die without a spouse or dependents. For this reason, I would like to express NFDA's strong support for H.R. 761 a bill introduced by Mr. Frank of Massachusetts that "authorizes the burial in a national cemetery of a parent of a deceased veteran who, at the time of the parent's death, does not have a spouse, surviving spouse, or child who has been interred, or who, if deceased, would be eligible to be interred, in a national cemetery".

I am honored to be joined at this hearing by Denise Anderson, the mother of deceased soldier, Corey Shea. Corey was 21 years old when he was killed in action in Iraq on November 12, 2008. Corey was not married and had no children of his own.

Corey Shea sacrificed his life for this country. His mother sacrificed her son for this country, and all she is asking in return is to be allowed to spend eternity with her son. Ms. Anderson is not asking for the VA to pay for her funeral and burial expenses, nor will she take up any space that belongs to other veterans, as she wishes to be buried in the space that is usually reserved for a spouse or qualified dependent. On behalf of funeral directors who care for the families of our Nation's deceased veterans, I ask Congress to amend the burial eligibility guidelines to address unmarried veterans with no eligible dependents. The passage of H.R. 761 means that Denise Anderson, the mother of one of our Nation's fallen heroes, will be able to be with her son, her hero, even in death.

Mr. Chairman, funeral directors support H.R. 3544, a bill introduced by Mr. Filner of California, to provide guidelines for the establishment of new national ceme-

teries by the Secretary of Veterans Affairs. NFDA supports this bill because the family of every deceased veteran should have easy and convenient access to a national cemetery. In a recent survey of our members, the average number of miles to the nearest VA cemetery was approximately 65 miles, however, responses to this question ranged from 1 to 330 miles. To ease the burden on families who may have limited transportation options, NFDA supports lowering the veteran population threshold to 110,000 within a 75-mile service radius is an appropriate threshold for the establishment of a new national cemetery.

Mr. Chairman, NFDA also supports H.R. 2243, a bill introduced by Mr. Buyer of Indiana, which increases the monthly rates veterans' dependency and indemnity compensation payable to surviving spouses through the Department of Veterans Affairs. Additionally, NFDA believes that Congress should enact legislation to adjust funeral and burial benefits for inflation annually. NFDA also encourages Congress to extend the current veteran burial benefit to cover cremation as a final form of disposition, as currently families may not receive the burial allowance unless they elect to bury the cremated remains of their loved one.

Mr. Chairman and distinguished Members of the Committee, on behalf of the members of the National Funeral Directors Association, I want to conclude my testimony today by thanking you for the opportunity to testify on behalf of the NFDA. I hope my testimony has been helpful and I will be happy to answer any questions you may have.

Prepared Statement of Richard F. Weidman, Executive Director for Policy and Government Affairs, Vietnam Veterans of America

Good morning, Congressman Hall, Congressman Lamborn, and other Members of this distinguished Subcommittee. Vietnam Veterans of America (VVA) is appreciative of the opportunity to present our views on the legislation you are considering today. Let me proceed in order.

H.R. 761 would provide for the eligibility of parents of certain deceased veterans for interment in national cemeteries.

While the intent of this bill is laudable, VVA cannot embrace it, for two reasons.

First, the key language in this bill is "enough space in open national cemeteries." "Enough space" precisely when? When a national cemetery is first opened or expanded, as several have been in recent years, there is, obviously, "enough space." But we are losing more than 1,000 veterans of World War II every day, many of whom will be laid to rest in national cemeteries. And hundreds if not thousands of Vietnam veterans, not to mention veterans of the war in Korea, are passing away in greater numbers, and perhaps at earlier ages, than anticipated. Many of us, too, will be buried in national cemeteries. Hence, "enough space" never is "enough."

Second, and perhaps more important, is that the purpose of our National cemetery system is to provide burial space for veterans, for those who served in our Armed Forces. In many cases, spouses join veterans in their final resting place, by being buried in the same plot on top of the veteran, which is appropriate. Opening national cemeteries to parents, no matter how much we might want to facilitate this, would alter the parameters for burial in these cemeteries. We do not believe this would be appropriate, or wise.

H.R. 2243, the Surviving Spouses' Benefit Improvement Act of 2009.

This bill would provide for an increase in the amount of monthly dependency and indemnity compensation (DIC) to surviving spouses. VVA strongly endorses this bill. It takes into account the increased, and increasing, costs of food, clothing, shelter, and, really, just getting by. It is a scandal that we have ignored the surviving spouses, and their very real needs, as long as we have. VVA believes this bill must be enacted on a priority basis, and the "PAY-GO" dollars found to allow it to move forward quickly.

VVA particularly endorses the caveat in H.R. 2243 that "neither a reduction nor an offset in benefits... shall be made by reason of such individual's eligibility for benefits under this section." Spouses of deceased veterans, because of their status, ought not be penalized in receipt of Serviceman's Benefits Program (SBP) or Social Security simply because they are eligible for, and receive, cash benefits under other provisions of law.

H.R. 3485, the Veterans Pensions Protection Act.

This legislation would provide that monetary benefits paid to veterans by States and municipalities shall be excluded from consideration as income for purposes of pension benefits paid by the VA.

VVA supports this bill, quite simply, because it would ensure that the VA could not penalize veterans who receive benefits provided by the State and/or municipality in which they reside. The generosity of a State or municipality should not reduce and/or offset Federal obligations.

H.R. 3544, the National Cemeteries Expansion Act of 2009.

This bill would provide guidelines for the establishment of new national cemeteries by the VA.

The rationale for the bill makes sense. While its passage may not make certain county executives joyous, it would bring a measure of honesty in the selection of tracts for the establishment of new cemeteries. We can't argue with giving priority to a location where at least 110,000 veterans reside within a 75-mile radius of the proposed location. And national cemeteries cannot be established everywhere that some veterans would like them to be. However, there does need to be some additional formula that would allow for our least populated States to secure at least one national cemetery. It is worth noting that about 40 percent of the current total force comes from towns of 25,000 or less. This only accentuates the need to allow for representation from more rural, less populated areas of the United States, so they are not left out of the mix. VVA also believes that the use of census tracts, rather than counties, as the primary geographic unit to test and identify potential locations for new national cemeteries, is logical and sensible.

Discussion Draft of the Veterans Appellate Review Modernization Act.

Vietnam Veterans of America (VVA) salutes the Chairman and this body for taking on the daunting task of trying to "fix" the dysfunctional system at the Compensation and Pension (C&P) Service of the Veterans Benefits Administration (VBA).

The crux of the issue of the C&P system being dysfunctional is at the Regional Office (RO) level, not at the Appeals level at the Board of Veterans' Appeals nor the Appeals Management Center (AMC) nor the Court of Appeals for Veterans' Claims (CAVC). Somehow the Congress has to prompt the Executive branch to start instilling better metrics and much more real accountability into the VBA if we are to make any headway at all in fixing this problem.

First, as simple a thing as an index and set structure of each claims file would be the place to start. Most C&P claims files ("C-files") are just a mess, and often many hundreds of pieces of paper, many of which are not particularly or at all salient to the matters at hand. Before you can computerize this, you need to set an organizational structure and index to each claims file.

Second, require VBA to institute competency-based testing at every level of C&P.

Third, require VBA to offer incentives for claims that are properly prepared, just like a legal brief with a cover summary sheet with footnotes, and the supporting documentation attached, with tabs corresponding to the footnotes. Starting an "express" line for claims prepared in this way whereby veterans can be guaranteed an answer in a set period of time (e.g., 30 days).

Fourth, start an express line for simple claims that are for presumptive conditions or conditions that are immediately self-evident (e.g., Type II Diabetes Mellitus in Vietnam veterans who served on the ground in Vietnam).

There are other common sense things that can be done to enhance the effectiveness of the system while at the same time simplifying this process as much as possible. However, it will require a major change of corporate culture and mindset at the VBA. VVA believes Admiral Dunn to be a decent and honorable man. We had the same positive opinion of his predecessor. Admiral Dunn has numerous positive projects underway, such as the all-electronic office pilot at the Little Rock, Arkansas Regional Office. But many other things are either problematic, or just "business as usual."

Frankly, "business as usual" just will not improve the situation in any sort of major way. This is particularly true when the same cast of characters is still actually running the VBA, irrespective of who is at the top. Thus far VVA has seen little to give us confidence that major change at the VBA is underway that is transformative along the lines of what the Secretary and Deputy Secretary are speaking in so many of their public remarks.

As ever, VVA remains hopeful, and will be ready to be supportive and to cooperate in any way we can to assist the leadership as they try to better meet the needs of the veterans of every generation.

The draft legislation under consideration today is conceived to improve the appeals process of the VA and authorize the Court of Appeals for Veterans' Claims to hear class actions. Let us comment on each section of this draft, as written.

SEC. 2. WAIVER OF REGIONAL OFFICE JURISDICTION OVER INCORPORATION OF SUPPLEMENTAL EVIDENCE INTO PREVIOUSLY SUBMITTED CLAIMS.

Section 7104(f) of title 38, United States Code, would be amended to read: "If a claimant submits new evidence in support of a case for which a notice of disagreement has been filed, such evidence shall be submitted to the Board directly and not to a regional office of the Department, unless the claimant requests that the evidence be reviewed by the regional office before being submitted to the Board."

The title of 7104 is "Jurisdiction of the Board." After reading this section it becomes relatively clear to us that the proposed language does not belong here. We believe you would be better served to amend section 7105, "Filing of notice of disagreement and appeal," and we respectfully suggest that this change should probably be moved to that section.

But let's look at this on a practical level. Here is how the system currently works, not how it should work. In reality, sometimes it works and sometimes it doesn't.

Generally speaking the VA Regional Office (RO) nearest the veteran or claimant will review a claim and ultimately make the original decision. Once the RO makes their decision, it will mail the claimant, and their representative (if any), a copy of their decision. If the claimant does not agree with the RO's decision, s/he should appeal.

The first step in appealing is filing a Notice of Disagreement (NOD) with the RO that issued the decision. The NOD must be in writing. It must state it is a "Notice of Disagreement" and must state specifically what VA action/determination the claimant disagrees with. It must specifically identify which VA decision is being appealed, and must list the date of this decision. Finally, it must list the issue that is being appealed.

The NOD must be submitted to the RO within 1 year of the date of the decision letter. The sooner the NOD is submitted, the sooner the VA will begin the appeal. If the NOD is not filed in a timely manner, the RO will consider their decision final. With a few exceptions, the claim is now closed. It can be reopened, but it cannot be appealed.

Assuming the NOD was properly filed, the appeal will next go to a Decision Review Officer (DRO). In theory, the DRO is required to review the appeal on a de novo basis. This means they must look at it as though it is new or fresh without giving any weight to the previous VA denial. The DRO can grant the issue on appeal or order additional developmental work which must be completed before a decision can be issued on the appeal. When the NOD is submitted, the appellant can choose to appear before the DRO and present his case. If s/he chooses not to appear before the DRO, the appeal can be adjudicated based on the documents and evidence that was submitted on behalf of the appellant or obtained by the RO on behalf of the appellant.

The VA's highest level of appellate review is the Board of Veterans' Appeals (BVA or Board) located in Washington, D.C. If an appellant does not request a DRO hearing in his NOD, the VA will send that veteran and his representative, if applicable, a letter that acknowledges receipt of the NOD and asks if the appellant would like DRO review or would you rather that the appeal be forwarded to the BVA for consideration. VVA service officers frequently have success with DRO hearings and generally we recommend using the DRO process before appealing to the BVA. If the DRO upholds the VA's initial denial, the veteran can still appeal to the Board.

If the DRO does not award the benefits that were sought on appeal or if BVA review was requested, the RO will issue a Statement of the Case (SOC). The SOC is the RO's explanation of why they made the determination they did. In their decision, they include their reasons and basis for their decision along with a list of the evidence that was submitted and reviewed, as well as the applicable rules and regulations.

If the VA receives new evidence after the SOC has been issued, the RO will consider the new material and issue a Supplemental Statement of the Case (SSOC). The SSOC is similar to the SOC in that it explains the VA's decision and why it was made. If the new evidence raises a new issue, an NOD must be filed in respect to that issue. It should be treated as an initial denial.

Procedurally, the SOC is important for two reasons. The first is that it provides a basis for challenging the RO's decision. The second is that it starts the deadline for perfecting an appeal to the Board which in turn provides the Board with jurisdiction over the appeal.

Once the SOC, or SSOC, is issued, the appellant has 60 days from the date of the decision or the remainder of the 1-year period after the RO issued the initial decision, whichever is later. It is usually at this time that an appellant submits a VA Form 9, a Substantive Appeal to the Board. The Form 9 must list each issue that is being appealed from the RO. The Form 9 also allows the appellant to choose a hearing at the Board, a Travel Board or video hearing, or simply submit the appeal to the Board for a paper review.

Once the Form 9 has been submitted to the RO, the RO must start their certification process to the Board. For many ROs this is a very lengthy procedure, often taking more than 365 days. Statistics on this may be found in the chairman of the board's Annual Report to Congress that is available online at www.va.gov. During the certification process, the RO essentially double-checks their work to ensure they have made the proper decision and have completed all of their administrative tasks, e.g., their duty to assist, in accordance with the Veterans Claims Assistance Act. In some cases, the RO will actually grant the appeal after they realize they have made an error.

VVA believes the certification process stems from the Board's displeasure at the high number of avoidable remands that they issue. We are relatively certain the certification process began 4 or 5 years ago because the Board was remanding a large number of claims. What was to aid the veteran and the VA became a long and drawn-out process.

For the record, the Board is also working on an expedited appeals processing initiative which is supposed to reduce the certification period.

When the claim is still at the RO going through this lengthy certification process, veterans and their service officers—often veterans do this without telling their service officer—submit new evidence. In many cases, the evidence submitted by the veteran without the knowledge of their service officer is totally irrelevant to the legal issues in question. Whether the evidence is legitimate or not, this triggers the RO's need to submit an SSOC, which once again slows down the process. Every time evidence is submitted, a new SSOC must be issued. This can add a great deal of processing time to an appeal.

What is being proposed is that once an NOD has been filed and new evidence is submitted, then the new material goes directly to the Board ***unless*** the appellant requests review by the RO. So unless an appellant specifically so requests, we now have a claims file at an RO and new evidence at the Board. The new evidence will not be reviewed and the RO will still need to certify the appeal but without an entire claims file. This is problematic for many reasons:

- This will likely overwhelm the Board with poorly developed claims, which in turn puts them right back at avoidable remands. If the appeal is remanded, this will likely mean a few more years of waiting.
- This essentially gives ROs a way out without proper accountability.
- Additionally, neither the Board nor the VSOs at the Board can keep up with the current caseload, never mind the proposed additional cases.
- The reality is that, in many cases, the RO makes the proper decision during certification in favor of the veteran.
- Also, the Board does not have the power to develop claims. Hence, there is no point in sending them additional undeveloped claims.

This proposed legislation seems to be trying to use the Board to fix the RO problems. Unfortunately, the Board lacks this power. Claims may move quicker within the system but we believe it will take even longer for them to actually be finally adjudicated. We do not believe that this proposition is ready to be enacted into law.

SEC. 3. ELIMINATION OF THE APPEALS MANAGEMENT CENTER.

The Appeals Management Center, the AMC, is a VA black hole.

Still, despite this, it is slightly better than the ROs. The fact that the AMC is better than many of the ROs is damning by faint praise indeed. If an appeal is remanded, this usually means the VA really screwed up. So, in the haywire logic that too often marks the adjudication process, the appeal is sent back to the people who screwed it up in the first place. If the ROs had proper accountability, we would agree with the proposition to eliminate the AMC. However, when the ROs have massive backlogs with little to no accountability, we in good conscience are not yet ready to give up on the AMC.

The interesting item in this section is that if a claimant/appellant is represented by an attorney at the Board and below on remand, their remand goes to the RO rather than the AMC. Why are appellants represented by attorneys treated differently? In many instances, if the RO did its job properly, the claim would never need to go to the Board or the RO. However, the AMC does not handle all BVA remands. Certain types will be decided at a local RO. The AMC will transfer to a local

RO any BVA remand in which the claimant has requested a personal hearing at the RO level. *The AMC will transfer to a local RO any BVA remand in which the veteran is represented by a private attorney.* And the AMC will transfer to a local RO any BVA remand that does not involve compensation and pension benefits (e.g., vocational rehabilitation and education, loan guaranty, education, and insurance claims), non-service-connected pension claims involving income issues, remands involving waiver decisions, and Veterans Health Administration and National Cemetery Administration remands.

SEC. 4. MODIFICATION OF JURISDICTION AND FINALITY OF DECISIONS OF UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

VVA does not, for the most part, have any problems with this except in cases in which the Court reverses a decision on the merits of a particular claim and orders an award of benefits. In such instances, the Court need not decide any additional assignments of error with respect to the claim.

While this is not a huge issue, we believe it is good for the Court to point out the problems with the Board and the RO. This can help obtain accountability. In fact, the VA should assign an employee who does nothing but review Court cases and tracks the metrics seeking patterns of problems.

The recommended amendment to 38 U.S.C. 7252 proposes to grant the Court of Appeals for Veterans Claims class action authority. We cannot support this proposition at this time. The proposed language as currently written is too vague and ambiguous. In general the CAVC, an Article III tribunal, has limited jurisdiction over final adverse decisions issued by the Board of Veterans' Appeals. For the Court to exercise their exclusive jurisdiction an individual must meet a few minimum requirements. These requirements include filing a Notice of Appeal within 120 days after the date the Board mailed a copy of its final decision to the claimant/appellant. The individual must also have been adversely affected by the BVA's decision, meaning they must have not received the full benefit they believe they were entitled to and seeking.

If we exclude the infrequent applications and appeals to the Court such as petitions under the All Writs Act the Court would only have class action jurisdiction over final BVA decisions where the adversely affected party filed a Notice of Appeal within the applicable 120 day limit. Unless the Courts jurisdiction is modified and expanded there cannot be that many similarly affected appellants before the Court at any given time that would justify a class action rather than joinder in accordance with rule 23 of the Federal Rules of Civil Procedure.

Under these circumstances new class actions could be certified every 120 days if the Board failed to issue the proper decision in accordance with previous Court decisions.

VVA supports class action jurisdiction for the Court as a general concept, but only if the Court has the full and proper authority to include all class members similarly situated whether their claim is pending before the Regional Office, the Board of Veterans' Appeals, or the AMC.

Mr. Chairman, Congressman Lamborn, these are our comments on the proposed legislation. On behalf of the members of VVA and our families, we thank you for your efforts on behalf of our Nation's veterans, and we will be pleased to respond to any questions you might care to put to us.

Prepared Statement of Vivianne Cisneros Wersel, Au.D., Chair, Government Relations Committee, Gold Star Wives of America, Inc.

With malice toward none; with charity for all; with firmness in the right, as God gives us to see right, let us strive to finish the work we are in; to bind up the Nation's wounds, to care for him who has borne the battle, his widow and his orphan."

. . .President Abraham Lincoln, Second Inaugural Address, March 4, 1865

Chairman Hall, Ranking Member Lamborn, and Members of the Subcommittee on Disability Assistance and Memorial Affairs, thank you for the opportunity to present this statement. In a press release last week, Secretary of Veterans Affairs Eric Shinseki said, **"Taking care of survivors is as essential as taking care of our Veterans and military personnel. By taking care of survivors, we are honoring a commitment made to our Veterans and military members."** We're asking you to honor that commitment.

Having been before you recently, let me remind you that I am Vivianne Wersel, the chair of the Gold Star Wives' Government Relations Committee. I am the surviving spouse of Lt Col Richard Wersel, Jr., USMC, who died suddenly on February 4, 2005, 1 week after he returned from his second tour of duty in Iraq. A regular day that began as seemingly routine as any other was a day past which all of my life's goals and dreams had to be adjusted. It's a time reference for me now—everything is either before or after; it is either the old normal or the new normal.

Gold Star Wives of America, founded in 1945, is a congressionally chartered organization of spouses of servicemembers who died while on active duty or who died as the result of a service-connected disability. It is an all-volunteer organization. We could begin with no better advocate than Eleanor Roosevelt, newly widowed, who helped make Gold Star Wives a truly national organization. Mrs. Roosevelt was an original signer of our Certificate of Incorporation and a member of the Board of Directors. Our current membership encompasses widows(ers) of servicemembers who died while on active duty or as a result of a service-connected disability during World War II, the Korean War, the Vietnam War, the first Gulf War, the wars in Iraq and Afghanistan, and every period in between.

Gold Star Wives is an organization of those who are left behind when our Nation's heroes, bearing the burden of freedom for all of us, have fallen. We are that family minus one; we are spouses and children, all having suffered the unbearable loss of our spouses, fathers or mothers. We are those to whom Abraham Lincoln referred when he made the government's commitment " . . . to care for him who shall have borne the battle, and for his widow, and his orphan."

Today, we'd like to focus on two important pieces of legislation before you.

H.R. 2243—The Surviving Spouses Benefit Improvement Act of 2009

We thank this Subcommittee and our government for providing essential services necessary to help us through our grief and the loss of our spouses, many services being done well, in a caring and helpful way. More can be done and H.R. 2243 will be an excellent start.

Gold Star Wives is grateful that Congressmen Buyer and Walz have introduced H.R. 2243 which would (1) increase the Dependency and Indemnity Compensation (DIC) to provide payment at 55 percent of the 100 percent disability compensation, and (2) remove the DIC offset to the Survivor Benefit Plan (SBP). These two issues are vital to us and would have the greatest positive impact on the members of Gold Star Wives. We urge your immediate passage of this legislation. One widow wrote that "at age 67, I am still working to have half of the lifestyle I had when my husband was alive."

In preparation for this testimony, we asked our members to share their personal, first-hand experiences under the current DIC program. Intellectually, we understood the need for these important changes to the current DIC program, but through the letters and emails we received, it became more evident that these inequities have continued untouched for too long.

Simply stated, an increase in DIC would bring that payment inline with all other Federal survivor programs—from 43 percent to 55 percent of the 100 percent disability compensation. Why military widows are forced to accept a lower percentage is something Gold Star Wives cannot fathom. One Gold Star Wife's father was a Federal employee who was home for dinner every night and never missed a holiday or a birthday. She married into the Navy, moved 26 times in 24 years, sent her husband into harm's way, and spent more than half her marriage alone. Why is her mother paid a higher percentage of the disability payment than she is?

In addition, no increase has occurred in the DIC since 1993, 16 years, since the flat-rate replaced the ranked-based DIC. With the economic stresses the country is now enduring, many widows are concerned about losing their jobs or worry whether or not they will ever have the ability to retire. Many are one step away from a car that stops running or an unpaid house payment or utility bill. Equalizing the DIC offers some relief from worry and would improve financial independence and confidence.

Gold Star Wives believes the elimination of the DIC offset to the SBP annuity payment would provide the greatest significant long-term advantage to a family's financial security for those affected by this offset. The elimination of the Dependency and Indemnity Compensation dollar-for-dollar offset to the Survivor Benefit Plan (SBP/DIC offset) is not a new subject. The offset leaves little or nothing from the SBP annuity for which most of our husbands paid.

An important decision was recently handed down by the U.S. Court of Federal Claims, *Sharp, et. al. v. United States*, which ordered the Department of Defense to refund SBP annuities withheld from three remarried widowed spouses who were

receiving DIC from the Department of Veterans Affairs. The Court found that DoD's dollar-for-dollar deduction of DIC payments from SBP annuities was based on a faulty interpretation of Federal law. If remarried widows can be paid the annuity and the indemnity payment without offset, why are we leaving the un-remarried widows behind?

A Gold Star Wife, the widow of a Marine killed in Iraq with three young children to raise, eloquently states her concerns: "I am confused by the arguments that seem to play back infinitely when the questions regarding SBP/DIC offset are raised. 'We can't afford to do it' or 'We can't find the mandatory spending offsets.' Do we lack importance? When do we become worth it? When do our children become worth it? When do you turn around and say you deserve it for your sacrifice? We are simply asking for what is due us. If this were a civilian insurance policy, they would have to pay. An offset would never enter the discussion. Why does the government relinquish itself from this responsibility of payment by way of exercising this offset?"

We strongly encourage swift passage of H.R. 2243 to permanently fix the aforementioned stated disparities. Passage of this legislation is the right thing to do and further delay by Congress for any reason is unwarranted. We appreciate that H.R. 2243 is before this Subcommittee and know each Member of this Subcommittee senses the urgency in a permanent fix for these disparities and inequities.

H.R. 3544—The National Cemeteries Expansion Act of 2009

Gold Star Wives of America supports this legislation. The new priority rating of 110,000 veterans residing within a 75-mile radius of the location and the proposed methods for calculating that population will help to assure that our Nation's veterans are adequately served by a national cemetery.

We have identified some concerns among our membership that there can be difficulty for some veterans' families in being able to bury their loved one in a national cemetery, depending on their particular geography. We would urge you to help alleviate these concerns by enacting H.R. 3544.

Thank you for this opportunity to testify. The families of the Nation's fallen have already suffered the greatest loss; there is no need to make these families struggle further. They are not living the "good" life, but rather are living a modest life and sometimes existing near poverty levels. As the previously mentioned Marine Iraq widow wrote, "It makes me ill to reduce my husband's sacrifice, his life, to a dollar amount, but I can't raise his children on letters, flags and Veterans Day speeches. If any of the words I hear are to ring sincere then remove this offset and speak to us . . . through your actions." This bill has overwhelming bi-partisan support, yet we seem unable to get this legislation passed. We have given up our vacations, time spent with our children, any relaxation time we may have had, and money we cannot afford to spend, to bring our concerns to Washington. We now look to you to fix this! Please make this Congress the Congress that gets the credit for enacting this legislation for these military surviving spouses and their children.

Gold Star Wives appreciates the compassionate work which Members of this Subcommittee and the staff do on our behalf. We always stand ready to provide this Subcommittee with any additional needed information. We are the voice for survivors.

Prepared Statement of Thomas Zampieri, Ph.D., Director of Government Relations, Blinded Veterans Association

INTRODUCTION

Chairman Hall, Ranking Member Lamborn, and Members of the House Veterans Affairs Subcommittee on Disability Assistance and Memorial Affairs on behalf of the Blinded Veterans Association (BVA), we thank you for this opportunity to present our testimony today regarding veterans' benefits legislation. BVA was founded in 1945 and Congressionally chartered in 1958 as the only Veterans Service Organization (VSO) exclusively dedicated to serving the needs of our Nation's blinded veterans and their families. The organization's governing body and members are proud of BVA's continuing advocacy of the important benefits and health care issues affecting them.

H.R. 3485—Veterans Pension Protection Act

BVA appreciates and supports the Veterans Pension Protection Act of 2009 (HR 3485) introduced by Congressman Higgins. Blinded veterans in receipt of non-service-connected pensions generally have very limited incomes and are clearly being penalized by the current VA pension laws requiring that all income be considered for

pension purposes. When States or municipalities honor their blinded veterans who served America by providing a small yearly "bonus or annuities" it should be viewed as is intended, as "gift" for there service to our Nation. However, under the current policy, these small annuities are subtracted, or "taxed" as an income.

On January 1, 1979, the Montgomery Act was amended and called The Improved Pension Program, Public Law PL 95–588. The law affects veterans who are permanently and totally disabled from non-service connected causes, and when the veteran has little or no income to prevent veterans from slipping into poverty. Although the Veterans Benefits Administration, VA Manual M21–1 Part Lv, paragraph 16.41 does not list States Blind Annuity Pensions as countable income, the VA has instructed VA counselors when administrating PL 95–588 to include this and deduct it. In the 110th congress, last year with the support of Chairman Rangel in H.R. 3997, section 202: "State annuities for certain veterans to be *disregarded* in determining Supplemental Security Income SSI benefits" to prevent these gifts as being income for purposes of SSI. Disability statistics reveal that severely disabled have high unemployment rates, incur more medical and transportation expenses, and have limited incomes.

The legislatures of New York, New Jersey, Pennsylvania, and Massachusetts currently provide a yearly small annuity for blinded veterans diagnosed with permanent blindness, three of these States listed provide these annuities to only the service connected blinded veterans, but New York provides them to both NSC and SC blinded veterans. Blinded veterans in New York currently receive an annual payment of $1101.28. The figure is $750 in New Jersey, $1,800 in Pennsylvania, and $2,000 in Massachusetts. Under current law, however, blinded veterans actually lose part of their VA pension benefits for receiving this modest annuity from these States. Many national surveys demonstrate that in the past decade, since the passage of the Americans with Disabilities Act, very little progress has been made in the employment rates of the disabled. Among several sources, one being the respected Cornell University Centers on Disability Statistics Annual Disability Status Report for FY 2007 (**www.disabilitystatistics.org**), data indicate that the country's disabled non-institutionalized population of working adults age 21–64 still have significantly lower rates of employment, lower earnings, and lower household income than the non-disabled when comparisons are made using several disability types.

Examples of such research findings follow:

- The 2007 Census Bureau's survey found that 60.1 percent of disabled men between ages 21–64 and with one disability were employed. When reviewing data on those with a severe disability affecting daily functioning skills, the rate is only 32 percent.
- The Survey of Income and Program Participation (SIPP) found that, in 2007, 24.7 percent of working age adults who were limited in their ability to work lived at or below the poverty level. Some 22.1 percent with a sensory disability lived at or below that level.
- Census Bureau American Community Survey (ACS) in 2007 found that individuals with a sensory disability age 16–64 in the general population lived in households with a median income $22,600 lower than that of average households containing non-disabled members.

For the non-service connected blinded veterans living on small fixed VA pension, these offsets diminish the quality of life for severely disabled veterans and we are amazed that since Congress first introduced legislation in the 106th, 107th, 108th, 109th, then again in the 110th Congress, this still has not been fixed. CBO scored this when examining the cost impact on H.R. 3997 as negligible for all four States that currently provide these annuities. So today while SSI does not count these small annuities as income, VBA persists in offsetting these disabled blinded veterans' pensions.

H.R. 2243 to Amend Title 38 U.S.C. to Provide Increases in the Amount of Monthly Dependent and Indemnity Compensation to Surviving Spouses. BVA strongly supports this legislation and requests that this Committee move this legislation forward. Congress must repeal the inequitable requirement that the amount of an annuity under the Survivor Benefit Plan be reduced on account of, and by an amount equal to, the amount received by a veteran under Dependency and Indemnity Compensation. This "war widow tax" is terribly wrong, and BVA has consistently requested that this be fixed by all Committees with jurisdiction over this problem. When a family has suffered the loss of a veteran to economically punish them by allowing this administrative offset to continue is injustice. We strongly commend Congressman Buyer and those 66 cosponsors supporting this legislation today.

H.R. 761 Eligibility of Parents of certain Deceased Veterans for interment in VA National Cemeteries, BVA does not have a resolution regarding this issue. We do understand that some parents of severely disabled veterans spend a life time providing home care for that veteran out of their love and devotion and if the veteran precedes them in burial at a VA cemetery, allowing that parent the authority to be buried next to the veteran would be the right thing to do. Our concern would be over capacity at certain existing national cemeteries being able to meet this new authority. If the NCA had any data on this that would offer recommendations about the impact of this legislation that would help guide this legislation.

H.R. 3544 Title: To amend title 38, United States Code, to provide guidelines for the establishment of new national cemeteries by the Secretary of Veterans Affairs, and for other purposes. BVA supports this legislation to provide more specific guidelines for future decisions regarding VA national cemeteries. The goal is to improve the decision process for including the correct number of veterans within a geographic area and accurately decide on placement of future cemeteries.

DRAFT Legislation: To Amend Title 38, U.S.C., "Veterans Appellate Review Modernization Act." This bill would improve the appeals process of the Department of Veterans Affairs, to authorize the Court of Appeals for Veterans Claims to hear class actions and for other purposes. BVA does not have a specific resolution addressing these proposed changes for the Court of Appeals, but in principle would support efforts that reduce the appeals burdens now placed on veterans when a claimant must submit new evidence on a notice of disagreement. Many veterans care caught in the cycle of repeating the same steps over again while trying to get final rating decisions made. Because of the expertise of other members of the VSO panel today before you, we would defer judgment on some other sections of this draft legislation to them.

CONCLUSIONS

Mr. Chairman and Members of this Subcommittee, the Blinded Veterans Association would appreciate your support in enacting the bills reviewed here today as these are important issues in your list of changes as we move forward to support our veterans and families. I would be willing to answer any questions now on this testimony.

Prepared Statement of Richard Paul Cohen, Executive Director, National Organization of Veterans' Advocates, Inc.

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

Thank you for the opportunity to present the views of the National Organization of Veterans' Advocates, Inc ("NOVA") on legislation pending before this Subcommittee.

NOVA is a not-for-profit §501(c)(6) educational association incorporated in 1993 and dedicated to train and assist attorneys and non-attorney practitioners who represent veterans, surviving spouses, and dependents before the Department of Veterans Affairs ("VA"), the United States Court of Appeals for Veterans Claims ("CAVC") and the United States Court of Appeals for the Federal Circuit ("Federal Circuit").

NOVA has written many *amicus* briefs on behalf of claimants before the CAVC and Federal Circuit. The CAVC recognized NOVA's work on behalf of veterans when it awarded the Hart T. Mankin Distinguished Service Award to NOVA in 2000.

The positions stated in this testimony have been approved by NOVA's Board of Directors and represent the shared experiences of NOVA's members, as well as my own sixteen-year experience representing claimants at all stages of the veterans benefits system from the VA Regional Offices ("RO") to the Board of Veterans' Appeals ("BVA") to the CAVC and the Federal Circuit.

Because of space and time constraints, NOVA will limit its comments on H.R. 761, H.R. 2243, H.R. 3485 and H.R. 3544 to offering unqualified support to legislation supporting increased benefits for surviving spouses, expanding a veteran's entitlement to pension, and improving the operation of national cemeteries. NOVA will concentrate its comments on the discussion draft for the Veterans Appellate Review Modernization Act. This legislation will directly impact the operation of the VA and the CAVC, and these are the areas in which NOVA members have the most expertise and the most information to add to the dialog.

Pursuant to draft section 2, new evidence submitted after a Notice of Disagreement has been filed will be submitted directly to the Board unless the claimant requests that the evidence be reviewed by the regional office. NOVA generally supports waiver of regional office consideration of new evidence, which is likely to save considerable time in the appellate process and should reduce the BVA's caseload in many cases where the issue to be resolved is a question of law or where the new evidence is sufficient for the RO to grant the benefits requested. However, NOVA suggests that veterans and their representatives be permitted to request regional office consideration of new evidence any time prior to the BVA making a final decision in the case. In cases where the veteran does not request regional office review of new evidence and remains unrepresented until his case is at the BVA, the veteran's new representative could reassess and ask for regional office review of the new evidence if the veteran's new representative determines it is in the veteran's best interests. NOVA further suggests that the draft section 2 with NOVA's suggested additional language be inserted in 38 U.S.C. § 7105 as a new subsection numbered (d)(3), rather than as an amendment to § 7104, and with the existing subsections (d)(3) to (d)(5) being renumbered (d)(4) to (d)(6), respectively.

NOVA supports the provisions of draft section 3 regarding the elimination of the Appeals Management Center.

Draft section 4 requiring the CAVC to decide all relevant assignments of error raised by an appellant is a very appropriate, essential, and long overdue change. It is essential because, as NOVA has asserted on previous occasions, the CAVC's practice of narrowly deciding appeals is a major contributing factor to veterans' repeat visits to the CAVC and to the CAVC's ever-increasing caseload. The CAVC, which is an Article I court, renders narrow decisions in specialized appeals which frequently return to the CAVC raising the same errors previously argued but unaddressed. Contrast this practice to that of Article III courts which tend to decide appeals containing one issue and which are unlikely to return to court raising the same issues. This comparison suggests that judicial economy requires the CAVC to resolve all relevant issues.

Similarly, providing class action jurisdiction in the CAVC, as suggested in section 5, is appropriate and will be of great benefit to veterans and to the CAVC. Class actions would allow the CAVC to efficiently resolve issues which affect a large number of veterans without having to consolidate some appeals and without having to stay a large number of other appeals pending resolution of the lead case. Permitting class actions would prevent appeals involving momentous issues, such as the proper application of the Veterans Claims Assistance Act, rating of tinnitus, and presumption of exposure to Agent Orange, from bogging down the Court and the VA. Also a veteran's allegation of an improper pattern of conduct by the VA could not evade review by being "mooted out" by the VA's attempt at belated and targeted corrective action if a class action challenging the VA's conduct could be heard in the CAVC.

NOVA supports the establishment of a Veterans Judicial Review Commission as set forth in section 6.

Prepared Statement of Steve L. Muro, Acting Under Secretary for Memorial Affairs, National Cemetery Administration, U.S. Department of Veterans Affairs

Mr. Chairman and Members of the Subcommittee, I am pleased to be here today to provide the views of the Department of Veterans Affairs (VA) on two bills that would affect VA's National Cemetery Administration.

H.R. 761

H.R. 761 would extend eligibility for burial in a national cemetery to the parents of certain Veterans, provided that VA determines that space is available in open national cemeteries and that the Veteran does not have a spouse, surviving spouse, or child who has been buried or who, if deceased, would be eligible for burial in a national cemetery under 38 U.S.C. § 2402(5). Currently, only parents who are eligible in their own right as a Veteran or spouse of a Veteran are eligible for burial in a national cemetery. We cannot support this bill as currently drafted. However, as I will explain in greater detail, VA could support this bill if it were modified to allow for burial of parents only in cases involving the death of an unmarried and childless servicemember who died due to combat or training-related injuries.

The primary reason we do not support H.R. 761 is our concern that, by broadening eligibility for national cemetery burial, this bill would reduce the number of gravesites available for Veterans, who have served our Nation. Every gravesite used

to bury a Veteran's parent is one gravesite not available to bury a Veteran. Because each family member's eligibility for burial is derivative of a Veteran's eligibility, which is earned through service to our Nation, we believe that preserving sufficient burial space for Veterans should take priority over burial eligibility for others.

We also note that the definition of "parent" in 38 U.S.C. § 101(5) is broad enough that more than two individuals could qualify for burial as the parent of a particular Veteran. Birth parents, adoptive parents, step parents, and foster parents could be eligible for burial under this bill as currently drafted.

Furthermore, the Secretary already may permit the burial of a Veteran's parents in a national cemetery. Section 2402(6) of title 38, United States Code, which permits the Secretary to designate "other persons or classes of persons" as eligible for burial, authorizes the Secretary to permit the burial of parents in a national cemetery. In 2007 and 2008, the Secretary approved two separate requests for the burial of a parent in the same grave as an unmarried, childless servicemember who died as a result of wounds incurred in combat. Neither deceased servicemember had a spouse or child who was buried or would be eligible for burial in a national cemetery.

VA would support legislation adopting similar burial eligibility criteria for parents but in a smaller number of compelling cases in which an unmarried servicemember without children dies due to combat or training-related injuries. Such legislation would distinctly honor servicemembers who made the ultimate sacrifice for their country and would also recognize their bereaved surviving parents by providing the option of burial in the gravesites of their fallen children.

Using Department of Defense Casualty Offices records, VA would be able to establish whether a deceased servicemember died as a result of combat or training-related injuries and whether the servicemember has a surviving spouse or child eligible for burial. This narrower proposal, to extend to parents eligibility for burial in the same gravesite with their child, would allay our concern that extending eligibility to parents would reduce the number of national cemetery gravesites available for Veterans. VA would, therefore, support modification of H.R. 761 to formally and publicly recognize the ultimate sacrifice of fallen servicemembers and the unique burden of their surviving parents without negatively impacting burial access for qualified Veterans.

If H.R. 761 as currently drafted were enacted, VA would incur estimated costs of $27,000 in the first year, $180,000 over 5 years, and $462,000 over 10 years.

H.R. 3544

H.R. 3544, the "National Cemeteries Expansion Act of 2009," would provide new guidelines governing the location of new national cemeteries established by VA. Specifically, in selecting a location for a new national cemetery, VA would be required to give priority to a location where at least 110,000 Veterans reside within a 75-mile radius of the location. Furthermore, in conducting an annual performance measure of the percentage of Veterans served by any cemetery, the Secretary would be required to: (1) use census tracts rather than counties as the primary geographic unit to test and identify potential locations for new national cemeteries and to determine the percentage of Veterans served; (2) use methods to avoid double counting Veterans in overlapping service areas; and (3) count Veterans who reside in counties bisected by a service area using a proportional overlay method.

VA cannot support this bill. We are concerned that enacting legislation to establish 110,000 as the Veteran population threshold will reduce VA's current flexibility to revise policy in order to more quickly respond to the changing needs of Veterans based on changing Veteran demographics and other factors.

Historically, VA has pursued a policy of locating new national cemeteries in areas of the country that have the greatest need for burial services, based on the number of unserved veterans. In 2002, VA refined this policy to locate new cemeteries in areas of the country with at least 170,000 veterans within a 75-mile service area based on the results of the Future Burial Needs study mandated by the Veterans Millennium Health Care and Benefits Act of 2000. This policy has enabled VA to target resources to provide access to a national cemetery in areas where the largest concentrations of unserved veterans reside. VA will achieve its current strategic target in 2011 when 90 percent of veterans will be served by a national or State cemetery convenient to their homes. As VA looks to the future, revisions to this policy may become necessary to identify new areas of the country that have a significant population of unserved veterans.

H.R. 3544 appears to be based on the recommendation made by Caliber ICF in its *2008 Evaluation of the VA Burial Benefits Program*. In this study, Caliber ICF considered three alternative veteran population thresholds: 130,000, 110,000, and 90,000. Caliber ICF recommended the 110,000 threshold, but did not explain why

this threshold is preferable to 90,000 or another threshold. It is not clear why a threshold of 110,000 is preferable to VA's current threshold.

In addition, VA does not support using census tracts, as opposed to counties, as the primary geographic unit to test and identify potential locations for new national cemeteries. The location of new national cemeteries is determined by identifying areas of the country that have a large number of Veterans who are not served by a burial option within 75 miles of their residences. Historically, VA has identified and analyzed areas that are in or around major U.S. cities and areas where demographic data indicate changes in Veteran population through migration. This method has proven successful in supporting the largest expansion of the National Cemetery Administration since the Civil War and the growth of national and State cemeteries that will serve 90 percent of Veterans within 75 miles of their residences by 2011. Given these factors, there is no need to turn to untested alternative methods such as the use of census tracts to identify potential locations that would serve the largest number of Veterans.

VA also cannot support the use of census tracts to determine the percentage of veterans served by a burial option or the use of a proportional overlay method to count veterans who reside in counties bisected by a service area. Under VA's current method, the percentage of veterans served is determined at the county level. In the case of counties that are bisected by a cemetery's service area, VA consistently applies two criteria. First, if a major population center within the county is identified as being within the service area of the cemetery, the entire population of the county is considered served by that cemetery. Second, in the absence of a major population center within the county, the county is determined to be served or unserved based on whether the majority of the area of the county is located within the cemetery's service area. As with the census tract method, this criterion assumes an even population distribution within the unit of measurement.

VA's current method for determining the percentage of Veterans served by a burial option ensures that Veterans are not double counted. In the case of a county that is bisected by the respective service areas of two or more VA national cemeteries, if the majority of the county falls within the combined service areas of the cemeteries, that county is assigned to the service area of one of the cemeteries in order to avoid double counting. In the case of a county that is bisected by the respective service areas of both a VA national cemetery and a State Veterans cemetery, if the majority of the county is served by the two cemeteries, the Veteran population is assigned as served by the national cemetery.

Both census tract and county calculations involve some error because the exact number of Veterans living within the service area of a cemetery cannot be determined. However, there is no indication that the census-tract method would be more accurate than the county-calculation method currently used by VA. This conclusion is supported by a VA Office of Inspector General audit that assessed the accuracy of data used to measure the percentage of Veterans served. This audit showed that VA personnel generally made sound decisions and accurate calculations in determining the percentage of Veterans served by a burial option. In addition, the National Cemetery Administration applied the county-calculation method to the locations for new national cemeteries in 2010 recommended in the Program Evaluation. The Veteran populations determined using county calculations were consistent with those determined using the census-tract method.

VA believes that the county-level method currently employed both produces accurate results and is easier for VA employees and stakeholders to understand than the census-tract method. Implementing the census-tract method would necessitate a significant investment in personnel, training, and equipment that is not clearly justified by potential improvement over the current method.

Applying a population threshold of 110,000 unserved Veterans residing within 75 miles as proposed in this bill would result in prioritizing a new national cemetery for the Melbourne/Daytona, Florida, area and another cemetery for the Omaha, Nebraska, area. VA estimates that, if this bill is enacted, VA would incur construction and startup costs of $50,200,000 and ongoing annual operational costs of $1,500,000 for each of these new national cemeteries.

Thank you for providing us the opportunity to present VA's views on these pending bills. I would be happy to answer any questions that you, Mr. Chairman, or the Subcommittee Members may have.

Prepared Statement of Hon. James P. Terry, Chairman, Board of Veterans' Appeals, U.S. Department of Veterans Affairs

Mr. Chairman and Members of the Subcommittee, I am pleased to be here today to provide the views of the Department of Veterans Affairs (VA) on an unnumbered draft bill, the "Veterans Appellate Review Modernization Act." This draft bill would make several changes to the appeal process applicable to VA decisions on claims, both at the Board of Veterans' Appeals (Board) and at the U.S. Court of Appeals for Veterans Claims (Veterans Court).

Section 2 of the draft bill would require a claimant who has initiated an appeal by filing a notice of disagreement and submits new evidence in support of the appeal to submit the evidence directly to the Board, not to a VA regional office, unless the claimant requests that the regional office review the evidence before it is submitted to the Board. This requirement would apply to evidence submitted on or after the date 90 days after enactment. In effect, this provision would provide an automatic waiver of initial consideration by the regional office of any additional evidence submitted after filing a notice of disagreement.

Although VA supports the concept of an automatic waiver of initial consideration by a regional office, as drafted the provision is flawed. Even with the filing of a notice of disagreement, a case remains within the regional office's jurisdiction. The Board does not obtain jurisdiction over an appeal until a substantive appeal (VA Form 9) is filed and the regional office certifies and transfers the appeal to the Board. Thus, additional evidence submitted after filing a notice of disagreement but before filing a substantive appeal should be initially considered by the regional office. However, imposing an automatic waiver after the Board acquires jurisdiction over an appeal would greatly streamline the current process while ensuring that newly submitted evidence is carefully considered in the *de novo* review process undertaken by the Board in every appeal. As explained, however, we urge that the triggering event be the filing of a substantive appeal, rather than the filing of a notice of disagreement, to ensure that the waiver would affect an appeal when it is within the Board's jurisdiction.

The establishment of an automatic waiver of regional office initial consideration of evidence submitted following the filing of a substantive appeal would likely improve the timeliness of appeal processing as a whole. Filing a timely substantive appeal is the last action required to perfect an appeal for the Board's consideration. Although an appeal is perfected once VA receives the substantive appeal, the certification and transfer of an appeal from a regional office to the Board in many cases is delayed because the regional office must readjudicate claims based on the submission of additional evidence. By establishing a statutory waiver that requires a claimant to affirmatively request that the regional office initially consider newly submitted evidence, it seems likely that many more appeals would be more quickly transferred to the Board following the receipt of the substantive appeal.

A potential criticism of this provision of the draft bill is that it would eliminate a claimant's opportunity to have the evidence considered by two different VA adjudicators, the regional office and the Board, and thereby decrease the opportunities for a favorable decision because only the Board, not both the regional office and the Board, would consider the new evidence. VA believes such concerns would be unfounded for the following reasons. First, section 2 would preserve a claimant's right to expressly choose initial regional office consideration of newly submitted evidence. Second, once an appeal to the Board is perfected, an appeal should be ready for certification and transfer to the Board. Although the Board is an appellate body, its jurisdiction is not limited to reviewing the regional office's decision. The Board reviews all of the evidence of record *de novo* and adjudicates the case afresh. Because the Board's ultimate decision is based upon the *de novo* review of all evidence of record, and because section 2 would allow an appellant to expressly choose not to waive initial regional office consideration of evidence, incorporating an automatic waiver would not prejudice appellants.

Section 3 of the draft bill would require the Secretary to eliminate the Appeals Management Center (AMC) and would require that any claim remanded by the Board be remanded to the regional office that was the agency of original jurisdiction, i.e., the regional office or other VA field office whose claim decision is on appeal to the Board. VA does not support section 3 because it is unclear and would unduly limit the Secretary's options and ability to effectively manage the delivery of benefits.

The language of section 3 presents at least two problems. First, it would require a Board remand to be sent to "the regional office that had original jurisdiction over the claim." However, not every appeal to the Board is from a regional office. Although the majority of appeals originate at regional offices, sometimes the original

decision is made by a Veterans Health Administration facility, a national Cemetery Administration office, or even the Office of the General Counsel at the VA Central Office. None of these entities is a "regional office," but each makes decisions that are appealable to the Board. Section 3 does not address such situations.

Second, even if an appeal has originated at a regional office, that particular regional office may no longer have jurisdiction over the claimant's submissions. Often during the course of an appeal, the claimant moves to another part of the United States, or even abroad, where a regional office different from the originating office handles interaction with the claimant. It would be inefficient and confusing for such a claimant to have to deal with the previous regional office with respect to a Board remand when another regional office has been handling other matters concerning that claimant.

Also, VA has created two Appeals Resource Centers (ARCs) to focus on improving the processing of appeals filed with respect to regional office decisions. The ARCs are located in Waco, Texas, and Seattle, Washington. Additionally, VA brokers workload from offices having difficulty with the volume of their workload to offices that have more capacity. Thus, the language of section 3 could be interpreted as requiring a remand to be returned to the office having jurisdiction over the claimant's residence, the office that made the decision being appealed, or to an ARC, even though that particular regional office or other facility may no longer have actual jurisdiction over the claimant's submissions.

VA also opposes section 3 because it would be inconsistent with VA's attempts to improve processing time, enhance specialization, and focus on outcomes rather than jurisdiction and process. In light of the significant increase in the number of claims received by VA in recent years, VA must have the ability to manage its workload in a manner it believes will produce the best outcome for individual Veterans and for all Veterans who submit claims. Section 3 would limit VA's ability to manage its workload.

Section 4 of the draft bill would make two changes to the Veterans Court's jurisdiction. First, it would modify the jurisdiction of the Veterans Court to provide that it may "affirm, modify, reverse, remand, or vacate and remand a decision of the Board." Currently the court is empowered "to affirm, modify, or reverse" a Board decision or "to remand the matter, as appropriate." Second, section 4 would also condition the court's power to act on its "deciding all relevant assignments of error raised by an appellant for each particular claim," unless the court reverses a Board decision on the merits of a claim and orders an award of benefits. In such a case, the Veterans Court would not have to decide any additional assignments of error with respect to that claim. These new jurisdictional rules would apply with respect to Board decisions made on or after the date of enactment. VA cannot support this provision in its current form.

These changes would be significant. In effect, they would overrule the Veterans Court's decision in *Best v. Principi*, 15 Vet. App. 18 (2001) (*per curiam order*), in which the Veterans Court articulated what has become known as the "*Best* doctrine." In *Best*, the Veterans Court remanded an appeal on limited grounds. Although the appellant agreed that the appeal should be remanded, he contended in a motion for reconsideration that the court erred by failing to consider other assignments of error that he raised in his brief. The court declined to adopt such a rigid approach to managing the cases coming before it and explained why a remand on narrow grounds is in the best interest of appellants and the sound administration of justice.

First, the court explained that, when it orders a remand, the underlying Board decision is vacated (i.e., nullified), and the claim must be adjudicated anew. The Board must reexamine the case and permit the claimant to submit additional evidence and additional arguments. In other words, the claimant retains the right to raise with the Board all putative errors in the handling of the claim, without being limited by the specific grounds of the court's remand order.

Second, the court noted that the practice of remanding a case on narrow grounds was consistent with the practice in other courts and consistent with 38 U.S.C. § 7261(a), the statute defining the court's scope of review. It warned that, to act otherwise, the court might be relegated to the role of issuing an advisory opinion with respect to putative errors asserted by an appellant because further development of factual and legal issues can change the landscape of the case on remand.

The court also warned that, if it were to rule on every allegation raised by an appellant, then any rulings against the appellant would foreclose him from reasserting the issues on remand. "A narrow decision preserves for the appellant an opportunity to argue those claimed errors before the Board at the readjudication, and, of course, before this Court in an appeal, should the Board rule against him." *Best*, 15 Vet. App. at 20. Such foreclosure would deprive an appellant of the oppor-

tunity to craft a more persuasive argument below against the new legal and factual context of the readjudicated claim and would deprive the appellant of judicial review of the issue if the Board or a field office decides against him.

The *Best* doctrine leaves to the judge's discretion which arguments will be addressed, depending upon the circumstances of each case. In innumerable instances, the Veterans Court has used its discretion to address additional arguments raised by an appellant, notwithstanding *Best*. For example, in Q*uirin v. Shinseki*, 22 Vet. App. 390 (2009), the court remanded an appeal based upon an error in the Board's application of the presumption of soundness to a congenital condition, and yet it also exercised its discretion to address additional allegations of error so that the errors would not be repeated on remand.

To the extent that section 4 would eliminate the court's discretion in handling an appeal, it would potentially create unfairness if the judges were required to address every relevant assignment of error without regard to whether the argument would change the relief granted by the court. Moreover, section 4 might deprive the judges of the flexibility they need to manage a burgeoning caseload with limited resources. Existing law already affords the court the discretion to distinguish between "relevant" and irrelevant assignments of error. To the extent that section 4 would curtail the court's ability to quickly dispose of multi-issue cases, the provision would be antithetical to the principle of judicial economy and counterproductive to Congressional efforts to reduce the inventory of appeals at the Veterans Court. Final resolution of cases would be delayed, and the backlog would grow.

For these reasons, we cannot support this provision in its current form. A more narrowly focused bill, dealing with situations such as when a decision addressing other assignments of error raised by an appellant could render the remand proceedings unnecessary by resolving a critical legal or factual matter or would address a matter separate from the remand proceedings, would be preferable. This approach would provide appellants with resolution of certain legal issues at the earliest point in time, while ensuring full factual and legal development for any remanded matter.

Section 5 of the draft bill would provide the Veterans Court with jurisdiction to conduct class actions in accordance with rule 23 of the Federal Rules of Civil Procedure, to the extent practicable. In *Harrison v. Derwinski*, 1 Vet. App. 438 (1991) (per curiam order), and *Lefkowitz v. Derwinski*, 1 Vet. App. 439 (1991) (per curiam order), the en banc Veterans Court held that it lacked statutory authority to unilaterally adopt a rule permitting class actions. Presumably, section 5 is intended to provide the missing statutory authority.

In any event, the Veterans Court also cautioned that a class action procedure "in this appellate court would be highly unmanageable." H*arrison*, 1 Vet. App. at 438; *Lefkowitz*, 1 Vet. App. at 440. No doubt the court was reluctant to assume the substantial administrative burdens that attend the administration of class actions. Class actions are susceptible to collateral litigation over issues such as commonality, typicality, adequacy of counsel, and notice. Class actions divert scarce judicial resources. Furthermore, it is not clear how the Veterans Court could develop the record necessary for class action proceedings. Administration of class actions would also fundamentally blur the Veterans Court's role as an appellate court of review, because it would be required, in the first instance, to determine whether it should certify a class, to define the class and class claims and issues, and to appoint class counsel. These considerations argue against imposition of class action procedures.

The court also noted in *Harrison* and *Lefkowitz* that a class action procedure is unnecessary because the court's precedential decisions bind VA in adjudicating the same or similar claims. Under existing rules, potential members of a "class" receive the benefit of the precedent, whether it controls because of identity of facts and issues or due to a logical extension of the precedential decision. In the interests of economy and efficiency, the Court has often exercised its existing authority to consolidate cases and to stay cases when there are questions of law or fact common to multiple appeals. In this context, the proposed class-action authority would be largely redundant. For all of the foregoing reasons, VA opposes section 5.

Section 6 would establish a Veterans Judicial Review Commission tasked with evaluating the appellate review process of veterans' benefits determinations and making recommendations to improve the accuracy, fairness, transparency, predictability, and finality of the appellate review process. The Commission would be required to submit to Congress an interim report of its evaluation and recommendations not later than July 1, 2010. The Commission would be required to submit to Congress a final report of its evaluation and recommendations not later than December 31, 2010. The Commission would terminate 2 years after the submission of its final report to Congress.

Members of the Commission would be appointed: six by the Speaker of the House of Representatives, six jointly by the President of the Senate and the President *pro*

tempore, four by the President of the United States, and one, who would serve as the Commission Chairperson, by the President of the United States with the advice and consent of the Senate. Members would be appointed for the life of the commission; would represent veterans service organizations, legal service organizations, or other affected organizations; and would have to be "specially qualified" to serve on the Commission based upon their education, training, or experience. Vacancies would be filled in the same manner as original appointments.

The Chairperson would be responsible for appointing a Director and would also be authorized to appoint additional personnel as appropriate. Upon the Chairperson's request, the head of any Federal department or agency could detail any personnel of that department or agency on a reimbursable basis to assist the Commission in carrying out its duties. The Commission would be able to obtain directly from any department or agency information necessary for it to carry out its responsibilities.

VA does not object to section 6, with one modification. We believe that the Commission membership would be enhanced by including a representative from the VA Office of the General Counsel and one from the Board. Given that staff from both of these offices are intimately familiar with the issues and challenges related to the current appeal process, the knowledge of these representatives would benefit the other Commission members and provide an opportunity for highly experienced staff to share their ideas for improving the process.

Thank you for providing the opportunity to present our views on this legislation. I would be happy to answer any questions that you, Mr. Chairman, or the Subcommittee Members may have.

Prepared Statement of Thomas Pamperin, Deputy Director, Policy and Procedures, Compensation and Pension Service, Veterans Benefits Administration, U.S. Department of Veterans Affairs

Mr. Chairman and Members of the Subcommittee, I am pleased to be here today to provide the views of the Department of Veterans Affairs (VA) on two bills: H.R. 2243, the "Surviving Spouses' Benefit Improvement Act of 2009," and H.R. 3485, the "Veterans Pensions Protection Act."

H.R. 2243

H.R. 2243, the "Surviving Spouses' Benefit Improvement Act of 2009," would increase the monthly rate of dependency and indemnity compensation (DIC) payable to a surviving spouse under 38 U.S.C. § 1311(a). Instead of the current base amount, VA would pay 55 percent of the rate of monthly compensation in effect under 38 U.S.C. 1114(j), the rate of disability compensation for disability rated totally disabling. In the case of an individual who is eligible for DIC under section 1311 and for benefits under another provision of law by reason the individual's status as a Veteran's surviving spouse, the bill would also prohibit the reduction or offset in benefits under the other provision of law by reason of eligibility for DIC under section 1311. Payment of more than one benefit to an individual by reason of the death of more than one person to whom the individual was married would continue to be prohibited.

Before addressing the merits of this bill in detail, we wish to call to your attention a technical issue. Section 2(a)(1) of the bill refers to several rates of DIC that, we believe, were superseded by amendments made by section 3(d) of the Veterans' Compensation Cost-of-Living Adjustment Act of 2009, Public Law 111–37. That law codified the 2008 cost-of-living adjustments in DIC rates.

Also, section 2 of Public Law 111–37 mandates an increase in current DIC rates, to be effective on December 1, 2009. The amount of that increase is to be calculated based on the percentage by which certain Social Security benefits are increased.

VA does not support increasing basic DIC payments. Regarding the elimination of the offset between DIC and other benefits, VA notes the likelihood of duplication of benefits for the same condition or event.

Increasing DIC

VA does not support this increase in DIC because we believe the current rates of DIC are appropriate. In October 2007, the Veterans' Disability Benefits Commission assessed the appropriateness of the level of DIC payments and found the current level of DIC paid to a surviving spouse is comparable to, or higher than, the earnings of a widow or widower in the general population. In addition, 81 percent of surviving spouses responding to a survey were satisfied with their DIC pay-

ments.[1] A May 2001 VA Program Evaluation of Benefits for Survivors indicated findings similar to those of the Veterans' Disability Benefits Commission–that DIC is a competitive survivor benefit compared to employer-provided benefits for survivors of non-veterans. The report pointed out that DIC provides a benefit that is approximately twice as large as benefits for survivors of private sector employees, State employees, and Federal employees covered by the Civil Service Retirement System, and that VA provides a significantly broader array of non-income benefits for survivors of disabled veterans.

DIC payments, unlike most other Federal benefits, are tax-free. Surviving spouses who are entitled to DIC are entitled to other non-income Federal benefits, such as care under the Civilian Health and Medical Program, Dependents' Educational Assistance, burial expense reimbursement, and servicemembers' or Veterans' Group Life Insurance. These additional benefits significantly increase the value of a surviving spouse's "benefit package" and help a surviving spouse to adjust during the critical transition period after a veteran's death.

If this provision is enacted, VA would incur an estimated cost of $1.2 billion during the first year, $6.6 billion over 5 years, and $15.2 billion over 10 years.

Eliminating the Offset Between DIC and Other Benefits

H.R. 2243 would eliminate the offset for DIC recipients who are also eligible for benefits under another provision of law based upon their status as a surviving spouse. The language of this provision is broad enough to include annuities under the Survivor Benefit Plan (SBP) and other Federal benefits, such as payments under the Radiation Exposure Compensation Act (RECA) 1990, the Federal Tort Claims Act, and the Federal Employees Compensation Act based on "death due to service in the Armed Forces." Current law prohibits payment of any other Federal benefit to a surviving spouse who is receiving DIC payments.

If the scope of the elimination of offset is intended only for DIC and SBP, then VA defers to DoD because DoD would incur the costs associated with enactment of the bill. VA pays the full amount of DIC regardless of whether a surviving spouse is entitled to SBP benefits. A provision of title 10, United States Code, which governs DoD programs, requires that SBP payments be offset.

If the elimination of offset is intended to cover Federal benefits in general, not only SBP, there would again be no financial implications for VA. However, the proposed legislation could result in some circumstances in duplication of benefits for the same condition or event.

If, for example, a surviving spouse receives DIC based on the veteran's death, which was attributed to his service-connected bladder cancer due to radiation exposure, then the surviving spouse would also receive a lump sum payment for the same disability from the Department of Justice under the Radiation Exposure Compensation Act 1990. In this hypothetical instance and others like it, the surviving spouse would receive a duplication of payments for the same disability.

There would be no costs to VA associated with the enactment of this bill.

H.R. 3485

H.R. 3485, the "Veterans Pensions Protection Act," would exclude from consideration as income for VA pension purposes any money paid to a veteran from a State or municipality as a veterans' benefit. The exclusion would apply to income determinations for calendar years beginning after the date of enactment. VA fully supports this bill.

VA supports H.R. 3485 because it would prevent a wartime Veteran who is eligible for, and in need of, VA pension from being deprived of any well-deserved additional Veterans' benefits from a local government. A previous statutory provision allowed the exclusion of a bonus or similar cash gratuity paid by any State to a Veteran from the Veteran's income calculation. H.R. 3485 would restore the State benefit income exclusion and would confer the additional benefit of excluding payments from a municipality.

VA cannot identify Veterans who are receiving or entitled to receive benefits administered by States and municipalities. Therefore, we cannot estimate the costs that would be associated with enactment of this bill.

Thank you for providing us the opportunity to present our views on this legislation. I would be happy to answer any questions that you, Mr. Chairman, or the Subcommittee Members may have.

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[1] Veterans' Disability Benefits Commission, "Honoring The Call To Duty: Veterans' Disability Benefits in the 21st Century, October 2007, page 393.

Statement of Hon. Bob Filner, Chairman, Committee on Veterans' Affairs, and a Representative in Congress from the State of California

Good Morning:

I want to thank Mr. Hall for holding this timely legislative hearing and for considering my bill, the National Cemeteries Expansion Act, H.R. 3544.

I appreciate your stellar leadership as Chairman of the DAMA Subcommittee and your ability to take on the toughest fights like the claims and appeals backlogs and the need for greater attention to combat PTSD. I commend you and the rest of your Subcommittee Members even more for getting results in these areas that positively impact the lives of our veterans, their families and survivors. Finally, I thank you for helping me to lead the charge to move the VBA into the 21st Century. As I have said many times in the past, it MUST become a world-class, veteran-centered, technologically adept, 21st century organization. Our veterans deserve no less.

Turning to my bill, H.R. 3544 seeks to reduce VA's current guidelines for the establishment of new national cemeteries from 170,000 veterans in a 75-mile radius to 110,000 veterans in a 75-mile radius and provide greater flexibility to the Secretary in this area. The goal of this legislation is to be able to provide more optimal burial options to our veterans and their survivors than the current policy affords.

According to a study conducted by ICF International for VA, no location in the U.S. will meet the current criterion for the establishment of a new national cemetery until 2015, leaving several large areas with large numbers of veterans (i.e., more than 110,000) unserved by a VA burial option. H.R. 3544 seeks to address the shortcomings of the current policy proactively instead of waiting until it becomes an emergency situation that leaves many veterans and their survivors with undesirable burial options.

My bill would also require the Secretary to consider specific measures when conducting annual performance measures of the percentage of veterans who are served by any cemetery. ICF International's comprehensive study concluded that VA's current methodology of measuring the percentage served by a VA burial option is flawed, because it is unable to accurately serve veterans living inside existing service areas and double counts veterans residing within multiple service areas.

Additionally, using census tracts rather than counties to determine the percentage of veterans served will enable the Secretary to better serve veterans with VA burial services by more accurately reflecting the veteran population of a given area. H.R. 3544 also calls on the Secretary to use measures to avoid double-counting to more accurately gauge the number of veterans living within an area when testing locations for new national cemeteries.

Mr. Chairman, this legislation would address the growing needs of our veteran population and their survivors by increasing access to VA burial services. The ICF International study cited that distance is particularly important to veterans when making burial choices and decreasing the veteran threshold for new cemetery construction would aid in giving veterans the optimal burial options to which they are entitled.

While VA indicates that it does not support this bill, I think it is insensible for VA to focus on meeting outdated targets due in 2011, instead of meeting the present burial needs of our veterans. In its testimony, VA talks about revising the policy as it looks to the future. Well, I say to you that the future is **NOW**. Between 2010 and 2030, your current policy would only allow the establishment of one national cemetery and only because it is to replace one expected to close.

VA's current policy negatively affects the veterans who live in the districts of many who sit on this Committee and many other Members of Congress who have contacted us. It simply leaves too many veterans and survivors unserved, **NOW**. We can and should do better by lowering the population threshold.

I strongly urge Secretary Shinseki and his leadership at the NCA, the VBA and VA's Office of Policy and Planning to work with the Committee to update its current national cemetery establishment policy to ensure that it is adequately meeting the burial needs of our veterans and their survivors.

Thank you, I yield back.

Statement of Hon. Christopher J. Lee, a Representative in Congress from the State of New York

Mr. Chairman, I appreciate the opportunity to offer my strong support for H.R. 3485, the Veterans Pensions Protection Act, introduced by my colleague from New York, Mr. Higgins.

H.R. 3485 is an important piece of legislation that will create fairness in the way we treat our Nation's veterans. Currently, four States provide an annuity to blind veterans. My home State of New York provides this annuity to 4,484 blind veterans that dedicated their service to our Nation. However, the Department of Veterans Affairs counts this annuity as income and thus offsets veterans' pension benefits by the amount of the annuity. These veterans are therefore not receiving the amount of benefits owed to them simply because they choose to reside in the State of New York, who chooses to provide an additional benefit to these heroes.

If this issue sounds familiar it is because the 110th Congress chose to act on a similar penalty being imposed by the Social Security Administration. Signed into law last year, H.R. 6081 directed the Social Security Administration to disregard annuities paid by States to blind, disabled, or aged veterans when calculating a veteran's SSI eligibility and benefit amount. As Congress agreed last year, this legislation will have a significant effect on veterans across our country.

H.R. 3485 will have a similar impact on veterans in New York State, as well as the three other States–Massachusetts, Pennsylvania, and New Jersey–that choose to provide their State's blind veterans with an extra benefit.

I urge this panel to lend its support to this bipartisan effort so we can support our Nation's veterans as they expected our great Nation would.

I thank the Committee for your time.

Statement of Military Officers Association of America

H.R. 2243

H.R. 2243, the *Surviving Spouses' Benefit Improvement Act of 2009*, would increase Dependency and Compensation (DIC) rates to an amount equal to 55 percent of the VA rate payable for a 100 percent service-connected disability.

MOAA is very grateful to Ranking Member Steve Buyer, Representative Tim Walz and the other 22 original sponsors for introducing this groundbreaking bi-partisan bill.

H.R. 2243 would establish the DIC payment rate at 55 percent of the rated of veterans' disability compensation amount paid to a 100-percent disabled veteran. MOAA believes strongly that survivors of veterans who die of service-caused conditions deserve compensation commensurate with the formulas used to establish survivor benefits for other Federal survivors. In that regard, the proposed change would be consistent with the military Survivor Benefit Plan (SBP), which represents 55 percent of the servicemember's retired pay. Additionally, the legislation would provide consistency across the Federal Government by linking DIC compensation to the deceased veteran's disability compensation in a way similar to Federal employees' survivor compensation is related to the retiree's retired pay. Moreover, the bill includes language that would provide consistent DIC and SBP treatment for all eligible survivors.

Since September 11, 2001, Congress has enacted multiple improvements for various segments of military and veteran survivors, including coverage increases for Servicemen's Group Life Insurance (SGLI) and the military death gratuity. MOAA is especially grateful for these gains that recognize the enormous sacrifice of those who have given their lives for our country in the current conflicts. However, there are well over 300,000 survivors and dependents who have not benefited from these improvements simply because their spouses died of service-connected causes before September 11, 2001. They are reliant upon DIC, which has not seen major reform since 1992.

MOAA strongly supports H.R. 2243.

H.R. 3485

H.R. 3485, the *Veterans Pensions Protection Act*, would exclude from a veteran's income for the purpose of determining VA pension benefits any monetary benefits paid by States and municipalities. For decades, Congress has authorized pensions for certain veterans who are permanently and totally disabled not as a result of service-connection. Chapter 15, 38 USC sets out the policy and procedures for these pensions, including a provision for determining a qualifying disabled veteran's annual income for setting the rate of the pension. H.R. 3485 would add to section 1503(a) a provision excluding monetary benefits paid to veterans by States and municipalities in determining the veteran's income for the purpose of setting the pension level.

MOAA supports H.R. 3485.

H.R. 3544

H.R. 3544, the *National Cemeteries Expansion Act of 2009*, would change the metrics for determining the need for and location of VA national cemeteries, and set the new rules in Title 38. Presently, the rules for national cemetery locations are determined by VA policy. The legislation would require the Secretary of Veterans Affairs to give priority in selecting a location for the establishment of a new national cemetery to a location where at least 110,000 veterans reside within a 75-mile radius of the location. Current policy requires that the area selected have at least 170,000 un-served veterans within a 75-mile radius. According to a study commissioned by the VA, no location in the U.S. will meet the current criterion for the establishment of a new national cemetery until 2015, leaving several large areas with large numbers of veterans (i.e., more than 110,000) un-served by a VA burial option. The bill also would require the VA to use more definitive demographic methodologies to determine the veteran population in a given area.

MOAA supports H.R. 3544.

Statement of National Military Family Association

Chairman Hall, Ranking Member Herseth Sandlin, and Members of the Subcommittee on Disability Assistance and Memorial Affairs, thank you for the opportunity to submit a statement on this important issue.

The National Military Family Association is committed to supporting optimum benefits and quality of life for survivors of those who have made the ultimate sacrifice. We have testified before this Committee in the past on survivor issues. We have participated in roundtable discussions you have held to learn more about the concerns of surviving family members. These forums have been very helpful to all in clarifying the problems these family members continue to face.

We appreciate the great strides that have been made over the past several years with increases to survivor benefits, especially for survivors of today's conflicts. Increases in the Death Gratuity and Servicemembers' Group Life Insurance annuities have made their lives easier. Expansion of health care benefits for surviving children has helped as well.

But what about those whose servicemember died on active duty before 2001? What about those whose servicemember died of a service-connected disability after years of service to their country? They did not have the opportunity to receive these enhanced benefits. *The Surviving Spouses Benefit Improvement Act of 2009* (H.R. 2243) recognizes the inadequacy of the Dependency and Indemnity Compensation (DIC) payment and would help to eliminate this inequity.

Most of the survivors who receive the DIC payment do not receive an additional annuity payment. They have not received the enhanced survivor benefits that survivors of active duty deaths have received back-dated to 2001. DIC is currently set at $1154 per month, which is 43 percent of disabled retiree compensation. Survivors of Federal workers have their annuity set at 55 percent of their disabled retirees' compensation. Do military survivors deserve less?

Our Association still believes the benefit change that will provide the most significant long-term advantage to the financial security of surviving families would be to end the Dependency and Indemnity Compensation (DIC) offset to the Survivor Benefit Plan (SBP). We appreciate this provision being included in H.R. 2243. Ending this offset would correct an inequity that has existed for many years. Each payment serves a different purpose. The DIC is a special indemnity (compensation or insurance) payment paid by the VA to the survivor when the servicemember's service causes his or her death. The SBP annuity, paid by DoD, reflects the longevity of service of the military member. It is ordinarily calculated at 55 percent of retired pay. Military retirees who elect SBP pay a portion of their retired pay to ensure that their family has a guaranteed income should the retiree die. If that retiree dies due to a service-connected disability, their survivor becomes eligible for DIC.

Surviving active duty spouses can make several choices, dependent upon their circumstances and the ages of their children. Because SBP is offset by the DIC payment, the spouse may choose to waive this benefit and select the "child only" option. In this scenario, the spouse would receive the DIC payment and the children would receive the full SBP amount until each child turns 18 (23, if in college), as well as the individual child DIC until each child turns 18 (23, if in college). Once the children have left the house, this choice leaves the spouse with an annual income of $13,848, a significant drop in income from what the family had been earning while the servicemember was alive and on active duty. The percentage of loss is even greater for survivors whose servicemembers served longer. Those who give their

lives for their country deserve more equitable compensation for their surviving spouses.

Thank you for the opportunity to support this important legislation. We ask that you pass H.R. 2243 to permanently fix the financial disparity for all deserving survivors.

Statement of Paralyzed Veterans of America

Mr. Chairman and Members of the Subcommittee, on behalf of Paralyzed Veterans of America (PVA), we would like to thank you for the opportunity to submit a statement for the record regarding the proposed legislation. We appreciate the fact that you continue to address the broadest range of issues with the intention of improving benefits for veterans. We particularly support any focus placed on meeting the complex needs of the newest generation of veterans, even as we continue to improve services for those who have served in the past.

H.R. 761

Paralyzed Veterans of America supports the intent of H.R. 761, but would like to recommend changing the language by incorporating the following:

"(9) If the Secretary determines there is enough space in open national cemeteries, the parent(s) of a deceased veteran who, at the time of the parent's death, does not have a spouse, surviving spouse, or child who has been interred, or who, if deceased, would be eligible to be interred, in a national cemetery, if it can be demonstrated that is was the expressed desire of the veteran for such interment pursuant to paragraph (5).".

This recommended language not only outlines veterans' as being deceased but also incorporates having the veterans expressed consent, intent, and desire to have his or her parent(s) interred in a national cemetery.

H.R. 2243, the "Surviving Spouses' Benefit Improvements Act of 2009"

Paralyzed Veterans of America supports the intent and concept of H.R. 2243, the "Surviving Spouses' Benefit Improvements Act of 2009," of increasing DIC to 55 percent of the one hundred-percent rate under 1114 (j) for survivors. However, we are disappointed that the bill does not support higher rates for survivors of veterans who were rated for special monthly compensation under 1114 (k) thru (s). PVA believes that the survivors of severely disabled veterans should be compensated at a higher rate commensurate to the level of disability.

For example, the spouse of a veteran who was rated under 1114 (r)(1) has made sacrifices and provided more care for the veteran while they were alive due to the severity of the service-connected conditions. Consequently, we recommend amending the bill to provide for a rate of 55 percent of the rates from (k) thru (s) provided the veteran was so entitled at the time of death.

H.R. 3485, the "Veterans Pensions Protection Act"

PVA supports H.R. 3485, the "Veterans Pensions Protection Act." This legislation would provide that monetary benefits paid to veterans by States and municipalities shall be excluded from consideration as income for purposes of pension benefits paid by the Secretary of Veterans Affairs. This bill would benefit PVA members that receive State benefits and assist in closing the gap in financial hardships that impact their quality of life.

H.R. 3544, the "National Cemeteries Expansion Act of 2009"

PVA supports H.R. 3544, a bill that would provide guidelines for the establishment of new national cemeteries by the Secretary of Veterans Affairs.

Statement of Deirdre Parke Holleman, Executive Director, The Retired Enlisted Association

Subcommittee Chairman Hall, Ranking Member Lamborn, and Members of the Committee, on behalf of The Retired Enlisted Association's 60,000 members I would like to thank you for calling this hearing to consider several important pieces of legislation and to allow us to comment on several of them for the record.

The Retired Enlisted Association was established in 1963 to represent the needs, concerns and goals of those (and their families and survivors) who served a life time career in the enlisted ranks of our Nation's Military. Several of the bills you are considering today are of extreme interest and concern to our members.

H.R. 2243—The Surviving Spouses Benefit Improvement Act of 2009

H.R. 2243 would accomplish two long term goals that TREA has to properly protect the loved ones of those servicemembers who died for our country. It would both create a method to keep DIC (Dependency Indemnity Compensation) at a proper level and it would finally end the SBP/DIC offset. Representative Steven Buyer's (R–IN) and Representative Tim Walz's (D–MN) bi-partisan bill would structure DIC payments to reflect the structure of other Federal employee survivor benefits. It would provide payment of 55 percent of the VA's 100 percent disability compensation which is equivalent to most of the Federal employee survivor benefits. This is a rational structure that can change with the times.

1993 was the last time there was a structural change in the DIC program. This was the time that the flat rate rather than the rank based payment was put into effect. Since that time the payment has only increased by COLAs. It now provides $1,154 a month for a non-disabled widow without minor children. Less than $14,000 a year does not reflect the financial loss much less the personal loss he or she has suffered. Of course, Congress can never make a family whole from this terrible—Money cannot do that. But you can abolish the practical problems and worries that the financial loss causes. We believe this bill will succeed in doing that.

It would also finally bring to an end the SBP/DIC offset—a long term goal of ours. TREA strongly believes that current law is unfair in reducing military SBP annuities by the amount of any survivor benefits payable from the DIC program. If the surviving spouse of a retiree who dies of a service-connected cause is entitled to DIC from the Department of Veterans Affairs and if the retiree was also enrolled in SBP, the surviving spouse's SBP benefits are reduced by the amount of DIC. Normally for those in the enlisted ranks the offset completely wipes out the retired pay. If any remains, a pro rata share of SBP premiums is refunded to the widow upon the member's death in a lump sum, but with no interest and in a single taxable year. This offset now also affects all survivors of members who die on active duty.

SBP and DIC payments are paid for completely different reasons. SBP is purchased by the retiree and is intended to provide a portion of retired pay to the survivor. This is the sort of behavior the government should wish to encourage. DIC is a special indemnity compensation paid to the survivor when a member's service causes his or her premature death. In such cases, the VA indemnity compensation should be added to the SBP the retiree paid for, not substituted for it.

It should be remembered that surviving spouses of Federal civilian retirees who are disabled veterans and die of military-service-connected causes can receive DIC without losing any of their Federal civilian SBP benefits. And obviously, the survivors of disabled veterans who retire from the private sector can collect both their civilian survivor benefits and their DIC. Only the families of the career military and those who die on active duty are harmed by this offset. Simple equity calls for this offset to be abolished.

Congress directed the Veterans Disability Benefits Commission (VDBC) to review the SBP–DIC issue. The VDBC's final report to Congress concluded that offset is inappropriate, unfair and should be immediately and completely eliminated.

Whether the servicemember gave his or her life for us on active duty or because of a service-connected disability, he or she has the right to expect us to make sure that their loved ones are cared for as they would have cared for them. **H.R. 2243** is a noble improvement in the goal.

The Retired Enlisted Association urges its passage.

H.R. 3544—The National Cemeteries Expansion Act of 2009

TREA urges the passage of this legislation. The new goal of a National Cemetery within a 75-mile radius of 110,000 veterans' residence will assure veterans the ability to be served by a national Cemetery. It will make it possible for families to visit a respectful gravesite. It will be a comfort to their families and an acknowledgement of their service and a Nation's gratitude.

TREA urges its passage.

Again, The Retired Enlisted Association thanks you for allowing us to present this testimony. We are also grateful to this Subcommittee for all you do for our Nation's veterans, their families and survivors.